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The case of *R v Ellis*: Groundbreaking or Token Gesture?

I Introduction

Numerous critics acclaim the Supreme Court's decision in *Ellis v R (continuance)* for being ahead of its time in terms of acknowledging and applying Tikanga as part of the common law. The case stepped into the spotlight at a time where significant progress had already been made as to the obligations of the Crown under the Treaty of Waitangi and Te Tiriti o Waitangi and the recognition of Maori customary law and practices. Against a backdrop of tenuous and highly contested treatments of Tikanga and Maori customary rights in the court system, *Ellis* was said to have marked a new era of acceptance. On its surface, the decision appears to have allowed Tikanga to have played a significant role in the granting of the appeal. However, whilst the judgement contains a great deal of reference to and interaction with Tikanga concepts and principles, it is apparent that the dominant, English-derived, common law legal system prevails. This essay seeks to uncover the true impact of the case and what it means for the future of Tikanga and the Common Law. It will examine the case itself and its various perspectives before expanding out to look at wider implications. Should we be as excited about *Ellis* as some claim we should be?

II Background

Ellis involved a series of proceedings following the conviction of Mr Ellis in 1993 on account of a number of sexual violation offences. He was sentenced to a total of ten years in prison and his two attempts at appeal were rejected. However, in 2019, new expert evidence came to light and Ellis was granted leave to appeal to the Supreme Court. A hearing to determine whether the leave to appeal should be allowed was set but before this was to take place, Mr Ellis passed away. Continuance upon death was at issue- something not expressly contemplated by the legislation. Notably, Mr Ellis and his whanau were not of Maori decent. Nevertheless, the relevance of Tikanga was raised in the proceedings and a number of inquires were made, involving experts, as to how and to what extent Tikanga could be applied in the case. The submissions were focused on the interplay between Tikanga, and principles derived from the Common Law and the weight afforded to each in these specific circumstances. The following

discussion will look at both the Supreme Court judgement and the preceding hearing- which dealt with Tikanga in more depth.

III How Tikanga was Applied in Ellis

Several Tikanga concepts were identified as being relevant to the case in both the hearing and the Supreme Court proceedings. One of these was Mana. Mana was both relevant and a point of contention in the case. The representative for Mr Ellis and his whanau in the pre-trial hearing noted that all parties concerned had mana and mana vested in the outcome of the proceedings. The Crown argued that it was in the interests of mana that the case cease to continue, and the appeal disallowed. However, the appellant responded by claiming that this was a misinterpretation of Tikanga- or at least a narrow one. More specifically, such an approach would damage both the mana of the appellant and the respondent by denying both sides the opportunity to answer the question of whether the appeal would succeed- even though Mr Ellis was now deceased.[1]

This leads us to the second relevant Tikanga principle- 'ea'. 'Ea' is defined as a state of balance or resolution. "The Tikanga view of it is to continue to probe as far as you are able to probe to get the best information to try and reach a conclusion or a resolution of the matter."[2] The appellant acknowledged that in such circumstances, resolution would prove difficult. However, this did not preclude any attempt to do so. This stance perhaps contradicts the Common Law's desire for certainty and predictability (a conflict that we will return to later on). Interestingly, Justice Glazebrook in the 2022 appeal agreed with the appellant and rejected the Crown's argument that "ea would be achieved by revoking leave".[3] It was accepted that it was in accordance with Tikanga that the appeal be allowed to continue for these reasons. That being said, it was also found that this determination was consistent with the common law objective of assessing whether a decision would be in the interests of justice. Thus, one interpretation of Justice Glazebrook and the majority's approach to this aspect of the case is that Tikanga (through the consideration of ea) was merely applied for the purpose of reinforcing what was already deemed appropriate according to the common law. Likewise, the majority's holding that the idea of mana was relevant, was consistent with the common law's precedent that one's

[1] *Ellis v R* [2020] NZSC Trans 19 at 29.
[2] Above n 1, at 62.
[3] *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [147].

reputation survived death. Therefore, it could be said that the outcome of the case was not materially affected by the application of tikanga.

Even more concerning is the observation that "the minority approach more forcefully injects tikanga into the mix".[4] Despite ultimately deciding that the correct outcome would be to discontinue the appeal, the minority was seen to have had a more genuine interaction with the application of Tikanga, rather than coming to a conclusion regardless and then purporting to have been guided by Tikanga. Thus, whilst the Supreme Court's efforts in gathering the relevant Tikanga evidence and making it a point of contemplation in the case were impressive, its impact on the outcome of the case fell short. Ultimately, common law was followed and Tikanga just happened to agree in this instance.

IV The Nature of Tikanga and the Court's Concerns

Underlying the discussion around the relevance and applicability of tikanga to this case was an apprehensiveness as to the correct application of tikanga and more importantly, whether it could and should be applied by the courts in common law proceedings. This issue is not exclusive to this case but rather points to a broader question of jurisprudence and the inherent incompatibility of Tikanga and the Common Law, as will be discussed in the following section. This concern was raised not only in the court, but by reporting media too. There was widespread unease about the courts being "the arbiter of tikanga".[5] There were concerns about the lack of representation- such as the fact that ninety percent of judges adjudicating on such matters would be Pakeha. There was also claims that the incorporation of Tikanga in decisions would be "a gross overstep, a breach of the promises of rangatiratanga".[6] Indeed, according to the Treaty and Te Tiriti, Maori retained authority and tikanga being a part of this authority- it is arguably only for Maori to practice and apply.

On the other hand, it is the reality of our constitutional arrangement that we function according to parliamentary sovereignty, as manifested in our common law system. Therefore, as the system stands, the only way for Tikanga to be recognised and implemented is through the courts attempts to "imbue the law with tikanga Maori…because the alternative is that we don't do

[4] Dean R. Knight and Mihiata Pirini "Ellis, Tikanga Maori and the Common Law: Relations Between the First, Second and Third Laws of Aotearoa New Zealand" (2023) P. L. 557.
[5] Jamie Tahana "Peter Ellis: Supreme Court Decision Reaffirms Tikanga Relevance to Legal Framework" (8 October 2022) RNZ <www.rnz.co.nz/news/on-the-inside/476286/peter-ellis-supreme-court-decision-reaffirms-tikanga-relevance-to-legal-framework>
[6] Above n 5.

that at all through fear of getting it wrong".[7] This is a strong argument. However, some argue that this case is exceptional in the aspect that it involved the sourcing of independent Tikanga experts through the proper traditional method of inquiry- "the wananga method".[8] In other cases, these processes might not be followed and/or these resources may not be so readily available. In such cases, it may be difficult for judges to follow and apply Tikanga where they do not have personal knowledge or experience dealing with it. On a positive note, *Ellis* has received praise for "seeking expert evidence…rather than having the court assert its own independent expertise and authority to determine the very applicability of tikanga."[9] However, the replication of such a process might not be achievable in every case.

Another concern that has been raised on this matter is that Tikanga is not one, cohesive set of rules that apply universally. Rather, tikanga is locally sourced and highly contested depending on the area and subject matter. This poses a challenge for any future attempt at an 'interlegality model'. Shared decision making would require specialist courts and a flexible relationship of interdependence between the courts and the relevant Tikanga authorities. One suggestion has been (similar to the process followed in *Ellis*) to have Tikanga matters heard by "a specialist court, such as the Maori Land Court"[10] who would then advise the general courts on the correct application. This would address the issues of ignorance and jurisdiction but how it would play out in practice may not be as seamless as one would hope.

V Conflict Between Tikanga and the Common Law

As mentioned, these concerns are encapsulated within a broader issue of the inherent superiority of and deference to the common law when decisions are being made in the courts. *Ellis*, in its various submissions and opinions, has a very optimistic and progressive attitude towards the relationship between tikanga and the common law. Of particular significance is the fact that the court rejected the traditional, stringent test for incorporating Tikanga. The element of 'reasonableness' as appears in this traditional test was said to be "based on colonial attitudes…and a view that the common law inherited from the United Kingdom should be presumptively dominant"[11] Furthermore, both the hearing and the Supreme Court judgement

[7] Above n 1, at 71.
[8] Above n 4.
[9] Nicole Roughan *Appendix 3: Interlegality, Interdependence and Independence: Framing Relations of Tikanga and State Law in Aotearoa New Zealand* (NZLC SP24, 2023) at 48.
[10] Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" [2015] 1 NZ L Rev 1 at 32.
[11] Above n 3, at [115].

make reference to the fact that the English common law did not replace Tikanga (which they refer to as the first law of New Zealand on multiple occasions). Rather, the common law was to be applied "insofar as it is applicable to the circumstances of New Zealand."[12] Also of importance was the observation made by Chief Justice Winkelmann that the purpose of the common law is to serve the whole of society-including Maori and the rights guaranteed to them under the Treaty and Te Tiriti.

Despite these admissions, however, there still exists an inherent incompatibility between the two systems of law. For example, Justice Williams in the Supreme Court judgement points out that where the common law considers the concept of posthumous reputation as being individualistic in nature, tikanga takes a more collective and integrated approach.[13] Whilst these differences were not polarising enough to result in a different outcome in this case, previous cases and general constitutional realities show us that the conflict can have a material impact on decision making. For example, the court in *Takamore v Clarke* acknowledged that "due weight is given by the common law to the tikanga concerning Maori burial practices".[14] However, it turned out to be more of a symbolic consideration as English Common Law principles ultimately took precedence over tikanga. This attitude cannot be distinguished from the court in *Ellis* because even though the outcome was consistent with tikanga, it is apparent that the common law was followed over and above tikanga.

This dynamic has been pointed out in some scholarship as indicating a strong theme of legal positivism within our system, which is "deeply resistant to the recognition of any unwritten, values-based, conception of customary law"[15] Accordingly, cases like *Takamore* indicate that tikanga is merely a secondary thought for the courts. The ruling common law system determines how and to what extent tikanga is applied in any given context. Cases thus far, including *Ellis* upon a critical reading, show a "selective appropriation of useful Maori concepts by the dominant legal system".[16] Therefore, we must be careful not to conflate acknowledgement of tikanga and Maori customary practices as any sort of prioritisation over the common law where it clearly is not.

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[12] Above n 3, at [172].
[13] Above n 3, at [254].
[14] *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [152].
[15] Emma Marguerite Gattey "Do New Zealand Courts Regard Tikanga Maori as a Source of Law Independent of Statutory Incorporation? Or is Anglo-inspired Common Law Still the Sole Arbiter of Justice in New Zealand?" (LLB (Hons) Dissertation, University of Otago, 2013) at 56.
[16] Above n 15, at [58].

VI Ellis's Narrow Applicability

Even if *Ellis* is taken as a significant step in the right direction for the consideration and implementation of tikanga in the common law, there remains the fact that the case was heard under quite specific and unique circumstances. As mentioned, there is no statutory authority or common law rule that determines whether leave granted should continue after the appellant's death. Therefore, the court in this case was much more at liberty to inject tikanga concepts into the conversation. In contrast, Justice Glazebrook noted that tikanga will only be considered in cases in which it is relevant, able to assist and "when it would not be contrary to statute or contrary to binding precedent".[17] These sentiments perhaps detract from the progress made by the court's rejection of the traditional common law incorporation test and emphasise the symbolic nature of tikanga in this case. There was also an apprehensiveness expressed by Chief Justice Winkleman in the pre-trial hearing about letting tikanga-inspired principles like the preservation of mana after death, overshadow common law principles like efficiency (flood gates argument). Thus, we see several instances of the court attempting to restrict the applicability of *Ellis* to future cases.

"The court's decision in Ellis emphasises the significance of tikanga at the level of values" but there is little "prospect of tikanga being controlling or determinative in hard-edged cases of conflict."[18] We can see that the courts are willing to incorporate tikanga into its decision-making processes where it is clear and consistent with pre-established ideas and practices. Thus, *Ellis* is a beacon of hope for tikanga in relation to questions of law that have not yet been addressed by the common law. There is a clear benefit in doing so and many sources acknowledge the potential of tikanga to positively influence our common law. Furthermore, *Ellis* tells us that tikanga need not be limited to circumstances exclusive to Maori. Rather, it has values and ideas which apply to all, and this should be taken advantage of. However, there is still much more to be done systematically to allow tikanga to have a more substantial influence in our courts.

VII The Future

So, what does *Ellis* tell us about the future of Tikanga in the common law context? As pointed out by Justice Williams in the pre-trial hearing, there has a been a shift in the dynamic between the two systems, "following the Treaty settlement process…and the law is responding to

[17] Above n 3, at [117].
[18] Above n 4.

that."[19] There is no doubt that there has been an increase in the dialogue between the legislature, judiciary and Maori in recent years. However, there are fundamental barriers between the two systems that have yet to be broken down. The relationship is a complex one and "the case-by-case approach of the common law"[20] has been found to be the most effective way of addressing this complexity. This is good in the sense that it allows for flexibility and subtle alteration of state law over time which could potentially instigate real change in the future.[21] However, leaving the use of and tikanga up to the complete discretion of judges who are confined to the limitations of a system that it designed to favour English Common Law principles and precedents does not bode well for a consistent, upwards trajectory. What we need going forward is meaningful collaboration and more intentional interaction with tikanga as applied to the common law generally.

VIII Conclusion

Ultimately, it can confidently be concluded that *Ellis* is indeed merely a 'token gesture'. Whilst the case made an admirable effort to include tikanga values and practices in its process, at the end of the day, English common law reigned supreme. We have looked at how and why tikanga was applied in the case and discovered that the majority's approach to the problem followed established common law principles and the outcome just also happened to be consistent with tikanga values and practices. We then discussed the dangers of allowing the mainstream courts to adjudicate on tikanga matters. *Ellis* is authority for the notion that it is better to try to incorporate tikanga as opposed to avoiding because it may not be executed perfectly. However, we then looked at more systemic, overarching concerns and the reality that tikanga has been and continues (*Ellis* being no exception) to be an afterthought or second-tier consideration, as per the nature of our constitutional arrangement. Finally, we considered the limitations of the decision and its potential influence on future decision making. On a positive note, *Ellis* exemplifies the increased awareness and acknowledgement of tikanga as the first law of New Zealand and one that still plays an active role in our legal system to this day. On a less positive note, this is subject to numerous limitations and the constitutional supremacy of state-imposed legislation and English-derived common law rules and principles. Overall, *Ellis* is symbolically brilliant. Yet, it does not make a dent in the hierarchical arrangement of the law. For real change

[19] Above n 1, at 55.
[20] Above n 3, at [183].
[21] Above n 10, at 32.

to occur, there needs to be extensive conversations and moves towards a systematic overhaul; one which genuinely accepts tikanga as binding and enforceable law in Aotearoa New Zealand.