

Ethnic Origin Discrimination: A Place for Iwi in the Human Rights Act?

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I: INTRODUCTION

Crown-Maori dealings today are characterised by recognition, reparation and rebuilding. Much in the way of resources and special consideration is now being restored to Maori, but if the Crown has its way, this will end its obligations arising from Treaty breaches. It is thus essential that all this is done fairly, and that all of those who are owed obligations have these fulfilled. My broad purpose with this paper, therefore, is to determine whether this process of rebuilding can be managed without unjust discrimination.

To subject intra-Maori and Crown-Maori dealings to the inspection of anti-discrimination law, a narrower distinction must be found beneath the broad umbrella of Maori, that can fit within the prohibited grounds of discrimination contained in the Human Rights Act 1993 ("the HRA"). This paper thus seeks to determine whether there is a way for Maori individuals or groups to claim that they are being discriminated against in favour of other Maori.

I consider that the surest path for such a claim is through the ground of ethnic origins, by recognising iwi as ethnic groups. In doing so I have had to make some compromises. I have skirted around a discussion of family status and race as possible grounds for bringing iwi into the HRA. Although those ideas have merit, I consider the ground of ethnic origins to be the ground that most naturally includes iwi. I have focused on iwi (tribes) and not hapu (sub-tribes) even though, for many Maori, hapu bonds are much the stronger. However, I think iwi are more likely to be recognised as discrete ethnic groups than hapu. Furthermore, I see iwi as the more flexible group of comparison in a discrimination claim, and thus more likely to be involved in litigation.

Therefore, in this paper I seek to determine whether iwi are ethnic groups for the purposes of the Human Rights Act 1993, and forecast some of the possible consequences if they are found to be so. My first objective consumes the bulk of this paper, as it necessitates a thorough discussion of both a definition of "ethnic origins" and the characteristics of iwi before its central question can be answered. My second objective brings me to cover what I see as the most interesting and most relevant of the possible consequences of recognition of iwi as ethnic groups.

II: THE GROUNDS OF THE HUMAN RIGHTS ACT

The Human Rights Act 1993 is a valuable tool for those who fall within its sphere of protection and who know how to use it. It is unlawful to treat a person less favourably in one of the areas described in Part II of the Act by reason of any of the grounds listed in s 21(1). The grounds are: sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status and sexual orientation.

The prohibited grounds can be divided into two distinct sub-categories. One set concerns relatively uncontroversial areas like sex, age and marital status, where it is unnecessary, or at least objectively easy to prove that a person is included in the ground. The other set covers areas where there may be some contention as to whether a person is inside or outside the prohibited ground. Political opinion and religious belief are such areas.¹ A person might claim, for example, that he or she has a particular religious belief, and in cases where that belief is among this country's more established religious beliefs, that claim could be easily upheld. However, there may be cases that analogies cannot cover that demonstrate the problem of a lack of a relevant touchstone. The test for age or sex may be satisfied by physical examination. With religious belief or political opinion, if analogy proves insufficient, the Court must provide the answers.

The quartet of "race" grounds that constituted the entirety of the protected grounds in the Race Relations Act 1971 ("the RRA"),² must be seen now to belong to this second set of more difficult grounds. Race may once have been viewed as having sure distinctions, as certain and as discrete as sex. Today, however, the stereotypes that once delineated colour, race, ethnic origins and national origins are unpopular. As stated by one writer, "[w]ith more wisdom today, we are able to recognize racial and ethnic categories as largely socially-constructed creations. Such categories are at most only stereotypically associated with particular phenotypical characteristics, which are themselves mutable".³

This recognition of race and ethnicity as socially constructed has come at the expense of an ability to categorise accurately. Though the idea of sorting people into racial and ethnic categories may appear offensive, the HRA's prohibition of discrimination on these grounds has made this necessary. Furthermore, outside the HRA, affirmative action programmes and the benefits they attach to being a member of a certain group provide incentives for people to declare themselves to be members of racial or ethnic groups. With the recent surge of Treaty of Waitangi settlements and laws protecting indigenous rights, it is becoming more necessary to give meaning

¹ I include here the redundant ground of "ethical belief".

² Section 21(1)(e), (f), (g).

³ Ford, "Administering Identity: The Determination of 'Race' in Race-Conscious Law" (1994) 82 California Law Review 1231, 1232.

to words like iwi and Maori. “The law requires that we make very ‘hard’ variables indeed of the comparatively ‘soft’ notions of race and ethnicity”.⁴

III: “ETHNIC ORIGINS”

If “racial” differentiation seems problematic, what are we to make of “ethnic” identity, in which a host of indefinable cultural, educational, and environmental factors complicate these already-muddy waters?⁵

The Human Rights Act protects people who have ethnic origins. Most of the other prohibited grounds of discrimination can be investigated on an individual basis, by asking whether the complainant is or has been perceived to be, for example, disabled or unemployed or homosexual. Whether that question can be easily answered or not, it does not depend on showing a link between the complainant and a wider group. Such a group is either irrelevant or taken for granted. However, on any understanding of ethnicity, one’s ethnic origin is inalienable. Ethnic origins cannot be fully encapsulated within one person. They stem from membership of an ethnic group. So an understanding of ethnic origins depends first on an understanding of ethnic groups, and of the very term “ethnic”.

Ethnicity is something that brings a whole array of different things together. It could be language, accent, skin colour, literature, song, dance, art, geographical origin, history, heroes, religion or the way one sees the world. What turns having a collection of these facets into being part of an ethnic group is that there are others who have these facets too and who are bound together by historical ties.

The second edition of The Oxford English Dictionary defines “ethnic” as “*1 Pertaining to nations not Christian or Jewish; Gentile, heathen, pagan. 2 Pertaining to race; peculiar to race or nation; ethnological. Also pertaining to or having common racial, cultural, religious or linguistic characteristics, esp. designating a racial or other group within a larger system; hence (US Colloq.), foreign, exotic*”. The more limited definition given in the first edition of the dictionary is emphasised.⁶ The concept of ethnicity is historically strongly linked to race, but as the lines of race have blurred before more enlightened eyes, so “ethnic” is now able to stand on its own, with the newer props of culture, religion and language.

1. Case Law

(a) *King-Ansell v Police*⁷

⁴ Supra note 3 at 1235.

⁵ Ibid 1239.

⁶ First published in 1897.

⁷ [1979] 2 NZLR 531.

The principal New Zealand case on the meaning of “ethnic origins”, *King-Ansell v Police*, drew much from the dictionary definition of “ethnic” and from the evidence of expert witnesses. The case arose under the HRA’s predecessor, the Race Relations Act 1971. The Court of Appeal had to decide whether Jewish people were an ethnic group so it could determine whether King-Ansell had breached the RRA by distributing material intended to and likely to incite ill-will against the Jewish community. King-Ansell argued that Jewish people were a religious group and were not protected by the RRA, which only prevented abuse on the grounds of colour, race, or ethnic or national origins.

The Court took a broad, inclusive approach to construing “ethnic origins”. Justice Woodhouse considered the elusive language of these terms in the context of the legislature’s intention to ban all discrimination based on the four grounds, “endeavouring to leave no loophole for evasion”:⁸

The problem of racial discrimination is difficult to pin down in any form of words and those that are used here have been left imprecise because in my opinion they are intended to completely embrace every aspect of that elusive subject matter.

Justice Woodhouse’s ends-based reasoning fits in this field of discussion. It is what the RRA seeks to eliminate – discrimination – that ought to colour the definitions of the four grounds.

While all three judges agreed that Jewish people did constitute an ethnic group for the purposes of the RRA, the judgments of Woodhouse and Richardson JJ are noteworthy for their consideration of the importance of a group’s self-definition. Justice Woodhouse held:⁹

[T]he test for contemporary purposes ... would be a subjective belief by the members of the group of being alike by reason of accepting and sharing the kind of characteristics already mentioned¹⁰ and of feeling different on that ground; together with the objective opinion of others that they should be so regarded. When considered in historical terms I think the issue will be answered by the strength of ancestral ties, whether real or assumed, and the traditional and cultural values and beliefs that have been handed down and are kept in mind and adhered to by all.

Justice Richardson rejected a genetic test and held:¹¹

[A] group is identifiable in terms of its ethnic origins if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past It is that

⁸ Supra note 7 at 537 quoting Lord Simon in *Ealing London Borough Council v Race Relations Board* [1972] AC 342, 362.

⁹ Supra note 7 at 538-9.

¹⁰ Justice Woodhouse is referring to the definitions in the *Oxford English Dictionary 1972 Supplement*, now contained in the second edition and reproduced supra note 6 and accompanying text.

¹¹ Supra note 7 at 543.

combination which gives them a historically determined social identity in their own eyes and in the eyes of those outside the group. They have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents.

While both Woodhouse and Richardson JJ included a subjective belief by the members of the group that they were alike and shared a historically determined social identity, they also limited the definition by means of the opinions of objective observers. It was not enough that a group believed itself to be set apart from others by its shared beliefs and customs. Outsiders also had to recognise this group as sufficiently distinguished.

*(b) Mandla v Dowell Lee*¹²

The House of Lords in *Mandla v Dowell Lee* had to determine whether Sikhs were a group defined by reference to ethnic origins. Like the Court of Appeal in *King-Ansell*, the House of Lords was faced with a group that did not fit the older, more convenient biologically determined label “ethnic”. Their Lordships saw past the fact that Sikhs were “not biologically distinguishable from the other peoples living in the Punjab”,¹³ instead acknowledging a test similar to, but with more detail than, the test in *King-Ansell*. Lord Fraser outlined some of the characteristics a group might need to possess in order that it could regard itself and be regarded by others as an ethnic group:¹⁴

1. A long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which keeps it alive.
2. A cultural tradition of its own, including social customs often but not necessarily associated with religious observance.
3. A common geographical origin, or descent from a small number of ancestors.
4. Having a common language, not necessarily particular to the group.
5. Having a literature particular to the group.
6. Having a common religion different from that of neighbouring groups or from the surrounding community.
7. Being a minority or being oppressed or a dominant group within a larger community.

Lord Fraser regarded the first two characteristics as essential and the remaining five as relevant but not essential, while Lord Templeman saw a common geographical origin as also essential, but put less emphasis on cultural traditions. The criteria in *Mandla* are more specific than the elements brought into the test in *King-Ansell*, but together the two cases provide a sturdy judicial foundation for an argument about ethnic origins.

*(c) Dawkins v Department of the Environment*¹⁵

¹² [1983] 2 AC 548.

¹³ Ibid 565.

¹⁴ Ibid 562.

¹⁵ (1993) ICR 517.

In this case, Dawkins, a Rastafarian, was not considered for employment with the respondent because he refused to trim his long locks. He argued he had thus suffered indirect discrimination because refusal to cut hair was an important element of the Rastafarian culture. The English Court of Appeal had to determine whether Rastafarians were a group defined by ethnic origins. Rather than disputing the evidence that Rastafarians fulfilled the criteria laid out in *Mandla*, Neill LJ focused on separate identity as the overarching concern, holding that when compared to the remainder of England's Jamaican community there was "nothing to set them aside as a separate ethnic group".¹⁶

2. Sociological Point of View

The judges in *King-Ansell* and *Mandla* were bound to leave "ethnic origins" with a reasonably certain definition that would be able to be used in interpreting the law later on. In contrast, sociologists have faced no such limitation and have sought to define the essence of the term "ethnicity". Dr A J C MacPherson, a lecturer in the Department of Sociology at the University of Auckland, was called as an expert witness by the prosecution when *King-Ansell* was tried in the High Court. Dr MacPherson was asked, "[a]s I understand your opinion, the Jews are an ethnic group because they regard themselves as such. Does that mean they would have an ethnic origin?".¹⁷ He replied affirmatively, and focused on a group's belief in its common origins and in the correctness of its customs, but not on any outside group's point of view. Paul Spoonley of Massey University has also argued that an "ethnic group" can exist independently of outside recognition.¹⁸

[Ethnicity] is not like "race" where membership of a particular "race" is specified by others or dominant groups. In the case of an ethnic group, there needs to be some collective consciousness of difference and of being related to others who share those differences. For most this difference is culturally defined and in ways that are not always obvious to an outsider. Indeed, some ethnic groups are invisible to the wider society and it is only within the group that a feeling of ethnicity prevails.

The idea that an "ethnic group" can exist independently of outside recognition seems to take the definitions of ethnicity away from their Euro-centric heritage. The word "ethnic", in its old usage as it appeared in the original edition of the *Oxford English Dictionary*, was very much a dividing line between "us" and "them". People who were "ethnic" were those that were different from the "ordinary" English person. Modern courts have severed the definition of "ethnic" from these stereotypical, visually

¹⁶ Per Neill LJ cited in Papworth, "Defining ethnic origins" (1993) New Law Journal 610, 612.

¹⁷ [1979] 2 NZLR 531, 534.

¹⁸ Spoonley, *Racism & Ethnicity* (1988) 41.

based roots, but still refer judgment of whether a group has ethnic origins to “the eyes of those outside the group”¹⁹ or to “the objective opinion of others”.²⁰

IV: ARE IWI ETHNIC GROUPS?

1. Introduction

The question I now turn to is: “Are iwi groups ethnic groups?” Posed today, the question is a difficult one, and it is harder to apply the convenient *King-Ansell* and *Mandla* tests to iwi than it was to apply them to Jewish, Sikh and Rastafarian people. Furthermore, the New Zealand judicial authority on the meaning of “ethnic origins” came from a time when the Crown and the Court still saw Maori as one entity.²¹ The shift in the Crown, and indeed the Maori focus from Maoridom to iwi since that time thus gives an extra conceptual layer to the idea of ethnic origins in New Zealand, a layer that was absent from the thinking of the Court in *King-Ansell*.

Maori social, cultural and economic organisation has shifted over time, between different foci. It might be easy to say that Maori as a whole are an ethnic group, but in an attempt to determine whether sub-groups of Maori are ethnic groups in themselves, one first needs to define the sub-group under investigation – iwi.

2. The Development of the Modern Iwi

The most obvious plane of Maori organisation today, and the Maori sub-group I see as most likely to be recognised as an ethnic group, is the iwi. This study does not seek to determine what “iwi” means. That is a question which has gone to the Privy Council and has been wisely avoided by the courts. In *Te Waka Hi Ika O Te Arawa v Treaty of Waitangi Fisheries Commission*,²² Paterson J gave a judgment on what Parliament meant by “iwi” rather than what iwi meant. He held that the Treaty of Waitangi Fisheries Commission (Te Ohu Kai Moana or “TOKM”) was to distribute the pre-settlement fisheries assets²³ to the Court’s definition of “iwi”. Therefore, for the sake of simplicity, I shall use iwi to refer to traditional Maori tribes.

In order to ascertain whether iwi are ethnic groups, a discussion of the development of the modern iwi is essential. The groups that people generally associate with the

¹⁹ Supra note 7 at 543.

²⁰ Ibid 538.

²¹ The Crown did however, recognise a division within Maori along conservative and activist lines.

²² High Court, Auckland, 4 August 1998 CP 395/93.

²³ The pre-settlement assets (PRESA) comprise around \$300 million in cash, shares and fishing quota transferred from the Crown to Maori as an interim settlement of Treaty fisheries claims. It is the Treaty of Waitangi Fisheries Commission’s responsibility to allocate these assets to the beneficiaries of the settlement.

word iwi today were not always the foremost means of Maori social, cultural, and economic organisation. Before contact, Maori organisation was a lot more fluid and centred on the hapu, or sub-tribe. Iwi was what linked some hapu together as kin, however distant and excluded others.

The iwi, as propounded by James Belich, could be seen as the sort of artificial grouping that has the tendency to make itself real over time. If small discrete groups, linked by descent, came together to co-operate on large-scale enterprises or emergencies and they began to associate more and more frequently, they would start to place more emphasis on past unity, meshing together compatible traditions or ancestors. The larger group that was born would reconstruct its myth and history to legitimise its unity.²⁴ Even where the members of an iwi did not consider their iwi to be their most important identification group, interaction with groups that were outside their iwi could lead to the strengthening of their own iwi ties.²⁵

One way of understanding all this may be to distinguish between actual and imagined groups, both of which might be described in the language of kinship as hapu or iwi. Actual groups (hapu) lived together permanently, or assembled for major enterprises Imagined groups (iwi), on the other hand, might be no more than a vague collective identity, based on descent, with no corporate functions at all. Yet even this created a sense of outsiders. An imagined group often defines itself in relation to other groups of the same order of size. The other groups are sometimes artificial projections, imagined by "us" not by "them", and need not themselves have a collective identity might catch on from inside as well, creating an internally imagined group with enhanced potential for operating together.

Despite a weakening of tribal ties brought about by government-sponsored urbanisation, the iwi formation process has continued right through to recent decades, and still carries on today, assisted by both Crown and Maori initiative. The Crown, having realised that Maori grievances had to be dealt with, has recently encouraged the concept of iwi, after earlier attempts to deal with Maori as one entity. The short-lived Runanga Iwi Act 1990 advanced the establishment of iwi councils, or runanga, in order to help formalise negotiations between the Crown and iwi and among iwi. Wrapped up with the idea of councils, officials and mandates, the iwi was a more manageable unit than the shifting hapu.

For Maori, the renaissance of the Treaty of Waitangi and the creation and later enlargement of the Waitangi Tribunal has helped provide the impetus to emphasise iwi identity. Unity of an iwi behind a Treaty claim removes one more barrier to successful settlement of the claim. Furthermore, coming together as an iwi helps concentrate economic, spiritual and intellectual resources, making the research and presentation of claims easier. Once a settlement has been awarded, the iwi managers can act as trustees of the reclaimed assets for the iwi, further strengthening the iwi bond.

²⁴ Belich, *Making Peoples – A History of the New Zealanders From Polynesian Settlement to the End of the Nineteenth Century* (1996) 85.

²⁵ Supra note 24 at 85.

Justice Paterson noted in his résumé of the *Treaty of Waitangi Fisheries Commission* case that "...the resurgence of iwi consciousness can also be traced to the re-awakening of kinship interests on behalf of Maoridom".²⁶ Many Maori whose kinship ties were weakened by urbanisation have begun to seek out their forgotten whakapapa and have found iwi as the most natural embodiment of their old ties. The "traditional" iwi can thus be seen as the fusion of modern managerial and ancient kinship structures.

3. Does Iwi Fit the Definition of Ethnic Group?

I will examine this question by passing iwi through the *King-Ansell* and *Mandla* tests and by then discussing further considerations outside these tests that might have a bearing in the case of iwi.

The *Mandla* test's criteria go some way towards showing whether or not a group is an ethnic group. To repeat, Lord Fraser identified the two essential characteristics of an ethnic group as:²⁷

1. A long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive.
2. A cultural tradition of its own, including family and social customs and manners, often but not necessary associated with religious observance.

Iwi seem to have the first characteristic. Whether or not their lineage holds true right back to the ancestral canoes, iwi has cemented itself into history. The process of legitimisation that James Belich described has taken place,²⁸ and has supplanted any need for actual history. What matters is not the accuracy of an iwi's history, but the iwi's belief in its history. Whether iwi have existed in their present form for hundreds of years or not, they have a historical identity which assumes more importance in modern times and thus makes them more capable of definition as ethnic groups today.

The iwi have become peoples, and they assert the inevitability of their future. Dick Dargaville, a prominent Ngapuhi elder and fisheries negotiator, contrasted what he saw as the impermanence of the Urban Maori Authorities with the permanence of Ngapuhi: "Who are they?", he asked. "Can they guarantee they will be here in 150 years? I can guarantee the Nga Puhi will be here as long as this world exists as we know it".²⁹

Iwi keep the memory of their own histories alive through their whakapapa, the web that ties together the threads of whanau, hapu, iwi, ancestors, future descendants, gods and the land. Their whakapapa is embodied not only in their people and their oral histories, but also in their songs, carving, weaving and their marae.

²⁶ Supra note 22.

²⁷ Supra note 12 at 562.

²⁸ Supra note 24.

²⁹ Dick Dargaville, quoted in Barlow, "Court in the Maori Fishing Net" *The Dominion*, 30 May 1996, edition, 2, 9.

Iwi also have “a common geographical origin, or descent from a small number of common ancestors”,³⁰ one of the characteristics Lord Fraser saw as relevant but not essential. There is strong evidence that the ancestors of all Maori migrated from a common island group in Polynesia, and most iwi trace their lineage back to a canoe shared with other iwi. Despite this, each iwi has maintained a common geographical origin by binding itself as tangata whenua (local people) to a certain part of New Zealand. Though iwi boundaries might shift and overlap, all iwi can claim to have kept their fires of occupation burning at some ancestral home. As with their history, it is the strength of the iwi’s current belief in its common geographical origin that is important, rather than the accuracy of its claim. Whakapapa, history and land bind each iwi in its own intricate web and to distinguish iwi from each other.

Nevertheless, besides history, geography and descent, *Mandla*’s criteria cover areas where it could be said that all iwi are very similar. Many Pakeha would probably see no distinction at all. Iwi are identical in terms of genetics, and are very closely related in language and religion.³¹ Custom and tradition among different iwi fit a general pattern, though they may be adapted to fit each iwi’s location and history. Each iwi might have special expertise in carving or weaving or architecture or singing, or might mesh its art and culture more strongly with a particular resource. But from an outsider’s point of view they would not seem sufficiently distinguishable from each other. A blunt way of putting this view would be to say that iwi were merely variations on a theme – like large neighbourhoods, proud of their own identity, but really no different from those on the other side of the tracks.

Iwi, though, would regard itself as having an historically determined social identity, and would see the differences between one iwi and the next as starkly obvious. Ignoring these differences would be saying that all Maori were culturally the same. Roger Maaka noted that “...the nineteenth-century social development of autonomous tribes identifying as one people, Maori were only for dealing with the outside world. Internally, belonging to a tribe remained central to an individual’s sense of identity”.³²

From an iwi point of view, every aspect of the iwi is its own, and is inseparable. Nevertheless, from the court’s point of view, an iwi needs something more than a belief in its own separate identity before it can be regarded as an ethnic group. It needs external recognition of its unique history and culture. To restate the words of Woodhouse J in *King-Ansell*, an ethnic group needs:³³

...a subjective belief by the members of the group of being alike by reason of accepting and sharing the kind of characteristics already mentioned³⁴ and of feeling different on that ground; together with the objective opinion of others that they should be so regarded.

³⁰ Supra note 12 at 562.

³¹ Regarding language however, Lord Fraser acknowledged that for group to be an ethnic group, it need have only a common language, not a unique one.

³² Maaka, “The New Tribe: Conflicts and Continuities in the Social Organisation of Urban Maori” (1994) 6/2 *The Contemporary Pacific* 311, 314.

³³ Supra note 7 at 538.

³⁴ Supra note 10.

Though both *King-Ansell* and *Mandla* refer to this need for recognition of the group by others, neither says who these “others” are. If they are referring to the average, reasonable person, the test would be whether that person saw iwi as ethnic groups in their own right, or whether he or she saw iwi merely as subsets of Maori. However, from an external perspective, identity is measured with increasingly crudity depending on the level at which it is observed. Asked to define the ethnic origins of an immigrant family from South Korea, the average New Zealander would probably say “Asian”, or even “Japanese”. As Donald Horowitz pointed out, regarding a man of the Ibo tribe of Nigeria, “[a]n Ibo may be...an Owerri Ibo or an Onitsha Ibo in ... the Eastern region of Nigeria. In Lagos, he is simply an Ibo. In London, he is a Nigerian. In New York, he is an African”.³⁵

If we analyse this point in the context of the *King-Ansell* case, any reasonable person would recognise Jewish people as an ethnic group. They are an ancient group, and their culture and history are distinctive and well known. It is likely that the objective opinion of others was therefore simply taken for granted. It was stated as a requirement, but did not need further elaboration. The same could be said regarding Sikhs from the point of view of the average English person.

If a smaller, more obscure group had been the focus of these cases, instead of the relatively clear-cut groups of Sikhs and Jewish people, the Court of Appeal and the House of Lords might well have had to reformulate their tests and further explain the requirement of external recognition. In such a case, it would be most unsatisfactory if a group were denied the status of an ethnic group simply because it was not well known enough to be seen as a distinct group in the objective opinion of the average person.

I suggest that in answering the question of whether iwi are ethnic groups, the external observer group should be Maori. Ethnicity is a creation of society which alienates one group from another. In terms of the broad concept of ethnicity, there is sense in considering whether wider society sees a group as an ethnic group or not. However, this is not an opinion poll on cultural awareness. It is a question of discrimination law. The purpose of the HRA’s anti-discrimination provisions is to prevent unjust discrimination. The plane of interaction on which the discrimination occurs is important. In discrimination law terms, iwi can only have relevance within a Maori level of interaction, and iwi discrimination can by logic only occur in areas already legitimately reserved for Maori.

The point illustrates the fact that, for the purposes of the HRA, a person might have more than one ethnicity. Which ethnic group is relevant depends on the type of discrimination. If a Maori woman were refused service for speaking Maori inside a shop, she would be suffering discrimination on the basis of her Maori ethnic origins. If she was not considered for a Maori scholarship because she belonged to a certain iwi, her iwi would be the expression of her relevant ethnic origins. In the latter example, the views of wider society should not be relevant, and a narrow definition of ethnic origins would hide the act of prejudice.

³⁵ Donald Horowitz, quoted in Huntington, “The Clash of Civilisations?” (1993) 72:3 Foreign Affairs 26.

If the *King-Ansell* and *Mandla* tests were rephrased in this way, with Maori as the referent, iwi groups would certainly be found to be ethnic groups. They have a subjective belief that they are alike in terms of their historical origins and cultural characteristics. They believe in the rightness of their own ways, and the importance of their traditions is not diminished by the fact that others have similar traditions. Iwi is the sphere that surrounds an iwi member, and within which this person can truly say and feel that all others are the same. Outside the sphere everyone else is different, some more so than others, and each lives in a realm of his or her own. Maori outside the group confirm this belief, especially those Maori also attached to an iwi. From a Maori standpoint, iwi seizes the essence of the meaning of “ethnic group”. From such a point of view, the iwi is the strongest expression of an iwi-member’s ethnic origins.

Furthermore, quite apart from issues of internal and external recognition, it would go against the intention of the drafters of the HRA if iwi were to be left out. This is not to say that Parliament specifically intended that the ground of ethnic origins was to cover members of iwi. However, what is important is what the Act was trying to achieve - the elimination of unjust discrimination in all its facets. That intention should not be denied by giving too narrow a meaning to the words “ethnic origins”.

In England, during the Parliamentary debates over the passage of the Race Relations Bill,³⁶ a government minister added “ethnic” to “race”, “colour” and “national origin”, and stated “[t]o understand the formula, it may be helpful to consider the nature of the evils that this legislation is designed to tackle. It is easier to identify these practical examples than it is to define [the terms]”.³⁷ The minister went on to say, “[t]he point is that the overall formula ... encapsulates a wide variety of ideas – sufficiently wide to cover all the various manifestations of racial discrimination”.³⁸ Concentrating on narrow definitions would be to ignore the aim of the Bill.

It would be wrong, of course, for the HRA to be the champion of every group that was treated harshly, without any reference to the grounds it covers. It cannot extend protection to people who lie clearly outside its scope. Iwi, however, are not such a case. At the very least they can be said to lie in the penumbra of groups defined by their ethnic origins. Giving members of iwi the protection of the HRA might add another bulge to the Act’s already lumpy figure. But leaving iwi outside the Act altogether would leave a gaping recess.

In 1994, Roger Maaka wrote, “I have concluded that the process of detribalisation is irreversible”.³⁹ I would argue that the erosion of the iwi has turned, even in these last few years. The strength of the traditional iwi, bolstered by the first flow of substantial Treaty settlements, is growing inexorably, and iwi are becoming more and more relevant. Maori who no longer feel a part of their iwi, or who have lost their link to their iwi, come together in pan-tribal organisations, the distinctions between iwi and between iwi and non-iwi Maori are increasing.

³⁶ This was to become the Race Relations Act 1976 (UK).

³⁷ 374 Parl. Deb., HL (5th ser.) 74 (27 September 1976).

³⁸ Ibid.

³⁹ Supra note 32 at 329.

4. Conclusion

I propose that iwi are ethnic groups. The iwi is the most fundamental level of group identification for many Maori. Iwi satisfy the court's tests for ethnicity when measured from a Maori point of view, and as iwi enter more frequently into New Zealanders' comprehension, it is increasingly likely that they could also satisfy the tests from a Pakeha perspective. Furthermore, discrimination based on iwi origin is the sort of mischief the HRA clearly seeks to combat. Prohibition of such discrimination comports with the Act's spirit as well as with the clear and ordinary meaning of its words.

V: CONSEQUENCES

1. Introduction

To assess the consequences of recognising iwi as ethnic groups is to build a hypothesis upon a foundation that does not yet exist. However, conclusions can be made – some with more certainty than others. Finding that iwi were ethnic groups would of course have the immediate consequence of allowing Maori to bring claims that they had been discriminated against by reason of their iwi, or by their lack of an iwi, and it would be relevant to the status of non-iwi urban Maori groups. It could also have great constitutional consequences. It might see a conflict arise in the HRA, which would say that all Maori must be treated alike regardless of their iwi; and government practice, which has been to deal with Maori on an iwi-by-iwi basis, treating them differently and granting them special status. It could even force a rethink of the very meaning of Maori.

2. Discrimination

To illustrate the possible consequences of a finding that iwi are ethnic groups, I will refer to two actual New Zealand cases where I think an iwi discrimination claim could have been pursued. Both consequences focus on Te Whanau o Waipareira Trust (Waipareira), an Urban Maori Authority (UMA) based in West Auckland. Waipareira is a pan-tribal organisation fulfilling many of the roles of the traditional iwi in an urban setting.

(a) Waipareira and the Treaty of Waitangi Fisheries Commission

In this case, the question of whether iwi were ethnic groups actually went to the Race Relations Office (RRO). In April 1997, Waipareira and the Manukau Urban Maori Authority (MUMA) made a complaint to the Human Rights Commission (HRC)

that TOKM and Moana Pacific⁴⁰ had discriminated against urban Maori on the grounds of colour, race, and ethnic or tribal origin".⁴¹ Among the matters said to give rise to the complaint was:⁴²

Moana Pacific's alleged denial of employment opportunities to Te Whanau o Waipareira Trust due to a Commission policy against providing employment opportunities to "urban Maori" through such urban Maori organisations.

The HRC referred the case to the RRO, which went some way towards investigating the complaint. After discussions with Massey University sociologist Professor Paul Spoonley it decided that not only traditional iwi, but also the UMAs behind the complaint, were "ethnicities" for the purposes of the HRA. Discussion between the Race Relations Conciliator, the complainants and TOKM, resulted in a withdrawal of the complaint, and there was thus no formal public decision on the issue.

If the allegations made by Waipareira and MUMA were true, and if iwi were ethnic groups, TOKM's actions would clearly constitute discrimination. TOKM's job is to determine allocation of the Fisheries Settlement assets and to help Maori enter into the fishing industry so they can manage their own assets. If it refused jobs to individual Maori who were not affiliated with certain iwi, it would be refusing to employ applicants by reason of ethnic origins, and that would be a breach of s 22 of the HRA. If it refused work to the Waipareira Trust it would be, at the very least, discriminating indirectly against the Trust's members on the grounds of ethnic origins, as a large number of Waipareira's members are Maori who are no longer affiliated with their iwi.

In this example, the Waipareira Trust itself would not have to prove that it was an ethnic group. Its members would not even need to show they had ethnic origins at all. This is because the anti-discrimination provisions of the HRA only require complainants to show that they have been discriminated against "by reason of any of the prohibited grounds".⁴³ The Act does not require that people demonstrate that they themselves come within the ground. In most cases the two concepts will be inseparable, but in the case of iwi-origin discrimination, complainants would only need to show that they were Maori and that other people, who had a certain ethnic origin, were preferred over them. For the sake of argument, however, I do not think that UMAs should be recognised as ethnic groups. They do not have the length of history, either real or imagined, that would make them the source of their members' ethnic origins. They seem to fall far short of the requirements of the *King-Ansell* and *Mandla* tests, even if the external recognition requirement is modified as I have suggested.⁴⁴

⁴⁰ Moana Pacific is a fishing company in which TOKM has a two-thirds share.

⁴¹ *Hui-a-Tau Report* (1997) Te Ohu Kai Moana 34.

⁴² *Ibid.*

⁴³ See, for example, s 22.

⁴⁴ *Supra* Part IV (3).

(b) Waipareira and the Community Funding Agency

Another past case shows an area where an iwi discrimination claim might have been made out. The Waipareira Trust made a complaint to the Waitangi Tribunal regarding the funding allocation practices of the Community Funding Agency (“the CFA”) – an arm of the Department of Social Welfare. The CFA existed to provide funding for community organisations working in the area of social services delivery. However, the CFA had a further mandate to give special consideration and funding discretion to Maori groups, and the Treaty of Waitangi had become an integral part of its approach to funding. As recognised Treaty partners, traditional iwi organisations were afforded special status in terms of the amount of consultation the CFA undertook, and the extent to which they themselves could determine how to use the CFA funding they were allocated. Waipareira was treated merely as a community organisation, of the same status as any other. The Waitangi Tribunal found:⁴⁵

The [Department of Social Welfare’s] view of its legal obligations means that it pays particular regard to the needs and views of iwi in its work. This is...borne out... in the particular case of the [CFA], by the clear focus upon iwi as opposed to other Maori groups in such matters as the development of consultation protocols between the agency and provider. The language used by agency witnesses throughout the hearings of the claim impressed upon the Tribunal their sense of the pre-eminence of iwi amongst Maori groups.

If the CFA could be defined as a “person who supplies...services to the public”,⁴⁶ it would seem clear that it treated non-iwi Maori less favourably in connection with the provision of its services by reason of ethnic origins,⁴⁷ and thus breached s 44 of the HRA. The issue of whether government welfare provision is a “service” for the purposes of the HRA has not been confronted by the courts in New Zealand. The issue has arisen in Canada, however, and the Saskatchewan Court of Appeal concluded that social services benefits were services offered to the public as those words appear in the Saskatchewan Human Rights Code. It further held:⁴⁸

The fact that a service is offered to the public does not mean that it must be offered to all members of the public. The government can impose eligibility requirements to ensure that the programme or service reaches the intended client group. The only restriction is that the government cannot discriminate among the client group, that is, the elderly, the poor or others, on the basis of the enumerated characteristics set out in the Code.

This case has been obliquely criticised by the Supreme Court of Canada.⁴⁹ More recently, however, the Nova Scotia Court of Appeal endorsed the Saskatchewan

⁴⁵ *Te Whanau o Waipareira Report – Waitangi Tribunal Report* (1998) 160.

⁴⁶ Section 44(1) Human Rights Act 1993.

⁴⁷ Non-Maori would not have such a claim because the CFA was allowed and required by law to give special consideration to Maori social providers.

⁴⁸ *Saskatchewan Human Rights Commission v. Saskatchewan* (Department of Social Services) (1989) 52 D.L.R. (4th) 253, 268.

⁴⁹ *University of British Columbia v. Berg* (1993) 102 D.L.R. (4th) 665, 682.

judgment,⁵⁰ as a response to changes to the Nova Scotia Code, in effect bringing its s 44 equivalent closer to the New Zealand legislation.

It would be stretching the limits of this paper to accurately determine how the New Zealand courts would have decided had Waipareira chosen to bring a discrimination claim against the CFA instead of going to the Waitangi Tribunal. However, these two examples demonstrate that recognising iwi as ethnic groups would have far-reaching ramifications and would further consolidate the rising non-iwi Maori groups. In practice, finding that iwi were ethnic groups would probably be far more significant in protecting non-iwi-affiliated Maori than it would be in protecting the members of the traditional iwi.

3. Treaty Concerns

An area of special concern is the effect this would have on the application of the Treaty of Waitangi. There are already opposing views as to whom, among Maori, the Treaty is meant to benefit. One view, that has been sustained by the Crown⁵¹ and by some tribal leaders is that the guarantees of protection of tino rangatiratanga,⁵² in Article Two of the Treaty, extend only to kin-based Maori groups, and cover only traditional resources such as lands, rivers, forests and fisheries. Article Two is thus said to have merely secured property rights for tribal groups, and Treaty settlements are said to be limited to redressing grievances arising out of breaches of these rights. Sir Tipene O'Regan said, in an editorial appearing on the Ngai Tahu website:⁵³

My concern has been with the basic Treaty right, because if you allocate or distribute assets on a basis other than the tribal property rights guaranteed under Article Two, you're allocating them to Maori as Maori. You're allocating assets on a race basis. You're saying that Pakeha hold their assets on a property rights basis, and Maori hold theirs on a race basis. You're dividing the world up on the basis of race. I don't think that's a position compatible with Treaty rights – or sound policy either, for that matter.

One criticism of this approach is that if property rights monopolise the content of the Treaty, all that is left once the settlements are done is an uncertain shell of Treaty principles. The property rights approach may be the most expedient way to redress Maori grievances, but it is not one that is in line with the current thinking of the courts or the Waitangi Tribunal:⁵⁴

⁵⁰ *Nova Scotia (Workers' Compensation Board) v O'Quinn* (1995) 131 D.L.R. (4th) 318.

⁵¹ *Supra* note 45 at xxiii.

⁵² A helpful but not absolutely accurate translation of "tino rangatiratanga" is "unqualified exercise of chieftainship" (from a translation of the Maori text of the Treaty by Professor Sir Hugh Kawharu).

⁵³ O'Regan T, *Readying The Canoe On The Beach* (Ngai Tahu Development Corporation, 1998) <http://www.ngaitahu.iwi.nz/NgaiTahu/ngai_tahu_home.htm>

⁵⁴ *Supra* note 45 at xxv.

[T]he Tribunal and the courts have viewed the principle of rangatiratanga as applying generally – that is, as a right of autonomy in a variety of situations neither restricted to tribes nor confined to the management of lands and fisheries.

So far, all but one of the Crown's Treaty settlements are on an individual basis with traditional iwi. With one exception – the pan Maori fisheries settlement was held in the *Treaty of Waitangi Fisheries Commission* case to be for the benefit of all Maori, channelled through traditional iwi.⁵⁵ A combination of the difficulties of the settlement process, the disparate nature of the claims, the Crown's desire for speedy resolution, and the focus on iwi groups, has meant that the Crown consistently treats different iwi differently.

Nevertheless, if iwi groups were brought within the ambit of the HRA, discrimination law would not be able to challenge this pattern of Treaty settlements, nor the preferences allotted to the tribes. The settlements are finalised by statute. Whatever its force, even after 1 January 2000, the HRA cannot overrule such specific statutes as those that pass the individual Treaty settlements into law.

Furthermore, the Treaty and the unique Crown-Maori relationship exist on a constitutional plane, removed from the run of ordinary legislation. The Treaty may be the ultimate exception to the HRA. If the Treaty's very essence requires that the Crown treat some iwi more favourably than others in a particular area, the HRA cannot presume to say "no". In *Morton v Mancari*,⁵⁶ the United States Supreme Court decided that Indian employment preference within the Bureau of Indian Affairs did not constitute invidious racial discrimination in violation of the Fifth Amendment. The judgment rested largely on a recognition of the "history and purposes of the preference and the unique legal relationship between the Federal Government and tribal Indians".⁵⁷ This "unique legal relationship" was brought about by the Constitution itself, and by "the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status to legislate on behalf of ... Indian tribes".⁵⁸

Maori and the Crown share a similar special relationship, and the founding of New Zealand is inextricably meshed with the signing of the Treaty. It is not merely a case of our Constitution allowing the creation of a Treaty. Rather, the Treaty itself is a part of our Constitution. The Treaty binds the Crown to keep to its promises, and though statutes have allowed the Crown to breach these promises in the past, they cannot now prevent the Crown from attempting to redress these breaches.

However, the HRA, with iwi origin inside, could still have great potential in influencing the development of Treaty jurisprudence. It might help the Crown define what those guarantees are. The Treaty speaks to tribes, but it need not speak only to tribes. The Treaty does guarantee the property rights of the tribes, and some would say that, beyond rights of citizenship, that is all it guarantees. But interpretation of

⁵⁵ Supra note 22.

⁵⁶ 417 US 535, 41 L Ed 2d 290, 94 S Ct 2474 (1974).

⁵⁷ Supra note 56 at 550, 301.

⁵⁸ Ibid.

the Treaty has moved beyond its exact words, and towards the living principles within it. I think that if the HRA was found to prevent discrimination based on iwi origin, it could help extend, rather than limit, the obligations in the Treaty. It would add statutory force to the claims that the Treaty encapsulates a relationship between the Crown and all Maori, not just between the Crown and a selection of individual iwi. Admittedly, the HRA was never intended to define what the Treaty meant, but by saying all Maori should be treated the same regardless of iwi, the HRA could not help but have an influence on it. Treaty settlements are necessarily matters of compromise, but compromise between Maori and the Crown ought not to translate into unfairness between Maori.

4. The Meaning of Maori

The question “who is and who is not Maori?” has not received much modern legal consideration.⁵⁹ However, a number of factors might force attention on the matter. If the HRA included being part of an iwi in its understanding of having ethnic origins, all Maori would enjoy its protection, regardless of whether they belonged to an iwi or not. If it was decided that Treaty settlements were not just limited to reparation to iwi, then the benefits of the Treaty, beyond the Article Three citizenship rights, would be there for all Maori, regardless of whether or not they belonged to an iwi. This state of affairs would force people to consider much more closely the question of who is and who is not Maori, because that question would take on a much greater significance. If a strict, narrow approach was used to determine whether or not a person was Maori, whakapapa and bloodlines become imperative, and some Maori might even face the indignity of having to prove their “Maori-ness”. Ironically, those Maori who have lost their tribal links, the ones who have the most to gain from a recognition of iwi as ethnic groups, might be unable to utilise these benefits by being denied status as Maori.⁶⁰

⁵⁹ The Electoral Act 1993 states: “Maori” means a person of the Maori race of New Zealand; and includes any descendant of such a person.

⁶⁰ Paul McHugh raises a possible solution to this problem in a discussion of the issues surrounding aboriginal status in North America and Australasia. McHugh suggests settler states should concentrate, in their duties in relation to their aboriginal populations, on “aboriginality” as a form of ethnicity. In the New Zealand context this would mean looking beyond the Treaty of Waitangi to the special duties the Crown owes Maori as a result of the status of Maori as the indigenous people of New Zealand. By focusing on indigenous peoples’ right to define themselves this approach could avoid the problems stemming from an overly structural method of defining who is and who is not Maori. See McHugh, “Aboriginal Identity and Relations in North America and Australasia”, in Coates & McHugh, *Living Relationships – Kokiri Ngatahi: The Treaty of Waitangi in the New Millennium* (1998).

IV: CONCLUSION

People have ethnic origins when their historically and culturally distinct group comprises the most intimate levels of their own self-identification, and when others recognise this fact. As a matter of law I think iwi are groups from which ethnic origins can be sourced, and as a matter of principle I think that that is rightfully so. The opportunities for the application of the HRA's discrimination laws to inter-Maori and Crown-Maori dealings will ensure that the question arises again soon. Section 152 of the HRA is set to unshackle the HRA and thus strengthen New Zealand's anti-discrimination laws. If iwi origins are recognised as ethnic origins, the coming years could add a uniquely New Zealand dimension to the HRA. The HRA could enter the new millennium, not only more powerful, but more relevant as well.



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