Tikanga and Culture in the Supreme Court: *Ellis* and *Deng*

Susan Glazebrook
Judge of Te Kōti Mana Nui o Aotearoa/Supreme Court of New Zealand[1]

with 'Introduction' by Mai Chen
Barrister and President of New Zealand Asian Lawyers

Abstract

The following article is based on a speech delivered by Justice Glazebrook on two recent Te Kōti Mana Nui o Aotearoa/Supreme Court of New Zealand cases: *Ellis v R* (role of tikanga in the law of Aotearoa/New Zealand) and *Deng v Zheng* (cultural considerations). After a short introduction by Mai Chen, Justice Glazebrook introduces the background to these cases, their holdings and makes a few preliminary comments. She also links these recent developments with other judicial-led projects to address cultural considerations.

Keywords: tikanga; cultural considerations; appeals; Supreme Court of New Zealand.

[A] INTRODUCTION BY MAI CHEN

Welcome to the seminar 'Tikanga[2] and Culture in the Supreme Court: *Ellis v R* and *Deng v Zheng*' and thank you to our kind host and sponsor, Russell McVeagh, and to Law Partner Mei Fern Johnson for her leadership.

The reason why New Zealand Asian Lawyers asked Justice Glazebrook to speak on 'Tikanga and Culture in the Supreme Court' and to comment on both *Ellis v R* (2022) and *Deng v Zheng* (2022) is because these cases apply indigenous law and culture and give guidance on superdiverse[3]

[1] This article is based on a speech given on 8 November 2022 in Auckland. I thank my clerk, Don Lye, and my associate, Rachel McConnell, for their assistance in preparing this article. I also thank New Zealand Asian Lawyers for inviting me to give this speech and law firm, Russell McVeagh, for hosting the event.

[2] 'Tikanga is a body of Maori customs and practices, part of which is properly described as custom law.' See *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board & Ors and Environmental Protection Society* (2021) at para 169.

[3] Superdiverse cities have been defined as cities where more than 25% of the resident population is composed of migrants: Spoonley 2013.

culture (Goddard & Chen 2022); they share issues in common but are also very different.

Even though tikanga is a normative system embedded in the lived experience of Māori, the majority judges in *Ellis*—Justices Winkelmann, Glazebrook and Williams—accepted that tikanga was the first law of Aotearoa/New Zealand (*Ellis v R* (2022) (continuance judgment) para 22).[4] The key question is when does indigenous culture become jural?

The New Zealand Law Commission, Te Aka Matua o te Ture, and specifically the Hon Justice Christian Whata, who I believe is online today, has to grapple with that very issue in the detailed study paper it is producing that examines tikanga Māori and its place in Aotearoa/New Zealand's legal landscape. We look forward to the publication of that paper, and I am sure the Supreme Court judgment of *Ellis* has assisted in this endeavour.

I wanted to highlight two footnotes in *Ellis* where Glazebrook J refers to the application of *Deng v Zheng* to Tikanga. Her Honour sat on both cases. The first is footnote 142 in Ellis where Glazebrook J states:

> But note the caution expressed in *Deng v Zheng* [2022] NZSC 76 about stereotyping at [80]-[82]. See also the general observations in that case at [78]. While the Court in *Deng v Zheng* said at [77] that these comments do not address tikanga, many of the observations will still have resonance in this situation (*Ellis v R* (2022) (continuance judgment) fn 142 at para 118).

The second is footnote 149 in *Ellis*, on appropriate ways of ascertaining the relevant tikanga, which states:

> As noted above at n 142, while the case of *Deng v Zheng*, above n 142, said at [77] that it does not address tikanga, the comments in that case may nevertheless be of relevance in this context (*Ellis v R* (2022) (continuance judgment) fn 149 at para 121).

Dr Rawinia Higgens (Chairperson of Te Taura Whiri i Te Reo Māori—the Māori Language Commission) said at Rt Hon Sir Geoffrey Palmer KC's 80th celebration in the Grand Hall of the New Zealand Parliament that she had spent her life learning Te Reo Māori (the language of the indigenous people of New Zealand) and learning about tikanga. She said that you could not understand tikanga if you did not understand Te Reo Māori. And despite learning Te Reo Māori her whole life, she professed that she felt that she hardly understood anything about tikanga. This is a stiff challenge to the legal profession to have enough cultural capability

[4] Ellis builds on *Takamore v Clarke* (2012) and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board & Ors and the Environmental Protection Authority* (2021).

and understanding of Te Reo Māori to truly understand and therefore be able to properly adduce, and apply, tikanga correctly.

Fortunately, in terms of mana tangata—mana derived from one's actions or ability (*Ellis v R* (2022) (continuance judgment) at para 131)—Justice Glazebrook has been training her whole life to write the judgments in *Ellis v R* and *Deng v Zheng* with cultural competence, as judges face the same challenge. Selecting just a few examples from her glittering *curriculum vitae*, Justice Glazebrook has a DPhil from the University of Oxford on Criminal Justice and Revolutionary France and she speaks French. Justice Glazebrook is also President of the International Association of Woman Judges which has 6,500 members from over 100 countries. She has an MA First Class from Auckland University in history and she has chaired the Institute of Judicial Studies.

Your Honour, you are so busy, yet you have kindly gifted us some of your precious time to address us on this increasingly important topic as New Zealand's population transforms. Can you please join me in welcoming, the Hon Dame Justice Susan Glazebrook?

[B] JUDGE GLAZEBROOK'S SPEECH

Preliminary comments

E aku nui, e aku rahi, koutou kua huihui mai nei, tēnā koutou katoa. E te kāhui roia nō Āhia, tēnei taku mihi maioha ki a koutou. Greetings to all esteemed guests and also my warm greetings to New Zealand Asian Lawyers. Thank you for inviting me to speak to you this evening about two recent Supreme Court cases: *Ellis v R* (role of tikanga in the law of Aotearoa/New Zealand) and *Deng v Zheng* (cultural considerations).

First some obvious disclaimers. Tikanga has been defined as including all the 'values, standards, principles or norms that the Māori community subscribe to, to determine the appropriate conduct' (Statement of Tikanga attached to *Ellis v R*: 2022: 26). I am not in any sense an expert in tikanga. I am not Māori and have no lived experience of tikanga in practice.

I am not Asian, and my experience of Asian cultures and business practices is limited to my involvement with the Inter-Pacific Bar Association (President in 1988) and, since becoming a judge, with the Advisory Council of Jurists for the Asia-Pacific Forum of Human Rights Institutions (from 2002 to 2010) and the International Association of Women Judges (IAWJ) (currently as its President). I use the plural because, of course, the word

Asian covers a multitude of different cultures and business practices, often in the same country and sometimes within the same family.

I am a judge. As judges we cannot pick and choose our cases, except to some degree in the Supreme Court and other leave courts, but we do so only through applying the statutory criteria for leave under section 74 of the Senior Courts Act 2016. We are obliged to sit and adjudicate when cases that may involve tikanga or cultural considerations meet the statutory criteria for leave and come before us.

Incidentally, this highlights the need to ensure that the courts as far as possible reflect the society in which they operate (Glazebrook 2021). This is very much a work in progress in New Zealand, although the Supreme Court does have equality of gender among the permanent judges and one of our number is Māori. We have no Asian judges, although we have had Asian judges' clerks and registry staff.

Some further preliminary comments. If anything that I say is contrary to anything in the judgments I discuss, then of course the judgments prevail. Anything I say is also subject to the obvious caveat that it is my personal view and not the view of the Supreme Court. And I reserve the right to change my mind about anything I say tonight in any future cases, after hearing full argument.

Background to the cases

Ellis v R

I start with *Ellis*.[5] The case involved convictions for sexual offending. The alleged offending was said to have taken place mostly in 1988 and 1989. Mr Ellis was convicted, after a jury trial in 1993, of 16 counts of sexual offending. There had been two largely unsuccessful appeals to the Court of Appeal in 1994 and 1999. In July 2019, the Supreme Court granted Mr Ellis' application for leave to appeal against his convictions, but Mr Ellis died in September 2019 before the appeal could be heard. Before he died, Mr Ellis had filed an affidavit expressing a wish that the appeal should continue despite his death. After his death his brother, who was his executor, filed an affidavit asking that the appeal proceed. (For full procedural history see *Ellis v R* 2022: 24–40.)

The issue before the Supreme Court in what I will call the continuation application was whether the application for the appeal to continue

[5] All in-text citations used here refer to the 'continuance judgment', or the reasons given for why the appeal should continue.

despite Mr Ellis' death should be granted. Both parties agreed there was jurisdiction for an appeal to continue in these circumstances (*Ellis v R* 2022: 44). The issues, therefore, for the Court were the circumstances in which the discretion to continue could be exercised and whether it should be exercised in Mr Ellis' case. In the event, the Court by majority decided the appeal should continue. The appeal was therefore heard and subsequently allowed.

The death of an appellant before the appeal can be heard is not likely to be common, but I apprehend that the real interest in the continuation judgment is the discussion in that judgment about tikanga.

I thought I should begin by explaining how tikanga became an issue in the continuation application in circumstances where it was not originally raised by the parties and where neither Mr Ellis nor, as far as the Court is aware, any of the complainants are Māori.

We began hearing the application for continuation in November 2019. In the course of argument, I asked the Solicitor General to address in her oral submissions any possible tikanga aspects of the case, referring to Crown Treaty settlements which show that miscarriages of justice, both individual and collective, 'have a profound effect right through the generations'. Later in the hearing, Williams J suggested that it was a 'very Anglo approach' to argue that on death there is nothing left to protect. He said that '[i]n a tikanga context … an ancestor has even more reputation to protect, is more tapu, has more mana'.

The parties asked for the hearing to be adjourned to allow them to consider the tikanga issue fully and prepare further submissions. We issued a minute the following day asking that the submissions cover:

a. whether tikanga might be relevant to any aspect of the Court's decision on whether the appeal should continue;
b. if so, which aspects of tikanga; and
c. assuming tikanga is relevant, how tikanga should be taken into account.

The parties decided to convene a wānanga with tikanga experts to discuss the issues in the Court's minute. As we note in the continuation judgment, this was a process agreed between the parties and not something the Court ordered (*Ellis v R* 2022: 35). The Court granted an application by Te Hunga Rōia Māori o Aotearoa (the Māori Law Society) to intervene, and they were also involved in the wānanga (*Ellis v R* 2022: 36-38).

Once the wānanga had been completed and a report from the tikanga experts issued, another hearing was held in June 2020. A results judgment was issued in September allowing the appeal to continue (*Ellis v R* 2020). The continuation reasons were issued in October 2022, at the same time as the judgment on the substantive appeal (*Ellis v R* 2022: 5).

So, what did the Court decide on the tikanga issue?

The Court was unanimous that tikanga has been and will continue to be recognized in the development of the common law of Aotearoa/New Zealand in cases where it is relevant, that it forms part of New Zealand law as a result of being incorporated into statutes and regulations, that it may be a relevant consideration in the exercise of discretions and that it is incorporated in the policies and processes of public bodies (*Ellis v R* 2022: 19).

The Court (by majority of the Chief Justice and Glazebrook and Williams JJ) held that the colonial tests for incorporation of tikanga in the common law no longer apply (*Ellis v R* 2022: 113-116, 177 & 260). Rather the relationship between tikanga and the common law will evolve contextually and as required on a case-by-case basis (*Ellis v R* 2022: 116, 119,127, 183 & 261).

The majority judges accepted that tikanga was the first law of Aotearoa/New Zealand and that it continues to shape and regulate the lives of Māori (*Ellis v R* 2022: 107, 110, 168, 169, 172 & 272). In light of this, the majority commented that the courts must not exceed their function when engaging with tikanga (*Ellis v R* 2022: 122-123, 181, 270-271). Care must be taken not to impair the operation of tikanga as a system of law and custom in its own right (*Ellis v R* 2022: 120, 122, 181 & 270-271). The majority judges also said that the appropriate method of ascertaining tikanga (where it is relevant) will depend on the circumstances of the particular case (*Ellis v R* 2022: 121, 125, 127 181, 261-267 & 273).

Tikanga was seen as relevant to the test for the continuation of the appeal by all of the majority judges. Given this, while some of the comments on tikanga can be seen as *obiter*, this does not apply to the statements about tikanga being part of the common law (which effectively just confirmed earlier authorities including those of the Supreme Court) (*Ellis v R* 2022: 92-97, 175-176 & 257-259) and the removal of the colonial tests for incorporation of tikanga (which the Supreme Court had not previously pronounced on) (*Ellis v R* 2022: 113-116, 177 & 260). Nor does it apply to the proposition that the relationship between tikanga and the common law will develop on a case-by-case basis in accordance

with the usual common law methodology (*Ellis v R* 2022: 116, 119, 127, 183 & 261). This is because, although there were differences in the approach to tikanga in this particular context between my approach and the approach taken by the Chief Justice and Williams J, all three of us considered tikanga was at least relevant to this case, and thus it was necessary for all three of us to decide whether or not the old incorporation tests had to be applied.

The comments in the three judgments about the different ways tikanga might be relevant in other cases, on the means of ascertaining tikanga and how it might arise in future cases can be seen as *obiter*. However, all those comments were still very tied to the reasoning of the majority judges in the case, and we did have the benefit of the Statement of Tikanga, a comprehensive report on tikanga from the experts attached to the judgment, as well as the very helpful comprehensive submissions from the parties and the intervener.

Some observations.

First, tikanga and tikanga concepts are increasingly being incorporated into statutes and policies of government entities (both in terms of process and in substance) (*Ellis v R* 2022: 100). In many cases, these statutes apply to Māori and non-Māori alike (*Ellis v R* 2022: 101). This trend is likely to continue and, indeed, to grow.

The Legislation Guidelines (2021), for example, require consideration of Te Tiriti (Treaty of Waitangi) and Treaty principles, both in terms of process (the need for consultation) and substantively (consideration of the rights and interests of Māori under Te Tiriti) (*Ellis v R* 2022: 99). One of the specific questions to be asked is: 'Does the legislation potentially affect rights and interests recognized at common law or practices governed by tikanga?' (Legislation Guidelines 2021: 5.3).

There has been criticism that, notwithstanding efforts in statutes to reflect tikanga, in some cases, they do not properly reflect tikanga and pay lip-service only to concepts taken out of their proper context. This may be the case, but the fact is that tikanga is referenced and must be applied. I expect that both the way in which tikanga is incorporated in statutes and the way the courts interpret and apply such references will become more sophisticated in the future as tikanga concepts become more well known and as projects such as the current Law Commission | Te Aka Matua o Te Ture project, led by High Court judge Whata J, on tikanga and the law are completed. This project plans to explain tikanga Māori, examine the place of tikanga and the law, as well as 'map' tikanga

Māori as a system of law, drawing, among other things, on its expression in the courts and the Waitangi Tribunal with the aim of providing a framework for engagement with tikanga within Aotearoa/New Zealand's legal system. Victoria University of Wellington (2022) is also developing a tikanga Māori 'digital companion'.

The Legislation Guidelines also recognize that, because of the constitutional significance of Te Tiriti, legislation should be read consistently with the principles of the Treaty (Legislation Guidelines 2021: 5.7). As I point out in my judgment, consistency with Te Tiriti has been suggested to include consistency with tikanga because the tino rangatiratanga guarantee in article 2 is generally taken to include the rights of Māori to live by tikanga (*Ellis v R* 2022: 98).

All of this means that lawyers should have been educating themselves on tikanga principles, even without tikanga being part of the common law. It can be argued that our decision in *Ellis* is the courts finally playing 'catch-up' to the developments in the law that have been taking place through actors other than the courts (*Ellis v R* 2022: 258).

As Williams J said in his judgment, over the last 45 or so years tikanga has been woven back into modern New Zealand law and policy (*Ellis v R* 2022: 257). These developments reflect deeper social change: both a growing appreciation of the indigenous dimension in our identity as a South Pacific nation but also broad support for Māori to maintain and strengthen their distinct language, culture, economic base and iwi institutions (*Ellis v R* 2022: 257). As he also said, it also shows how far we have come in that no party had submitted in *Ellis* that tikanga was not relevant (*Ellis v R* 2022: 259). The difference between the parties was merely how it was relevant.

The second point is that there is, however, nothing new in the proposition that tikanga is part of New Zealand common law (*Ellis v R* 2022: 108, 176 & 259). This has been the case since colonial times (*Ellis v R* 2022: 93). And some of the early cases where tikanga was applied involved Pākehā parties so its application was not confined to Māori (*Ellis v R* 2022: 93 & 246). There is no doubt that, since those early cases, tikanga was perhaps a bit lost sight of in the common law. There has therefore been a dearth of cases on tikanga in modern times until relatively recently. But this does not change the position as to the longstanding place of tikanga in the common law.

The third point is that there is no need to panic. The concept of tikanga being part of the common law does not mean that it will somehow replace

the common law wholesale. Indeed, that would not be consistent with the common law method of incremental change and adherence to precedent, as is made clear in all the majority judgments (*Ellis v R* 2022: 116-119, 163-167, 170, 259 & 266). Binding precedent must still be applied (*Ellis v R* 2022: 117, 163, 183 & 265).

Further, tikanga, like the common law more generally, will cede to statute (*Ellis v R* 2022: 98). This comment is of course subject to the fact that there is likely a requirement for statutes to be read consistently with tikanga where possible and the principle that clear statutory words are needed to displace it (*Ellis v R* 2022: 98).

The fourth point (and probably still to some extent part of the 'no need to panic' point) is that the wānanga in *Ellis* was the 'Rolls Royce' version. It will not be practical to emulate this in most cases for reasons of time and cost (*Ellis v R* 2022: 125 & 272). The fact remains, however, that most judges and counsel, even if Māori, will not be experts in tikanga (*Ellis v R* 2022: 123, 124 & 270). So, some evidence of tikanga will usually be needed, apart from in simple cases. This is particularly important in order to maintain the integrity of tikanga and to ensure that we engage in decolonization and not recolonization of the law.

The fifth point (and still on the theme of 'do not panic') is that *Ellis* does not require tikanga to be addressed in all cases (*Ellis v R* 2022: 117). It need only be addressed where it is relevant. Prior case law on tikanga will be a good guide to relevance, and of course from now on it is likely that case law on tikanga will increase as counsel get more attuned to the idea of tikanga being part of the common law and are more prepared to bring up tikanga issues where these are relevant.

Lawyers will need to keep abreast of this case law in the same way that they must keep abreast of case law relevant to their areas of practice more generally. And here the young lawyers coming out of law schools will have a lot to offer as tikanga will in future be woven through their studies (New Zealand Council of Legal Education website; Ruru & Ors 2020).

I can understand the concern that there was no test articulated in *Ellis* to replace the old colonial tests for recognition of tikanga. But these tests only excluded tikanga in very limited circumstances. They did nothing to indicate when and how tikanga might be relevant—the more vital question. Further, the tests did not take account of the nature of tikanga as living and not static, and they manifested an inappropriate colonial attitude towards tikanga which is at odds with modern thinking (*Ellis v R* 2022: 115, 177 & 260).

In any event, the tests were not applicable to tikanga concepts contained in statutes, and, even in the common law, the tests were not necessarily applied. For example, they were not applied by or even referred to by the Supreme Court in *Takamore v Clarke* (2012), a dispute about burial, even though the Court of Appeal in that case had discussed and applied them (*Takamore v Clarke* 2011: 109-175), albeit suggesting that a more modern approach to the incorporation of tikanga in the common law was appropriate (*Takamore v Clarke* 2011: 254-257).

The sixth point (and again probably part of the 'no need to panic' point) is that, just because tikanga might be part of the common law, this does not mean that tikanga will necessarily be directly applied. For example, none of the counsel in *Ellis* suggested that tikanga should be directly applied in that particular case. The submission rather was that it might be relevant in formulating the test and in providing some insight into the appropriate result.

In fact, tikanga is likely to be directly applied, at least in the near future, in a relatively limited number of cases: for example, where tikanga has been incorporated into a statute in a manner that makes it controlling or in other cases where there is a strong link between the dispute and tikanga principles (*Ellis v R* 2022: 118 & 267). One such example could be where the issue involves customary title to land or other customary property rights.

In other cases, tikanga principles or values may be a relevant consideration with regard to some aspect of the case. Tikanga might shape and influence public law decision-making as a permissible and even mandatory consideration. Tikanga might also explain the social and cultural context for the actions of Māori parties, and here there are parallels with *Deng*, which I will come to shortly.

Where tikanga will likely be of particular assistance is where a question arises (as it did in *Ellis*) on how to develop the New Zealand brand of the common law such that it is attuned to New Zealand society and values (*Ellis v R* 2022: 110, 176 & 267-269). I leave for another day the role that might be played by Asian, Pasifika or other cultural traditions in the development of the law, apart from to say that the New Zealand courts are increasingly prepared to consider and engage with material from non-Western cultural traditions and no longer limit themselves to looking to material and cases from other common law jurisdictions.

It is worth turning at this stage to examine the actual decision in *Ellis* and how tikanga was used in that decision.

Before deciding whether the appeal should continue or not in *Ellis*, it was necessary to work out the appropriate test or framework for deciding that question. At the November hearing, the argument proceeded on a standard basis. First, the relevant New Zealand cases were referred to. Then assistance was sought from case law in other comparable jurisdictions where the matter had been considered. In this regard, it was submitted by both parties that the appropriate test was whether it was in the interests of justice that the appeal should be allowed to continue. The parties also agreed that the factors set out by the Canadian Supreme Court in *R v Smith* (2004: 50) were useful in assessing whether that test was met.

At that first hearing, one of the issues raised with the parties was whether the interests of victims and the reputational issues related to the appellant and their whānau (family) should be factors to be added to those in *Smith*.

The Crown's argument was that the jurisdiction to hear an appeal, despite the death of the appellant, should be exercised very sparingly. One of the circumstances was where an interested person had a continuing pecuniary interest in the outcome of the appeal. It was submitted, however, that reputational issues relating to an appellant and their whānau were either not relevant or only marginally so. That had occasioned Williams J's remark I referred to above during the hearing that this was an Anglo approach. The issue of how tikanga might be relevant then led to the adjournment to receive submissions on tikanga and the June hearing where the submissions on tikanga were heard.

After the June hearing, the Supreme Court held unanimously that the test was the interests of justice (*Ellis v R* 2022: 7, 48, 57, 152, 233 & 294) and (by a different majority of myself and O'Regan and Arnold JJ) that the factors set out in *Smith* were useful to assess this, but with some modification to include consideration of the interests of the appellant and the victims and their whānau (*Ellis v R* 2022: 57, 278 & 292-293). As is clear from my judgment in *Ellis*, I had already come to the view that these additions should be made after the November hearing, but consideration of tikanga solidified that decision (*Ellis v R* 2022: 145).

I did not consider that any modification to the test was needed after hearing the tikanga submissions at the June hearing but noted that tikanga may be taken into account if and when relevant when assessing each of the factors in the test (*Ellis v R* 2022: 144). I noted that the concepts of mana, whanaungatanga (relationships), whakapapa (kinship), hara (the commission of a wrong) and utu (restoring balance) may be relevant in

assessing the interests of the appellant, the victims and their whānau, particularly if any of the parties are Māori. I also noted that the concept of ea (a state of balance) may be useful in assessing issues relating to finality.[6]

For myself, I very much doubt that most Pākehā New Zealanders would accept that the reputation of their deceased loved ones is unimportant. Nor would they consider that the reputation of their deceased ancestors has no effect on the living relatives, whatever the legal position with regard to defamation, for example. But there is no doubt at all that, for Māori, mana survives death. And the position of those in our Asian and Pasifika communities would likely be similar, even if not articulated in exactly the same way and arising out of different cultural traditions.

I note that this survival of reputation after death has been recognized by the practice of posthumous pardons, such as of the prophet Rua Kēnana, and in the Pardon for Soldiers of the Great War Act 2000 (incidentally, as far as I know, relating to non-Māori soldiers or at least the legislation was premised on the injustice suffered rather than whakapapa). And I note also that there was in the case of *Ellis*, unlike for defamation, no statutory impediment to considering the reputation of a deceased person when considering if an appeal should continue despite the death of the appellant (*Ellis v R* 2022: 56, n 64, 194 & 285).

I do stress, however, that the interests of both the appellant and the victims are only factors to be considered in the overall interests of justice assessment when deciding whether or not an appeal should continue. They are not controlling in themselves. And it is worth noting too that, while the interests of the complainants in *Ellis* were opposed to those of Mr Ellis and his family, this will not always be the case. For example, in a clear case of mistaken identity, the interest of both the appellant and the victims would be in ensuring that the true perpetrator is brought to justice. There is also, as pointed out in *Ellis*, a public interest component to miscarriages of justice (*Ellis v R* 2022: 14, 55, 78, 191, 227-228 & 274).

The approach of the Chief Justice and Williams J was different, although their test has much in common with that of the majority. In determining what was in the interests of justice they would have weighed four matters: practical considerations, the interest in finality in litigation, the personal interest in having a miscarriage of justice addressed through the appellate process and the public interest in addressing concerns that there has been such a miscarriage (*Ellis v R* 2022: 216-227 & 236).

[6] I give the bracketed definitions for ease of understanding, but I am acutely aware of the caution expressed in the Statement of Tikanga at para 30 that the concepts are intertwined and cannot be defined in isolation by a single English word.

Tikanga was more clearly woven into their test than it was in mine.

In terms of finality, the Chief Justice said that the concept that the grant of leave had unsettled the state of ea and that resolution of the appeal was needed to restore balance provided a useful perspective on why it is necessary to weigh the interest of finality against the personal and public interest in addressing miscarriages of justice when determining whether an appeal should continue despite the death of an appellant (*Ellis v R* 2022: 201).

In looking at the deceased appellant's personal interest in continuation, the Chief Justice said that this is informed by mana (a concept now firmly understood in broader New Zealand society) and includes not only consideration of the deceased appellant but also the interests of their whānau (*Ellis v R* 2022: 210(c)). Such interest is not limited to financial interests but may include clearing their family member's name and the impact of that upon mana tangata (mana derived from one's actions or ability) and mana tuku iho (mana inherited from ancestors).

The Chief Justice noted that this framework represented the development of common law appropriate for New Zealand, drawing on appropriate sources of legal influence and reflecting an interpretation consistent with tikanga and the existing principles of common law both here and overseas (*Ellis v R* 2022: 212). She said that the issue for the Court could in essence be expressed as being a consideration of which course of action – continuing the appeal or discontinuing it – would be most likely to achieve ea.

In Williams J's view the relevant tikanga principles provided a very helpful perspective on the issues but not because they provide any particular answer (*Ellis v R* 2022: 256). In his view, the Māori legal tradition, whose values are so different from those of the common law, still echoes in its own way the underlying considerations which the common law takes into account.

The slightly different emphasis on the place of tikanga in ascertaining the appropriate test between me and the other two majority judges in *Ellis* may signal differing views of tikanga's role in the development of the law. It may arise from a different legal methodology when considering the development of the law (the Chief Justice and Williams J being more influenced by values relevant to New Zealand rather than case law from comparable jurisdictions) or it might just be an accident of how the case proceeded, with the split hearing. The answer to which of three explanations is the correct one will have to wait until future cases. That

is not me being mysterious, by the way. I do not myself know the answer at this stage. I suspect, like everything, the approach taken by particular judges in any particular case will depend on the context.

What is clear though from my judgment and the judgments of the Chief Justice and Williams J is that, in considering what the law should be, the courts must make sure that we have a law that works for the whole of society as far as possible, and also one that takes into account Tiriti obligations, given its constitutional nature (*Ellis v R* 2022: 98, 109, 174 & 262). In this context, tikanga has an obvious role to play because of article 2 of Te Tiriti.

I mention briefly that the minority judges, O'Regan and Arnold JJ, did not consider *Ellis* a suitable case for making general pronouncements on the place of tikanga (*Ellis v R* 2022: 281), although they agreed that tikanga considerations supported personal reputational issues relating to a deceased appellant being taken into consideration in deciding whether an appeal should continue after death (*Ellis v R* 2022: 315).

One of the reasons they did not wish to make general pronouncements is the very different approach under tikanga compared to that under the common law to conduct that has wronged others or disrupted social order (*Ellis v R* 2022: 286). In this regard, they referred to the comments of the late Moana Jackson (*Ellis v R* 2022: 287; Jackson 1988:10-11).

As I note in my judgment, there is no doubt that challenging issues may arise due to the traditionally more individualistic nature of the common law and the more relational and communitarian perspective of tikanga (*Ellis v R* 2022: 119). But I do note that recent processes deriving from tikanga have increasingly been applied in our criminal courts, such as in the Rangitahi courts, and that these initiatives are now in the process of being rolled out more generally in the District Court through its new Te Ao Marama operating model (*Ellis v R* 2022: 104).

As Williams J notes in his judgment, tension between tikanga and the common law is not a given, and engagement between tikanga and the common law in respectful mutually advantageous dialogue will often do the work of ensuring the common law of Aotearoa/New Zealand develops along a path that is mindful of both legal traditions (*Ellis v R* 2022: 268–269).

Deng v Zheng

Turning now, and you will be relieved to know more briefly, to *Deng* (for more information, see Goddard & Chen 2022). This was a case concerning

two Chinese property developers. They had worked closely together for a number of years on a variety of projects before they had a falling out. Unfortunately, they failed to come to an agreement on separating out their interests. At the heart of the dispute was the relationship between the two men. Mr Zheng said that he and Mr Deng were in partnership. Mr Deng said they were not. Mr Deng prevailed in the High Court (*Zheng v Deng* 2019) but the Court of Appeal overturned the High Court decision (*Zheng v Deng* 2020)

The Supreme Court, after analysing the evidence that had been before the High Court (which had not included any cultural evidence), dismissed the appeal and agreed with the Court of Appeal that there was a partnership between the two men.

When the Supreme Court granted leave to appeal in *Deng*, it had invited Te Kāhui Ture o Aotearoa | New Zealand Law Society, after consultation with New Zealand Asian Lawyers, to intervene to make submissions on cultural issues that could arise in such cases (*Deng v Zheng* 2021). In the event, the Supreme Court considered that the nature of the relationships between the two parties had emerged with sufficient clarity from the contemporaneous documents and so did not need to engage with the cultural considerations in the instant case (*Deng v Zheng* 2022: 77), but the Court did make some *obiter* comments (*Deng v Zheng* 2022: 78-84).

There is no time for a comprehensive analysis of the Court's comments or on the wider issues arising. I just note a few points.

First, it is important that courts remember, where parties come from different cultural traditions, not to assess their business practices through a Western or Pākehā lens (*Deng v Zheng* 2020: 78). This is of particular significance in light of demographic changes in Aotearoa/New Zealand as our population becomes increasingly diverse.[7] The Court of Appeal was particularly conscious of this concern when it discussed the importance of sensitivity to social and cultural context and, in particular, stressed the need for courts to be cautious about drawing inferences based on preconceptions about normal or appropriate ways of conducting business (*Zheng v Deng* 2020: 86-89).

On the other hand, there are also concerns around stereotyping and the application of presumed group or personal characteristics by virtue of the parties' cultural background or ethnicity (*Deng v Zheng* 2022: 80). Further, there is a danger of assuming that people who share an ethnic or

[7] Stats NZ: the median projection is that the 'broad Asian ethnic group will [increase] from 16 percent of the population in 2018 to 26 percent (about 1 in 4 residents) by 2043'.

cultural similarity are a homogeneous group (*Deng v Zheng* 2022: 81(a)). As the Supreme Court put it (*Deng v Zheng* 2022: 80): 'Assuming, without case-specific evidence, that the parties have behaved in ways said to be characteristic of that ethnicity or culture is as inappropriate as assuming that they will behave according to Western norms of behaviour.'

It is also important to remember that, whatever the cultural traditions of the parties, what is being applied is the law of Aotearoa/New Zealand. In this regard, it would be inappropriate for example to reason that the concept of *guānxi* means (on its own) that the relationship between Chinese people doing business together must inevitably be as partners (*Deng v Zheng* 2020: 81(b)). The actual relations between the parties must be examined to ascertain if there is in fact a partnership according to New Zealand law.

Cultural considerations

It will pose a challenge for judges to be attuned to the cultural nuances of the case, while at the same time avoiding stereotyping or unwarranted assumptions. Judges will require assistance to negotiate this from a combination of evidence and submissions of the parties, expert evidence, interveners, judicial education programmes and benchbooks.

There are several judicial-led projects on foot to address cultural considerations (Te Tumu Whakawā o Aotearoa | Chief Justice of New Zealand 2022). Te Kura Kaiwhakawā | Institute of Judicial Studies, which supports the education and development of judges, has targeted programmes towards promoting cultural understanding. I also mention the development of *Kia Mana te Tangata – Judging in Context: A Handbook*. This is a judicial benchbook which aims to provide guidance on providing fair hearings for all those who come before our courts, regardless of gender, sexuality, religion, culture and ethnicity.

Importantly, Te Awa Tuia Tangata | Judicial Diversity Committee (Te Tumu Whakawā o Aotearoa | Chief Justice of New Zealand 2022: 9) is developing an approach to increase diversity and inclusivity of future judges. I chair the committee, Tomo Mai, which is tasked with looking at inclusion at all levels within our courts: including for the parties, their whānau, their counsel and court staff. And I mention the very helpful and honest preliminary dialogue we have had with New Zealand Asian Lawyers and other legal groups.

Finally, a word about the role of New Zealand Asian Lawyers, not only as a potential intervener in future cases but also as lawyers

representing clients and educators. New Zealand Asian Lawyers has an important role to play in bringing greater awareness to lawyers and judges and other justice sector personnel about the different cultural and ethnic backgrounds of those who may come before the courts. The Superdiversity Institute report on Chinese parties is a very good start (Chen 2019). But more work remains to be done for other communities, such as those of Indian or South-East Asian whakapapa. In practice, such work must address cultural ground rules of respect, must work with communities, and share processes and knowledge. I look forward to hearing more from you.

About the authors

Justice Susan Glazebrook *is a judge of the Supreme Court of New Zealand/Te Kōti Mana Nui and the President of the IAWJ. Before being appointed to the Bench, Justice Glazebrook was a partner in a large commercial law firm and a member of various commercial boards and government advisory committees. She served as the President of the Inter-Pacific Bar Association in 1998. In 2014 Justice Glazebrook was made a Dame Companion of the New Zealand Order of Merit for services to the judiciary.*

Mai Chen *LLB (Hons) (Otago), LLM (Harvard), is a Barrister and Chair of the Superdiversity Institute of Law, Policy and Business. She was previously Managing Partner of Chen Palmer Public Law Specialists and Adjunct Professor of Law at the University of Auckland Law School. She appeared on behalf of the New Zealand Law Society as intervener in* Deng v Zheng *[2022] NZSC 76 and is speaking at the Sorbonne in April 2023 at a Global Symposium on Cultural Experts in the Courts.*

Email: mai.chen@maichen.nz.

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