

TE TAI HARURU

Journal of Māori and Indigenous Issues

VOLUME 5 - 2017

Special Edition: Dr Nin Tomas

EDITORS

CLAIRE CHARTERS
KERENSA JOHNSTON



THE UNIVERSITY OF
AUCKLAND
Te Whare Wānanga o Tāmaki Makaurau
NEW ZEALAND

**AUCKLAND
LAW SCHOOL**

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GLOSSARY OF MĀORI TERMS¹

Hapū	Sub-tribe(s) that share a common ancestor
Kāinga	Home, address, residence, village, settlement, habitation, habitat, dwelling
Kaumatua	Elder
Kaupapa	Topic, basis; guiding principles
Kōrero	Speak, talk, discuss; discussion
Mana	Prestige, status, authority, influence, integrity; honour, respect
Mana whenua	Authority over land and natural resources, tribal estates
Manuhiri	Visitor(s)
Marae	Tribal meeting grounds; village common
Pā	Home
Pōtiki	Youngest child
Rangatiratanga	Self determination, autonomy, the right of Māori to be self-determining
Rohe	Area, region; boundary
Tangihanga	Funeral, rites for the dead

¹ Many of these translations are taken from the MAI Review website available here: <http://www.review.mai.ac.nz/info/about.php> or, alternatively, from the online Māori dictionary: <http://Māoridictionary.co.nz>

Taniwha	Water spirit, monster, dangerous water creature, powerful creature, chief, powerful leader, something or someone awesome - taniwha take many forms from logs to reptiles and whales and often live in lakes, rivers or the sea. They are often regarded as guardians by the people who live in their territory, but may also have a malign influence on human beings
Taonga	Treasure, anything prized - applied to anything considered to be of value including socially or culturally valuable objects, resources, phenomenon, ideas and techniques
Te reo Māori	The Māori language
Tikanga Māori	Māori customs and practices
Tōhunga	Expert, skilled, learned
Utu	Revenge; reciprocity; balance
Waiata	Sing, song, chant
Wānanga	Māori houses of higher learning, tertiary institute; conscious thought-processing discussion; transmitting the knowledge of the culture from one generation to the next
Whaikōrero	Formal speech, oratory
Whakapahā	Apology
Whakapapa	Māori genealogy
Whakatauki	Proverb

Whakawhānaungatanga	Kinship, links, ties; facilitating a more open relationship than mere researcher and researched; network of interactive links
Whānau	Family; nuclear/extended family
Whānaunga	Relative, relation, kin, blood relation

FOREWARD

Judge Layne Harvey

I met Nin in Room 237, the Interim Marae, in the University of Auckland Student Union Building, before it was named Hineahuone. That was in early March 1987, almost 30 years ago. I had caught a glimpse of her at the yet-to-be-formally-opened Waipapa Marae when all new first year Māori students were invited to a pohiri outside of the administration block at Māori Studies. Her height, compared with many of her peers, her glasses and her full-throated often nervous laugh, occasionally garnished with somewhat pungent language, guaranteed her notice during the harirū. By design or otherwise, Nin would always stand out in a crowd.

Never far from controversy, Nin would embroil herself in the Māori student politics of the day with a barely-concealed eagerness. She relished a good debate and was fearless in her arguments including when she tangled with the then Head of Māori Studies, the late Sir Hugh Kawharu, over the role of Māori students at the opening of Waipapa Marae in 1988. The proceedings of Ngā Tauria Māori o Te Whare Wānanga o Tāmaki Makaurau (or NTM, the Māori Students' Association of the University of Auckland) also benefited from her engagement where she regularly debated the issues of the day with some of her peers including the late Judge Karina Williams, La Verne King, Hyrum Parata, Willie Te Aho and Judge David Ambler, to name a few. She also had a rare wit. As third year students we would sometimes peer review our own draft opinions. Nin considered that brevity was not a skill I had mastered with the comment in red ink on an essay concerning Māori land "Layne, your sentences are longer than Judge Jeffries!" We were taught Māori Land Law by John Tamihere in 1991, a unique experience for both lecturer and students, with a significant amount of what is now termed "self-directed learning". The year before in 1990, Nin was also involved in establishing Te Rākau Ture, the Māori Law Students Association at the University of Auckland and was part of the programme of study groups, tutorials and volunteer mentoring for first and second year Māori Law students. Eventually, Nin would graduate with an LLB (Hons) degree in 1992, one of only three Māori that year, along with Christian, now Justice Whata, and William Kelly. With her exemplary academic results Nin secured the highest number of law clerk interviews of any Māori graduate, probably in the country. Yet she was dismayed that only two down-town firms offered her positions and wondered why so few. "It's because they've met you" I responded, a reply she thought both outrageous and hilariously correct at the same time. But that was Nin – forthright, opinionated and a ceaseless advocate for the acknowledgment of Māori.

Soon after her appointment to the Faculty later that year, we continued with our system of parallel tutorials, seminars, Māori issues mootings and learning weekends and wānanga for our students. Several of us who had graduated with Nin would often spend every second weeknight in her office at the then recently opened Law School on Eden Terrace. It was certainly a vast improvement on the Library Building where the Law School used to be housed - more so because not only did we succeed in retaining our Māori student support coordinators with an office but we were also able to secure a permanent learning space - Te Ako. In time Nin would rise to the rank of Associate Professor and also taught at Waikato University. Her courses included Māori Land Law, Contemporary Tiriti Issues and Comparative International Indigenous Law while at the same time, with support from Professors Jane Kelsey and David Williams, she ensured that mainstream courses like Public Law, Jurisprudence and Legal System/ Legal Method retained important Māori elements. She also pioneered *Te Tai Haruru* - the Journal of Māori Legal Writing for which I had the honour of writing a foreword in the first edition in 2004. Typical of Nin she believed that there was a “gap in the market” for local Indigenous legal writing and instead of musing about why this was so, she set about to remedy that deficiency, as she saw it, which led eventually to the production of *Te Tai Haruru*. This too will be one of her enduring legacies.

Without doubt, Nin took her role as a Māori legal academic - and in that order - very seriously. Few Māori lawyers would commit to print phrases about superior court decisions affecting Māori as “reinforcing their own mono cultural supremacy” as highlighted in the essay on Māori and adoption by Professor Jacinta Ruru. Or have an article on indefeasibility and Māori land published under the title “Jurisdiction Wars: Will the Māori Land Court Judges Please Lie Down”.¹ In time, Nin became extremely concerned with (she even acknowledged obsessed by) the *Takamore v Clarke* line of judgments that culminated in the Supreme Court decision of 2012.² Unsurprisingly, several of the articles and essays in this edition of *Te Tai Haruru* have as their focus that seminal decision, which involves: tikanga; Māori land and wāhi tapu - in this case an urupā; the interests of hapū and the wider whānau; and how all of these overlapping interests intersect with the law. She also made considerable efforts to strengthen the connections with Indigenous academics and would regularly attend symposia, conferences and seminars across the Americas and the Pacific. Contributing to the discourse on first nations’ struggles was a priority for Nin.

¹ (2000) 9 BCB 33.

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

Nin had many interests and passions. She was intensely proud of her Croatian whakapapa even traveling there in 2005-2006 to meet her whānau from that far away part of the world. Her tribes were also a crucial part of what defined Nin and she would offer comment and criticisms on the internal politics of her iwi. She was also an Independent Hearings Commissioner under the Resource Management Act 1991. Nin was the Founding Chair of the Mana Trust, established to encourage informed representation of Māori and Pacific Island issues in the New Zealand media and was involved with *Mana Magazine*. She also wrote for the *Collective Human Rights of Pacific Peoples*, published in 1999. As foreshadowed, Nin was an active member of NTM as well as Te Rūnanga Roia o Tāmaki Makaurau an initiative spearheaded by Joe, now Justice Williams, and Te Hunga Roia Māori.

Nin might have been many things if she had sought to pursue other careers. Any political party would have benefited from her insights, her tenacity, her capacity for hard work and her empathy for our people. On the rare occasions when she acted as an advocate – during employment proceedings involving friends and whānau – she took no prisoners, often straying to and sometimes over the limits of judicial patience. With her knowledge of tikanga and her bilingualism Nin would have made an important mark in the various fora of Māori dispute resolution if she had wanted to traverse that path.

I knew Nin for 27 years. She could be very funny, often self deprecating, and infuriatingly irascible at the same time. We attended many hui, wānanga, awards and social events over the years as well as holding hui and study wānanga for students and judging mooted competitions. Every year she would ask me to take a lecture in Māori land or Treaty Issues. We had plans for 2014 as well in terms of classes and courses. She told me about her illness a year before she died when I asked if she might supervise my PhD. When we met to discuss the idea I then saw what a toll the cancer was beginning to take. Even so, Nin carried on with mahi. I invited her to attend circuit court with me for a change of scene and we would have monthly catch ups by phone, email or in person. I admired her strength at such a terrible time. I visited her at home for the last time (little did I know it would be) on 17 January 2014. She looked frail but her attitude remained positive. We had a long korero over four hours about her work now and in the future. She was working on more case notes and lecture plans for Māori land in 2014 with *Takamore* again retaining prominence. The week before she passed away Nin was talking with Law School deans and colleagues about her work in 2014, as Claire Charters has outlined in the introduction to her essay on *Tamakore*. It will be very different and difficult going to the Law School now knowing that Nin is no

longer in the space she occupied for 22 years.

In summary, as Khylee Quince so eloquently affirms in her poignant farewell to a friend and mentor, for most of her career at the University of Auckland, Nin was a pioneer, a charismatic, determined and dominating figure who left her indelible mark on the Faculty of Law and influenced the pathways of so many taurira during her 22 year tenure. As she approached the final stages of her illness with courage and dignity, Nin would reflect on our customs and how the transformation from mortal to revered tipuna (ancestor) was simply another step in an unending state of consciousness.

Amongst her many achievements, few were as important to her and ultimately to her legacy than her son Inia, and her doctorate, the first in Law for a Māori. Nin secured that distinction in 2006 with a thesis on Māori customary law entitled “Key Concepts of Tikanga Māori and Their Use as Regulators of Human Relationships to Natural Resources in Tai Tokerau, Past and Present”. Coincidentally, this was the same day Inia graduated from Medical School. She was even more proud of her son’s success than her own. Even so, it had been, she wrote, an arduous yet fulfilling enterprise on an endless pathway of learning, which she mused, might make some contribution to the conversation. I leave the last word to her:

This study has been a journey of discovery for me – of dead ends, new directions, and much discarding of information. What have I achieved as a result? I have not become an expert in tikanga or te reo Māori. This seemingly endless process of inquiry, evaluation and constant revision has made me aware of how very little I know, or matter in the wider scheme of things. In the end all I can say with certainty is that the work is mine. I hope that it makes a small contribution toward the survival and progress of my people and New Zealand society generally.

TRIBUTES TO NIN

FAREWELL TO THE VIOLET ONE

Khylee Quince¹

Nin was born Violet Cecilia but has always been known as Nin in reference to her love of a whānau swimming hole known as “te puna o nini.” She was of the Rapihana whānau of Te Uri o Hina, a hapū of Te Rarawa, with other links to Lake Ohia and also our shared whakapapa through the Leef/Moetara line of Ngati Korokoro in South Hokianga.

Nin was sent to convent school in Auckland, then attended Queen Vic. She came to university as a young mother to Inia, and quickly shone as a student in Māori Studies, where she tutored. Nin went on to study law, where she excelled in contract, and became a protégé (and later close friend) to Professor Brian Coote. Nin was recruited by the Faculty immediately upon her graduation in 1992 becoming only the second Māori member of staff following the brief but influential stay of Ani Mikaere. I was then 20 and entering into the second year of my law studies.

Where to start on the complex and unique character that was Nin Tomas? She was a big part of my life. Over 22 years Nin was my teacher, my mentor, my friend, my whānaunga and on many occasions a pain in my butt. I always loved her but often did not like her very much. Nin was uncompromising, charismatic and sometimes plain scary. You always knew what she thought - she was uncompromising and fearless - living up to the reputation of Te Rarawa as people without extreme. At times students would refer to her as the “Tarara Taniwha”, which I think she secretly liked.

Nin taught me Māori Land Law in my final year of law school and her teaching style was unlike anything I’d ever encountered. It ranged from brilliant to bizarre, from esoteric to scatological in its earthiness. Nin’s teaching was often unorthodox and sometimes controversial. Often hilarious, with a cutting wit, her teaching was charismatic, unpredictable and inspiring. As teachers we often joke about not being prepared for classes but Nin often meant it. I’ve never seen another colleague give a two hour class from notes scribbled on the back of a serviette. She was able to do this because she thought deeply about the material and the issues affecting the law and her students’ lives. The law, and the Law School itself, was a huge part of Nin’s life. She loved to debate the law and the impact it has had on Māori.

¹ Senior Lecturer, Faculty of Law, Auckland University of Technology; Ngapuhi, Ngāti Porou.

Nin had great ideas for class participation and was particularly fond of role plays and dressing up. One memorable Māori Land Law class was constructed around a roleplay of the resource consent process for the Ngawha prison – complete with gaudy crowns for the Northland councilors and walking sticks and fake teeth for the kaumatua.

Nin and I co-taught several times in Māori Land Law and the comparative Indigenous rights course, which was a cutting edge Masters course taught by live-video link to students in Queensland, Oklahoma, Ottawa, and Saskatchewan. Some days we were like a Laurel and Hardy double act. One day it was our turn to present for three hours on a basic introduction to Māori culture, tikanga and its place in our legal system. Nin decided to liven things up so the two of us dressed in ridiculous outfits – we drew moko on our faces with eyeliner, draped tino rangatiratanga flags around ourselves, wore huge plastic tikis, wrapped piupiu over our pukus, and put feathers in our hair. She looked like a demented Māori Pocahontas activist and I looked like a white kid playing dress-ups. We presented our seminar completely straight faced. One of the Canadian teachers mentioned to us that he had an important visitor sitting in, but out of the view of our screen, who might want to make comment at the end of our class. We thought no more about it and carried on our merry way. At the end of the class, this distinctive voice boomed over the international airwaves “kia ora korua – thanks for that presentation, those are very interesting outfits you have on there.” It was Rongo Wetere, then tumuaki/CEO of Te Wānanga o Aotearoa – probably the most important man in Māori tertiary education at the time. We did the Law School proud that day and it was one of the very few times I ever saw Nin Tomas speechless.

Nin’s vision for the law school was to provide a safe space for Māori legal thinking, teaching and research. She also brought Māori people to the law - as students and manuhiri and as members of the community to be consulted in times of review or for new proposals. She had close links to the profession and to the judiciary and she worked hard to incorporate these views into her teaching and research.

She made significant progress towards her goals over her two decades on Faculty. Many of the things now institutionally ingrained and taken for granted by students and academics alike at the Auckland faculty are the product of Nin’s determination and years of hard work.

These include the presence of electives such as Māori Land Law, Contemporary Tiriti Issues and Comparative Indigenous Rights, and the automatic inclusion of Māori content in compulsory courses such as Public Law, Land Law and Jurisprudence.

When Nin started, these things were not part of Law School life. Under Nin's leadership, the Māori Academic Programme was founded and developed - a programme based upon fundamental tikanga principles of whānaungatanga, manaakitanga and utu. She placed these principles and Waipapa marae at the centre of our consciousness as Māori law students and her belief in this kaupapa was unwavering. She was a trailblazer although she often employed scorched earth tactics to get where she wanted to go.

If I had to sum Nin Tomas up in a single word, I think I would choose "curious", the etymology of which derives from the mid 14th century Old French "curios", meaning "solicitous, anxious, inquisitive; odd or strange". Further back still, the Latin "curiosus" meant to be careful, diligent; inquiring eagerly, meddlesome. Some might say a haututu. Nin was certainly curious in the intellectual sense - always seeking out information, gathering ideas, refining a thesis. She was also curious in the sense of being odd or unusual - she was one of a kind. (Remember the time we laughed ourselves silly for days over your inane joke - how do you frighten a unique animal? You 'neak up on them).

Nin had a constant thirst for knowledge - she wanted to know and be able to explain everything - through any and all possible lenses, including law, science, science fiction and empirical experience. I was thinking of Nin recently when the Stephen Hawking bio-pic "A Theory of Everything" was released. She was fascinated with Hawking's work and spent hours trying to summarise "A Brief History of Time" to me. In many ways Nin's professional life was a quest to discover that Holy Grail - the theory that would succinctly encapsulate the answers to our existence, illustrating what Hawking described as "the ultimate triumph of human reason - for then we should know the mind of God." Of course the element that science fails to explain and account for is the very essence of our humanity - our frequent irrationality, acting against reason, interest and logic, and our faith.

On the science fiction front, one of Nin's great loves was Star Trek, and she would often have a DVD binge over a weekend. I think she fancied herself as a bit of a Captain Kirk, who proclaimed the remit of the Starship Enterprise was to "[e]xplore strange new worlds, to seek out new life and new civilisations, to boldly go where no man has gone before." It didn't really matter if something was new *per se*, just that it was new to *Nin*. I'll never forget the day - sometime around 2007 when Nin "discovered" the internet but not the filter one requires to plow through the screeds of irrelevant and unsupported opinions therein.

Nin's research had both national and international impact. She was the first Māori to earn a PhD in law, and after many years toiling away at it, the long threatening shadow of Rob Joseph looming large over her shoulder in the home straight was the final spur on Nin needed to complete the task in 2007. Many a time she muttered that she would be damned if a man was going to beat her to the honour of being the first – and indeed she did it, by only a matter of months. Her doctoral thesis is an in-depth analysis of those fundamental principles of tikanga as a framework for Māori custom law – and is a masterpiece of drawing together both Māori and non-Māori sources of law. Nin looked magnificent on her doctoral graduation day – timed to coincide with her son Inia's graduation from his medical studies.

Over the years Nin forged many links with Indigenous communities - from Turtle Island (North America), South America, Australia, Rapanui and the Saami peoples - sharing our tikanga and history with them and learning of their own customs and experiences. She would come home with stories of camping on a six dollar pink lilo in minus twenty degrees in Northern Saskatchewan or tramping in the mud with James Anaya and the Mapuche people in Chile. These relationships Nin formed with Indigenous whānaunga around the world were often shared with us as members of Te Tai Haruru so that our whānau of international Indigenous legal scholars was ever-growing. Through Nin, I made the connection with Trish Monture – a pou of Indigenous justice and feminism – and in 2009 my family and I followed the trail to the Canadian prairies taken by Nin to stay with the Monture whānau in Saskatoon. Colleagues in Australia recall Nin causing a group of “frisky” Aboriginal men to quake in their boots when she loudly proclaimed that her people ate their enemies so they had better behave.

International visitors to the law school always want the Māori experience - and Nin loved to meet and host them. We had a regular tour - take them up the maunga of central Tamaki, to Orakei for a korero about Takaparawha and the occupation, out to Piha (stopping for fish and chips for lunch at the RSA) then for dinner on the waterfront. Blown away by her manaaki, many of these visitors extended invitations for reciprocal visits, which Nin often accepted. Only Nin could get internationally renowned scholars to roll up their trousers and follow her skipping into the waves – and I saw it many times.

We would speak at conferences and sing terribly afterward (although lots of people loved it). She loved meeting new people and experiencing new things - we went to an Elvis tribute show in Honolulu, a fa'afine show in Apia (we got up on stage at both shows), and many concerts, plays and kapa haka festivals over the years. One time

we hosted a quiz night for the students during an exam wananga at Waipapa and she insisted we dress up as the world's fattest Playboy bunnies. Thank god most of these things happened before the advent of social media and selfie-sticks.

Nin loved a good project - she learned to paint, to mosaic, to do DIY on her whare in Titirangi and her bach in Ahipara, to learn new languages (Croatian, Spanish, French). Nin always had to be doing something new - and she put her heart and soul into whatever her latest obsession was - saving Queen Vic school from closure, revamping tutorials or working on a piece of research. I called this her Pet Project Syndrome. She would demand that you kōrero with her about her latest idea, whether you wanted to or not - which meant that we would sometimes sneak around the building to avoid being caught in a three hour conversation/debate about Hobbes' Leviathan or how tapu worked as a conceptual regulator of behaviour. She was brilliant. Like another Violet of the north (the magnificent late kuia Waerete Norman), Nin could cut you dead with a single look over those over-sized glasses.

Over her years at the Law School Nin formed many friendships including, Brian Coote, Mike Taggart, Jock Brookfield, Jim Evans, Tim McBride, Paul Rishworth and her cousin Bruce Harris.

Many times I appreciated Nin's candour. Following my elder daughter's birth I was suffering from a significant episode of post-natal depression and my colleagues rallied around to help. Treasa Dunworth, a colleague at the Law School, took me to the doctor, and Scott Optican sorted out my work issues. Nin showed up on my doorstep, sat on my couch and told me to "get your shit together because we need you."

It is hard work being Māori. It is also hard work being an academic. Being a Māori academic in a Pākehā institution, particularly a law school, is next-level schizophrenia. Many people talk about the challenge of "walking in two worlds" or the difficulties of being forced into a particular paradigm or world view and this is the reality for all of us who do what we do. Nin had her own way of coping with this challenge both in her life and in her career.

Being Māori in a modern Aotearoa was a regular topic of conversation and debate between Nin and I - what this meant in terms of obligations, rights, tikanga, kawa. Although Nin advocated for and wrote about collective rights, she was one of the most individualistic and private people I have ever known - Māori or otherwise. I often wondered if this was a result of her being the pōtiki of such a large whānau - where

alone-time must have been precious and rare.

When Nin came to write a tribute in this journal to her friend and colleague Mike Taggart on his passing, she observed that “the measure of a man rests not on how long he lived, or even what he achieved, which may be greater or lesser, but on how well those who knew him tell his story.” Nin was certainly the taniwha with a longstanding reputation. But she was also big-hearted, passionate and constant in her drive and determination to provide a korowai of protection over us as Māori in the Law School. Nin’s professional legacy includes the many people, including prominent lawyers and judges, who have been influenced and inspired by her.

I hope that we have told our versions of your story to your liking e hoa. I love you. I miss you. I miss us together and all the silly things we would do in between profound circular conversations about law and the universe. I hear the echoes of your voice in the hallways of building 803. I pass your office expecting to see your fingers flying over the keyboard to give life to your latest great idea. I see the scrapes of paint on the pillars in the carpark underneath the building as reminders of your terrible parking. Rest easy whānaunga.

HE POROPOROAKI MŌ TE AHORANGI NIN TOMAS

Professor Margaret Mutu¹

He poroporoakī tēnei ki taku whanaunga, ki a Nin Tomas, nā mātou i tuku atu ki te kōpu o Papatūānuku, nā mātou i tangi, arā nā tātou katoa. Nō reira e te whanaunga, e Nin, takoto mai rā i ngā rua kōiwi o ō koutou mātua, o ō koutou tūpuna i Rangihaukaha i te rohe o Te Rarawa i Pukepoto. Haere mai, haere. Takahia atu rā te ara i takahia e te tini, e te mano, te ara kore ki muri, te ara wairua i Te Oneroa-a-Tōhē tae atu ki Pararaki, ki Haumu, ki te tuawhenua ki Wai-ngunguru, te wai e ngunguru ana i wētahi taima. Piki ake ki Herangi, ka heke atu ki te awa wairere e kīa nei ko Waiata-rau, ka whiti i te awa nei ka piki i te puke nui ko Te Atua-perunui, ka taiheke atu. Ka roa ka tatū atu ki te hekenga e tatū ai ki te moana, i te tūpoutanga atu ki Te Rerenga Wairua. Rukuhia te moana i konei, ka whiti ki ngā motu. Tangihia ki reira, ka hoki atu ki Hawaikinui, ki Hawaikiroa, ki Hawaikipāmamao, Te Hono i Wairua. Nō reira haere mai, haere e te whanaunga e Nin.

Ko tēnei te poroporoaki i tō taha ki a Ngāti Kahu, i ngā whenua tupuna i tupu ake ai koe i te roto e kīa nei ko Ōhia, tata atu ki Tokerau, arā ki Karikari. Ko koe te pōtiki, ā, ahakoa ngā māiuiui tamariki i uhia i runga i a koe i aua wā, i takahia e koe ngā whenua tūpuna, i purea rā koe e ngā hau o te kāinga, i kaukau koe i ngā awaawa me ngā moana o kui mā o koro mā. I tupu ake koe i ngā rekereke o ō tuākana, o ō tungāne, o ō mātua, o ō tūpuna nā rātou i hakatō ngā kākano o te mātauranga i a koe, nā rātou koe i poipoi. I uru mai koe ki tēnei Whare Wānanga o Tāmaki, i whaia e koe ngā tikanga a ō tūpuna me te ture tuatahi o tēnei whenua, me te taha hoki o te ture Pākehā, te ture tuarua. I kohia e koe ngā korero tuku iho a kui mā, a koro mā kia hakamārama atu ki a tauwiwi te take e hē ana ā rātou ture i te ao Māori. Nāu i whāngai atu ō tauira maha ki ngā māramatanga o taua ao, nāu i hakatō ngā kākano i ngā roia Māori maha i puta mai i ō hakaakoranga, ā, e mahi ana ināiane i ngā kōti a tauwiwi. Nāu hoki i ētita, i hakarewa tēnei pukapuka *Te Tai Haruru*.

Tēnei mātou e noho mokemoke ana. I tīmata mai koe i tēnei Whare Wānanga i te Tari Māori, ā, ahakoa ka whiti atu ki te Tari Ture, ka hokihoki mai koe ki tō Tari Māori i Waipapa marae, ki ō whanaunga, ki ō hoa mahi i āwhina, i tautoko i a koe. E kore koe e warewaretia. E moe, e moe, e moe i te moenga roa.

¹ Ngāti Kahu, Te Rarawa and Ngāti Whātua.

Nin was a close relation who grew up at Lake Ōhia in the territories of our Ngāti Kahu ancestors in Te Hiku o Te Ika, the Far North. The scholarly traditions of our nations have been passed down the generations so that those of our generation who survived the deprivation, dislocation and marginalisation that resulted from colonisation could still access that knowledge. Our elders gave their time freely to teach us our kaupapa and tikanga, the values and philosophical underpinnings of our law, the first law of Aotearoa. They taught us how tikanga regulated our behaviour within our whānau, our hapū, our iwi and the wider community. They warned against ever allowing foreign laws to take precedence over ours. They taught us the history of the arrival of the English and the agreements entered into with them. In particular He Whakaputanga o te Rangatiratanga o Nu Tireni (the 1835 declaration of the sovereignty of New Zealand) laid the constitutional foundation upon which the English settled in this country. Sovereignty lay with the rangatira of the hapū and law-making powers would never be given to anyone else. For the English, diplomatic relations could be established by the King of England sending an ambassador to assist the rangatira as they learnt the ways of their English guests. In 1840 He Whakaputanga was confirmed in Te Tiriti o Waitangi and control of hitherto lawless English immigrants was devolved to the Queen of England. Under this devolved authority she could make rules to control her English subjects but had no authority over Māori. The fact that the English immigrants ignored these agreements and established a parliamentary system that violated He Whakaputanga and Te Tiriti simply meant that that system had no proper constitutional basis in this country. As such the relationship between Māori and those who arrived here under the auspices of Te Tiriti, ngā tāngata Tiriti as they are sometimes known, has continued to be a work in progress that can only reach resolution when the correct and appropriate constitutional arrangements envisaged by our ancestors in 1835 and then in 1840 are put in place.

The philosophies and teachings of our ancestors of Te Hiku o Te Ika informed Nin's teaching and research throughout her time at the University of Auckland. Although she was based in the Law School she visited us frequently at Waipapa Marae and the Department of Māori Studies, seeking our help and tautoko for herself and her students and towards the end, shrugging off all the colonial myth-making in preference for reminiscing on what we had learnt at the feet of our elders, and the importance of whānau and mokopuna. Kei kō koe, e te whanaunga, e marewa ana ki runga ki nga whetu o te rangi, ki te rangi Tūhāhā, ki Tikitiki-o-rangi. Kua hoki koe ki te kāinga tūturu mō tātou mō te tangata. Moe mai, e Nin, i runga i te rangimārie me te aroha.

THE COHERENT ZEAL THAT NIN TOMAS BROUGHT TO HER RESPONSIBILITIES AS A LAW TEACHER AND RESEARCHER

Bruce V Harris¹

I am humbled to be invited to contribute to this collection of writing honouring the life and work of Dr Nin Tomas. Nin was my friend, colleague in the Auckland Law School for nearly twenty years, and fellow descendant of the 1830s union of Te Rangahau and John Leaf. The whakapapa link was only realised when I relatively recently discovered my Māori ancestry and traced it back to the Hokianga. Nin and I were good friends before this discovery but our friendship took on a new dynamic when we found that we shared a common Māori lineage.

I learned from Nin's attitude to life, her contributions to the life of the Law School and her passionate sharing of Māori perspectives on the law. Nin taught me a lot about how Māori really feel and think about things. She helped me to better appreciate how Māori see New Zealand's colonial history, the Treaty of Waitangi and the development and organisation of New Zealand society since 1840.

Nin often dropped into my office for a chat. The conversation would range across family, sport, the Law School and the ongoing struggle between the position of Māori and the current provision of the law. Nin's mind was always busily at work, constantly reflecting on what she was observing and reading. She expressed strong and clear views on all matters. These opinions were honest, well-reasoned and often well ahead of where many others were courageous enough to go with their thinking.

The academic role as critic and conscious of society came naturally to Nin. The expression of her views was not constrained by any desire to court popularity. She was concerned to recognise where change in New Zealand society and law was needed in order to bring about improvement, especially in the law's appreciation of Māori perspectives.

One was inspired by not only Nin's capacity for critique but also the enthusiasm and energy that she was willing to bring to giving practical effect to the aspirations that she was espousing. These practical achievements were evident in her leadership of the Māori teaching and student community within the Law School and in her own

¹ Professor of Law, The University of Auckland.

teaching and research.

When I was Dean of Law from 1995 to 2000, Nin and I worked closely together with the aims of strengthening the Māori teaching and research within the Law School and enhancing the support of the Māori law students. Nin was absolutely committed to these goals.

The Faculty had the capacity to employ additional staff who identified with strengthening the Māori dimension. However, notwithstanding energetic advertising and searching, it was not possible to encourage suitably qualified and experienced applicants to come forward. Able Māori lawyers were finding fulfilling careers in private practice and elsewhere in the law. The Faculty had to think laterally. We embarked upon a programme of “growing our own”. Advertisements were placed for threshold lecturers in the law related to Māori issues who would be allocated modest teaching loads and given the opportunity to pursue postgraduate qualifications in law. Two able former students, Khylee Quince and Shane Heremaia, accepted appointments to these positions in 1997.

Nin gave a lot of energy to the Māori law student community. Not only did she stand closely behind Te Rākau Ture, the Māori Law Students Association, encouraging and providing wise counsel to their officers, but she was always available to help Māori students on a one to one basis with Law School and life problems. Colleagues in the Law School do not always fully appreciate the time and energy that Māori staff give to the individual support of students. Like all her Māori colleagues, Nin wanted to facilitate Māori students gaining the most they possibly could from their law school experience, including particularly helping them to better understand their Māori culture and the relationship between that culture and the law.

Nin was a natural teacher. I shared lecturing with her in Legal Method and Public Law. She brought to the class room humour, infectious energy and a clearly developed critical understanding of whatever area of law she was addressing. Our discussions about what should be taught, and how it should be taught, were always laced with Nin’s practical suggestions about how things could be done better.

Nin’s move into teaching the Treaty of Waitangi part of the compulsory LLB course Public Law was the result of such a concern. Nin thought that students would benefit from being exposed to a Māori point of view on the Treaty. Similarly, her introduction of the comparative courses on Indigenous peoples and the law was a practical response

to a recognised student learning need. These courses were taught in a shared way across different jurisdictions through video links.

This journal is a manifestation of Nin's capacity to follow up her aspirations in the area of research with practical action. Nin drove the establishment of *Te Tai Haruru – Journal of Māori Legal Writing*, now *Te Tai Haruru – Journal of Māori and Indigenous Issues*. She was adding finishing touches to the editing of Volume 4 only weeks before her death. Nin thought that there needed to be a legal academic journal dedicated to Māori legal writing that would provide a vehicle for putting research by both established scholars and students before the academic and wider community. She turned the perceived need into reality.

There was a coherence to Nin's commitment to support of Māori colleagues and students, her teaching and her research and writing. In all these activities Nin was driven daily to advance Māori interests whether it be Māori students being better equipped to achieve their potential as lawyers and in other aspects of their lives, or be it better informed teaching of Māori perspectives on law or, through her research, better accommodation by the New Zealand legal system of Māori perspectives.

Nin wanted to mesh her lively capacity for critical analysis with the discipline of a scholar expected to build faithfully off the work of others. She was concerned to place her advocacy within a paradigm of internationally recognised jurisprudence notwithstanding the foundation of her knowledge of the Māori perspective being authentic "flax roots" rather than learned from books.

Nin's major scholarly work is the unpublished PhD thesis entitled *Key Concepts of Tikanga Māori (Māori Custom Law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present* completed in 2006.² The thesis is original and ambitious. It attempts to locate evidence of Māori customary practices in the mid-Tai Tokerau region as revealed in the proceedings of the Native Land Court in the early 20th Century and more contemporaneously in evidence put before the Waitangi Tribunal in two hearings.

Nin attempted to bring some order to the revealed cultural practices with a view to showing how research may be able to put forward rules of Māori custom that may

² Nin Tomas "Key concepts of tikanga Māori (Māori Custom Law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present" (PhD Dissertation, University of Auckland, 2006).

be capable of being recognised as justiciable common law rules in current New Zealand courts. There is no doubt that a potential exists for the New Zealand courts to recognise proven Māori custom in some circumstances as capable of being enforced by the courts as current law.³ One major challenge, with the effecting of such modern judicial recognition, is persuading the court to accept the original Māori custom given the practical difficulties often associated with establishing evidence of the custom's existence and regular observation. In researching and writing the thesis, Nin set about illustrating what needs to be done to provide a sufficient evidential foundation for current court recognition of such custom law.

Nin's interest in tikanga Māori and its judicial recognition naturally led to engagement with the issue of the relationship between potential court recognition of tikanga Māori when it is, or appears to be, in conflict with competing common law. Well before *Takamore v Clarke* came before the courts,⁴ Nin had gained research funding to investigate the way that New Zealand law providing for decisions surrounding human burial could accommodate possible tikanga Māori expectations that a person should be buried according to the wishes of their whānau pani (wider family) in the tribal territory of those relatives. In short, the deceased should be returned to their tribal territory for burial according to the expectations of wider whānau so that the culture of whakapapa will be upheld.

The facts of *Takamore* will be known from other contributions to this journal.⁵ There is an irreconcilable conflict between two packages of legitimate interest. On the one hand there is the responsibility an executor may be thought by the law to have in respect of the disposal of the body of the deceased and the interests of the surviving partner and their children in having the deceased buried where they can easily access the grave. On the other hand, tikanga Māori expects burial decisions to be made by the whānau in keeping with Māori culture.

By a majority (Tipping, McGrath and Blanchard JJ) the Supreme Court found the common law gave the decision-making responsibility to the executor who was

³ See *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 (CA); *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573; *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

⁴ *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573; *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

⁵ See Natalie Coates, "The Recognition of Tikanga in the Common Law of New Zealand" (2015) (1) NZLR 1 and reprinted in this edition of *Te Tai Haruru – Journal of Māori and Indigenous Issues*.

obliged to take into account, inter alia, tikanga Māori interests.⁶ The decision of the executor was considered to be vulnerable to being overridden by the courts should the discretion be considered by the court to be exercised “inappropriately”.⁷ The Chief Justice (Elias CJ) and William Young J were not willing to recognise the existence of a common law rule giving the discretion to the executor.⁸ Their Honours thought the affected parties should attempt to settle among themselves a suitable place of burial. If such agreement cannot be achieved, any party should be able to refer the matter to the High Court, which should consider the relevant factors and decide how the decision should be best made in the circumstances.

Both paths of reasoning meant the tikanga position was not to be determinative. The *Takamore* decision does not undermine the generic principle that in some circumstances tikanga may be recognised by the court as capable of metamorphosing into justiciable common law. However, none of the Supreme Court judges was willing to countenance, in the context of the burial of a Māori, a common law principle that tikanga should always prevail.

A critic sympathetic to tikanga Māori being recognised as justiciable common law may be disappointed with the approach adopted in the Supreme Court judgments in *Takamore*. Such a critic could argue that what is being accepted as justiciable law is being determined through a Crown/Pākehā law lens contrary to the spirit of the Treaty of Waitangi. The Treaty saw two equal partners entering into an agreement about the future governance of New Zealand and this is a context where, especially in the light of Article 2, the Māori perspective is not being given a sufficiently decisive influence.

The counter-argument would be that the rule of tikanga, if it meets the criteria for recognition as common law,⁹ has to be considered in the same way as any rule of the common law which is found to be in irreconcilable conflict with another common law rule. The court has to first recognise the tikanga as common law and then determine which aspect of the conflicting common law should be allowed to prevail. This decision should turn on a comparative weighing by the court of all the justifications for the operation of each rule in the circumstances.

⁶ *Takamore v Clarke* [2012] NZSC 116; [2013] 2 NZLR 733 at [152] and [164] per Tipping, McGrath and Blanchard JJ.

⁷ At [162] and [164] per Tipping, McGrath and Blanchard JJ.

⁸ At [12] and [101]-[108] per Elias CJ; At [173], [175] and [176], per William Young J.

⁹ See *The Public Trustee v Loasby* (1908) 27 NZLR 801 (SC) at 806-807 per Cooper J; *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [109]-[111] per Glazebrook J.

It is this latter approach which appears to have been adopted by the majority of the Supreme Court in *Takamore*. Both the High Court,¹⁰ and the Court of Appeal,¹¹ in *Takamore* expressly accepted in principle that tikanga could be recognised as justiciable common law, provided that certain criteria were met. Surprisingly, none of the Supreme Court judges expressly discussed whether the Tūhoe tikanga burial practice had been elevated to common law status, but the majority thought it a relevant consideration for the executor when deciding how and where the burial should take place.¹² Elias CJ and William Young J thought it relevant to any High Court determination of burial should the relatives not be able to agree.¹³

The majority weighed the competing justifications and decided that the testator's decision was appropriate, mainly because of the deceased's "life choices, in relation to living in Christchurch with his partner and now adult children".¹⁴ In coming to this conclusion the court was preferencing the decision of an individual executor over that of the wider collective whānau and their expectation of the return of the body to the tribal territory for burial.

Nin thought the approach of the Supreme Court in *Takamore* to be wrong.¹⁵ She advocated a more certain approach which gave greater force to a common law rule that could be derived from tikanga in the circumstances. Nin argued that where tikanga would expect the whānau to retrieve the body for burial in its tribal territory, that principle should prevail over the wishes of the executor. This should be so even if the executor is supported by the partner and children of the deceased, unless the deceased has indicated prior to death, by some legally recognised means, their intention that their burial should not be in accordance with the expectations of tikanga.

This approach, while preserving the deceased's personal autonomy, gives a stronger legal force to tikanga. However, the executor does have his or her discretion taken away, and the immediate, possibly non-Māori family, may have their preference thwarted. These reservations may be countered by pointing to the solution being in

¹⁰ *Clarke v Takamore* (2009) 27 FRNZ 676 (HC).

¹¹ See *Takamore v Clarke* [2011] NZCA 478, [2012] 1 NZLR 573 at [109]-[111] per Glazebrook J.

¹² See *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [152] and [164] per Tipping, McGrath and Blanchard JJ.

¹³ At [101] and [102] per Elias CJ and at [176] per William Young J.

¹⁴ At [169] per Tipping, McGrath and Blanchard JJ.

¹⁵ Nin Tomas "Recognising Collective Cultural Property Rights in a Deceased – *Clarke v Takamore*" (paper presented to the author, 2013).

the hands of the deceased, since he or she has the opportunity to avoid the default position in favour of tikanga with appropriate formal pre-death instructions. Foresight is demanded from the deceased. Nin acknowledges that the adoption of the approach that she suggests would require the abandonment of the common law principle holding that nobody has a property interest in a body.

It is no surprise that Nin supported an approach that provides a stronger possibility of tikanga being enforced as justiciable common law. All aspects of Nin's professional life were constantly devoted to advancing the Māori cause. Her advocacy of this point of view was heartfelt, honest and forceful. No doubt it followed naturally from her life experience as a Māori woman, her knowledge of tikanga Māori and her understanding of New Zealand law as a trained lawyer.

The New Zealand legal system continues to evolve in its recognition of Māori perspectives. The importance of the law and its operation being influenced by such perspectives has been acknowledged as a desirable policy direction by the legislature,¹⁶ the executive,¹⁷ and the judiciary.¹⁸ Much work remains to be done to translate the policy direction into a legal reality that meets the expectations of those who believe Māori perspectives require greater recognition. Evolution in this direction depends on strong well researched advocacy of the kind advanced by Nin. The status quo needs to be forcefully confronted with convincing justifications for change or otherwise those responsible for making the law, that is Parliament, the executive and the courts, will not be prompted to bring about change. The attitude of many in society also will not be prompted to change.

My life, and I am sure that of many colleagues, students and others, is considerably richer for having been exposed to Nin and her devotion to advancing the influence of Māori perspectives in contemporary New Zealand. Her chosen task was not easy, given the difficulty the Māori minority (approximately 15% of the population) has had in protecting and advancing its interests in a community where the democratic majority has so much power. In this, the New Zealand Māori experience has a lot in common with that of most other Indigenous minorities.

¹⁶ See Treaty of Waitangi Act 1975.

¹⁷ See Cabinet Office *Cabinet Manual 2008* at [7.60(a)] and [7.61].

¹⁸ See *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

Notwithstanding Nin's zeal to see the ideals she so passionately held manifest in societal and legal change, she accepted that Māori perspectives should not necessarily automatically prevail over the perspectives of other groups within New Zealand's pluralistic community. Nin just wanted the Māori history and point of view to be more thoroughly understood and, where justified, built into the law.

TIKANGA IN AOTEAROA/NEW ZEALAND

THE RECOGNITION OF TIKANGA IN THE COMMON LAW OF NEW ZEALAND

Natalie Coates¹

E tuku mihi ana ki a koe e te whaea Nin. E te rangatira aumangea, ko koe he kaiarataki wahine i roto i te ao ture. Kei te noho mokemoke tonu tātou te hunga mātauranga. E moe, e oki, e kore mātou e warewaretia i a koe i tō ake mahi mō tātou te iwi Māori.

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I. Introduction

Mr James Takamore passed away in August 2007.² Mr Takamore, of Māori descent and a member of the Tūhoe tribe, had resided in Christchurch, where he had lived with his non-Māori partner Denise Clark and their two children for twenty years. Ms Clark was the executrix of his will and contrary to her wishes, Mr Takamore's body was taken from Christchurch by his sister and other members of his family and buried at Kutarere marae (in the North Island) beside other whānau (family) members. This polarising and emotionally contentious set of facts highlights a clash of legal orders. On one hand, Ms Clark claimed rights under the common law, as executrix, to decide where the body should be buried. On the other hand, Mr Takamore's Māori family asserted that they had a right to the body by virtue of tikanga Māori (or Māori customary law), which also has status under the common law.

This factual scenario goes to the heart of an issue that the New Zealand legal system has been struggling with for over 150 years: the role and interaction between tikanga and the New Zealand state legal system.

For Māori, tikanga has always existed as a framework for regulating behaviour. It operated before Pākehā came to New Zealand and it continues to play a valued and relevant role in the lives of many Māori today. However, the routes by which tikanga can

¹ Solicitor at Kahui Legal, New Zealand. Parts of this article are adapted from a research paper that I completed for my Master of Laws from Harvard University. I wish to thank Claire Charters, Janet McLean and Treasa Dunworth for their comments and constructive feedback on early versions of this work.

² These facts are taken from the case of *Takamore v Clark* [2011] NZCA 587, [2011] 1 NZLR 573 [Takamore CA].

engage in a form of “legal association” with the mainstream New Zealand legal system are limited.³ The basic dominant legal structure, in essence, only positively recognises and enforces two primary sources of law: those statutes enacted by the New Zealand Parliament and judge-made common law.⁴ Therefore under current constitutional arrangements and orthodox legal thinking, tikanga either has to be recognised by these two sources of law or function as a normative order outside the system, permissible only where it does not conflict with the pervasive state legal scheme.

This article examines the interaction between tikanga and the common law and the potential of this route, as distinct from legislative incorporation, as a means by which tikanga can claim space within the state legal system. It does this by:

1. providing a basic explanation of the common law and tikanga Māori and their interaction;
2. giving a brief overview of the interaction between tikanga and the common law throughout New Zealand legal history;
3. making an argument that the common law should positively facilitate the recognition of tikanga;
4. exploring the current legal framework and its potential; and
5. pointing out a number of the broader limitations of this form of recognition.

The article concludes that, despite the many limitations and dangers in the current framework of association, there is scope for the common law to be a vehicle by which tikanga finds a limited space in the state legal system, provided that the judiciary is willing and takes care in the manner that they traverse the interaction between the two legal systems.

³ The term “legal association” is borrowed from Nicole Roughan’s article “The Association of State and Indigenous Law: A Case Study in ‘Legal Association’” (2009) 59 U.T.L.J. 135. It derives from legal pluralism and involves the opening of a legal system’s borders to another legal system. Roughan defines it as “inter-systemic relationships that are deliberate, involving the integrations, incorporations, or other formal interactions that occur between legal systems” at 136.

⁴ See Paul McHugh *The Māori Magna Carta* (Oxford University Press, Auckland, 1991) at 11 for a discussion on the sources of Anglo-New Zealand law.

II. The Common Law and Tikanga Māori

The common law in a broad sense refers to the system of law that developed in England and was subsequently transplanted into most former colonies of the British Empire. New Zealand accordingly inherited this legal system. It is characterised by law that is developed by judges through decisions of courts. Unlike civil law legal systems that are founded on extensive legal codes, the centrality of precedent is integral to the common law legal system. The common law in a more narrow sense refers to only part of the legal system and can be defined in contrast to statute.⁵ For simplicity, it can be thought about in two ways. First, there is the pure common law. This is law that arises from the inherent authority of courts to define the law, in the absence of an underlying statute. This is when judges create law with reference to situations that come before the court and past decisions, without the aid of legislation. The historical foundation of this law was community customs and practices.⁶ In the New Zealand context, this pure common law is based on imported English common law that has been modified over time by developments and decisions made by New Zealand domestic courts.

Second, there is interstitial common law, which is law that results when courts define law that is promulgated by legislative bodies. This is the system of precedents that arise when courts apply legislation or regulations to specific factual situations. In the process of interpretation and application, due to the precedential nature of this system, judges in effect create law. This article is primarily concerned with the former stream of pure common law as an avenue for the recognition of tikanga or Māori customary laws and practices.⁷

Tikanga Māori literally translated means the “right” Māori way of doing things. In this article the terms “tikanga Māori” and “Māori customary law” are used interchangeably. Māori customary law is a complex notion to define and there are a number of different ways of looking at it. It can be seen in a narrow legalistic sense to refer to those customs that have met particular legal tests and are enforceable in court, or in a broader sense

⁵ See John Gardner “Some Types of Law” in Douglas E Edlin (ed) *Common Law Theory* (Cambridge University Press, Cambridge, 2007) 51 at 72–74 for a discussion on the difference between the “Common Law” system in the broad sense and the “common law” in its narrow sense.

⁶ See Michael Lobban “Custom, common law reasoning and the law of nations in the nineteenth century” in Amanda Perreau-Saussine and James Bernard Murphy (eds) *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge University Press, Cambridge, 2007) 256 at 257.

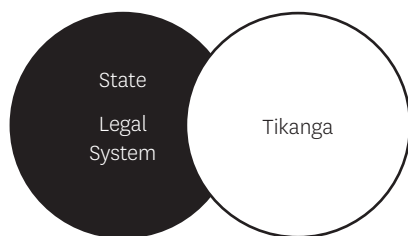
⁷ Note that this article will, however, go on to make some comments on the potential relevance of tikanga for interstitial common law

to refer to that body of rules developed by Māori to govern themselves.⁸

Although this article is about the association of tikanga with the state legal system and whether it has status within courts, when “tikanga” or “Māori customary law” is referred to generally, it is used in its wider sense as representing a body of law within its own cultural context. This is in a similar vein to Sir Eddie Taihakurei Durie who has described Māori customary law broadly as “[the] values, standards, principles or norms to which the Māori community generally subscribed for the determination of appropriate conduct”.⁹ It includes not only the procedures, protocols, practices and rules, but also the principles and values that inform these such as whakapapa, whānaungatanga, mana, manaakitanga, aroha, wairua and utu.

Tikanga can be conceptualised as being a sphere of law in its own right, a self-contained functional legal order that has rules, values, principles and processes dictating how customary practices are identified, how disputes are resolved, and how rules and protocols can change or be developed over time. When questions or issues pertaining to tikanga arise, unless it conflicts with the state legal system, they are usually resolved in the appropriate tikanga-orientated Māori forum. For example, the questions of whether cremation is consistent with tikanga or whether women should be permitted to deliver whaikōrero (oratory) in the pōwhiri (welcoming) process on marae are questions that are usually worked out in accordance with the tikanga of particular iwi (tribes).

Although tikanga and the state legal system can be conceived as two distinct legal spheres, there are instances when the two are forced to intersect and interact. This relationship is represented in the diagram below:



⁸ See Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP 9, 2001) at [1].

⁹ At [69].

This intersection can be called a “legal association”, which refers to “the integrations, incorporations, or other formal interactions that occur between legal systems”.¹⁰ There are many different ways that this confluence between the two legal systems in New Zealand can be reconciled. Alternative models can range from the state legal system simply trumping tikanga, to tikanga being recognised subject to certain tests and adjudication within the state legal structure, to tikanga being dominant and applying. This article is interested in what happens at this intersection when tikanga intersects with and seeks recognition within the common law.

III. The Legal Association between Common Law and Tikanga Thus Far

In New Zealand the state legal framework is dominant and asserts itself as the mechanism that dictates what occurs when tikanga intersects with the common law.

English common law developed to accept that when English law is transposed onto a new country, the laws of the Indigenous inhabitants survive the assumption of British sovereignty.¹¹ This presumption of continuity was designed to facilitate reconciliation between two fundamentally different legal norms and cultures.¹² The case of *Campbell v Hall* (1774) is typically associated, at least in the instance of settled colonies, with the recognition of this continuity doctrine.¹³ This case proposed that: (1) all inhabitants become subject to the legislative government of Parliament; (2) the inhabitants become British subjects; and (3) the laws of the newly acquired territory remain in force until altered by the Crown.¹⁴

According to the common law, Māori customary law therefore continued to operate as a normative legal order and was recognisable by the state legal system. The imposed English law was applied only “so far as applicable to the circumstances thereof”.¹⁵ One area where the common law clearly accepts the existence and continuation of

¹⁰ Roughan, above n 3, at 136.

¹¹ See *Takamore CA*, above n 2, at [112] and the Canadian case of *Delgamuukw v British Columbia* [1993] 5 CNLR 1 (BCCA) at [241].

¹² See McHugh, above n 4, at 84 where he notes that as a practical matter, this continuity doctrine was necessary as immediate transition to new imported systems of British law was simply unrealistic in settled colonies.

¹³ *Campbell v Hall* (1774) 1 Cowper 204, 98 ER 1045 (KB).

¹⁴ At [208]–[209].

¹⁵ The presumption of continuity can explain the English Laws Act 1858 (NZ) 21 & 22 Vict, which was passed by the New Zealand Parliament to clarify the status of English law in New Zealand. It stated that English law is part of the law of New Zealand with effect from 1840 only so far as applicable to the circumstances of New Zealand.

customary rights is in relation to the doctrine of aboriginal or native title.¹⁶ This is the doctrine that customary land tenure and proprietary rights in physical resources persist after the assumption of sovereignty. Because the source of this title is in the traditional customary connection that Indigenous peoples have to their lands or waters, by implication the doctrine has also been held to extend to associated rights to hunt, fish and gather.¹⁷ This article is concerned with the potential of the common law to recognise custom and tikanga that extends beyond those rights and practices that are encompassed by aboriginal title. Although dividing out customary practices in this way is not a natural distinction to make as land and natural resources are an inherent and central part of tikanga, there is already extensive discourse dealing with native and aboriginal title.¹⁸ Further, in New Zealand land ownership and traditional food-gathering practices are heavily regulated by statute.¹⁹ The focus is therefore on the development of this separate common law doctrine of recognition.

A. Initial framing of the boundaries of recognition

Although the presumption of Indigenous customs continuing existed when the British came to New Zealand, the way that the state legal system and officials within

¹⁶ See Richard Boast “Māori Customary Law and Land Tenure” in Boast and others (eds) *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004) 21 at 31.

¹⁷ In Australia, for example, Kirby P in the case of *Mason v Tritton* (1994) 34 NSWLR 575 (CA) at 579 stated that “a right to fish” based upon traditional laws and customs is a recognisable form of native title defended by the common law of Australia”. The Australian High Court in *Yanner v Eaton* (1999) 201 CLR 351 also accepted that native title included a right to hunt crocodiles; and in *Yarmirr v Northern Territory* (1998) 156 ALR 370 (FCA) at [87], [115] and [162(4)(b)] Olney J held that native title included free access to the sea and seabed for purposes which included fishing and hunting “for the purpose of satisfying their personal, domestic or non-commercial communal needs ...”. A New Zealand example is the case of *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 682 CHCS where the Court recognised an aboriginal title claim that involved the granting of non-exclusive customary fishing and shell-fish gathering rights. There have also been a number of Canadian cases including: *R v Adams* [1996] 3 SCR 101, *R v Cote* [1996] 3 SCR 139 and *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

¹⁸ See, for example, Paul McHugh *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, Oxford, 2011) that provides a history of the doctrine of aboriginal title. Also see Louis A Knafl and Haijo Westra (eds) *Aboriginal Title and Indigenous Peoples: Canada, Australia and New Zealand* (UBC Press, Vancouver, 2010); Kent McNeil *Common Law Aboriginal Title* (Clarendon Press, Oxford, 1989); Peter H Russell *Recognising Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (University of New South Wales Press, Sydney, 2006); and Richard H Bartlett *Native Title in Australia* (2nd ed, LexisNexis, Sydney, 2004).

¹⁹ See, for example, Te Ture Whenua Māori Act 1993, the Land Transfer Act 1952 and the Land Transfer Regulations 2002 that provides the primary statutory framework for dealing with land. There is also the Fisheries (Amateur Fishing) Regulations 1986 and the Wild Animal Control Act 1977 that set out the fishing and hunting limitations.

the system have viewed tikanga has varied over time. When the Declaration of Independence was signed in 1835 and the Treaty of Waitangi in 1840, it was generally accepted by officials that Māori operated a tikanga-based customary system akin to law.²⁰ This view, however, was infamously rejected in the case of *Wi Parata v Bishop of Wellington* (1877).²¹ Chief Justice Prendergast’s position cast Māori as savages and denied they had any settled system of law that could apply.²² Here the reconciliation of the confluence of two legal systems was simply the denial and rejection of tikanga.

Although *Wi Parata* remained a good precedent for many years, courts subsequently retreated from Prendergast’s extreme position. The Privy Council in *Nireaha Tamaki v Baker* [1901],²³ for example, rejected the notion that a court cannot take cognisance of Māori customary law and said that it is “rather late in the day for such an argument to be addressed to a New Zealand court”.²⁴ This rejection of *Wi Parata* was confirmed in 2003 by the Court of Appeal in *Attorney-General v Ngāti Apa*.²⁵

In 1908, in the case of *Public Trustee v Loasby*, the Supreme Court was asked to directly confront the question of the extent that the common law could recognise Māori custom.²⁶ The custom in question was that on the death of a chief or person of importance, the costs of the tangi (funeral) should be met by the deceased’s estate. The Court held that custom could be recognised, provided that a number of tests were met. Cooper J stated the three relevant inquiries when considering a question dealing with the ancient customs of Māori:²⁷

1. ... whether such custom exists as a general custom of that particular class of the inhabitants of this Dominion that constitute the Māori race; ...
2. ... [whether] the custom [was] contrary to any statute law of the Dominion ...
3. ... [whether the custom was] reasonable, taking the whole of the circumstances into consideration.

²⁰ See dispatch from Lord John Russell to Governor Hobson dated 9th December 1840 cited in Alex Frame “Colonising Attitudes Towards Māori Custom” (1981) NZLJ 105 at 105–106.

²¹ *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 77 (SC).

²² According to “good sense” and “indubitable facts”, no such body of law existed: at [14].

²³ *Nireaha Tamaki v Baker* [1901] AC 561 (PC).

²⁴ At 577

²⁵ *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).

²⁶ *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC).

²⁷ At 806.

In this case the Supreme Court found that the tests were satisfied and the custom was therefore applied.

This three-part test in *Loasby* was later cited with approval in the High Court in 1987 in the case of *Huakina Development Trust v Waikato Valley Authority*²⁸ and in 2004 in the case of *Proprietors of Parininihi Ki Waitotara Block v Ngaruahine Iwi Authority*.²⁹

Another case arose in 1919 where the Privy Council in *Hineiti Rirerire Arani v Public Trustee* (1919) directly considered the application of the Māori customary law of adoption.³⁰ The Privy Council found that the particular custom had a legal status, and that, in the absence of a legislative provision to the contrary, it was not interfered with by the enactment of the Adoption of Children Act 1895.³¹ The courts therefore have indicated the potential for the recognition of tikanga within the parameters set by the common law.

B. Recent revision of recognition

The case law that directly dealt with the common law recognition of tikanga up until 2007 is limited at best.³² It was not until the *Takamore* line of cases that the question of the status of tikanga arose again.³³ These cases addressed the factual situation set out at the beginning of this article where Māori were asserting the application of customary law relating to burial rights, in which the whānau declared a right to take and bury a deceased. Because legislation is silent on the issue of who has the right

²⁸ *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 215. The Court also went on to say that “customs and practices that include spiritual elements are cognisable in a Court of law provided they are properly established, usually by evidence” at 215.

²⁹ *Proprietors of Parininihi Ki Waitotara Block v Ngaruahine Iwi Authority* [2004] 2 NZLR 201 (HC) at 206 where the tests were described as “the criteria for qualification that Māori custom has to meet to be part of the common law of New Zealand”.

³⁰ *Hineiti Rirerire Arani v Public Trustee* [1920] AC 198 (PC).

³¹ Adoption of Children Act 1895 (NZ) 59 Vict. Section 19 of the Adoption Act 1955 later explicitly extinguished the legal recognition of Māori customary adoptions.

³² Note that in some instances the recognition of tikanga overlaps with the politics and the recognition of the Treaty of Waitangi. For example, in *Baldick v Jackson* (1910) 30 NZLR 343 (SC), Chief Justice Stout accepted that because Māori engaged in whaling, they could claim customary ownership of dead whales that washed up on the beaches. This, however, was asserted on the basis of art 2 of the Treaty of Waitangi that included the guarantee that Māori fishing was not to be interfered with. This article does not delve into Treaty of Waitangi issues and jurisprudence as they are usually around proprietary concerns and it is more concerned with the explicit common law interaction with tikanga.

³³ See *Clarke v Takamore* [2010] 2 NZLR 525 (HC), *Takamore CA*, above n 2; and *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 [*Takamore SC*].

to decide where a body is buried, this was a unique opportunity for the courts to confront the question of the place of tikanga within the common law of New Zealand.

In the High Court, Fogarty J framed the case as a choice between two conflicting common law positions.³⁴ He initially looked at the general English common law position, which was that the executor has the right to obtain possession of the body for burial.³⁵ However, that was then set against the competing common law doctrine that the customs of the Indigenous peoples survive and can have legal status. In this respect Fogarty J cited the three-part test in *Loasby* with approval and held that Māori customary law can be recognised as part of the common law.³⁶ Fogarty J, however, went on to conclude that the Tūhoe custom did not meet the “reasonableness” test in this instance.³⁷ The custom was therefore not recognised and the Court went on to apply the general common law executor rule.

The case was appealed to the Court of Appeal. The majority of Glazebrook and Wild JJ accepted that the acquisition of British sovereignty did not displace Māori customs which continued under the common law.³⁸ They then, however, went on to make an analogy to local English custom that is recognisable under the common law for boroughs and other local areas.³⁹

Under this route custom is not unqualified. The Court of Appeal drew upon the requirements set out in *Halsbury’s Laws of England* that in order for a custom to be recognised:⁴⁰

- it must have existed since time immemorial;
- it must have continued as of right and without interruption since its origin;
- it must be reasonable;

³⁴ See *Clarke v Takamore*, above n 33.

³⁵ At [23]–[53].

³⁶ At [81].

³⁷ This is because the custom was inconsistent with the general common law presumption of individual freedom at [82]–[90]. His reasoning was that the collective will of Tūhoe cannot be imposed upon his executor or over Mr Takamore’s body unless the deceased had made it clear during his life that he lived in accordance with Tūhoe tikanga. In this case it was held that Mr Takamore had chosen to live outside the customs of his tribe therefore there had been no legal authority for the defendant to dispossess his body.

³⁸ See *Takamore CA*, above n 2, at [112].

³⁹ At [109].

⁴⁰ At [109]. Note that the foundation case for these requirements is *The Case of Tanistry* (1608) *Davies* 28, 80 ER 516 (KB) at 32.

- it must be certain in its terms, and in respect of locality to which it obtains and the persons it binds; and
- it must not have been extinguished by statute

This is a slightly different approach than that taken in *Loasby*.⁴¹

In relation to the particular custom in question, the majority found that the burial custom did not satisfy the reasonableness test,⁴² and they also suggested that the custom would have struggled to meet the certainty requirement.⁴³ They therefore clearly rejected the view that custom applies in and of its own right as a separate stream of law.

The majority, however, then turned to the general common law position, namely that the executor has a duty to dispose of the body of the deceased. They then took what they termed a “more modern approach”, where customary law is integrated into the general common law position where possible.⁴⁴ In regards to the issue of burial rights, they did this by finding that a compromise would require that the custom was a relevant cultural consideration for an executor or executrix to take into account in determining the method and place of burial and that a culturally appropriate process of discussion and negotiation take place. The extent to which this more “modern” integration of tikanga actually changes the general common law executor position in relation to burials is questionable.⁴⁵ What is of note is the two-step approach that was taken where the Court examined if the custom met the gatekeeping tests so that it could be recognised by the common law as existing continuing customary law in and of itself. If the requirements of these tests were not met, then the Court turned to the general common law rule. The Court of Appeal (unlike the High Court) then took the extra step of finding that custom can still be relevant and modify the existing common law rule.

⁴¹ See Laura Lincoln “*Takamore v Clarke* [2011] NZCA 587: The Most Significant Legal Development Affecting Māori” (2013) Māori LR for an analysis of the differences between the approach taken by the Court of Appeal in *Takamore* and that taken by the High Court in *Loasby*.

⁴² See *Takamore CA*, above n 2, at [163]-[165], as it conflicted with the principle of “right not might”.

⁴³ At [167].

⁴⁴ At [254]-[258].

⁴⁵ See Lincoln, above n 41, who argues that although it increases the chance the executor will consider the wishes of the deceased, that requirement was already an implicit one in the executor’s common law duty.

The *Takamore* case was then appealed to the Supreme Court.⁴⁶ The 2012 Supreme Court decision framed the issue differently than the courts below it. It did not undertake the two-step process. The majority of Tipping, McGrath and Blanchard JJ instead ultimately took a similar legal position to the more “modern approach” in the Court of Appeal. However, they did so without engaging the first step of addressing the possibility of customary law being recognised as law in and of itself. They went straight to the premise that the common law prioritises the executor (or person with the highest claim to be appointed administrator of an estate) in the first instance. They then went on to recognise that the executor’s duty and right of deciding where a body is buried is not unfettered. As stated by Tipping, McGrath and Blanchard JJ:⁴⁷

[164] The common law is not displaced when the deceased is of Māori descent and the whānau invokes the tikanga concerning customary burial practices Rather, 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.

On their view, the common law accommodated custom and tikanga by influencing and adjusting the executor primacy rule so that tikanga is relevant in the matrix of considerations to be weighed by the executor in making their decision, or the court in its oversight of that decision. The Court therefore avoided the specific customary practice that involved the assertion of control over the body but went on to find that Māori burial practices, values and interests form part of the common law decision-making rubric.

Elias CJ in her minority decision rejected the executor primacy rule as being determinative. However, she also went on to find that Māori custom is a part of the “values” of New Zealand’s common law and is a matter to be weighed by the Court against other values.⁴⁸

⁴⁶ *Takamore* SC, above n 33. See Natalie Coates “What Does *Takamore* Mean for Tikanga? – *Takamore v Clarke* [2012] NZSC 116” (2013) Feb Māori LR 14, available at <www.Māorilawreview.co.nz>, for a discussion on the impact of the Supreme Court case on the recognition of tikanga.

⁴⁷ *Takamore* SC, above n 33.

⁴⁸ At [94].

The Supreme Court decision leaves the law in a somewhat confused state. Although all of the Justices found that customary law is clearly relevant in the common law, they did not explicitly address the possibility of customary law being recognised as law based on the doctrine of continuity and the additional tests set out in *Loasby* and by the Court of Appeal's *Takamore* decision. This is important because if a custom satisfies those tests, it could be recognised by the common law as a valid existing custom or practice that trumps other general common law rules (like the executor primacy rule).⁴⁹ Despite the eschewal of the Supreme Court to address tikanga being recognised as law in and of itself, a strong argument can be made that the Supreme Court decision should be read in a manner that opens doors for the recognition of custom and not closes them. In the specific case of burials, the fact that the Court went straight to a position whereby tikanga was relegated to a value to be weighed could be explained by the existence of a strong rule concerning executor primacy. Further, none of these judgments expressly overruled the Court of Appeal two-step approach to the recognition of custom.

It is therefore suggested that the Court has left open the potential for there to be two possible paths by which tikanga can be recognised:

1. as existing law that, subject to certain tests (such as that found in the Court of Appeal in *Takamore*), is bound to be respected;
2. or failing satisfaction of those tests, as forming part of the common law as a value or relevant consideration that has a legal impact and informs other common law rules.

The former route is more conducive to the recognition of specific rights and interests. It has the potential to recognise provable customary practices, such as the practice of collective decision-making in respect of burials. The latter is less about the specific manifestation of a customary practice and more orientated around the relevance and legal weight of normative values and principles implicit within tikanga.

⁴⁹ This is asserted on the basis that the very essence of the continuity doctrine is that the custom continues and is also supported by judicial interpretation of the "reasonableness" test where courts have said that a custom will not be considered unreasonable for merely being inconsistent with a particular common law maxim or rule. See *Loasby*, above n 26, at 806, *Takamore CA*, above n 2, at [111]; and *Tyson v Smith* (1838) 9 Ad & E 406, 112 ER 1265 (Exch Ch) at [421].

IV. Putting a Case for Recognition

The jurisprudence that emerged from the courts in the *Takamore* case broke new ground. It was a renewed realisation of the largely latent potential of the common law to engage with tikanga. Although it opened up the door for greater recognition and acknowledgement of tikanga, it is still relatively undeveloped and untested. There are many limitations and dangers with this form of association. However, if Māori on balance choose to pursue this form of recognition, there are a number of reasons why the judiciary and the state legal system should positively respond.

The overlay of the state legal system on the assumption of sovereignty left space for tikanga to continue. The recognition of custom, particularly in respect of specific pre-existing customary practices, can be framed as an “Indigenous right” protected under domestic law. Analogies can be drawn with native title claims where a proprietary right is sourced in Indigenous custom and is directly enforceable as a right within the state legal system. As expressed by the Australian High Court in the landmark *Mabo v Queensland (No 1)* decision, when there is a proprietary title capable of recognition, there is no reason why those antecedent rights and interests should not be recognised as a burden on the Crown’s radical title.⁵⁰ The same argument in principle can be made here. If custom or tikanga produces a right or entitlement that is protected by the common law the court should recognise it. Further, in the native title context, it has been acknowledged that to not recognise such proprietary rights or to deny them could constitute racial discrimination. This was also recognised in the *Mabo*⁵¹ decision and by the United Nations Committee on the Elimination of Racial Discrimination in respect of the New Zealand legislation that extinguished Māori customary title over the foreshore and seabed.⁵² A similar argument in principle can be made in the customary law context. Section 19(1) of the New Zealand Bill of Rights Act 1990

⁵⁰ See *Mabo v Queensland (No 1)* [1990] 166 CLR 186 at [53] and [62].

⁵¹ In *Mabo* the High Court struck down the Queensland Coast Islands Declaratory Act 1985 that purported to confirm the extinguishment of the property rights of the Torres Strait Islanders when the islands came under the rule of the Queensland government. It was found that this Act was inconsistent with s 10 of the Racial Discrimination Act 1975 and constituted discrimination on the basis of race as it impaired the rights of the Aboriginal Meriam people whilst leaving intact the property rights of other Queenslanders whose rights did not originate from the laws and customs of the Meriam people.

⁵² See the Committee on the Elimination of Racial Discrimination *Decision 1 (66) New Zealand Foreshore and Seabed Act 2004* CERD/C/DEC/NZL/1 (2005). This report stated that “Bearing in mind the complexity of the issues involved, the [proposed Foreshore and Seabed Act] legislation appears to the Committee, on balance, to contain discriminatory aspects against the Māori, in particular in its extinguishment of the possibility of establishing Māori customary titles over the foreshore and seabed ...” at [6].

protects the right of freedom from discrimination.

If the common law accepts the right to exercise a custom under tikanga, to fail to recognise it whilst recognising other common law rights could constitute discrimination.⁵³

Recognition of customary law is also consistent with developing jurisprudence around Indigenous rights in the international sphere. The preamble of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) that was adopted by the General Assembly in 2007 recognises:⁵⁴ the urgent need to respect and promote the inherent rights of Indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources[.]

There are a number of other rights in the Declaration that also support recognition, including article 11, which protects the right of Indigenous people “to practise and revitalize their cultural traditions and customs”. Article 34 articulates the right of Indigenous peoples “to promote, develop and maintain their ... distinctive customs, spirituality, traditions, procedures, practices and, in cases where they exist, juridical systems or customs”.⁵⁵ Developing the state legal system so that the Māori juridical system has legal status is consistent with these rights.⁵⁶

⁵³ The contrary argument is that Indigenous rights in fact discriminate against non- Indigenous peoples. See Claire Charters “Do Māori Rights Racially Discriminate Against Non Māori?” (2009) 40 VUWLR 649.

⁵⁴ *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/ Res/61/295 (2007) [UNDRIP].

⁵⁵ The qualification on this right can be found in art 34 that provides that the customs and traditions are in accordance with international human rights standards.

⁵⁶ Claire Charters in her brief of evidence for the Waitangi Tribunal (*Re Māori Community Development Act Claim (Brief of Evidence of Dr Charters)* Waitangi Tribunal, Wai 2417, 20 January 2014) discusses the relevance of UNDRIP in New Zealand. She recognises at [59] that the Declaration permeates the legal and political landscape on Indigenous peoples’ rights in New Zealand. She recognises that international law, including UNDRIP, is relevant to the application and interpretation of law in New Zealand (see *Takamore CA*, above n 2; *New Zealand Airline Pilots’ Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289 per Keith J; *Puli’uvea v Removal Review Authority* (1996) 2 HRNZ 510 (CA); *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA); and *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 (SC)). Further, the New Zealand courts have already taken note of the UNDRIP on a number of occasions including in: *New Zealand Māori Council v Attorney-General* [2013] 3 NZLR 31 at [92]; *Takamore SC*, above n 33, at [12]; *Takamore CA*, above n 2, at [242] and [252]; and *Greenpeace of New Zealand Inc v Minister of Energy and Resources* [2012] NZHC 1422 at [141].

The recognition of tikanga as having status in the state legal system is also a strong and positive symbolic statement. It is somewhat of a mihi (acknowledgement) that tikanga as the first law of Aotearoa is a valid and valuable part of the New Zealand heritage and continues to be relevant today. This view is evident in Robert Joseph's forward-looking statement that:⁵⁷

[t]he future of Aotearoa-New Zealand must lie in a single legal system which nevertheless recognises and respects the world views, values, customary laws and institutions of the two great founding cultures of this country, Māori and British, as well as “others” where appropriate. The existing legal framework must be modified thereby permitting the first law of this country, tikanga Māori customary law, to operate effectively.

The Rt Hon Sir Edmund Thomas, retired judge of the Court of Appeal of New Zealand and a former acting judge of the Supreme Court, reflects a similar view and recognises the promise in vesting tikanga Māori with legal status.⁵⁸ He frames recognition as being a positive enrichment of the law:⁵⁹

As tikanga are essentially principles rather than rules, and those principles are not static, tikanga Māori could readily be absorbed into the common law of this country. Again, there is no reason why the judges should not assimilate its principles in the development of the law generally so as to develop an endemic jurisprudence just as the judges in days gone by assimilated the customs of the times into the growing body of the common law of England. The aim would be to enrich the law by incorporating tikanga as and when appropriate. Māori principles regarding respect for the environment, for example, could have much to offer.

A genuine engagement with tikanga would therefore acknowledge our dual legal heritage. It would also align with the promises that were made in the Treaty of Waitangi and the generally accepted view that tikanga and Māori customary laws are a “taonga” under art 2 and that the Crown therefore has an obligation to protect them in

⁵⁷ Robert Joseph “Re-creating Legal Space for the First Law of Aotearoa-New Zealand” (2009) 17 Wai L Rev 74 at 96.

⁵⁸ See Rt Hon Sir Edmund Thomas “The Treaty of Waitangi” [2009] NZLJ 277.

⁵⁹ At 280.

good faith.⁶⁰ It is also consistent with the oral undertakings to the Treaty of Waitangi, known as the fourth article or protocol, that Māori custom would be protected by the Governor.⁶¹ Finally, recognition accords with the increasingly popular practice of giving more formal recognition to Indigenous peoples worldwide in international law, legislation and constitutions.⁶² In regards to the common law jurisprudence on the recognition of custom, New Zealand could be an international leader. If it is generally accepted that if Māori seek recognition of their tikanga then the common law should facilitate this, the next question is the likelihood of tikanga garnering recognition. The few cases that have come before the courts thus far demonstrate that the first route, that of outright recognition of a particular and discrete custom as law (as per the *Takamore* Court of Appeal test), is laden with significant barriers that have been erected by the common law. This article addresses these barriers and points out where there is potential for them to be interpreted or reconstructed in a manner that is more likely to facilitate the recognition of custom. It then turns to the second route for recognising tikanga, which was acknowledged by the Supreme Court, and examines the potential and promise in this approach.

V. Routes of Recognition: Barriers and Potential

A. The *Takamore* Court of Appeal tests

If one is looking to prove that a custom is recognisable under the tests in the Court of Appeal's *Takamore* decision, it must be shown that the custom has not been extinguished by legislation, that it has existed since time immemorial, that it is

⁶⁰ See, for example, Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at 3 where the Tribunal states: "In our view, the Crown's guarantee of te tino raNgātiratanga is meaningless if the tikanga that sustain and regulate the raNgātira and his relationship to the people, and the land, are discounted and undermined. Indeed, we go further. We say that in order properly to fulfil the role of Treaty partner, and actively protect the cultural foundation of what it is to be Māori, the Crown must itself be schooled in the essentials of tikanga."

⁶¹ See Waitangi Tribunal, *Muriwhenua Land Report* (Wai 45, 1997) at 113–114 citing W Colenso *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (Wellington, 1890) that states that the Governor assured Māori that "The Governor says the several faiths [beliefs] of England, of the Wesleyans, of Rome and also the Māori custom, shall be alike protected by him". In Māori the fourth article is said to have stated: "E mea ana te Kawana, ko nga whakapono katoa, o Ingarani, o nga Weteriana, o Roma, me te ritenga Māori hoki, e tiakina ngatahitie e ia: see Māori Council of Churches *He Korero Mo Waitangi* (Te Runanga o Waitangi, Ngaruawahia, New Zealand, 1984) at 178.

⁶² Andrew Erueti also makes this claim in relation to the recognition of Indigenous land rights. See Andrew Erueti "Demarcation of Indigenous Peoples' Traditional Lands: Comparing Domestic Principles of Demarcation with Emerging Principles of International Law" (2006) 23 *Ariz J Int'l & Comp L* 543 at 551.

reasonable, and that it is certain.⁶³ Although each of these is a significant barrier to recognition, the common law is a flexible tool, and provided judges are willing to see it as a genuine site of legal association, there is potential here.⁶⁴

(1) The problem of legislative extinguishment⁶⁵

The most prohibitive barrier to the recognition of tikanga within the common law under this route is that it cannot be recognised if the custom is extinguished or modified by legislation. This test reflects the fundamental proposition in the New Zealand state legal system that Parliament is sovereign and that common law is subordinate to legislation.

This is a huge barrier to the recognition of custom as the scope of statutory law in New Zealand is vast and in many instances any potential for custom to be recognised will have simply been replaced by elaborate statutory regimes.⁶⁶ Examples include the Crimes Act 1961, which codifies the criminal law of New Zealand,⁶⁷ the Adoption

⁶³ See *Takamore CA*, above n 2, at [109].

⁶⁴ See Law Commission, above n 8, at 10 for a discussion on the flexibility of the common law when looking at custom.

⁶⁵ One of the tests that the common requires is that the custom must have “continued without interruption since time immemorial”. This means that there cannot be an interruption of the right to practise the custom, and if this right is halted for any period of time the right is extinguished. The question, however, then becomes how a right to practise the custom can be discontinued or “interrupted”. In *Takamore CA*, above n 2, at [136] and [133]– [134] the Court of Appeal conflated its discussion on existence since “time immemorial” with “uninterrupted continuity” and treated “legislative extinguishment” separately. However, because the custom was shown to be long-standing and still actively practiced, they simply made no further comment. In regards to how this “continued without interruption” aspect of the common law has been interpreted elsewhere, Norman Zlotkin, in discussing the common law in Canada, unambiguously states that “interruption means legal interruption in the form of statutory abrogation by an act of the appropriate legislative body” and “through exercise of the royal prerogative or the lawful authority of an aboriginal government”: Norman Zlotkin “From Time Immemorial: The Recognition of Aboriginal Customary Law in Canada” in Catherine E Bell and Robert K Paterson (eds) *Protection of First Nation Cultural Heritage: Laws, Policy, and Reform* (UBC Press, Vancouver, 2009) 343 at 354 and 354, n 76. Although the approach taken in New Zealand is somewhat confused (compare *Loasby*, above n 26, where the uninterrupted continuity test was replaced by the inconsistency with legislation language, with the Court of Appeal in *Takamore CA*, above n 2, at [168]–[169], that treated customary extinguishment separately from their discussion on continuity), in essence it is consistent with the Canadian interpretation. A custom is likely to be considered to have been “interrupted” in New Zealand if it is displaced by the presumption of sovereignty, abolished by Indigenous peoples themselves, or extinguished by legislation. The most extensive and far-reaching of these “interruptions” and the one discussed in this article is legislative extinguishment or modification.

⁶⁶ See discussion by Boast, above n 16, at 35.

⁶⁷ In *R v Mason* [2012] NZHC 1361, [2012] 2 NZLR 695 at [37] Heath J found that the combined effect of ss 5 and 9 of the Crimes Act 1961 was that the Māori customary system had been extinguished and it is not possible to regard it as an existing parallel system.

Act 1955 that expressly denies recognition to Māori customary adoptions⁶⁸ and the Resource Management Act 1991 that provides an extensive articulation of how natural and physical resources are to be managed and incorporates tikanga in a different limited sense.⁶⁹ Because in New Zealand activities are largely controlled by statute, there are very few cracks in our comprehensive legislative regime in which Māori customary law can seep up through the common law. The *Takamore* case, which was considered under the common law because there was no clear legislation addressing the issue of a right to a deceased body, could have been the first real custom to fit in to a legislative gap in contemporary times.

Further, the doctrine of parliamentary sovereignty is such that even if Māori customary law was recognised through the common law, Parliament retains the power to simply legislate over and extinguish this recognition. This is what the government did when the Court of Appeal, in its *Ngāti Apa* decision,⁷⁰ recognised that Māori had the right to go to court to determine whether they had a customary land right to the foreshore and seabed of New Zealand. Based on the mere *potential* that a customary right could be claimed, within six months of the Court's decision, the government passed legislation that vested full legal title of all of the public foreshore and seabed within the Crown.⁷¹

This severe limitation is based on our vertical constitutional structure where Parliament sits at the top and there is no tradition of shared sovereignty. Given this limitation, short of a constitutional revolution, the only real argument that goes towards facilitating the recognition of custom is for this legislative supremacy to be read in as strict a manner as possible. The courts in New Zealand have attempted to do this by holding that customary rights cannot be extinguished by a side-wind.⁷² This means that legislative extinguishment can only occur by enactment of "clear and plain" statutory provision and that custom cannot be extinguished or restricted by remote implication.

This is the biggest barrier limiting the capacity of the common law to recognise Māori

⁶⁸ See ss 18 and 19.

⁶⁹ For example, s 7 of the Resource Management Act 1991 requires decision-makers to have particular regard to kaitiakitanga. See Natalie Coates "Should Māori Customary Law be Incorporated into Legislation?" (LLB (Hons) Dissertation, University of Otago, 2010) at 40–48 for a discussion on the advantages and disadvantages of incorporating a Māori word or concept into legislation.

⁷⁰ *Ngāti Apa*, above n 25.

⁷¹ See s 4 of the Foreshore and Seabed Act 2004, which was subsequently repealed by the Marine and Coastal Area (Takutai Moana) Act 2011.

⁷² See comments by Keith and Anderson JJ in *Ngāti Apa*, above n 25, at [147] to [154].

customary law. Because of this, for tikanga to gain space, a strict reading of legislative enactments should be enforced so that extinguishment or modification of a custom must be done through explicit statutory language.

(2) Time immemorial

In regards to the time immemorial test, New Zealand has already indicated a departure from the strict English interpretation that a custom must have existed since when there is “no memory of man to the contrary”, which in Britain was arbitrarily designated to be before 1189.⁷³ Instead, the New Zealand Court of Appeal held that in our context what is required is “proof of a ‘long-standing, consistent custom’ that demonstrates ‘continuity with a preceding legal system’”.⁷⁴ This is important because it suggests that, when looking at tikanga, the common law not only recognises customary rules but also customary legal systems.

The traditional interpretation of the “time immemorial” test, embodied in the English approach to local customs, is to take a custom on its face value and simply look back to see if the custom is reflected in relatively the same form. It treats a rule or a custom as merely being a fixed rule of conduct that cannot change and which tells a person what they can and cannot do and what consequences attach to obedience or disobedience.⁷⁵ An alternative way is for the common law to treat Māori customary law as more of a whole functioning legal system that has the ability to change its rules.⁷⁶ From this perspective, the requirement that the custom have existed from “time immemorial” can be met even though the custom seeking recognition may have existed in a different form in the past. In this instance, the “long-standing” test is met by focusing on the original custom but recognising that Māori have mechanisms to change their rules. There is therefore a bridge by which the original custom is related to the modern custom. This approach does not merely incorporate a rule but a second layer and deeper part of the legal system.

If one accepts that Māori have a normative order whereby a modern form of custom or tikanga can be linked to an old custom by a modification that occurred in accordance

⁷³ This is the first year of the reign of Richard I. Lord Blackburn in *Dalton v Angus* (1881) 6 App Cas 740; [1881–5] All ER Rep 1 recognises that this particular date is linked to the Statute of Westminster (AD 1275) which limited real actions to the arbitrary 1189 date.

⁷⁴ *Takamore*, above n 2, at [122].

⁷⁵ This is what HLA Hart identifies as a “primary rule” in HLA Hart *The Concept of Law* (2nd ed, Oxford University Press, 1994) at 79–99.

⁷⁶ See at 91–99 for a discussion on primary and secondary rules.

with normative systemic change, the question of how far one can push this arises. A conceptual continuum can be imagined ranging from a relatively slight modification of the custom to a complete overhaul of an old rule where a new custom is essentially created and there is merely a loose connection between the old and new custom. On this approach the “time immemorial” requirement could attach to the traditional rule that was simply transformed according to the legal regime and now exists in a contemporary and totally modified form.

The courts in native title cases, where continuity is also required, have tended *not* to take a generous interpretation of the similar “continuity” test.⁷⁷ In the High Court of Australia it was held that although alterations and development of the custom can occur, that to be recognised the custom must have its origins in the normative rules of the Aboriginal society that existed before the Crown acquired sovereignty.⁷⁸ This meant that in Australia, native title cannot recognise new customs or rights that were established after sovereignty.⁷⁹

Despite this strict approach taken in the native title context, it is important to recognise that, if there is to be meaningful engagement with tikanga, it is vital that the “time immemorial” test takes into account change. This is important because although Māori customary law has stayed true to its fundamental values, it has undergone changes since colonisation and the introduction of British law. Māori have had to adapt, sometimes radically, to survive the introduction of a new legal system. If the time immemorial requirement did not recognise this, it would promote racialised stereotypes that freezes Māori at the point of contact. It would tell Māori that for their laws to be recognisable in the 21st century they have to exist in the same form as they did before colonisation. Not recognising the changing character of Māori customary law would therefore either commit Māori law to a state of non-recognition or force Māori into a stagnated form of being.

⁷⁷ See *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, 214 CLR 422 at [43] that sets out the Australian position where the Court held that the law and custom must not have lost its “traditional” character and must have remained if not demonstrably identical than at least recognisably the same as it did at the time of obtaining sovereignty. In the case of *Delgamuukw*, above n 11, the Canadian test for title requires proof of exclusive use and occupation at the time of Crown sovereignty. Claimants must establish a connection with the pre-sovereign group upon whose practices they rely to assert title or claim and must show the group’s connection with the land was “of a central significance to their distinctive culture” (see *R v Marshall* 2005 SCC 43, [2005] 2 SCR 220 at [67]).

⁷⁸ See *Yorta Yorta Aboriginal Community*, above n 77, at [43].

⁷⁹ See at [44] where the justification for this is that there can be no parallel law-making after the assertion of sovereignty.

Thus far, the only customs which have been considered by the New Zealand courts are those long-standing primary rules that have existed in the same form for significant periods of time.⁸⁰ Although there may be difficulties in pushing the test to the limits and attempting to claim recognition of a new law, there is potential here for courts to adopt an expansive approach to the time immemorial test that could recognise a broad array of customs under its umbrella.

(3) Reasonableness

The element of the test that proved fatal for the *Takamore* Māori burial custom in the High Court and Court of Appeal was that it failed to meet the “reasonableness” requirement.⁸¹ This standard attempts to act as a litmus test that ensures that a custom meets minimum qualifications before the common law will open the door to recognition.

The benchmark of what will constitute “reasonableness” has been inconsistently applied by the New Zealand courts. The High Court in *Clarke* examined reasonableness by looking at whether the custom was consistent with “other principles” of the common law and whether it was reasonable taking “the whole of the circumstances into account”.⁸² The emphasis of the Court in this case was on maintaining the internal coherency of the state legal system.⁸³ The Court of Appeal in *Takamore*, however, adopted the *Halsbury’s* approach and applied the stricter test of whether the custom was inconsistent with *fundamental* principles of the legal system.⁸⁴ Under this approach, to constitute unreasonableness a custom must therefore conflict with a higher criterion than the mere maxims and ordinary principles of the common law.⁸⁵ Even if this stricter test were adopted, what constitutes a fundamental or root principle of the law for the purposes of the reasonableness test is difficult to identify. Fogarty J in the *Clarke* case held that the custom was unreasonable on the basis that it was incompatible with the notion of individual autonomy, which he saw to be a fundamental principle of the common law.⁸⁶ Essentially his position was that imbued within the

⁸⁰ See *Takamore CA*, above n 2, at [122] (involving burial rights); *Hineiti Rirerire Arani*, above n 30 (involving customary adoptions); and *Loasby*, above n 26 (involving Māori funerals and providing for guests).

⁸¹ See *Clarke v Takamore*, above n 33, at [83]–[89].

⁸² At [82]: the High Court relied upon the reasonableness standard set out in *Loasby*, above n 26, at 806.

⁸³ At [83].

⁸⁴ *Takamore CA*, above n 2, at [166].

⁸⁵ See *Johnson v Clark* [1908] 1 Ch 303 (Ch) at 311 per Parker J.

⁸⁶ *Clarke v Takamore*, above n 33, at [81]–[89].

common law is a liberal ideology that everyone is free to live life as he or she wishes. This common law presumption is fundamentally different to tribal custom which involves a collective decision-making process.⁸⁷ The majority of the Court of Appeal disagreed with Fogarty and simply stated that this was “not an area where individual autonomy rule[d] at common law”.⁸⁸ The Court of Appeal went on to find that instead, the custom was unreasonable on the basis that it violated the “right not might” principle.⁸⁹

What these conflicting decisions and opinions clearly highlight is the ambiguity and difficulties in identifying what constitutes a fundamental rule of the legal system. However, if the common law aims to be a site of association where Māori customary law can be recognised, judges should take a restricted and narrow view of what constitutes a “root” principle of the law for the purposes of the reasonableness test. The liberal notion of individual autonomy, for example, although it is reflected in many aspects of the New Zealand system should not be considered a fundamental principle, particularly in the context of the facts in *Takamore*. It would be hypocritical to prioritise the autonomy of the deceased individual as to where they are buried as even under the general common law a deceased’s direction, including that expressed in a will, is only regarded as being declaratory and is not legally binding or enforceable.⁹⁰

For a principle to be fundamental, it implies that it is consistently applied and a vital part of the coherency of the state legal system. Judges should boil this test down to only those principles that can truly be considered fundamental cornerstones of the legal system. Further, they should justify and convincingly cite the basis upon which they assert that a principle meets this criterion; otherwise it could constitute discrimination against Indigenous custom.

Even if judges engage in a narrow reading of these fundamental principles, the custom under the current approach will still inevitably be assessed according to internal standards drawn exclusively from the state’s own legal framework. The reasonableness

⁸⁷ At [88]: Fogarty J went on to say: “it is beyond doubt that the late Mr Jim Takamore chose to live outside tribal life and the customs of his tribe. Under the common law he was entitled to expect the choices he made during his life to be respected by the executor of his will when it came to the decision as to his funeral. ... He has personal rights as a New Zealand subject to the benefits of the common law of New Zealand. The collective will of the Tuhoe cannot be imposed upon his executor and over his body, unless he made it clear during his life that he lived in accord with Tuhoe tikanga.”

⁸⁸ *Takamore CA*, above n 2, at [150].

⁸⁹ At [163]–[166]. This is because the custom is such that if there is no agreement reached, then it is permissible by force to simply take the body.

⁹⁰ See s 4 of the Family Protection Act 1955 where a court is given the power to redistribute an estate *against* the specific testamentary wishes of the deceased.

test is therefore a one-way conversation in which Māori customary law is subjected to judgement by a Western yardstick that defines the acceptance parameters for custom. This facet of the common law test clearly denotes the inferiority of Māori customary law and its subordination to the primacy of the values of the state legal system. In *Takamore*, the Court of Appeal denied the custom recognition on the basis of the “right not might” principle.⁹¹ However, in this case, the Māori whānau argued that they did act in the right way; it is simply that their “right” was founded and reasonable in Māori customary law.

One way of going forward could be for legal systems to engage in a more dialogical approach, where instead of looking solely at the fundamental values of the state legal system, a court could engage with Māori as to the internal reasonableness of the custom within the Māori legal system. This aligns with the position of the Canadian courts, which have tended to judge customs by their reasonableness at the time of their inception and have therefore held that current conditions should not be examined to determine reasonableness.⁹² This could indicate that reasonableness should be measured in the context of the Indigenous culture from which the custom is derived.

Ultimately, however, if the fundamental values of the two systems conflict in an irreconcilable way, an outcome needs to be reached. The location of this discussion and examination is such that it takes place within the hierarchical framework of state law dominance. Given this, if the custom was repugnant and in conflict with the fundamental principles of the state legal system, a judge is unlikely to recognise it. At the very least, however, the competition and conflict of values needs to be transparent. Highlighting where the values of the two systems depart is important in gaining critical consciousness about the values that we are favouring in society. This consciousness is instrumental in then being able to deconstruct and challenge those preferences.

Further, even if part of the custom is viewed as being unreasonable through the lens of common law values, it should not negate the other important aspects of the custom and Māori thinking being considered “reasonable” and continuing to constitute part of the common law.⁹³

⁹¹ *Takamore CA*, above n 2, at [163]–[166].

⁹² See Zlotkin, above n 65, at 352–353.

⁹³ For example, in the *Takamore* set of facts, although the practice of taking a body may be considered unreasonable as per the decisions in the High Court (*Clarke v Takamore*, above n 33) and the Court of Appeal (*Takamore CA*, above n 2), the rest of the custom that could be framed as the process of collective decision-making may not.

(4) Certainty

Halsbury's states that there must be a definite limit claimed to exist under an alleged custom in respect of its nature generally, the locality where the custom is said to exist, and who is affected by it.⁹⁴

In *Takamore* the Court of Appeal recognised that the certainty test may need to be adapted to the specific New Zealand context and the nature of Māori customary law.⁹⁵ Māori customary law is primarily based around fundamental values as opposed to rules. These values are not only likely to have varying application in different cases and situations but this application is also likely to differ amongst Māori tribes. Because of the primacy of values and the centrality of the collective, Māori customary law also tends not to be comprised principally of single decisive rules but rather places an emphasis on mediated outcomes. The Court of Appeal in *Takamore* therefore stated that, given the nature of Māori customary law, “the certainty criterion cannot apply with the same rigour as it does in relation to English customs”.⁹⁶

This “certainty” requirement has not extensively examined or applied in the New Zealand context. I suggest that certainty can attach to custom in a number of different ways. At a basic level, for example, there are those rules that are *certain by virtue of their substance*. This refers to those Māori customary practices that are like rules and that are very specific in their nature in that they clearly set out what the custom is, who is affected, and where it applies. An example may be that in certain iwi in the pōwhiri (formal welcoming process) women will perform a karanga (call) when a new group comes onto the marae.

At a second level are those examples of Māori custom where there is not a clear rule but a custom which is restrained and informed by the value system. Take, for instance, the Māori customary practice of collecting seafood for events, such as tangihanga (funerals).⁹⁷ The amount of food that Māori need to take under the custom will vary

⁹⁴ *Halsbury's Laws of England* (5th ed, reissue, 2008) vol 32 Custom and Usage at [15].

⁹⁵ *Takamore CA*, above n 2, at [129].

⁹⁶ At [132].

⁹⁷ Under the Fisheries (Kaimoana Customary Fishing) Regulations 1998 tangata whenua (Māori that belong to and have tribal connections to the land concerned) can appoint a “kaitiaki” or “tangata tiaki”. This person, or group of people, once confirmed by the Minister of Fisheries, gains the power to authorise individuals to take aquatic life for customary, non-commercial, food-gathering purposes.

depending on the size of the funeral and how much mana the deceased had.⁹⁸ Although this prima facie seems uncertain, the amount of food that can be taken is tempered by the customary notions of kaitiakitanga,⁹⁹ manaaki,¹⁰⁰ and the idea that the atua (gods) are embodied in the natural world. These customary concepts and values are antithetical to the over-exploitation of resources. Therefore, although Māori customary law does not stipulate a maximum catch limit, the values and concepts underlying Māori customary law places broad parameters and limits on what can be done. In this instance the substance of the custom is more fluid and flexible. The permanence and *existence of the values is certain* and this constrains the exercise of the custom. These values, however, are not like specific rules and are open to interpretation.

At another level, there is *certainty of process*. An example of this is the *Takamore* case where the custom to decide where a body should be buried provides initially for a debate and negotiation and if consensus is not reached whoever takes the body has a right to it.¹⁰¹ The Court of Appeal indicated that this custom would not meet the certainty test as it did not provide a mechanism for making a final decision.¹⁰² However, this conclusion is questionable. Instead of adopting an approach akin to the common law, where the decision is simply handed over to the executor, the outcome under Māori customary law is based initially on the collective and then who can assert control over the body. This process does not indicate what the outcome will be in advance, where the body will be buried and whose interest will necessarily take priority. However, the general common law position also does not indicate these outcomes. Instead, it provides a process by which the executor has to take into account a number of considerations before making a final decision of how and where to dispose the body.¹⁰³ Both laws therefore dictate a method by which an outcome is ultimately reached. They simply adopt fundamentally different methods. There is therefore a strong argument to be made, that in cases where the process under Māori customary law is certain, even though the outcome under the process is indeterminate, the requirement of certainty should be satisfied.

⁹⁸ Mana has a number of meanings including: authority, control, influence, power, prestige, psychic force, effectual binding authority.

⁹⁹ This denotes the obligation of stewardship and protection and requires the observance of conduct respectful of the resources in question.

¹⁰⁰ This means to show respect and kindness.

¹⁰¹ Note that the custom is of course much more complex than this. See *Clarke v Takamore*, above n 33, at [57] where Counsel for Mr Takamore's Māori whānau summarises some of the fundamental components of the custom.

¹⁰² *Takamore CA*, above n 2, at [167].

¹⁰³ See at [199]–[218] for a discussion on the duties of the executor.

These are just some of the ways that certainty can be conceptualised. It is accepted that a degree of certainty is necessary in any coherently functioning legal order. This clarity and stability is important so that people know how to act and how customary law may bind them. This is no different for Māori. Māori do not live in a limitless open society where anything goes. One of the underlying fears of accepting Māori customary law into the folds of the state legal system is that Māori can invent “custom” to reach a favourable outcome and abuse the general lack of knowledge on the part of non-Māori, particularly judges.¹⁰⁴ This fear, however, largely derives from a lack of understanding and knowledge of tikanga. Judges, in assessing tikanga, need to be willing to engage deeply with Māori customary concepts and the law to see that limits, guidelines and broad parameters exist and that in specific contexts this value-based system can be applied in a way that does provide a degree of certainty.

This article has explored a number of ways in which the certainty test can be construed and reconstructed so that it takes into account the nature of Māori customary law. If all of these gatekeeping tests are satisfied, then it can be argued under the Court of Appeal’s approach in *Takamore* that tikanga is a free-standing part of the common law and will trump other common law positions. These tests, however, are not easy to meet and pose significant barriers to the recognition of custom. In particular, the extensive and pervasive nature of our legislative scheme makes it difficult to conceive of any customs that could be recognised under this route. However, it is still a legal avenue that is open to development and can be pursued by advocates.

VI. The Potential of the Modern Approach

As well as tikanga being capable of recognition as law in and of itself under the Court of Appeal tests, the “modern approach” also holds some promise. All of the Supreme Court Judges accepted that tikanga and its values are part of the common law without measuring it against the Court of Appeal gatekeeping tests.¹⁰⁵ It is unclear exactly what this means yet, and specific facts will need to test how far this could extend. However, it is a potentially exciting recognition of the relevance and applicability of tikanga and it opens up the possibility for lawyers to make a range of arguments in the courts.

¹⁰⁴ See Eddie Durie “Ethics and Values in Māori Research” (paper presented at the Te Oru Rangahau Māori Research and Development Conference, Massey University, 7–9 June 1998) in Te Pūmanawa Haurora (ed) *Proceedings of Te Oru Rangahau Māori Research and Development Conference* (Massey University, Palmerston North, 1998) who noted that because judges are assessing custom that is foreign to them there is “scope for those who would profit from the situation” to effectively “pull the wool over the judges’ eyes”.

¹⁰⁵ See *Takamore SC*, above n 33.

One way in which this route has potential is that instead of focusing solely on the particular customary practice, it can also take into account the values that inform it. For example, in the Supreme Court’s *Takamore* decision, it was held that Māori burial practices *and* the relevant values and principles informing Māori thinking and actions are part of the required decision-making framework.¹⁰⁶ In this burial context the relevant values include the importance of intergenerational connectivity of people to their whakapapa (genealogy) and ancestral land, and the emphasis of the collective over the individual. The common law framework therefore allows for the recognition of different elements of tikanga without having to accept either “all or none” of it.¹⁰⁷ This is a legal development that could pave the way for recognition of tikanga as being legally relevant beyond specific customary practices. This approach reflects the nature of tikanga.

A further area that potentially holds promise going forward is whether the idea of tikanga forming part of the “values” of the common law could be pushed further than the pure judicially derived stream of common law. It is beyond the scope of this article to explore this issue in-depth. However, the automatic acceptance of tikanga as having a legal impact by the Supreme Court could mean that a case can be made that tikanga is relevant in respect of interstitial common law or the law that is constructed over time when judges interpret legislation. Tikanga could form part of the general framework of legal principles and values that work to inform legal outcomes and the judicial legal reasoning process. In hard cases where statutory rules have some ambiguity, Ronald Dworkin sees principles as underlying the legal structure and being the basis upon which decisions are made.¹⁰⁸ Principles are considerations of “justice or fairness or some other dimension of morality”¹⁰⁹ and Dworkin argues they are found throughout the law and are an inherent and vital part of the legal system. If tikanga forms part of the “values” of the common law, then they can perhaps be seen as part of the network of legal principles that can be applied in contentious and hard cases.

There has been some positive movement from the courts in treating the Treaty of Waitangi as relevant or an aid to interpretation even when not specifically incorporated

¹⁰⁶ At [149]-[164].

¹⁰⁷ Whether this is a good or bad thing is another question. As in *Takamore SC*, above n 33, although tikanga was held to be relevant it still became only one value amongst many to be weighed by the executor or courts.

¹⁰⁸ See Ronald Dworkin “The Model of Rules I’ from *Taking Rights Seriously*” in Keith C Culver (ed) *Readings in the Philosophy of Law* (2nd ed, Broadview Press, Petersborough, Ontario, 2008) 148.

¹⁰⁹ At 153-154.

into legislation. ¹¹⁰An even stronger argument can be made that tikanga should be seen as part of our legal framework of thinking and balancing due to its recognition within the common law. This may be particularly appropriate when there is discretion or weighing of values. It is a difficult yet interesting question to explore: could or should tikanga values be part of the common law principles used in statutory interpretation?

It is unknown how the judiciary will interpret what it means to have “values” within the law and whether this will allow for some of the constraints of the Court of Appeal’s common law test to be avoided. It does, however, leave open hope that Māori practices, experiences and values could come to be seen as a valued part of the legal framework of New Zealand.

VII. Implications and Limitations of Recognition

This article has argued that there is potential in the common law to develop in a manner that is more conducive to the incorporation and recognition of tikanga. There are, however, a number of general concerns that are raised with seeking recognition in this forum.

One of the major limitations is that the development of the common law depends on the receptiveness of the judiciary to tikanga-orientated arguments. Through one prism, the courts can view the common law as a flexible tool designed to recognise Māori customary law as a dynamic living body of law that is applicable to New Zealand society today and is part of our legal framework. Through another, the common law can be seen like it was when colonisation first occurred, merely as a transitional mechanism that should be read strictly to only recognise a certain limited type of traditional and static custom.

The recognition of tikanga within the state legal system, as demonstrated by the intense media scrutiny and interest in the outcome of the *Takamore* case, is highly contentious and political. The development of native title jurisprudence has shown that in similarly

¹¹⁰ See *Huakina Development Trust*, above n 28, at 210 where Chilwell J took into account the Treaty of Waitangi as an aid to interpretation, when construing the term “the public interest”, despite there being no statutory reference to the Treaty in the relevant provisions. In the case of *Barton-Prescott v Attorney-General* [1997] 3 NZLR 179 (HC) at 184 the Court took a similar approach and stated that “[w]e are of the view that since the Treaty of Waitangi was designed to have general application, that general application must colour all matters to which it has relevance, whether public or private and that for the purposes of interpretation of statutes, it will have a direct bearing whether or not there is a reference to the treaty in the statute”.

controversial areas of law, courts “have tend[ed] to err on the side of conservatism”.¹¹¹ Certainly, the initial promise of the native title doctrine was never realised, as after the emergence of the doctrine and the accompanying public glare and accusations of activism, the judiciaries in Canada and Australia tended to resile and interpret the various gatekeeping tests in a relatively restrictive manner that has made native title difficult to establish.¹¹² Further, if one casts their eyes internationally, beyond the native title context, the common law route of recognition of custom has not been embraced. In Australia, for example, there has not yet been a case in over 200 years where the common law rules for recognition of custom have been satisfied.¹¹³

As well as the potential reluctance from the state legal system to positively engage with tikanga, there are concerns that may arise for Māori with a non-Māori institution having the power to apply and interpret Māori customary law. A judge may have very little understanding or background in tikanga, which leaves open the possibility of misinterpretation or for meaning to be lost in translation. These distorted constructions run the risk of altering the substance of tikanga and becoming codified in judicial precedent. Further, recognition of customary law within the common law is clearly a hierarchical form of legal association, in which the dominant system controls and defines the parameters of the recognition of tikanga. In this model of association, where the common law and the judiciary are the moderators of what is permitted to enter, the two legal systems are not on an equal playing field. This subordinate status was evidenced in the High Court *Clarke* case where Fogarty J rejected the custom because it was considered “unreasonable” on the basis of the liberal emphasis on the individual.¹¹⁴

There are some Māori legal scholars who challenge these political arrangements and reject the supremacy of the state legal system as a given.¹¹⁵ On their view, recognition

¹¹¹ Erueti, above n 62, at 579 where he points out judicial conservatism in the context of the development of native title. Also see McHugh, above n 18, at 331 where he notes that the immense controversy that arose as a result of the *Ngāti Apa* judgement concerning the foreshore and seabed spooked the judiciary and may have made their subsequently cautious.

¹¹² See McHugh, above n 18, at 106–188 where he sets out what he describes as the “evisceration” of native title in Canada and Australia “through tests of continuity, scope, desuetude, and extinction”.

¹¹³ See the Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws* (ALRC Report 31, 1986) at [62].

¹¹⁴ See *Clarke v Takamore*, above n 33, at [86]–[89].

¹¹⁵ See 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* (Oxford University Press, Melbourne, 2005) 330 at 334. Also see Moana Jackson “Justice and Political Power: Reasserting Māori Legal Processes” in Kayleen M Hazlehurst (ed) *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia and New Zealand* (Avebury, Sydney, 1995) 243 at 254.

of tikanga within the state legal system is part of the continuing colonisation of the Indigenous soul.¹¹⁶ They see a danger in seeking space within the state legal system as it could be perceived as giving legitimacy to the whole enterprise, that is, a colonialist construct that has often been the engine for the denial of Māori rights. On this view, the model of association should either be one that is more of a dialogue, or tikanga, as the first law of Aotearoa, should trump. The current hierarchical state-centric model that we have therefore prompts the questions: Why should Māori expect the common law to do anything differently this time? Is seeking recognition of tikanga within the common law “another futile use of the ‘master’s language ... to dismantle the master’s house?”¹¹⁷ This links into the conceptual and practical question faced by Indigenous peoples around the world: Should they attempt to carve out a small space within the whare (house) of the state legal system if the whenua (ground) and foundations upon which it is built are defective?

Achieving recognition of tikanga through this route faces multiple challenges. The *Takamore* jurisprudence, however, will likely mean that the courts will be forced to increasingly address and take a position on the place and status of tikanga. On balance, this article contends that, depending on the manner of engagement with tikanga, common law recognition can be a positive development for the New Zealand legal system and for Māori. In regards to judicial reluctance, a number of reasons that support recognition have already been advanced.¹¹⁸ Further, the *Takamore* developments can also be seen as an indication that the New Zealand courts at the highest level are attempting to confront the difficult task of practically engaging with tikanga. This is supported by the musings and excitement on the potential of the common law avenue by Justice Joseph Williams of the High Court of New Zealand.¹¹⁹ The door is open for the judges to positively diverge from the restrictive approach taken in native title jurisprudence.

With respect to Māori concerns about the common law generally, including submitting to the colonialist design, John Borrows makes some encouraging comments.¹²⁰ Borrows

¹¹⁶ See Moana Jackson “Where does Sovereignty Lie?” in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 196 at 197.

¹¹⁷ John Borrows and Leonard I Rotman “The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?” (1997) 36(1) *Alta L Rev* 9 at 27.

¹¹⁸ See reasons outlined above in part IV.

¹¹⁹ See Justice Joe Williams “Henry Harkness Lecture: Lex Aotearoa: A Heroic Attempt at Mapping the Māori Dimension in Modern New Zealand Law (podcast, 7 November 2013) YouTube <www.youtube.com>.

¹²⁰ See Borrows and Rotman, above n 117.

views the finding of space within the common law not as consent to colonialism but as serving:¹²¹

the limited purpose of providing a toehold to bridge out of colonial territory into one they can call their own. ...In employing this application of law, Aboriginal people only want to dismantle that part of the master's house that keeps them incarcerated.

Borrows' basic assertion is that using and attempting to redesign the common law, to more closely address the needs and reflect the position of Aboriginal nations, does not mean submitting to being trapped within the system. Instead, he sees it more as a "bridge that permits an exit from colonialism's hostile and confining thicket",¹²² and a way of clearing a site that respects aboriginal perspectives. This reasoning is primarily based on the argument that aboriginal rights recognised by the common law are sui generis as they take their source in Indigenous custom, practices, traditions and tikanga.¹²³ As a consequence he contends their essence is somewhat insulated and protected against inappropriate intrusions in their interaction with common law.¹²⁴ Borrows recognises that Western bias will of course continue to restrain aboriginal rights. However, he downplays the potential impact of recognition on aboriginal customs as he believes that aboriginal people will continue to be guided by their own teachings regardless of formal recognition, that customs have resisted and survived colonial onslaught thus far, and that common law recognition should not be seen in a vacuum.¹²⁵

These arguments are all applicable in the present discussion. Attempting to carve out Indigenous space within the state legal system and seeking fundamental constitutional change are not mutually exclusive goals. Further, the limitations of what the common law route does and does not do also need to be acknowledged. This route does not deliver self-determination to Māori and it is unlikely to satisfy Māori constitutional, political, economic or legal aspirations. However, it can be viewed as but one tool that can be wielded in a greater Māori movement. Further, taking an incremental approach by subtly altering the sources of state law could facilitate the creation of an intellectual and political climate whereby greater constitutional change becomes

¹²¹ At 28.

¹²² At 28.

¹²³ At 30–31.

¹²⁴ At 31.

¹²⁵ At 30.

possible in the future.

The potential of this route to be a positive development for Māori does of course depend entirely on how the judges engage with tikanga and the interpretive principles that are employed if they choose to recognise it. It is beyond the scope of this article to set out the tools that courts should employ in this process. However, as stated by Walters, in these instances of confluence “a morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives”.¹²⁶ This is therefore a challenge to the judiciary to genuinely engage with tikanga and the Māori legal perspective. The discussion on the limitations of the gatekeeping tests for custom and where they have the potential to be reconstructed to facilitate recognition of tikanga is a starting point. However, some of the other relevant considerations that require further exploration include: the degree of autonomy that Māori have over the content, application and interpretation of their tikanga; the corresponding standard of required evidential proof; and the best practices to avoid cultural misunderstandings. It could be that a specialist court, such as the Māori Land Court, is deemed the appropriate body to hear questions of custom or provide expert opinions and advice to the general courts on the interpretation or application of tikanga.¹²⁷

There will always be challenges that arise from the meeting of two dissimilar legal cultures. In particular, there will always be a question about which culture is to provide the vantage point from which the association will be determined and defined. The current framework of association is one where the common law controls how tikanga is incorporated and accepted into it. This article has argued that there is scope within the current framework for the common law to be interpreted so as to facilitate the recognition of tikanga. It has identified that provided that care is taken in the manner that the interaction between the two legal systems is traversed, the common law can act as a bridge between tikanga and the state legal system. This could provide a platform for a movement to there being more of a negotiated dialogue and relationship between the common law and tikanga in the future.

¹²⁶ See M Walters “British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*” (1992) 17 Queen’s LJ 350 at 413 as cited in *R v Vanderpeet* [1996] 2 SCR 507 at [49].

¹²⁷ This is suggested as under s 7(2A) of Te Ture Whenua Māori Act 1993 a person must not be appointed as a Māori Land Court Judge unless they are “suitable, having regard to the person’s knowledge and experience of te reo Māori, tikanga Māori, and the Treaty of Waitangi”.

VIII. Concluding Remarks

The scope of this article is such that it only addresses a sliver of the vast array of issues involved in considering the recognition of customary law by the common law. This area of law is a minefield of fascinating questions that warrant further research and intellectual consideration. For example, there are issues around who Māori customary law can and should apply to, the institutional and practical constraints of the judiciary to hear such cases, and the actual effect that incorporation may have on custom at a broader level.¹²⁸ Further, to determine whether the common law is a favourable route for Māori to seek recognition, more work could be done around comparing it to alternatives. Legislative incorporation has the benefit of having the flexibility to recognise Māori aspirations in virtually any form, including giving them greater autonomy. However, it is also dependent upon political will. These questions feed into the broader question about the appropriate manner in which Māori customary law and the state legal system can engage with each other and the different ways that Māori can seek to have their aspirations met.

The common law route of recognition is by no means perfect for Māori. It is an association whereby Māori customary law is subordinated and forced to measure its validity against the standards set by another legal system.¹²⁹ Seeking recognition within the common law is a route that has not been favourable for Indigenous peoples thus far. It also risks being part of the “politics of distraction” where the legal system presents as being sympathetic to the recognition of tikanga whereas in reality the legal threshold may be such that it is unlikely to ever result in any genuine engagement or recognition.

However, when there is a confluence between legal systems, an outcome needs to be reached. Despite its many limitations, this article argues that there is residual potential for the common law to be used as a tool to fight for space within the dominant legal framework of New Zealand. There is the Court of Appeal’s approach in *Takamore*, which although restrictive, can be read in a way that facilitates

¹²⁸ If customary law was recognised would the court become the arbiter of every dispute? Would recognition in the Western sense bind the custom into a frozen enforceable legal precedent? Would it have a floodgates effect that would encourage those that would not have practised the custom to do so? Would recognition change the fundamental character of the custom? Would it have an essentialising effect?

¹²⁹ As recognised by the South African Constitutional Court, there are dangers of assessing Indigenous customary law through a “common law prism” as “[t]he two systems of law developed in different situations, under different cultures and in response to different conditions”: see *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC) at [56].

recognition of tikanga as outright free-standing law. There is also the potential and promise of tikanga being part of the common law regardless of whether it measures up against the Court of Appeal tests.

The effectiveness of the common law as a route of recognition of tikanga should of course not be overstated. A co-option and incorporation of tikanga values into the legal system through the common law is not a complete solution for Māori. However, the common law is a tool, a site where advocates can argue and where limited concessions can potentially be achieved.

The challenge that the common law faces is whether it can be reforged to accommodate the insertion of Indigenous legal thought in a manner for which it was not originally designed. It has the potential to be a more functional site of legal pluralism, and not only recognise those rights or traditions that are deemed capable of mirroring it, but also become an association of contestation and of dialogue where Māori values can be considered relevant and seep into common law decision-making. If this occurs it would go some way towards recognising that Māori, as first peoples of our land, should have a greater space within the legal order of New Zealand.

THE CHILDREN OF THE TAKAMORE CASE, AND THE PRICE OF GOING HOME

Māmari Stephens¹

When the news started filtering through from late 2007 about the dispute over James Takamore's tūpāpaku,² I had a sinking feeling in the pit of my stomach. Being a Christchurch-raised urban Māori with a Pākehā mum, with almost no contact with my hapū or iwi until my 20s I suspected that, however the dispute ended up, the adult children of James Takamore would suffer disenfranchisement, loss, and estrangement from their whakapapa and that this suffering would last generations. Over 7 years later, and the niceties of the legal issues and disputes aside, I still have the same feeling.

I'll make a small digression to put my sinking feeling into context. I remember the one and only time I visited my father's marae and kāinga in Ahipara as a 7 year old skinny white Māori girl with patent leather shoes (no, really, and in a navy-blue sailor suit no less!) how terrifying and strange it all was.³ And that was with people who cared about me and wanted me to be there. It wasn't until my nephew died some 8 years later that I returned and then again another several years after that until a third visit. And then another visit, and then another. I'd love to say that my hapū and I are tight now but it wouldn't be strictly true. I have some pretty good relationships now and we do know each other. But the real-life ties (as opposed to the metaphysical ones) are still pretty fragile if only because I am just not there often enough; maybe twice a year. My aunty Mere Williams passed away a couple of years ago and she was the most solid of all my living connections to that mysterious place called 'home'. I miss her and the certainty of bowling into her whare knowing I, and all my urban gaucheness, belonged there. And so the foundations of the house seem to crack a little more. But then again, when doors close, other doors open, beckoning us onwards. That kind of hopeful fragility is often the way for us urban-borns.

Of course I can't presume to speak for all of us but some of us will never truly make those ties that enable us to really be part of the functional group. We will remain liminal creatures, some talking up the mysterious nature of the connection we feel with the

¹ Nō Te Rarawa.

² See Yvonne Tahana "Police ran out of time to stop burial" *The New Zealand Herald* (New Zealand, 25 August 2007).

³ Ko Wainui te marae o ngā hapū, Ngāti Moetonga me Te Rokekā.

ancestral land of our tupuna in an attempt to feel the connection. In most cases those feelings will be absolutely heartfelt, but for some, grounded in little reality. Take us to that place, let us out of the car outside the homestead, with its peeling blue paint and that pathway leading up to the front door, and that journey of a few steps becomes very long indeed.

Some 14 years ago, I was a senior law student at Victoria University. That lovely whānaunga of mine Associate Professor Nin Tomas externally marked one of my assignments. In its pages I mentioned my own default disenfranchisement from hapū and iwi dynamics. She wrote in the margins: “So come home!” in a tidy, insistent script. And to be fair, I have been heading home, step by faltering step ever since, in my own way.

‘Faltering’ is the right word. A little while ago, I attended a wānanga at one of my marae, did the karanga on behalf of those coming on, only to learn I had completely botched one of our Northern tikanga. My aunty Mere told me gently a couple of days later in the last long conversation we were ever to have together. After the feeling of mortification had passed, and the flaming in my cheeks had subsided, I was OK with it; failure at our tikanga is just something to be expected for those of us not raised in it. All I can do is try and be better. But for many of us coming ‘home’ is not easy for we children, and grandchildren, of the urban migrations. I have never forgotten Nin’s words to me and they rang clear again in to me when the *Takamore* case came back into the public consciousness in 2014.

I can’t presume to know how the adult son and daughter of James Takamore feel or have felt over the past 9 years experiencing their own cultural estrangement in such an horrifically public and prolonged manner. From public documents it’s pretty plain that at the time Mr Takamore was taken north, the children, and their mum, were at a significant cultural disadvantage in negotiations with the Kutarere-based whānau who came to Christchurch to ask for his tūpāpaku to be able to return to them. The following excerpt comes from the Supreme Court judgment:⁴

Ms Clarke and Mr Takamore’s son resisted the request but Mr Takamore’s Kutarere family continued to press into the night the claim that he should return with them to the Bay of Plenty for burial. The discussion was heated and, for Ms Clarke and her son, distressing. After the son appeared to acquiesce

⁴ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [18]-[19].

reluctantly, Mr Takamore's paternal uncle (who also lived in Christchurch) intervened to say that the son was being pressured and that the discussion should be continued the following day. At least one member of the Kutarere family stayed with Mr Takamore's body while Ms Clarke and their son went home. The next day, after some delay and after it appeared that Ms Clarke was reluctant to return to resume the discussion, the Kutarere family, now with the support of the uncle who had intervened the night before, took Mr Takamore back to Kutarere. The Kutarere family believed their actions to be justified according to tikanga. They may have considered that the son (whose views were culturally of particular importance) had sufficiently acquiesced to give them the moral authority according to tikanga to take Mr Takamore home, at least when there was no resumption of discussion the next day and they were left with Mr Takamore's body. If so, there was significant cross-cultural misunderstanding. For their part, Ms Clarke and her children were completely at a disadvantage, since they had no understanding of the process being followed and the risk they ran in appearing to withdraw from contending for their rights.

I read that passage, and the clash of rights aside, I can at least imagine how traumatic this episode must have been, how unsure of the cultural landscape the Christchurch whānau must all have been, while fresh in their own grief for the sudden death of their Dad. There is no doubt that tikanga, when allowed to operate as designed, can be a wonderful instrument to achieve equilibrium, but this case shows that it can create disequilibrium (albeit as a result of a clash with Pākehā law as well) in the pursuit of some larger goal of the larger collective entity. I can't presume to make any judgment on the correctness or otherwise of the tikanga used in 2007 or in succeeding years up to and including 2014's attempted exhumation.⁵ I'm wondering instead how tikanga can henceforth be used to reconcile and repair. Counsel for the Kutarere whānau at least acknowledged this long-term view of the role of tikanga, before the Supreme Court in the transcript of argument:⁶

I would say on the evidence [tikanga] imposes obligations that ensue beyond the decision and, with respect, the Court cannot compel those of any party in the sense of that restorative long-term process and, you know, I don't know what will be the situation, but in a generation's time when, as I say, Mr Takamore's mother has passed, if Ms Clarke has passed, is it, would it be a

⁵ Dana Kinita 'The battle over James Takamore' *Rotorua Daily Post* (New Zealand, 9 August 2014).

⁶ *Takamore v Clarke* [2012] NZSC Trans 9 at 44.

different conversation that those future generations are having about all of this and where they all sit? Possibly, one can't guarantee that.

So perhaps the Tūhoe based whānau had been prepared to accept the cost in the short to medium term at least that their whānaunga in Christchurch must suffer in order that the interests of the collective are met, on the presumption that generations to come will heal the rift, that utu will be restored. I don't know, and there was a private mediation in 2015 that points to a 'successful resolution', without details being released on what that means, but that suggests 'completion' at least.⁷ But what of the future?

Knowing how hard it is to make that cultural journey just when all that gets in the way is unfamiliarity and insecurity, how much harder will it be for the Christchurch whānau, left with the legacy of pain and perhaps even humiliation in the wake of the last several years, to take those steps? When tamariki and mokopuna arrive (if they have not already), what will being Māori mean to them? Where will 'home' be for them? Regardless of the means, tikanga, Western law, whatever, used by both sides of the dispute, how will the children and grandchildren of each side of this dispute feel about *each other* in the years to come? Maybe, and this is the heartbreaking risk, just maybe, they won't think of each other at all. Maybe that is the ultimate price the children of this case will pay.

He mihi aroha ki ōku whānaunga kua wehe atu ki tua o te ārai i te tau kua hipa ake nei, tōku māmā, Adrienne Stephens, ki a Mere Williams, Buddy Nathan, Nin Tomas hoki, koutou katoa, haere atu rā ki te kāinga tūturu...Mā te kahukura ka rere te manu...

⁷ Sally Murphy "Legal case over James Takamore's burial resolved", *Radio New Zealand News* (5 June 2015) available at <<http://www.radionz.co.nz/news/national/275531/legal-case-over-james-takamore-s-burial-resolved>>.

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

Claire Charters¹

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.

¹ Ngāti Whakaue, Nga Puhi, Tuwharetoa and Tainui. Associate Professor, Faculty of Law, University of Auckland.

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 of 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.

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

Andrew Erueti¹

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 Appeal³ 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-

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.

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 *Justice 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

¹⁷ See, Hill, above n 16, at 175-176 (noting how an emphasis on Indigenous autonomy, self-determination and sovereignty as *tino rangatiratanga* 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,

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 negligible, 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

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

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

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

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 Tūhoe 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 Tūhoe 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

NGĀITERANGI TREATY NEGOTIATIONS: A PERSONAL PERSPECTIVE

Matiu Dickson¹

Treaty settlements pursuant to the principles of the Treaty of Waitangi can never result in a fair deal for Māori who seek justice against the Crown for the wrongs committed against them. As noble the intention to settle grievances might be, at least from the Crown's point of view, my experience as an Iwi negotiator is that we will never receive what we are entitled to using the present process. Negotiations require an equal and honest contribution by each party but the current Treaty settlements process is flawed in that the Crown calls the shots.

To our credit, our pragmatic nature means that we accept this and move on. At the end of long and sometimes acrimonious settlement negotiations, most settlements are offered with the caveat that as far as the Crown is concerned, these cash and land compensations are all that the Crown can afford so their attitude is "take it or leave it". If Māori do not accept what is on offer, then they have to go to the back of the queue. The process is also highly politicised so that successive Governments are not above using the contentious nature of settlements for their political gain, particularly around election time. To this end, Governments have indicated that settlements are to be concluded in haste, they should be full and final and that funds for settlements are capped. These are hardly indicators of equal bargaining power and good faith, which are the basic principles of negotiation.

As mentioned, the 'negotiations' are not what one might consider a normal process in that, normally, parties are equals in the discussions. The Crown sets the timeline for the negotiations and decides with whom they will negotiate. Where there is a disagreement within the tribe as to who has a mandate to negotiate and thus settle, the Crown policy is normally not to proceed in the negotiations until that matter has been dealt with. This approach causes long delays and dissent among tribal members.² This is the old divide and rule mentality that the Crown pursues.

¹ Ngāi Te Rangī, Te Whakatōhea. Former Senior Lecturer, Te Piringa. Matiu Dickson was appointed a negotiator for Ngāiterangi tribe in February, 2010 together with Mita Rinui (Lead Negotiator) and Spencer Webster (Negotiator). The tribe is now awaiting the legislation that will conclude the Settlement, likely later in 2016. Matiu passed away during the editing process of this edition of Te Tai Haruru.

² The situation in the Ngāpuhi treaty claim where mandate is being contested by Tuhoronuku and Nga Hapu o Ngāpuhi is a case in point.

The Crown's requirement is that they negotiate with only one mandated entity of the tribe approved by them. This is contrary to Māori dispute resolution processes which accommodate different groups and are geared to finding a resolution which is fair to all parties and supported by them as well. The participants in Māori dispute resolution processes always strive for the collective good even though initially the parties to the negotiation might be competitors.

Māori favour the approach of seeking positive aspects of what the other party has to offer, recalling times when relationships and obligations between the two parties were established. Elders with tribal knowledge are essential to this process. A favour carried out in the past is never forgotten or, if it is, it is often revisited as part of the negotiations. The same is true for a wrong deed carried out in the past. Māori also appreciate the admission by the other party of any wrong-doing by them and their apology for it happening. This approach of *whakapahā* (apology) restores the *mana* of the offended party and therefore makes the negotiations more meaningful and binding. Once the *utu* is made, that is the end of the matter and the parties are ready to move forward. Good faith has been restored. The talking has been taken to another higher level of *te kōrero o te rangtira* (discussions of and by chiefly people). Leadership is important and those in the group who are able to facilitate this process are respected and their word is given authority.

The *whakatauki* related to this process is: *he mana tō te kupu* (the word of a chief has authority) is still relevant in Māori negotiation processes and dispute resolution. Another *whakatauki* which guides this process is: *he iti te kupu he nui te kōrero* (the word may be small but it has a lot to say or many meanings). The wisdom of the elders is called upon when the discussions are taking place, the best speakers dwelling on the positive aspects of the opposing side and recalling historical events that support their *whaikōrero*. *Whaikōrero* literally means "to follow on from the speaker before", thus a person should not speak unless there is something that can be added to whatever has been said. This eliminates frivolous talk on serious matters. A person cannot be interrupted while speaking and this allows the discussions to be focussed on the matter at hand. However, this process can be altered to allow a *tōhunga* to raise topics that on the face of it may seem remote to the issue at hand but are in fact a holistic way of dealing with the *kaupapa*. Story-telling containing wise and pertinent messages is encouraged.

For my tribe Ngāiterangi, this process of engagement has a particular significance. One of our ancestors is Rauru-ki-tahi (Rauru who speaks but once). He is an ancestor

of the Ngāti Kuku and Ngāitukairangi hapū and his name is immortalised as the name of the meeting house at Whareroa marae at Mt Maunganui. His wife Kuraimōnoa is the name given to the dining hall of the marae. Rauru was often referred to during the submissions made on behalf of tribe to the Waitangi Tribunal held at that marae. He is the ultimate negotiator in the history of the tribe. He is well-known as a great listener, who having heard all of the kōrero of the tribal members, summarised the arguments and sought a solution that benefitted all tribal members. Importantly, once he had delivered his kōrero, it was supported by the people, such was his wisdom and mana. He needed only to speak once. As a consequence, even now members of that hapū are often called upon to mediate disputes.

So the Treaty negotiations are generally a one-sided affair in which Māori soon come to the realisation that they will only make progress if they look after their own interests and they treat their kin, who may be co-claimants, as adversaries rather than as potential partners or kinsmen in the collective. This again is contrary to tikanga Māori practice. The desire by Māori for a collective approach is exemplified in the whakatauki of the second Māori King, Tāwhiao, *Ki te kotahi te kākaho ka whati, ki te kāpuia e kore e whati* (one strand of the reed will break but a bundle tied together will not break).

As a result of these deficiencies in the Treaty settlements process, it is therefore not possible to achieve just compensation, which Waikato/Tainui, for example, advocated for during their negotiations for the settlement of their Treaty claim.³ Their desire for a just deal was expressed in this way, *Kua riro whenua atu, me hoki whenua mai* (land was taken and so it must be returned). The negotiators knew that this wasn't going to happen but wanted it stated anyway to emphasise the enormity of their loss and the inadequacy of the settlement process.⁴ Settlements represent but a small percentage of the value of the land taken either by confiscation or by the machinations of the colonial governments.

This approach of 'land for land' was also similar for Ngāiterangi during our negotiations for settlement of our Treaty claim. However this goal is frustrated by the fact that the Crown holds little land in the rohe that can be used for settlement. On this point, the tribal leaders considered that the Tauranga harbour itself might be used

³ Settlement signed by the late Te Arikiniui Dame Te Atairangikaahu on behalf of Waikato Tainui and Prime Minister Bolger at Turangawaewae Marae, Ngaruawāhia on 22 May, 1995 See "Waikato-Tainui sign Deed of Settlement with the Crown" 22 May 1995, New Zealand History <www.nzhistory.net.nz>.

⁴ This fact is sometimes lost on the general New Zealand public and is not helped by sensational reporting by some provincial newspapers that allege favouritism to Māori.

to compensate the claim. They made the suggestion to the Crown negotiators and, no doubt, had they considered this an option it may have come about. However the Crown rejected the idea out of hand. Thus, other means like monetary compensation are needed to reach a settlement. There is also the problem of having to match this settlement to completed settlements of other tribes in similar circumstances. This is the approach of the Crown for the settlements in the Mataatua region beginning with Ngāti Awa's settlement but as the Tribunal findings have shown in each case, the circumstances are different not similar. Making comparisons is unfair and leads to more injustice.

The Crown considers that the pursuit of comparatively equal settlements is a fair approach. However, this idea of theirs is highly controversial because the colonial experience of each tribe is different. Some tribes, called kūpa (Crown loyalists), collaborated with the Crown to gain advantage for themselves but also to seek revenge for past wrongs by the errant tribes, evoking the practice of the old tikanga Māori of utu. The relationship between Ngāiterangi and the Ngāti Whakaue of Te Arawa is a good example of this approach. Their conflict goes back to the time before European settlement and concerns the mana whenua over Maketu, a coastal pā site. Ngāiterangi maintained that despite Ngāti Whakaue claiming the land after the engagement with Ngāiterangi at Te Tumu in the 1820s, the settler Hans Tapsell's request to Tupaea the Ngāiterangi chief to allow him to settle was evidence of Ngāiterangi's prior claim. During the years leading to the Tauranga land wars at Pukehinahina and Te Ranga in 1864, Ngāiterangi and Ngāti Whakaue continued their squabbles, even supporting Ngāpuhi raiding parties against each other. Peace was settled at Te Ariki pa near Maungatapu.

The settlement for Ngāti Awa is a case in point as to the problems associated with the Crown policy to pursue comparatively equal settlements. The Ngāti Awa settlement was accepted by Ngāiterangi negotiators as a starting point. Ngāti Awa are kin of Ngāiterangi and some of their experts gave evidence in the Ngāiterangi claim to illustrate the whakapapa links of the tribes.⁵ However, the policy to secure comparatively equal settlements is also a means for the Crown to control the way settlements are 'negotiated' and to limit the negotiating power of iwi.

Like Ngāti Awa, Ngāiterangi's claim was recognised as a claim of a so-called 'raupatu iwi' in that the tribe suffered land confiscations as a result of what the Crown referred

⁵ Evidence given by Sir Hirini Mead at Whareroa marae to establish whakapapa links between the two tribes.

to as ‘acts of rebellion’ as per the Tauranga District Lands Act 1867 and 1868. According to research 50,000 acres were confiscated by the Crown after the two land battles that Ngāiterangi engaged in. This land was the most productive land of the tribe and eventually formed the land basis of the township of Tauranga. To complicate matters the confiscated land was under the mana of two of the main tribes of the rohe, Ngāiterangi and Ngāti Ranginui. Thus, since that time the two tribes agree to disagree about the extent of their respective own muru raupatu by the Crown claims (confiscation not according to tikanga Māori) to enable the settlement process to progress.⁶

These confiscations were retrospectively legitimised by the passing of legislation basically to give the Crown a clear conscience in its nefarious dealings with Māori and their land and any other illegal activity.⁷ I addressed the assumption on the part of the Crown that Māori were rebellious when I gave evidence at the hearing of Ngāiterangi’s claim. I asserted that the tribes were in fact defending their homelands during the two land wars from the aggressive acts of the Crown.⁸ The tribes were not rebelling and therefore their lands were taken illegally.

Ngāiterangi’s individual claim started 20 years ago and culminated with the Tauranga Moana Report of the Waitangi Tribunal.⁹ The Report was presented to the tribes in 2011 at Hairini marae. It covers the claims of the three claimant tribes (Ngāiterangi, Ngāti Ranginui and Ngāti Pukenga included) since the updated claims process led by the Crown required the three tribes to form a ‘cluster’ to better facilitate the Crown’s dealing with them.

From the point of view of time saved there might be an advantage in clustering tribes but invariably this process disadvantages the separate tribes whose claims of prejudice are immediately compared to the claims of the other co-claimant tribe. The seriousness of the prejudicial behaviour of the Crown is somewhat lost in the disagreements that tribes have with each other. And in all of this, the Crown can step back and say they are not to blame for the procrastination and delay in the settlement

⁶ This phrase was first coined in Taranaki. It refers to the confiscation of land by the Crown but not according to the tikanga Māori of raupatu where imposing the mana of the victorious tribe over the land was accepted. Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003) at 21.

⁷ For example, the New Zealand Settlements Act 1863 which legitimised the raupatu of Māori land.

⁸ Refer to Evidence of Mati Dickson to the Waitangi Tribunal at Whareroa marae in support of the Ngāiterangi claim. See Waitangi Tribunal *Te Raupatu o Tauranga Moana* (Wai 215, 2004).

⁹ Waitangi: Tribunal *Te Raupatu o Tauranga Moana*, above n 8.

process. This aspect of the negotiations was frustrating for me as I had been raised to accept the other tribal members as whānau members and not opposing sides.

One of the positives of the Treaty process, if it can be called so, is that the history of the tribe is researched and written about and therefore available for all to see and hear. The passing on of traditional history is often confined to discussion by elders, both men and women, on the marae. Traditional history was initially recorded in book form by mostly Pākehā ethnographers like Elsdon Best,¹⁰ and later by Māori academics.¹¹ Knowing the authors of Māori historical accounts is important because the early ethnographers invariably interpreted what they saw in the light of their own world view, which is also true of present day ethnographers. In doing so they often made negative conclusions of early Māori custom and behaviour. Early references to cannibalism is a good recent example of where a tikanga Māori was criticised as barbaric without a full understanding or explanation by the ethnographer of its purpose.¹²

Even the records of the Native Land Courts are not always reliable because the Native Land Court judges, mostly Pākehā, tended to put their own take on matters and issues before them. Some of them had their own land dealings with Māori, which were often of a dubious nature.¹³

The value of the passing of oral traditions and history on the marae is that those talking about the history are usually the descendants of the makers of the history. So there is an immediate relevance to the speakers and the listeners about what is being said and an admiration for their ancestors' exploits and victories. The lessons are often mixed with humorous anecdotes suitable to the occasion. The telling is a collective activity which all enjoy and look forward to especially after the formalities of whaikōrero has ended. If visitors were present, the speakers relish the opportunity to retell stories and to quote whakapapa that connects those visitors to the people of the marae. Then it is the visitors' turn and they usually try and outdo the marae speakers with stories of their own. It is an informal game of one-upmanship. All of this is conducted in te reo Māori using the colloquial and classical forms of the language.

¹⁰ Elsdon Best *Tuhoe, Children of the Mist* (Reed, Wellington 1972).

¹¹ Pei te Hurinui Jones *Nga Iwi o Tainui* (Auckland University Press, Auckland 1995).

¹² Paul Moon *This Horrid Practice* (Penguin, Auckland, 2008) – The books title hints at the negative view of the author.

¹³ Refer to Judge Fenton, Dictionary of New Zealand Biography, William Renwick.

Waiata is also sung to emphasise a point or sometimes merely to entertain. An example of a waiata used to tell history happened at a wānanga or study session held at Whareroa marae in 1980 where the elders explained to our hapū members the reasons why a waiata was taken by the hapū Ngāitukairangi to our relatives of Te Whānau-a-Apanui tribe on the East Coast.¹⁴ It was during the time of an accidental drowning there in 1900. Eighteen people, sixteen of them school children, drowned crossing the Motu river by boat. It was a calamity for the tribe.

The waiata *E Tama Waha Kore* (for a young person unable to speak) has references to the accidental and premature death of a young member of the tribe so it was very appropriate to the occasion. Ngāitukairangi hapū in paying their respect to those who had drowned sang this waiata at the conclusion of the speeches. Te Whānau-a-Apanui kept the waiata for this reason and after changing some parts of it, they still sing it today. They celebrated the waiata nationally by performing it at the Te Matatini Festival held in Tauranga over 100 years later thus cementing the bond between the tribes. The history of this waiata was shared with us by Turirangi Te Kani an elder of the hapū whose mother Tangiwai was from the Delamere whānau of Te Whānau-a-Apanui.¹⁵ Knowledgeable and entertaining speakers like this kaumatua were admired and well-listened to. He was also an expert singer of tribal songs.

During the hearing of the Ngāiterangi Treaty claim at Whareroa marae, I was given the task of collating the tribal waiata and teaching the tribal members how to sing these waiata. The waiata were chosen to support the particular speakers of the tribe and their hapū. For example the opening speaker for the tribe was Kihī Ngatai the acknowledged main elder of Ngāiterangi whose marae is Whareroa. His hapū is Ngāitukairangi, the same as mine, so the waiata chosen to conclude his evidence was *E Tama Waha Kore*. On that occasion an exception was made by the elders because the tikanga of the waiata is that it is only sung when there is a deceased such as at a tangihanga. The first part of the waiata starts this way, *E tama waha kore maranga mai ki runga whītiki to kahu ka tu taua e* (young man rise up and fasten your cloak so that we may journey together). Here the deceased is spoken to directly as in most waiata tangi. The words of the waiata takes the young person on a spiritual journey of the tribal lands. It makes reference to Waipu Bay, Whareroa marae and Mauāo Mountain, the tribal icon. In choosing this waiata the elders considered that the importance of the occasion

¹⁴ Ngāitukairangi is a hapu of Ngāiterangi. They are settled at Matapihi and Mt Maunganui. Tukairangi was the son of Taapuiti and grandson of Te Rangihōuhiri.

¹⁵ At the Te Matatini held in Tauranga in 2009, the kapa haka of Te Whanau-a-Apanui sang the Ngāiterangi version of the song to acknowledge the waiata's origin.

warranted such a waiata and that the dead of the land wars represented the presence of a deceased person required by the tikanga of waiata. It was a moving experience.

I was also present at the hearing for the the Ngāti Hangarau hapū claim held on their marae at Bethlehem in 2008.¹⁶ I have a whakapapa connection to that hapū through my great grandmother, Tangiwai Parata. At the conclusion of their hearing the people of the marae sang the song *Takiri ko te Ata* (At the break of Dawn). The meeting house was filled to the brim and members of the hapū had been prepared to sing this important song for their tribal speakers.¹⁷ This waiata was composed by Turupa for her husband Kereti who was killed in the land battle of Te Ranga in 1964. The first lines of the waiata are *Takiri ko te ata he tūnga no te makau, taku tiroiro noa i waenga i te hono ka ngaro koutou...* (At daybreak I can see the vision of you my beloved husband among the spirits of those who have been killed...). Turupa was not aware that her husband had been slain so she walked to the battle ground, a three hour journey, looking for him. As she passed those returning she asked them if Kereti was alive but no-one had the heart to tell her of his death. The lament expresses how she felt, comparing her husband's death to the collapse of the ancestral house on the marae. All members of the tribe were aware of this history and hearing them sing the waiata at the end of a long hearing was a very poignant.

The Tauranga Moana Tribunal Report is similar to others in that it gives a detailed record of Ngāiterangi history leading up to and during colonisation and it sets out the negative effects on the tribal people and the tribal estate.¹⁸ It is not good reading from the Crown's point of view. It is plain to see in the Report that evidence supports the view that the Crown acted prejudicially in its dealings with the Tauranga tribes. Thus, the Crown's attempts to minimise their role and then play down the negative impact on the tribe during the hearing process is hard to accept and understand for some Māori. Worse still, some Tribunal members showed their prejudice. I recall a Tribunal member asking a question during a part of the hearing concerning the effect of poverty on the tribe when the lands were lost. That Tribunal member was known for his cynicism and asked pointedly: "Well, your people weren't really *that* poor, were they? Surely!" This query was met with guffaws and incredulous looks by the assembled claimants and highlighted the up-hill struggle they had to change attitudes and seek empathy with Tribunal members.

¹⁶ Ngāti Hangarau is a hapu of Ngātiranginui. Their territory surrounds their marae at Bethlehem and reaches up into the Kaimai Ranges to Poripori.

¹⁷ The waiata was led by Kaumatua Kihī Ngatai.

¹⁸ Waitangi Tribunal *Te Raupatu o Tauranga Moana*, above n 8, at 3 – 108.

The Treaty process is alien to the Māori way of thinking. Māori seek a way of resolving disputes which benefits everyone, even with those who may be regarded as adversaries. In the end Māori quickly understand that all must live in harmony for the survival and wellbeing of the whole tribe. Māori showed this in their dealings with vanquished tribes. Mostly the defeated tribes were reincorporated into the victorious tribe by marriage or by giving the vanquished tribe an opportunity to move away.¹⁹ This rule was upset in some cases though where tribes, because the wrong they believed they had suffered, completely annihilated the unfortunate people. The starting point of seeking a resolution is the question proffered to the other side: 'What is the aroha you have for me?'

Greed is not a chiefly trait.²⁰ Humility and generosity are the traits of the chief. The mana gained in negotiations is the refusal to impose too many demands on the other side because for Māori, you are punishing yourself in the long run. The connection is always found through whakapapa. This applies in inter-tribal negotiations more so than with the Crown although the principles still applies for Māori participants.

Haere e tama, mōu taiahihi mōku tai awatea (Farewell my son, you go out with the evening tide and I will go with the morning tide). This saying signals a turning point in the history of the Ngāi Te Rangihōuhiri people. It was said by the chief Te Rangihōuhiri when he was told that his eldest son Tutengaehe had been killed in the battle at Herekaki between Te Arawa tribes and Ngāi Te Rangihōuhiri. The battle took place near Maketu, a place which for a long time caused continuous warfare between the two tribes concerning the mana whenua. Tutengaehe was killed during the early evening at the turning of the tide. Te Rangihōuhiri predicted his own death would occur during the early morning skirmishes when the tide again was on the ebb. Māori history often makes reference to chiefs who predicted their own death. Possibly it was to show their not being afraid of death, a sign of a real rangatira, or that they accepted the inevitability of their demise considering the circumstances they were in. Te Rangihōuhiri did die at Poporohuamea and in memory of his death, the tribe adopted the name Ngāiterangi and thus begun their Tauranga Moana history. It is also the beginning of the history of the tribe as a separate entity from the rest of their Mataatua relatives but not entirely. Those whānauangata ties are still warm and vital to the tribe's identity.

¹⁹ Te Waho o Te Rangi did this with Te Rangihōuhiri and his people, allowing them to travel back to their ancient settlements in the Mataatua region.

²⁰ Shown by Kahungunu to Whaene. Kahungunu took the biggest fish from the catch before asking his older brother Whaene and he was struck in the face with it for his troubles. He left the area in disgrace and called the place he arrived at Tutamure (Hit by a Snapper).

It is important therefore to know the whakapapa ties that the tribe has with the rest of the Mataatua region. Ngāiterangi are the descendants of Toroa, the acknowledged leader of the Mataatua waka that brought Māori to New Zealand. The whakapapa that shows the relationship to Te Rangihōuhiri is the following:

Toroa
/
Ruāihona
/
Tahīngaotera
/
Te Awanuiārangi
/
Rongotangiawa
/
Rōmainohorangi
//
Te Rangihōuhiri Tamapahore
//
Taapuiti Uruhina
/
Tukairangi

This whakapapa illustrates that the connections between the descendants of Toroa are very close and over the time of the Mataatua settlement of the Bay of Plenty region by these tribes, the tikanga of whakawaungatanga has been continually reinforced. According to the Mataatua tradition, Puhi the brother of Toroa took his immediate relatives and the waka to the north and settled there, the canoe being laid to rest in the river at Tākou. Their saying is *Me tāwharautia te waka o Mataatua* (shelter under the mana and unity of the Mataatua waka). This saying has been referred to only several times in Mataatua history. The first was during the time of the coming of the Pākehā and the destructive nature of colonisation they brought with them. The second time was during the building of the historic Tīpuna Whare, Mataatua. As to the first instance, the tribes of Mataatua recognised that the Pākehā colonisers were here to stay and that eventually they would cause trouble for the tribes. The leaders of the time were particularly alarmed at the Pākehā hunger for land and devised a plan that they would try to stop the advance of Pākehā settlement into their territory by taking part in the warfare outside of the *rohe* (tribal areas), particularly in the

Tainui rohe. That is, to support the Kingitanga whose genesis was to hold on to Māori land and to unite the Māori tribe under one leadership. Ngāiterangi took part in the land war at Rangiriri in 1864 and returned to Tauranga almost immediately to defend their own territory from incursions by the Crown. The Crown wanted to teach Ngāiterangi a lesson for assisting Waikato/Tainui and allowing supplies to be brought to them through their territory. However as shown later it did not go exactly as they had planned.

Unfortunately warfare did arrive in Mataatua on the pretext by the Crown that various tribes of Mataatua committed treacherous acts against the Crown. For Ngāti Awa it was the killing of James Fulloon, and for Te Whakatohea it was the killing of Reverend Carl Volkner, the missionary spy. For Ngaitūhoe the invasion and land confiscations came later with the Crown's pursuit of the Māori prophets, like Rua Kēnana and Te Kooti Arikirangi. As a consequence of these deaths the Crown invaded the tribal territory and confiscated lands to punish the tribes. They also imprisoned those who they thought responsible and after very unfair trials had those people hanged and buried in the prison yards at Mt Eden Prison. The body of the chief Mokomoko of Te Whakatōhea was later exhumed after it was accepted by the Government that he had been wrongly convicted and he was subsequently pardoned. But the injustice to his descendants was already done.

A further study of the Mataatua tribal whakapapa shows that whakawhānaungatanga with Ngāiterangi has been maintained by marriage. Irapeke was Romainohorangi's brother and his son Hikakino married Tamapahore's daughter Uruhina. His two daughters Kahurua and Whariki married Te Rangihōuhiri's grandson Tukairangi.

Te Rangihōuhiri's people have had a knack in their history of finding themselves suddenly in a dangerous situation and then having to extricate themselves as necessary and as soon as possible. Because of a dispute with the Ngāti Ha in Whakatane they vacated that area and travelled to Whangarā on the East Coast where they were given shelter by the Aitanga-a-Hauti chief, Te Waho-o-te-rangi. Their existence there was as bondsmen and before too long Te Waho realised that these people might overcome his own people so he allowed them to leave and they travelled along the coast back to the Mataatua area where they arrived at Tōrere. They were given haven there at a place called Hakuranui.²¹ It wasn't too long before

²¹ This migration is referred to as Te Heke o Te Rangihouhiri, the travels of Te Rangihouhiri. The land at Hakuranui was recently revested in to the name of the Ngaiterangi tribe and is a reserve for the tribe's use.

they upset the local people and decided to move on to a pa site at Tawhitirahi near present Opotiki. Again for the same reasons, they moved from there to Matata to avoid their relatives at Whakatane.

From Matata they considered the possibility of moving to Maketu which at that time was occupied by Te Arawa people. Tamapahore was sent to scope the land and investigate the chances of a successful incursion. While there he and his party happened upon Punoho, the daughter of one of the Tapuika chiefs. They killed the unfortunate woman and hid her in a pit and then returned to Matata to await the message from Te Arawa that they were seeking revenge for the killing. This gave the Te Ranghōuhiri people an excuse to make a pre-emptive attack on the Maketu people. This is what they did and it was at the battle of Pōporohuamea in which Te Rangihōuhiri and Tutengaehe died.

Ngāiterangi lived at Maketu for a time and then looked toward Tauranga Moana as a possible place to settle. They received the opportunity to do this when one of Te Rangihōuhiri's grandsons Tauāiti was captured by the resident tribe there, Ngāti Ranginui, while on a food gathering trip. Tauāiti was tortured by having his body cut with maram grass and while this happened Tauāiti predicted that his death would be avenged by his younger brother Kotorerua. He uttered the words, *E papaku ana te moana o Tauranga i te riri o taku teina a Kotorerua* (the waters at Tauranga are shallow compared to the anger of my brother Kotorerua when he avenges my death). Tauaiti's head was severed and placed on a waka and floated toward the Ngāiterangi settlement no doubt as a warning to those people to stay away from the Tauranga rohe.

However, Te Rangihōuhiri's younger male kin had devised a plan to take over the Tauranga rohe and extract revenge. They used a ruse that was common among Māori war strategists. They pretended to make peace with the Ngāti Ranginui and arrived at their major pa at Mauāo carrying what they purported to be baskets of kōkōwai, an important red clay used to decorate carvings. However the kōkōwai was spread over the top of earth that filled the baskets. Thus the name of the battle of the Kōkōwai. The group, which included Te Rangihōuhiri's grandson Tukairangi, were invited into the pa and took their places in the meeting house of Kinonui, the main chief of the pa. During the entertainment in the meeting house the Ngāiterangi warriors left separately pretending to be overcome by the heat inside. Kinonui was on guard but not sure what to expect. On a signal from their leader all of the rest of Ngāiterangi ran out of the house as it was set alight.

The battle ensued with Ngāiterangi reinforcements having landed at the most inaccessible side of Mauāo near Tirikawa rock.²² It was a Ngāiterangi victory with some of the Mauāo inhabitants taking flight by swimming across the channel to Matakana island. It is said that the sight of the heads bobbing in the sea gave the name to that part of Matakana being Panepane (many heads bobbing in the water) which is now an important wāhi tapu of the tribe.

Thereafter Ngāiterangi occupied those parts of Tauranga which are recognised as their rohe today. The Ngāti Ranginui tribe repositioned themselves in the rohe and with intermarriage the two tribes lived peacefully together and cooperated until the land wars with the Crown ensued.

It can be said that the occupation of Tauranga by Ngāiterangi was a raupatu by them of the land and therefore a recognised consequence of warfare according to tikanga Māori where the victor occupies land forcefully. This matter was important later in discussion about the manawhenua of Tauranga and the status of the tribal people of the Tauranga Moana rohe.

Some commentators refer to Ngāti Ranginui and Waitaha having occupied the rohe after defeating the original settlers the Ngā Marama. Ngāiterangi were joined at a later stage by Ngāti Pukenga who were invited to assist Ngāiterangi in seeing off attacks by Te Arawa people.²³ Ngāiterangi's settlement of Tauranga was affected greatly by the musket wars of the 1820s and the later land wars with the Crown in the 1860s. The wars with Te Arawa over the mana whenua of Maketu intensified with the musket and were not resolved until 1845 at a peacemaking ceremony held at Te Ariki Pa at Maungatapu.

An incident that occurred after that time illustrates the tribal collaborations that took place in the rohe and outside of it. Te Hunga, a relative of Te Waharoa of Ngāti Haua, was killed instantly with a patu by Haerehuka of Ngāti Whakaue. Haerehuka's reason for killing this visitor to Ohinemutu was obtuse. He had taken a dislike to some of the actions of his own Ngāti Whakaue kin believing that he had been left out of a distribution of payments for flax fibre. He sought to teach them a lesson by killing Te Hunga knowing that news of the death would prompt his powerful relative Te

²² Since the assault on the Pa was at night the Ngāiterangi warriors tied the wide whau leaf to their forehead so they could be identified by touch before the fatal blow of the mere.

²³ They were rewarded for their efforts by Ngāti He who gave them land to settle at Ngapeke. Richard Boast in Waitangi Tribunal *Te Raupatu o Tauranga Moana*, above n 8, at 35.

Waharoa to seek utu. This is what Waharoa prepared to do and to do this he travelled to Tauranga to seek the support of Ngāiterangi which they gave. Ngāiterangi did not need much persuasion to enter battle with their old enemy. Te Waharoa did not succeed in his invasion into the heart of the Te Arawa rohe but this skirmish signalled an end to the quarrels between the Te Arawa and Ngāiterangi.

The political situation at the time was also very unsettled because Ngapuhi also entered the fray and attacked Ngāiterangi as utu for a killing earlier of one of their kin. Ngāti Maru also took an opportunity to attack Ngāiterangi at Te Papa and this assault was the last time that cannibalism was witnessed by the missionaries who were caught in the cross fire.

This was to become more unsettled when Ngāiterangi became involved in two major land wars with the colonial troops at Tauranga. The first of the land wars was fought on 29 April 1864 at Gate Pa or Pukehinahina as the site is known to Māori.²⁴ The lead up to the conflict is unusual in that it started from rumours that Māori were gathering to travel to Waikato to help their kin there. The Governor of the time Sir George Grey determined to blockade this move and gathered in forces which assembled at Te Papa.

Rawiri Puhirake of Ngāitukairangi was acknowledged as the leader of the Ngāiterangi force and more unusually for the time he issued a challenge to the Crown forces to take part in a battle to settle matters once and for all. He also issued some 'rules of engagement' written up by Henare Taratoa, an educated Christian. The rules required humane treatment of injured and unarmed combatants. Women and children were to be given safe shelter and if a person sought refuge in a church their safety was guaranteed. The rules referred to the Christian rules of showing mercy to your enemies. The saying *mehemea e mate inu wai to hoa riri, me inumia* (if your enemy thirsts, give him water) was followed by the Māori warrior in the battle.²⁵

However the Crown officers ignored the challenge and prepared themselves expecting to overcome the Māori warriors. A fortified Pa was built by Ngāiterangi incorporating new techniques of construction to contend with musket warfare. The Pa included trenches, parapets and importantly chambers underground that protected the warriors from the heavy artillery and allowed them to move about the Pa undetected. Sir Duncan Cameron amassed 1700 soldiers while Ngāiterangi had only 200 warriors

²⁴ Gilbert Mair *The Story of Gate Pa* (Bay Times Printer, Tauranga, 1937).

²⁵ This motto was adopted by the Tauranga Moana Trust Board established to administer an earlier settlement to the tribes.

to fight. At the beginning of the fighting Rawiri Puhirake taunted the soldiers by standing in the line of fire and yelling to them, "*tēna, tēna e mahi i to mahi!* (There you go, do your worst if you can!)".

Puhirake also instructed his warriors "*ko te manawarere kia u!* (Be patient, hold your fire!)". The warriors waited in the underground chambers until the soldiers charged and then fired volley after volley of musket fire without their being detected. One hundred soldiers were killed in the mayhem and confusion and the soldiers retreated. Ngāiterangi warriors had won the engagement. Cameron as the commander was much criticised for his inept leadership especially that the assault took place in bad weather and near night-fall.

The victory for Māori was short-lived because, on 21 June 1864 at Te Ranga, the reinforced Crown soldiers overwhelmed the Ngāiterangi and Ngāti Ranginui warriors and broke their resistance to Crown rule.²⁶

Immediately after these engagements, the tribes of Tauranga Moana gathered with the Crown to discuss a peace agreement on 6 August 1864. It was at this peace meeting that the confiscation of land was discussed and decided upon by the Crown. Initially 290,000 acres was required by the Crown. This area was later reduced to 50,000 acres but included the most productive land of the tribes at the time.²⁷

This was the historical background to the Ngāiterangi claim when in May 2010 Te Rūnanga Iwi o Ngāiterangi sought application for Treaty negotiators for the tribe. I applied for one of the positions and was accepted.

Each applicant was required to give a presentation to a committee of elders and tribal management. I began mine by showing a picture of a kapa haka group made up of women mainly from Ngāitukairangi hapū. The photo was taken in 1932 at Memorial Park and celebrated the group's success at the Coronation celebrations held at Turangawaewae marae that year. The group was tutored by Tatau Ngatai and placed first in the competitions. Significantly for me, my grandmother, Waimihi, and her mother, my great grandmother Tangiwai, along with other grand aunts feature in the photo. At the time of my presentation all of the group members had passed

²⁶ Other tribes joined this skirmish and lost warriors. In 2012, Ngāti Ranginui signed their Deed of Settlement at the Te Ranga site. The land had already been returned to them and the signing on the site was highly significant for the Tauranga Moana tribes.

²⁷ Waitangi Tribunal *Te Raupatu o Tauranga Moana*, above n 8, at 149.

away signalling for me the passing also of the Ngāiterangi knowledge and reo base. For example many of the kuia were the expert weavers of the tribe. For me, the Treaty settlement was urgently required to begin the task of restoring to the tribe its tikanga and reo knowledge.

These were the factors I raised as important to me if I were a negotiator:

- *Te tino rangatiratanga o Ngāiterangi (Ngāiterangi sovereignty)* – that the person of the negotiator should be someone who strongly identifies as a Ngāiterangi person and who has a background that reinforces that person’s tribal knowledge and commitment to the tribe.
- *He whakaaro rangatira (chiefly principles)* – settlement should be fair and equitable particularly from the tribe’s point of view. The tribe ought to have non-negotiable issues which are very important to them.
- *Te nohongātahi a ngā iwi o Tauranga Moana (the well-being of the tribes)* – because of the Treaty settlements process, the tribes of Tauranga Moana must compete with each other on some issues therefore the settlement negotiations require leaders who do not forget the whakapapa connections of each tribe. These connections will sustain the tribes in the future.
- *Te whaioranga mo te iwi (tribal revival)* – settlement should give the tribe a renewed sense of economic and cultural growth. The benefits must trickle down to every member of the tribe.
- *Me haere whakamua (the way forward)* – any settlement will allow the tribe to move forward and plan its future. This should benefit tribal members and the whole of the community in the long term.²⁸

I was chosen as one of three negotiators, the other two being Mita Ririnui (lead negotiator and retired politician from Ngāti Hē hapū) and Spencer Webster (a lawyer from Ngā Potiki hapū).

Ngāiterangi tribe operates politically as clusters of hapū more so than at the iwi level. Thus, we have the hapū of Matakana Island and Katikati, the hapū of Matapihi, the hapū of Papamoa and the hapū of Maungatapu and Rangataua. These collectives give the tribe its strength and they must be maintained at both the hapū and marae level filtering down to each whānau. These are the hapū and marae of the tribe:

²⁸ Taken from my presentation slides shown at the interview.

- Te Whānau a Tauwhāo – Rangiwaea and Otāwhiwhi;
- Te Ngare (ki Raukawa) – Opōnuī and Rangiwaea;
- Ngāi Tamawhariua – Oruarahi at Matakana Island and Rereatukāhia at Katikati;
- Ngāti Tauaiti – Kutaroa at Matakana Island;
- Ngāi Tūwhiwhia – Opureora at Matakana Island;
- Ngāi Tūkairangi – Hungahungatoroa at Matapihi and Whareroa at Mt Maunganui;
- Ngāti Tapu – Waikari at Matapihi;
- Ngāti Kuku – Whareroa at Mt Maunganui;
- Ngā Pōtiki – Tamapahore and Tahuwhakatiki at Kairua; and
- Ngāti He - Maungatapu.

The role of the tribe is still important at a national and regional level and recently Ngāiaterangi have asserted themselves at national hui but in my view we have a number of issues in our own rohe to resolve. The main one for me is the retention of our Ngāiaterangi reo because knowledge of reo allows us to enjoy the stories of our ancestors and to participate fully in our own tribal ceremonies. Reo is essential to retain and practice our tribal tikanga. Each hapū has put in place its own strategies for reo revival and retention and it will become a success tribally only if it is applied and embraced at hapū and whānau level. As with other iwi our efforts are our own because other iwi have their own issues to deal with. We will prosper culturally by our own efforts but we need to deal with the Crown and the Treaty settlement process first.

As mentioned at the beginning of this article, the Treaty process is a flawed one in that the Crown controls process and it is not mandatory for Tribunal findings to be taken into account by the Crown. Even where land for settlement is scarce, the Crown pre-empted the purchase of private land by an amendment to the Treaty of Waitangi Act 1993 preventing the Tribunal from making recommendations to purchase private land. This occurred as a result of the Te Roroa Report 1992 and its recommendations.²⁹

For our tribe the evidence given at the Tribunal hearings and the process of the hearings themselves awakened for tribal members a strong identity and connection to the tribe. Recently this has shown itself in the commemorations held for the land battles at Pukehinahina and Te Ranga attended by Crown representatives and several thousand iwi members of the Tauranga Moana iwi. The tribes are keen to move on in their plans for revitalisation of tribal reo, history, tikanga practice and marae protocol.

²⁹ Waitangi Tribunal *Te Roroa Claim* (Wai 38, 1992).

Again it should be reiterated that the process has in some cases put up barriers between the Tauranga Moana tribes which were not obvious previously; more work in rebuilding those relationships is needed. I believe that generally iwi are positive about the tribal future and it is achievable with the support of all stakeholders in the region.

“THIS IS NANA NIN TALKING ON BEHALF OF MY MOKOPUNA AND YOURS”: A MĀORI VISION OF CONSTITUTIONAL REFORM

Carwyn Jones¹

I. Introduction

In 2012, Nin Tomas participated in the Te Papa Treaty Debates series.² That year, the theme of the series was ‘Pathways to the Future’ and Nin was part of a session entitled ‘A Long Conversation – The Constitutional Review’.³ Nin’s presentation explored ways of thinking about a “Māori-based, New Zealand constitution”. Her presentation reflected three things that I think of as being typical of Nin’s contribution to legal scholarship. First, she internationalised the issues faced by Māori by drawing on examples of Indigenous rights issues from other parts of the world. Second, despite locating the issues in an international context, her analysis was nonetheless rooted in Māori values and principles and centred around the Māori community. Third, she addressed the social context of law by making it personal – focusing attention on the ways in which all of us interact with and are affected by law. So, when she said “This is Nana Nin talking on behalf of my mokopuna and yours”, this was not merely a rhetorical flourish, but rather encapsulated the thinking that sits behind the entire paper. That is, ultimately, grand constitutional theorising is only important because it affects people and communities. Furthermore, we all have a stake in constitutional reform because of the human (as opposed to the legal or constitutional) relationships that connect us.

II. Internationalising Māori

The first thing that Nin did in her Te Papa address was to set the issue of constitutional reform in context – in both international and historical context. Often the discussion of the Treaty of Waitangi and constitutional reform in Aotearoa can be insular – the

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² “Treaty Debates: A Long Conversation—The Constitutional Review” (2 February 2012) Te Papa Museum of New Zealand <www.tepapa.govt.nz>.

³ Nin Thomas “Treaty Debate 2 (2012)” (5 February 2012) Radio New Zealand <www.radionz.co.nz>.

world outside does not speak to our situation because our Treaty is unique, our history is unique, our tikanga and our way of doing things in these islands in Kiwa's great ocean is unique. This is true, of course, as far as it goes, but as Nin and others have pointed out, that does not mean that we should forever look inwards. In her paper, Nin turned her gaze outward. She turned first of all to 18th century Europe and, in particular, the great constitutional changes wrought by the French Revolution. She noted that, through this revolution:

[t]he French changed the rules of engagement by changing who ruled and how it was done. The fundamental human principles identified at the time as being important to justify the shift were “fraternity, liberty and equality”.

However, Nin also noted that, in many important respects, the new Constitution still served an elite:

But this shift to representative government occurred in a society already deeply enamoured with capitalist ideas and individualism. And so power moved sideways to protect the interests of the bourgeoisie. Although the new constitution theoretically included the poor as “people” they were not citizens, legislators, judges, these offices and voting were restricted to citizens who were land-owning, literate, older Euro-descendent males. The poor stayed where they were – at the bottom.

Nevertheless, this might be said to illustrate a phase of constitutionalism that reflected a move to democratization and the establishment of responsible and representative government. Nin points out that this eventually led to a 20th century form of constitutionalism. This saw a transformation from colonial to post-colonial constitutions in states controlled by colonial powers where Western systems of democratic government had been established as part of the colonisation process:

Africa and the Pacific are examples of a two-step process. First step – colonisation. In both regions modern, macro-level western-type governments were superimposed onto societies whose history, social structure and socio-political organisation was totally different to that of the West.

Commerce was often a key driver of the colonial project and, Nin suggests, this is evident in the colonial constitutions:

Underpinning these constitutions were the same capitalist values that encouraged extraction of resources from the region, with little return. The granting of property rights protected exploitation and ensured that it could happen. It protected itself in the name of progress. The hollow shell left of Nauru after it had been strip mined of phosphate is a graphic and tragic example of this.

Nin went on in her paper to contend that the post-colonial constitutions of the 20th century remained an uneasy mix of customary law and the structures of the colonial state:

After the second world-war the international community decided to end colonization. A series of new constitutions marked the largely peaceful handing over of colonial power to the locals. The new Constitutions are a legacy of contradictions between the legal principles that are entrenched in European historical processes, and the customary law that governs the daily lives of the people according to their own history and traditions. Throughout the Pacific, colonial judges and western expert advisers are still powerful actors in administering the state.

If a constitution should engage the soul of the nation and protect the people it covers, then these constitutions struggle. At best they represent societies in which customary systems based on traditional rules of sharing compete with capitalist protections for those with wealth, education, modern individual rights and gender rights. Women and children are particularly vulnerable in these societies.

The final group of constitutions that Nin considered in her address was a group that she identified as being more inclusive and less exploitative:

The third type of constitution is the 21st century constitution based on participatory democracy and relationship building. The South American constitutions of Venezuela, Ecuador, and Bolivia are examples of this. These constitutions have socialist leanings. By socialism I mean state regulation of major industries to benefit the people who live there. Where the state has been reformulated to be more inclusive and has taken measures to counter the capitalist ethic of protecting individual property rights over community rights to basic resources such as water, and are trying to ensure that resources are shared in a more equitable manner.

Nin made particular reference to the Bolivian Constitution and its environmental protections, which she compared to the Māori ethic of kaitiakitanga:

The Bolivian Constitution recognises different nations within the nation state, which it calls plurinational; and Bolivia is an example of a bottom up constitution. The constitution was written by a constituent assembly representing 26 Indigenous nations. It protects the diversity of nature – Pachamama – and recognises that human diversity is a product of the fact of nature’s diversity. This requires a shift in how we perceive our world and our place within it. In this new plurinational state, the nations are listed in the Constitution as ALL being guardians of Pachamama – or in Māori terms with which you are all familiar, kaitiaki. It is a shared role with a specific purpose. Under the Constitution, no-one can be jailed for acting in protection of pachamama. Is this protection real? Last year Brazil wanted to forge a highway through Bolivian Indigenous lands into Peru in order to export its soya beans to China. The Indigenous kaitiaki of the land objected. They successfully argued their actions were to protect Pachamama and were constitutionally protected. But this highlights the tension between, on one hand, the need for development and its legal protection, which has been an essential part of the development of western nations since the 18th century, and the worldview of the Indigenous which perceives Pachamama to be a living entity that is no longer freely available to be exploited for profit by privileged individuals (most of whom were foreign-owned companies).

Nin suggested that the important thing to note about these constitutions was their inclusiveness, though also warned that these constitutions still had to grapple with the balance between a capitalist ethic and other community rights and aspirations for how society ought to be structured:

What is significant about the new South American constitutions is their inclusive, participatory nature, and that the change-makers called upon the poorest elements of society to not only participate, but to give shape and form to their new constitutions. What they still have to negotiate is the tension between development and protecting economic individual rights, which gives power to transnational companies as individuals on the one hand, and the social relationships that exist on the land and to the land, on the other.

III. Māori-centred Analysis

In her paper, Nin then moved to set out how Māori values sit within the context of international constitution building. Throughout this part of the paper Nin drew on lessons from the South American experience, making particular reference to the provisions of the Bolivian Constitution.

Nin used the Māori concept of aroha as the foundation for a Māori vision for constitutional reform. She described the concept of aroha as follows:

Aroha is a positive emotion that can be extended beyond the self to include others. I have translated it as “respect” but it means at heart the conscious care of and for others. It is duty-based rather than rights-based.

From that general societal value, Nin teased out three basic constitutional principles:

Aroha ki te tangata:	respect for others
Aroha ki te whenua:	respect for the land
Aroha ki nga mokopuna:	intergenerational obligations

The principle of aroha ki te tangata (respect for others) directs us to explore more effective models of representative government that in particular (in light of the Treaty of Waitangi partnership) address Māori participation and engagement in our democratic institutions.

Aroha ki te tangata = respect for others, envisages a different construction of the state as the fundamental body representing society. In South America the formal participation of *assemblies* in the governing structure of the state provides an alternative to the way representative democracy operates in Aotearoa New Zealand. A constitution would provide models for engagement that are acceptable to Māori. Direct democracy could be hapū, iwi and community-based. The fact that only 54% of Māori voted as opposed to 75% rest of NZ tells us that alienation of some sort exists amongst Māori. We won't find out unless we ask. And having asked, we then need to include.

The environmental ethic, embedded in Māori relationships to land and the natural world and given practical effect in the Bolivian Constitution, is reflected in the principle of aroha ki te whenua.

Aroha ki te whenua = respect for the land, would accept land as a living entity on which our future depends. It would protect Māori tribal relationships to their territories and provide a role for Māori in decision-making concerning their resources in ways that current structures do not. The South American example is instructive here in that immediately after passing the Constitution, the President of Bolivia, who has more power than John Key or Jerry Mateparae combined could ever exercise, tried to override it to satisfy the interests of economic development of neighbouring Peru. Although it took enormous effort, the constitutionally protected defence of Pachamama principle has, so far, held him in check. The notion of defending the land against economic exploitation demands a stretch of the imagination away from centuries old ideas of resource exploitation and private accumulation being god-given rights with minimal responsibility for any detrimental collateral damage.

The third underlying principle that Nin addressed was the recognition of intergenerational obligations encompassed in aroha ki ngā mokopuna.

Aroha ki ngā mokopuna requires us to extend our thinking framework into the future – to accept that we have intergenerational obligations to our grandchildren and their children – to provide a durable legacy for them. To do without so that they can have more. It reverses the current trend of short-term gratification being okay.

By placing these principles at the heart of her paper, and at the heart of her vision for constitutional reform, Nin articulated a determinedly Māori-centred analysis. The discussion of the international context that preceded this Māori-centred analysis ensured that the discussion of Māori principles took place against a backdrop of existing mechanisms that seek to implement similar ideas or values. Basing a constitution on the principles of aroha ki te tangata, aroha ki te whenua, and aroha ki ngā mokopuna could not, therefore, be portrayed as ‘unrealistic’ because Nin based her analysis on real constitutional instruments and processes that are already being used in other parts of the world.

IV. Law as Personal Relationships

Those Māori principles, based on the fundamental value of aroha, lead into Nin’s characterisation of constitutional reform as being future-focused and ultimately concerned with our relationships to one another:

This is Nana Nin talking on behalf of my mokopuna and yours! The nuts and bolts of managing the relationships I have outlined will have to be worked through in a process that involves everyone. It will be costly and time consuming if it is properly conducted. And it will definitely result in a shift in governing power, even if it retains many of the institutions of western government. Transformation cannot be superimposed from above – and ideally, must reflect the relationships revealed by the uplifting of society.

This conceptualisation of law (and perhaps especially constitutional law) as being about personal relationships is a notable feature of a Māori world view, as illustrated by the principles upon which Nin focused. That is not a conceptualisation that is exclusive to Māori but relationships are certainly central to tikanga Māori and, to some extent, everything in the Māori world is filtered through that relationship/whānaungatanga lens.

Perhaps just as important is the language that Nin chose to use to convey her thinking here. These issues are made directly personal because Nin explicitly inserts herself and the audience into the constitutional conversation. We are all implicated and we are all responsible for constitutional reform.

V. Real, Practical and Personal

Throughout her paper, Nin's approach was to make the issues of constitutional reform real, practical, and personal. She looked at the international context to illustrate the drivers of constitutional change and to provide examples of what a process of constitutional reform might look like in Aotearoa. And she directed our attention to the relationships involved to drive home the importance of what was at stake. That she did this with her usual strength and style was no surprise. Nor was it a surprise that she explained that her credibility in these matters was defined less by her position as a legal scholar and more by her status as a grandmother of Māori children and the mana that comes with that role. After all, that was Nana Nin.

MOTATAU NO. 50/3

Amokura Kawharu¹

I. Albert Hepi Rankin

Sometime in late 2008 I had a phone call from my cousin Tene Rankin to tell me that there was a Māori Land Court hearing coming up the following March. The issue, he said, had something to do with our land being taken by the Crown. I was unable to attend the hearing but as it turned out it was a preliminary one and only the first stage in an ongoing saga that even Nin could not have scripted better.

The land at issue is a block of around 67 hectares known in the Māori Land Court records as Motatau No. 50/3. The land is covered in dense native bush and sits within a large conservation reserve. It had been split into 96.5 shares, with seven Māori owners, in around 1923. All but one of these owners then sold their shares. The remaining owner was Albert Hepi Rankin, my grandfather. Albert was a farmer and, during World War I, a sergeant in the Pioneer Māori Battalion. He returned after five years' service devastated to learn that even more of the family land had been lost into Pākehā ownership and was still being sold. In 2008, only the eldest of his five children was still alive, his son Jim. When I spoke to Uncle Jim about what was happening with the Motatau block, he explained that land sales had caused a lasting rift between Albert and his mother. It seemed that my grandfather had valued our land as a taonga tuku iho (ancestral treasure) and it was not to be sold.

II. The Crown Argues Infeasibility of Title

When the block was split into shares, title was issued under the Torrens system to the named "Aboriginal Natives of New Zealand" to facilitate its future sale. At the same time, title to the block also continued to be recorded in the Māori Land Court records. Several years ago, the Māori Land Court initiated a major project to reconcile titles held under Te Ture Whenua Māori 1993 (TTWMA) with titles held under the Land Transfer Act 1952. It was discovered during this process that while Albert Rankin was still named as a co-owner of the Motatau land in the Māori Land Court records, the Land Transfer Act title had been cancelled in favour of the Crown, which now apparently owned the entire block and held it as a reserve under the Reserves Act 1977. It was

¹ Ngāti Whātua and Nga Puhi. Associate Professor, Faculty of Law, University of Auckland.

being managed by the Department of Conservation (DoC) as a conservation reserve. Given the discrepancy, the Māori Land Court scheduled the hearing in March 2009 and approached the matter as an application under s131 TTWMA to determine the status of the land.

Over the decades, there had been several transfers of the 84.5 shares in the Motatau block, all the while Albert Rankin was still named as owner of his 12 shares as tenant in common. Then, in 1968, Hilstan Limited purchased the 84.5 shares. Hilstan also acquired around 600 hectares of the surrounding land. The company was owned by the prominent Northland businessman, the late Hilel Korman, who gifted his land interests to the Crown under his will. By mistake – of Korman’s solicitors, the Crown’s solicitors, and the Land Registry Office (now operated through Land Information New Zealand or LINZ) – the 12 Rankin shares were included in the transfer to the Crown when the gift was completed in 2000.

At a substantive hearing before the Māori Land Court hearing in May 2009, the Crown argued, in opposition to any return of the 12 shares to Albert Rankin’s descendants, that:²

- the Crown has good title under the principle of indefeasibility;³ and
- the Rankin family may be entitled to compensation for their loss, in accordance with the usual Land Transfer Act principles. Since only \$28,000 was paid to Hilstan Limited as consideration for the transfer of the entire Hilstan land at Motatau, at best, the Rankin family are entitled to be paid a nominal amount.

In early 2010, I went to a meeting with DoC’s legal team accompanied by another cousin, Mere Baker, to press for a return of our land. One of DoC’s solicitors began by explaining that, in New Zealand, “there is a legal principle called indefeasibility of title”. Before she could continue, I replied something like, “thank you, I have been teaching land law at Auckland Law School for some years now.” Mere tried hard not to laugh. In our view:

- the Crown received the shares in the land by mistake and the Registrar General of Land has extensive powers under the Land Transfer Act 1952 to correct mistakes;⁴

² Māori Land Court Minutes, 140 Whangarei Minute Book 27 at 30 (22 May 2009).

³ The Land Transfer Act 1952 overrides Te Ture Whenua Māori Act 1993. See *Warin v Registrar-General of Land* (2008) 10 NZCPR 73 (HC).

⁴ Land Transfer Act 1952, s81; *Frazer v Walker* [1967] NZLR 1069, [1967] 1 AC 569, [1967] 1 All ER 649 (PC).

- the Crown is a volunteer in respect of the land and the position in relation to volunteers under the Land Transfer Act remains uncertain in New Zealand. None of the contentious Australian cases on volunteers and indefeasibility involve situations even remotely similar to the one at hand. The rights of volunteers have recently been recognised by the New Zealand Supreme Court, in *Regal Castings Ltd v Lightbody*, in an obiter comment by one of the judges.⁵ Like the Australian cases, *Regal Castings* involved a situation where the land was transferred by the registered proprietor to the volunteer. Hilstan was not the registered proprietor of our 12 shares;
- the \$28,000 was only gift duty and does not reflect the economic value of the land; and
- anyway, the Crown should know better than to take advantage of its own mistake to deprive Māori of their turangawaewae (place to stand).

The idea of a land swap was mooted but then dismissed as impractical and unprincipled. DoC's view has continued to be that a return of the land to a co-ownership between the Crown and the Rankin family would be technically difficult because of the status of the land as a reserve governed by the Reserves Act 1977. The transcript of a Māori Land Court hearing in 2013 records the following exchange between the Judge and DoC's solicitor:⁶

[DoC] We have a problem in that if we go back to an undivided tenancy in common, the reserve status has to go, because you just can't have an undivided interest in a reserve, because you don't know whether an offence has been committed or not because –

[Court] Say that again? You don't know?

[DoC] You won't know whether an offence, for example, has been committed on the reserve because the owners will have rights as land owner.

[Court] Yes.

[DoC] And then the right to prove those same rights as well. So the reserve status is at risk and it's part of a whole reserve. There's a 700 hectare reserve and this is a part of it.

[Court] I see.

Further on in the transcript, the Crown finally acknowledges the mistaken transfer.⁷

⁵ *Regal Castings Ltd v Lightbody* [2008] NZSC 87 (SC) per Tipping J at [133]-[136].

⁶ Māori Land Court Minutes, 73 Taitokerau Minute Book 62 at 72 (19 November 2013).

⁷ At 73.

III. Lost in the Bush

For whatever reason, Crown Law largely dropped out of the picture and the matter was taken up by the Northland Conservator, Chris Jenkins. Without hesitation, Jenkins (who has since retired) accepted that the land interests should be returned and DoC's legal team is now very focused on that outcome. Meanwhile, the Māori Land Court appointed the law firm Wackrow Williams & Davies to provide legal support to the family. The parties are working towards identifying a portion of the land to be partitioned. Although LINZ has not formally committed to paying for the survey, the expectation is that the Crown will cover the survey costs under the compensation provisions of the Land Transfer Act 1952 in final settlement of the Crown's responsibility under those provisions.⁸

Because the land can only be accessed through neighbouring forestry land with a permit from the forest owner, DoC has guided us on our two site visits to date (a third and final one is planned). The first site visit took place in 2014. There was another visit in January 2015, during which a cousin somehow became lost in the bush. (*Blimmin' Māori...*). Over two dozen police and search and rescue people came out to look for him and, sometime after midnight, they found him not far from the Tokawhero stream. His "bush walk", as he likes to call it, adds to the korero we are building up around the Motatau block and we are looking at whether the partitioned section might even include part of the stream. Since the stream is some distance from the legal road, we may need an easement along either the northern or southern boundary to ensure legal access to the partitioned area.⁹ (See map below.)

Apart from its value as ancestral land, the land is also significant in terms of its unique biodiversity. It includes high altitude podocarp and broadleaf forest, which is rare in Northland, with both regenerating and established native species such as horoeka, kohekohe, parataniwha, ponga, puriri, rata, rimu, supplejack, taraire, totara, towai and many others. The area is home to native fauna including brown kiwi, kukupa, the forest ringlet butterfly and several species of native fish. The options for the proposed new block include vesting it in the family,¹⁰ or vesting it subject to a kawenata,¹¹ or as

⁸ Letter from LINZ to Wackrow Williams & Davies dated 12 August 2014 (on file with author).

⁹ Either under Part 3B of the Conservation Act 1987 or TTWMA, s315(1)(a).

¹⁰ A simple vesting under s134 TTWMA.

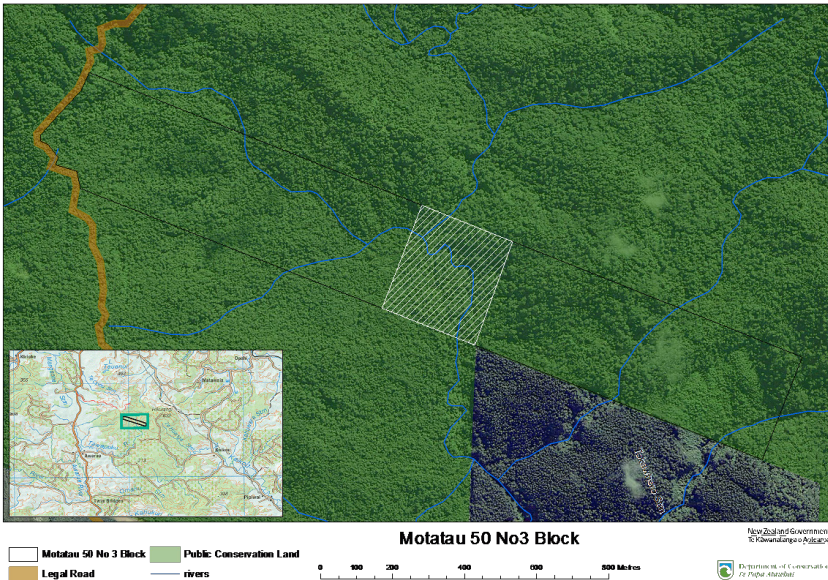
¹¹ The Minister of Conservation would need to apply to the Māori Land Court for a vesting order in the Rankin family subject to a kawenata under s77 or s77A of the Reserves Act 1977.

a Māori reservation with continued DoC management.¹²

IV. The Printer in Building 803

Nin and I worked on the same floor at law school. Nin’s office was next to the printer, and sometimes I would stop for a chat on my way to collecting my printing. She was keenly interested in what had happened at Motatau, and how we were dealing with it all. Uncle Jim has since died, Nin has left us, and even the printer has been moved to another part of the floor. Nin made the most of the time she had. She was a person who persevered, and I can only hope that we will too. Takoto mai e hoa i roto i te rangimarie o te runga rawa.

She was a person who persevered, and I can only hope that we will too. Takoto mai e hoa i roto i te rangimarie o te runga rawa.



¹² The Minister of Māori Affairs would apply for the land to be vested on this basis under TTWMA, s339.

WHĀNAU VERSES WHAKAPAPA IN THE MĀORI LAND COURT: A TRIBUTE TO NIN TOMAS

Jacinta Ruru¹

I. Introduction

In May 1999 I began my solo Māori law academic career at the University of Otago at a time when many formidable Māori were working at the North Island law schools. There was of course Dr Nin Tomas but also others including the now Judge Craig Coxhead, Matiu Dickson, Andrew Erueti, the now Judge Caren Fox, the now Judge Stephanie Milroy, Ani Mikaere, Linda Te Aho, Pierre Tohe, Andrea Tunks, Kylee Quince and Leah Whiu. I had the good fortune of a wise Dean who at the time encouraged me to travel to meet with these Māori law academics, many of whom have had a large influence on my academic life. The Waikato Law School cemented these early relationships by hosting the most wonderful wananga for us at a marae in Raglan in mid 1999. We all introduced our research-in-progress. I distinctly remember nervously presenting on day two about the only topic I could think of: adoption and the Māori Land Court. The year prior, as a student of Māori Land Law and as a volunteer at the Ngāi Tahu Māori Law Centre, I had completed a legal opinion about whether a testator ought to be able to devise his Māori freehold land interests to his adopted *out* now adult child which was potentially contrary to the reading of ‘child’ in section 108(2)(a) of Te Ture Whenua Māori Act 1993/Māori Land Act 1993 (TTWMA). Section 108 restricts the testamentary freedom of owners of Māori freehold land. Owners can only devise their beneficial interests in Māori freehold land to persons within the permissible categories in section 108. Children is one such category. The issue was whether an adopted out child remains a child of the testator for the purposes of Māori land succession. The obvious stumbling block is section 16(2)(a) of the Adoption Act 1955 which creates a legal fiction that deems the adopted child “to become the child of the adoptive parent, and the adoptive parent shall be deemed to become the parent of the child, as if the child had been born to that parent in lawful wedlock”.

In this article, 15 years on, I wish to return to adoption in the Māori Land Court because of this start in my career but also because of interesting subsequent case law on this point including the fascinating decision: *Shirley Dawn Quinn v Robert Tawhiri*

¹ Raukawa, Ngāti Ranginui me Ngāti Maniapoto. Professor, Faculty of Law, University of Otago.

Coote.² In this December 2013 case, the Māori Land Court approved an application to cancel a succession order in respect of Titi Island blocks vested in the deceased's adopted *in* children. An order was made revesting the shares back into the siblings of the deceased. This case is poignant because it captures the difficult interplay between whānau and whakapapa, the decision-making to privilege one over the other and the relationship between TTWMA and the Adoption Act 1955. But also I want to take this opportunity to write about a Māori Land Court decision because it is within the arena of Māori land law that Dr Nin Tomas has had the most impact on me. Of course I admire all of her other work, especially her PhD,³ and her stellar creation of *Te Tai Haruru Journal of Māori Legal Writing*, but Nin Tomas was a significant giant in my eyes in the Māori land law arena.

II. Nin Tomas and Māori Land Law

In 2000 - my first year of teaching Laws 455 Māori Land Law at the University of Otago - Tomas published two articles in the Butterworths Conveyancing Bulletin:

- Nin Tomas “Jurisdiction Wars: Will the Māori Land Court Judges Please Lie Down” (2000) 9 BCB 33; and
- Nin Tomas “Me Rapu Koe Te Tikanga Hei Karo Mo Ngā Whenua: Seek the Best Way to Safeguard the Whenua” (2000) 9 BCB 49.

These two articles have influenced me greatly in my career. Right now, I can think of few other pieces of New Zealand legal writing that have had such a profound effect on me. These two articles gave me the confidence to critically analyse judicial decisions from a Māori perspective. Today, I still discuss these articles with my Laws 455 Māori Land Law students.

In these two articles, Tomas discussed two Court of Appeal cases, *Attorney-General v Māori Land Court*⁴ and *McGuire v Hastings District Council*,⁵ and argued that read together they illustrated “a clear intention by the Court of Appeal to restrict the

² *Shirley Dawn Quinn v Robert Tawhiri Coote* (2013) Chief Judge's MB 1018 (2013 CJ 1018).

³ Nin Tomas “Key Concepts of Tikanga Māori (Māori Custom Law) in Tai Tokerau Past and Present” (PhD Thesis, University of Auckland, 2006).

⁴ *Attorney-General v Māori Land Court* [1999] 1 NZLR 689 (CA).

⁵ *McGuire v Hastings District Council* [2000] 1 NZLR 679 (CA).

jurisdiction of the Māori Land Court”.⁶ She critiqued the Court of Appeal in these cases as taking a “selective approach”,⁷ “reinforcing their own monocultural supremacy”,⁸ and “reading down”,⁹ “routinely ignoring”¹⁰ and “completely ignor[ing]”¹¹ the intent of TTWMA.

In brief, at issue in *Attorney-General v Māori Land Court* was whether the Māori Land Court had jurisdiction to return a stretch of general land to original Māori owners pursuant to section 18(1)(i) of TTWMA based on an argument that the land was being held in a fiduciary capacity.¹² The facts here concerned a block of Māori freehold land at the end of the Ruakituri Road alongside the then known as Te Urewera National Park.¹³ The land was taken many decades earlier for roading purposes prior to the establishment of the national park. Later it was vested in fee simple as general land in the Wairoa District Council. The original Māori owners argued that the Council was holding the land in a fiduciary capacity and because the road was unlikely to go ahead (because the land abutted the national park), the Court should vest the land back to them. The Māori Land Court first heard this case.¹⁴ It decided that the Court does have jurisdiction to consider a fiduciary claim in regard to general land and the facts warranted the Court making an order vesting the land back in the original Māori owners. On judicial review, the High Court agreed that the Court had the jurisdiction but that the facts were not sufficient to warrant the vesting order because the Council had not made a final decision to not proceed with building the road.¹⁵ The Court of Appeal disagreed on the jurisdiction point. It held that even though s 18(1)(i) states that the Māori Land Court has jurisdiction to do this with “any specified land”, this phrase must mean any specified *Māori* land (that is, not general land).

⁶ Nin Tomas “Jurisdiction Wars: Will the Māori Land Court Judges Please Lie Down” (2000) 9 BCB 33 at 33.

⁷ At 35.

⁸ Nin Tomas “Me Rapu Koe Te Tikanga Hei Karo Mo Ngā Whenua: Seek the Best Way to Safeguard the Whenua” (2000) 9 BCB 49 at 55.

⁹ At 52 and 54.

¹⁰ At 52.

¹¹ At 55.

¹² Section 18(1)(i) reads that the Māori Land Court has jurisdiction to “determine for the purposes of any proceedings in the court or for any other purpose whether any specified land is or is not held by any person in a fiduciary capacity, and, where it is, to make any appropriate vesting order”.

¹³ Now simply Te Urewera, see Te Urewera Act 2014.

¹⁴ Māori Land Court, Tairāwhiti District, Appln 94546, 21 October 1996.

¹⁵ (1998) 3 NZ ConvC 192, 772.

In brief, at issue in *McGuire v Hastings District Council* was whether the Māori Land Court had jurisdiction under s 19(1)(a) of TTWMA to issue an injunction restraining a local authority from embarking on the designation processes under the Resource Management Act 1991 (RMA). The facts here concerned Māori freehold land that the Hastings District Council wanted to acquire for the purposes of creating a northern arterial link from Hastings and Havelock North to the Napier motorway. The Māori land owners protested the proposed land taking not by pursuing usual options under the RMA and in the Environment Court but under TTWMA and in the Māori Land Court. The owners argued that the Māori Land Court should issue an injunction order pursuant to s 19(1)(a) because the Council action constituted trespass and injury.¹⁶ The Māori Land Court issued an interim injunction order.¹⁷ On judicial review, the High Court¹⁸ and Court of Appeal held that the Māori Land Court does not have the necessary jurisdiction to do this. According to the High Court and the Court of Appeal, the Māori Land Court's specialist Māori land jurisdiction could not be stretched to consider laws of general application including the RMA that has its own tailor-made procedural safeguards for Māori. The High Court held that if it could be proven that the Hastings District Council had acted unlawfully, the correct approach was to appeal the decision to the Environment Court or seek a High Court review of the decision. The Privy Council also later agreed.¹⁹

Tomas had a lot to say about both of these Court of Appeal judgments. In regard to *Attorney-General v Māori Land Court*, Tomas said: "The Court of Appeal's approach to interpretation in this case is a superb example of the *maxim generalis specialibus non derogant* devouring itself".²⁰ This Latin maxim of legal interpretation means the provisions of a general statute must yield to those of a special one. She argued that "the Court of Appeal may be perpetuating the historical approach to legislation affecting Māori land that Parliament was attempting to escape".²¹ She argued this because,²²

¹⁶ Section 19(1)(a) reads that the Court may issue an injunction "against any person in respect of any actual or threatened trespass or other injury to any Māori freehold land, Māori reservation, or wahi tapu".

¹⁷ *Chadwick Family Trust & Karamu GB (Balance) v Hastings District Council* Māori Land Court, 29/4/1999, 156 Napier MB 242.

¹⁸ (1999) 5 ELRNZ 514; High Court Napier 3/9/1999, CP11/99.

¹⁹ *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC). Note, Tomas critiqued this Privy Council decision too: see Nin Tomas "Te Ture Whenua Māori Act and the Resource Management Act: *McGuire v Hastings District Council*" (2002) 10 BCB 22.

²⁰ Tomas "Jurisdiction Wars", above n 6, at 36.

²¹ At 36.

²² At 36.

In the past the New Zealand Courts have purposely ignored rights accruing to Māori in legislation. One of the most blatant examples is fisheries legislation under which the clear meaning of the words ‘nothing in this Act shall affect any Māori fishing rights’ (Fisheries Act 1983, s 77(2) and its antecedents which go back to 1877) was disregarded by the Courts for almost 100 years. Why? Because it went against the grain of general legislation concerning fisheries, general rights of individuals to fisheries, and piqued the prejudices of Pākehā Judges. Te Ture Whenua Māori Act goes further. It is an entire Act that has Māori values as its basis. As such, it moves away from the arena of the Torrens system and the underlying Pākehā law with which most Judges are familiar and comfortable, challenging them to step outside their legal comfort zone. And therein may lie the answer as to why the Court of Appeal so rigorously focused on status of land, rather than the need to protect Māori land interests, in their decision. It is tidier and far less troublesome to confine the jurisdiction of the Māori Land Court, than to have them meddling with land that is held under another system of land tenure. Hence status prevails over Māori land interests. Unfortunately, this may not be what Parliament intended.

And this paragraph too,²³

The Court of Appeal has ring-fenced the jurisdiction of the Māori Land Court under s 18(1)(i) to Māori freehold land and General land owned by Māori. Its decision is not challengeable unless one takes the long trek to London and the Privy Council. This is hardly likely as the cost of pursuing a case through the general Courts of New Zealand is already prohibitive for Māori. Ironically perhaps, cost is another reason why the Māori Land Court may be the better venue for hearing fiduciary claims brought by Māori. While one detects an underlying resistance in this case, to the Judges of the Māori Land Court venturing into the Torrens system arena via fiduciary investigations, perhaps the concern should more properly be in the other direction. It may be that the Judges of the general courts do not have sufficient knowledge and understanding of the Māori focus of Te Ture Whenua Māori Act to properly conduct the inquiry.

Tomas was equally scathing of the Court of Appeal’s decision in *McGuire v Hastings District Council*. She stated:²⁴

²³ AT 37.

²⁴ Tomas “Me Rapu Koe Te Tikanga Hei Karo Mo Nga Whenua”, above n 8, at 54.

This judgment is also heavily laced with monoculturalism in that the Judges seem to be unable to comprehend that ‘plain and ordinary meaning’ derived from a Pākehā common law context may not be determinative when dealing with an Act that has a Māori philosophical and language base. The goal seems to be simply to restrict the jurisdiction of the Māori Land Court and in that way avoid the issues of cultural interface raised when TTWMA comes into contact with any other statute.

These two articles by Tomas contain strong coherent arguments with a principled challenge to the courts and Parliament to apply more justly the law. The effect of this writing on me is obvious. In one of my very first pieces of published work I followed Tomas’ lead and critiqued the Court of Appeal’s November 2002 decision in *Bruce v Edwards* as another example of the upper appeal courts curtailing the jurisdiction of the Māori Land Court.²⁵ I published this work in the same journal where Tomas had published her critiques of *Attorney-General v Māori Land Court* and *McGuire v Hastings District Council* - the Butterworths Conveyancing Bulletin.²⁶ My opening sentence in that article referenced these two Tomas articles. Without the foundation laid by Tomas, I doubt I would have had the confidence to write that article (and thus potentially much of my subsequent writing). She had identified a concerning theme in the decisions of the upper appeal courts and I merely reinforced her conclusions. The *Bruce v Edwards* case was an easy case to critique in the light of Tomas’ work.

I like to think that through the work of Tomas, the upper appeal courts were challenged to confront their biases. Many of the upper appeal court decisions since have read quite differently to these three abovementioned cases. *The Attorney-General v Ngati Apa* Court of Appeal decision in 2003 concerning the jurisdiction of the Māori Land Court to determine the status of whether specific stretches of foreshore and seabed were Māori customary land was an obvious circuit breaker.²⁷ Here the Court of Appeal agreed that the Māori Land Court did have the necessary jurisdiction. The Court of Appeal has since heard several cases concerning TTWMA and all demonstrate a comparatively stronger understanding of the Act including the special foundation of the preamble and sections 2 and 17 that reinforce the principles of retention

²⁵ *Bruce v Edwards* [2003] 1 NZLR 515.

²⁶ Jacinta Ruru “*Bruce v Edwards*: the Court of Appeal’s latest ruling on Māori land” (2003) 10 *BCB* 169.

²⁷ *Attorney-General v Ngati Apa* [2003] 3 NZLR 643.

and utilisation of Māori land.²⁸ Moreover, the recent Environment Court decision concerning the proposed taking of Patricia Grace's Māori freehold land pursuant to the Public Works Act 1981 for roading purposes is a strong contemporary example of the new respect for the importance of retaining Māori land in Māori ownership even in the other courts of first instance.²⁹ Tomas' work, I believe, has paved the way for more respectful judicial decisions concerning Māori land. I now wish to turn to a Māori Land Court decision that has interested me recently.

III. Shirley Dawn Quinn v Robert Tawhiri Coote

Shirley Dawn Quinn v Robert Tawhiri Coote is a Māori Land Court decision that concerned succession to beneficial interests in one of the Titi Islands, in particular, whether an adopted *in child* can succeed to such interests.³⁰ The Titi Islands consist of about 36 islands to the east, south and west of Rakiura Stewart Island. Preserved titi (muttonbirds/sooty shearwaters) are an important part of the Ngai Tahu economy and diet.³¹ In 1864, the Crown negotiated an agreement to purchase Stewart Island from Ngai Tahu and as part of this agreement reserved 21 of the surrounding islands exclusively for certain Ngai Tahu individuals and their descendants (known as the Beneficial Titi Islands). The remaining Titi Islands were returned to Te Runanga o Ngai Tahu ownership as part of the Ngai Tahu Claims Settlement Act 1998. Since 1909, the Māori Land Court has had exclusive jurisdiction to update the list of owners to the Beneficial Titi Islands with the most recent provision for this stated in s 6 of the Māori Purposes Act 1983.

Section 6(1) defines owners as:

in relation to the islands, means the persons found by the court to be beneficially entitled to the islands under and in accordance with the provisions of section 109 of the Māori Purposes Act 1931 and shown in the records of the court as being so entitled at the commencement of this section.

²⁸ For example, see *Clarke v Karaitiana* [2011] NZCA 154; *Kameta v Nicholas* [2012] NZCA 350, [2012] 3 NZLR 573; *Tito v Tito* [2012] NZCA 493; *Rameka v Hall* [2013] NZCA 203; *Naera v Fenwick* [2013] NZCA 353; *The Te Aute Trust Board v Hauraki* [2014] NZCA 532.

²⁹ *Grace v Minister for Land Information* [2014] NZEnvC 82. See also the related Māori Land Court decision: *Grace – Ngarara West A25B2A* (2014) 317 Aotea MB 268 (317 AOT 268).

³⁰ Above n 2.

³¹ Michael Stevens "An intimate knowledge of 'Māori and mutton-bird': Big Nana's story" (2013) 14 JNZS 106-121. See also: Atholl Anderson, Judith Binney, and Aroha Harris *Tangata Whenua: An Illustrated History* (Bridget Williams Books, Wellington, 2014).

Section 6(3) reads:

The islands shall hereafter be deemed to be Māori freehold land under and for the purposes of the principal Act, and, subject to the succeeding provisions of this section, the provisions of that Act shall apply accordingly”.

The principal Act then meant the predecessor to TTWMA, the Māori Affairs Act 1953. It now means the TTWMA.

Section 6(4) reads:

The court shall continue to have exclusive jurisdiction to determine relative interests and succession to such interests of deceased owners and appoint trustees for persons under disability in respect of the beneficial ownership of the islands; and in determining any such succession the court may exercise its jurisdiction in the same manner as it did before the commencement of this section, notwithstanding any of the provisions of the principal Act relating to succession on intestacy to undivided beneficial freehold interests in common in Māori freehold land.

Another relevant statute is the Titi (Muttonbird) Islands Regulations 1978. These Regulations explicitly restrict non-Rakiura Māori from entering the Titi Islands without permission from the Rakiura Titi Committee.³² *Rakiura Māori* are defined to mean a person who is a member of the Ngai Tahu Tribe or Ngatimamoe Tribe and is a descendant of the original Māori owners of Stewart Island.³³ Thus, only those who have a beneficial interest are permitted to enter the Titi Islands. The Regulations do make an exception for children and grandchildren of beneficial owners. They can accompany the beneficiary to his/her island and even go unaccompanied provided their parent/grandparent has authorized this in writing.³⁴

The facts of this case concern Shirley Quinn who died leaving a will devising her interests in three Titi Islands to her three legally adopted in children. On the 5th June 2008, the Māori Land Court issued a succession order in favour of these three adopted children in reliance on the Adoption Act 1955.³⁵ That is, as stated at the outset of this article, s

³² See Titi (Muttonbird) Islands Regulations 1978, reg (3)(1).

³³ Reg 2.

³⁴ Regs 3(3) and (4).

³⁵ At 124 South Island MB 224-228.

16(2)(a) of the Adoption Act creates the legal fiction that deems the adopted child to be the child of the adoptive parent as if the child had been born to that parent. Thus, the legal interpretation of ‘child’ in New Zealand’s legislation is to include adopted in children. But is this correct in the context of Māori freehold land, and specifically Titi Islands, when blood connection to the lands is significant?

Following this Māori Land Court decision, Robert Tawhiri Coote wrote to the Court in his capacity as Chairperson of the Raikura Titi Committee expressing his concern that the Court was making orders in favour of adopted in persons who were not connected to Rakiura Māori by bloodline. A Māori Court Judicial Conference was called under s 67 of TTWMA to consider this issue. On 7 August 2009, Judge Carter presided over the Judicial Conference and produced a 39-paragraph report that the Chief Judge relied on in deciding this later case in 2013.

Mr Coote’s position was that only persons of blood descent in fact should be entitled to succeed to beneficial interests in Titi Islands. His argument meant that the Adoption Act 1955 fiction should not apply in the special circumstances of the Titi Islands. He claimed that he had been adversely affected by the succession order because the Māori Land Court in 2008 had not considered:³⁶

- the customs (“tikanga”) of the Beneficial Titi Islands;
- the Titi (Muttonbird) Notice 2005;
- the Titi (Muttonbird) Regulations 1978;
- section 48(d) of the Conservation Act 1987;
- the implicit intent of the reservation of 21 Titi Islands within the Deed of Cession of Stewart Island; and
- the intent of s 6(4) of the Māori Purposes Act 1983.

Mr Coote argued that the Adoption Act 1955,³⁷

cannot impact on succession to the Titi Islands due to the Māori Purposes Act 1983 specifying that the law to be applied to successions to the Titi Islands is that in force prior to 1 April 1954. The Adoption Act 1955 did not exist prior to that date and while some provisions of the Adoption Act can act retrospectively they were not existing law prior to 1 April 1954 and therefore could not be applied.

³⁶ *Shirley Dawn Quinn v Robert Tawhiri Coote*, above n 163, at [2].

³⁷ At [7(i)].

Judge Carter’s report is reproduced in full in the Chief Judge’s 6 December 2013 judgment.³⁸ Judge Carter’s report considered all this law in detail. Judge Carter concluded,³⁹

In relation to the Titi (Muttonbird) Island Regulations 1978 which defines that a beneficiary to those islands means a Rakiura Māori who holds a succession order from the Māori Land Court entitled them to a beneficial interest in any beneficial island. A Rakiura Māori is further defined as a member of the Ngai Tahu tribe or Ngatimamoe tribe who is a descendant of the original Māori owners of Stewart Island. Therefore only those connected to the bloodline of original owners are entitled to birding rights and those legally adopted persons with no blood connection are not.

In regard to jurisdiction, the Court stated that pursuant to s 44 of TTWMA the Chief Judge may cancel or amend an order made by the Court if satisfied that the order was erroneous in fact or in law.⁴⁰ Section 45 permits an applicant who has been adversely affected by an order to ask the Court to exercise these special powers. The Court cited earlier judgments that held that the Chief Judge “must exercise his jurisdiction by applying the civil standard of proof of the balance of probabilities”⁴¹ and added,⁴²

Section 45 is a unique section amongst the Courts of New Zealand. It was evidently felt that, as a titles Court, the principle of indefeasibility was extremely important and consequently orders should not be easy to overturn.

The Court stated the issue as “whether the Court was in error when it found that adopted children with no blood connection to the Titi Islands were entitled to succeed”.⁴³ The Court stated that if this issue was simply one concerning *Māori* freehold land then adopted children with no blood connection *are* entitled to succeed pursuant to TTWMA because of the operation of the Adoption Act 1955.⁴⁴ But does it matter that the lands are Titi Islands? Is the law relating to Titi Islands interests distinct

³⁸ At [4].

³⁹ At [21].

⁴⁰ At [10].

⁴¹ At [12].

⁴² At [14].

⁴³ At [17].

⁴⁴ At [18].

from the general laws set out in TTWMA?⁴⁵

Yes, answered the Court,⁴⁶

Having considered the report from Judge Carter and the laws controlling muttonbirding and successions to the Titi Islands, there is a clear synergy in objectives between them. That is to enable the benefits of birding rights and succession to interests in Titi Islands to be enjoyed by blood descendants of Rakiura Māori who were the original owners of the Titi Islands.

And,⁴⁷

Further, I agree with Judge Carter that the legislation is clear that the Adoption Act 1955 does not apply to Titi Islands successions, and that the entitlement to Titi Islands interests is determined by the Native Land Act 1931 which ensures that entitlement is to be determined in accordance with Native Custom. That is, only persons who are blood descendants of Rakiura Māori who were the original owners of the Titi Islands are persons entitled to succeed.

The Court thus cancelled the succession orders to Shirley Quinn's adopted children and vested them equally in her eight siblings.

The rights of adopted children to Māori freehold land interests have always been controversial. The High Court held in November 2008 that a person adopted *out* could not make a claim against his or her birth parent's estate in terms of s 3(1) of the Family Protection Act 1955 because the adopted out child does not constitute a child of the birth parent.⁴⁸ But the Māori Land Court held in October 2012 that a person adopted *out* could succeed to Māori freehold land interests devised to him or her in a will written by a member of the birth family (in this case the birth grandfather) under s 108 of TTWMA. The Court accepted this not because the person could claim to be a grandchild of the testator (as required by s 108(2)(a)) but because the person in this case was related by blood and a member of the hapū associated with the land (as

⁴⁵ At [19].

⁴⁶ At [22].

⁴⁷ At [23].

⁴⁸ See *Sainsbury v Graham* HC Whanganui CIV 2008-483-000068, 28 November 2008, Justice Wild, discussed in (2009) March Māori LR 7.

required by s 108(2)(c)).⁴⁹ Thus *Hovell* has limited the Adoption Act fiction to only severing the relationship between the birth child and the birth parent (the whānau) but not severing in fact the blood relationship (the whakapapa).

On 8 October 2013, the Māori Land Court again reinforced this precedent set in *Hovell* that blood children named in a will can succeed to Māori freehold land interests held by the blood parent via s 108(2)(c).⁵⁰ In this case, the Court emphasised that s 16(2)(e) of the Adoption Act 1955, which reads “subject to the Citizenship Act 1977, the adoption order shall not affect the race, nationality, or citizenship of the adopted child”, aligns with s 108(2)(c) of TFWMA. The Court stated:⁵¹ “[i]n simple terms neither s 16(2)(e) Adoption Act 1955 nor s 108(2)(c) Te Ture Whenua Māori Act 1993 sever a person’s blood connection to the land.”

Shirley Dawn Quinn v Robert Tawhiri Coote extends this jurisprudence to emphasising whakapapa but this time within the context of adopted *in* children and the Titi Islands. This case holds that the Adoption Act 1955 fiction captured in s 16(2)(a) does not apply in regard to succession to the Titi Islands because other law specific to the Titi Islands gives prominence to whakapapa and legal adoptions ought not to muddy this – or in other words, a child may be a child in law but not in fact. Read together these cases reinforce a growing precedent set by the Māori Land Court that the importance of blood relationships with Māori land is fundamental to a point where, if pushed, whakapapa will be prioritised over whānau. This decision certainly limits the rights of adopted children into a whānau with Titi Island interests. While their adopted parent with the blood link to the Titi Islands is alive they will be able to enter the Titi Islands and take birds. But once that parent dies, will these children (and their children) be able to continue to enjoy access to these Islands? Perhaps only with permission from the Rakiura Titi Committee.

IV. Conclusion

The *Shirley* case demonstrates the new forcefulness of the Māori Land Court in confidently making hard decisions about Māori land. It is representative of a new era where the Māori Land Court and the Māori Appellate Court are judicially recognised as having the expertise and standing to decide legal issues concerning Māori land and

⁴⁹ *Estate of Ross Glencairn Hovell* (2012) 25 Tairawhiti MB 258 (25 TRW 258), discussed in (2012) October Māori LR 15.

⁵⁰ See *Paul Anderson v Anna Anderson* (2013) Chief Judge’s MB 783 (2013 CJ 783).

⁵¹ At [21].

related tikanga Māori issues. As the Court of Appeal recently stressed in regard to the Māori Appellate Court, it is specialist court with “collective knowledge of tikanga or Māori customary values and practices”.⁵² The work of Nin Tomas is in part a testament to this new respectful era.

The loss of Nin Tomas to the small Māori legal academic community is immense. We have lost our fearsome writer but too we have lost our dear irreplaceable mentor. To Nin, thank you for all of your treasured work and friendship. You certainly made opportunities for me in my career and instilled in me much confidence and belief that I was doing right. You examined my LLM thesis. You gave me lead roles in your cherished Te Tai Haruru. You always had time to meet with me for coffee when visiting Auckland. You came to my “*In Good Faith*” conference marking the 20th anniversary of the *Lands* case in the middle of an icy Dunedin winter (and even though you left early, because it was so cold!, I have captured moments of your presence in your bright red coat). I wish I had told Nin that I treasured her work. Perhaps she knew anyway. Hopefully. She certainly remained a mentor until the end of her life. I received my last email from her in late January 2014 where we discussed what content we were going to include in our Māori land law course materials for the upcoming teaching semester. We talked about work life balance, stress and health too. She signed that last email ‘lots of love’. My love to you too Nin.

⁵² *Kameta v Nicholas*, above n 28, at [9].

MĀORI SEEKING SELF-DETERMINATION OR TINO RANGATIRATANGA? A NOTE

Dr Valmaine Toki¹

I. Introduction

Dr Nin Tomas wrote a considered and substantial piece entitled “Indigenous Peoples and the Māori: The Right to Self-Determination in International Law - From Woe to Go” for the New Zealand Law Review published in 2008.² In her conclusion she notes two ways in which self-determination has been implemented by the state: first, by “greater tolerance and benevolence along a series of principled guidelines”,³ and, second, as a “peoples-centred, enabling principle that allows Indigenous peoples to re-establish their social, economic and political institutions”.⁴

In 2010, New Zealand reversed its position and supported the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration).⁵ With this in mind, this short piece revisits the notion of self-determination by examining the differing dynamics of concepts of external and internal self-determination before a short discussion on pluralism and the relationship between tino rangatiratanga and self-determination. In conclusion some thoughts are offered on a potential form of self-determination that could be consistent with the exercise of tino rangatiratanga.

II. United Nations Declaration on the Rights of Indigenous Peoples

The Declaration is the only United Nations instrument dedicated to Indigenous peoples’ human rights and to addressing Indigenous-specific concerns. The Declaration does

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² Nin Tomas “Indigenous Peoples and the Māori: The Right to Self-Determination in International Law - From Woe to Go” (2008) NZ L Rev 639.

³ At 681.

⁴ At 681.

⁵ United Nations Declaration on the Rights of Indigenous Peoples (2007) UN GAOR, 61st sess, GA Res 61/295, UN Doc A/RES/47/1. Australia, Canada and the United States have also changed their initial vote and signalled their support for the Declaration.

not create new rights. Despite the compromises made,⁶ it is the only international instrument that views human rights through an Indigenous lens.⁷

The Declaration promotes measures to remedy the historical and systemic denial of Indigenous people's rights⁸ and affirms rights derived from human rights principles such as equality and self-determination. These basic rights have been denied to Indigenous peoples and the Declaration recognises such rights and contextualises them in light of their particular characteristics and circumstances.⁹ To this end, the Declaration seeks to restore equality with the relevant form of self-determination, for example, for Indigenous peoples who have been forcibly and violently alienated from their lands territories and resources, a form of self-determination that could attach could be an external form. Subsequently for those Indigenous peoples where the alienation is perceived as less violent or where assimilation has occurred, perhaps more of an internal form of self-determination could attach to restore equality.

III. External Self-Determination

The Declaration couches the right of self-determination as a fundamental human right for Indigenous peoples. Article 3 of the Declaration states:

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Brookfield acknowledges that a right of self-determination exists for Indigenous peoples. However, contrary to international law, he was less certain as to whether this right would extend to include a right of external self-determination for Indigenous

⁶ For example, the article providing for the right of self-determination was progressively watered down during the text negotiations and for some Indigenous peoples this compromise was too great. See Moana Jackson "The Face Behind the Law: the United Nations and the Rights of Indigenous Peoples" [2005] 9(2) Yearbook of NZ Jurisprudence 10. See also Kiri Toki "What a difference a DRIP makes; the Implications of Officially Endorsing the United Nations Declaration on the Rights of Indigenous Peoples" (2010) 16 Auckland U L Rev 243 at 248 for discussion on the weakening provisions of military action in article 30(1) of the Declaration.

⁷ S James Anaya *International Human Rights and Indigenous Peoples* (Aspen Publishers, New York, 2009) at 63.

⁸ Anaya, above n 7.

⁹ Anaya, above n 7.

peoples.¹⁰ Some states considered that the Declaration would provide Indigenous peoples with a right to secede from the State, thereby impacting on their state sovereignty and political unity.¹¹ But according to Professor James Anaya:¹²

... for most peoples, especially in light of cross cultural diverse identities, full self-determination, in a real sense, does not justify a separate state and may even be impeded by a separate state. It is a rare case in the post-colonial world in which self-determination, understood from a human rights perspective, will require secession or the dismemberment of states.

Anaya views self-determination as a human right and when self-determination is denied, a breach occurs, requiring a remedy. This remedial form of self-determination is proportionate to the nature of the breach or violation.¹³ Following this reasoning, external self-determination would only be invoked when the nature of the violation was so great that external self-determination is the only adequate remedy.

From Anaya's perspective, for Māori to claim external self-determination, the violations and actions, or inactions, by the Crown would need to be viewed as so harmful that external self-determination is a justified remedy. In view of the violations suffered by Māori, such as Tūhoe,¹⁴ it is plausible that when applying this narrative external self-determination could be a potential remedy. It is acknowledged that Tūhoe have always sought an external form of self-determination.¹⁵

As it is uncertain when, and if, external self-determination would be achieved, alternatives such as self-government, internal self-determination or legal pluralism

¹⁰ FM (Jock) Brookfield *Waitangi & Indigenous Rights* (2ed ed, Auckland University Press, Auckland, 2006) at 77.

¹¹ Brookfield, above n 10.

¹² Anaya, above n 7, at 60.

¹³ At 189.

¹⁴ See Judith Binney *Encircled Lands: Te Urewera, 1820-1921* (Bridget Williams Books, Wellington, 2008) at 68. See also Waitangi Tribunal *Taranaki Kaupapa Tuatahi Report* (Wai 143, 1996) for the violations and alienations against the peoples of Taranaki.

¹⁵ For example, the Urewera District Native Reserve Act 1896 that provided for the "ownership and local government of the native lands in the Te Urewera district" and allowed tino raNgātiratanga for the Tūhoe people. However, this was eventually to result in the opening up of traditional lands to settlers. See also Tūhoe Claims Settlement Act 2014; Te Urewera Act 2014, ss 17-18 (management of Te Urewera).

may be appropriate. Many Māori commentators, such as Andrea Tunks,¹⁶ have argued that Māori do not seek external self-determination but rather tino rangatiratanga. According to Moana Jackson, tino rangatiratanga is more akin to sovereignty.¹⁷ For instance, Māori follow their own tikanga within their own marae. Potentially this practice of tikanga could extend to determining their own form of justice, thereby exercising tino rangatiratanga.

IV. Internal Self-determination

The key distinction between internal and external self-determination is that internal self-determination operates within the existing state's legal framework.¹⁸ It is viewed as the right for people to freely choose their own political and economic regime.¹⁹ Internal self-determination is consistent with article 46 of the Declaration:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent States.

And, also article 4:

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Thus, article 4 recognises the right of Indigenous peoples to realise their autonomy or self-government over their internal and local affairs. Read together with articles 5, 18 and 19, the Declaration provides for Indigenous peoples the right to participate fully, if they so choose, in the political, economic, social and cultural life of the State and to participate in all decisions affecting them or their rights.

¹⁶ Andrea Tunks "Pushing the Sovereign Boundaries in Aotearoa" (1999) 4(23) *Indigenous Law Bulletin* 15 at 69.

¹⁷ Moana Jackson "Where Does Sovereignty Lie?" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) at 196 – 197.

¹⁸ Toki "What a Difference a DRIP Makes", above n 6, at 243–273.

¹⁹ See Antonio Cassese *Self Determination of Peoples* (Cambridge University Press, Cambridge, 1995) at 101.

Historically models such as the Kingitanga, established as a response to land alienations and exclusion from Parliament, provide an example of internal self-determination. More recently the ‘tricameral model consisting of an Iwi/Hapū assembly (the rangatiratanga sphere), the Crown in Parliament (the kāwanatanga sphere) and a joint deliberative body (the relational sphere)’ proposed by the Independent Working Group on Constitutional Transformation also suggests such a governance structure.²⁰

The thrust of self-determination is to enable Indigenous peoples to be in control of their destinies and to create their own political and legal organisations.²¹ This does not necessarily amount to separate statehood, although that possibility remains.²²

Erica Irene Daes argues that although article 3 provides grounds for an argument to achieve external self-determination, in some instances, Indigenous peoples have a mutual duty to share power with the existing state.²³ Further, Professor James Anaya argues, that although external self-determination often is not the objective of Indigenous peoples, it has, nevertheless, held a symbolic rhetoric as it embraces the ideology of Indigenous sovereignty.²⁴ It would thus appear that the Declaration provides for two types of self-determination.

V. Aotearoa/New Zealand

Under New Zealand’s Constitution, it is assumed that Parliament is supreme and has full power to make law.²⁵ It is suggested that this assumption is subject to the effect of developing common law in New Zealand together with the recognition of custom law

²⁰ *He Whakaaro Here Whakaumu Mo Aotearoa* - The Report of Matike Mai Aotearoa – the Independent Working Group on Constitutional Transformation (25 Jan 2016).

²¹ See discussion by Iris Marion Young “Together in Difference: Transforming the Logic of Group Political Conflict” in Will Kymlicka *The Rights of Minority Cultures* (OUP, New York, 1995) at 155 – 175 where she notes that “what a bicultural society means... for Māori ... has not ended” highlighting the importance for Indigenous peoples to be in control of their destinies.

²² See also discussion by James Tully “Indigenous Peoples and Freedom” in James Tully (ed) *Public Philosophy in a New Key* (Cambridge University Press, New York, 2008) at 285 – 287.

²³ Malgosia Fitzmaurice “The Question of Indigenous Peoples Rights: A Time for Reappraisal?” in Duncan French (ed) *Statehood and Self-Determination* (Cambridge University Press, Cambridge, 2013) at 350. See also Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work The United Nations Declaration on the Right of Indigenous Peoples* (IWGIA, Copenhagen, 2009).

²⁴ Anaya, above n 7.

²⁵ Constitution Act 1986, s 15(1).

by the Courts,²⁶ potential equitable remedies for Māori and Treaty jurisprudence.²⁷

The New Zealand government maintains the orthodox view that the Declaration is morally aspirational with no binding force but is affirmed so far as it was consistent with New Zealand's domestic law.²⁸ As an expression of aspiration, the New Zealand Government espoused that "it will have no impact on New Zealand law and no impact on the constitutional framework".²⁹

The duties and obligations contained in the Treaty of Waitangi reflect the Crown's human rights responsibilities, such as recognition of "the unfettered chiefly powers [tino rangatiratanga] of the rangatira, the tribes and all the people of New Zealand over their lands, their dwelling-places and all of their valuables [taonga]".³⁰ It is suggested that in light of the continuing Treaty breaches by the Crown, the entrenchment of fundamental Indigenous rights, including that of self-determination, is required to step towards a form of equality for Māori. In the absence of entrenchment, it is foreseeable that applying the text of the Treaty consistently with the Declaration could provide an avenue for Māori to attain self-determination.³¹

²⁶ See *Takamore v Clarke* [2012] NZSC 116 [2013] 2 NZLR 733 for a discussion and approach of the New Zealand Supreme Court on tikanga Māori.

²⁷ For example see *Paki v Attorney-General* [2014] NZSC 118, [2015] 1 NZLR 67 where the Court noted that the unique nature of the relationship between the Crown and Māori under the Treaty could result in the recognition of a *sui generis* fiduciary duty as appropriate. However, the court also noted that, given their recognition of parliamentary sovereignty, the courts should not develop the law in this area in a manner inconsistent with legislation, and should leave such development to Parliament. However, the outcome of the decision in the appeal of *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 is likely to clarify the uncertainty of whether or not the Crown owes fiduciary duties to Māori.

²⁸ Laura MacKay "The United Nations Declaration on the Rights of Indigenous Peoples; A Step Forward or Two Back?" [2013] (1) NZ Pub Int Law J at 177.

²⁹ McKay, above n 28.

³⁰ See Distinguished Professor Dame Anne Salmond's Brief of Evidence for the Waitangi Tribunal (Wai 1040, 17 April 2010) at 11 where she provides a translation of Article 2 of the Treaty.

³¹ It is envisaged that this application would be initially confined to legal submissions asserting the right of Māori to self-determination. However, with the additional support of international instruments, such as the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, which contain general human rights and considered in light of favourable general comments and creative legal interpretations of treaty monitoring-body decisions it is suggested that this application can advance indirectly Indigenous rights at the UN level and perhaps be persuasive for recognition of the right of self-determination for Māori. See also Waitangi Tribunal *Whaia te Mana Motuhake / In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) where the Tribunal provided an opinion on how the Declaration can inform Treaty principles such as Māori retaining their 'rangātiratanga' over their resources and taonga.

The internationally recognised right to self-determination is fundamental to recognising and realising the rights of Indigenous peoples including to culture and tikanga Māori. Achieving self-determination might allow Māori to freely choose and determine their own political and legal systems. The synergy with tino rangatiratanga provided for in the Treaty further supports this dialogue.

Professor James Anaya stated:³²

I have observed several positive aspects of New Zealand's legal and policy landscape, as well as ongoing challenges, in relation to Māori issues. A unique feature of New Zealand is the Treaty of Waitangi of 1840, which is understood to be one of the country's founding instruments. The principles of the Treaty provide a foundation for Māori self-determination based on a real partnership between Māori and the New Zealand State, within a framework of respect for cross cultural understanding and the human rights of all citizens. I have learned of steps being taken within this framework, which can be described as constituting a good practice in the making, and I hope that concerted efforts will continue to be made in this regard.

If the right, for Māori, to self-determination was realised through a Treaty partnership, this could result in a pluralistic society where Māori might, for example, exercise their right of self-determination over their resources such as freshwater. The Crown, in a true partnership, might respect that right and enter into an agreement should the Crown seek access to the resource of freshwater. On a constitutional level this arrangement would broadly align with the bicameral model proposed by Matike Mai.³³ This model comprises of an Iwi/Hapū assembly and the Crown in Parliament with distinct rangatiratanga and kāwanatanga spheres.³⁴

³² Statement of the United Nations Special Rapporteur on the situation of the human rights and fundamental freedoms of Indigenous peoples, Professor James Anaya, upon conclusion of his visit to New Zealand, 22 July 2010.

³³ The Report of Matike Mai Aotearoa, above n 20.

³⁴ Above n 20.

VI. Pluralism

Anne Griffiths notes that,³⁵

... legal pluralism has been invoked to uphold notions of authority and legitimacy, to favour or promote one set of legal claims over another

Underscoring this comment are issues of who has the power to make law and who is to benefit. However, Sally Engle Merry describes legal pluralism as “a situation in which two or more legal systems coexist in the same social field”.³⁶

With the use of case studies from Australia and Canada, Kristen Anker provides convincing comments on ways to make space for Indigenous legal traditions within a sovereign nation.³⁷ Anker states:³⁸

... that an approach to law known as ‘legal pluralism’ provides a more apt language for treating ‘the justice question’ of the place of Indigenous law than orthodox legal theory because, in the way I conceive it, a legal pluralist recognition is an engagement about the nature of law and not about a formal relationship between two fixed entities.

Whilst this may be logically sound, on a practical note, within a legal system that fiercely adheres to the principle of Parliamentary sovereignty underpinned by legal positivism, entertaining the notion of legal pluralism in New Zealand to accommodate tikanga Māori appears unworkable.³⁹

³⁵ Anne Griffiths presentation to *Human Rights and Legal Pluralism in Theory and Practice Conference 5th to 6th December 2014*, Norwegian Centre for Human Rights (NCHR) in co-operation with the Rights, Individuals, Culture and Society Research Centre (RICS) at the Faculty of Law, University of Oslo. See also Anne Griffiths ‘Pursuing legal pluralism: the power of paradigms in a global world’ (2011) nr 4 *Journal of Legal Pluralism* 174.

³⁶ Sally Engle Merry “Legal Pluralism” (1988) 22 *Law and Society Rev* 869 at 870. See also Nicole Roughan “Conceptions of Custom International Law” (August 2007) *Social Science Research Network* <www.ssrn.com> at 84 – 88.

³⁷ Kirsten Anker *Declarations of Interdependence A Legal Pluralist Approach to Indigenous Rights* (Ashgate Publishing, UK, 2014).

³⁸ Anker, above n 37.

³⁹ Also Nicole Roughan “The Association of State and Indigenous Law: A Case Study in ‘Legal Association’” (2009) 59 *UTLJ* 135 at 143.

As legal pluralism can ‘favour one system over the other’, under a pluralist legal order Māori could be required to accept a legal system that was responsible for land alienation and displacement of their customs. Although Sir Edward Taihakurei Durie contends that “the Treaty of Waitangi is not just a Bill of Rights for Māori but also for Pākehā too”,⁴⁰ and to this end if the Treaty of Waitangi was entrenched constitutionally it could realise legal pluralism within New Zealand society,⁴¹ Moana Jackson is skeptical of any benefits in legal pluralism for Māori and depicts such orders as “inherently assimilative and racist”.⁴² Moana Jackson further contends that under “a guise of sensitivity and good faith the colonial certainty of overt dismissal of [tikanga Māori] has been replaced by a new-age legalism”.⁴³ Further Jackson has stated that:⁴⁴

The redefinition and incorporation of basic Māori legal and philosophical concepts into the law is part of the continuing story of colonization. Its implementation by government, its acceptance by judicial institutions, and its presentation as an enlightened recognition of Māori rights are merely further blows in that dreadful attack to which colonization subjects the Indigenous soul.

VII. Tino Rangatiratanga and Self-Determination

According to Article 2 of the Treaty (Māori text), Māori retain their “tino rangatiratanga” (chieftainship). In contrast, the English version only guarantees to Māori possession over their lands and estates.

Tino rangatiratanga and self-determination are both rights that have not yet been incorporated by the state into domestic legislation. To this end, both are aspirational rights representing ideals as opposed to codified national standards. Both “advocate

⁴⁰ New Zealand 1990 Commission The Treaty of Waitangi: The Symbol of our life together as a Nation, Wellington: NZ 1990 Commission, 1989 14. See also Turia: Immigration Bill – First Reading Friday, 17 August 2007, 11:08 am Speech: The Māori Party <scoop.co.nz>.

⁴¹ Rodolfo Stavenhagen “Mission to New Zealand” E/CN.4/2006/78/Add.3 (13 March 2006) para 85.

⁴² Moana Jackson “Changing Realities: Unchanging Truths” (1994) 10 Aust J of L and Soc 115 at 116.

⁴³ Jackson “Changing Realities: Unchanging Truths”, above n 42.

⁴⁴ Moana Jackson “Justice and Political Power: Reasserting Māori Legal Processes” in Kayleen M. Hazlehurst (ed) *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia and New Zealand* (Avebury, Aldershot, 1995) at 254.

for legal pluralism, thereby enabling iwi to practice internal self-government and manage their own affairs”.⁴⁵ However, they also differ.

Whilst there is much written on the right of self-determination and application to both Indigenous and non-Indigenous peoples, the application of tino rangatiratanga is limited to Māori with comparatively less written. As a Māori term, it is suggested that tino rangatiratanga provides a stronger claim for Māori.

Previously, the Waitangi Tribunal acknowledged that sovereignty was acquired subject to tino rangatiratanga.⁴⁶ However, more recently the Tribunal found that Māori who signed the Treaty did not in fact cede sovereignty to the Crown.⁴⁷ This implies that tino rangatiratanga exists independently of state sovereignty. In contrast, the right of self-determination derives from, and exists under, sovereignty as an international law norm.⁴⁸ Furthermore, self-determination has clear boundaries; it can either prevail or fall when in conflict with other human rights, for example if the right to religion conflicts with a right of self-determination then the right of self-determination may fail. Tino rangatiratanga is not subject to these restrictions and exists independently to international law norms as such it is uncertain whether such boundaries exist.⁴⁹

Finally, tino rangatiratanga expresses the unique Māori concept of rangatiratanga that relates to concepts such as leadership and governance. Self-determination, however, is a creation of a Western paradigm.⁵⁰

While self-determination seeks to realize similar goals, it is philosophically distinct from tino rangatiratanga primarily because tino rangatiratanga is a right that is viewed in context or part of the Māori world whereas the right of self-determination is a right on its own.

⁴⁵ Toki “What a Difference a DRIP Makes” above n 6 at 256. See also the Waitangi Tribunal that has defined tino rangatiratanga as “self-determination”. See Waitangi Tribunal *Taranaki Kaupapa Tuatahi Report* (Wai 143, 1996) at 307.

⁴⁶ See the Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9, 1987).

⁴⁷ See also Waitangi Tribunal *Te Paparahi o te Raki* (Wai 1040, November 2014).

⁴⁸ Toki “What a Difference a DRIP Makes” above n 6.

⁴⁹ The Waitangi Tribunal sees the Crown’s right to govern may only override tino rangatiratanga as a last resort. Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999) 330. The Tribunal saw the “national interest in conservation [was] not a reason for negating Māori rights of property”.

⁵⁰ Toki, “What a Difference a DRIP Makes”, above n 6.

Nonetheless, the right of self-determination will support and complement Māori claims to tino rangatiratanga.⁵¹ Mason Durie regards Treaty settlements as the perfect union between tino rangatiratanga and self-determination.⁵² Although often criticized by Māori as not providing a satisfactory form of tino rangatiratanga they provide for tino rangatiratanga in the sense that they recognise the mana of the Māori people and often provide an economic basis for development.

This analysis indicates that tino rangatiratanga is the stronger right for Māori when compared to self-determination. An internal form of self-determination does not encourage radical change to the nature of existing Indigenous Māori rights. Rather, it supports and complements tino rangatiratanga.

VIII. Conclusion

Despite the international jurisprudence and constitutional examples articulating the recognition of Indigenous rights, including that of self-determination, how this right can be manifested, for Māori, is still unclear.

What is clear, however, is Māori seek a form a self-determination that affords them respect as Treaty partner and an ability to realize their social, cultural and political systems; the exercise of tino rangatiratanga. If this is not achieved, and Māori seek recognition through force, then by referring to “the idealism that gave birth to self-determination as a means to prevent war”⁵³ Dr Tomas noted:⁵⁴

the ultimate irony from which unity of thought can be achieved is, therefore, that the peoples of Aotearoa New Zealand and the state must work diligently together to avoid this ever happening.

⁵¹ See Wai 2417, above n 30, at 70 where the claimants noted that “the Declaration complements and reinforces the principles of the Treaty” Note also the finding that the Māori Community Development Act 1962 provides self-government for Māori and reflects the Crown’s recognition that Māori raNgātiratanga must be protected.

⁵² Mason Durie *Te Mana Te Kawanatanga* (Oxford University Press, Auckland, 1998). See also Wai 2417, above n 30.

⁵³ Tomas, above n 2, at 683.

⁵⁴ Tomas, above n 2, at 683.

