

REMARKS ON TIKANGA AND THE DISTRICT COURT

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Abstract

This article explores tikanga in the District Court context. It explains that the incorporation of Te Reo Māori (Māori language) and tikanga Māori is relatively new in the District Court. It discusses the introduction of Te Ao Mārama and solution-focused judging approaches since 2020 and goes on to describe how tikanga might operate in a Te Ao Mārama context.

Keywords: Te Ao Mārama; tikanga; education; rangatahi; te reo.

Tēnā koutou katoa (Greetings in Te Reo Māori).

Thank you, Frazer Barton, for that wonderful introduction. I wanted to start on one of the values of tikanga, whakaiti or humility, and also by being very clear that there is a lot to this complex topic. It has all been explained in the way that Justice Whata outlined his framework, and I thought I might capture some of the themes that I have heard already this afternoon, by speaking about this idea of capacity-building within the profession and within the judiciary. When it comes to understanding tikanga, I want to capture an idea of building the capacity to the point where the level of intuition about tikanga is the norm. Tikanga is the correct way of doing things for a specific purpose, from a Māori worldview.

Much of the behaviour you see associated with tikanga is simply informed by tikanga values and principles. What has been very clearly identified, not just within the District Court, is the education around tikanga that is needed. So I wanted to acknowledge you, Mai Chen, for bringing us together this afternoon to speak about this really important topic.

I want to set the scene by talking about the District Court on 30 May 2008. That was the date of the first sitting of the Rangatahi (Youth) Court. The reason I mentioned that date is because, prior to that date, there was no incorporation of Te Reo Māori (the Māori language) or tikanga Māori in any division of the District Court whatsoever. That was only 15 years ago.

So we should not be too hard on ourselves that there is an education gap.

It may well have been discussed in the senior courts' decisions over generations, but in the District Court, we have some catching-up to do.

We announced Te Ao Mārama in 2020, which has been described by Justice Whata as an enabling process. I want to explain what Te Ao Mārama is and how tikanga fits into the new landscape in the District Court.

I want to share a document that we commissioned in our Chambers that has been drafted by our clerks for the benefit of the District Court bench and to fill that education gap. But there must also be a way that we can share this with the profession. It is not an attempt at an authoritative textbook, but it actually is quite helpful.

I don't want to go through any of the history of how we've ended up at Te Ao Mārama. That has been clearly explained in the Norris Ward McKinnon speech in 2020. I wanted to give you some key statistics and give you an idea of the focus of Te Ao Mārama. It relates to the experience of people who are dealt with in our courts, across the divisions of the District Court including the Family Court, the Youth Court and the adult court in the criminal jurisdiction.

A 2018 report found 83% of young people in the adult prison system had been through the state care and protection system. There is a direct connection. Any child who has transitioned from state care to youth justice is 15 times more likely to go on to offend, and 107 times more likely to be sentenced to a term of imprisonment before reaching the age of 21. Just over half of the adult prisoners have been exposed to sexual and family violence when they were children. For Māori prisoners that figure is at 60% and for female prisoners, the figure is nearly 70%.

Those statistics paint a very grim picture of the justice highway that represents our legal system in the District Court. The system traps people from a young age and really holds on to them, following a path from state care to the Youth Court and then to the adult criminal court. There is quite a confronting context that informs where Te Ao Mārama is directed. Te Ao Mārama is a judicially led response to longstanding calls for transformative changes, over four decades. This is not something that happened overnight. This is a long-standing issue. The words Te Ao Mārama have the literal meaning "world of light", but they have been used as a metaphor for reform in the District Court to suggest a deliberate intention to adopt a more enlightened approach to justice. This is based on

what we have been trying to establish over the years in certain specialist courts and jurisdictions.

Te Ao Mārama aims to promote both tangata Tiriti and tangata whānau customs and values as well as principles of restoration, healing and enhancing community wellbeing. So why would we want to better connect our courts to our communities? Because the legitimacy of the District Court actually relies on public confidence in the way that we operate. So the District Court must be perceived to be both relevant and legitimate.

The idea behind Te Ao Mārama is to draw on those best practice approaches that have been developed over the years. Many of you have probably heard of some of these developments. I have already mentioned the Rangatahi Court, which is here in Auckland. There is also the Matariki Court in Kaikohe and in Wellington the Court of Special Circumstances, by way of example.

These are all examples of judicially led, solution-focused approaches in our mainstream courts. I do not think we can realistically adopt them wholesale. The approaches that have been taken in these specialist courts must be modified so that we do not cause too many issues. We know the courts have major backlogs that we are addressing at the same time.

In terms of Te Ao Mārama, if you use Māori words to describe a mainstream concept, there could be a perception that it is only for Māori. I need to be very clear that it is designed for everyone who has been affected by the business of the court. The solution-focused approaches are extended to all, and they are not designed solely for Māori.

Picking up on Justice Williams' point from the beginning of this afternoon, about early tikanga cases that did not involve Māori people, much of the solution-focused approach that will form part of Te Ao Mārama will not involve Māori people either. But because there is such a high representation of Māori in our court, it will inevitably affect Māori. It will also have to be relevant and reflect who we are today in 2023: a multicultural, vibrant society that has people from all sorts of different ethnicities that the courts see.

There is no intention to infringe upon fair trial rights. In fact, much of the solution-focused approach only applies if people plead guilty or if they are found guilty. However, there are parts of Te Ao Mārama that apply generally based on procedural fairness in the way that we deal with people. For example, Te Ao Mārama deliberately encourages the use of plain language in the court. While legal terms have their place, we often do not go further and actually explain in plain English what we

are talking about. So it can be quite a closed conversation when you use terms like “section 106” and do not say what that is.

Toning down the formalities in court, as long as it is done appropriately, is intended to increase engagement and strengthen inclusiveness. This is so people actually participate in proceedings that involve them. The real scope for all of this is going to be asking how tikanga operates in a Te Ao Mārama landscape.

I think it has two aspects to it. One is enabling processes. If Te Ao Mārama is a vision of the District Court being a community-connected court that engages participants in the process, then we must invite tikanga into the process. Especially if the providers of therapeutic services approach their task informed by a tikanga perspective. Then the processes that they should be adopting for the people that they are serving means that tikanga will have relevance. Not necessarily across the country and not necessarily for everyone, but most relevantly for people who are Māori.

In the District Court, tikanga has relevance in the development of the well-known jurisprudence when a case makes it through to the senior courts on appeal effectively. However, there are a growing number of District Court decisions that are developing an analysis of tikanga.

As I said earlier, we have tried to fill the education gap by producing a document on tikanga through the clerks in our office that I think will be of interest when it is published, not just with our bench, but also for the profession, and for the wider stakeholders of the District Court. The principles of Te Tiriti are also captured in the publication. It is designed to be referred to and used in practice.

If 30 May 2008 was the start date for the incorporation of tikanga and Te Reo Māori in the District Court, there is a bit of catching-up to do on our part. The relevant provisions in the Oranga Tamariki Act that include tikanga concepts and Treaty principles are required to be applied in an accurate and informed manner in cases in the Youth Court and Family Court.

In this publication, there is a summary of senior courts’ decisions outlining how they have dealt with tikanga concepts and Treaty principles. However, I think that the most interesting part of the paper from the District Court point of view is the outline of a collection of relevant cases that have actually been decided in the District Court, understanding what other District Court judges in our court have been doing as they have incorporated tikanga concepts in a substantive and legal manner.

For example, tikanga concepts are increasingly incorporated during sentencing under the Sentencing Act 2002.

There is plenty of room for development of the jurisprudence in the District Court, and no doubt the same applies for the senior courts. When appropriate cases are brought up to the senior courts, they will continue to build on and take the lead on all of this. However, it is helpful for one District Court judge in the South Island to know what a brother or sister judge in the North Island is up to when it comes to dealing with statutory provisions, treaty principles and tikanga concepts. Having it all in one publication will help.

About the author

Judge Taumaunu (*Ngāti Porou, Ngāti Konohi and Ngāi Tahu*) is the Chief District Court Judge of the District Court of New Zealand, Te Kōti-ā-Rohe o Aotearoa. Appointed in 2019, he was the first Māori to be appointed to the role and is a fluent Te Reo Māori speaker. Judge Taumaunu is regarded as a pioneer of the Ngā Kōti Rangatahi o Aotearoa, the Rangatahi Court. He has been a driving force in encouraging the District Court to embrace tikanga as a way to enhance Māori engagement and confidence in the court.

Legislation, Regulations and Rules

Oranga Tamariki Act 1989

Sentencing Act 2002

Te Tiriti o Waitangi 1840