Non-doctrinal research methods in Environmental Law: Applying scientific disciplines and other knowledge to law and policy research to cope with complexity – IUCN Academy of Environmental Law, Queensland University of Technology, Brisbane, Australia, 11 July 2022

Indigenous voices

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Indigenous people and their communities have a vital role in environmental management and development, and states should (in accordance with principle 22 of the Rio Declaration 1992) recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

This paper will critically analyse the normative influence of tikanga Māori, non-doctrinal methods for discovering tikanga Māori, the special rules for interpretation of tikanga, and the wider application of customary values.

1 The normative influence of tikanga Māori

Tikanga Māori (customary values and practices) has been described from a legal perspective as including:

- Whanaungatanga – which "embraces whakapapa (genealogy) and focuses on relationships", including, family and collective group relationships. Put simply, it is the "glue" that provides the rationale for the Māori social system and holds society together. But whanaungatanga also has an intergenerational aspect given the cultural significance for Māori of protecting the welfare of children (*Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179).
- Tapu – which has been described as both a "social control on behaviour" (e.g. public health) and "evidence of the indivisibility of divine and profane". For example:

> The conferment of tapu was essentially a safety measure designed to invoke a sense of caution and to

> warn of threatened danger. For Māori it offered a series of practical rules to protect communities from known dangers … (Trevor Gould and Trevor Daya-Winterbottom, "Blood, Sweat, and Fears" [1999] NZLJ 342, 343).

- Kaitiakitanga (guardianship) – which includes both an "obligation to care for one's own" and "stewardship and protection often used in relation to natural resources".

(Horiana Irwin-Easthope, "The Increasing and Enduring Importance of Tikanga Māori and Cultural Evidence in the Environment Court" [2017] RM Theory & Practice 93, 95).

Tikanga Māori is also firmly embedded in the statutory provisions of the Resource Management Act 1991 (RMA) via a series of "multi-dimensional" provisions:

- Section 6(e) – which provides for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga (treasures – which include flora and fauna and geological resources).
- Section 7(a) – which provides for kaitiakitanga (the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources, including the ethic of stewardship).
- Section 8 – which in relation to achieving the statutory purpose of the RMA (sustainable management) requires that all persons exercising functions and powers under the RMA shall in relation to managing the use, development, and protection of natural and physical resources, take into account the principles of Te Tiriti o Waitangi – Treaty of Waitangi (partnership, active protection, and redress)

These provisions have been described by Justice Williams of the Supreme Court (writing extra-judicially) as "the first genuine attempt to import tikanga in a holistic way into any category of the general law"

(Joseph Williams, “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension of Modern New Zealand Law” (2013) 21 Wai L Rev 1, 18). Similarly, Justice Whata of the Court of Appeal (also writing extra-judicially) observed that s 6(e) of the RMA is merely a declaratory statement of tikanga Māori rather than the creation of rights derived from the statute (Christian Whata, “Environmental Rights in a Time of Crisis” [2013] RM Theory & Practice 42, 47).

Beyond that, tikanga Māori also exerts a normative influence on the architectural design of legislation. For example, the New Zealand government has embarked on a wide-ranging reform of the resource management system because the RMA has not in practice consistently given effect to tikanga Māori. The exposure draft of the Natural and Built Environments Bill (which is intended to repeal and replace the RMA) focuses on the twin-objectives of upholding the welfare and wellbeing of the environment by protecting and enhancing the natural environment, and provides for present generations to use the environment without compromising the reasonably foreseeable needs of future generations. These objectives will be achieved by complying with environmental limits; and avoiding, remedying, or mitigating any adverse effects of activities on the environment.

The objective of upholding the welfare and wellbeing of the environment is firmly based on tikanga Māori and gives primacy to the health of the environment, and (based on whanaungatanga) recognises the interconnectedness of all parts of the environment and the essential need to safeguard the life-supporting capacity of the natural environment.

A key aspect of the principle of active protection is rangatiratanga (self-determination) and embedding mātauranga Māori (Māori knowledge and Māori ways of knowing) via the imposition of tapu (prohibitions) and rahui (restrictions) on resource access and use based on centuries of empirical observation – which could have a profound influence on how the obligation to comply with environmental limits is applied.

2 Non-doctrinal methods for discovering tikanga Māori

The statutory definition of kaitiakitanga in s 2(1) of the RMA as "the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources" emphasises the relational nature of the concept. Guardianship is exercised by a specific group (the tangata whenua – people of the land) in relation to both a specific place and the natural and physical resources endemic to that area. Additionally, guardianship is required to be exercised in accordance with tikanga Māori. Therefore, implicit from the definition there will be a need for decision-makers to identify both the tangata whenua of the area and the relevant tikanga Māori.

Whanaungatanga and whakapapa transcend both time and space and establish the relational connection between Māori and the subject area and the specific natural and physical resources that may be affected in some way. For example, in *Ngai Te Hapu v Bay of Plenty Regional Council* ([2017] NZEnvC 73 at [36]) the Environment Court (concerning whether a shipwreck should be left in situ on a reef in the territorial sea) approached this question by receiving evidence about the relationship of Māori with the reef including:

- Whakapapa (genealogy);
- Ancestral traditions and cultural association;
- Ahi kā (burning fires or occupation) and title to land;
- Mana (customary authority exercised by iwi (tribe) or hapu (clan) in an identified area);
- Customary associations and activities; and
- Contemporary mechanisms such as Treaty of Waitangi settlements, and claims to customary marine title.

Subsequently, in *Ngati Maru Trust v Ngati Whatua Orakei Whaia Maia Ltd* ([2020] NZHC 2768 at [73]) Whata J (when reconciling layers of Māori interest in Auckland's Waitemata Harbour) emphasised the positive nature of this inquiry:

> … the statutory obligation to recognise and provide for the relationship of Maori and their culture and traditions with their whenua and taonga, to have regard to their kaitiakitanga … does not permit indifference to the tikanga-based claims of iwi to particular resource management outcomes. On the contrary, the obligation "to recognise and provide for" the relationship of Maori and their culture and traditions with their whenua and other taonga must necessarily involve seeking input from affected iwi about how their relationship, as defined by them in tikanga Maori, is affected by a resource management decision. To ignore or to refuse to adjudicate on … iwi claims about their relationship with an affected taonga (for example) is the antithesis of recognising and providing for them and an abdication of statutory duty.

However, Whata J was careful to indicate that "when the Court evaluates the relative strength of relationships it is not determining what is tikanga Māori" but is merely ascertaining tikanga Māori based on "the available evidence" ([2020] NZHC 2768 at [102]).

3 Special rules for interpretation of tikanga

Active protection of the relationship of Maori with natural and physical resources in accordance with tikanga Maori engages the principles of Te Tiriti o Waitangi – Treaty of Waitangi. From an administrative law perspective Burrows and Carter (*Statute Law in New Zealand* (6th Edition, LexisNexis, 2021) 684) indicate that similar to privative or ouster clauses "clear statutory words" would be required to "avoid interpreting a statute" consistent with Te Tiriti o Waitangi – Treaty of Waitangi. Likewise, Burrows and Carter (at 187-188) also emphasised the differing and open textured nature of the provisions of Te Tiriti o Waitangi – Treaty of

Waitangi and the need to reconcile any linguistic differences in meaning in accordance with the interpretive provisions of the Vienna Convention on the Law of Treaties 1969.

Similar to the approach to applying international treaty obligations, the Court of Appeal in *Attorney-General v Mair* ([2009] NZCA 625 at [85] per Baragwanath J) found that statutes are "presumed to conform with our obligations under treaties, of which the Treaty of Waitangi is paramount".

For example, the High Court in *Huakina Development Trust v Waikato Valley Authority* ([1987] 2 NZLR 188) held that when deciding a water permit application under the Water and Soil Conservation Act 1967 (now repealed and replaced by the RMA) that decision-makers were required to consider Te Tiriti o Waitangi – Treaty of Waitangi (as a mandatory consideration) as part of the legal context of the decision.

In terms of timescale, the Senior Courts have found that the principles of Te Tiriti o Waitangi – Treaty of Waitangi should be interpreted in the context of changing modern day circumstances (*Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641). For example, the leading Māori historian Sir Tipene O'Regan stated:

> In my view it is the capacity for dynamic adaptation which is the particular genius of Māori culture and associated values. I believe that it is powerfully demonstrated in Māori traditional history as well as in our more recent historical experience. I take the view that we should follow the historical precept of our tupuna and permit our values to flourish in accordance with the changing environment and the expansion of human knowledge and capacity. (Cited in Trevor Gould and Trevor Daya-Winterbottom, "Blood, Sweat, and Fears" [1999] NZLJ 342, 343).

4 Wider application of customary values

The possibilities for the wider application of customary values both across New Zealand law generally and internationally have been heralded by

recent decisions from the Senior Courts. For example, in *Ellis v R* ([2020] NZSC Trans 19) the Supreme Court in the context of deciding whether a right of criminal appeal could survive the death of a non-Māori accused posed the novel question of whether the result would be different if viewed from a tikanga Māori perspective.

Likewise, the decision of the Court of Appeal (NZCA) in *Te Runanga o Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council* [2021 NZCA 452 which concerned the end use of the water, namely, export and use of plastic bottles – the Court, when declining leave found that it could not reinterrogate the effects of the proposal on tikanga Māori without reassessing the key finding of the Environment Court that:

> In assessing the evidence on the primary issue of the adverse metaphysical effects resulting from the asserted loss of mauri from the water that is bottled and exported, *we have accepted Mr Eruera's evidence that there is no loss of mauri from the water as the water remains within the broad global concept of the water cycle and in is returned to Papatuanuku [mother earth] irrespective of where it is used*. (Emphasis added).

This approach to the environment has strong parallels with the adoption of the Ecuadorian Constitution in 2008 based on the rights of nature and the indigenous Andean concept of Pachamama (mother earth), and connects the domestic jurisprudence of Aotearoa – New Zealand with possibilities for the wider application of customary values both across New Zealand law generally and internationally.

Overall, recognizing and supporting the identity, culture and interests of Māori and other indigenous peoples affirms the critical role of law in protecting the environment – and from a human rights perspective is an aspect of human dignity.