

- [24] *Ngāti Whātua Ōrākei Trust v Attorney-General*, above n 3, at [124].
- [25] *Ngāti Whātua Ōrākei Trust v Attorney-General*, above n 3, at [124].
- [26] *Ngāti Whātua Ōrākei Trust v Attorney-General*, above n 3, at [127].
- [27] Waitangi Tribunal *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007).
- [28] Pare Hauraki Collective Redress Deed, at clause 22.1.
- [29] Pare Hauraki Collective Redress Deed, above n 28. at clause 22.5.
- [30] *Ngāti Whātua Ōrākei Trust v Attorney-General*, above n 3, at [72].
- [31] *Ngāti Whātua Ōrākei Trust v Attorney-General*, above n 3, at [72].
- [32] *Ngāti Whātua Ōrākei Trust v Attorney-General*, above n 3, at [73].
- [33] *Ngāti Whātua Ōrākei Trust v Attorney-General*, above n 3, at [63].
- [34] *Te Ohu Kaimoana Trustee Limited v Attorney-General* [2016] NZHC 1798.
- [35] Office of Treaty Settlements, above n 1, at 39.
- [36] The report of Matike Mai Aotearoa (The Independent Working Group on Constitutional Transformation) could provide some useful direction for the consideration of constitutional matters. See 'He Whakaaro Here Whakaumu mō Aotearoa' (2016) <http://www.converge.org.nz/pma/MatikeMaiAotearoaReport.pdf>.

Ka mate kāinga tahi, ka ora kāinga rua Growing Mana Motuhake while fighting for it

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Sacha McMeeking, senior lecturer and head of school, Aotahi – School of Māori and Indigenous Studies, University of Canterbury

It is an intimidating privilege to share in the 30 year anniversary of Hunga Roia, not least because I didn't grow up to be a lawyer. It fills my heart to acknowledge this milestone, which if it was a wedding anniversary would be marked with pearls. The members of Hunga Roia are perhaps more accustomed to being the wearing process that makes pearls, rather than actually wearing them, and it is the power of wearing persistence that I want to talk about today.

The apology in the Ngāi Tahu Settlement contains the whakatauki 'he mahi kai takata, he mahi kai hoaka'. It likens the intergenerational pursuit of justice to the use of hoaka (sandstone) grinding, shaping and polishing pounamu: the softer sandstone can shape pounamu like a wearing disruption, with enough time, conviction and persistence. I think about that whakatauki often as I contemplate how change in the world is forged.

It is particularly pertinent as we mark the 125 year anniversary of women's enfranchisement, as the catch call question of the year is 'are we there yet?'. After 125 years of political equality for women, have we achieved the social change aspired to? The only answer can be no, despite pay equity having been legislated for longer than I have been alive. Despite

the legal recognition, domestically and internationally, of women's equality in all spheres of life, that equality is not real in a lived sense. The statistics say that the woman to your left is likely to have experienced physical violence and the woman to your right is likely to have experienced sexual violence. Both of those women will likely earn materially less and the likelihood of experiencing prejudice or an abuse of power in their career is high. These facts are a well-known uncomfortable truth that the popular consensus says is unacceptable. If we have a broad moral consensus that supports women's equality and legal recognition of equality and women holding the most powerful three constitutional roles in the country, how can these realities persist and how can we seem so far from being 'there yet'.

In this whare, the natural next thought is to ask the same question of Te Tiriti o Waitangi: with good fortune, everyone in this room will be part of commemorating 200 years since the signing of Te Tiriti, so are we there yet? Are we at a place as a community, as a nation where the purpose of Te Tiriti can be realised. The answer is as loud an unequivocal no as for women's equality. It made me ask the question why don't I believe that mana motuhake will be genuinely realised within my lifetime, although I very much hope that I am wrong.

I think the answer lies in how social change is effected and the strategies we are using to advance mana motuhake. I believe in the power of the law, the righteous pursuit of justice, but just in the same way that formal legal equality has not cured the violence experienced by women, I do not believe that fearless, principled and righteous legal advocacy will deliver mana motuhake. The law is a critical strand in the resurgence of our mana motuhake, but like muka, it takes more than one strand to weave something that is as beautiful as it is functional.

Starting with the legal strand to forging social change, I want to acknowledge the whakapapa of our jurisprudential landscape, which was forged by many of the people in this whare. It is over a decade since the United Nations Declaration on the Rights of Indigenous Peoples was adopted. It is over thirty years since the *Lands* case rightfully returned Te Tiriti to being recognised as part of our constitutional fabric. An entire generation of Māori lawyers have inherited a legal landscape in which Te Tiriti is recognised, half a generation have inherited international recognition of our right to self-determination, so why hasn't the world changed?

My personal reflections are very much shaped by hanging on the coat tails of Moana Jackson and Claire Charters as we fought the Foreshore and Seabed Act 2004 in the corridors of the UN. As a naïve and impassioned 25 year old I expected that if the United Nations upheld the righteousness of our claims against the Act, that something might happen. When the Committee on the Elimination of Racial Discrimination (CERD) found the Act to be unconscionable, I expected a Minister would phone a chief to talk about the Act, to perhaps talk about change. I didn't expect radical change, I didn't expect instant repeal, but I did expect the courtesy of an acknowledgement, a conversation, something that would start a slow process of change. As we know, the findings of CERD were summarily

dismissed, in the same ilk of preferring the company of the mutant sheep Shrek to the faces of our people on the steps of parliament.

That experience made me question the power of the law to effect change, question the power of human rights to create the societal conditions necessary for human dignity to flourish. Those questions hurt, because I had imagined my life to be a continuation of the fearless advocacy of many in this room. The ensuing process of existential angst made me question the role of my generation in our intergenerational quest to change the world, to realise Te Tiriti, to achieve the aspirations of those who have passed. It made me question what it takes to create social change.

According to sociologists, social change is hard because social forces are inherently conservative and people who might clamour for change are psychologically change averse. From a societal perspective, there are social facts which are things society treats as a given. Once a social fact is established, it is very hard to displace it with another social fact because conservative social forces protect the status quo. There are a raft of social facts which counter against the resurgence of mana motuhake: societal norms that conflate equality and equity, institutional structures of government and the like, all founded on the invisibility of Te Tiriti to mainstream New Zealand. The living history of Te Tiriti and the fight for justice that we share around dinner tables is not widely shared beyond our community, which has allowed social facts to crystallise in its popular absence. I am not saying this is right, quite the reverse, but it is a reality we must engage with. Those social facts are there and society will fight to retain them.

Psychologists identify individual aversions to change through the status quo bias. There have been repeated experiments where individuals are given a 'thing', and then the opportunity to trade their 'thing' with someone else who has a different 'thing'. Imagine a group of people, half have crunchie bars and the other half have snickers bars. The experiments show, time and time again, that most people prefer to keep the chocolate bar they have. Even if they don't like that chocolate bar as much as what the other half of the room has. Individuals, potentially if they are allergic to peanuts, will keep hold of their snickers bar, or their crunchie bar, just because it is the bird in the hand.

For lawyers answering a calling to make the world a better place, it is not the jurisprudence that is your greatest obstacle to achieving the real and meaningful change you aspire to. The greatest obstacles are pre-existing social facts that fight to protect themselves and people who will fight to hold onto realities they know, even if they don't like them.

So what is the role of the law in effecting social change? Some sociologists use the analogy of a desire path. A desire path is what landscape architects use to describe the dirt track people make taking a short cut. Imagine your favourite park, with its neat asphalt paths and then the path that looks like a goat track because that's actually where people walk. To change social facts, to overcome status quo bias and achieve tangible social change, requires the creation of a desire path in our societal fabric. Like the desire path at the local park that forms through the passage of many feet, sociologists would say that in the absence of

radical social upheaval, social change is effected by constant wearing disruptions to the social facts as we know them. In my view, the law is one part of the wearing disruption that is needed to create conditions for the resurgence of mana motuhake, but we need to be more intentional about the threads it is woven with. If our collective responsibility is creating the wearing social disruption that creates a desire path in the hearts of our community, in the institutions of the state and ultimately the social norms of Aotearoa New Zealand, what will that take?

Socrates is attributed with saying that you can either fight the status quo or build the new. Both fighting the status quo and building the new are necessary to create a desire path than enables social change. However, in my view, fighting the status quo has consumed too much of our energy for too long, and it needs to be rebalanced with how we create the new.

If you go to any academic library to hunt literature on Indigenous self-determination, what you will find are acres of writing on the right to self-determination and an anaemic looking cluster of writing on how to build, grow and practice self-determination. This makes sense in three ways. First, we needed the literature on the right to Indigenous self-determination to gain the normative wins internationally and domestically, and second we needed those normative wins to create the space for the resurgence of mana motuhake to grow. Finally, it is no surprise that the academic literature is lagging behind what are communities are actually doing. There are practitioners in this room, like the indomitable mana wahine Donna Flavell, who are doing the hard yards to rebuild mana motuhake on the ground. The academy needs to catch up, and build useful insights into how to practice self-determination in our communities. To do so, we need to realise that while the fight will never end, increasingly the focus must be balanced with intentionally learning about how to practice self-determination: what works in different contexts, the ripple effect of different approaches to self-determination and how to sequence different elements of the resurgence of our mana motuhake to gain the maximum ground and positive social change within our communities.

There are three theories in the international Indigenous literature that provide some guidance on how to rebuild mana motuhake, none of which I think provides a complete guide for our communities. Given the complexity and multi-dimensional nature of mana motuhake, it is perhaps unreasonable to expect there to be any one theory that is a complete answer.

The most established theory, which I think is most relevant to our post-Settlement governance entities (PSGEs), is the 'cultural fit theory' which germinated from the Harvard Honoring Nations Project and is now particularly driven out of the Native Nations Institute at the University of Arizona.^[1] The essence of this theory is that if Indigenous communities can build tribal organisations that are a strong cultural fit, they will build both constitutive and ongoing self-determination, to use Anaya's framework.^[2] The pearl in this approach is that embracing and embodying tradition based expectations is both self-determination in action, as well as creating the blueprint for ongoing self-determination.

When we apply that theory to our PSGEs, I think we are failing to adequately take heed of the pearl. Our PSGEs are predominantly cut from a Western template that the Crown considers create sufficient safeguards for prudent management of the formerly public funds transferred through Settlements. Our tribal governors dance to standing orders that are rich with 'best practice' Western governance and light on elevating tikanga based values and processes. Some of the consequences are well known, others quietly kept secrets and the general climate one of mistrust of our tribal entities. Not long ago I was publicly asked to answer for Ngāi Tahu buying the Rotorua Agro-Dome without having talked with Te Arawa first. That purchase is perhaps 10 years old, but the insult and indignity of it will live on because it was a clear breach of tikanga. I was not involved in that purchase, but we all wear our whakapapa and it is inevitable that tribal members will be held to account for the conduct of our tribal entities. It is not the first or last time I will be embarrassed by how my tribal entity disregards tikanga in how tribal business is conducted. I will also not be alone in this regard. It is a telling reflection of how we are not practising that which defines us in rejuvenating our self-determination.

If we were to apply this theory, of ensuring our tribal institutions embody our tikanga we would simply, I think, be putting the label of theory on what our communities expect. I believe that to our communities, ensuring that our institutions are a strong 'cultural fit' is common sense. But, we are still not actually practising it as well as I believe we should. To create meaningful space for mana motuhake by slowly changing the social norms within New Zealand, we have to first have the courage to elevate adherence to our own cultural norms within our own institutions. It will take courage because doing so means we will be creating new organisational templates, and anything new is a departure from the status quo, which I have already said is hard to do, but in my opinion critical for our collective future.

The second theory, which I believe our communities have never ceased practising, is known as 'practices of everyday resurgence'. Under this theory mana motuhake is rebuilt by actively, intentionally using our language and practising our cultural traditions.^[3] The growth in first language speakers, the continued ability to access tītī are all evidence that our communities consider this theory common sense.

The third theory is less well developed, but equally something I believe Māori pioneered the practice of. It is the theory of 'collective capability development', which argues that there is a need to build the collective capability to be self-determining.^[4] This theory builds on the work of Amartya Sen. Sen argues that development is freedom, and freedom is achieved by building the capabilities people value. The subtext to this argument is that while human rights are an important declaration of the ethics of the time, what actually matters is the capability to express those human rights. What this theory looks like inside our communities is building the real capability to make choices that are important to us. This approach to self-determination leaves aside juridical sophistication and contortions over the scope of political autonomy in favour of seeing self-determination as the ability to make our own future: to chart our own

destinies, in our own image, according to our own values, for our own reasons.

I think we can see this theory in action within the Kohanga Reo movement and more recently through Whānau Ora. The shared value of both is that the ends and means are inherently valuable, inextricably bound and have a ripple effect far beyond their founding kaupapa. The stated 'ends' of Kohanga Reo was language revitalisation, but the means of self-organising strengthened our agency, our unity, our ability to build the new on the foundations of our values and aspirations. In my view, the Kohanga Reo movement is one of the most powerful contributors to the resurgence of our mana motuhake because we created institutions that were a cultural fit, it exists to perpetuate practices of everyday resurgence, and importantly, it built and continues to build the capability within our communities to imagine and implement the 'freedoms' we value.

If we were to learn from the Kohanga Reo movement, as fundamentally a mana motuhake movement, I think it has insights about the importance of having inter-related macro, meso and micro layers to our strategies of resurgence. The macro-level is the level of the state and constitutional architecture. The meso are intermediary institutions, such as our PSGEs, Whānau Ora Commissioning Agencies and the like. The micro are whānau and community level initiatives, such as the local Kohanga Reo or Iron Māori at its early stage, before it became the inspiring phenomenon that it is today.

In my opinion, if we had more intentional alignment between the bold and pioneering work that is being done at macro, meso and micro levels, we would be more effective in creating the wearing disruption of a new desire path that creates more space for mana motuhake to be realised. Many of you work, powerfully, at the macro level seeking to wear away at the normative and institutional forces that uphold the status quo. Some of you work within our tribal institutions seeking to achieve greater alignment with our tikanga. Many of you will have strong relationships, through whānau and active participation, with the many micro-level initiatives that are being driven by social entrepreneurs. Rarely though, are we talking to each other about our respective contributions to the resurgence of our mana motuhake and I believe we should be.

I also think we should be live to the potential for a 'washing machine moment' in the resurgence of mana motuhake. Women's empowerment owes a great debt to the invention of the washing machine.^[5] Before the washing machine, washing consumed countless hours given predominantly by women. The 'free hours' that access to washing machines created, gave women choice about how to spend their time. Washing machines created the space for education and employment, both ends and means for greater agency and individual self-determination.

I don't think an invention will have a comparatively emancipatory effect on the resurgence of mana motuhake, but I do think there are occasional convergences which might create a 'washing machine moment'. The one I am closest produced the landmark statutory partner status for Ngāi Tahu under the *Canterbury Earthquake Recovery Act 2011*. Ngāi Tahu, for particular purposes, had an equal legal status to central and local

government. I believe that is the strongest contemporary statutory reflection of Te Tiriti o Waitangi, albeit narrowly defined and thereby imperfect. The question has to be asked, how did that change in the macro architecture come about? I believe the answer is in the alignment between macro, meso and micro levels. At the macro level, Ngāi Tahu has political influence that is well known. At the meso level, Ngāi Tahu is well regarded as a stable tribal entity which commands an ever growing \$1.5 billion asset base. But I believe what really enabled the statutory partner status was at the micro level.

Following the 2011 Christchurch earthquake Ngāi Tahu co-ordinated a Māori Response Network (MRN) that reached 10,000 families in the worst affected suburbs, Māori and non-Māori alike. The MRN harnessed the collective generosity of the Māori community across New Zealand. Te Arawa sent nurses, Waikato Tainui sent doctors, Ngāti Porou auctioned a goat on the local radio station. The collective resources that flooded into Ngāi Tahu, as the channel to the local community, contributed to the hapū and lwi being able to practice the mana that goes with mana whenua. We practiced manaaki: our marae were refuges, we took necessary supplies to people in need and we co-ordinated with civil defence and the wider government response efforts. In doing so, we were able to change a 'social fact'. The pre-existing social fact is the widespread perception that Māori are about looking after Māori, and take from the government. After the rū whenua, Ngāi Tahu with the support of the motu, demonstrated the truth that Māori have always contributed to the public interest. As we know, we have 'paid' for our citizenship rights many times over, from ensuring early settlers didn't starve to the Māori Battalion and far beyond. The micro-level organisation was a 'washing machine moment' in wearing over, at least for a time, the pre-existing 'social fact' in the mind of government and replacing it with a 'social fact' that Ngāi Tahu had resources and contributions to make that government valued, hence the statutory partner status. I think this was a temporal achievement because the pre-existing 'social fact' held in the minds of the wider community was not changed, largely I think because the Māori Response Network did not receive coverage from mainstream media which has meant the contributions were not etched into public memory in the way of the Student Volunteer Army. To achieve enduring displacement of the social facts that constrain the resurgence of mana motuhake, I believe more needs to be done to promote the micro-level innovation within our community, within a coherent narrative that integrates the micro, meso and macro. If we can achieve this, consistently over time I hope and believe that the space accorded to mana motuhake will progressively grow.

The Māori economy is perhaps an arena in which we could/should intentionally recast the narrative to change the pre-existing social facts. To do so, I think the first step is to redefine what we mean by the Māori economy. Currently, the Māori economy is perceived as a collection of entities owned by one or more Māori. An economy is however defined as the combination of norms, institutions and practices within a given community. If we were to intentionally recalibrate the enthusiasm about the Māori economy into a deeper consideration of building institutions and normative practices within and between Māori entities that reflect our

tikanga and our aspirations, I think we could potentially forge another 'washing machine moment'.

One example is Ngāi Tahu pounamu. At the macro level, pounamu was repatriated to Ngāi Tahu through the *Ngāi Tahu (Pounamu Vesting) Act 1997*. At the meso level, the Iwi invested in GIS based tracking so that each piece of Ngāi Tahu pounamu can be traced back to both the whenua and the carver, if it is a worked piece, creating a robust authentication framework that increases market advantage. The hapū also put in place a management plan that guides the harvesting of pounamu. At the micro-level, the hapū retails pounamu and Ngāi Tahu artisans gain income through carving pounamu. I believe this is an example a genuine economy regenerating, with institutions and norms guiding practice and the inter-relationship between different level actors in the trade network. Importantly however, it also delivers multiple contributions to the resurgence of mana motuhake. Business and employment opportunities enable whānau to remain at, or return to the pā and to make a livelihood through tradition based practices (carving) thereby perpetuating the transmission of mātauranga Māori. If the Māori economy were to increasingly focus on these types of economic innovations and the institutions needed to underpin them, rather than buying and selling things like Go-Bus and Rymans shares, we could make more significant advances toward the resurgence of mana motuhake.

There are many micro-level innovations from Māori social entrepreneurs which, like the carving and retailing of pounamu, are powerful contributors to community development. Examples such as Iron Māori, Hand Over a Hundy and Manaaki Preserves out of Omaka marae are inspiring examples of social entrepreneurs creating meaningful social change within our communities, according to our own values. What is needed is greater connectivity between the innovators with the courage to build the new, but with limited resources, and the well-endowed but largely conservative forces of the Iwi entities. If we could intentionally use the Māori economy to grow a movement of localised social entrepreneurship within our communities, I believe it would be like a fleet of 'washing machine moments', both inside our community and across wider New Zealand.

To create stronger linkages, to forge a genuine Māori economy that embraces our values to build new norms and institutions, while intentionally creating linkages at macro, meso and micro levels will take imagination and courage. It will perhaps also take the intentional building of a bridge from here to there.

Moana Jackson has said that the most debilitating consequence of colonisation is that we lose trust in ourselves. To create the new, which in many ways is going 'back to the future' (ie harnessing tradition to lead us into the future), will require us to trust ourselves and our people. Tā Tipene O'Regan has used the analogy that pre-Settlement, we spent generations barking at the bus as it drove off. With the repatriation of resources that comes through Settlement, we now have the right and opportunity to drive the bus. But, many of our people struggle to move from barking at the bus to driving it. That I believe is a consequence of colonisation and if we are

to move comfortably into the driver's seat, we need a bridge from here to there.

Our lawyers I believe have a critical role in building the bridge. Most importantly, in rebuilding the trust in ourselves by approaching the law as an enabler rather than a rule book: helping tribal governors to find safe ways to pioneer the new and in doing so, reshaping the meso level architecture and norms. Equally important is the enduring role to hold the Crown to account and to advocate for change at the macro level. The micro-level actors might not be able to pay for your services, but there is much help you could provide there. Finally, however, perhaps the greatest contribution our lawyers can make is holding the vision of what could be and helping to steer greater alignment between the macro, meso and micro layers of the resurgence of mana motuhake. You have positions within our community where you see and hear a lot of the moving parts. You are also in positions of tacit power within our community: when you talk people listen. If you encourage designing our institutions on the basis of cultural fit, people will listen. If you encourage exploration of new forms of economic development, people will listen. If you encourage greater co-ordination of the threads in the resurgence of mana motuhake, people will listen. That I believe is the responsibility of this generation of Māori lawyers: to hold the Crown to account while supporting our communities rebuild our own capabilities to be self-determining. Nā reira, Ka mate kāinga tahi, ka ora kāinga rua.

Notes

[1] See particularly:

Cornell, S., & Kalt, J. P. (2000). Where's the glue? Institutional and cultural foundations of American Indian economic development. *The Journal of Socio-Economics*, 29(5), 443-470.,

Jorgensen, Miriam (2007) *Rebuilding Native Nations: Strategies for Governance and Development*, University of Arizona Press.

[2] Anaya, J. (2004). *Indigenous Peoples in International Law*. New York, Oxford University Press.

[3] See particularly Corntassel, J. (2012). "Re-envisioning resurgence: Indigenous pathways to decolonization and sustainable self-determination." *Decolonization: Indigeneity, Education & Society* 1(1): 86-101. And Alfred, T. and J. Corntassel (2005). "Being Indigenous: Resurgences against Contemporary Colonialism." *Government and Opposition* 40(4): 597-614.

[4] See particularly Murphy, M. (2014). Self-Determination and Indigenous Health: Is there a connection? *Restoring Indigenous Self-Determination: Theoretical and Practical Approaches*. M. Woods. Belgium, Ku Leven: 34-40. And Murphy, M. (2014). "Self-Determination as a Collective Capability: The Case of Indigenous Peoples." *Journal of Human Development and Capabilities* 15(4): 320-334.

[5] I'm conscious that there needs to be a footnote on the division of household labour between men and women, that while the washing machine both alleviated and exacerbated tensions, it did not fundamentally alter the ideological blueprint, which makes the washing machine an imperfect metaphor.