**[2024] NZLJ 190**

# Tikanga

## Andrew Steele, Barrister, Auckland, on the addition of Tikanga to the list of compulsory law degree subjects

In *LawNews* Issue 14 (3 May 2014), Gary Judd KC opined on the appropriateness of Tikanga being added, by regulations promulgated by the New Zealand Law Society under the Lawyers and Conveyancers Act 2006, to the list of compulsory law degree subjects alongside The Legal System, The Law of Contracts, The Law of Torts, Criminal Law, Public Law and Property Law (incorporating Land Law, Equity and the Law of Succession) — per the Professional Examinations in Law Regulations 2008. In short, Mr Judd was against the addition.

In his article, Mr Judd states (emphasis added):

> The tikanga regulations are symptomatic of a dangerous trend which has emerged within some sectors of New Zealand society where those with the power to do so seek to impose the beliefs and values of one section of society upon the community as a whole. *They do so in this instance by pretending that tikanga is law* and therefore it is fitting to compel law students to learn about it'.

I make no comment on the existence or not of dangerous trends, but instead focus on Mr Judd's view in the passage I emphasised. Is there a pretence that tikanga is law? Is it correct to say that tikanga is not law, so that teaching the subject to law students would potentially mislead them into believing that it is law?

I suggest that the best place to receive guidance as to the legal status of tikanga is New Zealand's highest court — the Supreme Court. The Supreme Court in *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 unanimously held that tikanga forms part of the law of New Zealand and has and will be recognised in the development of common law where relevant. Too much is said about tikanga in the judgment to properly traverse here, so instead I highlight below a selection of relevant passages.

Justice Glazebrook (at [108]) stated:

> As shown by my discussion of both old and more modern caselaw, that tikanga as law is part of the common law of Aotearoa/New Zealand is a longstanding and uncontroversial proposition. It has been recognised by the courts since 1840 and has been recently confirmed by this Court in *Trans-Tasman*.

(See *Trans-Tasman* [2021] NZSC 127, [2021] 1 NZLR 801).

Her Honour used the term 'tikanga as law' to recognise that tikanga is a subset of the customary values and practices which constitute tikanga (at n 81).

At the commencement of her Honour's analysis of the relationship between tikanga and the common law, Winkelmann CJ stated (at [168]):

> Tikanga was the first law to be applied in these lands. As is described in the Tikanga Statement, it is 'the law that grew from and is very much embedded in our whenua (land)'.

At [171], her Honour added:

> ... while each system is therefore grounded in its own cultural and constitutional context, there is a growing relationship between them. This Court has acknowledged on previous occasions that tikanga is relevant to the development of the common law.

In developing her Honour's framework of considerations for application in the case before the Court, she expressly referred to both tikanga principles and existing common law principles (at [201]). Applying one tikanga principle, mana, her Honour stated, at [228], that notwithstanding his death, Peter Ellis's:

> ... individual interest continues to be engaged through the impact of these events on his mana. And although his death meant that the appellant would not live to see his appeal determined, his family had a continuing and strong interest in continuing with the appeal, given the impact that the convictions had on them and their mana. In this case, there was also a powerful public interest in addressing a potential miscarriage of justice and understanding how it came to pass.

Justice Williams, at [258], referred with approval to the Supreme Court's earlier decision in *Takamore v Clarke* ([2012] NZSC 116, [2013] 2 NZLR 733 at [94] per Elias CJ, [150] and [164] per Tipping, McGrath and Blanchard JJ) when stating:

> ... this Court acknowledged that tikanga is a part of the values of the common law and contributes to its ongoing development.

His Honour referred to the mātanga (those individuals who produced the Statement of Tikanga annexed to the *Ellis* judgment) belief that the common law of Aotearoa/New Zealand should develop bi-jurally with Tikanga and added (at [272]):

> ... like the mātanga, it is my view that the development of a pluralist common law of Aotearoa is both necessary and inevitable.

His Honour expressly considered the issue before the Court through the frames of common law and tikanga values (at [274]).

In a shared reasoning, O'Regan and Arnold JJ dissented from the majority view (that is the view of Winkelmann CJ, Glazebrook and Williams JJ) that the appeal be allowed to continue (at [275]). Nevertheless, in regard to the role of tikanga, their Honours stated (at [279]):

> We accept the essential proposition that tikanga Māori has been, and will continue to be, recognised in the development of the common law of New Zealand in cases where it is relevant to the matters in issue.

And noted (at [280]) that in addition:

> Tikanga Māori 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 also incorporated in policies and processes of public bodies.

Having regard to the above judicial statements and the fact that these are our country's highest judicial officers, it appears fairly clear that tikanga is part of New Zealand law and will be recognised in the continuing development of the common law. It follows that it does not seem untoward that law schools should be teaching the subject to law students. Whether or not tikanga should be a compulsory subject seems only a matter of degree.

Mr Judd states:

> The problem is the holus-bolus adoption of tikanga as if it were part of the common law developed by the courts incrementally over the centuries, case by case.

After reading the Supreme Court's judgment, I am not persuaded that the Court contemplated a holus-bolus adoption of tikanga. Instead, all the Judges expressed a cautious approach to the issue of how tikanga would affect the common law. Their Honours Glazebrook J (at [116] and [127]) and Winkelmann CJ (at [167] and [183]) stated that the relationship between tikanga and common law will continue to evolve contextually and through incremental development.

Mr Judd argues:

> Certainty, consistency, generality, reasonableness and not being repugnant to justice and morality are all thrown out as necessary requirements because tikanga cannot pass those tests.

Rather than comment on Mr Judd's opinion as a whole, I focus on his view that tikanga would fail a test of certainty. When one looks at the key 'concepts, principle and values' that were highlighted by the group attending the wānanga (meeting) that produced the Statement of Tikanga for the Supreme Court (annexed at the end of the judgment) one sees a list of pivotal terms: hara, mana, whakapapa, whanaungatanga and ea (see p 331 at [57]). Each term is expanded on later in the Statement. As Mr Judd opines, the terms comprised in the list of tikanga terms appear to lack certainty. I suggest that this is because they are 'high level' concepts which refer to matters in a general way, for instance, as harm, reputation, genealogy, community relationships and the securing of peaceful outcomes. But does this disqualify tikanga from having legal effect?

I understand that it was not always so that the law was certain, detailed and well regulated. Certainly, tikanga is not set out in the manner of *Halsburys Laws of England* or *Laws of New Zealand*. On the other hand and using the Law of Equity as an example, if one refers to paragraph [1-002] of the first page of *Snell's Equity* (24th ed), the learned authors state:

> In its most general sense, equity refers to a conception of justice that transcends the substantive and procedural rules of the positive law. Equity in this sense has been a feature of many legal systems from ancient times. It introduces an ethical element into the positive law by holding the parties to a more sensitive or exacting standard of justice than the rules of positive law would require of them. Across many legal systems, the principles which motivate the intervention of equity have been variously expressed as aequum et bonum, conscience or transcendent principles of natural law.

According to the authors, the position of equity was to qualify the enforcement of positive law to ensure a more complete standard of justice that the law itself would attain. Consider the 'high level' Maxims of Equity which include: equity will not suffer a wrong without a remedy, he who seeks equity must do equity, equity looks on as done that which ought to be done, and so on. The uncertainty of such proclamations has not stunted the development of equity nor stopped it developing into a vital part of the legal firmament. I note that equity is a compulsory subject for law students in that reg 3(1)(b)(ii) deems that it should be treated as an equivalent to Property Law.

As all lawyers know, the developmental road upon which the law of equity travelled was a rocky one. As equity developed in England in the 13th century it was maligned for uncertainty and the subjectivity involved in its early application. An example of the criticism levelled at its intervention was that equity was whatever the Chancellor at the time decided it should be, a situation the English legal scholar John Selden demeaned by coining the phrase the 'Chancellor's foot' meaning that the law of equity was as fickle and personalised in application as the length of the Chancellor's foot. The law of equity survived of course and now occupies a pivotal role in the administration of justice.

Tikanga has not found its place in relation to the common law and established principles of law, but if nothing else does, the consideration of it in the *Ellis* case shows that it can perform a role which assists rather than undermines the administration of justice. Perhaps tikanga may end up bringing something to New Zealand's existing law that is lacking in a similar way to how the law of equity brought something to the then existing law of England.

In sum and in any event, I suggest that if the Supreme Court says that tikanga is part of New Zealand law, then it is — whatever people may think about the matter. And while tikanga holds that place or status, it seems axiomatic and reasonable that it be taught in law schools. While it may be debated whether or not the subject should be a compulsory subject for students as the New Zealand Law Society has decided, I am unpersuaded, having regard to the detailed analysis and views of the Bench in *Ellis*, that the Society's decision is outside the range of reasonableness. ❐