The Increasing Need for Cultural Experts in New Zealand Courts

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Abstract

New Zealand's unique demography, with a large indigenous Māori population and a national population which is also increasingly superdiverse, means that New Zealand courts need more assistance from cultural experts if "the common law [is to] serve all in society", as our Chief Justice recently said in the Supreme Court (*Peter Hugh McGregor Ellis v R* (*Ellis*) 2022: para 174). This paper examines two recent Supreme Court decisions: *Ellis* and *Deng v Zheng* (2022), which explain the increasing need for cultural experts in New Zealand courts to determine what tikanga (Māori customs and practices) as the first law of New Zealand is and how it applies, as well as to ensure equal access to justice despite cultural and linguistic diversity. The greatest need for cultural experts arises from the majority of the Supreme Court's acceptance that tikanga was the first law of Aotearoa/New Zealand. There has been *ad hoc* (albeit growing) incorporation of tikanga and Te Tiriti o Waitangi (Te Tiriti) in various statutes, and no entrenchment in a supreme constitution, but even without statutory incorporation, the courts have interpreted statutes to take account of tikanga values and interests and to be consistent with Te Tiriti to the extent possible. Lawyers and judges need to acquire a base level of tikanga knowledge and cultural competency to be able to identify when a deeper level of tikanga/cultural expertise is needed, and cultural experts need to be called on to provide evidence to assist the Court.

This is important (not only to ensure that justice is done in particular cases) but to maintain broader constitutional legitimacy. This includes acknowledging significant cultural differences in the application and development of the common law, in relevant cases. Pluralism is an important value which may be relevant to filling the gaps in the common law created by new situations that indigenous and superdiverse cultures and languages give rise to (Chen, forthcoming 2024; see also Palmer & Ling 2023).

Keywords: tikanga; New Zealand; cultural experts; evidence; statutory interpretation; development of the common law.

* Paper delivered by Mai Chen at the Euro-Expert Conference on Cultural Expertise in the Courts in Europe and Beyond: Special Focus on France and International Perspectives, held at the Université Paris Panthéon Sorbonne on 6-7 April 2023.

[A] SOME CONTEXT ABOUT NEW ZEALAND

New Zealand (Aotearoa) is a small and geographically isolated country in the South-West Pacific Ocean. The first settlers arrived from Polynesia between 1250 and 1300. These are the "tangata whenua" or "the people of the land"—known as Māori.

New Zealand was first "discovered" by Europeans in 1642, with the arrival of Dutch explorer Abel Tasman. He was followed in 1769 by the English Captain James Cook. European migration and settlement ensued.

In the 1830s, the British Government came under increasing pressure to curb lawlessness in New Zealand, to protect British traders and to forestall the French, who also had imperial ambitions. In 1840, the British Crown entered into Te Tiriti o Waitangi with a majority of the Māori chiefs (rangatira).

Under Te Tiriti, Māori ceded powers of government (but not sovereignty) to Britain in return for the rights of British subjects and guaranteed possession of their lands and other "treasures" (taonga). Early jurisprudence dismissed Te Tiriti o Waitangi as "a simple nullity" (*Wi Parata v The Bishop of Wellington* 1877). But, as Justice Harvey said, "since colonisation, the courts have continued to give recognition to tikanga commencing with the decisions of the Native Land Court to today" (*Te Runanga o Ngati Whatua v Kingi and Dargarville* 2023: para 30).

Subsequent waves of migration have occurred, with arrivals from the Pacific (Auckland is the biggest Pasifika city in the world), East Asia (particularly China) and South Asia (particularly India). The descendants of these people have lived in New Zealand for generations, some much longer than others. Ongoing migration flows mean that New Zealand has a large population of people born overseas who have migrated here, as well as diverse well-established (second and subsequent generation) ethnic communities who identify as New Zealanders.

[B] WHY IS NEW ZEALAND DEMOGRAPHICALLY UNIQUE?

The context discussed above means that New Zealand is demographically unique.

First, we have a large indigenous Māori population. As at 30 June 2022, New Zealand's estimated Māori population was 17.4% of the national

population.[1] That is projected to increase to 21 % by 2043.[2] State and legal recognition of Te Tiriti rights is leading to the restitution of land and resources and a growing Māori economy. Māori own a significant proportion of assets in the primary sectors: 50% of the fishing quota; 40% of forestry; 30% in lamb production; 30% in sheep and beef production; 10% in dairy production; and 10% in kiwifruit production.[3] The asset base of the Māori economy was estimated to be worth $68.7 billion in 2018[4] and projected to be worth $100 billion by 2030.[5]

Secondly, New Zealand is a superdiverse nation of migrants. Superdiversity means that more than 25% of the population is comprised of migrants, or more than 100 nationalities are represented (Spoonley 2013; Chen 2015). In the 2018 census, 27.4% of the usually resident New Zealand population was born overseas, following the upward trend from 22.9% in 2006 and 25.2% in 2013.[6] The Asian population is projected to make up 26% of the total New Zealand population by 2043, compared with 16% in 2018.[7] The Pacific population is projected to make up 11% of New Zealand's population by 2043 compared with 8% in 2018.[8] By the 200th anniversary of the signing of Te Tiriti o Waitangi in 2040, the Asian population will have overtaken the Māori population.

This confluence has pushed New Zealand Courts to the forefront of jurisprudence on culture and the law. Our Supreme Court has had much to say recently about the common law method adapting to properly protect the people it serves (*Peter Hugh McGregor Ellis v R* (*Ellis*) 2022: para 174, per Winkelmann CJ), and a majority has recognized tikanga as the first law of New Zealand (*Ellis*: para 22).[9] There has been *ad hoc* (albeit growing) incorporation of Te Tiriti o Waitangi and tikanga in various statutes, but even without statutory incorporation, the courts have interpreted statutes to take account of tikanga principles and values (*Ellis*: para 175, per Winkelmann CJ and see footnote 185). There is, however,

1 "Māori Population Estimates: At 30 June 2022", 17 November 2022, Statistics NZ.

2 "Subnational Ethnic Population Projections: 2018(base)-2043", 29 March 2022, Statistics NZ.

3 "The Māori Economy", Ministry of Foreign Affairs and Trade.

4 "Te Ōhanga Māori 2018", 28 January 2021, BERL.

5 "Māori Economy Investor Guide", June 2017, New Zealand Trade and Enterprise.

6 "2018 Census Data Allows Users to Dive Deep into New Zealand's Diversity", 21 April 2020, Statistics NZ.

7 "Subnational Ethnic Population Projections: 2018(base)-2043", 29 March 2022, Statistics NZ.

8 Ibid.

9 See also Ellen France J on the place of the Treaty and customary interests in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* (2021: paras 139-161).

no entrenchment in a supreme constitution, like the recognition and affirmation of aboriginal and treaty rights in the Canadian Constitution Act 1982.

The increasing incorporation of tikanga into statute and the recognition of tikanga as the first law of New Zealand mean that cultural experts are critical to ensuring justice is done in New Zealand courts for indigenous and culturally and linguistically diverse people in particular, but also for all people.

[C] TIKANGA AS LAW—THE *ELLIS* CASE

This judgment was a procedural decision by the Supreme Court about whether to allow Peter Ellis' appeal against child sex abuse convictions to continue, despite his death.

The *Ellis* case is one of New Zealand's most enduring legal controversies (the Supreme Court described it as "a long and painful journey through the courts for the many people involved"),[10] which arose in the broader context of the worldwide "satanic panic" of the late 1980s/early 1990s.

The Supreme Court allowed the appeal to continue in the interests of justice, and the substantive decision quashed Mr Ellis' convictions, finding that there were problems with the evidence of the main prosecution witness, a psychiatrist, and that the jury had not been fairly informed of the risk of contamination of the children's evidence.

However, the significance of the procedural decision is the consideration given by the Court to the relevance of tikanga. This was not a case where tikanga arose as part of the context or subject matter of the underlying litigation. Mr Ellis was not Māori. Tikanga only became an issue after it was raised by a member of the bench (Glazebrook J), once it became clear the appeal would have to be heard posthumously (Burrows & Finn 2022).

The majority of the Supreme Court in *Ellis*, in deciding to allow the appeal to continue in the interests of justice, did not modify their test considering that tikanga concepts may be relevant (*Ellis*: para 11). The minority of Winkelmann CJ and Williams J folded tikanga considerations into the framework for deciding whether it was in the interests of justice for an appeal to continue (*Ellis*: para 10). The Statement of Tikanga of Sir Hirini Moko Mead and Professor Pou Temara, appended to the judgment in *Ellis*, was accepted by Glazebrook J (at para 107), Winkelmann CJ (at

[10] "Media Release: Peter Hugh McGregor Ellis v the King", 7 October 2022, Supreme Court.

para 185), Williams J (at para 247) and was referred to by O'Regan and Arnold JJ (at para 282].

So what is tikanga?

Justice Glazebrook accepted the nature of tikanga as including all the "values, standards, principles or norms that the Māori community subscribe to, to determine the appropriate conduct," and that tikanga comprised both practice and principles (Tikanga Statement, appended to *Ellis*: paras 34-37).

Ellis builds on earlier precedent establishing that "tikanga is a body of Māori customs and practices, part of which is properly described as custom law" (*Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* (*Trans-Tasman*): para 169).

The Court in *Ellis* adopted expert evidence that tikanga includes all the "values, standards, principles or norms that the Māori community subscribe to, to determine the appropriate conduct" (*Ellis*: para 107). The expert evidence provides further illumination:

> Unlike legislation, tikanga is not compiled in a tidy collection of written books. Although there is increasing published material on tikanga, it is lived and exists as unwritten conventions.
>
> Knowledge of tikanga is passed down through sources such as wānanga (institutions of learning), whaikōrero (oratory); karanga (call); waiata (songs); mōteatea (traditional chant or lament); whakapapa recitations (genealogy), whakatauākī (proverbial sayings) and pūrākau (stories). It is also learnt through exposure to its practice in everyday life.
>
> The foundational notions of tikanga are widely known. However, some tikanga might be tapu (sacred) and kept confined to certain expert people. For example, certain karakia (ritual incantations) would be only used by a small group of experts who have the appropriate training, expertise and standing.
>
> Given the nature of tikanga, being law that is comprised of principle and custom and the practice of people, we consider that the convening of this hui and forum of tikanga experts to be an appropriate way of determining the relevant tikanga that applies to an issue at hand (Tikanga Statement, appended to *Ellis*: paras 34-37).

Even though tikanga is a normative system embedded in the lived experience of Māori, the majority in *Ellis* accepted that tikanga was the first law of Aotearoa New Zealand, and that it continues to shape and regulate the lives of Māori (*Ellis*: para 22). Te Aka Matua o te Ture (the New Zealand Law Commission) will soon publish a report on tikanga and its place in Aotearoa New Zealand's legal landscape.

Tikanga is relevant to the development of the common law "because the common law must serve all in society" (*Ellis*: para 174, per Winkelmann CJ). It does not just apply to Māori but also to non-Māori (as noted above, Mr Ellis was not Māori).

Tikanga is adaptable. As the Chief Justice said: "tikanga is not fixed, but changes and evolves across time, to meet new situations. What is 'tika' (right) in any situation may need to be discussed and negotiated between those expert in tikanga" (*Ellis*: para 169, per Winkelmann CJ). This is echoed by the Supreme Court's later description of tikanga as "an adaptable framework for resolution"—after finding the lower court's approach to be "rigid". "Context is everything" (*Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* (*Wairarapa Moana*) 2022: paras 74 and 79, per Williams J).

[D] BREADTH OF THE APPLICATION OF TIKANGA TO STATUTE AS WELL AS COMMON LAW

Tikanga was the first law of New Zealand and may be relevant where there are issues concerning the interpretation of legislation and the exercise of discretion, as the Supreme Court said in *Ellis v R*:[11]

> The Court is unanimous that tikanga has been and will continue to be recognised in the development of the common law of Aotearoa/New Zealand in cases where it is relevant. It also forms part of New Zealand law as a result of being incorporated into statutes and regulations. It may be a relevant consideration in the exercise of discretions and it is incorporated in the policies and processes of public bodies (*Ellis*: para 19, footnotes omitted).

Chief Justice Winkelmann also said in *Ellis* that "[c]ertainly even without express statutory references to tikanga, the courts have interpreted statutes to take account of tikanga values and interests" (*Ellis*: para 175). In making this statement she referred (at footnote 185) to *Barton-Prescott v Director-General of Social Welfare* (1997: para 184); *Tukaki v The Commonwealth of Australia*;[12] *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* (2022: paras 358 and 587); and *Mercury NZ Ltd v The Waitangi Tribunal* (2021: para 104).

Justice Glazebrook said further in *Ellis* that there is a generally accepted presumption that statutes are to be interpreted consistently with Te Tiriti

[11] See also at para 171 and footnote 176 per Winkelmann CJ.

[12] *Tukaki v The Commonwealth of Australia* [2018] NZCA 324, para 38. The Supreme Court declined leave to appeal in *Tukaki v The Commonwealth of Australia* [2018] NZSC 109.

as far as possible and, as a result of the tino rangatiratanga guarantee, it has been argued that statutes should be interpreted consistently with tikanga as far as possible (*Ellis*: para 98).[13]

In *Trans-Tasman*, William Young and Ellen France JJ stated that: "An intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear" (para 151). Justice Williams further stated that: "If Parliament intends to limit or remove the Treaty's effect in or on an Act, this will need to be made quite clear" (*Trans-Tasman*: para 296). Both Glazebrook and Williams JJ in *Ellis* cited *Trans-Tasman* with approval in holding that the application of tikanga in the common law could only be limited or excluded by unambiguous statutory language.[14]

In *Trans-Tasman* (para 9), the Supreme Court confirmed that tikanga was "applicable law" in terms of section 59(2)(l) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012. Justice Glazebrook J in *Ellis* endorsed the comments of Williams J in *Trans-Tasman* where, in her words, "[h]e cautioned that the issue of statutory interpretation in that case regarding tikanga should not be viewed only through a Pākehā lens" (*Ellis*: para 96, referring to *Trans-Tasman*: para 297). Justice Williams in *Trans-Tasman* (para 297) pointed out that the interests of iwi with mana moana in the consent area reflected the relevant values of the interest-holder: mana, whanaungatanga and kaitiakitanga. These relational values were found to be principles of law that predated the arrival of the common law at 1840.

The Supreme Court in *Wairarapa Moana* (para 73) found that Parliament could not have intended the Waitangi Tribunal to be empowered to breach the principles of the Treaty, and thus tikanga was a very important consideration in the exercise of the Tribunal's discretion.

[E] SO WHAT DOES THIS MEAN FOR LAWYERS AND JUDGES IN NEW ZEALAND?

Lawyers need to put a tikanga lens on legal issues and consider whether tikanga is relevant—from a jural perspective, as well as from a different culture and language perspective.

[13] And also footnote 107 regarding interpreting statutes consistently with tikanga as far as possible.

[14] *Ellis*: para 98 per Glazebrook J and at 265 and footnote 263 per Williams J citing *Trans-Tasman*: paras 151 and 154 per William Young and Ellen France JJ and agreed to by Glazebrook J at *Ellis*: para 237, by Williams J at 296 and by Winkelmann CJ at 332.

Is tikanga a source of rights and interests? Lawyers will need assistance from cultural experts to determine that questions and, if so, how tikanga would apply. Judges adjudicating may be equally dependent.

At a recent parliamentary event in honour of former Prime Minister Sir Geoffrey Palmer (with whom I co-founded Australasia's first boutique public law specialist firm Chen Palmer almost 30 years ago), Dr Rawinia Higgins, Chairperson of Te Taura Whiri i te reo Māori (Māori Language Commission) said she had spent her whole life learning tikanga and te reo Māori (the Māori language); that you cannot understand tikanga if you do not understand te reo Māori; and that despite learning te reo Māori her whole life, she felt she hardly understood anything about tikanga.

This is a stiff challenge to the legal profession[15] and the judiciary to have enough cultural capability and understanding of te reo Māori to truly understand, and therefore be able to properly adduce and apply, tikanga. This is exacerbated by the fact that many Māori clients "have become alienated from their lands, [and] culture and are [themselves] unfamiliar with tikanga", as a consequence of "the devastating impact of colonisation" (Tikanga Statement, appended to *Ellis*: para 38).

However, the Supreme Court in *Ellis* took seriously the concerns of tikanga experts "that tikanga Māori might be misappropriated and wrongly applied in the court system" (Tikanga Statement, appended to *Ellis*: para 51). It acknowledged that "courts must not exceed their function when engaging with tikanga" (*Ellis*: para 22). It is not the role of the courts, according to the Chief Justice, "to pronounce on or develop the content of tikanga" (*Ellis*: para 181, per Winkelmann CJ). Those who are sources of tikanga or experts on it "will be external to the court" (*Ellis*: para 123, per Glazebrook J). This recognizes that Māori have rangatiratanga or sovereignty over how tikanga is interpreted.

Accordingly, there will be considerable reliance on tikanga experts. This expertise may be based on experience, rather than acquired through formal education or professional qualifications.[16]

Without cultural experts in tikanga to assist them, the courts would not be able to *adapt* tikanga to new circumstances confronting them, as

[15] The New Zealand Council of Legal Education is currently proposing to amend the Professional Examinations in Law Regulations 2008 to incorporate tikanga Māori in the New Zealand law degree from 1 January 2025. See New Zealand Council of Legal Education for more information.

[16] As noted Rewa (2021, 172): "Māori expertise is often drawn from those with experience, whether they have completed formal education or not." In Ministry of Agriculture and *Fisheries v Hakaria* (1989: 290), the District Court described the expert in question as being "steeped in the lore of his people" and considered a lack of formal historical qualifications to be "irrelevant" to the determination of his expert status.

envisaged by Justice Williams when he described tikanga as "an adaptable framework for resolution" (*Wairarapa Moana*: para 79, per Williams J). Many of the issues that arise for the Court's determination will "inhabit the grey area between cultural and legal worlds, requiring understanding and the ability to comprehend nuance" (*Wairarapa Moana*: para 84, per Williams J).

According to *Ellis*, the appropriate method of ascertaining tikanga (where relevant) will depend on the circumstances of the particular case (*Ellis*: para 23), including the significance of tikanga to the case and matters of accessibility and cost (*Ellis*: para 125, per Glazebrook J). Options range from submissions to deal with simple cases using reputable secondary sources and reports of the Waitangi Tribunal (*Ellis*: para 273, per Williams J, and footnote 266), to expert statements and to the appointment of independent expert witnesses (pūkenga) with knowledge and experience of tikanga (*Ellis*: para 125, per Glazebrook J).

The Supreme Court in *Wairarapa Moana* said that "tikanga speaks to process as well as substance" (*Wairarapa Moana*: para 95, per Williams J, emphasis added). That is engaging tikanga processes to resolve applications (*Wairarapa Moana*: para 226, per O'Regan J), which could include, depending on the particular iwi, hapū or grouping, wānanga, hui (gathering) and the involvement of taumata (gatherings of elders).

The Māori Land Court, established under Te Ture Whenua Māori (Māori Land) Act 1993, comprises judges appointed because of their expertise, having regard to the person's knowledge and experience of te reo Māori, tikanga Māori and Te Tiriti (Te Ture Whenua Māori (Māori Land) Act 1993, section 7(2A)). There is an ability to refer questions of tikanga that arise in the High Court to the Māori Appellate Court also established under that Act for its opinion (Te Ture Whenua Māori (Māori Land) Act 1993, section 61; Marine and Coastal Area (Takutai Moana) Act 2011, section 99(1)(a)).

Māori Land Court judges, who are eligible for appointment as alternate Environment Court judges (Resource Management Act 1991, section 249(2)(a)), are increasingly being invited to sit on the Environment Court to assist that court in carrying out its obligations to Māori.[17] The Environment Court is required "to recognise tikanga Māori where

[17] For example, *Ngāti Māru Trust v Ngāti Whātua Ōrākei Whaia Maia* (2020: para 102); *Poutama Kaitiaki Charitable Trust v Heritage New Zealand Pouhere Toanga* (2021); *Te Whanau a Kai Trust v Gisborne District Council* (2021); *Director-General of Conservation v Taranaki Regional Council* (2021); *Director-General of Conservation v New Zealand Transport Agency* (2019); *Puwera Māori Ancestral Land Unincorporated Group v Whangarei District Council* (2016).

appropriate" (Resource Management Act, section 269(3)), and the Resource Management Act 1991 provides that "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" is a "matter of national importance" to be recognized and provided for (section 6).

The Marine and Coastal Area (Takutai Moana) Act 2011 also legislates the ability of the High Court to "obtain the advice of a court expert (a pūkenga)" where applicants under that Act raise a question of tikanga (Marine and Coastal Area (Takutai Moana) Act 2011, section 99(1)(b)).

[F] CROSSOVER BETWEEN JURAL TIKANGA AND SOCIAL AND CULTURAL FRAMEWORK APPLYING TO INDIGENOUS AND SUPERDIVERSE POPULATIONS: *DENG v ZHENG*

Deng v Zheng is another significant Supreme Court decision providing guidance on when a social and cultural framework would be relevant to the determination of adjudicatory facts and issues in a case with culturally and linguistically diverse parties.

The Court in *Ellis* was alive to the crossover between tikanga and social and cultural issues more broadly. This is reflected in three footnotes to the judgment of Glazebrook and Williams JJ, who sat on both cases.

At footnote 142 in *Ellis* (para 118), Glazebrook J states:

> But note the caution expressed in *Deng v Zheng* [2022] NZSC 76 about stereotyping at [80]–[82]. See also the general observations in that case at [78]. While the Court in *Deng v Zheng* said at [77] that these comments do not address tikanga, *many of the observations will still have resonance in this situation* (emphasis added; see also Glazebrook & Chen 2023).

At footnote 149 in *Ellis*, on appropriate ways of ascertaining the relevant tikanga, Glazebrook J states:

> As noted above at n 142, while the case of Deng v Zheng, above n 142, said at [77] that it does not address tikanga, *the comments in that case may nevertheless be of relevance in this context* (*Ellis*: para 121, footnote 149, emphasis added).

At footnote 266 in *Ellis*, on some contexts only requiring references to learned texts or Waitangi Tribunal reports, Williams J said:

> … and, in a different context which was not intended to apply to Tikanga, *Deng v Zheng* [2022] NZSC 76 at [79]-[84] acknowledged different ways in which relevant cultural information could be bought before the court.

So what are the observations and comments in *Deng v Zheng* that are both of broad application and of specific relevance to tikanga (see Goddard & Chen 2022)?

That case concerned whether, despite a lack of formal documentation, the parties had entered into a legal partnership, of which they would be jointly responsible for the debts of the partnership. Two issues arose relating to the culture of the parties: namely, whether the meaning to be ascribed to 公司 (*gingsi*) went beyond 'company' and could extend to 'firm' or 'enterprise' and the significance of 关系 (*guanxi*). Both parties were Chinese and their business relationship appeared to have been conducted in Mandarin.

The specifics of the case are less important than the Court's guidance as to how "the social and cultural framework within which one or more of the protagonists [may operate] … can be brought to the attention of the court" when it is "of … significance" (*Deng v Zheng*: para 77).

First, the court noted that cases involving a cultural dimension (where one or more parties have a cultural background different from the judge) are likely to become more common in the future and must be approached with caution (*Deng v Zheng*: 78(a)-(b)). Judges need to develop "a mental red-flag cultural alert system" so they can assess what needs to be done about it (*Deng v Zheng*: para 78(b), citing Kyrou 2015: 226), and recognize that "some of the usual rules of thumb they use for assessing credibility may have no or limited utility" (*Deng v Zheng*: para 78(c)). In my view, the same advice applies to lawyers. Both lawyers and judges need to acquire a base level of cultural competency and be able to identify when a deeper level of cultural expertise is needed of indigenous or superdiverse cultures, especially those that are very distant from New Zealand culture.

Not all cases with a cultural dimension will require social and cultural framework evidence to be adduced. The usual ways that judges assess credibility remain available, and a "sense of proportionality" is required (*Deng v Zheng*: para 78(d)). It is therefore a matter of striking the right balance. The cost of providing the necessary evidential basis as well as funding interpreters could create a barrier to equal access to justice for culturally and linguistically diverse parties. Where judicial common sense can be exercised, counsel would only introduce evidence of cultural and linguistic context to inform the court why the implicit or explicit

assumptions a judge might make about behaviour do not apply in the court's assessment of the evidence.

In cases where it is appropriate to introduce social and cultural evidence, the court said (*Deng v Zheng*: para 79):

- ◊ it is open to witnesses to explain their own conduct and relationships with reference to their own social and cultural background;
- ◊ this may be supported by expert evidence or reference to sources of information of unquestionable accuracy or reliable published documents;[18]
- ◊ where a litigant wishes to explain the conduct of another party, such evidence is likely best provided by an expert, or by reference to sources of information of unquestionable accuracy or reliable published documents.

The court also sounded some important notes of caution. General evidence about the social and cultural framework cannot, of course, replace a careful assessment of the case-specific evidence (*Deng v Zheng*: para 80), and

> people who share a particular ethnic or cultural background should not be treated as a homogeneous group. … The more generalised the evidence of information, and the less it is tied to the details of what happened, the greater the risk of stereotyping (*Deng v Zheng*: para 81(a)).

Specifically concerning "*guanxi*", the Court stated that:

> We have no doubt that the Court of Appeal was entitled to refer to guanxi in the way in which it did. But, to reiterate a point we have already made, while guanxi influences the behaviour of some Chinese people, it should not be assumed that this is so with all Chinese people (*Deng v Zheng*: para 82).

In contrast to the French court system, New Zealand courts are adversarial, and therefore it is for counsel to raise issues of the social and cultural framework where they consider them to be relevant. In an adversarial system at least, the failure to call evidence when the social and cultural framework is of significance can be fatal to a party's case (*Ming Shan Holdings Ltd v Ma and Zhang* 2008; *Zhang v Li* 2017; *Li v Wu* 2019; *Zeng v Cai* 2018). As the court noted in *Tian v Zhang*:

> [The plaintiff provided] no independent evidence that there was any customary practice in Chinese culture for the payment of a dowry by an internet husband to his intended wife or family … The dispute about the existence of such a custom as is alleged might have been

[18] As permitted under sections 128 and 129 of the Evidence Act 2006.

> easily resolved by evidence from an independent expert, but there was none. Ms Tian suggested in evidence that evidence of the custom would be found on the internet, but the court is not disposed to "Google" its way past the inadequacies of the plaintiff's proof to find the answer (2019: para 56).

The Supreme Court in *Deng v Zheng* noted that "while judges can usually leave it to the parties to put relevant information before the court", they can still "inquire of the parties if they consider they would be assisted by additional information as to social and cultural context" (*Deng v Zheng*: para 84). In both *Ellis* and *Deng*, the cultural aspects were raised by judges sitting on the cases in the Supreme Court and the Court of Appeal, and not by counsel. The Supreme Court also noted the ability of the court to appoint an expert.[19]

Using the mechanism of a court-appointed expert to assist the judge is not, however, a silver bullet. Judges may not have enough information to select the right expert, if the parties are unable to agree, even if an expert with the requisite expertise is available. Often very little factual detail about the parties' backgrounds, culture and dialects is provided by the parties' counsel, or the parties themselves, if self-represented. It is very seldom that you see the degree of detail about different types of dialect and phonology, as in *Ye v Minister of Immigration* (2002, 2008).

There may be very rare dialects and cultures where it would be difficult to source an expert in New Zealand. Also if both sides call experts, it still leaves the judge having to decide which expert is right—through a cultural lens—which underscores the need again for judges and lawyers to have a base level of cultural competency. Our High Court Rules Committee recently recommended that expert evidence be subject to the presumptions that there will be one expert witness per topic per party, and experts must confer before expert evidence may be led at trial, which may help.[20]

The guidance provided by the Supreme Court with respect to tikanga and cultural and social issues is, however, a critical step in the right direction to ensuring justice is done in our courts for indigenous and culturally and linguistically diverse people in particular.

In conclusion, this Global Symposium on cultural experts in the courts is timely as indigenous and superdiverse populations expand in a growing number of countries around the world, and there is recognition of their

[19] Rule 9.36 of the High Court Rules 2016 and rule 9.27 of the District Court Rules 2014.

[20] Recommendation 21 of the Rules Committee Report, *Improving Access to Civil Justice Report* (November 2022) at 57.

rights and interests and the role of indigenous custom and practices as the first law of a nation. Experts are increasingly needed to explain what customs and practices are law, and whether they apply to a particular case, as well as what the parties did and said, and what they intended, to allow courts to properly determine the law that applies as well as the facts and the credibility issues fundamental to preventing miscarriages of justice and ensuring equal access to justice. Experts are also critical to assisting the Court to adapt and develop the common law to new circumstances where culture may be relevant. This is essential to ensure justice in individual cases and to maintain constitutional legitimacy more broadly (Chen, forthcoming 2024).

About the author

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