The Challenges and Possibilities of Common Law Constitutionalism

Justice Susan Glazebrook[1]

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 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 Israel, is one of only three countries in the world that has what is often called an unwritten

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constitution. Some would say this means such jurisdictions have no real constitution at all.[2] This is too simplistic.

Speaking for Aotearoa/New Zealand, its constitution is found in many places,[3] including the common law, the prerogative powers of the sovereign, constitutional conventions, statutes, both imperial[4] and domestic,[5] and the Treaty of Waitangi/te Tiriti o Waitangi, which was a treaty entered into in 1840 between Māori chiefs and the British Crown. The Treaty is now regarded as the founding document of our nation. Most of these parts of the constitution are now at least recorded in writing, although not in one supreme, entrenched constitutional document.

Parliamentary sovereignty is a fundamental principle of New Zealand's constitutional system.[6] This means that our unicameral Parliament may legislate without restriction on any subject.[7] 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.

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2 See for example Marshall CJ's doubts expressed in an American context in *Marbury v Madison* 5 US 137 (1803) at 177.

3 A brief essay on the 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).

4 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.

5 For example, the Constitution Act 1986, which (briefly) sets out the roles of the Executive, Legislature and Judiciary and the Electoral Act 1993, which provides rules surrounding elections like the term limit of Parliament.

6 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.

7 Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) 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]. While some have occasionally 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 system of government. For further comment on this 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.

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.[8] 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 accommodated within the statutory wording.[9] There are also common law interpretative principles applied by the Courts.[10]

In light of my comments above relating to the constitutional status of the Te Tiriti/the Treaty of Waitangi, it will come as no surprise that there is a principle that legislation should be interpreted consistently with the Treaty of Waitangi.

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, 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.

Also relevant is the principle of legality.[11] 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 New Zealand Bill of Rights Act.[12] This is seen as constitutional even though it is an ordinary statute that could be repealed by simple majority of Parliament.

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8 Legislation Act 2019, s 10(1).
9 Section 11.
10 See R I Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 431–446.
11 See *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115 (HL) at 131.
12 See Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015).

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.

The Bill of Rights applies to acts done by all three branches of government.[13] 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.[14] Legislation must also be non-discriminatory and respect privacy interests.[15]

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.[16] 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.[17]

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

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13 Section 3(a).

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

15 At 37–45.

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

17 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/>.

overturn it. In other words, the Bill of Rights is an "interpretive bill of rights rather than an overriding one".[18]

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[19] and the Minister responsible for the legislation must then prepare and present a report advising Parliament of the government's response.[20]

It seems to me that this formalises what has been called the dialogue model of constitutionalism[21] or, in a soon to be published book, what Professor Aileen Kavanagh calls a collaborative model.[22] The dialogue model is predicated on inter-institutional dialogue, with the courts contributing to that dialogue through their judgments, especially in human rights cases.[23] Professor Kavanagh regards rights protection as a collaborative, inter-institutional exercise where each branch of government must play a part in a dynamic endeavour.

The requirement that a declaration 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

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

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

20 Section 7B.

21 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.

22 Aileen Kavanagh *The Collaborative Constitution* (Cambridge University Press, Cambridge, forthcoming).

23 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).

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.

Finally, I mention the other 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.

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 customary law) in New Zealand law. All of these cases have constitutional elements, as I will explain.

The first case is *Taylor*, which was decided in 2019.[24] The appeal concerned a prohibition on all prisoners voting which had been introduced in 2010. 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. 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.

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.[25] The majority did not accept the Attorney-General's submission that making a declaration of inconsistency does not fit with judicial function. 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.[26]

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

25 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.

26 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.

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.[27] 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.[28]

There was a legislative response and, in June 2020, voting rights were restored to prisoners serving less than three years' imprisonment.[29] 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.[30]

Turning now to the interpretation of legislation, I first discuss *Fitzgerald*.[31] In that case, the Supreme Court considered the validity of a sentence imposed under the then-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.

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27 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/>.

28 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/>.

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

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

31 *Fitzgerald v R* [2021] NZSC 131, 1 NZLR 551.

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.[32] The Attorney-General was of the view that the differential treatment of offenders could result in disparities between offenders that were not rationally based. 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. 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. 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. 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.

Mr Fitzgerald was convicted of indecent assault with regard to the kiss. 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.[33] 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.

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32 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).

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

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". This meant that the sentence of seven years' imprisonment went well beyond 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.

The majority[34] 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. In coming to that conclusion, the majority referred to the legislative history as well as the nature of section 9 itself.[35]

In light of this, the majority considered it possible, and thus necessary, to interpret s 86D(2) so that it does not require the imposition of sentences that would breach s 9. As a result, the relevant provision, 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.[36]

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

35 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. 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.

36 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. 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.

In his dissent, Justice William Young, 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.[37] He concluded his dissent by saying: "I construe section 86D as meaning what it says."[38]

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. 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.[39]

The second point is that the majority (apart from the Chief Justice who relied primarily on section 6 of the Bill of Rights) would have arrived at this interpretation by ordinary statutory interpretation principles and techniques. This would include looking at 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 the Chief Justice pointed out in her judgment, closely connected and commonly employed techniques of statutory interpretation.

The third point is that the minority judge and some commentators 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.[40]

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37 *Fitzgerald v R*, above n 31, at [328] per William Young J.

38 At [332].

39 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.

40 See for example 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>. Also see discussion in Claudia Geiringer "It's Interpretation, Jim, But

It is worth mentioning, because it deals with some related issues, another recent Supreme Court case, *D v NZ Police*.[41] 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.[42] 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 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 and the Bill of Rights section 25(g). This meant that a registration order should not have been made in Mr D's case.

The minority, Justice William Young 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.

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. The relevant provision in the Act explicitly states that it was passed to "fill the gap identified" in *D*.[43] The Act provides that the relevant clause applies to a person who committed a qualifying offence before 14 October 2016 and was convicted on or after 14 October 2016.

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.

Not As We Know It: Ghaidan v Mendoza, the House of Lords and Rights-Consistent Interpretation" (2005) 3(6) Human Rights Research 1.

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

42 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.

43 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.

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. But he had already served more than four years in prison out of his seven-year sentence 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.[44] This judgment has been appealed to the Court of Appeal and the appeal is to be heard early August. 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 current 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.[45] 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.

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 Court's 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.[46]

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

45 (9 August 2022) 761 NZPD.

46 Another important area is the judicial review of Executive actions, but that is beyond the scope of this paper. For a broad overview see Joseph, above n 7, at Chapters 22–26.

It was, however, the Legislature which 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 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.[47] New Zealand's different constitutional architecture has meant that tikanga Māori has had to follow a different path to recognition.

Tikanga is broader than 'law' in the Western sense. It is a holistic system of principles which cover all aspects of life. It incorporates "all the values, standards, principles or

[47] Constitution of the Republic of South Africa, ss 211–212.

norms that the Māori community subscribe to, to determine the appropriate conduct".[48] It comprises both practice and principle and is essentially relational and collective.[49]

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.[50]

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.

This situation has changed markedly in recent times.[51] 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, our main environmental and planning legislation, which also has an explicit reference to the Treaty of Waitangi. Tikanga principles are now also incorporated into the policies of many public and private entities.[52] In addition, the Council of Legal Education has recently decided that tikanga must be integrated into all aspects of university law teaching.[53] Finally, the Law Commission/Te Aka Matua o te Ture is in the process of producing a detailed study paper examining tikanga Māori and its place in the legal landscape of Aotearoa/New Zealand.

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48 *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239, Appendix: Statement of Tikanga at [26].

49 See *Ellis*, Appendix: Statement of Tikanga.

50 *Baldick v Jackson* (1910) 30 NZLR 343.

51 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.

52 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>.

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

This is against the background that tikanga is considered by many to be protected by article 2 of the Treaty of Waitangi, the founding document of Aotearoa/New Zealand. 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.[54] The opportunity to have a more in-depth look at tikanga and the law arose in a rather unusual context.

I now turn to my final case, *Ellis*. In 1993 Mr Ellis had been convicted of sexual offending against seven child complainants. Two appeals to the Court of Appeal were largely unsuccessful.[55] A Ministerial Inquiry had also concluded that the convictions were not unsafe.[56]

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.[57] 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

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54 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [150], [164] and [94]; *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [169], [296]-297 and 332, 237 ; *Cowan v Cowan* [2022] NZSC 43 at [38] and [67].

55 *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);

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

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

to the judgment, 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 (Chief Justice Winkelmann and Justice Williams) tikanga was a major component of the reasoning.[58] As the other majority judge, I held that tikanga could have influence but did not alter the test for whether or not an appeal can continue despite the death of the appellant.

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.

Justices O'Regan and Arnold would not have allowed the appeal to continue. 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. It was also agreed that it forms part of New Zealand law as a result of being incorporated into statutes and regulations 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.

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

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[58] *Ellis v R*, above n 48. 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.

seen as part of the common law, no longer applied.[59] 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 to new conditions and local circumstances as appropriate. 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.

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. 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. Indeed, a values-based common law constitution (though its values may differ from those of tikanga) can possibly more easily accommodate the tikanga method than an entrenched supreme law constitution which might prevent the same kind of flexibility.

The next point is that tikanga will nevertheless remain separate. The Chief Justice 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. Justice Williams said that "…it is my

[59] 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.

view that the development of a pluralist common law of Aotearoa is both necessary and inevitable."[60]

This means that, although the common law has always "made room"[61] 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. 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.[62] 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. For example, in 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.

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60 *Ellis v R*, above n 48, 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 and [272]

61 At [259].

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

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.

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.'[63] 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.

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.

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63 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>.