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Shireen Daft
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Carwyn Jones
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Cheryl Saunders
Anna-Marie Skellern
Pádraig McAuliffe
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The Student Editor
New Zealand Journal of Public and International Law
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand
e-mail nzjpil-editor@vuw.ac.nz
fax +64 4 463 6365

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BOOK REVIEW: *TRIBAL CONSTITUTIONALISM – STATES, TRIBES, AND THE GOVERNANCE OF MEMBERSHIP*

Carwyn Jones*

Book review of Kirsty Gover Tribal Constitutionalism: States, Tribes, and the Governance of Membership *(Oxford University Press, Oxford, 2010*).

Relationships sit at the heart of the Māori world. The system of relationships expressed as *whakapapa*, a genealogical framework, describes connections between all things in the natural world, and lays the foundation for a distinctive Māori philosophy. Rights and obligations within Māori legal traditions are determined by reference to that system of relationships. Rules and processes affecting membership are therefore of vital concern to Māori communities. Kirsty Gover's *Tribal Constitutionalism: States, Tribes, and the Governance of Membership* makes an important contribution to the discussion of indigeneity and membership at a time when these issues are of pressing practical concern to many indigenous communities, both in New Zealand and around the world. Given the significance of matters of cultural identity to indigenous communities, I would have liked to have seen a greater role for indigenous perspectives within this book. Nevertheless, Gover's book has much to recommend it and I have found it to be an excellent resource.

Tribal Constitutionalism carefully develops a tightly structured conceptual framework. The book is organised in four chapters. Chapter 1 lays out the theoretical foundation of the book, drawing on pluralist theory and anthropological scholarship in a developing field known as "new culture". The application of the ideas of new culture to the rules and policies relating to indigenous membership is, I would argue, one of the most important aspects of this book and I will return to discuss this in more detail shortly. In Chapter 2 the book shifts from the theoretical to the empirical, with Gover presenting her key findings from a detailed study of the governance and constitutional instruments of indigenous communities in North America and Australasia. Gover's empirical

* Ngāti Kahungunu and Te Aitanga-ā-Māhaki, Lecturer at the Faculty of Law, Victoria University of Wellington, New Zealand.

research is another key strength of the book, which I return to below. The final two chapters of the book provide more detailed analyses of membership governance in the United States and Australasia. Chapter 3 focuses on the role of descent in determining indigenous membership in the United States. Chapter 4 considers the impact of claims settlement processes on membership governance in New Zealand and Australia.

The theoretical framework that underpins *Tribal Constitutionalism* is one of the real strengths of the book. Gover draws on "new culture" theories that suggest that cultures are not clearly separated from one another, and that cultural production is an active process whereby communities constantly engage in determining markers of cultural difference. This understanding of cultural identity in general has implications for understanding the particular issues of indigenous identity and membership. Perhaps most significantly, the application of the "new culture" approach allows a more relational examination and explanation of indigenous governance and membership than is possible within older theoretical accounts of culture.

Once cultural identity is understood as a relational process of differentiation, it is possible to move beyond some of the orthodox concerns about tribal constitutionalism. Gover identifies two key concerns that are raised in the literature relating to the juridification of indigenous nations (at 161). The first is a concern that formal rules cannot accurately reflect the customary law relating to membership – the customary system has an inherent flexibility that cannot be matched by a formalised constitution, which inevitably fails to capture the nuances of cultural practice at play. The second concern is that juridification, furthermore, actually distorts the customary membership rules. Gover rejects the opposition implicit in these concerns, arguing instead that formality per se need not be seen as necessarily inconsistent with indigenous legal traditions. As the "new culture" model suggests, culture itself must be understood as a dynamic process rather than a "static attribute of a community" (at 165–166).

The move away from the assumption of some pluralist accounts that formality and institutionalisation are incommensurable with custom helps to reveal the importance of examining the extent of indigenous agency in the design and implementation of tribal constitutions. One reason why *Tribal Constitutionalism* is an important work is because it provides an analysis of corporate membership within indigenous communities that places indigenous agency at the centre of the discussion. However, with indigenous agency recognised as an area worthy of attention, it becomes even more important to ensure indigenous perspectives form a part of the analysis, as discussed below in relation to issues of descent and membership.

Another notable strength of *Tribal Constitutionalism* is its basis in empirical research. The book presents Gover's findings from her analysis of 737 tribal constitutions and membership codes. This includes historic and current tribal constitutions from 245 United States tribes, 38 constitutions of Australian Native Title Prescribed Bodies Corporate, 13 constitutions of Canadian Self-governing Aboriginal Communities, 243 membership codes of Canadian First Nations, and historic and current

constitutions from 48 Māori iwi. This empirical research is, in itself, a valuable resource and gives the book an important and authoritative evidential core.

These constitutions and membership codes provide an indication of the ways in which indigenous peoples self-constitute and the criteria which indigenous communities seek to apply in determining membership. Gover's theoretical framework is nuanced enough to recognise that tribal constitutions are also influenced by a range of other factors including public policy and the particular histories of state-indigenous relations. Gover is also careful to draw a distinction between tribal members as defined by the tribe and members of a formalised governance entity. In the New Zealand context, Gover points to the difference between a class of Treaty settlement beneficiaries, as defined by the Crown and membership of a hapū or iwi (at 207). However, it is around these central issues that I think greater reference to indigenous scholarship would have strengthened Gover's key arguments. Māori scholars such as Mason Durie, Mereana Hond, and Roger Maaka (with Augie Fleras) have written about issues relating to Māori identity and social organisation in the context of Treaty settlements.[1] Such scholarship might usefully have been deployed to illustrate more directly indigenous peoples' objectives in constitutionalising rules of governance and membership.

The discussion of descent as a criterion of membership that runs throughout the book is a key example of a discussion that might usefully have been supported by greater reference to indigenous perspectives. Gover notes that descent tends to be the primary criterion for membership of an indigenous community within the common law jurisdictions that her study encompasses. She further notes that this may still allow plenty of scope for indigenous agency in setting the boundaries of the tribe (at 166):

> Descent rules, for example, can form the scaffolding of tribal membership regimes, because these rules are relatively stable and uncontested. This could provide the legibility and accountability considered necessary for the public transfer of resources and governance capacities to tribal institutions, while allowing space for adaptation of those rules in accordance with the evolving custom of the tribal community, for instance by enacting rules admitting non-descendants.

However, without indigenous agency, Gover recognises that substantive rules or laws relating to membership in modern settlement processes that focus primarily on descent may distort or misrepresent indigenous legal traditions relating to membership. As Gover notes, this approach to membership serves to provide certainty for non-indigenous governments but severely limits the autonomy of indigenous communities (at 160):

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1 See Mason Durie "Universal Provision, Indigeneity and the Treaty of Waitangi" (2002) 33 VUWLR 167; Mereana Hond "Resort to Mediation in Maori-to-Maori Dispute Resolution: Is it the Elixir to Cure All Ills?" (2002) 33 VUWLR 155; and Roger Maaka and Augie Fleras *The Politics of Indigeneity: Challenging the State in Canada and Aotearoa New Zealand* (Otago University Press, Dunedin, 2005).

> … membership criteria must be clear enough to permit public officials to identify a person as a member, or non-member, at any given time. Tribal constitutionalism, then, requires that a formal member – non-member boundary be extracted from the cultural practices of tribal communities. Membership rules that appear to be indeterminate, inchoate, or otherwise inaccessible to outsiders are unlikely to survive the claims process. They include rules permitting a high degree of discretion in the selection of members, and those that allow the modification of a person's status over the course of their lifetime, due to changes in residency, marriage, or their observance of laws and customs. The exigencies of the claims process accordingly tend to favour descent rules over other forms of affiliation. The preference for descent rules in formal membership governance therefore seems to displace tribal custom and constrain tribal self-constitution.

Understanding the experiences of indigenous peoples would therefore appear to be vitally important in ascertaining the practical consequences of constitutionalising tribal governance of membership. For example, the emphasis on descent could be argued to be quite limiting for Māori communities in the modern Treaty settlement process. The application of descent rules to post-settlement governance entities is not entirely dissimilar to the approach taken by the Native Land Court in the 19th century with regard to the identification of customary interests in land. In both instances, particular criteria appear to be given priority in order to facilitate administration by the state legal system. In the Native Land Court, rights that came through conquest and the forced taking of land became predominant, regardless of the Māori legal systems' concern with other matters such as ancestral connection to the land.[2] At the heart of the issue is the question of indigenous agency, which Gover's analysis rightly draws to our attention. What is missing are indigenous perspectives on that question.

Despite this criticism, *Tribal Constitutionalism* provides a highly sophisticated analysis of the formalised governance and membership rules of indigenous communities. Drawing on political theory, anthropology and law, Gover's account moves the discussion of these issues beyond arguments about the juridification of indigenous law and situates it in the broader context of the dynamic relationships between tribal entities, indigenous peoples and the state. Though built on Gover's comprehensive analysis of tribal constitutions and membership codes, *Tribal Constitutionalism*'s contribution is not limited to issues of membership but speaks to more fundamental questions of indigeneity and the constitutive processes of both indigenous and state polities.

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2 See David V Williams *"Te Kooti Tango Whenua": The Native Land Court, 1864–1909* (Huia, Wellington, 1999) at 187–189.