

TIKANGA AND THE LAW: A MODEL OF RECOGNITION

JUSTICE CHRISTIAN WHATA
High Court of New Zealand

Abstract

This paper is based on the transcript from a presentation given at the New Zealand Asian Lawyers Wānanga on Tikanga and the Law given on 3 May 2023. This paper offers one of many explanations of tikanga and is an entry level introduction only to a complex kaupapa. This paper traverses briefly a proposed three-part model of recognition of tikanga. The first part of the model is a methodology of engagement. The second part is the notion of kaitiaki as a controlling principle. The third part is tikanga-enabling processes. The last two steps of the methodology are covered briefly due to time restraints.

Keywords: tikanga; normative system; recognition; methodology of engagement; tikanga-enabling processes; common law.

[A] INTRODUCTION

Thank you for the kind introduction from Maria Dew KC, President of the New Zealand Bar Association.

It is always a difficult task to follow my tuakana Justice Joe Williams when he speaks. Who else can talk about 700 years of law and actually make it sound interesting?

My objective is more humble, although it links into his notion of a need for a cognitive shift. I hope you will leave with more insight into tikanga as a normative system and as a system of law. Understanding tikanga as a system will address, in my view, many of the core issues confronting us now: lack of certainty. When is it relevant? What is the weight that we give tikanga in any particular case? Tikanga when viewed as a system provides many of the answers. We just need to understand it.

Some disclaimers before I start. First, I am not an expert on tikanga Māori. That expertise resides in local marae and in our koroua, our kuia. I have had the privilege over the last 18 months or so of sitting at the feet

of some very great people who are tikanga experts, and they have passed on to me some of their wisdom which I have gratefully accepted.¹

The second disclaimer is that I am not speaking as a High Court Judge nor as a Law Commissioner today.

[B] THREE-PART MODEL OF RECOGNITION

I am going to talk about what I call a three-part model for recognition of tikanga. The first and very important part of the model is a methodology of engagement, and the most key element is to apply a tikanga or Māori lens to everything we do when we engage with tikanga.

The second part is the notion of kaitiaki (or similar concept) as a controlling principle, and what I mean by that, when we engage with tikanga we have to have the humility to understand that tikanga has its genesis, and exists in a very special way, in another place. And then when it comes out of its natural environment and into our legal domain, we need to take care of it.² More importantly, we need to understand that there are others that must take care of it. And we have to give them the opportunity and empower them to exercise their kaitiaki responsibilities.

The third aspect I want to talk about briefly is tikanga-enabling processes, for example like the processes used by my colleagues at the Māori Land Court and at the District Court who weave tikanga into their everyday activities. The District Court is probably undertaking the largest exercise in that weaving process with its Te Ao Mārama, which is critical in this time of transition.

[C] THE COMMON LAW

Before I address my proposed model of recognition I want to look first at the common law and its capacity to recognize tikanga. As Chief Justice Elias said in *Lange v Atkinson* (1997: 45), the common law is, at its

¹ It is important to note that what I say here involves “an” explanation of tikanga only. On matters of this complexity such an explanation must be treated with caution, and as an entry-level introduction only to a very complex kaupapa.

² In the presentation I used the word “want” rather than must. But the obligation to take care of tikanga is not a matter of desire but responsibility. I also take the opportunity to acknowledge that use of the concept kaitiaki in this context is not without complexity. Some would prefer the concept of tino rangatiratanga to denote mana, as in authority and responsibility, in respect of tikanga. While kaitiaki and kaitiakitanga is better reserved for protection of mauri within the whakapapa-whanaunga matrix. The use of it here is strictly confined to the notion that there are expert stewards of tikanga within te Ao Māori who must be acknowledged and given the opportunity to perform their responsibilities when engaging with tikanga.

heart, “the application of established principle to new situations”. This is important because tikanga also involves the application of established principles to new situations.

Issues

This brings me to some of the key issues involved with the application of tikanga by the courts. First, dealing with what I call the “common law” issues. There is much talk of concern about tikanga being too uncertain for the common law method. But all of the research that I have done and all the people that I have spoken to are clear that the fundamental principles of tikanga are broadly shared, and they are clear, and they can be applied consistently, as we like to do when we apply the principles of the common law.

We often hear the question: “But how does tikanga fit in with the ‘rule of law’?” I do not want to talk about the constitutional and philosophical debate about the rule of law today. But a key aspect of the rule of law, when thinking about the inculcation of tikanga into the common law, is the principle of procedural and substantive fairness, often referred to as legality. People order their lives in reliance on the law and we have to be cognizant of that when we bring something new or different to the common law. It is a guiding principle in my view, in terms of this process of weaving or stitching of tikanga into the law.

More specifically, the requirement for certainty is, in my view, an aspect of procedural fairness, namely that the law needs to be sufficiently certain so that it can be applied fairly. And we need to have some idea of when a new principle is relevant to a fact situation. We also need to know how we weigh these new principles. A significant part of the answer to concerns about uncertainty is tikanga itself. Tikanga provides the boundaries that we need to identify when it is relevant—it will tell you; it will give you that cue. And as Justice Williams mentioned, the law is not absolutely certain most of the time anyway, but fundamental tikanga do have that core of certainty, and then the rest evolves according to context.

I turn to examine the other side of the coin—the “tino rangatiratanga” side. Kingi Snelgar, who is here today, has been helping me on the Law Commission’s tikanga project with some insights on this. There is a part of our world that believes that tikanga should be managed and enforced by iwi Māori only. We have to be aware that there are hapū and iwi who believe this is a fundamental aspect of tino rangatiratanga, and it should be another guiding principle. It means we have to be careful about how we use tikanga, how we bring it into this common law environment and

recognize that there are those that think this taonga³ should stay within te Ao Māori, and this links to another point, namely of integrity. We need to be conscious that we need to maintain the integrity of this thing called tikanga.

Categories of tikanga cases

My team at the Law Commission and I have reviewed and identified three broad categories of tikanga cases. These categories help in terms of engagement with tikanga because they involve recognition of tikanga in very different and important ways. The first way that most of us will be familiar with is custom law recognition. That is the recognition by the common law of custom. And then a process of conversion of custom into proprietary rights.

I had a debate with my colleague, Justice Powell, who says we are not engaged in the process of making proprietary rights when we recognize tikanga. “Property” did not exist in tikanga, and I fully agree with him. But under this category of law, I believe once you do go through that transformational custom law process, you end up with something that very much looks like a property right.

We have developed rules around custom law and it is important that those settled rules remain with us because if you are going to introduce custom into the property law matrix, where people order their lives by reference to property rights, then it is important to maintain the certainty that comes with that form of custom law recognition.

The second major category in this taxonomy is “tikanga values”. Those of us that have worked under the Resource Management Act (RMA) will be familiar with the fact that we have these values inculcated throughout the RMA. They do not translate to exact rights because they are always subject to an exercise of discretion; so it is what I call a values engagement. But the beauty of values engagement is that we are not necessarily in a contest of opposites, of absolutes: there is an opportunity for synthesis and harmonization in reaching the result. That is what I think former Chief Justice Sian Elias was saying when she talked about tikanga values being part of values of common law. It gives us an opportunity for synthesis and harmonization; and, in that way, we weave or stitch tikanga into the law.

³ Referring to tikanga as a “taonga” is another complex proposition. Some leading tikanga and Tiriti o Waitangi jurists do not consider it is correct to refer to tikanga as a taonga, for example in the context of article 2 of the Tiriti.

The final category is in some ways the most significant, and the most fragile. It is the notion of tikanga law, or what I would prefer to call tikanga relational interests. It is a term that Moana Jackson coined many years ago. At its simplest, it involves the identification of a tikanga-based right or obligation, according to tikanga. It is the third branch of engagement by the common law with tikanga.

It is a whole new area that we have to come to grips with, and I hope some of my discussion today will help us navigate, at least in a very introductory way, how we might do that, because it needs its own approach.

[D] A METHODOLOGY FOR ENGAGEMENT

So, what is this methodology of engagement? Here are some key concepts that I think are important.

Mātauranga Māori and mātauranga-ā-iwi:

- ◇ a normative system (patrolling its own boundaries)
- ◇ a living system
- ◇ a natural environment
- ◇ te Whareniui

First, we must appreciate that tikanga exists within te Ao Māori, and it is based on mātauranga Māori, that is Māori knowledge. Its deeper contextual meaning lies in mātauranga iwi or iwi knowledge. Tikanga Māori are the principles of, say, general application and tikanga-a-iwi (and by iwi I mean hapū, whānau, iwi, Māori communities) are the localized expressions of tikanga. These localized expressions are particularly important when dealing with what I have called tikanga relational interests.

Second, equally important to understand, is that there is a coherent normative framework of tikanga. Tikanga is not simply a collection of abstract principles that float around in the atmosphere. There is a clear normative framework, an integrated system of norms that includes values, principles and rules. They operate as an integrated whole and you have to view it in that full normative context.

The third point I want to make is that it is a living system—the system lives on every marae (and elsewhere), the 700-plus of them every day, up and down New Zealand. The people of those marae are exercising these concepts of tikanga Māori every day, and they are expressing them in their own way every day.

That is the natural environment for tikanga, the marae, but of course extends out to all Māori whanaunga that live and breathe it. And to understand that natural environment is really important because when we try to extract tikanga out of that natural environment and put it in an alien environment, problems arise. That is when there is the potential for overreach, and the integrity of tikanga itself is potentially affected.

I spent some time with my tikanga experts on the issue of how to assist diverse audiences with varying degrees of understanding of tikanga to locate themselves within te Ao Māori so as to really understand tikanga. We came up with concept of Te Wharenui (the meeting house). It is not an original concept. Te Wharenui are important to Māori in many ways. They are a store of knowledge. Metaphorically and literally, wharenui store knowledge within te Ao Māori. It also connects us to our ancestors and connects us to atua (creators). It places us within our context of being Māori. It symbolizes order. The construction of a wharenui is the accurate application to tikanga. It follows particular processes and in accordance with particular rules and principles. It is the place of interaction of tikanga. It is the place where tikanga is expressed every day. Every pōwhiri is an expression of a detailed set of rules that must be abided by. If you don't follow them, there will be consequences. And so we landed on Te Wharenui as our reference point for te Ao Māori.

Now, I can imagine you sitting in your offices sometime in the future confronting some tikanga problem and puzzled about what Justice Whata was meaning. How do I get into this wharenui? Well, in truth, we already do this sort of metaphysical exercise every day. For example, when we think about contracts and we do so within this settled framework or wharenui of principles, because that's how we've been trained. We need to get ourselves to that point with tikanga. It does not have to be a wharenui. It can be something else, but I propose use of the wharenui. So take yourself into that wharenui (or something equivalent) when you are engaging with tikanga because it is an important device for reminding you that you are dealing with a particular system that needs to be engaged with in a particular way.

Tikanga as a normative system

Turning to what I mean by tikanga as a normative system. I want to share some core tikanga concepts with you and offer an explanation of how they function as a system, namely concepts of:

- ◇ connection (structural norms)—whakapapa, whanaungatanga, mauri;
- ◇ balance (prescriptive norms)—utu and ea;
- ◇ status (relational norms)—mana, tapu, noa;
- ◇ responsibility (obligations)—kaitiakitanga, manaakitanga, aroha (etc); and
- ◇ procedure—kawa.

Tikanga is a multi-layered system of norms, commencing with what I call structural norms. They are congruent with the framing of te Ao Māori, namely according to whakapapa, whanaungatanga and mauri. Whakapapa is often referred to as genealogy. It is the map that connects all things to all things. It is critical to understanding your place within that complex map; where you are located on it will often define your rights, your obligations, your responsibilities.

Justice Williams often refers to whanaungatanga as the glue. It is the binding element that runs through whakapapa that seeks to sustain that whakapapa and keep us connected. It is a fundamental structural principle that governs all behaviour. I also refer to mauri as a structural norm, in that it is central to existence, often referred to as life force, the signature as to who you are, what a place is, or what a hapū or iwi is. It runs through this map glued by whanaungatanga and is something we have to be conscious of in everything that we do.

You also need to be very familiar with utu and ea—what I refer to as prescriptive norms of balance. They make the prescriptive demand that we seek to achieve balance in our arrangements with each other and in our relationship with the environment. Utu is the means by which we restore balance. For example, a gift if unreciprocated will lead to imbalance and a gift in return will restore balance. So, these two concepts are intertwined and fundamental to understanding the operation of tikanga, the why of tikanga remedies. If there is lack of balance, then there is a weighty issue that needs to be resolved.

The next layer, in very simple terms, refers to status according to mana, tapu and noa. They are the infrastructure of jural relations in te Ao Māori, particularly mana and tapu.⁴ Mana in this context means power, but integral to that power is responsibility. There is no point having mana without a concomitant responsibility. If you do not discharge the

⁴ By jural I simply mean a condition that attracts powers, rights, obligations, freedoms, immunities. Another word of caution is needed here. There is no exact correspondence between tikanga and jural concepts. They are at best, a loose descriptor to assist with understanding of the operation of tikanga.

responsibility, your mana will diminish. Kaitiakitanga is the example that Justice Williams used in his korero. If you have mana in relation to the environment as a steward of that environment, you must discharge that responsibility to that environment; and if you fail to discharge that responsibility to that environment, your mana will diminish accordingly.

Tapu is often connected to sacredness of a person, place, or thing in terms of the spiritual dimension of te Ao Māori, but it can also simply refer to, say, the inherent worth of a person and that inviolable part of you. Think of it as an immunity in terms of legal language, but also closely aligned with mana so that the two go together; so the protection (or restriction in relation to) something that is tapu is also a matter of right. Now noa, again in very simple terms, refers to freedom—freedom from restriction.

We see the operation of these particular concepts on a marae especially during a powhiri processes. At the beginning of that process the people of the marae and the visitors to the marae are tapu with respect to each other, and it is necessary to go through a process to lift that tapu to reach a state of noa, so that you are free to engage with each other in a place of harmony. It is a very simple illustration of the operation of jural relations, of the engagement of mana, tapu and noa.

Responsibilities are the next layer and they are key. Justice Williams mentioned the obligations of kaitiakitanga, manaakitanga and aroha that are linked to, whanaungatanga, the glue. We must also discharge these obligations to keep our mana.

It is also really important to understand the significance of kawa. These are procedural rules that we have in tikanga that guide our behaviour, particularly in terms of our relationships with each other. For example, it may appear confusing to say a person or place is tapu sometimes and then not at other times. But part of that confusion might be because the functions of kawa processes are not well understood. They may for example be used to alleviate that tapu at a particular time, that then enables us then to engage with that otherwise tapu person, or place.

Mana, tapu and noa

I want to elaborate on the operation of mana, tapu and noa. Figure 1 attempts to capture the potential jural status of an entity. It can represent a person, a mountain, a river, the sea, or anything natural. Mauri is located in the centre referring to that life-force signature that makes a

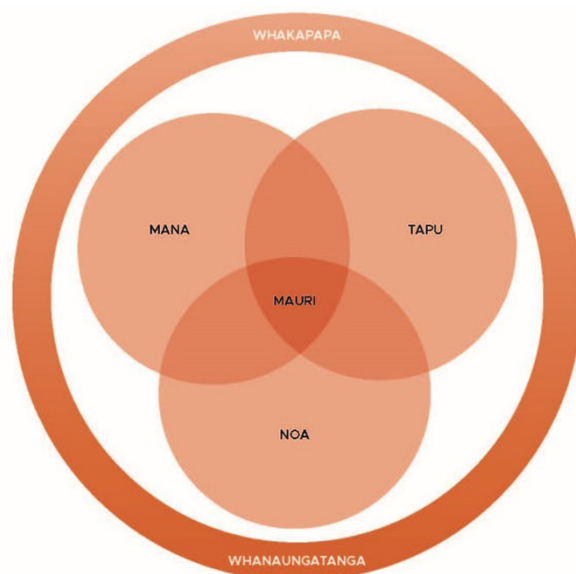


Figure 1

person or thing special, that inheres within all natural things. Mauri is then surrounded by layers of mana, tapu and noa.⁵

Mana can materialize at a particular time, say when a person has been given the mana (power and responsibility) to do something. A person may also have this layer of tapu potential within them all the time, and that tapu may or may not come to the fore on a particular occasion, but may be completely at the fore for some people a lot of the time. The layer of noa then refers to the potential to be free from restriction, especially to engage with others. These potential layers may then actualize or materialize depending on context.

Figure 1 also shows that all of these layers of potential are surrounded by whakapapa and whanaungatanga to signify that all of these potential jural conditions exist within a whakapapa–whanaungatanga matrix. That is the natural environment within which these tikanga jural relations take place.

Thus, if you extract one of these layers out to explain a jural relationship, let's say we're talking about property and let's say it is mana, because the issue is about control of that property. If you extract it out, without

⁵ As with the explanation of tikanga as a normative system, this figure must be treated with care. It does no more than introduce the reader to the presence of these elements (and corresponding potential jural status) in all natural things, and how they may manifest themselves according to context and then function to regulate relationships between all natural things. Importantly, the intersection of the spheres does not denote intersection of the layers—many tikanga jurists would not describe tapu and noa, for example, as intersecting states of being. Rather the emphasis here is to show the potential for each of these states, or status, in all things depending on context.

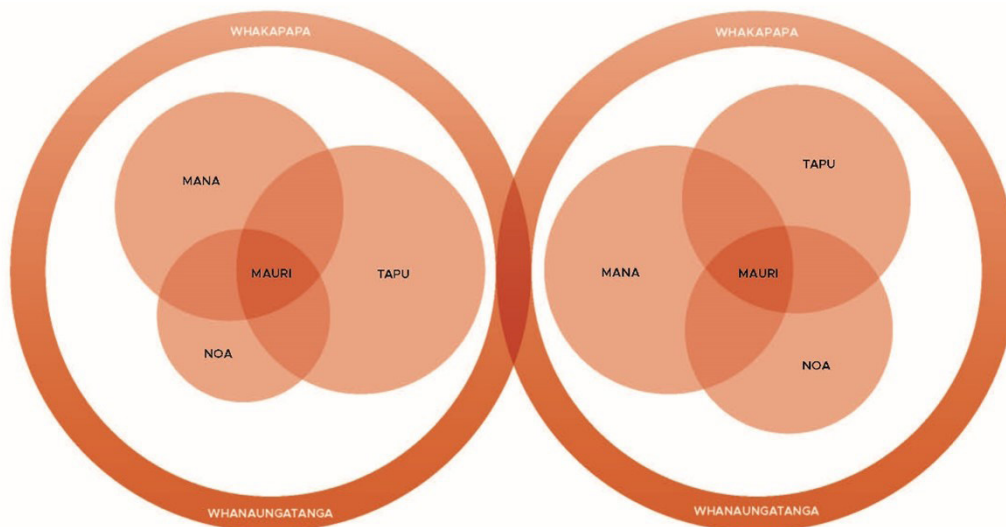


Figure 2

whakapapa and whanaungatanga, then that is not tikanga in action. That mana needs to be relocated within the whakapapa–whanaunga matrix. You are then looking at whenua (not property). You are looking at a relation through whanaungatanga and something that you are connected to through whakapapa. So the boundaries of that engagement are set by those tikanga.

Figure 2 refers to two natural entities. Now let us just assume the figure on the left is a river, and this river is in a state of tapu at that time.⁶ On the right are the people of that river. The river and the people are connected by whakapapa and whanaungatanga, represented by the two circles intersecting to signify that connection. The tapu circle within the river is amplified to show that the river is in a state of tapu or restriction. On the right we see the enlarged mana circle to indicate the responsibility of those people to the river. They are kaitiaki of the river. They have the power and responsibility to restrict access to the river while it is in that tapu state.

I mentioned before that a person may lose mana if the responsibility attached to that mana is not discharged. Referring to Figure 2, that mana circle would then be shown as much reduced and potentially to the point that the person or people no longer have the mana. That would be a travesty in tikanga Māori, so you never let that happen. This also helps to illustrate normative weight attached to whanaungatanga and kaitiaki responsibilities to a place.

⁶ A river may be in a state of tapu, for example, while fishing is occurring or where a death has occurred.

Methodology

I suggest engagement involves a step by step process as follows:

- ◇ Step one: identify key facts;
- ◇ Step two: identify the cause of the dispute;
- ◇ Step three: identify any core tikanga principles in play—whakapapa, whanaungatanga, mauri, utu, ea (framing);
- ◇ Step four: identify the key relational tikanga—mana, tapu or noa (including their source and associated responsibilities); and
- ◇ Step five: identify methods of resolution—rāhui, karakia, koha, hui, kawenata.

As Justice Williams says, first identify the facts, and whether the facts engage tikanga. Identify the cause of the dispute. Are there violations in tikanga that we are concerned with or does this dispute exist in a different place such that it is not a tikanga concern? Can you see, on the fact pattern, tikanga concepts engaged by the facts?

You then need to be able to frame the dispute within the whakapapa, whanaunga and mauri matrix and identify whether any one of these core tikanga principles is engaged on the facts and how they are engaged. For example, on cases concerning climate change, you can see whanaungatanga and whakapapa and mauri engaged. However, whose whakapapa, whose whanaungatanga, whose mauri, and who then has the mana in relation to that issue? These are really difficult questions that need to be properly framed before you can articulate an answer (or a pleading). Even if you do see these principles located, how do they devolve into relational tikanga, mana, tapu and/or noa?

Can we see displayed, according to the histories of the people that you are dealing with, that the facts engage those concepts, that there is a mana issue here, and who has the power and responsibility, kaitiakitanga being an obvious responsibility in this context?

And then, of course, you must look to whether in a particular context there is a method of resolution that exists within or outside of the court process.

[E] KAITIAKI AND ENABLING PROCESSES⁷

Briefly, on kaitiaki controlling the boundaries, pūkenga (tikanga experts) can be helpful. A specialist court may also be helpful, particularly in this time of transition, when we need to have people who can help us protect the integrity of tikanga through this period.

Enabling processes, outside of the court, like arbitration, should be considered because they are consensual. We can more easily frame the engagement by reference to tikanga. Not all arbitrations have in the past been successful, but that problem may be about whether they are framed correctly.

More broadly, the Te Ao Mārama initiative and the experience of the Te Kōti Whenua Māori are very important because of their active engagement of tikanga-enabling processes. The more we utilize tikanga-enabling processes, the better.

Te Reo and tikanga

In response to the question—can you really understand the tikanga without reo fluency? My instinct is that you can develop an intuition about tikanga even if you are not reo fluent. But if you want to develop expertise about tikanga, then I think you definitely have to be able to speak te reo Māori. For that deeper esoteric knowledge, I think you need people that are te reo fluent.

In response to the question about how we deal with conflicting views on tikanga, we need the right people with the right expertise in the right places.

About the author

For further details about Justice Whata's legal career, please visit his page on the [New Zealand Law Commission website](#).

Legislation, Regulations and Rules

Resource Management Act 1991

Te Tiriti o Waitangi 1840

⁷ I only had a short amount of time in the presentation to talk about the last two steps in the methodology.

Cases

Lange v Atkinson [1997] 2 NZLR 22, [1998] 3 NZLR 424, [2000] 1 NZLR 257, [2000] 3 NZLR 385