

## THE MYTH OF TIKANGA IN THE PĀKEHĀ LAW

Annette Sykes\*

Ki te kore koe e mau pū ana ki o tikanga me tō Mana Motuhake, Kua ngaro koe ki te pōuri otirā e whai kē ana koe i ngā tikanga a tētahi Noatu.

*When you fail to sustain your beliefs, sovereignty, freedom, You become lost to yourself as you are subsumed by those whose customs and practices you must now serve.*

### *1 Introduction*

As Eva Rickard would always remind us, you need to be strong in the inherited understanding that this land, this whenua rangatira is ours, to care for, to manaaki, to fill with love as much to care for the ecosystem to which we belong, but to ensure the mutual survival and respect of those that live on this part of the planet. An obligation that we must not and cannot shirk from. This obligation is especially important when considering how we nurture tikanga Māori and any effort to maintain our own Māori justice system.

My message: if you really believe in tino rangatiratanga, if you want a tikanga-based legal system, if you are committed to genuine systemic change, you need to be prepared to walk the talk. Don't expect the Crown to become a revolutionary and hand over or even share real power. Don't expect to get rich or popular. Or even safe.

Don't expect resistance and co-option just from the Crown either. Eva warned us that the most difficult matters you will have to confront in your struggle for independence is the sometimes-open hostility of your own, those who have aspired to participatory roles in the corporate world of creating capitalist futures or as part of the apparatus of the judicial system that oppresses our people.

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Perhaps the struggles at Ihumātao illustrate how the acts of resistance I was involved in at Raglan, Pākaitore and Takahue have played out in the contemporary context. The Crown's response to that occupation is almost textbook. It is a movement led by wāhine toa, who without compromise have steadfastly demanded their whenua back. They have used the parallel strategies of confronting the policies of the state that have undermined the status of the land, and asserting the power to protect their inherited obligations to look after it. And the Māori World have rallied to their call.

But it is important to recognise why Ihumātao isn't just about mana motuhake and tino rangatiratanga, but about the very real scars of capitalist crimes of homelessness, poverty and of course the deep existential crisis of environmental degradation that confronts this nation.

## *II The Dimensions of Power at Play*

I have deliberately entitled this kauhau to you all as "The Myth of Tikanga in the Pākehā Law". I did so because if tikanga is to be truly incorporated in anyway in the Pākehā legal structures of this nation, we need the power and respect to define how that is to occur.

The absolute nature of the mana which rangatira exercised included a number of different components which may be called the specifics of power, defined as:<sup>1</sup>

- The power to define — that is the power to define the rights, interests and place of both the collective and of individuals as mokopuna and as citizens;
- The power to protect — that is power to be kaitiaki, to manaaki and maintain the peace, and to protect and care for the land and waters within the rohe;
- The power to assign for use — that is the power to grant or withhold entitlements to the land and waters subject to tikanga and the reciprocal obligations between individuals and the collective;

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1 See *Brief of Evidence of Moana Jackson* (Wai 898, A117, 12 November 2012) at [35]. Jackson argued that mana includes several components, called the *specifics of power*, which include powers to "define", "protect", "decide", "develop" and "treat".

- The power to decide — that is the power to make decisions about everything affecting the wellbeing of the people;
- The power to reconcile — that is the power to restore, enhance and advance whakapapa relationships in peace and most especially after conflict through processes such as hohou rongo or rongo taketake; and
- The power to develop — that is the power to change in ways that are consistent with tikanga and conducive to the advancement of the people.

### *III Tikanga is the First Law of Aotearoa*

Before I go on to develop that kaupapa, there are three important matters I want you to remember that are foundations for my kōrero. These understandings are not new, but they are matters I remind myself of daily as part of the armoury that helps me to survive the daily grind of practice in Pākehā law.

They draw on two of the most important intellectuals of Te Ao Māori, jurist Moana Jackson and legal academic Dr Ani Mikaere, who have warned us to forever be aware of the distortions of tikanga in the administration of justice in this country and any jural system that seeks to incorporate tikanga Māori in the way it operates, while denying Māori the power to control how that occurs.

The first understanding is what colonisation means to tikanga. It is of course extremely difficult to discuss basic questions about the nature and meaning of tikanga without acknowledging the impact of colonisation and the associated history of dispossession suffered by all iwi and hapū since 1840. Indeed, the very basic question “What is tikanga?” requires some consideration of that dispossession, because colonisation has never just been about the now acknowledged confiscations of land or the depredations of war waged against iwi and hapū. It has also inevitably involved the redefining and misrepresentation of Māori knowledge, law, and philosophy.

The second understanding is how colonial law denied the existence of our own. In the process of colonisation it was assumed for centuries that Indigenous Peoples and other “savages” did not possess “real” law. As you all now learn in first year law,

it was vehemently argued as a fact that somehow law was only developed by, and reserved for, the so-called “civilised” races who assumed the right to colonise. Because Indigenous Peoples were deemed to be uncivilised, it was assumed that they either had no law or possessed only some form of custom that lacked both the efficacy and worth of “real” law.

The third understanding is the need to reassert the integrity of our law on our terms. Ani Mikaere has aptly said that tikanga is the “first law” of this land.<sup>2</sup> It developed from philosophies to do with the sacred and the interrelatedness of whakapapa between humans and between people and their lands and waters. It also draws upon the rituals, precedents, and customs that have been handed down through the generations. It recognises the need for sanctions when a hara or wrong was committed but stresses ethics and reconciliation rather than mere punishment. It puts wāhine Māori in our rightful place at the centre of the cosmos. The development and evolution of tikanga is very real proof that, like all societies, our tīpuna saw the need for guidelines to ensure that people could live in harmony with each other and the world. It too is a culturally specific construct reflecting the fact that we were never a law-less people.

Professor Hirini Mead comprehensively described tikanga as embodying:<sup>3</sup>

... a set of beliefs and practices associated with procedures to be followed in conducting the affairs of a group or an individual. These procedures are established by precedents through time, are held to be ritually correct, are validated by usually more than one generation and are always subject to what a group or an individual is able to do.

Mead continues:<sup>4</sup>

Tikanga are tools of thought and understanding. They are packages of ideas which help to organize behaviour and provide some predictability in how

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2 Ani Mikaere “Tikanga as the First Law of Aotearoa” (2007) Yearbook of New Zealand Jurisprudence 24.

3 Hirini Moko Mead “The Nature of Tikanga” (paper presented to Mai i te Ata Hāpara Conference, Ōtaki, 11–13 August 2000) at 3–4.

4 Mead, above n 3.

certain activities are carried out. They provide templates and frameworks to guide our actions and help steer us through some huge gatherings of people and some tense moments in our ceremonial life. They help us to differentiate between right and wrong and in this sense have built-in ethical rules that must be observed. Sometimes tikanga help us survive.

I agree entirely. I doubt without my own grounding in tikanga I would have survived my participation in what is still an institution built on colonial values and practices, where its decision makers still hold the power to decide whether or not to permit Māori to be an active element, and if so on what terms and how far.

#### *IV Journey of Transformation*

##### *A Daughter of Ngāti Pikiao and Ngāti Mākinō*

My mates said if I was going to bring you with me in this journey of transformation to tikanga-based justice I need to locate myself in the story.

He uri ahau no Te Arawa me Mataatua. Ko tōku maunga ko Matawhaura. Ko ooku hapū ko Ngāti Pikiao me Ngāti Mākinō. Ko tōku tīpuna ko Taingarū. Ko tōku marae ko Tapuaeharuru kai Te Rotoiti i kitea i a Ihenga. Anei taku ūkaipō.

I was raised at Te Koroki Te Wao, which is an idyllic spot situated beneath my maunga, and for the first six years of my life was brought up in the embrace of the extended whānau of Tawhirotariki Margaret Morehu and Pirimi Whata Karaka. Our home was a great gathering point for significant tribal leadership of the period.

My earliest memories are mostly of my grandmother running to hui with her cousins around health and wellbeing of our hapū members with the Women's Health League. Or with her brother and uncles around incorporation developments being implemented under the Department of Māori Affairs welfare officers like Te Puia and Sir Charles Bennett.

My grandfather devoted any free time he had when he wasn't working on the roads as the kaitiaki cop of our precious lakes and waters. He was an extraordinary orator

and established many incorporations and trusts for his hapū Ngāti Kawiti and Ngāti Tamateatutahi which are extraordinary powerhouses of commercial success now.

My Pākehā father was a farmer from Taneatua. My mother was part of the first vanguard of school teachers who, like the late Ranginui Walker, Keri Kaa and so many others, matriculated from Māori boarding schools they attended to then be the first of their whānau to assume careers in the government delivery of Pākehā-designed and implemented education processes.

I contrast this to the reality of my grandparents who, despite being Dux of Queen Victoria (as my grandmother was) and despite matriculating from St Stephens in Parnell (as my grandfather did), maintained themselves on our papakāinga in essentially a subsistence kind of lifestyle living with their cousins, and committed to surviving wars and depressions that threatened their very ways of life and demanded an adaption to the way they had been brought up. It was either sink or swim.

Not that their roles were insignificant. Their bilingualism made them both fundamental to the developing tribal governance structures of the 1920s and 1930s, with my grandmother being the minute Secretary for her father Morehu Te Kirikau and Te Reiwhati Vercoe in the establishment phase of the Te Arawa Māori Trust Board in the 1920s and my grandfather committed to all facets of Māori development.

Interestingly, religion in their lives was very much influenced by how the process of confiscation had impacted on them. Not many know, but Ngāti Mākino to whom they both affiliate was part of those peoples who had all of their lands taken by the New Zealand Settlements Act 1863.<sup>5</sup> They were devout followers of Ratana who helped them survive the landlessness that was inflicted on their families. Ironically, the very lands that were taken were the same ones used to resettle my Pākehā grandparents at

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5 Ngāti Mākino, Ngāti Mākino Iwi Authority and the Crown *Deed of Settlement of Historical Claims* (2 April 2011) at [2.23].

Ōtamarākau and Tāneatua. Unsurprisingly, when my parents announced their intention to live together it was met with scepticism and concern because of this fact.

My parents also had the audacity to break some of the taboos of their time. My dad was white and Catholic and divorced with the full-time care of my two elder brothers. He was to be the first Pākehā to join our Whata whānau.

My mother was a Presbyterian graduate from Turakina Māori Girls College and Auckland Teachers Training College who was committed, as many of her time were, to maintaining my grandparents' ways of life in whichever way she could. I doubt for the first few years of her teaching career that any of the money she earned was ever spent by her. She and her sisters just gave everything to their father for the communal well-being of our whānau.

Her loyalty to this goal shaped my thinking as a child and is part of why, as a tribal fundamentalist, even now I see the value of those living in urban realities maintaining links to their ūkaipō — not only for the questions of identity that such relationships assure but because without that practical support our marae and ways of life on our papakāinga are threatened by the real fact of depopulation and urban migration otherwise.

### ***B Growing up in Kawerau***

I am a girl from Kawerau though — through and through. When I was six, my mother and father felt that I should begin living with them there (not without some angst on my part), where my mother had obtained employment at the Kawerau Central Primary School, an institution she gave most of her working life to. Like many of her contemporaries Beverly Anaru, Mere Rankin, Sara Eruera, Rangi Simpson, Merata Mita, Frederick Leonard, and Hemi Hau, nurturing and sustaining Māori children and developing models of learning to facilitate their participation in education goals of the state were significant goals for all of them. And their efforts were not in vain.

I went to school there, with pathways from the learnings there taking me to Singapore International School on a scholarship to pursue an International Baccalaureate at 16.

Later doing stints at summer school in Wales, Cambridge, and Geneva, before returning to Victoria University and then Auckland.

Kawerau was a mill town. It was even contemplated in its early development by the Fletcher family as a place that might be renamed Fletcherville. Kawerau only existed when I was growing up because of the paper mill. “Uncle Tasman” was its name. In the early 1970s it was the town where the workers constantly challenged the bosses. Significant and militant union leadership were household names like Blue Murphy, Tame Iti and Willie Wilson. In the 1970s and 1980s there was a lot of strike action, short ones and long ones. In 1978 the mill closed for 35 days, in 1983 for 50 days. By the mid-1980s “Uncle Tasman” had changed. It had become Fletcher-Challenge, New Zealand’s first multinational. The government corporatised and privatised the forests and poverty and whanau and entire communities were driven deeper into poverty.

### ***C Urban Reality of Māori Protest Movement***

I had my political and legal education in the 1980s. That was a profoundly important time, when wāhine toa were to the fore. We had Te Matakite in 1975 led by Whina Cooper, Bastion Point/Takaparawhau in 1977–1978 with Rene and Joe Hawke, Eva Rickard at Tainui-a-whiro in Raglan, the Springbok tour with Josie Keelan, Donna Awatere, Ripeka Evans. Mira Szazy was a fearless advocate for mana wāhine as secretary of the Māori Womens’ Welfare League.

There were other radical allies — te Runanga Whakawhanaunga i Nga Hahi o Aotearoa, the Māori Council of Churches, who brought liberation theologians like Father Philip Franchette to run structural analysis workshops for young Māori, and who organised the “Don’t Vote” campaign for the 150th anniversary of te Tiriti o Waitangi 1840 in 1990.

### ***D The Beginnings of a Demand for a Tikanga-based System***

Demands for a tikanga-based system were at the core of this movement. In 1985, Moana Jackson came back from overseas and worked for the Justice Department for a



year. That was around the time that Te Miringa Hohaia, John Hippolite, Sandy Morrison, Roma Balzer and others worked on a report on access to justice called *Te Whaingā i te Tika*. One of the eventual outcomes from that was legal aid at the Waitangi Tribunal.

Moana's ground-breaking *He Whaipāanga Hou: Māori and the Criminal Justice System* came out in 1987.<sup>6</sup> His report stirred revolutionary foment among Māori and chaos and toxic backlash in the Pākehā world. Justice Minister Geoffrey Palmer, who commissioned it, had wanted a nice safe explanation and remedy for the number of Māori in prison.

Moana's call for a Māori justice system was attacked by Pākehā as separatism. In the Māori world, it laid the foundations for modern Māori demands for a tikanga-based justice system, and the creation of Nga Kaiwhakamarama i nga Ture, the Māori Law Commission, by Moana, Caren Wickliffe (now Fox) and others as an alternative to the newly created New Zealand Law Commission.

So, I grew up in this time of tumult. During the 1981 Springbok Tour I was the babysitter while my whānau protested apartheid in South Africa and Aotearoa. I was privileged though to be part of early radical movements for change like Te Kotahitanga o Waiariki, shaped by the late Syd and Hana Jackson and the late Taini Morrison, the late Tuhipo Kereopa, Mereana Pitman and Roma Balzer who were also those pioneers of the Women's Refuge and Rape Crisis Movements.

### ***E Inside/Outside Strategy***

There was always what we called an "inside/outside" strategy, grounded in the ethics of tikanga and commitment to tino rangatiratanga. My role was to not drink, to not smoke, and to provide analysis of what the system would do in response to different strategies.

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6 Moana Jackson *The Maori and the Criminal Justice System: A New Perspective: He Whaipāanga Hou Study Series 18 Part 1* (Department of Justice, February 1987).

I cannot thank Donna Awatere, Josie Keelan, Hilda Halkyard Harawira and Ripeka Evans enough for their feminist teachings that underpinned the Black Women's Movement, which became the Māori Women's Movement. I attended the earliest gatherings of this Movement in Ōtaki and Auckland and became a foundation member of Te Amorangi, a women's group established for Auckland University students navigating these tumultuous times with Dr Margie Hohepa, Donna Gardiner, Damian Rikihana, Dr Aroha Harris, and April Parata.

### *F Understanding the Workings of Pākehā Law*

When I came to law school the first case where I learned about te Tiriti was *R v Symonds*.<sup>7</sup> It was not even about te Tiriti. Two Pākehā were fighting over which one should own Māori land. In my view, the Pākehā law is still stuck in that place 180 years on.

When I graduated in 1985, the Waitangi Tribunal had come to life and under the first-ever Māori chief judge of the Māori land court Taihakurei Eddie Durie. He began making the most of its Crown mandate as a Commission of Inquiry and insisting that Treaty principles were derived from te Tiriti itself. Their first few hearings, on the marae, celebrated the kaumātua whose knowledge filled the baskets for the Motunui, Kaituna River and Manukau Harbour claims, finding there was no cession of sovereignty.

My first involvement in these claims was initiated here at Auckland University, when we were asked to go to the hearings at Ihumātao for the Manukau Harbour claims where Sian Elias was counsel. Myself and a group of the Black row at that time — John Tamihere, Mark Milroy, Hiram Parata and the late Gina Rudland — would head out to the marae there to see what this new innovation to Pākehā Law was all about.

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7 *R v Symonds* (1847) NZPCC 387 (SC).

David Williams roped me in to help run mock trials at Waiheke for those from Ngāti Paoa occupying a Māori land block there that was administered by the Māori Affairs Department and led to its own Tribunal claim.

I returned home to help research for the Kaituna River claim which was made by my grandmother's brother Mata Morehu and other significant contemporary leaders of the Te Arawa Trust Board at the time like Stan Newton. I helped craft some of the testimony of the origins for Te Arawa that was given by the late Irirangi Tiakiawa and Tamati Te Wharehuia.

There was huge suspicion around the transfer of mātauranga knowledge even then, with orders being made for secret files and recordings not open to all and sundry via the public access available as is usual in court processes.

### ***G Te Reo Māori Claim Wai 11***

These were a precursor to my first appearance as a lawyer in the Te Reo Māori claim hearing, where the importance of tikanga Māori enveloped every waking moment in those hearings. Busload after busload was organised by the principal claimants Nga Kai Whakapumau i Te Reo and Te Reo Māori Society from Rotorua. The former was led by the late Huirangi Waikerepuru and Piripi Walker and the latter by the late Hikooterangi Hohepa and Cathy Dewes.

We had no money but were armed with self-belief and the knowledge we were right. I was a baby lawyer with an enormous task. There was no legal aid to help us. We were looked after for the whole hearings process at Kokiri Marae Seaview in Lower Hutt by Keriana Olsen of Tokomaru Bay. Our team was comprised of volunteer lawyers who literally closed our practices in Rotorua to fight for the right to have Te Reo Māori available as part of the vernacular of the courts of the land.

I remember being surrounded by silks. Every government department in the country had hired a QC and Rawiri Rangitauira and I were developing submissions in the evenings on an old-fashioned typewriter and using a Gestetner to make copies the following day.

Justice Joe Williams was still studying if I recall and Judge Caren Wickliffe (now Fox) was also completing her degree. I would be told years later that I was the first Māori woman lawyer to ever make a formal appearance in the Waitangi Tribunal. Martin Dawson, a Wellington based Pākehā lawyer, came down to develop arguments around positive discrimination and the te Tiriti guarantees.

Of course, when you look at the news footage, every inch of the Māori world was represented in some way, both urban and rural. Rangatira like Sir James Henare, the great Sonny Waru, the great Api Mahuika and Koro Dewes from Ngāti Porou, Tamati Wharehuia, Te Reo from Ratana, Dame Te Atairangi Kahu and her paepae of eloquence, Lena Manuel, Miro Stephens, Dame Mira Szazy were pepper potted throughout the hearings. Sir Graham Latimer and Paul Temm QC made up the tribunal with Taihakurei Durie presiding.

Writing this has brought a flood of memories of how their process had to adapt to the cascade of tikanga Māori that was exhibited. For us, tikanga wasn't an intellectual concept and set of values learned at the university. In part, it was what we always carried with us.

The Te Reo Māori claim, as it was carried through the invisible invader (the television sets in every New Zealand household), exposed a number of important realities. The Māori protests that had been triggered by the courts' refusal to allow Te Ringa Kaha Mangu's (Dunn Mihaka and Diane Prince) "claim of right" to represent Māori defendants as a Māori agent in the District Court put more pressure on the Waitangi Tribunal to confront some of these outdated common law precepts.

I don't think many had envisaged how that claim became a beacon for the Māori language revitalisation movement, but it did and still is a focus point in measuring the effectiveness of Māori development.

Read the report and you see how claimants reminded the Tribunal they were not just asserting rights as part of an ethnic minority. They are not to be treated like migrant groups who have recently come to this country from other lands. That they belong here, that they and their culture have no other home, that they are the tangata whenua

of Aotearoa, and that by the Treaty they made with the colonising English they and their culture were given promises in writing that they expect and demand to be kept.<sup>8</sup>

The Tribunal agreed that s 77A(1) of the Māori Affairs Act 1953 achieved nothing. It just recognised Te Reo and left the Minister of Māori Affairs (often a Pākehā) to decide what he (almost always) deemed appropriate to encourage the learning and use of the language.

The Tribunal's recommendations led to amendments to the status quo with the enactment of the Māori Language Act 1997 and Te Taura Whiri i Te Reo Māori. More recent changes following challenges by the Kōhanga Reo National Trust to give greater status and effect to Te Reo as an official language in 2016 have resulted but very little change has been affected in the resource allocation required to meet the aspiration of retention and revitalisation of the Reo. I was on the board of Te Māngai Pāho for several years, as part of my insider role. Looking back, I see how those gains have been very incremental and some might say not effective in arresting the decline in Māori Language retention, despite an increasing number of non-Māori seeking to acquire basic Te Reo Māori skills — an ongoing dilemma for policy makers.

I have spent some time explaining that pathway to reach the key question for this korero: has the incrementalism that featured in the way tikanga Māori is being incorporated into the Pākehā law just more of the same window dressing by Pākehā Law makers and those that administer justice?

### ***H Co-option into the Process of Incremental Change***

Those times were seductive because we came to think that something could be achieved through the Tribunal, and then the courts. We got co-opted into fighting for tikanga and mana motuhake within a colonial state and legal system. By the mid-1980s with the *Lands* case,<sup>9</sup> things were heading seriously downhill. Once the courts got hold of te Tiriti they went on a frolic of their own developing Treaty principles that

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8 Waitangi Tribunal *Report of The Waitangi Tribunal on The Te Reo Maori Claim* (Wai 11, 1986) at 18.

9 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

simply affirmed Crown sovereignty and showed contempt for tino rangatiratanga. The Tribunal caved, said there was a cession of sovereignty, let the lawyers take control, and saw itself as another, browner, part of the coloniser's legal system.

Māori lawyers became co-opted into this system as colonisation weaved its web yet again. I know about that. I went through the co-option phase. I could have been comfortable as a company director of Māori enterprises and \$200k a year. Gone to the bench. Been a part of reinventing colonisation with a light brown lens. But, as I said, those three understandings made me confront my role.

## *V The Institutionalisation of te Tiriti o Waitangi*

It's a hard truth to confront. Over time te Tiriti has become institutionalised in the Crown's space. The legal arguments moved from Crown principles to trying to argue tikanga in the courts — but on the Crown's terms as they, from time to time, confirmed that particular tikanga practices can be recognised as customary law.

Let me flesh this out with reference to the criminal courts — a place I spend too much of my time confronting these contradictions, because there are so few criminal lawyers committed to social justice, and even fewer who are eligible for legal aid to do the serious cases. The few are getting fewer.

### *A White Hatred*

Let me be blunt. This is a system that really hates us. I was physically attacked by the police when I acted for Tame Iti in the flag case. I became known as that activist lawyer because I committed to defending any of our people who used Noho Whenua as legitimate tactics for fighting for our land.

My involvement in defense of those charged for the symbolic One Tree Hill action against the Fiscal Envelope created the basis of the demonisation of me that would be a constant by some of the most astute defenders of the state and the mantra of one law for all. It became very visible during the Foreshore and Seabed march.

In the Urewera terrorism trials most of the Māori lawyers ran away simply because of the sheer weight of the process of justice and the lack of institutional support. Just as the lawyers who defended Rua Kēnana too, many were confronted by complaints to the Law Society and some were on the verge of bankruptcy because of the slow dirge of the legal aid system. Some of our Pākehā allies worked tirelessly without compensation and I will be forever indebted to their support. Professor Jane Kelsey and Rodney Harrison QC must be acknowledged for their efforts. We had to deal with the criticism of our efforts to ensure the right of representation in the system and outside it. My family sought out international solidarity on that case because there wasn't any here. We made complaints to the Special Rapporteur on Terrorism at the United Nations and participated vigilantly in processes lead by Dame Lowell Goddard for the Independent Police Conduct Authority. The civil complaints ended up in a settlement being negotiated by tribal leaders of the Tūhoe PSGE with some families still without recognition for how those raids at Rūātoki changed their lives forever. We took sabbaticals in Seattle and Vancouver after the case was over to look at how State Oppression used Terrorism Suppression Legislation to stymie indigenous movements for independence.

I know many of you think there has been real progress in the courts. But let's look at some recent cases through a decolonised tikanga lens.

### ***B The Myth of Progress***

In *Solicitor-General v Heta* in 2018, Christian Whata delivered a great judgment, creatively using s 27 of the Sentencing Act 2002 and drawing on evidence from Khylee Quince.<sup>10</sup> But it was still within the framework of participatory justice. At one level a colonisation discount is a step towards restorative justice. But a “30 percent discount”, with the Crown arguing the discount should never exceed 10 percent, is still a “discount” within the colonial paradigm.

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10 *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241.

*Takamore v Clarke* is currently the leading authority on the role of tikanga Māori as part of the common law of New Zealand.<sup>11</sup> This case arose from a dispute about who had the right to decide where the body of a deceased person would be buried. Of particular relevance was the role of tikanga (specifically, in this instance, Tūhoe burial customs) in such decisions. Despite Tūhoe custom, the High Court ruled that:<sup>12</sup>

... [t]he collective will of the Tūhoe cannot be imposed upon his executor and over his body unless he made it clear during his life that he lived in accord with Tūhoe tikanga.

Which the court found as a matter of fact he did not.<sup>13</sup> The executor rule, established in English law in the 19th century, was upheld. It meant that the executor of the deceased's estate — Clarke in this case — has the legal right and duty to make funeral arrangements.

The case went further, to the Court of Appeal and on to the Supreme Court. The majority of Supreme Court members found that the executor rule applied but there was some disagreement. Chief Justice Dame Sian Elias thought that common law was “obscure” in this area,<sup>14</sup> and Justice Sir William Young agreed with her that the executor rule is not part of New Zealand law.<sup>15</sup> The Supreme Court found tikanga Māori and Māori burial customs were a relevant consideration to be weighed among others by the executor or the personal representative of the deceased. In a minority judgment, Elias CJ concluded that the law did not provide a determinative rule or law as to who can dispose of a deceased, but noted that:<sup>16</sup>

Values and cultural precepts important in New Zealand society must be weighed in the common law method used by the Court in exercising its

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

12 *Clarke v Takamore* [2010] 2 NZLR 525 (HC) at [88] (macrons added).

13 At [88].

14 *Takamore v Clarke*, above n 11, at [51] per Elias CJ.

15 See at [202]–[206] per William Young J.

16 At [94] (emphasis and macron added).



inherent jurisdiction ... Māori custom according to tikanga is, therefore, *part* of the values of the New Zealand common law.

### *C The Denial of Māori Systems of Justice*

In *R v Mason*, Mason was convicted of murder and attempted murder after pleading guilty.<sup>17</sup> Heath J refused to allow Mr Mason to be dealt with in accordance with tikanga Māori in his sentencing and imposed a term of life imprisonment, with a minimum 17 years on the charge of murder.<sup>18</sup>

The judge applied a conventional but careful approach, diligently reviewed the facts, acknowledged the victim and family, and addressed Mr Mason's personal circumstances. He then weighed further factors in deciding that a minimum period of imprisonment was necessary, in particular, the case was a home invasion of particular brutality, and one of multiple crimes committed on one night that "balance[d] ... out" Mr Mason's guilty plea and acceptance of responsibility.<sup>19</sup>

References to tikanga Māori and cultural considerations appear throughout the judgment: the judge allowed the victim impact statements to remain forthright and strong to approximate the approach to issues on a marae. He observed that it was difficult for him as a Pākehā judge to understand "how kaupapa Māori apply in the circumstances"<sup>20</sup> — a comment that some might see as justifying greater judicial education on kaupapa Māori, and more appointments of Māori judges to the bench.

Most tellingly, he said that "cultural considerations are relevant", but that they had "little weight" in the case before him because of the seriousness of the crimes.<sup>21</sup> Heath J insisted, as well, that consideration of matters Māori was consistent with the notion that there is "one law for all in New Zealand".<sup>22</sup> He went on to say "there are

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17 *R v Mason* [2012] NZHC 1361, [2012] 2 NZLR 695.

18 *R v Mason* [2012] NZHC 1849.

19 At [49].

20 At [6] (macron added).

21 At [7].

22 At [8].

problems in taking the tikanga approach too far”.<sup>23</sup> Tikanga Māori considerations “are relevant to the sentencing process but they cannot drive it”, in particular because of the community interest in consistency in sentencing.<sup>24</sup>

There is not an attempt to use tikanga Māori to achieve a more merciful outcome for Mr Mason (though it perhaps should not be presumed that incorporation of tikanga Māori will always lead towards parsimonious outcomes).

Instead, Heath J said controversially:<sup>25</sup>

The tangle you got yourself into in dealing with the way in which the Courts approach matters such as this and issues of tikanga Māori proved a distraction and stopped the most important thing from happening.

This was an acceptance of responsibility for what occurred.

That might be interpreted as punishment for Mr Mason’s attempts to raise issues of tikanga Māori, and discouraging others from invoking tikanga arguments in future. I think the better view is that Heath J was indicating that Mr Mason ought to have apologised to the victim’s family at an earlier stage, and pursued his arguments around tikanga Māori with remorse already expressed.

#### ***D Hybridity and the Assimilation of Māori Values***

Now to *Ellis*. We need to ask why we had to wait for a Pākehā man who was charged in an extreme case involving allegations of sexual violence against the most vulnerable of our communities to argue the need for restorative justice. There were Māori cases where it could have been as easily argued — Rua Kēnana, Mokomoko, Teina Pora or David Tamihere spring to mind.

New Zealand has no legal precedent for posthumous appeals. However, the Rua Kēnana Pardon Act was passed in December 2019, which officially pardoned

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23 At [40].

24 At [40].

25 At [47] (macron added).

the Tūhoe prophet and apologised for the lasting damage done by wrongfully convicting him in 1916.<sup>26</sup> This only occurred after severe agitation over decades a full Waitangi Tribunal Inquiry and petition after petition from the descendants of those at the Maungapōhatu community whose lives were irrevocably impacted upon by the wrongful invasion of the State Forces into their tribal homeland.

In New Zealand the Governor-General has the prerogative of mercy. In addition to this monarchical power, s 406 of the Crimes Act 1961 allows them to refer convictions or sentences back to the appeal court to consider the justices of a particular situation.

This is the route Ellis embarked on some time ago. His original conviction on 16 charges dates back to 1993.<sup>27</sup> An appeal in 1994 was successful on three charges but unsuccessful on the other 13.<sup>28</sup> A second appeal was heard after a reference by the Governor-General, but this was dismissed in 1999.<sup>29</sup>

Another application was made under s 406. This led to a judicial inquiry but no reference back to the Court of Appeal. So, the most recent court decision is the one from 1999.

The date of the convictions and appeals means the case could technically have been appealed to the Privy Council in London (as happened in Teina Pora's case). However, Ellis's lawyers went to New Zealand's Supreme Court instead. The court granted Ellis permission to appeal further in July 2019.<sup>30</sup>

It is the general position in common law countries like New Zealand that a person's right to trial or appeal dies with them.<sup>31</sup> The rationale is that a dead person cannot represent themselves, and therefore a fair trial would not be possible; not to mention

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26 Sam Farrell "Rua Kenana officially pardoned 103 years after imprisonment" (21 December 2019) Newshub <[www.newshub.co.nz](http://www.newshub.co.nz)>.

27 *R v Ellis* HC Christchurch T9/93, 22 June 1993.

28 *R v Ellis* (1994) 12 CRNZ 172 (CA).

29 *R v Ellis* [2000] 1 NZLR 513 (CA).

30 *Ellis v R* [2019] NZSC 83.

31 Māmari Stephens "Rāhui, mana, and Peter Ellis" (26 July 2020) E-Tangata <[www.tangata.co.nz](http://www.tangata.co.nz)>.

divert resources away from the living. Here, the question asked was whether tikanga could alter this common law principle.

### ***E The Distortion of Mana Tuku Iho***

At the centre of the present processes of appeal is mana and the importance of seeking to restore and uphold mana in circumstances of wrongful allegation and then conviction. It is argued that mana is something that transcends death and thus restoration of mana becomes significant in the justices that need to be weighed in the totality of the matter.

I think the argument for the exercise of the prerogative of mercy could easily have been premised on the notions of honour as opposed to the importation of the concept mana, which would be preferable to my Māori mind.

Ko tō mana, he mana tuku iho i heke mai i nga atua.

Because of the relational nature of Māori culture any mana or tino rangatiratanga exercised by iwi or hapū could only be legitimised in concert with what may be termed the “essence of being” or spirituality that resides in the mana in the land, the waters and the atua. This implies for me the recognition of one’s sacred relationship with our mother Papatūānuku by virtue of whakapapa as being an important precondition before such a claim of right exists.

I know there were a number of pūkenga engaged to proffer advice on the point, but my position remains and it serves to illustrate how we need special care before we raise arguments in the courts which may have unforeseen consequences beyond any particular facts matrix. I would hate to think we are allowing the use of Māori values to advance a position of justice which would be denied Māori because of the institutional pitfalls that Māori confront in their quest for justice daily.

### ***F Who May Assert Tikanga-based Arguments and When Should They Be Raised?***

One reason this case is ground-breaking for tikanga in New Zealand law is because it was not originally a case about tikanga. Much of the past precedent for tikanga in

New Zealand has come from cases where issues of tikanga were either the main focus or directly relevant.

Here, tikanga was not involved in the case in any way until Ellis' death. It was raised on its own, in the appeal of a Pākehā man, as sole authority of how a new principle could be formed in New Zealand's common law.<sup>32</sup>

A number of other cases reinforce my thinking that the myth of tikanga in Pākehā law is just window dressing. The application for the appointment of a pūkenga to assist in assessing competing expert evidence on tikanga came before the High Court recently in a judicial review application being advanced for Ngāti Whātua Ōrākei Trust.<sup>33</sup> Palmer J in declining the application commented:<sup>34</sup>

... the parties and interveners have provided a significant amount of expert tikanga evidence from a number of pūkenga already. ... it is not clear how much additional utility there would be in appointment of independent pūkenga. If there is a conflict in expert evidence, and if it needs to be determined, it is the Court's role to determine the conflict on the basis of the evidence of the parties and interveners.

I find it very difficult to accept that a High Court judge who is not an expert in tikanga Māori has the capacity to weigh the differences between and amongst expert tikanga witnesses without the assistance of a tohunga or specialist knowledge-keeper to guide the assessment of the propositions being contended for.

There are presently some 200 cases being managed by the High Court pursuant to a range of applications that have been made under the Marine and Coastal Area (Takutai Moana) Act 2011 where the High Court will be called upon again to undertake very similar exercises. These cases are already putting a huge strain on the resources of the courts to meet the demands of the applicants, many of whom have been waiting almost

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32 See Kate Mackay "Peter Ellis, Tikanga and a Precedent For Posthumous Appeals" (30 September 2020) Equal Justice Project <[www.equaljusticeproject.co.nz](http://www.equaljusticeproject.co.nz)>.

33 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2020] NZHC 3120.

34 At [39].

15 years since *Attorney-General v Ngati Apa* to confirm their ownership and rights and interests in the foreshore and seabed.<sup>35</sup>

## ***VI Transformative Change is Demanded***

So, what do we need to do for transformative change rather than co-option? We have to be talking about constitutional change. The vision for a decolonised Aotearoa in Matike Mai is not about a hybridised justice system, where the question is whether or not Māori values will be recognised within a colonial paradigm.<sup>36</sup> It is about having a tikanga system of justice based on our values that work for our people.

Moana Jackson is clear that will only happen when Māori are prepared to stand up for our justice, and not be co-opted by participation in the colonial apparatus.

We all know that in our hearts, but if we say it out loud that means we have to be prepared to say what change really means and take the risks of being ostracised, physically attacked and lonely.

That sounds radical and to some of you unachievable. It is more comfortable to seek incremental change and acceptance within the status quo. I have never been about what's comfortable because when we lower our ambitions it is our people who suffer.

Constitutional change means systemic change, not reform. Where is the next generation of lawyers who will help make that happen?

I am honoured to be here to pay respect to Nin Tomas. She was part of the vanguard of the Māori intellectuals who devoted her life to inspiring us all to make that happen. She was a woman extraordinaire who with the same tenacity of her tīpuna Muriwhenua understood that tikanga was about understanding the dynamics of whanaungatanga and how that shaped the power over the life or death of tikanga.

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35 See generally *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

36 See *He Whakaaro Here Whakamu Mō Aotearoa: The Report of Matike Mai Aotearoa - The Independent Working Group on Cultural Transformation* (25 January 2016).

I hope as I have traversed parts of my own career that the responsibility to ensure that the colonial objective to assimilate, to deny, to oppress, to distort, and marginalise our tikanga does not occur. It is one that I have embraced in my career in the law, steeped in the understanding that of course one of the most powerful tools of colonisation is the law itself.

*Kia Tūpato*

*Ka whakatūohu atu ki whakairihau ngā takutakunga a rāwaho*

*Beware you are bowing to the dogma of outside influences*

Koinei te ringamatau o te Ture Pākehā. Kei te kī au he iro ēnei Ture o Te Pākehā ko ngā Tikanga o te Iwi te tupapaku. Ehara tēnei i te whakaaro nui i roto i te Tiriti o Waitangi. Ehara hoki tēnei tumomo āhuatanga e noho pūmau ana ki te Mana Motuhake me Te Tino Rangatiratanga o te Iwi Māori.

Mehemea ka puta te pātai a tētahi mo tēnei tūāhua kōrero, ko taku whakahoki, i roto i aku mahi i tēnei tau he maha ngā tauira kino kei roto i ngā ture Pākehā, mai i ngā mahi i roto i te wharepāremata me ōna kaupekatanga tae atu hoki ki ngā Kooti Pākehā.

He pēnei anō te kōrero a Te Kooti a Rikirangi Te Turuki mo te Tiriti o Waitangi:

*Ko te mana tuatahi ko te Tiriti o Waitangi*

*Ko te mana tuarua ko te Kooti Whenua*

*Ko te mana tuatoru ko te Mana Motuhake*