**Is the Incorporation of Indigenous Law into State Law an Expression of Indigenous Peoples’ Self-determination?**

**Theory, Practice, Opportunities and Challenges**

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Professor Claire Charters

University of Auckland

# I Introduction

In recent years, Aotearoa New Zealand courts and Parliament have increasingly incorporated tikanga Māori into Aotearoa New Zealand’s law.

The question I address here is whether incorporation of tikanga amounts to recognition and realisation of Māori self-determination under international law, and tino rangatiratanga under te Tiriti o Waitangi. I consider theory on legal pluralism and compare this development with recognition of Indigenous peoples’ legal systems in other states. Expressed in another way, I take a deeper dive into developing Aotearoa New Zealand law on tikanga Māori to assess how it might realise Māori aspirations to self-determination, considering also how Aotearoa New Zealand compares with other models of Indigenous peoples’ self-determination.

Aotearoa New Zealand adopts an incorporation model of Māori law, where Indigenous law is incorporated into and then applied *as state law*. Its reach is personal – it applies to individuals and groups wherever they are situated rather than necessarily over a bounded territory. Many other states, such as Mexico, Canada and the United States adopt a territorial model, where Indigenous peoples’ governance bodies regulate territorial areas in accordance with their own law – at least to some extent – independently of the state and state law.

Ultimately and primarily, I ask in this lecture whether incorporation amounts to recognition and application of an independent (of the state) legal authority in Aotearoa New Zealand. Or rather, is incorporation simply an apology for ongoing colonisation by state legal systems, which results in the distortion and ongoing relative subjugation of Indigenous peoples’ legal systems.

The 2012 Supreme Court case of *Takamore v Clarke* is an example of the incorporation model.[[1]](#footnote-1) Aotearoa New Zealand’s highest court found that tikanga Māori is a relevant factor, under common law, in determining where a person is buried, contrary to what was assumed to be orthodox state/common law at the time. Under the tikanga of the person who came from the relevant tribal nation, a person is to be buried on their tribal land. The *Takamore* decision opened the possibility that, within Aotearoa New Zealand’s traditionally exclusively mono-legal system, there are spaces for Māori law to prevail.

First, I look at some of the jurisprudential questions that arise in relation to plural legal systems. Then, I outline models of Indigenous peoples’ self-determination found elsewhere with a focus on independent/territorial sovereignty models. From there I analyse how, in Aotearoa New Zealand, Indigenous peoples’ law is increasingly applied by state courts and law-making or regulatory bodies (the incorporation model), while making some comparisons with the independent/territorial sovereignty model. Finally, I suggest some lessons we might learn from all of this, with potential global significance.

# II Legal Pluralism

Theoretical takes on legal pluralism – multiple legal systems operating within one territory – can help us assess the effectiveness of state application of Indigenous law as a tool to realise self-determination. It helps us to isolate and understand the questions we should be asking in making such assessments. For example, Nicole Roughan asks, where there are multiple legal authorities co-existing in one juridical space:[[2]](#footnote-2)

how do/should they relate to each other? Are denials of the status of legality a kind of injustice? Can denials of that status ever be justified? Can unjustified denials of legality statuses be corrected through new forms and practices of recognition? Can one legal order justifiably use force to override or exclude another, or can they interact as plural authorities?

Inequality between legal systems is created when one legal system is imposed on peoples in their territories who do not consent to that imposition, especially when the imposed legal system is fundamentally inconsistent with their own legal system. They are subjected to standards that they do not (and have good reasons not to) recognise as their own. We might ask – as Roughan does – how could law operate in a way that is not violent or based on illegitimate domination? At an individual level, this requires responding to the inequality faced by individuals who have a foreign legal system forcefully imposed on them, when others are regulated by a system born from their own cultural context.

Extrapolating from these basic questions, we might also consider these more specific issues when assessing how well a specific model of pluralism might realise Indigenous peoples’ self-determination:

* How can there be “equality” between legal systems when multiple legal systems operate within one territory?
* Is a system that requires state recognition of non-state law for non-state law to have authority and legitimacy truly “pluralist”? Griffiths has suggested that it is not, as it basically subordinates one system to another, creating a hierarchy of systems, with one system dominant over another.[[3]](#footnote-3)
* What about “conflict of laws rules”, when rules from one system – for example, the Aotearoa New Zealand legal system – determine which legal system regulates a dispute when two legal systems are in play. Conflict of laws rules are common in private international law, determining, for example, whether Australian or Aotearoa New Zealand law applies where a dispute engages both jurisdictions. They are also regularly engaged in federal legal systems, such as the United States, to determine which state’s law is to be applied – for example, Californian or Arizona – when the dispute has multi-state dimensions. One of many issues here is that different legal systems, including Indigenous peoples’ legal systems, have different rules to determine which legal system should regulate when two are in play. These are called “conflicts in conflicts of laws rules”.[[4]](#footnote-4)
* Where a state claims regulatory authority over a territory based on illegitimate or illegal grounds, as is the case in many colonial systems, does acknowledgement of legal pluralism – the co-existence of Indigenous and state legal systems – imply consent to the imposed legal system?
* Can models of pluralism post-facto legitimate and legalise dubious state claims to regulatory authority? Roughan writes, “[r]escuing both legality and law’s authority requires ways of relating the legal orders without resort to mere power. Can the rule of law apply to a relationship between legal orders?”[[5]](#footnote-5)

Roughan argues for a form of “inter-legality” to counter some of the above-mentioned concerns about hierarchy between legal systems, especially power imbalance between legal systems and dominance of one over the other: [[6]](#footnote-6)

Unlike legal forms that allow one order to unilaterally determine its relationship with the other (for example, conflict of laws tools) or legal forms that subject both legal orders separately to a higher legal order (in the manner of public international law), interlegality requires that the interaction and intersection between legal orders operates institutions and rules of engagement – rules and institutions for managing the relationship between the legal orders – that are determined and recognised by both. In simplified form, interlegality requires genuinely common law and genuinely shared institutions to contest its development and deployment.

# III Comparative models of self-determination

What models of Indigenous peoples’ self-determination do we find globally? I outline here some examples. Most of these would be defined as territorial models in that they involve Indigenous peoples making law applicable on their territories.

Under United States constitutional law, American Indian nations recognised by the state retain their inherent sovereignty. This means they retain jurisdiction – the legal authority to regulate – over their territories alongside Congressional authority to pass law in so-called Indian Country. The United States recognises almost 600 Indian nations. Moreover, treaties between the United States and American Indians have the status of federal law and trump inconsistent state law.[[7]](#footnote-7)

In Canada, provincial and federal governments recognise First Nations’ self-determination in modern-day treaties and legislation implementing the United Nations Declaration on the Rights of Indigenous Peoples.[[8]](#footnote-8) The Nisga’a settlement is an example of a contemporary treaty that includes arrangements for ongoing regulation by First Nations over their territories and peoples in accordance with their law.[[9]](#footnote-9) In a 2024 decision, the Supreme Court of Canada upheld legislation recognising First Nations’ jurisdiction with respect to child and family services.[[10]](#footnote-10) Where First Nations prove native title over their lands, their laws regulate those territories, albeit subject to some restrictions.[[11]](#footnote-11)

In Australia, when a claim to aboriginal title is upheld, the Indigenous laws regulating that land are recognised. Moreover, in ongoing treaty negotiations between states and Aboriginal peoples, with Victoria top of mind, there appears to be an openness to recognising Aboriginal self-determination.[[12]](#footnote-12) Additionally, the Queensland Human Rights Act 2019 (Qld) preamble recognises Aboriginal self-determination and *Kastom*, and various Indigenous-specific cultural rights are included in the body of the legislation.

Saami Parliaments in Norway, Finland and Sweden are well-known.[[13]](#footnote-13) Each is different, but they all exercise political power with respect to Saami issues, including administrative authority.

Examples of Indigenous peoples’ regulatory authority in Latin America abound, often recognised under constitutional law. Mexico is one especially important example, which is now undertaking fundamental reform to better realise Indigenous peoples’ self-determination. Similarly, customary law regulates much of life in many countries in the Pacific, such as Vanuatu and Samoa.

Finally, international human rights law requires states to recognise Indigenous peoples’ self-determination, laws and jurisdiction.

# IV Assessing the Effectiveness of Models of Self-Determination, Self-Governance and Self-Regulatory Authority

Considering the above-mentioned theory and comparative examples, there are several factors relevant to assessing whether specific models of legal pluralism realise Indigenous peoples’ self-determination. There are undoubtedly many factors; the following suffice for a preliminary review.

* Does the model satisfy Indigenous peoples’ claims for independent self-determination, self-governances and legal authority?
* Does it address various “flaws” associated with the non-consensual imposition of state law on Indigenous peoples and over their laws, including a lack of legitimacy and structural inequality, and breach of the rule of law?
* How does the model compare to forms of positive self-determination and legal pluralism elsewhere, and, especially, in jurisdictions that share some similarity, as these evidence what is “possible” within a specific place?
* Does it meet agreed international legal and political standards for self-determination, especially as set out in the United Nations Declaration on the Rights of Indigenous peoples and under binding international human rights treaties?

# V The Aotearoa New Zealand Context

Aotearoa New Zealand’s Westminster-derived constitution can be described as political rather than legal.[[14]](#footnote-14) Parliament is the highest legal authority. There is no law higher than legislation. The Executive, usually consisting of ministers selected from the political party or coalition holding the majority or near majority of seats in Parliament, exercises considerable control over Parliament. This means that the Executive effectively determines laws adopted by Parliament, jeopardising the separation of powers and raising serious concerns about Aotearoa New Zealand’s perceived attachment to democratic ideals.

Under te Tiriti o Waitangi, the Crown and some Māori rangatira agreed that the Crown would share authority, with Māori retaining our inherent sovereignty and basic power to regulate our own. Crown sovereignty was then unilaterally imposed without Māori consent, contrary to the rule of law and te Tiriti o Waitangi. Today, there is no recognition of tino rangatiratanga in Aotearoa New Zealand law.

Aotearoa New Zealand’s legal system has historically been fiercely mono-legal. For the above reasons, the system has traditionally been incapable of tolerating legal pluralism in regulating life in Aotearoa New Zealand. It is this aspect of Aotearoa New Zealand’s constitution, and incremental changes to it to better respect tikanga Māori, that I am focussed on.

# VI Tikanga Māori

Tikanga Māori has been described as:[[15]](#footnote-15)

“…the set of beliefs associated with practices and procedures to be followed in conducting the affairs of the group or an individual. These procedures are established by precedents through time, are held to be ritually correct, are validated by usually more than one generation and are always subject to what a group or individual is able to do.”

Tikanga consists of both fundamental principles and specific rules, with the specific rules required to conform to the fundamental principles. Fundamental principles of tikanga Māori include:[[16]](#footnote-16) mana (prestige, authority, control, power, influence, status), tapu (sacred, prohibited, restricted, set apart), whanaungatanga (kinship, sense of family connection), utu (balance, revenge, retaliation, reciprocity) and kaitiakitanga (guardianship, stewardship, trusteeship).[[17]](#footnote-17)

# VII The Ways in Which Tikanga Māori is Given Legal Effect in Aotearoa New Zealand Law

## A Tikanga in Legislation

The Resource Management Act includes a Treaty of Waitangi principles clause requiring decision-makers to take the Treaty principles into account.[[18]](#footnote-18) Further, s 7 requires that all persons exercising functions and powers under the Act, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to kaitiakitanga. These provisions have been relevant in several cases involving:

* Recognition of Māori relationships with the environment and an obligation of care in environmental decisions (such as in the construction of a sewer pipe in an area of cultural significance);[[19]](#footnote-19)
* Māori spiritual relationships with water (concerning diversion of water from the Whanganui River to the Taupō catchment);[[20]](#footnote-20)
* Whether secular courts can adequately assess interference with spiritual beliefs (concerning the establishment of a prison on land where taniwha resided).[[21]](#footnote-21)

On the other hand, the High Court found there was no room for tikanga Māori to operate in the Crimes Act 1961, because the legislation was considered too comprehensive.[[22]](#footnote-22) This leaves minimal opportunity for the courts to decide consistently with tikanga when dealing with legislation the effectively covers the area of law leaving judges with little room to read in tikanga.

## B Tikanga in Treaty Settlements

Numerous settlements of historical grievances, colloquially known as Treaty settlements, incorporate tikanga Māori. There are several well-known examples where mountains (Taranaki Maunga), forests (te Urewera) and rivers (Whanganui River) have been recognised as having legal personality in line with tikanga. The respective iwi/tribal nations are included in the management of those persons. In the case of the Tūhoe Treaty settlement, the Urewera Board “must consider and provide appropriately for the relationship of iwi and hapū and their culture and traditions with Te Urewera when making decisions”.[[23]](#footnote-23)

## C Tikanga Māori in Common Law

The most significant development in Aotearoa New Zealand law with respect to tikanga has been its incorporation into the common law – judge made law. From as early as 1987 in its *Huakina Development* decision*,* the High Court read in a requirement to consider tikanga Māori when determining the change of land use, namely the spiritual significance of water and discharge into a river.[[24]](#footnote-24)

In the words of the Chief Justice Winkelmann in a speech to te Hunga Roia Māori|Māori Law Society:[[25]](#footnote-25)

The common law is sometimes thought of as immutable and never changing. But that is the second misconception I mention. It is true that the common law method requires looking back to precedent in deciding how to move forward. It is a method which enables judges to resist passing storms or fads, and which brings stability. But it does not prevent evolution to meet a change in circumstance or a change in knowledge.

## D Tikanga in Private law

A well-known case is that of *Takamore v Clarke*.[[26]](#footnote-26) The facts were as follows:

* Mr Takamore, from Tūhoe, died in Christchurch where he had lived for 20 years with his wife and their children.
* His Tūhoe family wanted him buried in his tribal territories in accordance with tikanga Māori.
* His wife – executor of his will – and children wanted him buried in Christchurch.
* His wife and children left him overnight so the Tūhoe family took his body up to his tribal territories and buried him there. This practice is also consistent with Tūhoe law, in that a deceased person is not to be left alone until such time as they are buried, and that there is honour in being “claimed” by multiple tribal nations. The taking of bodies by a tribal nation is a sign of respect.

A legal question arose from the conflict between the assumed common law doctrine that the executor has the authority to decide a deceased’s burial place, and Māori law. A central question was whether tikanga Māori or – at the time unsettled and uncertain – common law favouring the right of the executor.

The Court of Appeal held that Māori law could not prevail because it is contrary to the common law against ‘might is right’. When the case was appealed to the Supreme Court, it unanimously decided that Māori law can be incorporated into the common law. The majority stated that:[[27]](#footnote-27)

… 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.

If an executor’s decision is challenged, 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”.[[28]](#footnote-28)

When assessing the competing claims to decide where to bury Mr Takamore, the majority found that Ms Clarke’s right prevailed. In weighing up the respective claims, the Court found that the relevant factors 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 his tribal town of Kutarere. “Secondly, Kuturere is the place of central importance to Mr Takamore’s Māori family and their custom.” Third, different views were expressed as to Mr Takamore’s own wishes. Fourth, Mrs Clarke and children wanted him buried in Christchurch. Finally, although of little weight, Mr Takamore was buried in Kutarere.

However, while recognising the authority and influence of tikanga Māori, the Court also affirmed the supremacy and the legitimacy of Parliament and state law. The majority in *Takamore* rejected the submission that the common law only applies to the extent it is not inconsistent with tikanga. Elias CJ noted that, “As in all cases where custom or 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.”[[29]](#footnote-29)

There are positive takeaways from this case:

* Aotearoa New Zealand’s highest court has recognised tikanga Māori as a legal system functioning in this state, upsetting the previously held assumption that Aotearoa New Zealand is “mono-legal” with only state law being applicable in these territories.
* While the facts did not favour the Tūhoe family in this specific case, with favourable facts, it could open a space for tikanga Māori to regulate where a person is buried in a way that tikanga would take precedence.
* Tikanga is part of common law in some cases, such as this one.

However, there are less positive implications of the case from the perspective of recognition of tikanga Māori in Aotearoa New Zealand:

* The finding was NOT that state law has to conform to tikanga Māori, which would be more consistent with te Tiriti o Waitangi.
* Tikanga is subordinate to legislation and does not replace the common law.
* In deciding on the facts and balancing the various claims, tikanga Māori was just one factor amongst many.
* It is difficult to imagine a case where tikanga Māori would be so easy to establish.

## E Tikanga in Environmental Law

In *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* the facts were as follows:[[30]](#footnote-30)

* The Environmental Authority granted Trans-Tasman Resourced Ltd concessions to mine iron sands off Taranaki under Aotearoa New Zealand’s Exclusive Economic Zone (EEZ) legislation.
* The Taranaki-Whanganui Conservation Board opposed the consents because of the effects of the proposed activity on the environment and other existing interests including those of iwi holding mana moana|authority and kaitiaki|guardianship responsibilities in the areas affected by the proposed mining.
* The case eventually landed in the Supreme Court. It held that the Environmental Authority didn’t adequately provide for a “precautionary principle” which was required by the EEZ legislation. Under that principle, where there is a risk of harm, albeit not yet proven, no action should be taken until there is scientific proof that there will be no harm.
* One of the leading questions was whether the decision of the Environmental Authority could be reviewed on the basis that it was inconsistent with tikanga Māori.
* The Court held that the inclusion of the principles of the Treaty of Waitangi in the legislation required considering tikanga-based customary rights and interests, including kaitiakitanga, as well as the reference in a section of the legislation to “other applicable law” (based on *Takamore v Clarke*).

So, tikanga was here again recognised as a separate legal system applicable as part of the common law in Aotearoa New Zealand.

## F Tikanga in Criminal Law – Ellis

The *Ellis* case concerned a Pākehā man who was convicted of sex offending and then died before his case on appeal was heard. The issue was whether an appeal could continue in the event of the appellant’s death and whether the appeal would be in the interests of justice.[[31]](#footnote-31) Under tikanga Māori, the mana or standing of a person continues when they die – only phsysically – and they are considered to live on. The Court considered whether tikanga could be considered when determining whether the appeal should be allowed to continue.

The majority found that:

* Tikanga should not be required to be consistent with common law nor reasonableness requirements before its application, because this would imply the domination of tikanga Māori by state law and the supremacy of Western values.
* Tikanga Māori is a free-standing legal system and continues to regulate lives in Aotearoa New Zealand.
* The appeal could proceed with tikanga as one of the factors relevant in the decision.

As Williams J noted, in Aotearoa New Zealand's system, where tikanga has force and integrity with or without the common law, “judges must be comfortable engaging with tikanga principles yet understand that they cannot change tikanga. And while they may apply tikanga in appropriate cases they must also understand that they cannot authoritatively declare it for general purposes” as they may declare the common law.[[32]](#footnote-32)

There are some particularly important observations to make with respect to this case:

* Again, tikanga Māori is recognised as a source of law under the common law.
* Tikanga Māori can influence judicial decisions applicable to non-Māori.
* Tikanga Māori should be determined by experts in tikanga Māori.

## G Tikanga in public law

The *Ngāti Whātua* case involved a dispute between multiple iwi|tribal nations over who holds traditional “mana whenua” or authority over a specific piece of land “lost” historically and now – formally – owned by the Crown.[[33]](#footnote-33) The Crown had tried to return it to one iwi as part of redress for historical wrongs, and other iwi|tribal nations disputed their right to the land.

Justice Palmer held that under each iwi’s tikanga, they held the mana whenua over the land. In other words, the relevant tikanga of the different iwi differed. Summarising his toughts:[[34]](#footnote-34)

Tikanga is often assumed, recognised and referred to by New Zealand legislation. Like the common law made by courts, the legal effects of tikanga can be overridden by legislation. But even Parliament cannot change tikanga itself. Only iwi can, exercising their rangatiratanga. Similarly, one iwi cannot override the tikanga of another iwi without impinging on their rangatiratanga. Tikanga was recognised by English common law that accompanied the Crown to New Zealand, as were other sources of law. It is recognised by New Zealand common law today. As governing values for iwi and hapū, tikanga informs the common law. But it can be even stronger in legal effect than that. Tikanga can determine the outcome of a court’s application of a statute or the common law, as it has in some cases. It can be a direct source of legal rights enforced by the courts.

He further wrote that “Neither interferes with the legal effect of the other.”[[35]](#footnote-35)

Lessons we can take from this case include, reinforcing several earlier reflections:

* Tikanga Māori is recognised as a distinct legal system that cannot be changed by the state legal system.
* While the outcome was not definitive, it was clear that tikanga Māori should ideally regulate disputes between and within iwi|tribal nations.

## H Tikanga and property rights

The *Re Edwards Whakatohea* case involved a claim to customary title to the foreshore under the Marine and Coastal Area (Takutai Moana) Act 2011.[[36]](#footnote-36) The legal test that iwi or hapū Māori must meet is to have had exclusive use and occupation of the relevant area since 1840 without substantial interruption, and to have held that area according with tikanga.[[37]](#footnote-37)

An award of customary marine title results in the relevant Māori group acquiring certain rights. The Court found that the ‘sui generis’ nature of customary marine title requires the assessment to focus on tikanga, rather than Western proprietary concepts.[[38]](#footnote-38)

# VIII Conclusions

Returning to our assessment of whether the increasing incorporation of tikanga Māori into state law amounts to a realisation of the right to self-determination, what have we learned? On the one hand, there are several developments that reflect possible greater self-determination.

* There has been a fundamental constitutional shift in that pluralism has been recognised, contrary to the basic understanding that Aotearoa New Zealand is mono legal where state law is the only legal system operative in the territories of Aotearoa New Zealand.
* The courts have accepted that they have no authority to change or interfere with either the content of, nor methods of, developing tikanga Māori. They recognise that Māori have the exclusive authority to do so.
* The courts are leading the way in the increasing incorporation of tikanga Māori into state law, although the legislature has also been active in including tikanga in a few statutes.
* The courts have taken evidence and heed of experts’ interpretations of tikanga Māori as determinative of relevant tikanga.
* The courts, in the case of *Ellis*, the courts found that tikanga Māori can have universal jurisdiction, irrespective of whether the case applies only to non-Māori. In other words, it is applied universally as part of state law.
* Finally, tikanga no longer must measure up to any Western or colonial legal standards to be recognised. This reflects a change from the previous court findings that tikanga Māori must be acceptable under common law principles to be recognised. This change was made in the Supreme Court’s decision in *Takamore*, which overturned the previous rule found in *Loasby.[[39]](#footnote-39)*

Nonetheless, the incorporation of tikanga Māori into Aotearoa New Zealand state law still falls short of Māori tino rangatiratanga or an Indigenous peoples’ right to self-determination. Here are some reasons why:

* A primary concern is that there is an implicit assumption that recognition by state law – by state courts and state legislature – is necessary for tikanga to apply in these territories. It suggests that state law sits higher than tikanga in the hierarchy of legal systems applicable here, contrary to hapū tino rangatiratanga.
* In a similar vein, tikanga Māori will not have force where it conflicts with statute law such as the Crimes Act 1961.
* Some iwi, hapū and Māori individuals seem to be buying into the state system as a venue to resolve intra-iwi, hapū and Māori disputes which should ordinarily be resolved outside of the state and its legal system. This is true in the *Ngāti Whatua* case. This undermines self-determination.
* While the courts have intimated that they have no authority to determine tikanga Māori, in effect they do judge the tikanga of a particular iwi or hapū based on evidence presented. This blurs the lines somewhat as judges are certainly involved in determining tikanga for the purposes of its recognition by common law and, when in relation to a statutory provision, recognition under legislation.
* Tikanga Māori often competes with other factors when judges determine the outcome of a dispute. In *Takamore*, for example, the relevant tikanga rule was outweighed by other factors.

## A Some Reflections

Even with the increasing incorporation of tikanga Māori into state law, there is very limited opportunity for Māori to exercise their self-determination.

I discussed above models including the recognition of American Indian inherent sovereignty in the United States, increasing scope for First Nations to exercise legal jurisdiction in Canada and the role Saami Parliaments in Norway, Sweden and Finland in national law and politics. These models are still suboptimal when assessed against international law under the United Nations Declaration on Indigenous Peoples and relevant reports by international human rights bodies.[[40]](#footnote-40) This is because, despite significant scope for self-government and autonomy, Indigenous self-determination is always subject to the state’s overall claim to jurisdiction over the state’s territory.

However, in my view, the territorial model is qualitatively more effective in realising self-determination than the incorporation model. This is because its authority does not come from its application as state law, but as an independent source of law with, in some places, exclusive authority. At the same time, the incorporation of tikanga Māori in Aotearoa New Zealand state law is a profound development because it upsets the Westminster attachment to ultimate and absolute state authority. Also, courts have made it clear that tikanga Māori retains its legal character derived from the independent authority of tikanga Māori.

The more perplexing question is whether the development of the incorporation model in Aotearoa New Zealand ultimately undermines Māori claims and aspirations to full realisation of tino rangatiratanga. If we assume that some form of state recognition of Māori sovereignty is needed before that sovereignty can be exercised fully, my fear is that the incorporation model may become an apology for a lack of recognition of full sovereignty, or worse, stymie moves towards greater recognition of sovereignty. On the other hand, incorporation may facilitate a move towards greater Māori sovereignty, paving the way forward.

On a different note, other states, including those that practice the territorial model, might learn from Aotearoa New Zealand’s development of the incorporation model. For example, it could influence the application of Indigenous law by state courts off-reservation where Indian nations do not exercise any independent law-making authority. An argument might also be made that s 35 of the Canadian Constitution Act 1982 – protecting aboriginal and treaty rights – requires state legal systems to apply Indigenous law.

Tēnā koutou kātoa|Thank you.

1. *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733. [↑](#footnote-ref-1)
2. Nicole Roughan *Interlegality, interdependence and independence: framing relations of tikanga and state law in Aotearoa New Zealand* (Te Aka Matua o te Ture|Law Commission, Wellington, September 2023). [↑](#footnote-ref-2)
3. John Griffiths “What is Legal Pluralism?” (1986) 24 Journal of Legal Pluralism and Unofficial Law 1 at 3. See also Ralf Michaels “Law and Recognition – Towards a Relational Concept of Law” in Nicole Roughan and Andrew Halpin (eds) In Pursuit of Pluralist Jurisprudence (Cambridge University Press, Cambridge, 2017) 90 at 100. [↑](#footnote-ref-3)
4. Kirsty Gover “Boundaries, Indigeneity and Legal Pluralism: Can Private International Law Assist?” (draft research Paper, University of Melbourne, October 2024). [↑](#footnote-ref-4)
5. Roughan, above n 2, at [3.8]. [↑](#footnote-ref-5)
6. At 4. [↑](#footnote-ref-6)
7. United States Constitution, art VI; see also *United States v Washington* 384 F Supp 312 (WD Wash 1974), aff'd 520 F.2d 676 (9th Cir Wash 1975); and *McGirt v Oklahoma* 140 SC 2452 (US 2020). [↑](#footnote-ref-7)
8. United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295 (2007); Declaration on the Rights of Indigenous Peoples Act RSBC 2019 c 44; United Nations Declaration on the Rights of Indigenous Peoples Act RSC 2021 c 14. [↑](#footnote-ref-8)
9. Nisga’a Final Agreement, Nisga’a Tribal Council–Canada (signed 27 April 1999, entered into force 4 May 1999). [↑](#footnote-ref-9)
10. *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families* 2024 SCC 5. [↑](#footnote-ref-10)
11. Tsilhqot’in Nation v British Columbia 2014 SCC 44. [↑](#footnote-ref-11)
12. See Victoria State Government: First Peoples – State Relations “Pathway to Treaty” <www.firstpeoplesrelations.vic.gov.au/treaty-process>. [↑](#footnote-ref-12)
13. See Eva Josefsen and Jo Saglie “The Sámi Parliament in Norway: a ‘breaking in’ perspective” (2024) 14(1) Polar Journal 109 at 110. [↑](#footnote-ref-13)
14. See Matthew Palmer “Constitutional Realism About Constitutional Protection: Indigenous Rights Under a Judicialized and a Politicized Constitution” (2007) 29 Dalhousie Law Journal 1 at 37. [↑](#footnote-ref-14)
15. Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003) at 11. [↑](#footnote-ref-15)
16. Translations taken from Te Aka Māori Dictionary at <www.māoridictionary.co.nz> [↑](#footnote-ref-16)
17. For more detail on the content of tikanga Māori see, for example Mead, above n 15; Law Commission *Māori Custom and Values in New Zealand* (NZLC SP9, 2001); and Cleve Barlow *Tikanga Whakaaro: Key Concepts in Māori Culture* (Oxford University Press, Auckland, 1991). [↑](#footnote-ref-17)
18. Resource Management Act 1991, s 8. [↑](#footnote-ref-18)
19. *Watercare Services v Minhinnick* [1998] NZRMA 113, [1998] 1 NZLR 294. [↑](#footnote-ref-19)
20. *Ngāti Rangi v Manawatu-Whanganui Regional Council* [2016] NZHC 2948. [↑](#footnote-ref-20)
21. *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401, [2002] BCL 757. [↑](#footnote-ref-21)
22. *R v Mason* [2012] NZHC 1361, [2012] 2 NZLR 695. [↑](#footnote-ref-22)
23. Te Urewera Act 2014, s 20(1). [↑](#footnote-ref-23)
24. *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188. [↑](#footnote-ref-24)
25. Helen Winkelmann, Chief Justice of New Zealand “Renovating the House of the Law” (keynote speech to te Hūnga Rōia Māori o Aotearoa, Wellington, 29 August 2019) [↑](#footnote-ref-25)
26. *Takamore v Clarke* [2012] NZSC 116,[2013] 2 NZLR 733 at [164]. [↑](#footnote-ref-26)
27. At [164]. [↑](#footnote-ref-27)
28. At [162]. [↑](#footnote-ref-28)
29. At [95]. [↑](#footnote-ref-29)
30. [2021] NZSC 127. [↑](#footnote-ref-30)
31. *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239. [↑](#footnote-ref-31)
32. At [271]. [↑](#footnote-ref-32)
33. *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601. [↑](#footnote-ref-33)
34. At [33]. [↑](#footnote-ref-34)
35. At [65]. [↑](#footnote-ref-35)
36. [2021] NZHC 1025, [2022] 2 NZLR 772. [↑](#footnote-ref-36)
37. Marine and Coastal Area (Takutai Moana) Act 2011, s 58. [↑](#footnote-ref-37)
38. *Re Edwards Whakatohea*, above n 28,at [128] – [130]. [↑](#footnote-ref-38)
39. *Public Trustee v Loasby* (1908) 27 NZLR 801 at 806. [↑](#footnote-ref-39)
40. See Expert Mechanism on the Rights of Indigenous Peoples *Report on Self-Determination under the UN Declaration on the Rights of Indigenous Peoples* UN Doc A/HRC/48/75 (4 August 2021); and United Nations Economic and Social Council: Permanent Forum on Indigenous Issues *Guiding principles for the implementation of Indigenous Peoples’ rights to autonomy and self-government* UN Doc E/C.19/2024/3 (5 February 2024). [↑](#footnote-ref-40)