"Too Far, Too Soon": Speech Given on 3 May 2023 at the Wānanga on Tikanga and the Law

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Tēnā koutou katoa kei aku hoa-whakawā, me aku hoa-rōia.

[A] SOME BASICS

I think it is good to always start with basics and context. Tikanga is a Polynesian system of law, one of many cognate systems that populate the Polynesian triangle from Hawaii to Rapanui to here. When Kupe and his people arrived here around, they say, 900 years ago, he brought that legal tradition with him. Over maybe three or four generations, Aotearoa changed from a jural blank slate into a land where law was planted and legal ecosystems developed—all long before the arrival of the European colonizers.

The basic ideas of tikanga are simple enough and easily stated, though their application is more difficult, which is probably true with all law. The most important idea, the most important principle in Kupe's law, is whanaungatanga or kinship. It is the infrastructure that holds the whole system together. It is much broader than the Western idea of kinship. It is wider than just rights and obligations between individuals who are related. It also involves rights and obligations between those individuals and the ecosystems in which they live, between the living and their ancestors, and between the living and their descendants as yet unborn.

Whanaungatanga is a holistic framework into which some other basic tikanga principles fit. These include the concepts such as tapu (the idea of the presence of the divine in all things animate and inanimate); utu (the striving for reciprocity or balance in relationships); mana (the idea of human dignity as expressed in modern terms, as well as the currency or coinage of leadership; how you get it, lose it and what you are allowed to do with it); and kaitiakitanga—the responsibilities associated with belonging. That is the responsibility to care for your community—whānau, hapū, iwi, its knowledge, lands, waters, and other resources and its mana. And all of this is bound together by the conceptual and emotional infrastructure of kinship.

[B] POST-COLONIAL TIKANGA

So, when Cook, then Hobson, and eventually millions of others arrived—Aotearoa was no *lex nullius*; it was already a jural entity. Though British colonization changed much and displaced much, it did not succeed in wiping that pre-existing slate clean again. Earlier this century, the Supreme Court delivered its decision in *Takamore v Clarke* (2012) which dropped the old colonial rules of incorporation and replaced them with the broader idea that tikanga, as the Chief Justice said, is part of the "values" of New Zealand's common law. More recently, the Court in *Ellis v R* (2022) has said that tikanga is simply a part of the common law in New Zealand and was the first law.

This did not just pop up out of the blue. In the postcolonial period, which started tentatively in the late 1970s and took off in the reforming 1980s, New Zealand abandoned its colonial mindset. It was at this time that various aspects of tikanga came to be inserted in the law. It is important to understand the cultural process going on at the same time. Anyone born in New Zealand in the 1940s to the 1960s (ie the Boomers) would be forgiven for thinking these islands were located somewhere off the coast of Britain. As time went on we drifted towards the United States because of the political and economic heft of that country. But still, we were somewhere in the Atlantic, not the Pacific. In the 1970s and 1980s Aotearoa began to drift back to the Pacific. That process started, probably, in 1975 with the enactment of the Treaty of Waitangi Act and the creation of the Waitangi Tribunal, but more clearly in the 1980s when tikanga, sometimes via references to the Treaty of Waitangi and sometimes on its own terms, came to be inserted into contemporary legislation.

In addition to the arrival of the Waitangi Tribunal (Waitangi Tribunal 1983), the Māori Land Court came to take a much more tikanga-based approach to its work and to the retention of Māori land (McHugh 1991) (Māori Affairs Act 1953, section 438). And the Town and Country Planning Act 1977 contained section 3(1)(g) which made Māori relationships with their ancestral land an important factor in town planning.

Then in 1989 the Children and Young Persons Act (which ultimately became the Oranga Tamariki Act 1989) referred to whanaungatanga; that is to the importance of whānau, hapū, iwi in child welfare matters. Four years before that, section 15 of the Criminal Justice Amendment Act 1985 (which became section 27 of the Sentencing Act 2002) introduced considerations of culture into sentencing with a particular focus on Māori culture and the background of Māori offenders. What followed then was, as Whata J aptly described it, a Cambrian explosion of Treaty

and tikanga-focused legislative reform (Whata 2013). These included the administration of the Department of Conservation estate which covers 30% of our land surface area and a significant proportion of our territorial sea;[1] multiple substantive and procedural provisions in the Resource Management Act 1991; the Ture Whenua Māori Act 1993; and the Local Government Act 2002. More recently similar provisions have been enacted in relation to Hazardous substances (Hazardous Substances and New Organisms Act 1996, section 8), the Environmental Protection Authority (Environmental Protection Authority Act 2011, section 4), patents, trademarks and designs,[2] and all educational institutions. And of course multiple Treaty claims settlements introduced legislatively, local tikanga considerations into local decisions, often environmental but also local and central government service delivery and the like.[3] The most spectacular examples are the Waikato and Whanganui river settlements and the Tūhoe settlement in relation to the Urewera forest.[4]

Most provisions were general in their nature and forward-looking. The detail was left to iwi and hapū leaders, state and local officials and the judges. So from the 1980s through to the 2010s a welter of judge-made law was developed about what they meant, in the context of which, judges were required to confront the larger questions arising from the insertion of tikanga and Treaty clauses into legislation of general application.

This meant that by the time we get to *Takamore* and more recently *Ellis*, lawyers were pretty familiar with the presence of tikanga in the life of the law in Aotearoa. And judges were familiar with having to think about tikanga issues in identifiable parts of their work. With *Takamore* and then *Ellis*, the common law finally caught up as it usually does in situations of social change that drives an initial legislative response. The common law is methodologically, procedurally and, by inclination, conservative. Almost always in situations like this across the common law world, responses to social change are legislative first, and then judicial in the gaps. What follows then is a feedback loop between community, legislature and the courts which finds balance over time.

1 See Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, ss 4 and 12. See also Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, s 9. For a discussion, see *Trans-Tasman Resources Ltd v Taranaki Whanganui Conservation Board* (2021).

2 Patents Act 2013; Trade Marks Act 2002; and Designs Act 1953.

3 See, for example, Te Arawa Lakes Settlement Act 2006, pt 3, subpt 1; and Ahuriri Hapū Claims Settlement Act 2021, pt 3.

4 Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010; Te Awa Tupua (Whanganui River Claims Settlement) Act 2017; and Te Urewera Act 2014.

[C] IS TIKANGA OK FOR EVERYONE?

Some of the questions I have been asked to address at this Wānanga and comments I have heard elsewhere give you a sense that *Ellis* and *Takamore* and similar cases might have spooked the horses a bit too much and introduced a level of imprecision which may not be particularly good for the law in Aotearoa. I thought I would pick up on a few of those themes. There is often the comment that the application of tikanga to non-Māori is somewhat unorthodox, and, in that sense, *Ellis* was pushing the canoe too far out into the surf. My own reaction to that is that this is a fear arising from a lack of memory.

First of all, some of the earliest and most celebrated cases on tikanga did not involve any Māori at all. For example, *The Queen v Symonds* (1847), usually cited as New Zealand's acceptance, early on, of the enforceability of aboriginal title, did not involve any Māori litigants. It was a fight between the Pākehā holder of a title derived from a local hapū, and the Pākehā holder of a title to the same land derived from the Governor. It was, as David Williams explains, deliberately set up as a test case in order for the conflict to be resolved, and, of course, the owner, by virtue of the Governor's writ, won (Williams 1989: 388). But the original Māori owners were not part of the case at all. Similarly *Public Trustee v Loasby* (1908) is often held out as a case where New Zealand law recognized the application of tikanga early on, and it is. But the beneficiary of that recognition was a Pākehā. Hamuera Tamahau Mahupuku, a very important Wairarapa chief, died. He had a typically lavish tangi, as befitted his status. The question in the case was who should pay the local grocer Mr Loasby's bill: the Public Trustee who administered Mahupuku's estate or his widow. The Supreme (now High) Court held that if the tikanga is that chiefs have large tangi, then the common law should recognize it and payment should come from the estate.[5] Had the court found that Mrs Mahupuku was solely responsible to settle the debt, Loasby would almost certainly have gone unpaid. There is, I noticed while driving around Greytown a few years ago, a Loasby Place behind Pāpāwai marae; testament I presume, to the way the Public Trustee paid Mr Loasby's bill.

The other well-known case, *Baldick v Jackson* (1910), is about a dead right whale (agreed value 200 pounds) found by Jackson floating in Cook Strait. Jackson hitched the whale to his ship towed it ashore and claimed it. Baldick sued, claiming the whale was killed by his crew who had "made

[5] The Court found that Loasby should have sued the widow as she (not the Public Trustee) had placed the order, but that the Public Trustee was required by Māori custom to indemnify her from the assets of the estate; at 806-807 and 809-810.

it fast" to his boat but then released it to float when they saw and pursued another whale. They were presumably intending to retrieve it later. Jackson argued Baldick could not claim property in the whale even if it had been made fast to his boat because by English law whales were royal fish and so belonged to the sovereign. Stout CJ rejected the argument. He said that the English common law doctrine that whales belong to the crown cannot apply in New Zealand because of the guarantees in the Treaty of Waitangi and the fact that Māori traditionally hunted whales. *Baldick v Jackson* is often held out as a case about the relevance of both the Treaty and tikanga in early 20th-century case law, and it is. But again there were no Māori involved and no Māori rights claimed in the dispute.

So, right from the early days, tikanga has been applied to non-Māori where this was seen to be appropriate. Similarly, in modern times, legislation which incorporates tikanga is often, and intentionally, for general application. The Resource Management Act 1991 intentionally integrates tikanga considerations such as kaitiakitanga, whanaungatanga and mana whenua into all environmental processes and decisions. They are intended to affect non-Māori as well as Māori. The Oranga Tamariki Act does the same thing. Oranga Tamariki (the agency) and the Family Court must be guided by the mana tamariki of the child or young person.[6] It does not assume only Māori have mana tamariki. On the contrary it defines mana tamariki as the intrinsic value and inherent dignity all children derive from belonging to family and culture. In intellectual property, provision for avoiding offensive use of Māori phrases and images in the Trade Marks Act 2002 (sections 17(1)(c) and 177–180) and Designs Act 1953 (section 51), and for the protection of traditional knowledge and species in the Patents Act 2013 (sections 15 and 225–228) necessarily apply to everybody. That is their point. We have had a hybrid system for a long time.

With that context in mind, let us turn to some of the difficult issues—the issues that present, or are likely to present problems in the future.

[D] ACHIEVING A CERTAIN FLEXIBILITY

There is a sense out there that tikanga is too imprecise, adaptable and flexible; that it threatens, if not undermines, the necessity that the law be certain and predictable in its application.

There is something in the suggestion that tikanga is less rigid and more flexible than state law. Tikanga is a system of law for village people,

6 See Oranga Tamariki Act 1989, s 5(1)(b)(iv); and s 2 for the definition of mana tamariki.

in which maintaining the cohesion of the village is as important as maintaining the symmetry of the law. So it is willing to make exceptions in the way the traditional common law once did and equity still does. But this distinction can be overplayed. When you have to grapple with what irrationality means in public law, what is a sufficiently proximate relationship in general negligence, or what are charitable purposes or public benefit in charities law, the certainty glow of state law fades a little. Resort must often be had to policy considerations to resolve these questions case by case, but that does not make the answer any more certain or predictable. It just makes the reasoning process more honest. In some ways, all law is inherently imprecise. It has to be, or it will be unjust. Tikanga, like the common law, is instinctively facts first and principles second. It is inductive in its response to new situations. A settled principle will apply by analogy only if the facts justify it.

So, certainty is an issue to be worked through, but it is not an issue with which we are unfamiliar, still less one to be afraid of.

[E] DIFFERENCES AND CONFLICT

Relatedly, there is the potential for friction between the cultural values that underpin the tikanga system and the western values that underpin the common law. In that mixing zone tikanga and the common law and tikanga and legislation must interact to produce useful results or problematic ones. I do not think there is any dodging this friction. Nor is there just one way of thinking our way through those problems. They are sometimes just difficult, although, in my experience, that is rather less often the case than is assumed. The whole point of the structural fusion of tikanga and state law is to establish a place where safe conversations can be had when needed about how these two ways of perceiving the world should resolve their differences. The infrastructure built in the last 40 years is an admission that there is something to be discussed here. Denying that this is the case would be to classify these differences as extralegal; that is, as matters to be resolved somewhere else. First, that is no longer an option, and second, even if it were, it is one to be assiduously avoided.

[F] WHOSE TIKANGA?

There is then the question of who expounds tikanga in the modern context. If tikanga is woven too tightly into the common law, judges may be unable to resist the temptation to take it over. In taking it over, they will inevitably freeze it in time, and thereby kill it. Or worse, they may

distort it to fit with their own assumptions and legal training. Common law judges did both of these things to local custom in England in the period before the 18th century.

Judges in Aotearoa will have to understand that while they will be required to declare and apply tikanga for the purposes of a particular case, they do not make it; others, outside the judiciary, do. The judge's function is to apply it as established to the facts rather than to expound or develop it according to their own preferences. Judges are familiar with this deference when we apply legislation, although the fact that in relation to tikanga there is not necessarily a definitive text setting out the relevant law adds an extra and important layer of difficulty.

This is not a problem unknown to the common law either historically or currently, it is just a problem we will have to work our way through with care and humility. Especially, humility.

[G] THE COGNITIVE SHIFT

So, my take on this is, lawyers and judges are going to be required over the next few years, in fact, over the next generation, to achieve a cognitive shift.[7] Many of you will know that the old approach to the application of custom (including tikanga) was to treat it as foreign law to be proved in evidence and then to subject it once proved to the tests of certainty, antiquity and reasonableness.[8] *Takamore* impliedly overruled this, and *Ellis* did so expressly. Tikanga is definitely not foreign law, it is quintessentially local law. But, of course, it is foreign in a broader sense to many lawyers and judges. Over the next generation, something of a cognitive shift is going to have to occur so that lawyers and judges can work with it and in it, when required.

Let me start with the lawyers. Most bad decisions about tikanga are the result of judges not getting enough help from lawyers, who, though perfectly competent, do not understand its principles and processes. I am sorry to lay the blame on lawyers like that. I would rather place it at the feet of the judges to be honest. But judges are usually pretty good at applying principles explained by reference to appropriate sources by counsel or referred to in evidence. If the judge fails in that regard we can expect that the case will have been so structured and the evidence-base

[7] Cognitive shift is a term Horiana Irwin-Easthope used in a conversation we had earlier this year. It so perfectly captured what I was trying to describe to her that I now use it routinely as a useful label to convey the change in thinking that I have in mind. The credit belongs entirely to Horiana.

[8] See *The Case of Tanistry* (1608); and *Campbell v Hall* (1774).

sufficient that mistakes can be corrected on appeal. The really problematic cases are those in which the statements of claim or defence, arguments and evidence are so lacking that correction is impossible, assuming a correct result is discernible. So, this system-wide cognitive shift simply cannot occur unless lawyers develop their own intuition about the place of tikanga in the case, just as they have intuitions about disputes arising from contract, crime, intellectual property, property, equity or public law.

Easy for me to say right? But bear with me. I readily acknowledge that tikanga is a very different form of law to that in which you have been trained, but it is law nonetheless. You will not need to become instant tikanga experts any more than you must be expert in other subcategories of law with which you are unfamiliar. You just need know enough to develop good instincts. These will help you to judge when tikanga might be relevant to your case, when you need help and if you do, where to go to get it. You will then be able to explain to us poor judges why tikanga is relevant, how it is relevant, and, where needed, how other non-tikanga principles or considerations in the case are to be weighed, measured or reflected as the case may be. That is the cognitive shift: the development of an ability to step into the shoes of someone from the partner system of law, even if imperfectly, in order to view the conflict from their perspective. A profession with that kind of intuition will make all the difference.

That is going to take time, and we are on that journey. I do not think there are any shortcuts. At least none worth taking. We are helped, going forward, by the fact that the New Zealand Council for Legal Education has made tikanga a compulsory aspect of core law degree courses from 2025. Meanwhile, us judges are in the process now of developing a postgraduate judicial diploma course about tikanga in partnership with Te Whare Wānanga o Awanuiārangi. We are developing that course because the needs are the same for practitioners and judges. Once we have successfully road-tested it, our aim will be to make the programme available to practitioners too. This must be a joint endeavour.

There are a small number of practitioners around now who do have those instincts and intuitions. Not all of them Māori. They know when they have got or might have a tikanga issue; whether evidence will be required, or whether the textbooks or primary sources will do, or whether there are modern authorities that articulate the principle at a sufficient level of particularity. These are all judgement calls that in other areas of the law, lawyers (and judges) are required to make every day. So I would not catastrophize. Rather I would embrace this process of change because it does seem to me that the direction of travel of our national project

generally is one of the steady dilution of the influence of inappropriate colonial doctrines and attitudes and their replacement where required with law that is either a hybrid of the local Polynesian law and the common law or in some relatively narrow areas, solely tikanga-based.

The direction of travel is clear now and your role in it as counsel or as lawyers advising clients is going to be utterly crucial. In fact. If you are not up to the job, this will fail. Probably spectacularly. So I encourage you to do your bit. I encourage you to engage in educational programmes that will help you make that cognitive shift so you can help us do a better job of applying tikanga in the courts. With your help, we judges are going to try and do our bit to avoid making a mess of this.

Nō reira tēnā koutou katoa.

About the author

For further details of the **Honourable Justice Williams'** *legal career, please visit the Courts of New Zealand website* Supreme Court Judges page.

References

McHugh, Paul. *The Māori Magna Carta*. Auckland: Oxford University Press, 1991.

Waitangi Tribunal. "Report of the Waitangi Tribunal on the Motunui-Waitara Claim (Wai 6)." 1983.

Whata, Christian. "The Evolution of Legal Issues Facing Māori." Presented at Māori Legal Issues Conference, Legal Research Foundation, Auckland, 29 November 2013.

Williams, David V. "The Queen v Symonds Reconsidered," *Victoria University of Wellington Law Review* 19 (1989): 385–402.

Legislation, Regulations and Rules

Ahuriri Hapū Claims Settlement Act 2021

Children and Young Persons Act 1989

Criminal Justice Amendment Act 1985

Designs Act 1953

Environmental Protection Authority Act 2011

Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012

Hazardous Substances and New Organisms Act 1996

Local Government Act 2002

Māori Affairs Act 1953

Oranga Tamariki Act 1989

Patents Act 2013

Resource Management Act 1991

Sentencing Act 2002

Te Arawa Lakes Settlement Act 2006

Te Awa Tupua (Whanganui River Claims Settlement) Act 2017

Te Tiriti o Waitangi 1840

Te Ture Whenua Māori Act 1993

Te Urewera Act 2014

Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977

Town and Country Planning Act 1977

Trade Marks Act 2002

Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010

Cases

England & Wales

Campbell v Hall (1774) 1 Cowp 204, 98 ER 1045 (KB)

The Case of Tanistry (1608) Dav Ir 28, 80 ER 516 (KB)

New Zealand

Baldick v Jackson (1910) 30 NZLR 343 (SC)

Ellis v R [2022] NZSC 114, [2022] 1 NZLR 239

R (on the prosecution of McIntosh) v Symonds (1847) NZPCC 387 (SC)

Takamore v Clarke [2012] NZSC 116, [2013] 2 NZLR 733

The Public Trustee v Loasby (1908) 27 NZLR 801 (SC)

Trans-Tasman Resources Ltd v Taranaki Whanganui Conservation Board [2021] NZSC 127 [2021] 1 NZLR 801