The Challenges and Possibilities of Common Law Constitutionalism

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Tēnā koutou, tēnā koutou, tēnā tatou katoa.

I have greeted you, as is customary in my country, in te reo Māori, the language of the indigenous people of Aotearoa/New Zealand.

It is a great honour to have been asked to speak to you today and to be part of the annual academic conference of your Constitutional Court, as well as the Constitutional Forum associated with the conference of the International Association of Judges (IAJ). Hearing about the issues in other jurisdictions and having the opportunity to exchange views with jurists from around the world can serve not only to enhance our understanding of those other jurisdictions and the international order but also to enhance our understanding of our own domestic systems.

I have been asked to talk to you about some of the most challenging recent decisions of my Court, the Supreme Court of New Zealand or, as it is called in te reo Māori, Te Kōti Mana Nui o Aotearoa. In particular, I have been asked to concentrate on cases relating to the theme of the academic conference: "The Contemporary Challenges of Constitutionalism".

Aotearoa/New Zealand is unusual in that it, along with the United Kingdom and perhaps Israel,[2] is one of only three countries in the world that has what is often called an

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[2] Israel's constitutional situation is complex. For historical reasons, Israel never adopted a written constitution, and its Knesset (Legislature) was instead empowered to iteratively pass "basic laws". Following the Supreme Court's *Bank Hamizrahi* decision in 1995 (CA 6821/93 *United Hamizrahi*

unwritten constitution. Some would say this means such jurisdictions have no real constitution at all. Though he would ultimately reject the view, A V Dicey put the issue in the following terms:[3]

> … a doubt occurs to one's mind which must more than once have haunted students of the constitution. Is it possible that so-called 'constitutional law' is in reality a cross between history and custom which does not properly deserve the name of law at all… ?

Famous commentators from other jurisdictions have made similar observations. De Tocqueville once commented that "the English constitution has no real existence".[4] Across the Atlantic, Marshall CJ of the United States Supreme Court commented in *Marbury v Madison* that "Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on the level with ordinary legislative acts…".[5]

Underlying these remarks is scepticism as to how an unwritten, non-supreme constitution can perform its core function of regulating the activity of the branches of government. If the components of a constitution can be altered by ordinary legislative acts, how can an unwritten constitution be called a constitution at all? To thinkers like Marshall CJ, New Zealand's modern constitution might seem an illusion, persisting only as long as Parliament chooses not to repeal it. More fundamentally, how can a "political constitution", which consists in large part of unwritten conventions, even be called law?

The problems identified by these thinkers remain worthy of consideration, but the unqualified claim that unwritten constitutions do not fulfil the function of a constitution is overly simplistic. If the essential task of a constitution is to "determine the composition and functions of the organs of central and local government in a state and

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Bank v Midgal Cooperative Village 49(4) PD 221 [1995]), the provision of a statute which infringes a provision of a basic law will be invalid. However, though the Israeli constitution is 'written' in the sense of being contained in basic laws, the coverage of these basic laws is incomplete. Moreover, some provisions of the basic law can be amended by a simple majority of the Knesset, as not all provisions are entrenched. See: Suzie Navot *The Constitution of Israel: A Contextual Analysis* (Hart Publishing, Oxford, 2014) at 1–46.

3 A V Dicey *The Law of the Constitution* (Oxford University Press, Oxford, 2013) at 19.

4 Alexis de Tocqueville, cited in A V Dicey, above n 3, *The Law of the Constitution* at 19.

5 *Marbury v Madison* (5 US) 137 (1803) at 177.

regulate the relationship between the individual and the state",[6] then unwritten constitutions can and do fulfil this function.

No modern unwritten constitution is in any event unwritten in a pure sense. While unwritten constitutions are not set out in any one place it is wrong to say that they exist entirely in the aether. In Aotearoa/New Zealand, the constitution is found in many places,[7] including the common law, the prerogative powers of the sovereign, constitutional conventions, statutes, both imperial[8] and domestic, and the Treaty of Waitangi/te Tiriti o Waitangi.[9] Most of these parts of the constitution are now at least recorded in writing, although not in one supreme, entrenched constitutional document. Statutes like New Zealand's Constitution Act 1986,[10] the Electoral Act 1993[11] and the New Zealand Bill of Rights Act 1990 (Bill of Rights) clearly codify fundamental elements of the constitution. Moreover, certain provisions in the Electoral Act are entrenched, requiring a referendum or a two-thirds majority before they are amended or repealed.[12]

Even the unentrenched statutes play a constitutional role while they remain in force. It has been suggested too that "constitutional statutes", which either condition the legal relationship between citizens and the state or enlarge or diminish the scope of citizens' fundamental rights, have a measure of protection in that such statutes cannot be subject to implied repeal by an ordinary statute.[13]

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6 Jonathan Law (ed) *A Dictionary of Law* (8th ed, Oxford University Press, 2015) at 138.

7 A brief essay on the New Zealand constitution by Sir Kenneth Keith can be found in the introduction to the Cabinet Manual (Cabinet Office C*abinet Manual 2023* at 1–6). For a recent book on the subject see Matthew SR Palmer and Dean R Knight *The Constitution of New Zealand: A Contextual Analysis* (Hart Publishing, Oxford, 2022).

8 For example, the Imperial Laws Application Act 1988, which confirms that certain historical English statutes like the Magna Carta and the Bill of Rights Act 1688 continue to form part of New Zealand law.

9 The Treaty of Waitangi/te Tiriti o Waitangi is a treaty that was entered into between Māori chiefs and the British Crown in 1840. The Treaty is now widely regarded as the founding document of our nation.

10 The Constitution Act 1986 sets out the roles of the Executive, Legislature and Judiciary albeit very succinctly.

11 The Electoral Act 1993 provides rules surrounding elections like the term limit of Parliament.

12 See Electoral Act, s 268.

13 *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151 at [63] per Laws LJ. In *Fitzgerald v R* [2021] NZSC 131, 1 NZLR 551 at [222]–[224] Arnold and O'Regan JJ quoted Laws LJ's notion of constitutional statutes with approval in reference to the status of the New Zealand Bill of Rights Act, although they noted the existence of s 4 of that Act, and that the issue of implied repeal did not arise in that case.

Further, conventions play a role even in jurisdictions with supreme law constitutions.[14] It may be that many of these conventions are not law in the sense that they may not be able to be directly enforced by the courts, but they are essential for the proper functioning of all constitutions and adherence to them will always be subject to the Legislature, the Executive and the general population possessing respect for these conventions.

One phrase sometimes used in the discussion of unwritten constitutions is "common law constitutionalism". This term has a range of meanings. Thomas Poole summarises common law constitutionalism in the following manner:[15]

> … the common law is both the foundation-stone and lodestar of the political community: that is, it both constitutes the political community and contains the fundamental principles that ought to guide its political and legal decision-making.

Under this conception, it is the common law (rather than Parliament) that is the ultimate source of the constitution and, in some sense, legislative decisions are subject to the common law.[16] The classic suggestion that this may be the case in New Zealand remains Cooke J's statement that: "Some common law rights presumably lie so deep that even Parliament could not override them."[17]

Robert French[18] argues that the term "common law constitutionalism" can have a broader (and less constitutionally radical) meaning and one that can apply in common

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14 For a discussion of the role of political conventions in the Canadian constitution, and an argument for their codification, see: Philippe Lagassé and Vanessa MacDonnell "Writing Canada's Political Constitution" (2023) 48 Queen's Law Journal 1.

15 Thomas Poole "Back to the Future? Unearthing the Theory of Common Law Constitutionalism" (2003) 23 Oxford Journal of Legal Studies 435, at 453. I use his definition, although note that Poole is in fact a critic of common law constitutionalism, opposing it on the basis that the reality of judicial proceedings fails to achieve the ideals that common law constitutionalists hold: Thomas Poole "Questioning common law constitutionalism" (2005) Legal Studies 25 at 155–163.

16 At 439–447.

17 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398; also see *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA) at 121. In both cases Cooke J's judgment was separate, and the other members of the panel did not join in these remarks. For further discussion of this notion, and for a differing view, see Michael Kirby "Deep Lying Rights – A Constitutional Conversation Continues" (2005) 3 New Zealand Journal of Public and International Law 195.

18 While Robert French was then Chief Justice of the High Court of Australia (which has a written constitution) his lecture dealt with the constitution of New Zealand as well, touching on how the notion of common law constitutionalism relates to both jurisdictions.

law jurisdictions with written supreme law constitutions. He suggests that there are common law concepts that define the roles of the branches of government and their relationship to one another. Alongside these, there are also common law principles which create strong rules for the interpretation of statutes, other written instruments and the scope of decisions taken under these instruments.[19] Even if the common law is not explicitly supreme, judges will inevitably draw on the common law in their capacity as the "final arbiters"[20] of constitutional disputes. This gives the common law a high degree of de-facto authority in the shaping of the constitution, even if it is not supreme in a de-jure sense. It is this broader sense of common law constitutionalism with which I am concerned in this paper.

The role of the common law in upholding the constitutional structure is an important and distinctive quality of systems with unwritten constitutions, such that the moniker "common law constitutionalism" is warranted. This is because unwritten constitutions are distinct in that they possess numerous and varying sources of authority without an authoritative written source which will 'trump' other sources in the event of conflict. In such systems, judge-made rules are often especially necessary to determine the relationship between these different sources of the constitution.

This is not to say that unwritten principles do not also play a role in systems with written constitutions. They clearly do. But a reliance on common law principles and reasoning as constitutional tools is especially necessary in systems with unwritten constitutions.

In jurisdictions with unwritten constitutions, the constitution draws its authority from a range of constitutional statutes, conventions and principles. Courts must determine how these pieces of authority should be reconciled, and how they relate to ordinary statutes. This does not necessarily make the judicial role any larger or more complex, but it does

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19 Robert French "Common Law Constitutionalism" (2016) 14 The New Zealand Journal of Public and International Law 153 at 166.

20 Lord Woolf "Droit—Public English Style" [1995] Public Law 57 at 68. Lord Woolf made this point about the courts as "final arbiters" in the context of endorsing a similar view to Cooke J's, but this general point about the role of courts does not require the endorsement of Lord Woolf's view about limitations on the power of Parliament.

require judges to undertake inquiries which would not be necessary under a supreme, entrenched constitution.[21]

After this general introduction, I now move on to the discussion of four recent 'constitutional' cases of the Supreme Court, but before doing so, I discuss some aspects of New Zealand's constitutional arrangements in a little more detail.

While, as indicated above, it has been suggested that there might be some limit to the powers of Parliament to legislate contrary to certain fundamental rights, Parliamentary sovereignty nevertheless remains at the core of New Zealand's constitutional system.[22] This means that our unicameral Parliament may legislate without restriction on any subject.[23] One consequence of the doctrine of Parliamentary sovereignty and of Aotearoa/New Zealand not having a supreme constitutional document is that the courts have no power to overturn legislation. Their remit is to interpret applicable legislation and to apply and develop the common law, New Zealand being a common law country.

It is worth at this point making some comments on the process of interpreting legislation. Our Legislation Act 2019 provides that the meaning of legislation is to be ascertained from its text in light of its purpose and context.[24] The Act also provides that legislation applies to circumstances as they arise — essentially that it is to be interpreted to respond to contemporary conditions, as long as that interpretation can be

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21 For a survey of the relationship between the Executive, Judiciary and Parliament in the United Kingdom see House of Lords Select Committee on the Constitution *Relations between the executive, the judiciary and Parliament* (26 July 2007); also see House of Lords Select Committee on the Constitution *Relations between the executive, the judiciary and Parliament*: *Follow-up Report* (16 October 2008).

22 For more on the relationship between the courts and Parliamentary sovereignty see Andrew Geddis "Parliament and the Courts: Lessons from Recent Experience" in John Burrows and Jeremy Finn (eds) *Challenge and Change: Judging in Aotearoa New Zealand* (LexisNexis New Zealand, Wellington, 2022) 135. Kirby argues that the notion of a particular institution (whether Parliament or the Crown) as "sovereign" is a misnomer, it is the people who possess sovereignty and it is the role of various bodies (including the Judiciary) to be "instruments of the people's sovereignty": Kirby, above n 17, at 217–218.

23 Joseph, below n 53, at 24. For case authority on this point see for example the statement in *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [44]. For further comment on the notion of limits to Parliamentary sovereignty, see Justice Glazebrook "Comment: Mired in the past or making the future?" in John Finnis *Judicial Power and the Balance of our Constitution* (Policy Exchange, London, 2018) at n 3.

24 Legislation Act 2019, s 10(1).

accommodated within the statutory wording.[25] There are also common law interpretative principles applied by the courts.[26]

Although New Zealand is notionally a dualist state, meaning international obligations entered into by the Executive are not part of New Zealand law unless incorporated into legislation,[27] there is also a presumption that Parliament did not intend to breach New Zealand's international obligations, and legislation is interpreted in light of that presumption.[28] There is also a principle that legislation should be interpreted consistently with the Treaty of Waitangi.[29]

Relevant too is the principle of legality.[30] This is a common law principle of statutory interpretation designed to protect and uphold certain rights and values that the common law has identified as fundamental or as having a constitutional nature. It exists independently of the Bill of Rights. The principle of legality has been important in two recent decisions of my Court I will come to later.

Particularly important as another constitutional document relevant to the interpretation of legislation is the Bill of Rights.[31] This is seen as constitutional even though it is an ordinary statute that could be repealed by simple majority of Parliament.[32] The Bill of Rights deals with mostly civil and political rights and provides in section 5 that the rights guaranteed under the Bill of Rights can be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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25 Section 11.

26 Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 431–446.

27 Treasa Dunworth "International Law in New Zealand Law" in Alberto Costi (ed) *Public International Law: A New Zealand Perspective* (LexisNexis, Wellington, 2020) at 598.

28 Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at 27.

29 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 655–656 per Cooke P and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [150]–[151] per William Young and Ellen France JJ, [237] per Glazebrook J, [296] per Williams J and [332] per Winkelmann CJ.

30 See *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115 (HL) at 131.

31 See Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015).

32 *Fitzgerald v R*, above n 13, at [41] per Winkelmann CJ, [250] per Glazebrook J and [221] per Arnold and O'Regan JJ.

The Bill of Rights applies to acts done by all three branches of government.[33] This means that all three branches have an obligation to uphold the Bill of Rights. This responsibility is taken seriously. For example, the guidelines for the preparation of legislation, which are prepared by an expert committee appointed by the Attorney-General, require that the policy process leading to the preparation of legislation must ensure that proposed legislation accords with constitutional principles, the values of New Zealand law, the Treaty of Waitangi and the Bill of Rights.[34] Legislation must also be non-discriminatory and respect privacy interests.[35]

As a further safeguard, section 7 of the Bill of Rights requires the Attorney-General to bring any provision of a bill which appears to be inconsistent with the Bill of Rights to the attention of Parliament. These Attorney-General reports are publicly available.[36] Some argue that a possible failing of the Attorney-General reporting system is that, unlike in the United Kingdom, the reports are not updated to deal with any changes made to the legislation in the course of its passage through Parliament.[37]

Even with the safeguards designed to make sure that legislation is rights consistent, the Bill of Rights nevertheless recognises Parliamentary sovereignty. Section 4 provides that no court shall decline to apply any provision of an enactment based on inconsistency with the Bill of Rights.

Our Bill of Rights does, however, provide in section 6 that legislation must be interpreted consistently with the Bill of Rights to the extent possible. I stress that the courts' role in this context is still to interpret legislation and not to amend or repeal or overturn it. In other words, the Bill of Rights is an "interpretive bill of rights rather than an overriding one".[38]

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33 Section 3(a).

34 Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at 22–40. Available at <www.ldac.org.nz>.

35 At 37–45.

36 Available at <www.justice.govt.nz/>.

37 The Joint Committee on Human Rights, consisting of twelve members, scrutinises every Government bill for its compatibility with human rights. More information is available at <committees.parliament.uk/committee/93/human-rights-joint-committee/>.

38 Stephen Gardbaum "The New Commonwealth Model of Constitutionalism" (2001) 49(4) The American Journal of Comparative Law 707 at 728.

The nearest the New Zealand courts have to the ability to overturn legislation is the power to make declarations that legislation is inconsistent with the Bill of Rights. Under recently passed amendments to the Bill of Rights, the Attorney-General must bring a declaration of inconsistency to the attention of Parliament[39] and the Minister responsible for the legislation must then prepare and present a report advising Parliament of the government's response.[40]

It seems to me that this formalises what has been called the dialogue model of constitutionalism[41] or, in a recently published book, what Professor Aileen Kavanagh calls a collaborative model.[42] 'Dialogue' is a metaphor often used to describe the functioning of the New Zealand Bill of Rights Act and of rights jurisprudence generally within the Commonwealth and more broadly. The dialogue model is predicated on inter-institutional dialogue, with the courts contributing to that dialogue through their judgments, especially in human rights cases.[43]

This dialogue is not restricted to states where courts do not have the power to strike down legislation. Indeed, the underlying possibility of a power to strike down legislation being used can lead to a form of dialogue of its own. In a recent book, Rosalind Dixon describes the use suspended declarations of invalidity giving legislators the chance to consider possible solutions and implement them.[44] Dixon also discusses other approaches that similarly combine "weak" and "strong" elements of judicial review.[45] For example, a court might utilise an "engagement" remedy requiring

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39 New Zealand Bill of Rights Act 1990, s 7A.

40 Section 7B.

41 See Peter W Hogg and Allison A Bushell "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)" (1997) 35(1) Osgoode Hall Law Journal 75. I note that the Canadian position has changed since Hogg and Bushell published their original article, Canada's Charter now performs a supreme-law role: see Peter W Hogg, Allison A Bushell Thornton and Wade K Wright "Charter Dialogue Revisited: Or "Much Ado About Metaphors"" (2007) 45(1) Osgoode Hall Law Journal 1.

42 Aileen Kavanagh *The Collaborative Constitution* (Cambridge University Press, Cambridge, 2023).

43 This is especially the case in countries with non-supreme bills of rights like New Zealand and the United Kingdom. However, the theory also exists as an abstract model apart from these jurisdictions. For a general discussion of "dialogic" theories of judicial review see Rosalind Dixon *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press, Oxford, 2023).

44 Dixon, above n 43, at 230.

45 At 228–240.

consultation as a precondition to coercive state action.[46] Though these remedies involve the use of orders that place a direct duty on the Legislature to act, they still constitute forms of dialogue in that they give the Legislature space to respond. Professor Dixon's examples demonstrate that dialogue may come in different forms and that even a court with the power to strike down legislation can use judicial review in a responsive way.

Continuing on the theme of the possibility of different forms of dialogue, in a 2001 article, Stephen Gardbaum used the term the "The New Commonwealth Model of Constitutionalism" to refer to the recent constitutional experience of the UK, Canada and New Zealand.[47] In Gardbaum's view, all of these jurisdictions had challenged the traditional dichotomy between judicial and legislative supremacy. All existed at various points along a continuum between traditional Diceyan legislative supremacy and the United States' system of strong judicial review. One feature of these new systems, he argued, was a "rich and more balanced inter-institutional dialogue" rather than a "judicial monologue".[48] Kavanagh regards rights protection as a collaborative, inter-institutional exercise where each branch of government must play a part in a dynamic endeavour.[49]

Although they are distinct notions, Commonwealth and common law constitutionalism are arguably related in a range of ways. First, two of those jurisdictions which are examples of Commonwealth constitutionalism (New Zealand and the United Kingdom) are also major examples of common law constitutionalism. Secondly, on a more fundamental level, techniques now described as features of Commonwealth constitutionalism (for example, interpreting legislation as consistent with a statutory bill of rights) have long been features of common law constitutionalism (for example, applying the principle of legality to interpret legislation consistently with common law rights). The particular link between the principle of legality and New Zealand's Bill of Rights will be discussed further below. Finally, a key feature of both forms of constitutionalism is that the Judiciary in those countries with unwritten constitutions does not possess the power to overturn legislation, although statutory bills of rights may

46 At 230.
47 Gardbaum, above n 38.
48 At 745.
49 Kavanagh, above n 42.

impose greater restrictions on Parliament than common law principles have historically done.

Of course, it is important to note that this Commonwealth constitutionalism is not without its critics. Richard Bellamy argues that these commonwealth models fail exactly where Gardbaum argues they succeed.[50] On his view, by making use of tools like declarations of inconsistency, the Judiciary exerts uneven influence on the Legislature, given that it is not often politically expedient to disagree with the court.[51] Whether or not we agree with Gardbaum or Bellamy on a theoretical level, the experience of the New Zealand courts with the New Zealand Bill of Rights Act presents a valuable case study of Commonwealth constitutionalism in action. As stated in the above paragraph, the important link between the two forms of constitutionalism means that Bill of Rights Act jurisprudence is also relevant to common law constitutionalism.

The requirement that a declaration under New Zealand's Bill of Rights is put before Parliament also means that Parliament must decide on an appropriate response. It is of course free to disagree with the court's view as to consistency with the Bill of Rights. For example, it may take the view that in fact the legislation is a limit that can be justified in a free and democratic society. But, even if it accepts that the declaration is correct, it can, because of the doctrine of Parliamentary sovereignty, decide to do nothing in terms of amending or repealing the offending legislation. But the fact the declaration is put before Parliament means that it is required to confront the issue if it decides on this course of action. This accords with the principle of legality.

There is another relevant aspect of Parliamentary sovereignty. This is that Parliament, being supreme, can pass legislation to override court decisions it considers wrong, although by convention not in a manner that deprives the successful litigants of the fruits of their victory.[52]

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50 Richard Bellamy *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, Cambridge, 2007) at 47–48.

51 At 47–48.

52 P A Joseph *Laws of New Zealand* Constitutional Law (online ed) at [11], n 4.

Finally, I note the power New Zealand courts have to review Executive actions to ensure legality and proper process.[53] Relevant to the above discussion of constitutional dialogue, Professor Knight argues that this form of judicial review can itself constitute a form of dialogue.[54] He writes that it "provides a mechanism for ministers, public bodies and officials to render account for their actions".[55]

After this brief introduction about New Zealand's constitution, I intend first to discuss one recent Supreme Court case dealing with declarations of inconsistency. I will then discuss two cases relating to the rights-consistent interpretation of legislation and finally discuss a recent case about the place of tikanga Māori (Māori customary law and Māori practices and values more generally) New Zealand law. All of these cases have constitutional elements, as I will explain.

The first case is *Attorney-General v Taylor*, which was decided in 2019.[56] The appeal concerned a prohibition on all prisoners voting which had been introduced in 2010.[57] Prior to this amendment, only long-term prisoners were disenfranchised. The High Court had made a formal declaration that the 2010 amendment was inconsistent with the right to vote guaranteed in s 12 of the Bill of Rights.[58] The issue before the Supreme Court was whether there was jurisdiction to make such a declaration, it being accepted that denying all prisoners the right to vote was contrary to the Bill of Rights.[59]

The Supreme Court, by majority, held that there was such a power, largely because there was no other effective remedy with regard to legislation breaching the Bill of Rights.[60] The majority did not accept the Attorney-General's submission that making a

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53 See Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at Chapters 22–26 for a broad summary of judicial review in New Zealand. Also see Claudia Geiringer "Tavita and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 New Zealand Universities Law Review 66. Two interesting decisions of my Court that highlight the constitutional significance of judicial review are *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 and *Montcrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459.

54 D R Knight "Judicial Review as Dialogical Accountability: Aotearoa New Zealand's Supervisory Jurisdiction" (2023) 17 295 ICL Journal.

55 At 311.

56 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213.

57 At [1] and see The Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010.

58 *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791.

59 *Attorney-General v Taylor*, above n 56, at [2].

60 At [41] per Glazebrook and Ellen France JJ. The main majority judgment was written by Ellen France J and I joined her judgment. The then Chief Justice, Elias CJ, largely agreed with those reasons.

declaration of inconsistency does not fit with judicial function.[61] The making of declarations as to rights and status is part of the role of the courts and there was utility in providing a formal declaration of prisoners' rights and status.[62]

This meant that the declaration that the restrictions on prisoner voting were inconsistent with the Bill of Rights was upheld. Of course, this did not affect the validity of the legislation, which continued to apply to deny prisoners voting rights.

There was a further development in 2020 when a report on prisoner voting was released by the Waitangi Tribunal.[63] The report found that banning prisoners from voting disproportionately affects Māori prisoners and therefore that it is inconsistent with the Treaty of Waitangi. The Tribunal noted that Māori are hugely over-represented in prisons and that in 2018 they were 11.4 times more likely to be removed from the electoral roll than non-Māori.[64]

There was a legislative response and, in June 2020, voting rights were restored to prisoners serving less than three years' imprisonment.[65] The *Taylor* case predated the amendment to the Bill of Rights that requires a declaration to be brought to the attention of Parliament, but I think that it can nevertheless be seen as an illustration of the process of dialogue or collaboration in action, although in this case the restoration of prisoner voting rights was likely also to have been related to wider political developments.[66]

Turning now to the interpretation of legislation, I first discuss *Fitzgerald v R*.[67] In that case, the Supreme Court considered the validity of a sentence imposed under the then-

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61 At [65] per Glazebrook and Ellen France J and [103] per Elias CJ.

62 For example, a declaration may also be of use where a claim is made to the United Nations Human Rights Committee in the context of a challenge under the Optional Protocol to the International Covenant on Civil and Political Rights: at [55] per Glazebrook and Ellen France JJ and [110] per Elias CJ.

63 The Waitangi Tribunal is a permanent commission of inquiry into the Crown's relationship with Māori in accordance with the Treaty of Waitangi. Claims can be brought by Māori in regard to Crown breaches of the Treaty. The Tribunal then can make (usually non-binding) recommendations and determinations on claims. Tribunal decisions and further information are available at <www.waitangitribunal.govt.nz/>.

64 Waitangi Tribunal *Te Aha I Pērā Ai? The Māori Prisoners' Voting Report* (Wai 2870, 2020) at viii. Available at <www.waitangitribunal.govt.nz/publications-and-resources/waitangi-tribunal-reports/>.

65 Electoral (Registration of Sentenced Prisoners) Amendment Act 2020.

66 The legislation was introduced in 2010 by the Fifth National Government and was repealed in 2020 by the Sixth Labour Government.

67 *Fitzgerald v R*, above n 13.

current ‘three strikes’ sentencing regime. The relevant provision at the time, section 86D of the Sentencing Act 2002, required those who had committed three designated violent offences (including indecent assault) to be sentenced to the maximum term of imprisonment for the third offence committed.

When the Bill dealing with three strikes regime was first introduced into Parliament, the Attorney-General had prepared a s 7 report concluding that the Bill appeared to be inconsistent with the Bill of Rights.[68] The Attorney-General was of the view that the differential treatment of offenders could result in disparities between offenders that were not rationally based.[69] He also considered that the regime could result in gross disproportionality in sentencing. Some changes were made to the regime during the course of the Parliamentary process which addressed some of his concerns.[70] But, as indicated above, the Attorney-General reports are not updated to deal with any changes during the Parliamentary process.

Turning back to the case of Mr Fitzgerald. The circumstances of the crime for which he was sentenced were as follows.[71] Mr Fitzgerald approached two women walking along the street, grabbed one of them by the arms, pulled her towards him and tried to kiss her. She moved her head so the kiss fell on her cheek. There was also a related assault on the other woman (she was pushed away when she went to assist her friend) but that was not relevant for the purposes of the three strikes regime as common assault was not part of that regime.

The fact that Mr Fitzgerald suffers from longstanding and serious mental illness is relevant.[72] He had been hospitalised on a number of occasions but otherwise had been treated in the community. The sentencing court noted that his mental health issues contributed to the impulsive nature of his offending.

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68 Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Sentencing and Parole Reform Bill* (18 February 2009).

69 At [15].

70 The obligation to sentence a person convicted of any third strike sentence (except murder) to life imprisonment was substituted with an obligation to impose the maximum period of imprisonment for the particular offence: at [193(b)] per O’Regan and Arnold JJ. In addition, Police would refer all charges that qualified for the mandatory maximum penalty to the Crown solicitor for review: (25 May 2010) 663 NZPD 11228.

71 At [15]–[20] per Winkelmann CJ.

72 At [15] per Winkelmann CJ.

Mr Fitzgerald was convicted of indecent assault with regard to the kiss.[73] He had two prior convictions for indecent assaults, for which he had received short sentences of imprisonment. The current incident was therefore his third strike. Although very distressing for the victim, it was accepted by the sentencing judge that the attempted kiss was "at the bottom end of the range" of indecent assaults and that, standing alone, it would not normally have attracted a prison term.[74] Nevertheless, the sentencing judge considered, because it was Mr Fitzgerald's third strike, he had to impose the maximum sentence of 7 years for the kiss.

The Supreme Court was unanimous in finding that the sentence imposed on Mr Fitzgerald was in breach of s 9 of the Bill of Rights which provides that "Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment."[75] This meant that the sentence of seven years' imprisonment went well beyond merely excessive punishment (which would not engage s 9) and that it would shock the conscience of properly informed New Zealanders. Section 9 is not a right that allows justified limitations, meaning s 5 of the Bill of Rights was not engaged.[76]

The majority[77] of the Supreme Court held that Parliament did not intend, when it enacted the three strikes regime, to require judges to impose sentences in breach of s 9 of the Bill of Rights and New Zealand's international obligations.[78] In coming to that conclusion, the majority referred to the legislative history as well as the nature of section 9 itself.[79]

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73 At [16] per Winkelmann CJ.

74 *R v Fitzgerald* [2018] NZHC 1015 at [21].

75 *Fitzgerald v R*, above n 13, at [79]–[81] per Winkelmann CJ, [167] per O'Regan and Arnold JJ, [239] per Glazebrook J and [283] per William Young J dissenting.

76 At [38] and [78] per Winkelmann CJ, [160] per O'Regan and Arnold JJ and [241] per Glazebrook J.

77 There were three separate judgments of the majority: Winkelmann CJ, Glazebrook J and a joint judgment of O'Regan and Arnold JJ.

78 At [123] and [128]–[130] per Winkelmann CJ, [203] per O'Regan and Arnold JJ and [247] per Glazebrook J.

79 Although amendments put forward by Opposition members of Parliament to exclude minor offending from the operation of the regime were rejected, it had been acknowledged by the responsible Minister that it was important that the appropriate charges were laid. The Minister explained that Cabinet had decided on a process whereby all three strike charges would be referred to the Crown solicitor for review (see above n 70). This was, it seems, intended as a sifting mechanism so that only cases falling within the purpose of the regime (serious violent offending) would be caught by it: see discussion at [200] per O'Regan and Arnold JJ.

In light of this, the majority considered it possible, and thus necessary, to interpret s 86D(2) so that it did not require the imposition of sentences that would breach s 9.[80] As a result, s 86D, was read to include the implied limitation that any sentence imposed by it would not breach s 9 of the Bill of Rights. Mr Fitzgerald's case was remitted to the sentencing judge for resentencing in accordance with ordinary sentencing principles and taking account of his significant mental health issues.[81]

In his dissent, William Young J, although agreeing that the sentence breached s 9 of the Bill of Rights and accepting that the principle of legality had been used to read down generally worded provisions, was of the view that s 86D was "extremely precise" such that the majority's approach was not tenable.[82] He concluded his dissent by saying: "I construe section 86D as meaning what it says."[83]

I make a number of points about this case. The first point is that the argument that prevailed in the Court was one brought to the attention of the parties by the Court itself.[84] In an adversarial system, there is some debate as to when it is appropriate for a court to suggest arguments that are not raised by the parties. My view is that it is incumbent on a final court to do so as a final court must be able to ensure that its decisions accord with the law, especially in criminal cases, and therefore it must raise other arguments that may bear on the result. This is provided the parties are given an opportunity to comment on the new arguments and that they can be addressed fairly based on the evidence before the court.[85]

The second point is that the majority (apart from Winkelmann CJ who relied primarily on section 6 of the Bill of Rights) would have arrived at this interpretation by ordinary statutory interpretation principles and techniques.[86] This would include looking at

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80 At [139] per Winkelmann CJ, [219] per O'Regan and Arnold JJ and [250] per Glazebrook J.

81 O'Regan and Arnold JJ and I considered that, once the sentence was set aside, Mr Fitzgerald should be dealt with under ordinary sentencing principles: at [236] per O'Regan and Arnold JJ and at [252] per Glazebrook J. Winkelmann CJ took the view that s 86D added a sentencing principle that recidivism by those caught by the regime ought to be viewed as serious and worthy of a stern response but not one that breached s 9 of the Bill of Rights: at [137]–[138].

82 *Fitzgerald v R*, above n 13, at [328] per William Young J dissenting.

83 At [332].

84 At [2].

85 In this case, the parties were given an opportunity to file submissions on the new point raised by the Court. They did so but did not seek a further oral hearing.

86 At [206]–[227] per O'Regan and Arnold JJ and [250]–[251] per Glazebrook J.

Parliamentary purpose and using the principle of legality to read down the section or to read in a qualification to make it clear that it did not encompass punishments that would breach s 9 of the Bill of Rights. These are, as Winkelmann CJ pointed out in her judgment, closely connected and commonly employed techniques of statutory interpretation.[87]

The third point is that the minority judge and some commentators[88] have criticised the majority for stretching the wording past the point of mere interpretation. This has been an area of controversy with regard to s 6 and, in particular, in relation to United Kingdom decisions on the interpretation of their Human Rights Act.[89]

It is worth mentioning, because it deals with some related issues, another recent Supreme Court case, *D (SC 31/2019) v New Zealand Police*.[90] This related to legislation allowing a person sentenced to a non-custodial sentence for a qualifying sexual offence to be placed on a sex offenders register.[91] Mr D had committed a qualifying offence before the Act came into force but had been convicted and sentenced after the Act came into force. The relevant issue was whether the provisions of the relevant Act[92] applied retrospectively to cover Mr D's offending.[93]

The majority in that case, applying the principle of legality, held that the legislation was not sufficiently clear to displace the presumption against retrospective penalties contained both in the Sentencing Act section 6 and the Bill of Rights section 25(g).[94] This meant that a registration order should not have been made in Mr D's case.

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87 At [62] per Winkelmann CJ.

88 Andrew Geddis and Sarah Jocelyn "Is the NZ Supreme Court Aligning the NZBORA with the HRA?" (1 December 2021) UK Constitutional Law Association <ukconstitutionallaw.org>.

89 See for example Geddis and Jocelyn, above n 88. Also see discussion in Claudia Geiringer "It's Interpretation, Jim, But Not As We Know It: Ghaidan v Mendoza, the House of Lords and Rights-Consistent Interpretation" (2005) 3(6) Human Rights Research 1.

90 *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213.

91 The Child Sex Offender Register is not public. The information can be accessed by authorised by Police and Corrections staff and can be given to certain Government agencies in the interests of public safety. Police and Corrections staff are sometimes authorised to release information to third parties in the interests of safety.

92 Child Protection (Child Sex Offender Government Agency Registration) Act 2016.

93 For an outline of the text of the relevant provisions see at [18]–[27] per Winkelmann CJ and O'Regan J.

94 At [77] and [82] per Winkelmann CJ and O'Regan J and [159] per Ellen France J.

The minority, William Young J and myself, considered that the only available interpretation of the Act was that it applied to all offenders convicted of a qualifying offence and sentenced to a non-custodial sentence after the Act came into force, no matter when the offence was committed.[95]

In a further example of inter-institutional dialogue, on 22 March 2021 royal assent was given to the Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2021, which amended the provisions held not to have retrospective effect in *D*. The relevant provision in the Act explicitly states that it was passed to "fill the gap identified" in *D*.[96] The Act inserts a clause which applies to a person who committed a qualifying offence before 14 October 2016 and was convicted on or after 14 October 2016.[97] The clause states that such an offender must be taken to be a registrable offender for the purposes of the registration regime.

The comment I would make on both *D* and *Fitzgerald* is that these cases show that reasonable minds can differ as to the appropriate line between interpretation, which is permissible, and "legislating", which is not.

An interesting example of a critique of both *Fitzgerald* and *D*, beyond the traditional critique based on Parliamentary sovereignty and the proper limits of interpretation, comes from New Zealand academic Edward Willis.[98] He argues that the reasoning of the majorities in *D* and *Fitzgerald* was too formalistic. Rather than characterising their use of interpretive presumptions as an exercise in ordinary statutory interpretation (and side-stepping substantive weighing of principle and policy), he argues that courts should directly engage in substantive constitutional reasoning.[99]

Some of you may be wondering what happened to Mr Fitzgerald. When his case came before the sentencing judge again, he was sentenced to six months' imprisonment.[100] But he had already served more than four years in prison out of his seven-year sentence

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95 At [252] and [257] per Glazebrook J and [266(a)] per William Young J.

96 Child Protection (Child Sex Offender Government Agency Registration) Act 2016, sch 1, s 5. The amendment was passed under urgency with the support of all parties except one.

97 Schedule 1, part 1, clause 5.

98 Edward Willis "Interpretive Presumptions: Catalysts for Constitutional Reasoning" (2022) New Zealand Law Review 515.

99 At 540–545.

100 *R v Fitzgerald* [2021] NZHC 2940.

for the indecent assault. On his release Mr Fitzgerald applied for compensation for the additional time he had spent in prison. The High Court awarded Mr Fitzgerald $450,000 in damages.[101] This judgment has been appealed to the Court of Appeal and the Court's decision is currently reserved.[102] As it may come before us, I make no further comment on the case.

As to the three strikes legislation, Parliament subsequently passed the Three Strikes Legislation Repeal Act 2022. This repeal was in line with the then Government's policy before the *Fitzgerald* case. But part of the expressed motivation for the repeal was that the High Court, Court of Appeal and the Supreme Court had found that sentences imposed under the regime had breached the Bill of Rights Act.[103] So again this can be seen as an example of the dialogue or collaborative models of constitutionalism.

I do note for completeness, however, that the Supreme Court in *Fitzgerald* did not make any findings about whether or not the three strikes legislation generally was contrary to the Bill of Rights. The decision was limited to situations where its application led to the imposition of sentences that breached s 9 of the Bill of Rights, which the majority held was in fact not the purpose of the legislation.[104]

I offer some final thoughts on the role of the courts in upholding the Bill of Rights. It seems to me that there could be no more important part of the courts' role than upholding the rights of those in New Zealand and in particular those of minorities or other vulnerable groups. There is no doubt, however, that the courts' role in making declarations of inconsistency could lead to tensions between the Legislature and the Judiciary. The same can be said about the interpretation of legislation to accord with the Bill of Rights, the Treaty of Waitangi and international instruments. Parliament, however, passed the Bill of Rights. This means that the Judiciary is acting in accordance with the law as passed by Parliament when adjudicating on Bill of Rights

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101 *Fitzgerald v Attorney-General of New Zealand* [2022] NZHC 2465, [2023] 2 NZLR 214.

102 Mike White "Crown appeals $450,000 mentally unwell payout to 'Cuba St kisser'" (9 August 2023) Stuff <www.stuff.co.nz>.

103 (9 August 2022) 761 NZPD (Three Strikes Legislation Repeal Bill — Third Reading, Kiritapu Allan).

104 New Zealand's new coalition government has indicated that the three strikes' law will be reinstated, "with a tighter definition of offences that qualify as strikes": Cindy Kiro, Governor General of New Zealand (Speech from the Throne, Parliament, Wellington, 6 December 2023).

matters. I also note that it is the Executive which entered into the various human rights treaties which are binding on New Zealand under international law.

A second point is that there is bound to be tension in any system of government which embodies some form of the separation of powers. As long as such tension is at the margins and managed in an atmosphere of mutual respect and understanding of the role of each branch of government, it is healthy and a sign of a functioning system.

A third point is that there is no doubt that in some cases the Judiciary should show restraint, at least in areas where there are institutional competencies involved and structural limitations. The courts' role is to decide the case in front of them and this means they are much better placed to undertake incremental development of the law in line with the common law method. Courts are not the best places to undertake wide-ranging reform involving policy choices that are much better evaluated by the Executive and the Legislature.

I now move to my final topic: the role of tikanga Māori in New Zealand's law. I turn to this issue not just because of its intrinsic importance, but because of its significance to the idea of common law constitutionalism. Other jurisdictions have the ability to embed respect for indigenous law in supreme law documents. For example, the South African constitution explicitly recognises customary law and the role of traditional leadership and requires courts to apply customary law subject to the constitution and other legislation.[105] New Zealand's different constitutional architecture has meant that tikanga Māori has had to follow a distinct path to recognition.

There is not time to present other than a truncated history of tikanga's relationship to the common law.[106] Tikanga is New Zealand's "first law", present since Kupe and his people arrived in Aotearoa around 900 years ago.[107] Tikanga is broader than 'law' in the Western sense. It is a holistic system of principles which cover all aspects of life.

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105 Constitution of the Republic of South Africa, ss 211–212.

106 See Law Commission *He Poutama* (NZLC SP24), Appendix 4: Timeline of statutory and common law engagement with tikanga.

107 Joe Williams ""Too Far, Too Soon": Speech Given on 3 May 2023 at the Wānanga on Tikanga and the Law" Amicus Curiae (2023) 4 599 at 599.

It incorporates "all the values, standards, principles or norms that the Māori community subscribe to, to determine the appropriate conduct".[108] It comprises both practice and principle and is essentially relational and collective.[109]

The Law Commission/Te Aka Matua o te Ture has produced a detailed study paper examining tikanga Māori and its place in the legal landscape of Aotearoa/New Zealand.[110] The study paper consists of a discussion of tikanga, its interaction with state law and the potential for future development. It also has four appendices going into more detail on other subjects.

One of the central points made by the paper's authors is the importance of realising that tikanga is a coherent, structured system of norms.[111] At the centre of this system are the concepts of whakapapa (the interconnections which join all life and govern relationships)[112] and whanaungatanga ("kinship or a sense of familial connection and relationships" which requires that whakapapa connections, and relational obligations more generally, are respected).[113] As the Law Commission states, "whakapapa and whanaungatanga function as underlying structural norms within tikanga".[114] Within the "underlying normative frame"[115] of the structural norms of whakapapa and whanaungatanga exist the "prescriptive norms" of mauri, utu and ea:[116]

> These are concepts that relate to equilibrium or balance and play a key role in Māori life. Mauri refers to the vitality and wellbeing of an entity. It is prescriptive to the extent that tikanga makes demands to protect and maintain this essence or wellbeing. Similarly, utu also demands action or behaviours to constantly restore and maintain balance. Utu may enable the settled state of ea to be achieved.

Also extremely important are mana, tapu and noa: relational norms connected with status.[117] These norms "identify the status of an entity and signal the ways in which

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108 *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 (*Ellis* continuance), Appendix: Statement of Tikanga at [26].
109 See *Ellis*, above n 108, Appendix: Statement of Tikanga.
110 *He Poutama*, above n 106.
111 At [3.9].
112 At [3.24].
113 At [3.36]–[3.37].
114 At [3.48].
115 At [3.16(a)].
116 At [3.49].
117 At [3.71].

others may engage with that entity".[118] Joe Williams refers to tapu as "the presence of the divine in all things" and mana as "the idea of human dignity as expressed in modern terms, as well as the currency or coinage of leadership".[119] Noa "refers to a state where strict processes are not required".[120]

There are other important norms besides these, but all are rooted in the normative framework provided by whakapapa and whanaungatanga.[121] While these norms form part of an interrelated whole, they also vary according to local conditions.[122] The limitations of English translation mean of course that I cannot do justice to the full depth and meaning of even those concepts which I have mentioned. Another important point raised in *He Poutama* is the need for those engaging with tikanga to gain an "appreciation of the nature of the Māori knowledge systems that underpin it".[123] This requires jurists to allow themselves to enter a "mātauranga-immersed space".[124] That is, a space immersed in Māori systems of knowledge.

Tikanga has been part of New Zealand common law since 1840 and has never ceased to be so. Relevantly, tikanga has historically applied even to disputes which do not involve Māori. For example, in the 1910 case of *Baldick v Jackson*, a dispute over a whale carcass, the then Chief Justice rejected the English doctrine that whales were the property of the sovereign, holding that this doctrine did not apply in New Zealand due to the guarantees of the Treaty of Waitangi and because Māori hunted whales. Neither of the parties to the dispute were Māori.[125]

However, while tikanga has had a continued presence in New Zealand law (particularly in the lives of Māori) for many years it experienced marginalisation at the hands of New Zealand's dominant English-derived legal and political institutions.

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118 At [3.71]. The Law Commission uses the term "entity" deliberately, signifying that mana and tapu are not confined to living humans.
119 Williams, above n 107, at 599.
120 *He Poutama*, above n 106, at [3.101].
121 See at Chapter 3.
122 At [1.7].
123 At [2.9].
124 At [2.3]. Also see at [2.3]–[2.16] and [3.18].
125 *Baldick v Jackson* (1910) 30 NZLR 343.

This situation has changed markedly in recent times.[126] Modern legislative practice has been to incorporate tikanga principles into a wide range of statutes where it is considered relevant. This includes the Resource Management Act 1991, the main environmental and planning statute in New Zealand,[127] which also has an explicit reference to the Treaty of Waitangi.[128] Tikanga principles are now also incorporated into the policies of many public and private entities.[129] In addition, the Council of Legal Education has recently decided that tikanga must be integrated into all aspects of university law teaching.[130] Finally, there is of course the Law Commission study paper which I mentioned above.

This is against the background that tikanga is considered by many to be protected by article 2 of the Treaty of Waitangi. The protection of tikanga is also part of New Zealand's obligations under the United Nations Declaration on the Rights of Indigenous Peoples, and in particular article 34.

The Supreme Court had had occasion to consider the place of tikanga in the law in at least three cases but not in a comprehensive manner.[131] The opportunity to have a more in-depth look at tikanga and the law arose in a rather unusual context.

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126 For a summary of recent developments see Natalie Coates "The Rise of Tikanga Māori and Te Tiriti o Waitangi Jurisprudence" in in John Burrows and Jeremy Finn (eds) *Challenge and Change: Judging in Aotearoa New Zealand* (LexisNexis New Zealand, Wellington, 2022) 65.

127 Under the Sixth Labour Government, two new Acts were introduced: the Natural and Built Environment Act 2023 and the Spatial Planning Act 2023, both of which received royal assent on 23 August 2023. The Spatial Planning Act, and some parts of the Natural and Built Environment Act, came into effect the day after royal assent, with other aspects of the regime to be phased in over 10 years ("Resource management system reform" (14 August 2023) Ministry for the Environment <environment.govt.nz>). But the new Government has indicated that these Acts will be repealed, and the Resource Management Act will remain until a new regime is introduced: Kiro, above n 104.

128 Section 8.

129 See, for example, Te Puni Kōkiri | Ministry of Māori Development *Te Hanga Whanaungatanga mō te Hononga Hāngai ki te Māori | Building Relationships for Effective Engagement with Māori* (October 2006) accessible at <www.tpk.govt.nz>. See also Te Arawhiti | The Office for Māori Crown Relations *Guidelines for engagement with Māori* accessible at <www.tearawhiti.govt.nz>; New Zealand Petroleum & Minerals *Best Practice Guidelines for Engagement with Māori* (August 2014) accessible at <www.nzpam.govt.nz>; and Waka Kotahi | NZ Transport Agency *Hononga ki te Iwi // our Māori engagement framework* accessible at <www.nzta.govt.nz>.

130 New Zealand Council of Legal Education "Te Ao Māori and Tikanga Māori" <www.nzcle.org.nz>.

131 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [150], [164] and [94]; *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 29, at [169], [296]–[297] and [332]; and *Cowan v Cowan* [2022] NZSC 43 at [38] and [67].

I now turn to my final case, *Ellis v R*.[132] In 1993 Mr Ellis had been convicted of sexual offending against seven child complainants. Two appeals to the Court of Appeal were largely unsuccessful.[133] A Ministerial Inquiry had also concluded that the convictions were not unsafe.[134]

In 2019, Mr Ellis applied successfully to the Supreme Court for leave to appeal against his convictions and an extension of time to make his leave application.[135] Both applications were granted. Before his appeal could be heard, Mr Ellis died. Before his death he had expressed the wish that his appeal should proceed to hearing and an application was accordingly made by his brother to allow the appeal to continue.

The Court therefore had to consider whether Mr Ellis' appeal could continue despite his death. During the first hearing on this issue, members of the Court asked whether tikanga could be of any assistance to the Court in coming to its conclusion on the issue. It is significant that this question was asked even though neither Mr Ellis nor, as far as the Court was aware, any of the complainants, were Māori.

The parties asked for an adjournment so that they could prepare submissions on the tikanga issue. They decided to hold a wānanga (meeting) with experts on tikanga and they filed the report from that wānanga with the Court. The report, which is appended to the judgment,[136] considered in detail the position of tikanga in the law of Aotearoa/New Zealand, as well as its application to the particular case. The parties then filed detailed additional submissions and we held a second hearing.

The Court, by majority, decided that the appeal should continue and for two of the judges (Winkelmann CJ and Williams J) tikanga was a major component of the reasoning.[137] As the other majority judge, I held that tikanga could have influence but

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132 *Ellis* continuance, above n 108.

133 *R v Ellis* (1994) 12 CRNZ 172 (CA) (Cooke P, Casey and Gault JJ); *R v Ellis* (1999) 17 CRNZ 411 (CA) (Richardson P, Gault, Henry, Thomas and Tipping JJ).

134 Thomas Eichelbaum *The Peter Ellis Case: Report of the Ministerial Inquiry for the Hon Phil Goff* (Ministry of Justice, Wellington, 2001).

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

136 *Ellis* continuance, above n 108, Appendix: Statement of Tikanga.

137 *Ellis* continuance, above n 108, at [187], [192], [207], [210] and [228] per Winkelmann CJ and [256] and [274] per Williams J. There were three separate majority judgments: Winkelman CJ, Glazebrook J and Williams J. Arnold J wrote the minority joint judgment for himself and O'Regan J. A summary is at [1]–[23] of the decision.

did not alter the test for whether or not an appeal can continue despite the death of the appellant.[138]

In allowing the appeal to continue the majority judges were of the view that the grounds of appeal were strong and that public interest factors meant that it was in the interests of justice for the appeal to proceed. They were conscious of the additional stress the appeal would cause the complainants and their families. However, given the level of public interest and the fact that the Court had already granted leave to appeal, the majority considered that not allowing the appeal to continue would not bring finality for the complainants.

O'Regan and Arnold JJ would not have allowed the appeal to continue.[139] For them, the interests of the complainants and their families outweighed all the other considerations.

As it had been fully argued, the position of tikanga in the law of New Zealand more generally was considered by the Court, which was unanimous that tikanga has been and will continue to be recognised in the development of the common law of Aotearoa/New Zealand in cases where it is relevant.[140] It was also agreed that it forms part of New Zealand law as a result of being incorporated into statutes and regulations[141] and that it may be a relevant consideration in the exercise of discretions and it is incorporated in the policies and processes of public bodies.[142]

The majority went further. They held that the old colonial test for the recognition of customary law, which required various conditions to be met before custom could be seen as part of the common law, no longer applied.[143] One of these requirements is that, to be recognised, custom must be certain and consistent. I commented that this did not accord with the nature of tikanga — one of the strengths of tikanga is its ability to adapt

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138 At [142]–[145] per Glazebrook J and [315] per O'Regan and Arnold JJ.

139 At [275] per O'Regan and Arnold JJ dissenting.

140 At [108]–[110] per Glazebrook J, [171]–[174] per Winkelmann CJ, [257]–[259] per Williams J and [279] per O'Regan and Arnold JJ.

141 At [98]–[102] per Glazebrook J, [175]–[176] per Winkelmann CJ, [257] per Williams J and [280] per O'Regan and Arnold JJ.

142 At [103]–[105] per Glazebrook J, [173] per Winkelmann CJ, [257] per Williams J and [280] per O'Regan and Arnold JJ.

143 At [113]–[116] per Glazebrook J. This was agreed with by the other majority judges: at [177] per Winkelmann CJ and [260] per Williams J.

to new conditions and local circumstances as appropriate.[144] I also considered that the old requirements for a custom to be reasonable and not repugnant to justice and morality were based on colonial attitudes that were artefacts of a different time.[145]

The majority did not attempt to reformulate the test for the inclusion and application of tikanga in the common law. It sufficed to say that tikanga is a part of the common law of Aotearoa/New Zealand.[146] What this means will be elucidated on a case-by-case basis in accord with the normal common law method of incremental development.

The *Ellis* decision is obviously a significant one for a number of reasons, but I want to focus specifically on its constitutional implications.

Common law constitutionalism presents both challenges and benefits to the status of tikanga in New Zealand law. On the one hand, common law constitutionalism allows the recognition of a wide range of sources of constitutional law. Common law judges already draw from a deep well of principles and values found in written and unwritten sources. There is therefore nothing in this conceptual architecture to prevent them from drawing on tikanga.

Justice Williams, writing extrajudicially, has said that "Tikanga, like the common law, is instinctively facts first and principles second."[147] Putting this in slightly more cautious terms, both the common law and tikanga proceed on the basis of applying principles to facts in a way that requires judgment and discretion. Neither system consists of a clear body of written rules that apply axiomatically to all cases. In a constitutional context, common law constitutionalism similarly requires applying abstract 'common law values' to the facts. In this sense, a values-based common law constitution (though its values may differ from those of tikanga) might more easily accommodate the tikanga method than a written constitution.

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144 At [114] per Glazebrook J.

145 At [115] per Glazebrook J.

146 At [116], [119] and [127] per Glazebrook J, [183] per Winkelmann CJ and [261] per Williams J. For a theoretical discussion of interlegality see Nicole Roughan "Appendix 3: Interlegality, interdependence and independence: Framing relations of tikanga and state law in Aotearoa New Zealand" in *He Poutama*, above n 106.

147 Williams, above n 107, at 604.

The next point is that tikanga will nevertheless remain separate. Winkelmann CJ noted that in te ao Māori (the Māori world) tikanga has continued to shape and regulate the lives of Māori to the present day and that it reflects values that are older than our nation. I commented in my judgment that tikanga will continue to be applied and autonomously developed by Māori, and in this sense therefore it is a separate source of law and stands apart from the common law. Williams J agreed and also said that "…it is my view that the development of a pluralist common law of Aotearoa is both necessary and inevitable".[148]

This means that, although the common law has always "made room"[149] for custom, the recognition of tikanga in New Zealand's modern common law goes further than the historical role customary law has always had in English common law, which had arguably been predicated on the view that the English common law was superior and that in time it would absorb and overtake customary law.

Ellis does not stand for the proposition that the common law will somehow absorb tikanga and deprive it of its own autonomy, as recognised by all the majority judges.[150] The majority warned that the courts should take care not to impair the operation of tikanga as a system of law and custom in its own right. As it stands, tikanga is both part of the common law of Aotearoa/New Zealand and an autonomous body of law which will more generally influence New Zealand's constitutional development.

Again, some of you are no doubt wondering what happened in Mr Ellis' appeal against his convictions. The answer is that, in a unanimous judgment, his convictions were set aside.[151] This was on the basis that a substantial miscarriage of justice occurred. There were two main errors identified.

The first related to evidence given by an expert witness under section 23G, a provision of the 1908 Evidence Act that has now been repealed. The Court found that the witness had exceeded the proper bounds of s 23G in a number of respects.[152] For example, in

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148 *Ellis v R*, above n 108, at [272] per Williams J. For the other remarks cited in this paragraph see [107] and [110]–[111] per Glazebrook J, [168], [169] and [172] per Winkelmann CJ.

149 At [259].

150 At [120] and [122] per Glazebrook J, [181] per Winkelmann CJ and [270]–[272] per Williams J.

151 *Ellis v R* [2022] 1 NZLR 338, [2022] NZSC 115.

152 At [157]–[201].

her evidence, she commented on the credibility and reliability of the complainants' evidence which was not allowed under s 23G. Her evidence also lacked balance and could have suggested that the presence of certain behaviours was diagnostic of sexual abuse, a view that was known not to be the case even at the time of the trial.

The second error related to the risk that the complainants' evidence had been contaminated by a number of influences including direct questioning by the parents. The Court concluded that, although the risk of contamination had been traversed at trial, the jury was not fairly informed of the level of risk.[153]

As an aside, an interesting and unusual feature of the appeal was the need for the Supreme Court to hear evidence from expert witnesses called by both the appellant and the Crown. This was because of the length of time between the appeals in the Court of Appeal and in our Court and also because of the different focus of the appeal before us.

It might be of interest to set out the process we followed for hearing the expert evidence. Each of the expert witnesses produced written briefs dealing with the aspects of the appeal on which they were opining. We then required counsel to attempt to refine and narrow the areas of agreement and disagreement between their experts and to file a joint memorandum outlining the result of these discussions. At the hearing it was agreed that there would be a form of what has been called 'hot tubbing'.[154] The parties agreed on the division of the evidence into several topics. At the hearing each of the relevant experts first gave a summary of their evidence on that particular issue. Cross examination and re-examination then followed. The Bench then decided if it had any questions and, if so, the parties could ask any further questions they wished to ask. The same process was followed for each topic. The process worked very well as the Court was able to assess the similarities and differences of view between the experts on a topic-by-topic basis.

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153 At [313]–[321].

154 The term 'hot tubbing' refers to the giving of concurrent expert evidence, where expert witnesses from the same discipline give evidence at the same time. For a survey of the development of the term and practice see Steven Rares "Using the "Hot Tub" How Concurrent Expert Evidence Aids Understanding Issues". Available at <www.fedcourt.gov.au>.

To recap, I have discussed four major recent cases of my Court (*Taylor*, *Fitzgerald*, *D* and *Ellis*) which respectively reveal different aspects of recent developments in New Zealand's constitutional framework. These cases speak to both the challenge and possibility of common law constitutionalism. Contrary to those who argue that jurisdictions without a supreme law constitution have no constitution at all, these cases show that New Zealand's constitution is profoundly real and significant for the lives of New Zealanders.