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INDIGENOUS RIGHTS FROM THE NEW ZEALAND PERSPECTIVE

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Introduction

New Zealand officials, frequently impose on Māori their own cultural views or misconceptions of what they believe to be the Indigenous, or Māori, culture. They may do so with good intentions, or they may believe that assimilation is best for all. But each such imposition erodes the capacity of Māori to maintain their own culture and their survival as a people. It also erodes their capacity to contribute to New Zealand society by capitalising on their own cultural strengths.

I propose to look at three ways in which Māori are prone to cultural imposition, even inadvertently, and will look also at the impacts that each has on Māori people. I will measure the conduct complained of against the standards expected of state officials, in the United Nations Declaration of the Rights of Indigenous People (hereafter called UNDRIP).

The three examples of bad interventions which have been, and continue to be destructive in my view, are first and probably foremost, a failure to provide properly for Māori collective interests; second, to work with Māori representative institutions; and third, to comprehend Māori legal concepts.

Providing for Māori collective interests

The problem is that the Māori collective interest is either not provided for, or is incorrectly provided for. The trouble is that the collective interest has not figured much as an imperative for the predominant white population. The predominant population has an alternative focus on individual enterprise.

Māori are accustomed to operating in small, autonomous communities, or tribes, of a few hundred persons. In these communities, the community owns most things, in tradition, including especially, the land. While individuals have use rights, the land is held by the community with use rights persisting only for so long as the user uses for the benefit of the community as well. For example, if I have the use of an eel weir passed to me from my grandfather I will feed my family, but I will also consider the elderly and needy, and when the community is hosting visitors, I will contribute to the occasion. This is natural in a society where personal survival and standing is linked to the survival and standing of the community.

The predominant white population on the other hand, is from a different tradition which values individual enterprise.

Nonetheless, from 1860, the government created titles for Māori land. Common sense should have shown that following Māori custom, the land should have vested in an entity representative of the tribe, with power to confirm use rights. Instead the government, through the agency of the Native Land Court, subdivided the land and awarded different parts to different persons. In this instance, the intention was to assimilate Māori into the title system of the predominant population.

For Māori, the results were disastrous. The community power to prevent land sales was removed, an unexpected wealth was created for individuals, and many sold. The tribal wealth dissipated and the sellers became labourers for others. Others sold because on their own, the subdivisions were too small. The titles were too fragmented to be economic. In addition, Māori custom meant that all children were entitled to succeed to land and so the ownership became fragmented as well. Then as people moved away, absentee owners came to predominate on the titles. In custom, interests in land grew cold when people moved away but now, the interests were maintained on a title to befuddle the management of the asset.

Today, most Māori land is in multiple ownership with most of the owners living away, many not even aware that they have land interests. For the people, the land is now an illusory asset, and that is what my generation came to inherit – an unusable land tenure system in real economic terms.

Today, many Māori have joined their lands into trusts or incorporations for economic development and these are generally doing very well, but the income does not go back to support the tribal community. It is dissipated in increasingly smaller shares to owners living away. The land is no longer a benefit to the customary community.

UNDRIP article 26(3) provides that States shall give legal recognition and protection to the traditional lands of the indigenous people and that such recognition shall be conducted with due respect to their customs, traditions and land tenure systems. Unfortunately, its all too late for Māori land. It has all been reformed to fit an English tenure system which was inapplicable to the customary circumstance. But it is not too late to do something about other collective interests, for example, in education, health, child care and housing.

UNDRIP Article one provides that Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognised in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law. That goes to the heart of the matter in recognising the primacy of the group interest for indigenous people, equal in status to the individual rights of the Western world.

This is reinforced by Article 35 which provides that Indigenous peoples have the right to determine the responsibilities of individuals to their communities. Following somewhat in the

steps of the jurist, Professor Hohlfield of Yale University, and his concept that for every right there is a duty, UNDRIP is close as can be to recognising responsibility as the flip side of rights, and so defines as critical, a great deal of indigenous thinking. For example, if one inquires deeply into Māori respect protocols for keeping peace between communities, and peace with the environment, we can see that it stems from concepts of individual responsibility. Using that route, one may see more clearly the importance of a Charter of Responsibilities as the other side of the coin to the Declaration of Human Rights, as equally necessary for the preservation of the world.

To illustrate the application of the collective interest in social issues, I refer to a social policy which grew out of New Zealand as a result of Māori initiatives. In Māori society, the community, being all related, is responsible for the conduct of children and any member may assert discipline. When Māori children were brought before the state, Māori insisted that members of the extended family should attend to discuss a solution. This was seen to have benefits and was adopted by the state for all people. Unfortunately, the state developed its own protocols for the process, as necessary for the protection of the department, and Māori were increasingly dissatisfied with the outcome. This started off as a good case for the adoption of Māori custom, instead of assimilation, but which, in the hands of state officials, became so assimilated into the bureaucratic ethic as to take away from its customary value.

The lesson is that cultural initiatives are more likely to work in the environment of the culture concerned. As a principle, that has wide application to similar Māori initiatives in health and education. We must appreciate these constraints if we are to give effect to UNDRIP Article 7.2, which may be paraphrased as saying that Indigenous peoples have the collective right to live as distinct peoples.

Working with representative Māori institutions

UNDRIP Articles 5 and 20, also in paraphrase, provide that Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions. They have the right not to be subjected to enforced assimilation or integration, in terms of Article 8, and by Article 18 they have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions. Article 19 sets the standard that states must consult with indigenous people through such institutions.

The problem here is that New Zealand has not recognised Māori through their own institutions. The institution is the tribe and the tribe has not been recognised as a political or legal entity.

Instead, government has set up structures of its own for dealing with Māori. For example, from the 1920s, when it was agreed that certain resources were Māori owned, or compensation should be paid to certain tribal groups, the resource or compensation was vested in Māori Trust Boards for the benefit of the Māori concerned. However, the Trust

Boards were under the control of a government Minister and the purposes for which the funds could be applied were determined by the statute.

In post-contact times, the tribes (hapū) have bandied together according to their descent lines to form what are called iwi. These are tribal coalitions. Again, these were not recognised as legal entities. To be recognised as such they would need to transform into some form of legal entity, like a company, or trust, capable of contracting. In 2007, the New Zealand Law Commission proposed a statute by which iwi might be represented through an entity more closely accountable to the iwi, but the proposal was rejected by government when many Māori themselves were opposed. There were fears that the tribe would be dominated by business Māori, rather than customary leaders.

The consequence has been that, in its revised, comprehensive programme to provide all iwi with partial compensation for historical losses, Government has unilaterally set the conditions on the entity to be established to receive the funds. These conditions have not been agreed with Māori, and in the negotiations by which a free, prior and informed settlement is said to be reached, the conditions for the entities to receive the funds are not negotiable. This leads to a unique form of negotiation where in many respects, there is no real power to negotiate.

I will use one example to illustrate the impact. Because Māori tribes are described as descent groups, the Government prescribes that all descendants from named ancestors must be beneficiaries with a vote on appointments. The first problem is that today, most Māori live a distance from the customary home base and do not engage with it. The second is that a tribe was never defined by its absentees but only by those present on the ground to defend the tribe in times of stress or in peace, to uphold its reputation for hosting visitors. Of course, there were many absentees in the old days too. Tribal members commonly married outside of their community to live with the community of their spouse. Accordingly, the Māori had a metaphorical saying that one lost one's interests once one fires grew cold.

The consequence is that today, those who staff the customary home base and are most responsible for keeping the culture and identity of the tribe alive, are at great risk of being overtaken by absentees, and to see more and more of the unknown businessman in charge of the tribes' affairs. It is very much like the issues at the time of tenure reform, with the exception that we now have a framework by which to assess policy, in the form of UNDRIP.

Article 33 provides

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions ….

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

The right thoughts are there in the clouds, and with the help from the international community, they may one day, also apply on earth.

Comprehending Māori legal concepts

The problem

The problem here is that officials and even judges will look to simple, absolute rules in giving effect to Māori custom when Māori themselves will look to pragmatic solutions, and thus a range of circumstances, according to what, in their experience, works for them.

For example, several years ago a Judge of the Native Land Court is said to have been faced with a question of whether it was a custom that a man with a young family is obliged, if his wife dies and there is an unmarried sister, to marry the sister. It was about ensuring that the children are not lost to the extended family by a subsequent marriage to a person outside the group.

The Judge considered a custom was a custom if it invariably applied.

The family in the court room were agreed that this was a custom, but when asked if it always applied, the answer was that that depended on whether the parties agreed. The judge then considered it was not a custom.

The difference was that the judge was using his own cultural test, and it was one that looked for a single simple rule. That is something we may all do when trying to get our heads around an unfamiliar culture. We dumb it down to something overly simplistic. Other cultures, Māori in this instance, will in fact look to a range of norms with which they are familiar, to determine what is right for the particular case.

My experience has been littered with cases of people purporting to apply Māori custom without an adequate understanding of the nuances that are involved in Māori law.

We have to keep in mind, article 11, that indigenous peoples have the right to practice and revitalise their cultural traditions and customs. They may do so only if we do not inadvertently take the traditions away from them. For the last 10 years we have been assisted by a framework for appropriate in conduct. The task we now face is to ensure its application in practice.

Thank you for the opportunity to contribute to this important gathering of minds.