TIKANGA AND THE TRIBUNAL:

How has the Waitangi Tribunal Affected the Status of Tikanga Māori in New Zealand Law?

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I Introduction

The passage of the Treaty of Waitangi Act 1975 represented the legislative culmination of a period of increasing social action and awareness of Māori issues, perspectives, and grievances in Aotearoa New Zealand. It established the Waitangi Tribunal, offering a formal, new avenue through which Māori could address injustices and reconcile the Treaty's textual discrepancies. The 1985 extension of the Tribunal's jurisdiction to hear historical claims was a meaningful recognition of the real grievances that needed addressing. Its effects on Aotearoa New Zealand have been wide-reaching and significant.

Fundamentally underpinning those grievances, the treaty situation, and te ao Māori itself is tikanga Māori. Tikanga Māori has been identified as the system of law that existed in Aotearoa before colonisation. Contrary to some of the historical narrative, tikanga or 'customary law' was clearly present in Aotearoa prior to Pākehā arrival – but in what manner has tikanga survived into the 21st century?

This paper makes a comparative analysis of the status of tikanga in Aotearoa New Zealand's lex pre- and post-establishment of the Waitangi Tribunal. This evaluation will emphasise the development of tikanga in two interconnected spheres and reveal how the Waitangi Tribunal has influenced this development. First, 'tikanga' will be defined. Its status in sources of law prior to the Tribunal's establishment will then be explored. Following this, the context and origin of the Tribunal and some of its key reports will be identified. Next, the post-Tribunal status of tikanga will be established to provide comparative grounding. All these elements will then be drawn together in an exploration of the connection between the progression of tikanga in New Zealand law and the effects of the Waitangi Tribunal on this development.

The final assessment will identify two main realms in which the development of tikanga in Western law has occured, and will show how the key reports identified – Wai 11, Wai 22, Wai 1071, and Wai 262 – have each influenced the status of tikanga in law. Further, this paper argues briefly that this influence must, by virtue of its nature, arise from the Waitangi Tribunal. This paper does not aim to make a substantive evaluation or provide commentary on the benefits, disadvantages, or appropriateness of tikanga in a Western law system. It seeks only to compile evidence and scholarship on the connection between the status of tikanga and the Waitangi Tribunal and make observations surrounding this connection.

II Tikanga

The root of the word "tikanga" is tika – meaning true, correct, or just.[1] The suffix "nga" transforms this into a noun, meaning "tikanga" is the embodiment of doing and thinking in the just, correct Māori ways.[2] Sir Hirini Mead provides a defintion: "tikanga refers to the ethical and common law issues that underpin the behaviour of members of whānau, hapū and iwi as they go about their lives", especially in economic, social and cultural activities.[3] The 2016 Matike Mai report acknowledges the meaning of "tikanga" is widely debated due to its fundamental importance in te ao Māori.[4] It also clarifies how tikanga "may be defined as both a law and a discrete set of values".[5] No direct comparison between tikanga and colonial notions of law can be made: many aspects of tikanga are analogous to the concept of colonial British law, but the scope of British law is not analogous to all the broader principles of tikanga. Not

1 Hirini Mead *Tikanga Māori (Revised Edition): Living by Māori Values* (Huia (NZ) Ltd., Wellington, 2016) at 18.
2 Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 16.
3 At 19.
4 Margaret Mutu and Moana Jackson *He Whakaaro Here Whakaumu Mo Aotearoa* (Matike Mai Aotearoa, Independent Iwi Working Group on Constitutional Transformation, January 2016) at 41.
5 At 41.

only does tikanga encompass the core principles, but it refers also to the protocols, customs, and practices that uphold these.[6]

Mead identifies multiple principles that underlie and contribute to tikanga: tika (correctness) and pono (true/genuineness in terms of Māoritanga), the system of take-utu-ea (breach-reciprocity-state of resolution), manaakitanga (embodiment of support), whanaungatanga (community responsibility), mana, tapu (sacredness), noa (antonymous to tapu: normalcy) and ea (state of equilibrium).[7] Tikanga is not static: the knowledge base is drawn from accumulated generations, dating from Kupe's arrival, and continues to develop.[8]

III Conceptions of Tikanga in Pākehā Law: 1840-1975

To effectively identify the impact of the Waitangi Tribunal on the status of tikanga in New Zealand law, an assessment of tikanga Māori in the post-Treaty, pre-Tribunal era will be undertaken. Inevitably, the period identified includes a multitude of views and evidence; no attempt at reconciliation or conclusive definition of these will be made. Instead, key legislation and cases will be identified to provide a high-level understanding of how tikanga existed in law between 1840-1975. Following this, the way these sources indicate institutional perspectives on tikanga will be observed in conjunction with contemporary scholarly opinions.

A Legislation and Case Law

Most prominently, the concept of Māori governance in law was identified in section 71 of the New Zealand Constitution Act 1852 (UK). This section provided for the ability to reserve

6 Alexander Gillespie and Claire Breen *People, Power and Law: A New Zealand History* (Hart, Oxford, 2022) at 1; Māmari Stephens ""Kei a Koe, Chair!" - The Norms of Tikanga and the Role of Hui as a Māori Constitutional Tradition" 53 VUWLR 463 at 467.

7 At 28.

8 Mead, above n 1, at 19; and Joseph Williams "Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law" (2013) 21 Wai L Rev 1 at 2.

districts "within which [Māori] laws, customs, or usages should be so observed".[9] While never exercised, such allusion to self-government demonstrates Crown recognition of an indigenous law-governance system. The 1844 Native Exemption Ordinance similarly recognises the existence of Māori legal systems, but in pursuit of a clearly assimilationist rhetoric. It describes that it is desirable that Māori be "brought to yield a ready obedience to the laws and customs of England" and this is best achieved by a gradual enforcement, thus dictating that where crime between Māori occurs, the law applying to Pākehā would not necessarily be enforced.[10] Further, alternate justice administration for Māori is provided for in the 1846 Resident Magistrates Court Ordinance.[11] Finally, the Native Rights Act 1865 identifies Māori "Ancient Custom and Usage" in relation to land rights, referring clearly to a customary system of law.[12] In the realm of criminal law, te tikanga o nga hara (a semi-equivalent "criminal code")[13] was found by the Court of Appeal to have effectively been extinguished by ss 5 and 9 of the Crimes Act 1961.[14]

The infamous 1877 case *Wi Parata v Bishop of Wellington* portrays an early Courts' view of Māori law in its reference to the 1865 Native Rights Act's mention of customary law, which it describes as "non-existent".[15] 31 years later the Supreme Court in *Public Trustee v Loasby* was required to consider whether it should recognise a particular Māori custom. Justice Cooper recognised that a decision of English courts on such a matter cannot "be directly in point".[16] He proceeded to formulate a test for recognition of custom in the courts: whether the custom exists, whether it is contrary to statute law of the Dominion, and whether it is reasonable.[17]

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9 New Zealand Constitution Act 1852 (UK) 15 & 16 Vict c 72, s 71.
10 Native Exemption Ordinance 1844 7 Vict 18.
11 Resident Magistrates Ordinance 1846 9 Vict 16, s 7.
12 Native Rights Act 1865 (UK) 29 Vict 11, s 4.
13 Moana Jackson "Criminality and the Exclusion of Māori" (1990) 20 VUWLR (Issue 2) 23 at 27.
14 Crimes Act 1961; *Mason v R* [2013] NZCA 310, (2013) 26 CRNZ 464 at [3], [24].
15 *Wi Parata v Bishop of Wellington* (1877) 1 NZLRLC 14 (SC) at 79.
16 *The Public Trustee v Loasby* (1908) 27 NZLR 801 at 806.
17 At 806.

B Contemporary Commentary and Analysis

Sir Joe Williams identifies the post-colonial period in which English law and governance norms were being imposed on Aotearoa as the 'Second law of New Zealand'.[18] He argues that in this period, tikanga was recognised in its existence and influence: but simultaneously, Crown recognition of tikanga went only as far was necessary to suppress it in pursuit of assimilation.[19] Mead affirms this view.[20] Natalie Coates identifies the English common law precedent that Maori customary law "continued to operate as a normative legal order and was recognisable by the state legal system", particularly in the continuation of native title.[21]

Blatantly racist and assmilationist sentiments are evident in *Wi Parata* and the Native Exemption Ordinance. This typically colonial approach might appear to be countered by the existence of the s 71 provision in the 1852 Constitution Act and the recognition of custom in the Native Rights Act. However, these provisions arguably simply conceal governmental agendas of assimilation.[22] *Loasby* demonstrates a more progressive approach than of Prendergast CJ in *Wi Parata*, but continues to enforce parliament's sovereignty over the existence of Māori law in the second limb of the test. With affirmation in 2013 of the extinguishment of tikanga in criminal law in 1961, a further realm of colonial suppression is observed. The status of tikanga in the pre-Tribunal period was, at best, that operation would be on the terms of English law and at worst, that it was non-existent.

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18 At 6.

19 At 8.

20 At 11.

21 Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" (2017) 5 Te Tai Haruru 25 at 29-30.

22 Lyn Waymouth, "Parliamentary Representation for Māori: Debate and Ideology in Te Wananga and Te Waka Māori o Niu Triranga, 1874-8" in Jenifer Curnow, Ngapare Hopa & Jane McRae (eds) *Rere atu, taki manu! Discovering History, Language, and Politics in the Maori-Language Newspapers* (Auckland, Auckland University Press, 2002) at 161.

IV The Waitangi Tribunal

The long title of the Treaty of Waitangi Act 1975 records that it aims to observe and confirm Treaty principles through the Tribunal, which is to make recommendations on claims on practical Treaty application and determine inconsistency with Treaty principles.[23] When enacted, the Tribunal could only consider claims concerning issues that would prejudicially affect Māori after the Act's commencement.[24] In 1985 this jurisdiction was extended to all Crown instruments and acts from the 6th of February 1840, allowing Māori to address historical grievances.[25] At the third reading of the Bill as originally enacted, Matiu Rata recorded that "this is the first time in the 135 years since [the Treaty's] signing that an attempt has been made to put it into statutory form and give it the practical application it deserves."[26]

The Tribunal has published reports on many claims since its inception. There are a few which are notable in regard to the status of tikanga in New Zealand law. The first of these is the 1986 Te Reo Maori Claim (Wai 11) report. This recorded the Tribunal's finding on the Māori Language Council claim that the Crown "failed to protect the Maori language...and that this is a breach of the promise made in the Treaty of Waitangi".[27] The Tribunal ultimately found that te reo was protected under article 2 of the Treaty and therefore the Crown was obliged to protect it.[28]

Secondly, in 1988 the Tribunal published Wai 22, Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim. This report attempted to investigate and define "the nature and

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23 Treaty of Waitangi Act 1975.
24 Treaty of Waitangi Act 1975 (as enacted), s 6(1).
25 Treaty of Waitangi Amendment Act 1985 (1985 No 148) (as enacted), s 3(1).
26 (10 October 1975) 402 NZPD 5407-5408.
27 Waitangi Tribunal *Report on the Te Reo Maori Claim* (Wai 11, 1986) at 1.
28 At 49.

extent of Muriwhenua treaty fishing interests" as an enquiry to inform negotiations on the issue between the Crown and iwi.[29]

A third key report was Wai 262, Ko Aotearoa Tēnei, published in 2011 – 20 years after the claim was lodged in 1991. This report concerned the effect of wide-ranging law and policy on the preservation on claimant control over culture, identity and relationships. [30] It was "one of the most complex and far-reaching claims ever to come before the Waitangi Tribunal". [31]

Finally, the 2004 Wai 1071 Report on the Crown's Foreshore and Seabed Policy recorded the findings of an urgent inquiry into the Clark government's response to the 2003 *Ngāti Apa* decision that moved to legislatively override any customary right to the foreshore and seabed.[32] This report found that the Crown's policy did breach Treaty principles and that the policy failed in other norms of good government.[33] This paper will draw from findings and observations from these four key reports in a final analysis.

V Conceptions of Tikanga in Pākehā Law: 1975-2022

The status of tikanga and related values in the post-Tribunal period has been steadily accelerating. The most notable sources showing this will be identified and again evaluated holistically alongside contemporary scholarship.

A Legislation and Case Law

29 Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22, 1988) at 2.
30 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011), vol 1 at xxiii.
31 Wai 262, above n 30, at xxiii.
32 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at xi.
33 At xiv.

The Resource Management Act 1991 (RMA) is widely acknowledged as a significant development in the recognition of tikanga principles.[34] Section 2 defines "tikanga Māori" as "Maori customary values and practices". Part 2 extensively incorporates values of tikanga.[35] Many other instruments include reference to Treaty principles in differing capacities.[36] Inclusion of treaty principles ranges from generally specifying that the act must be applied in accordance with them,[37] to dictating they are mandatory relevant considerations.[38]

The Courts' interactions with tikanga and treaty principles through the RMA and other legislation has been extensive: with a body of case law in many areas developing the consideration and enforcement of various values in the common law.[39] A signficant amount of this case law arises from jurisprudence on treaty principles: related, but not directly relevant to the scope of this paper. The following cases are those that make general statements about the existence of tikanga in New Zealand law.

Takamore v Clarke concerned entitlement to bury a person, with the Supreme Court in 2012 considering common law recognition of tikanga governing the burial of a hapū member contrary to the wishes of the deceased's wife as the executor of his will.[40] Chief Justice Elias wrote that "Māori custom according to tikanga is thereforefore part of the values of the New Zealand common law", affirming the test from *Loasby*.[41] The Chief Justice made it clear, though, that the values of tikanga are not to be judged by the Court: only the "application of

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34 Williams, above n 8, at 18; Mead, above n 1, at 12-13; and Coates, above n 21, at 42.
35 Sections 6(e), 7(a), 8.
36 See generally Public Service Act 2020 ss 14, 15; Conservation Act 1987, s 4; Local Government Act 2002, ss 4, 14, 77, 81; see McGuinness Institute "Appearances of the Treaty/te Tiriti in New Zealand Legislation" (Working Paper 2023/03) 14-17, 20-22. <https://www.mcguinnessinstitute.org/publications/working-papers/>.
37 See State-Owned Enterprises Act 1986, s 9.
38 See Crown Pastoral Lands Act 1998, s 84.
39 Williams, above n 8, and Coates, above n 21.
40 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [4].
41 At [94].

established traditions".[42] The majority, concurring in result, concludes differently on the common law aspect, reiterating that the English common law has applied only so far as is applicable to New Zealand circumstances, and that existing developments allow for due weight to be given to tikanga surrounding burial practices.[43]

The High Court in 2022 released a lengthy judgment in *Ngāti Whātua Ōrākei Trust v Attorney-General* in response to declarations sought by one iwi in respect of their mana whenua in Tāmaki Makaurau.[44] The declarations were opposed by other hapū and iwi with historical interests in the area.[45] The Court refrained from making the declarations on the terms sought, as it would require the Court to rule on tikanga between hapū. The judgment considered tikanga at length, holding that "Courts do not and cannot make, freeze, or codify tikanga" and citing the need for caution in approaching issues of tikanga.[46] Following this evaluation, the judge declined to make the declaration as it went further than the tikanga of just one iwi, and instead suggested pursuit of a tikanga-based resolution.[47]

The implications of the 2022 decision of the Supreme Court in *Ellis v R* are undoubtedly still yet to be fully realised.[48] *Ellis* concerned the continuation of an appeal of a high-profile alleged sex offender despite his death before the conclusion of the case. The question of continuation of the appeal considered the influence of tikanga. The significance of this case is evident in the contemporaneous issuing of two separate judgments: one concerning the appeal and the other focused on the issue of tikanga. Importantly, in summary the judgment records the Court's

42 At [97].
43 At [150], [152].
44 *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601.
45 At [457].
46 At [371].
47 At [464], [466].
48 *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239.

unanimity in affirming recognition of tikanga in both the common law where relevant and in legislative instruments.[49] The majority removed the application of colonial tests for incorporation of tikanga in the common law (from *Loasby*), prescribed that the tikanga-common law relationship should evolve contextually, and case-by-case, and accepted tikanga as the first law of Aotearoa.[50] They recognised the Courts must not "exceed their function" in dealing with tikanga, and should not "impair the operation of tikanga as a system of law and custom in its own right".[51] Commentary on the judgment suggests that its ultimate importance rests in the "signal...about the pressing need to understand tikanga" and how it might be expressed in the legal system.[52]

B Contemporary Commentary and Analysis

Sir Hirini Mead comments on the modern status of tikanga, identifying it as "more widely known and accepted" from the 1980s and 1990s, with various legislation and papers proving this.[53] He writes that "New Zealand society at large is beginning to understand tikanga...we are all learning more about tikanga and gradually embracing it as a point of difference that helps define us as a people".[54] Sir Joe Williams, too, identifies this 'third law' era, in that legislative recognition – where previously an instrument of assimilation – "is intended to be permanent and...transformative".[55] He posits that tikanga is no longer entirely independent but is seen "as a flavour in the common law of stronger or weaker effect".[56]

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49 At [19].
50 At [21]-[22].
51 At [22].
52 Dean R Knight and Mihiata Pirini "*Ellis,* tikanga Māori and the common law: relations between the first, second and third laws of Aotearoa New Zealand" (2023) Public Law (forthcoming) at 13.
53 At 12-13.
54 At 13.
55 At 12.
56 At 16.

The direct and implied reference to tikanga Māori in legislation and case law is widespread. It is inevitable that elements of analysis have been missed in this attempt to ascertain the current status of tikanga. From the identified sources, though, the general status of tikanga in Aotearoa's law seems to be in a process of development. Parliament, through legislation, is continually recognising and attempting to incorporate Treaty obligations – and therefore, tikanga.

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VI Tracing the Path: Tikanga and the Tribunal

Finally, this paper will draw together the above information to attempt some conclusions on the impact of the Waitangi Tribunal on the status of tikanga Māori in law. To do so, the broad

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57 See McGuinness Institute, above n 41, at 16.

58 Aupito William Sio, Minister for Courts "The Justice Sector's Contribution to the Government's Wellbeing Agenda" (18 April 2021); "Te Pae Oranga" (20 July 2022) New Zealand Police <www.police.govt.nz/>; "Rangatahi and Pasifika Youth Courts" District Court of New Zealand <www.districtcourts.govt.nz/>.

development of tikanga in law will be evaluated together with the key effects of various Tribunal actions and reports. Inevitably, the progression of the status of tikanga in New Zealand law is dependent on many factors. This paper aims simply to identify some aspects of the Tribunal's role to date that are reflected in the status of tikanga.

In considering the above suggestions of the status of tikanga pre- and post-Tribunal formation, it is clear that the following spheres of development exist concurrently:

1. Tikanga as a body of law and its associated concepts have been more actively incorporated into tangible Western sources of law.
2. Subsequently, and simultaneously, tikanga as a part of Māoritanga has become a more active presence in the realm of Western law and otherwise.

This distinction between tikanga as a body of law and tikanga as part of Māoritanga is deliberate, and aimed at appreciating the elements of tikanga that are not comparable to colonial conceptions of law. The identified Waitangi Tribunal reports show how this body has observed and contributed to these developments.

The Wai 11 report made findings and recommendations indirectly significant for the cultural presence of tikanga Māori – the second sphere of development identified above. The inherent connection between te reo Māori and te ao Māori (and therefore tikanga) is evident, stating that "the language is the embodiment of the particular spiritual and mental concepts of the Māori...it offers a particular worldview".[59] It draws on evidence stressing "the language is the core of our Māori culture and mana".[60] The report's recommendations focused on the encouragement and fostering of te reo use throughout government and the public sphere.[61] This claim was

59 At 17.
60 At 34.
61 At 51.

instrumental in the use of reo in Aotearoa. This is therefore linked to the promotion of culture, inevitably including tikanga, in a more public forum: reflected in the adoption of bilingual presentations of many court, government, and parliamentary materials. Sir Hirini Mead identifies this report as a successful influence on the changing attitudes toward Māori culture and involvement.[62]

The Wai 22 report makes simple, but significant conclusions on tikanga, despite not being explicitly referred to. In reference to "tradition", the report asserts that "tradition applies more to beliefs than to methods" and that "Maori [*sic*] tradition does not prevent Maori [*sic*] from developing their personal potential, or resources, for traditionally Maori [*sic*] were developers."[63] While in this report, "tradition" was in the context of fishing practice, the same conclusions can be applied elsewhere: reflected in *Ngāti Whātua,* with the Court emphasising the versatile nature of tikanga.[64]

The Wai 262 reports consider an extensive range of content.[65] Significantly, its first pages explore Kupe's arrival to Aotearoa and the Hawaikian culture that followed him: "its defining principle, and its life blood, was kinship – the value through which the Hawaikians expressed relationships with the elements of the physical world, the spiritual world and each other."[66] The description of what would become Māori culture clearly reflects the base of tikanga as defined today. While the report focuses on various areas where claimants express concern for kaitiaki perspectives, the general thrust of the report is fundamentally significant for the recognition of tikanga. As established by Wai 1071, "everything is about tikanga, and tikanga

62 At 12.
63 At 237-238.
64 At [370].
65 Wai 262, above n 30, at ix-xiv; see also Vols. 1 and 2 of the extended report Te Taumata Tuarua.
66 At 5.

is about everything".[67] Wai 262 makes this evident in its analysis of how Māori culture considers so many areas, and notes that what is needed "more than anything is a change in mindset" that shifts from valuing one culture "to one in which the other is equally supported and promoted".[68] The legislative, structural, and cultural actions suggested in the report to encourage more room for mātauranga Māori in law and policy are clear indicators that Wai 262 is significant for the appreciation of wider Māori culture in government. This contributes to both identified spheres of development as it pertains to the concept of tikanga in the wider context of mātauranga Māori and encourages legislative inclusion of values.

Finally, the Wai 1071 report more explicitly considers tikanga in relation to statutory and common law. Tikanga is directly considered in relation to the Courts' ability to determine it and largely in relation to land rights. Claimant submissions on the nature of tikanga in relation to this issue are recounted in depth and, importantly, given weighty consideration.[69] The conclusions drawn in the report on the historical and present exercise of tikanga over the foreshore and seabed by Māori show the genuine appreciation for this management.[70] In its recommendations, it states that "we think Māori are entitled to tread the path they chose – that is, recognition of rights through the courts – without interference by the State".[71] This suggests that the development of aspects of tikanga in the common law are favoured in some disputes. Certainly, this is reflected in the *Ellis* majority with the Court favouring a 'where relevant' and 'case-by-case' approach to tikanga incorporation. Otherwise the report suggests legislative remedy in ensuring the foreshore and seabed is inalienable.[72] The Wai 1071 report reflects

67 At 1.
68 At 245.
69 At 19.
70 At 38.
71 At 139.
72 At 141.

aspects of the first model of tikanga development in how it should be considered and incorporated by courts and parliament.

These reports show the Tribunal's indirect and direct considerations of aspects of tikanga Māori in 1986, 1988, 2004 and 2011 respectively. Each, to differing degrees, demonstrates the effect of the Waitangi Tribunal on a bi-fold development of tikanga in Aotearoa New Zealand's law: through tangible incorporation in legislation and cases, and through cultural and attitudinal development in the wider realm.

And this paper seeks to argue that inevitably, it must. By nature of the institution, its actions must influence the presence of tikanga in the legal system. Firstly, tikanga rests squarely within the taonga afforded protection under article 2 of te Tiriti o Waitangi/the Treaty of Waitangi. Its inherent links to te reo and fundamental importance in te ao Māori make this assertion strong. Secondly, the Tribunal assesses and speaks to the obligations of the Crown. With the Crown being embodied by the government, the legislature and judiciary's status as constitutional brethren of the executive mean that in effect, any Tribunal recommendation, report, or finding, has (if implemented) indirect ramifications for all branches of government. Many reports can, to varying degrees, be linked to the existence of tikanga in law.

Omnipresent in this analysis lingers the question of the propriety of tikanga in law. As established, this paper does not seek to make judgment on such a question: this is outside the scope. However, in keeping with the fundamental thesis of this paper it is not controversial to assert that the direct and implied recognition of tikanga through the Waitangi Tribunal can be observed in two spheres. Through social and legal avenues, tikanga is increasingly present. And this presence will inevitably continue in both spheres.

VII Conclusion

Tikanga Māori was the first law of Aotearoa and its presence continues today. However, its existence is marked by continually developing views of its role in society. It was included in colonial statute in pursuit of assimilation and denied existence in aspects of the common law. Later it was considered influential only so far as it did not conflict with parliament's supremacy. Today, aspects of tikanga are enshrined in many statutory instruments and it recently has been acknowledged to have continuing influence on the common law as systems continue to merge. Its existence now symbolises a more integrated approach to systems of law in this country and many hope for a more just – and perhaps, tika – role for tikanga in constitutional and systemic transformations.

In 2002, Robert Joseph and Tom Bennion asserted that "Māori rights under the Treaty of Waitangi and many of their tikanga values were...marginalised and lay legally dormant until the Treaty of Waitangi Act 1975 with the establishment of the Waitangi Tribunal."[73] The above analysis and comparative assessment supports this argument and further elucidates the two spheres of development through which the Waitangi Tribunal supported tikanga in law. Further, it is asserted that the Waitangi Tribunal as an institution must inevitably affect tikanga in law.

The Waitangi Tribunal has certainly contributed to the changed conception of tikanga in New Zealand's law. Its role should not be overstated - it operates within a Western system of government, subject to restrictions and reflective of its social surroundings – but various reports

[73] Robert Joseph and Tom Bennion "Challenges of Incorporation Māori Values and Tikanga under the Resource Management act 1991 and the Local Government Bill – Possible Ways Forward" (2002-2003) 6 Y.B. N.Z. Juris 9 at 11.

such as Wai 11, Wai 22, Wai 1071 and Wai 262 show the gradual yet certain impact of the Waitangi Tribunal in the development of tikanga in Aotearoa's law. This is seen through two broad categories in the incorporation of tikanga as law and in law, and through the more attitudinal incorporation in society of tikanga as a part of Māoritanga.

From this venture into historical and current sources it is evident that the subject has far more to offer. The breadth and depth of content in regards to tikanga, law, and government is extensive and offers an engaging topic to explore further. This paper identifies key sources in cases, legislation, reports, and scholarly opinion to sketch a tenative conclusion on the question of the impacts of the Waitangi Tribunal on the status of tikanga in Aotearoa New Zealand's law.

A Cases

Ellis v R [2022] NZSC 114, [2022] 1 NZLR 239.

Mason v R [2013] NZCA 310, (2013) 26 CRNZ 464.

Ngāti Whātua Ōrākei Trust v Attorney-General (No 4) [2022] NZHC 843, [2022] 3 NZLR 601.

The Public Trustee v Loasby (1908) 27 NZLR 801.

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

Wi Parata v Bishop of Wellington (1877) 1 NZLRLC 14 (SC).

B Legislation

1 New Zealand

Conservation Act 1987.

Crimes Act 1961.

Local Government Act 2002.

Public Service Act 2020.

Resource Management Act 1991.

State-Owned Enterprises Act 1986.

Treaty of Waitangi Act 1975.

Treaty of Waitangi Act 1975 (as enacted).

Treaty of Waitangi Amendment Act 1985 (as enacted).

2 United Kingdom

Native Exemption Ordinance 1844 7 Vict 18.

Native Rights Act 1865 29 Vict.

New Zealand Constitution Act 1852 15 & 16 Vict c 72.

Resident Magistrates Ordinance 1846 9 Vict 16.

C Reports

Waitangi Tribunal *Report on the Te Reo Maori Claim* (Wai 11, 1986).

Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22, 1988).

Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004).

Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011), vol 1.

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