ONE ADVOCATE'S OPINIONS –THE "LEAST DANGEROUS BRANCH"? PREDICTABILITY AND UNEASE

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I. INTRODUCTION

The circumstances of the creation of our Supreme Court some 20 years ago provided a unique opportunity for it to establish its role, value and reputation as our court of final appeal. The passage of the subsequent two decades provides an opportunity to reflect on the Court's role, value and reputation.

In what follows, one advocate offers his opinions relevant to those topics. Those opinions are undoubtedly shaped by experiences in law reform and legal commentary as well as in litigation over several decades. As will become evident, this paper reflects an orthodox perception of the courts as deliberately constrained participants in the overall government of New Zealand—the "least dangerous branch"[1]—not least because of their lack of a democratic mandate or of democratic accountability. However, it seems that others, perhaps inevitably many legal academics but perhaps also some of the Supreme Court Judges themselves, do not share that perception. Such others may perceive the past two decades as ones of satisfactory or only cautious "development" of the role of the Court. But some of us in the business of providing legal predictions perceive a remarkable level of "mission creep", and I have a troubling sense of unease about that.[2]

Advocates should know their cases better than anyone else in the courtroom, including the judges. The essence of oral argument in an appellate court is a conversation which provides (or should provide) both judges and advocates with opportunities to test the reasoning of the judgment subject to appeal, the written submissions, and the appellate judges' own thinking. All of this means that advocates do have a very clear understanding of how the courts have addressed their cases and the wider legal context in arguments and in judgments.[3]

This paper is, in part, a continuation of my now lengthy engagement — as a continuing student, a practising lawyer, a former Law Commissioner, and a legal commentator — with various basic questions about the country in which I have lived my life and practised New Zealand law. What does "democracy" mean here? The "rule of law"? "Parliamentary sovereignty"? The "common law"? "Development" of the law? The legitimacy and limits of judicial decisionmaking? In relating these questions to the work of the Court, and exploring the question "What is the Supreme Court for?", I provide only my perspective and opinions on some selected but significant — and

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[*] Barrister. I am very grateful to Taz Haradasa and Sam Coad, currently junior barristers (and colleagues) in (respectively) Thorndon Chambers, Wellington, and Shortland Chambers, Auckland, for excellent research and editing assistance. More than "the usual disclaimer" is appropriate to emphasise that they should not be identified with my opinions and errors.

[1] Alexander Hamilton famously predicted in 1788 that, in a system of government built upon the separation of "the different departments of power", the judiciary will "always be the least dangerous to the political rights of the Constitution" because it "has no influence over either the sword or the purse", while the legislature "not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated": Alexander Hamilton "Federalist No 78" in Ian Shapiro (ed) *The Federalist Papers* (Yale University Press, New Haven, 2009) 391 at 392.

[2] Confronting the composition of this paper, an initial practical question was: *What voice?* With no claim to omniscience or representative mandate, and having not undertaken definitive research, first person singular seemed prudent. I settled on that. It may be relevant to record here that the composition of this paper occurred largely in the first half of 2023, before the New Zealand general election of October 2023 and the associated campaign and aftermath.

[3] However, not much reflection was required to conclude that this paper is not an opportunity to praise the judgments in cases "won" or seek the last word on any cases "lost" over those two decades. So, with only a few regrets, this paper abstains from commentary on the reasonable number of appeals I have been involved in from *Awatere Huata v Prebble* [2005] 1 NZLR 289 (SC) to *Yan v Mainzeal Property and Construction Ltd (in liq)* [2023] NZSC 113.

interesting — aspects of the Court's work, in the context of the anniversary.[4]

These questions are of course important in the work of legislators, those in the executive branch of government, law reformers, and legal commentators, as well as that of lawyers and judges. For advocates, in particular, these questions provide the context for their predictive "crystal ball": their craft of producing predictions about the lines of legal reasoning that the Court will adopt in addressing and deciding cases that come before it.

Such expectations about lines of legal reasoning underpin my perception of our legal system. The starting point is the freedom to do anything not prohibited or regulated by accessible and reasonably clear legal rules.[5] Such rules enable all to shape their conduct to avoid adverse consequences enforced by legal means. Accordingly, there is a profound public interest in the predictability of those legal rules – whether legislative or "common law". Predictability reflects the basic idea that like circumstances are treated alike by "the law", including in cases determined by the courts.

That last comment applies with special force to senior and appellate courts. If their work confirms legal rules or clarifies uncertainties, lawyers can give credible advice, individuals and groups can plan their affairs to comply with legal rules, social and economic activities proceed with confidence, and the incentives to litigate disputes are diminished.

Further, predictability in the identification and application of legal rules applies to both major areas of judicial work. In relation to legislation (the primary modern source of our legal rules), this is through interpreting legislation in a straightforward manner – giving primacy to the language which legislators have enacted and which everyone can read. In relation to the "common law" (the accumulated body of case law), it is through adherence to precedent: being bound by previous decisions of direct relevance; and applying settled principles identified and confirmed over time, by earlier cases and expert commentary, with some necessary clarifications.

This element of predictability from adherence to precedent is a core feature of the common law system, and of the rule of law. As the former Law Lord, Tom Bingham, explained: "The law must be accessible and so far as possible intelligible, clear and predictable." [6]

There is also in what follows an underlying theme of democratic legitimacy. This reflects my appreciation of our parliamentary democracy. I continue to understand our democracy as formed on (at least): a universal franchise with regular, competitive and fair general elections; a political foundation of individual equality and egalitarianism; wealth creation by private enterprises but intertwined with a range of public sector infrastructure and regulations; and accessible and objectively applied legal rules; but not any founding "constitutional" statement or structure. In other words, "parliamentary sovereignty".[7]

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4 In its first 20 years, the Court has heard and decided hundreds of cases, and decided a much greater number of leave applications. In most of that work there is much to praise and little to criticise. That is to be expected. The judges have been and are intelligent, experienced and conscientious. Inevitably, it is a minority of decisions which attract critical commentary. This paper is no exception.

5 A fundamental point but perhaps not widely enough appreciated. It was explicitly recognised recently in *R v Copeland* [2020] UKSC 8, [2021] AC 815 at [28].

6 Tom Bingham *The Rule of Law* (Penguin Books, London, 2011) at 37. This is especially relevant to our commercial law, the English underpinnings of which include: parties being held to their bargains; party autonomy; certainty (with only limited exceptions); suspicion of equitable concepts; the system of precedent applied by the courts; and flexibility to accommodate commercial realities. See Patrick Hodge, Deputy President of the United Kingdom Supreme Court "The Rule of Law, the Courts and the British Economy" (Guildhall Lecture, 4 October 2022) at 9–10.

7 This paper is not "an academic's view" of the Court, but I should acknowledge that I have read and agree with the historical and philosophical analyses of parliamentary sovereignty by (now Emeritus) Professor Jeffrey Goldsworthy of

In that context, I consider that an essential feature of legal rules is their predictability and that decisions about changing legal rules which involve contentious public policy issues should be made by democratically accountable decisionmakers. Governmental and legislative processes are designed to raise, gather information and opinions on, and decide such issues. Where there is a democratic regime change, there is no need to apologise for reversal of earlier decisions by other people. Judicial decisionmaking is entirely different. It is not well suited for determining such issues, either by the adversarial processes or by the credentials and (limited) accountability of the judges. In our democracy, the courts have no mandate to become agents of societal change.

II. A NEW COURT OF FINAL APPEAL

The Advisory Group Report (2002)

The Supreme Court is of course the creation of a statute: the product of the work and processes of the executive and legislative branches of government. The history is important. Anyone with an interest in the establishment of the Court should be aware of the work of the Ministerial Advisory Group established by Hon Margaret Wilson, Attorney-General and Associate Minister of Justice, in November 2001. The Group's report, *Replacing the Privy Council: A New Supreme Court*, was presented to her in March 2002.[8] To a very large extent, the Group's recommendations were reflected in the Supreme Court Act 2003.[9]

The Group had the firm view that replacing the Privy Council with the Supreme Court in the form recommended should and would:[10]

- improve accessibility to New Zealand's highest court;
- increase the range of matters considered by New Zealand's highest court;
- improve the understanding of local conditions by judges on New Zealand's highest court.

In the wake of cases such as *Australian Consolidated Press Ltd v Uren*, *Reid v Reid* and *Invercargill City v Hamlin*, it was obvious that the Privy Council had retreated markedly — and inevitably — from its earlier centralised role in the British Empire and then Commonwealth.[11] Without that role, and with the new Court based in New Zealand, the three improvements mentioned above were inevitable, as I believe has been well demonstrated over the past two decades to differing degrees.

The Group's expectation was of "high-quality decisions" given in real cases which reached the

Monash University's Faculty of Law. See Jeffrey Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, Oxford, 1999), especially ch 10.

8 Advisory Group *Replacing the Privy Council: A New Supreme Court* (Office of the Attorney-General, April 2002) [Advisory Group Report]. I was a member of that Advisory Group, and a supporter of the replacement of the Privy Council by a new local court as the final appellate court for New Zealand.

9 The explanatory note to the Bill records that the proposals reflect more than two years of consultation with the community and policy development by government and that "[k]ey features of the design of the Supreme Court were subsequently identified in the report of the Ministerial Advisory Group" released in April 2002: Supreme Court Bill 2002 (16-1) (explanatory note) at 1–2.

10 Advisory Group Report, above n 8, at 18.

11 *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590 (PC) (abandoning the idea of a "common law" consistent across the British Commonwealth); *Reid v Reid* [1982] 1 NZLR 147 (PC) (leaving interpretation of the purpose of contentious statutes to the local court); and *Invercargill City v Hamlin* [1996] 1 NZLR 513 (PC) (leaving common law policy to the local courts). In all three decisions, the Privy Council refused to allow the appeal based on unwillingness to interfere with the domestic court's assessment of relevant local conditions. Generally, see Sir Ivor Richardson "The Permanent Court of Appeal: Surveying the 50 Years" in Rick Bigwood (ed) *The Permanent New Zealand Court of Appeal: Essays on the First 50 Years* (Hart Publishing, Oregon, 2009) 297 at 319–322. See also *Finnigan v New Zealand Rugby Union Inc* [1986] 1 NZLR 13 (PC), discussed by Richardson at 321.

Supreme Court on appeal.[12] There was also an expectation of the Chief Justice presiding (and not sitting in other courts);[13] of collegiality;[14] and that, "as a whole", the membership of the Court would have an appreciation of the human diversity of New Zealand, not least of te ao Māori.[15]

The Group fudged the question of judicial appointments:[16]

> Further work should be undertaken on the judicial appointment process to ensure a more transparent and inclusive process [for all courts].

That recommendation was premised on three ideas:[17]

- First, that individual judicial appointments would be of people of the highest calibre, with excellent legal skills, legal acumen and personal integrity.
- Second, it would be important for the new court—as a whole—to not only better reflect the diversity of New Zealand society than the Privy Council, but also have a range of experiences which reflected that diversity as broadly as possible.
- Third, that it would be important to maintain the New Zealand tradition of non-political judicial appointments.

The Advisory Group's discussion of judicial appointments did not address the topic of scrutiny of appointments by reference to a candidate's views on public policy issues, on judicial philosophy or on their approach to interpreting statute or developing the common law. I am confident that this omission was because the Group members did not see the new court fulfilling a role markedly different from that of the Privy Council, and certainly not one which would provoke calls for those nomination and confirmation processes comparable to the United States Supreme Court and other United States appellate courts. The expectation was, indeed, that our new court would take its place at the head of the "least dangerous branch" of government.

A New "Court"

The primary purpose of the Supreme Court Act was to establish a "new court of final appeal".[18] Self-evidently, the idea was always for a new "court" — with judicial members, hearing cases initiated by one party and contested by opposing parties, and making binding decisions consistent with the law.[19]

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12 Advisory Group Report, above n 8, at [123] and [165]. The Advisory Group declined to recommend the new Supreme Court be granted jurisdiction to issue advisory opinions or deal with references. By comparison, the Canadian Supreme Court has authority to answer references on abstract legal questions not involving a live dispute between parties.

13 At [105].

14 At [82], [87], and [105].

15 At [8.3], [10.2] and [131.4].

16 At [10.1.2] and [130.3].

17 At [130]–[131].

18 Supreme Court Act 2003, s 3(1)(a).

19 Compare Professor John Finnis' first (of ten) theses his "Judicial Power: Past, Present and Future" in Richard Ekins (ed) *Judicial Power and the Balance of our Constitution* (Policy Exchange, London, 2018) 26 at 29–30 (available online at <www.judicialpowerproject.org.uk>): "The judicial responsibility is to adjudicate between parties who are in dispute about their legal rights and obligations by applying — to facts agreed between them or found by the court after trial — the law that defined those rights and obligations at that time past when the matter of their dispute (the cause in action) arose." Writing extrajudicially in an invited response to Professor Finnis' ten theses, Justice Glazebrook noted among other things that Finnis' characterisation of the roles of the three branches of Government was "too simplistic": see Susan Glazebrook "Comment: Mired in the past or making the future?" in Richard Ekins (ed) *Judicial Power and the Balance of our Constitution* (Policy Exchange, London, 2018) 79 at 80. The Finnis/Glazebrook exchange (including a response in John Finnis "Rejoinder" in Richard Ekins (ed) *Judicial Power and the Balance of our Constitution* (Policy Exchange, London, 2018) 26 at 111–128) is, I think, particularly interesting and important — and insufficiently known.

Inherent in that was and is adherence to the core idea that litigation is adversarial. That in particular cases a party is seeking some form of binding court order against some other party. The first party must commence a proceeding, with the other party assumed to actively oppose the grant of any such order. The court is then assisted in deciding whether the order is justified by considering what the respective parties are advancing as their best cases on the relevant facts and law. It is necessarily dependent upon the parties' accumulation of evidence and their advocates' synthesis of arguments. Conversely, the court does not initiate cases. It has no inquisitorial role. Nor does it involve itself in improving the parties' respective cases.

In other words, the new court was a replacement tier in an established judicial system forming part of the legal system, itself part of the body politic. Its role was and is important: in the words of the Advisory Group report, to "determine the law in the context of deciding the particular cases that come before it".[20] Implicitly, the new court was and is not a commission of inquiry, nor a law reform agency, nor a collaborator in legislative or executive government, nor the final arbiter of constitutional issues (unlike, for example, the United States Supreme Court). The appellate role does not of course undermine the adversarial nature of litigation.

The Advisory Group also anticipated consistency with "the limits of judicial decision-making", and the "traditional judicial decision-making role".[21] It did not anticipate "a departure from the common law as it currently stands".[22]

One component of "the limits of judicial decisionmaking", not articulated in the Advisory Group report, is the limited means for a court, including a final court of appeal, to be credibly informed on matters of social policy or public controversy. This is another aspect of the adversarial system. The contrasts with the information and opinion accumulation processes of central (and perhaps local) government, and of Parliament, are overwhelming.

Expectations

Inevitably, advocates have expectations of any appellate court, not least a final appellate court.[23] Reflecting on the Advisory Group report, my expectations continue to be:

- Clear and consistent recognition of the functions (and limits) of the Court.
- Astute appreciation of the necessary apolitical (in the broadest sense) reputation and legitimacy of the Court.
- An exemplar of the principles of natural justice and the features of the rule of law in a free and democratic society.
- Intellectual strength and honesty.
- Clarity of reasoning in judgments.
- Courtesy and respect for parties and counsel.
- Constructive utilisation of, and engagement in, oral arguments.
- Relatively simple processes for dealing with leave applications and appeals, and with costs issues.

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20 Advisory Group Report, above n 8, at 21. See Finnis' tenth "thesis", in "Judicial Power: Past Present and Future", above n 19, at 54: "In maturely self-determined polities with a discursively deliberative legislature, it is not wise to allow courts to constitute themselves roving law reform commissions …".

21 Advisory Group Report, above n 8, at [2.1], [45] and [47].

22 At [48].

23 See, for example, Mary Massaron Ross "Reflections on Appellate Courts: An Appellate Advocate's Thoughts for Judges" (2006) 8 Journal of Appellate Practice and Process 355 at 357-358. I do not attempt here any kind of subjective scorecard on the achievement (or not) of such objectives. And this is a small country. But read on … .

- A credible and timely output of judgments.

The Nature of Appellate Review

One basic topic for any advocate is the nature of appellate review. In almost all cases, an appeal heard by the Supreme Court will be the third hearing of the disputed claims, and a second appeal.[24] Obvious and important questions go to the approach taken to the decisions of the courts below: Starting afresh? A presumption (or related onus) that the previous provisions decision is correct? A general deference to the trial court's advantages? The Supreme Court jurisprudence on such matters has been problematic.

The legislation says that Supreme Court appeals "proceed by way of rehearing".[25] Succinct, but not very enlightening. But no one doubts that this is a rehearing on the written record, not a recalling of the witnesses to give evidence again.

It has long been common for appellate courts to emphasise the advantages of first instance judges, and discourage appeals on factual matters. In *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* (decided in 1997), the Court of Appeal referred to the public interest in ensuring that parties put up their best case at trial (i.e., they should not assume a second and fresh run on appeal), and emphasised that the ambit of an appeal on fact is very narrow.[26] (In a concurring judgment, it was suggested that it would be "an arrogance" for an appellate court to seek to "second-guess" a trial judge's findings of facts, given the advantages that a trial judge has — essentially in observing and assessing the evidence provided first hand, often over an extended period.[27])

Yet, by 2020, in *ANZ Bank New Zealand Ltd v Bushline Trustees Ltd*, the Supreme Court had declared (unanimously) not only that it did not adopt the *Rae* reasoning but also (in a crisp footnote) that *Rae* "should not … be cited".[28] The stages in this development are significant.

The key first stage was the Court's 2007 decision in *Austin, Nichols & Co Inc v Stichting Lodestar*, involving the disputed registration of a trade mark and the statement that:[29]

> Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters …

Further, the Court said, it was a matter of discretion for the appellate court whether the reasoning of the earlier decision-maker should be

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24 Where "exceptional circumstances" exist, the Supreme Court can grant leave to appeal directly to it against a decision of a court other than the Court of Appeal: see s 75 of the Senior Courts Act 2016.

25 Senior Courts Act, s 78.

26 *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 197–198 per Richardson P and Tipping J.

27 Per Thomas J at 199, referring to *Nocton v Lord Ashburton* [1914] AC 932 (HL) at 957 ("it is only in exceptional circumstances that judges of appeal, who have not seen the witness in the box, ought to differ from the finding of fact of the judge who tried the case"); *Clark Boyce v Mouat* [1993] 3 NZLR 641 (PC) at 647; and *Rangatira Ltd v Commissioner of Inland Revenue* [1997] 1 NZLR 129 (PC).

28 *ANZ Bank New Zealand Ltd v Bushline Trustees Ltd* [2020] NZSC 71, [2020] 1 NZLR 145 at [59], n 43.

29 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16] (footnote omitted).

given any or how much weight.[30] However, the Court also said that:[31]

> The appeal court must be persuaded that the decision [of the court below] is wrong, but in reaching that view no "deference" is required beyond the "customary" caution appropriate when seeing the witnesses provides an advantage because credibility is important.

The "customary caution", and the appellate role, was explained in the Court's 2019 judgment in *Sena v Police*.[32] While this explanation predated *Bushline Trustees*, it was cited with approval there (in the same paragraph which defenestrated *Rae*).[33] Given the substantial overlap between what was said in *Rae* and in *Sena/Bushline Trustees*, it appears that there is some ongoing recognition of the advantages available to the judge presiding over at least a medium or long trial with oral evidence.

Further, in *Kacem v Bashir* (decided in 2010), the Court addressed a "not altogether easy to describe" distinction between a general appeal and an appeal from a discretion (the latter involving stricter criteria for the appellant to meet).[34] However, the presence of a factual evaluation and a value judgement did not mean that the relevant decision was discretionary rather than a matter of assessment and judgement (albeit requiring individualised attention in the particular case).[35] In other words, the scope for applying the stricter criteria to discretionary decisions was narrowed by effectively redefining what is a discretionary decision.

However, the result of all of this seems to be sub-optimal clarity and a significant departure from the nature of appellate review, and the full recognition of a trial court's advantages, found in the United States, Canada, Australia and the United Kingdom. A survey of Scottish, English, United States and Canadian authorities to this effect was undertaken by the United Kingdom Supreme Court in *McGraddie v McGraddie* (decided in 2015)[36] and affirmed (again) by that Court in *Perry v Raley Solicitors*.[37]

However, citation of *Perry* to our Supreme Court in *Lodge Real Estate Ltd v Commerce Commission* received short shrift.[38] In no case has our Supreme Court yet explained why the approach taken in comparable courts elsewhere, and the reasons for that approach, should not be applicable here.

In the result, it remains unpredictable whether the Court will hear and determine an appeal only at a high level, in terms of general principles of law or policy, or will seek to engage in a micro-examination of some aspects of the facts. The usual cryptic but broad terms of a grant of leave are not informative on this point.[39] Nor is the scope of factual examination by the Court much

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30 At [5].

31 At [13], referring to *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437 (CA) at 441 per Cooke P; and *Powell v Streatham Manor Nursing Home* [1935] AC 243 (HL).

32 *Sena v Police* [2019] NZSC 55, [2019] 1 NZLR 575 at [39]–[40].

33 *Bushline Trustees*, above n 28, at [59], n 42.

34 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1. Appeals from the exercise of a genuine discretion are to be adjudged against the following: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong. See at [32] of *Kacem* referring to the well-known principles in *May v May* (1982) 1 NZFLR 165 (CA); and *Blackstone v Blackstone* [2008] NZCA 312, (2008) 19 PRNZ 40.

35 At [32].

36 *McGraddie v McGraddie* [2013] UKSC 58, [2013] 1 WLR 2477 at [1]–[6]. There, the Supreme Court cited to Scottish authorities (including *Thomas v Thomas* [1947] AC 484 (HL) and more recently *Thomson v Kvaerner Govan Ltd* [2003] UKHL 45, 2003 SCLR 765), United States authorities (*Anderson v City of Bessemer* 470 US 564 (1985)), English authority (*Re B (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911), and Canadian authorities (*Housen v Nikolaisen* 2002 SCC 33, [2002] 2 SCR 235).

37 *Perry v Raley Solicitors* [2019] UKSC 5, [2020] AC 352 at [49]–[50].

38 *Lodge Real Estate Ltd v Commerce Commission* [2020] NZSC 25, [2020] 1 NZLR 238 at [60].

39 The most common "question" approved is whether the Court of Appeal was correct to dismiss/allow the appeal before it.

constrained by the notice of appeal or written submissions.

Adhering to Precedent

Most notions of "justice" in at least the English-speaking world (because that is the limit of my observations) feature the idea that "like cases are decided alike". This effectively means, in most cases, that a later case is resolved consistently with the resolution of preceding cases. Such "adherence to precedent" permits the legal system to incorporate a material degree of certainty and stability.[40] Conversely, "no judicial system could do society's work if it eyed each issue afresh in every case that raised it".[41]

Indeed, and that is why the topic of adherence to precedents (or not — and, also, why not?) is of fundamental importance to legal advisers, not least advocates involved in cases which may or do end up in a final appellate court.

On the other hand, generations of judges have said that there may be occasions where the law is "developing" — that is, can and should be changed by the judges. Prior to the establishment of the Supreme Court, the "cautious willingness" of the Court of Appeal to review its earlier decisions in rare cases was recognised, but in the context of the ordinary position as explained by Richardson J:[42]

> Adherence to past decisions promotes certainty and stability. People need to know where they stand, what the law expects of them. So do their legal advisers. And a Court which freely reviews its earlier decisions is likely to find not only that the Court lists are jammed by litigants seeking to find a chance majority for change, but also that the respect for the law on which our system of justice largely depends is eroded.

However, in the same case, and typically pursuing flexibility, Cooke J referred to "new thinking", noting:[43]

> … at least in developing fields of common law, departure from stare decisis may be warranted by new thinking in this country or abroad, or changing social conditions. This must naturally depend on the nature of the changes.

Avoiding detail or enlightenment, the Advisory Group's 2002 report referred to the importance of precedent in ensuring consistency in the law, but said that a new Supreme Court should be free to depart from existing authority "when it appears right to do so".[44] A forerunner of this came soon after. In June 2003, a five-judge panel of the Court of Appeal in *Attorney-General v Ngāti Apa* overruled its 1963 decision in *Re the Ninety Mile Beach*.[45]

The *Ngāti Apa* majority held that *Re Ninety Mile Beach* was wrongly decided, essentially because it was considered to be inconsistent with earlier authority and fundamental principle. In his judgment, Tipping J addressed the issue as follows: "While the case has stood for a long time,

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40 See, for example, JD Heydon "Limits to the Powers of Ultimate Appellate Courts" (2006) 122 LQR 399 at 403–405 (noting that "certainty facilitates predictability", "fosters continuity over time" and thereby "vindicates the very idea of the rule of law"). In *Willers v Joyce (No 2)* [2016] UKSC 44, [2018] AC 843, the United Kingdom Supreme Court reiterated the necessity of stare decisis and remarked that without respect for precedent, the law becomes "anarchic, and it loses coherence, clarity and predictability": at [4].

41 *Planned Parenthood of Southeastern Pennsylvania v Casey* 565 US 833 (1992) at 854, citing Benjamin Cardozo *The Nature of the Judicial Process* (Yale University Press, New Haven, 1921) at 149. Commonwealth courts have also recognised the impossible task of deciding each case afresh without regard for precedent, including in *Lewis v Attorney-General of Jamaica* [2001] 2 AC 50 (PC) at 89 per Lord Hoffmann.

42 *Collector of Customs v Lawrence Publishing Co Ltd* [1986] 1 NZLR 404 (CA) at 414.

43 At 411.

44 Advisory Group Report, above n 8, at [48]. See also at [46]–[47].

45 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA), overruling its earlier judgment in *Re the Ninety Mile Beach* [1963] NZLR 461 (CA).

it is better in the end that the law now be set upon the correct path".[46]

For context, the Supreme Court Act 2003 was enacted a few months later; and most of the members of that Court of Appeal panel were appointed to the Supreme Court with effect from 1 January 2004.[47] The Foreshore and Seabed Act 2004 was enacted in November 2004 as a response to *Ngāti Apa*.[48] It was controversial, to understate its reception, and repealed by the Marine and Coastal Area (Takutai Moana) Act 2011.[49]

The current leading Supreme Court authority on adherence to precedent is *Couch v Attorney-General (No 2)*.[50] Both Elias CJ and Tipping J from the *Ngāti Apa* appeal formed part of the *Couch (No 2)* court, which declined to follow the Privy Council's 2002 decision in *Bottrill v A*.[51]

Elias CJ (dissenting) noted the insufficiency of "intellectual preference" for departure from precedent:[52]

> [32] It is open to this Court to depart from a decision of its own or of the Privy Council on appeal from New Zealand if it is right to do so because the rigid adherence to precedent would lead to injustice in the particular case or would unduly restrict the proper development of the law to meet the needs of New Zealand society. That could be the case where the Court comes to the view that an earlier decision is wrong or has become wrong. But it would seldom be appropriate to take that course because of a difference in intellectual preference. …

However, while agreeing in principle, Tipping J justified the departure from *Bottrill* in part as follows:[53]

> The persuasive force of the decision of the Privy Council is in the circumstances reduced because of the strong dissent by two of the five Judges sitting. It is the sort of issue of which it can reasonably be said that the outcome in the Privy Council could well have gone the other way if the Board had been differently constituted.

I continue to think that part of the reasoning is neither compelling nor benign. Nor can it be limited to Privy Council decisions. The court system recognises majority decisionmaking in multijudge panels as entirely legitimate, and no less a "decision" or a precedent than where unanimity is present. The alternative is to accept that personnel selection or changes dictate the outcomes of judicial decisions. That is not a recognised or desirable feature of our legal system, not least the common law. If judges are to change or make the law as previously understood, that has to be rationally justified. It cannot be justified by the mere fact that a different team is in command. While that justification is a central and valuable feature of regular elections and consequent legislative decisionmaking, its absence is one of the primary features which reinforces the legitimacy of judicial decisionmaking.

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46 At [215]. See also at [204].

47 The panel in *Ngāti Apa* comprised Elias CJ, Gault P, Keith, Anderson and Tipping JJ. Following the creation of the Supreme Court, the inaugural bench was comprised of Elias CJ, Gault, Keith, Tipping and Blanchard JJ.

48 Strikingly, the explanatory note to the Bill opens by noting that the "Bill constitutes the Government's response to the Court of Appeal decision [in *Ngāti Apa*]. That decision recognised the possibility that Te Ture Whenua Maori Act 1993 would lead to private ownership of the foreshore and seabed. This was not the intention when the Act was developed. Nor was this form of ownership anticipated by the other statutes that control activity in the coastal marine area": see Foreshore and Seabed Bill 2004 (129-1) (explanatory note) at 1.

49 Marine and Coastal Area (Takutai Moana) Act 2011, s 5.

50 *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149.

51 *Bottrill v A* [2002] UKPC 44, [2003] 2 NZLR 721.

52 Footnote omitted. This would seem to treat "new thinking" (see n 55 below) as insufficient.

53 *Couch*, above n 50, at [108].

Returning to the essence of adherence to precedent, Sir Douglas White has summarised the orthodox position as follows:[54]

> Incremental development of the common law should occur within the confines of the doctrine of precedent and recognising that any significant law reform should be left to the Government, the Law Commission and Parliament which have (or should have) the resources, facilities and time to investigate, consult and propose such reforms.

I continue to agree.[55]

III. "DEVELOPMENT" OF THE LAW

As will already be evident, I am cautious about the idea of judicial "development" of the law. The word "development" is usually defined in terms of "growth" or "advancement". It has connotations of a journey towards some destination, and of a theory or plan of how to get to that destination. But no such destination or plan would be consistent with the expected impartiality of the judicial role in applying accessible and predictable law.

The Supreme Court Act 2003 did not refer to "development". Rather, s 3(2) of the Act featured express reference to New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament. Taken together, those references connote values of stability and predictability in the law, including law determined by the new court of final appeal.[56]

To the extent that the common law (by which I mean the accumulated body of case law) might remain anchored in largely bygone prejudices or by assumptions about superseded technology, a departure from precedent would be unexceptionable. For example, the common law on contractual offer and acceptance was and is required to accommodate electronic means of communication. That does seem to me to be a legitimate incremental "development" of that area of law, or perhaps more appropriately a "clarification".

If the idea of "development" is broader, then the judicial role becomes problematic. It might be (and is) said that the body of the common law is "judge made", and thus it is open to contemporary judges to remake it as they think fit. Yet that overlooks the incorporation of the wisdoms and testing of the past within such law, and the reliance that is placed on its predictability by persons subject to the law, and by those engaged in drafting enacting legislation. The historical nature and survival of common law rules is a principal source of their modern legitimacy.

Democratic Legitimacy and Accountability

All final appellate courts will from time to time be required to consider controversial issues. Their legitimacy matters in achieving acceptance for the outcomes in such cases, and generally. And in large part, that legitimacy depends on the courts remaining within areas where they have institutional competence, and where democratic legitimacy and accountability are not expected. (Which areas could, I think, be thought of as within a moderately capacious container — a box, say, labelled "Least Dangerous Branch".)

In my understanding of our "free and democratic society", with a fair claim to egalitarian traditions, the legitimacy of state-enforced rules of conduct is expected to be traceable to some democratic

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54 Douglas White "Originality or Obedience? The Doctrine of Precedent in the 21st Century" (2019) 28 NZULR 653 at 684.

55 Jack Hodder "Departure from 'Wrong' Precedents by Final Appellate Courts: Disagreeing with Professor Harris" [2003] NZ Law Review 161 at 183.

56 This is of course my interpretation and reflects the legislative history, of which more below. I have recently become aware of both Justice Glazebrook's very different view that the rule of law should include human rights, access to justice and redress for historical disadvantage: "The Rule of Law: Guiding Principle or Catchphrase?" (2021) 29 Wai L Rev 2 at 19, and of James Allan's contrary view in "Thin Beats Fat Again: Conceptions of Democracy" (2006) 25 Law and Philosophy 533.

source. Most obviously in relation to legislation, and notwithstanding the blurring effect of a mixed-member proportional electoral system, the central idea is that, at regular elections, the electors can vote for those who seek office and (usually) are expected to do something. All votes count equally, and the majority determines the control of the legislative and executive branches of government. Legislation then enacted is accepted as legitimate. The process is not always edifying, but is well understood and has withstood the test of generations.

Similarly, there is scope for democratic accountability, including for the enactment or impact of new legislation, at the next election. That is an opportunity for electors to "throw the scoundrels out". Then, importantly, different legislation may then be enacted without apology for inconsistency. All of which has been helpfully explained by Andrew Geddis.[57] This is the publicly recognised and democratic form of "development" of the law.

Judges are of course in a very different position. They are not elected in this country, and there is no serious suggestion that we might change that. Rather, they have roles sanctioned by legislation, currently and relevantly the Senior Courts Act 2016. And they apply legislation to specific factual circumstances as a large part of their key role.

These matters are fundamental. Important social, cultural, economic and other political topics are the subject of central government processes and decision-making. And we have a long history of, in particular, legislation responsive to social and/or political aspirations for change. Since 1970, for example, I have observed important legislative changes (or "developments") in, among other areas: "open government";[58] the electoral system;[59] Treaty of Waitangi claims processes and settlements;[60] "nuclear free New Zealand"; corporatisation/privatisation of previous central government activities; "no fault" accident compensation;[61] shop trading hours; the age of majority; the end of compulsory unionism; "no fault" divorce; matrimonial/relationships relationship property;[62] and the legitimising of same sex encounters and relationships.[63]

Our legislative abortion law changes, mostly from 1977, have proved broadly durable and relatively uncontroversial.[64] This is in dramatic contrast with the past half century of judicial "developments" of abortion law in the United States of America.[65]

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57 Andrew Geddis *Electoral Law in New Zealand* (LexisNexis, Wellington, 2007) at ch 1. For the related "hard truth" that law is not and cannot be a substitute for politics, see JAG Griffith "The Political Constitution" (1979) 62 Modern L Rev 1 at 16–17. See also Martin Loughlin *Against Constitutionalism* (Cambridge (Massachusetts), Harvard University Press, 2022). For a recent article making points similar to Griffith's, but from a very different political starting-point, see James Allan "Very High Risk, Very Low Reward: The Voice Referendum Deserves to Be Defeated" (2023) 97 ALJ 411.

58 For example, the Official Information Act 1982 and its companion legislation, the Local Government Official Information and Meetings Act 1987.

59 Most notably the Electoral Act 1993.

60 Treaty of Waitangi Act 1975; and the Treaty of Waitangi Amendment Act 1985.

61 Accident Compensation Act 2001.

62 Property (Relationships) Act 1976.

63 Homosexual Law Reform Act 1986; and the Marriage (Definition of Marriage) Amendment Act 2013.

64 See the Contraception, Sterilisation and Abortion Act 1977; and the Abortion Legislation Act 2020.

65 From *Roe v Wade* 410 US 113 (1973) to *Dobbs v Jackson Women's Health Organization* 597 US _(2022). Varying views between judges on abortion law issues are not limited to the USA: see *Re Northern Ireland Human Rights Commission* [2018] UKSC 27 at [1]–[2] and [362]. Such variation has prompted calls for reform of the judiciary in the USA, including prompting a Presidential Commission on the Supreme Court. The Commission's *Final Report* (December 2021) observed (at [79]) that, internationally, most "constitutional" courts sit with between 9 and 18 judges, with a larger number being harder to "pack" by one or two new appointments. The Commission considered providing for congressional overrides of Supreme Court judgments to limit judicial supremacy. See also Mark A Lemley "The Imperial Supreme Court" (2022) 136 Harvard L Rev Forum 97 at 115–117 (discussing a change to 18-year term limits perhaps with one new appointment every two

The Common Law: Fairy Tales

The topic of "the common law", and its development or making, leads to contemplations of a fairy tale. To explain: By almost all accounts, Lord Reid (1890–1975) was an outstanding 20th century judge. In this century his most cited prose appears to be from the opening paragraphs from his early 1970s lecture, "The Judge as Law Maker":[66]

> There was a time when it was thought almost indecent to suggest that judges make law – they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the pass word and the wrong door opens. But we do not believe in fairy tales any more.
>
> So we must accept the fact that for better or for worse judges do make law, and tackle the question how do they approach their task and how should they approach it. …

Those remarks have proved to be dangerous. They have been taken to mean that those expressing caution about judicial lawmaking are purveyors of fairytales, and to assume legitimacy for appellate law making as a matter of course. But that is not what Lord Reid's lecture was saying. He advanced a conventional conservative analysis of the judicial role.[67]

On the famous cave denying part of Lord Reid's address,[68] I suggest that the metaphor is part right and part wrong. There is a repository of the "Common Law", but it is not hidden. It is the historical accumulation of case law, some of it now centuries old, revealed in the law reports and organised in learned legal treatises. And there is no need for a password for newly appointed judges. They are or should be expected to apply their legal skills and training in the orthodox and honourable manner of generations of their judicial forebears.

This "classic liberal" approach to the nature of the common law has been well explained by Professor Richard A Epstein:[69]

> … an incremental approach to case law issues allows for a conversation over the centuries to which many contribute but in which no one voice dominates.
>
> …
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> … behind the endless array of discrete cases lies a series of coherent principles whose value in application survives the multiple false turns of judicial reasoning.
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> …
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> … the material of the common law forms a vast depository of the raw material (which no moral philosopher could hope to duplicate by unaided reflection) needed to fashion a sound set of legal rules for our political and social institutions.

Conversely, in my view the strength and legitimacy of common law rules does not involve contemporary judges setting out to divine the "needs of the time" and then redefining established law. It does derive from those rules having been tested and refined by time and experience, and applied consistently and

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years, with judges at the end of their 18 years able to sit only in the lower courts).

66 James Reid "The Judge as Law Maker" (1972) 12 JSPTL 22 at 22.

67 See also AA Paterson "Lord Reid's Unnoticed Legacy—A Jurisprudence of Overruling" (1981) 1 OJLS 375, analysing a series of judgments delivered by Lord Reid between 1966 and 1975.

68 Reid, above n 66, at 22.

69 Richard A Epstein *Skepticism and Freedom: A Modern Case for Classical Liberalism* (University of Chicago Press, Chicago, 2003) at 14.

predictably – by the adherence to precedent: that is the essential methodology of the common law.

IV. "INCREMENTAL DEVELOPMENTS"?

In a relatively recent case, the Court referred to the common law method as one of "incremental development of the law to adjust to societal changes".[70] This incorporates assumptions about judicial identification of societal changes and of declaring the appropriate response. It also implies a substantial degree of dynamism in the common law — that "incremental development" is inevitable and an ever-present prospect. The emphasis seems not to be on predictability, but on change — albeit case-by-case change.[71]

By way of illustration of "development" of essentially non-statutory areas of the law, I consider below two Supreme Court decisions, from 2006 and 2022.

Lai v Chamberlains: Barristerial immunity

While not politically controversial, a conspicuous "development" of the law was *Lai v Chamberlains* (2006), where the Supreme Court abolished the previous longstanding immunity of barristers from claims for negligence.[72] This was because, it held, it was unnecessary for the protection of the public interest in the judicial process.[73] This decision usefully indicates some tendencies which have not much diminished since.

In so deciding, the Supreme Court aligned itself with the then recent similar abolition of the immunity in the United Kingdom by the House of Lords,[74] and against the more recent contrary affirmation of the immunity by the High Court of Australia.[75] The leading judgment in *Lai* commenced with the proposition that:[76]

> Access to the Courts for vindication of legal right is part of the rule of law. Immunity from legal suit where there is otherwise a cause of action is exceptional. … All cases of immunity require justification in some public policy sufficient to outweigh the public policy in vindication of legal right. … Public policy is not static.

However, the High Court of Australia, in *D'Orta-Ekenaike v Victoria Legal Aid* (2005) was also focused on public policy. It considered that the central and coherent policy justification for maintaining the immunity was the need for finality in litigation. As the joint judgment (of four Judges) said:[77]

> … the central justification for the advocate's immunity is the principle that controversies, once resolved, are not to be reopened

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70 *Attorney-General v Family First New Zealand* [2022] NZSC 80, [2022] 1 NZLR 175 at [155].

71 See, for example, the sequence of cases culminating in *Body Corporate No 207624 v North Shore City Council [Spencer on Byron]* [2012] NZSC 83, [2013] 2 NZLR 297 which, as the expansionary reach of the tort of negligence in New Zealand illustrates, may become cumulatively radical and problematic. Also relevant in this context, and identifying trends in private law judgments which preceded the Supreme Court's establishment, see Peter Watts "The Judge as a Casual Lawmaker" in Rick Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, 2001) 175 at 175–213.

72 *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7.

73 See at [68], [72] and [80] per Elias CJ, Gault and Keith JJ, [155] per Tipping J and [203]–[204] per Thomas J.

74 *Arthur J S Hall & Co (a firm) v Simons* [2002] 1 AC 615 (HL).

75 *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12, (2005) 223 CLR 1.

76 *Lai*, above n 72, at [1]–[2].

77 *D'Orta-Ekenaike*, above n 75, at [45]. In concurring, Callinan J noted a wide range of other immunities (e.g., journalists, regulatory agencies, military officers), as part of a "broader public interest" which outweighed the risk of denial of a remedy for a wrong: at [360]. In the case of advocates, he emphasised at [373]: "the overwhelming public importance in the isolation and consequential inscrutability of juries, the independence of judges, and the inability therefore of either a plaintiff client or a defendant advocate to call the judge, or the jurors to prove or disprove causation".

> except in a few narrowly defined circumstances. This is a fundamental and pervading tenet of the judicial system, reflecting the role played by the judicial process in the government of society. If an exception to that tenet were to be created by abolishing that immunity, a peculiar type of relitigation would arise. There would be relitigation of a controversary (already determined) as a result of what had happened during, or in preparation for, the hearing that had been designed to quell that controversy. Moreover, it would be relitigation of a skewed and limited kind. No argument was advanced to this court urging the abolition of judicial or witness immunity. If those immunities remain, it follows that the relitigation could not and would not examine the contribution of judge or witness to the events complained of, only the contribution of the advocate. An exception to the rule against the reopening of controversies would exist, but one of an inefficient and anomalous kind.

The conclusion in the *Lai* judgment, rejecting an argument that any change was best left to Parliament, included the following:[78]

> The immunity was a creation of the common law. Its reception into New Zealand law did not alter its character. Authoritative acknowledgement of the immunity in New Zealand law is comparatively recent. It rests entirely on legal policy, not wider consideration of social justice. The higher-level social interests are in access to the Courts and the rule of law, both of which Parliament has recently affirmed in legislation. The more immediate legal policy justifications for immunity turn on the needs of the administration of justice and the adequacy of Court processes, which the Courts are well placed to assess.

I continue to think that such reasoning failed to address the important questions. Where is the distinction between "legal policy" and "social justice" drawn from? What is the boundary? Does this dichotomy not conspicuously leave out the wider public interest and policy in avoiding relitigation of cases, in particular in the "skewed and limited" way noted in *D'Orta-Ekenaike*?[79] Do the executive and legislative branches not have a real interest in this topic? Would their processes not be markedly better suited to ascertaining information and opinions on the topic (e.g., insurance availability, assessment against the immunity of judges, a nonsuperficial investigation of the efficacy (or not) of the abuse of court processes)?

In *Lai*, Tipping J was unapologetic about appellate lawmaking, stating:[80]

> We are changing the law in the present case. … We are changing the law because of a change in perceptions over time of what public and legal policy require.

A "change in perceptions"? Whose perception? When and why did any such change occur? What evidence? And what accountability?

I happen to think that the High Court of Australia's approach is more convincing (by a considerable margin), but at the very least *Lai* is a useful early indicator of what can now be seen as some Supreme Court tendencies. In particular:

- An expansive approach to the law of negligence,[81] including treating most

78 *Lai*, above n 72, at [94] (footnotes omitted).

79 See *D'Orta-Ekenaike*, above n 75, at [45] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

80 *Lai*, above n 72, at [135]–[136].

81 During the Third Reading debate on the Supreme Court Bill, David Parker MP referred to concerns about judicial law-making by a future final court. He gave as an example the Court of Appeal's "overenthusiastic" imposition of liability in

established immunities as all but presumptively suspect.[82]

- An express confidence in addressing public policy issues and consequences without the benefit of a wide body of relevant evidence or opinion.[83]

- A problematic confidence in other court processes[84] – here strikeouts for abuse of process, to protect the finality of litigation from collateral attack.

- Generally, not much concern for disturbing the settled law.[85] The threshold in *Lai* for reconsideration, and departure from "the values of certainty and finality", seems to have been no more than the recent revisiting of the topic by the House of Lords.

- Not much interest in alignment with Australian law (and with the harmonisation of laws sought in the context of a closer economic relationship with Australia).[86]

- Conversely, not much recognition that public policy (not just "legal policy") issues were involved and would be more fully explored in a legislative process.

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negligence upon local councils for inspections by their building inspectors. After the turning of the tide in England, he speculated judicial law-making in the building cases had reached a "high-water mark" and future judges would take special care "not to make new law in politically controversial areas", being the "preserve of Parliament": see (14 October 2003) 603 NZPD 9118. He will have been disappointed as the Supreme Court has continued to follow an expansive approach to negligence: see, for example, *Spencer on Byron*, above n 71; *North Shore City Council v Body Corporate 18859 [Sunset Terraces]* [2010] NZSC 158, [2011] 2 NZLR 289; and *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725.

82 See *Couch (No 2)*, above n 50, where the Court unanimously held that s 86 of the State Sector Act 1988 did not remove Crown liability in tort. The majority also held that s 86 did not provide immunity for government employees from primary tortious liability. In *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462, Elias CJ (dissenting) said: "Because immunities conflict with other important rule of law values, they are always regarded with suspicion."

83 Beginning in approximately 2017, the Court began a practice of inviting intervention by the Attorney-General to address matters of "public policy" or the public interest: see, for example, *Horsfall v Potter* [2017] NZSC 21; *Duthie v Roose* [2017] NZSC 57; *S v Vector Ltd* [2019] NZSC 97; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZSC 67.

84 See *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126, [2021] 1 NZLR 117 (concerns about the use of an opt out class action procedure absent a legislative basis was not sufficient reason to require an opt in approach; the concern not to "work injustice on a defendant" is ameliorated by the continued application of the "usual armoury provided by the High Court Rules", including the ability to strike out and stay proceedings, and the court playing a "greater role in representative proceedings", for example, in relation to litigation funding arrangements and approving settlements: see at [41], [57], [81]–[82], [86]–[89]); and *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 (confidence that the courts will be able to incrementally develop the integration of tikanga Māori into the common law).

85 For example, see *Re Greenpeace of New Zealand Inc* [2014] NZSC 105, [2015] 1 NZLR 169, abolishing the old political purposes exclusion in the law of charity. The Court recounted the history of that exclusion, which first emerged in *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 (HL) and was then confirmed in *Bowman v Secular Society Ltd* [1917] AC 406 (HL). The exclusion was affirmed in New Zealand in two first instance decisions (*Re Wilkinson (dec'd)* [1941] NZLR 1065 (SC) and *Knowles v Commissioner of Stamp Duties* [1945] NZLR 522 (SC)) and was entrenched by the leading Court of Appeal authority in *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA). Despite the exclusion having existence since at least 1917, a majority of the Supreme Court abolished the exclusion. William Young and Arnold JJ dissented, noting that the exclusion was "reasonably defensible not only on the basis of the authorities but also as a matter of policy and practicality": at [127].

86 See the Australia-New Zealand Closer Economic Relations Trade Agreement and current version of the Trans-Tasman Business Law Harmonisation Agreement; and see *Commerce Commission v Telecom Corp of New Zealand Ltd* [2010] NZSC 111, [2011] 1 NZLR 577 at [31] where the Supreme Court said that in competition law issues it was "important that the approach to the issue under consideration be broadly the same on both sides of the Tasman". But see Stephen Kós and Diana Qiu "Parallel Universes: The Curious Dearth of Trans-Tasman Citation" [2023] NZ L Rev 61.

- An assumption that "an anomaly created by the Courts"[87] is best fixed by the courts.[88]

R v Ellis (Continuance): Tikanga and posthumous criminal appeals

A more recent and more important case on "development" of the common law is *Ellis v R*, in which the Court decided (by 3:2) that an appeal against 1993 convictions for sexual offending should continue notwithstanding the appellant's death in 2019.[89] The majority took into account tikanga considerations in reaching their conclusion, and provided extended discussion of tikanga as part of New Zealand's common law.

The implications and ramifications of the *Ellis* majority judgment will be with us for a long time. They will doubtless feature in other contributions marking the Supreme Court's 20th anniversary. I select only a limited number of points which inform the topic of "development" of the common law.

One way to "develop" the common law is to redefine it. *Ellis* marks a significant move away from the *Takamore v Clarke* approach which emphasised that tikanga incorporated values might, in some circumstances, inform the general law.[90] The *Ellis* majority judgments differ somewhat on the extent to which they describe tikanga as "part of the common law",[91] as a separate system of law,[92] as a factor in "development" or application of the common law,[93] but the enlarging intent is clear.[94] Beyond that, most things are far from clear.

In the leading judgment, Glazebrook J stated that our common law is "in a state of transition",[95] given the still developing recognition of tikanga in New Zealand law. She referred to the strong values of certainty, consistency and accessibility, and to precedent,[96] but also emphasised the values and principles of tikanga.[97] She described the function of the Court as being:[98]

> … to declare the law of Aotearoa/New Zealand … mindful of the values that in combination give us our own sense of community and common identity. …[T]ikanga is part of the values of the New Zealand variety of the common law. The consideration of common values is important when applying the common law to new or novel situations or when considering the need (or otherwise) to develop or modify the common law.

In her judgment, Winkelmann CJ emphasised societal values as part of the "common law method" for deciding cases, which may require development of "the common law" (the principles

87 *Lai*, above n 72, at [94].

88 This was not accepted some 50 years ago in the development of the statutory no-fault accident compensation regime to replace the "lottery" of common law personal injury litigation. The Law Commission Act 1985 is also a strong indicator that common law anomalies will often be better addressed by legislative reforms, following wide and thorough research.

89 *Ellis*, above n 84.

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

91 *Ellis*, above n 84, at [108], [111], [116] and [127] per Glazebrook J.

92 At [111] per Glazebrook J.

93 See at [171], [174]–[175], [179], [182]–[183] and [212] per Winkelmann CJ and [268] and [272] per Williams J.

94 Justices O'Regan and Arnold JJ agreed at [279]–[280] that tikanga has been and will continue to be recognised in the development of the common law in cases where it is relevant. It also forms part of the law as a result of being incorporated into statutes and regulations. It may be a relevant consideration in the exercise of discretions and it is incorporated in the policies and processes of public bodies. However, despite this acknowledgement, O'Regan and Arnold JJ did "not consider this … a suitable case for the Court to make pronouncements of a general nature about the incorporation or application of tikanga in New Zealand's common law": at [281].

95 At [82], [116] and [127].

96 See at [127].

97 At [126].

98 At [110].

that can be extracted from the body of case law).[99]

Referring to the Tikanga Statement provided by experts following adjournment of the hearing, Winkelmann CJ noted the Statement's reference to tikanga as "the Māori 'common law'", and observed:[100]

> Tikanga itself is not just a set of rules that can be rigidly applied, just as the content of the common law is not prescriptive nor to be divorced from context. Moreover, applying tikanga to new issues requires drawing on historical precedent and how tikanga has been recognised in similar situations.

The third majority judgment, that of Williams J, stated his view that: "the development of a pluralist common law of Aotearoa is both necessary and inevitable".[101] Earlier, Williams J had explained that weaving tikanga "back into modern New Zealand law and policy" reflected wider, deeper social change, that is:[102]

> … both a growing appreciation of the indigenous dimension in our identity as a South Pacific nation, as well as broad support for the Māori desire to maintain and strengthen their distinct language, culture, economic base and tribal institutions.

Further, Williams J stated limits on the role of the general courts in relation to tikanga:

- "they have neither the mandate nor the expertise to develop or authoritatively declare the content of tikanga"; and[103]

- they "must be comfortable engaging with tikanga principles yet understand that they cannot change it".[104]

All three majority judgments stated that these matters would have to unfold over time on an "incremental" (i.e., case-by-case) basis.[105]

For those seeking—indeed, expecting—a significant degree of predictability in our law, which has no substantial tradition of addressing legal rules in terms of explicit "societal values", these judgments are problematic in multiple ways. I touch on a few of these in what follows.

As Williams J noted,[106] *Ellis* did not involve an appellant or complainants known to identify as Māori; or persons known to regard te ao Māori as noticeably relevant to their lives. Further, these were circumstances in which no party had, prior to the appeal hearing, so much as mentioned tikanga.

All of which underpinned the minority judgment's powerful list of unaddressed questions:[107]

> So the tikanga issue has come before the Court in an uncontested environment and in circumstances where the Court has not had to address a number of difficult issues of both legal and constitutional significance. These include: how the Court can identify when tikanga is relevant to the case at hand and when it is not; if it is relevant, how it should be

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99 At [163] and [165]. See also Helen Winkelmann "Picking Up the Threads: The Story of the Common Law in Aotearoa New Zealand" (2021) 19 NZJPIL 1.

100 At [170].

101 At [272].

102 At [257].

103 At [276].

104 At [270].

105 At [116] and [127] per Glazebrook J, [167] and [183] per Winkelmann CJ and [261] and [265] per Williams J. (There have been subsequent elaborations of this and other points in addresses by Glazebrook J "Tikanga and Culture in the Supreme Court: *Ellis* and *Deng*" (2023) 4(2) Amicus Curiae 287 and by Williams J "Too Far, Too Soon" (2023) 4(3) Amicus Curiae 599).

106 At [246].

107 At [285] per O'Regan and Arnold JJ (footnotes omitted).

> addressed; whether tikanga is a separate or third source of law; how the relevant tikanga should be brought to the Court's attention (noting the acknowledgement in the reasons for Glazebrook J that the process used in this case, though commendably thorough and authoritative, will not be able to be followed in more run-of-the-mill cases); how the application of tikanga in one area of the law affects the common law in another area; and how to avoid tikanga being distorted when applied by courts. Also, how [earlier] precedents are affected by arguments that tikanga should be taken into account when it was not taken into account in an earlier decision.

From an advocate's perspective, there are the same and more questions: How do we approach future cases? Should the parties to any dispute and/or their lawyers invariably explore whether there might be a tikanga dimension? Should the diligent lawyer have tikanga experts available, and consult them, before providing definite advice on most topics?

Given the disparagement of the previous expectation that tikanga be proved by evidence as a matter of custom as being a "colonial relic",[108] there are important practical questions about the manner of establishing relevant tikanga matters. Is an expert panel required in every case? Or competing experts retained by the parties? Referral to the Māori Land Court?

In his judgment, Williams J acknowledged that there must be some way of getting unfamiliar material before the judge who will then apply it.[109] (That was of course the point of the previous exposition – that tikanga would be proved by evidence.) He mentioned an increase in the exposure of courts and lawyers to tikanga, and suggested that reference to Waitangi Tribunal reports or learned texts may suffice in some cases.[110] However, given his cautionary observations regarding the courts' role, noted earlier, taking judicial notice of tikanga matters appears unlikely. As to the body of Waitangi Tribunal reports produced over the past four decades or so, they were almost all produced as recommendations to central government; they were never intended as precedents similar to case law; they contain significant differences of approach; and they remain the result of the evidence advanced and the composition of the panel.

More broadly, there are important questions about the nature of the common law and the common law method as discussed in the majority judgments:

- Is it really the case that the common law and its development is based on judicial identification of relevant "values"? Rather than an identifying set of principles and propositions, legitimised by recognition and application over time? And "prescriptive", where applicable?

- Is it not the case that a core "value" of our legal system is that litigants are treated equally, that like cases are treated alike, and that adherence to precedent (seeking certainty and consistency) is important? Are these core features of tikanga?[111]

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108 At [113] per Glazebrook J. See also at [177] per Winkelmann CJ and [260] per Williams J.

109 At [273].

110 At [273]. Justice Glazebrook said at [125]: "In simple cases where tikanga is relevant and uncontroversial, submissions may suffice" (footnote omitted). Ultimately, the majority Judges said that the appropriate method of ascertaining tikanga will depend on the circumstances of the case: at [121]–[125] per Glazebrook J, [181] per Winkelmann CJ and [273] per Williams J.

111 See, for example, at [114] per Glazebrook J noting that the traditional "tests for certainty and consistency" are "contrary to the very nature of tikanga" and are "therefore clearly inappropriate". These may be relevant in tikanga being developed in, and a feature of, closely knit communities: see, for example, Taisu Zhang and John D Morley "The Modern State and the Rise of the Business

- By what logic or training or experience, and by which criteria, do the courts identify and weigh inconsistent "values" in applying and developing the common law?

The "development of a pluralist common law of Aotearoa"[112] is a striking phrase, itself raising a host of questions.[113] Perhaps the most immediate is the capacity of anyone to reconcile the significant differences between tikanga and the "general" common law.

As other judgments noted:

- Tikanga is focused on values and principles (rather than being rules-oriented), and has local variations as appropriate.[114]

- Tikanga involves a more relational and communitarian perspective than the more individualistic nature of the common law.[115]

- Thus tikanga would not regard individual offenders as solely to blame for their crimes — their whānau would be equally liable and the offence would also be against another whānau.[116]

- In a tikanga process in a case such as *Ellis* the complainants and their whānau would play an active part in the process of achieving ea, and the default position would be continuance of an appeal notwithstanding the death of the appellant. This is not the process for criminal appeals.[117]

- What is "tika" (right) in any situation may need to be discussed and negotiated between those expert in tikanga.[118]

If the underlying point of a "pluralist common law" objective, and the dismantling of "colonial relics", is a conclusion that our law requires major realignment to combat the legacies of colonisation, who should decide that? Or has it now been decided by a majority of the Court in *Ellis*? Was the pending Law Commission work on the interrelationship of tikanga and the "general law" not an appropriate indicator that there will be a wide range of considerations of a kind that are best addressed, to the extent appropriate, by statutes rather than case-by-case?[119]

Finally, for present purposes, the purpose and beneficiaries of the common law were addressed in a memorable paragraph in Winkelmann CJ's judgment. In explaining why tikanga is relevant to the development of the common law, she said:[120]

> … the protection of the law was guaranteed to Māori under Article 3 of Te Tiriti o Waitangi. The common law as developed and applied in New Zealand must therefore serve Māori. It must serve all in our society.

No one can seriously argue against the generalisation that the common law should serve "all in our society". But that does require further analysis. *How* does it serve the 5,000,000 plus inhabitants who make up "our society"? (Do we also include collective entities – families, groups, corporations?) Is the common law not a settled body of non-legislated law which is understood

Corporation" (2023) 132 Yale LJ 1970 at 1989–1995.

112 At [272] per Williams J.

113 Although, its scope might be limited by the sufficiency of a "tikanga-as-an-ingredient approach" in most cases: at [269] per Williams J.

114 At [114] per Glazebrook J.

115 At [119] per Glazebrook J.

116 At [286]–[287] per O'Regan and Arnold JJ, citing Moana Jackson *The Māori and the Criminal Justice System: He Whaipaanga Hou — A New Perspective* (Department of Justice, Study Series 18, 1998) pt 2 at 110–111.

117 At [312] and [314] per O'Regan and Arnold JJ.

118 At [169] per Winkelmann CJ.

119 As noted in the minority judgment: at [288] per O'Regan and Arnold JJ.

120 At [174].

and applied by the courts? And by which "all in our society" are equally served and bound as a key element of the rule of law? Does the rule of law not benefit all, not excluding those who identify as Māori?

The question remains whether the "must … serve Māori" component of Winkelmann CJ's proposition requires something different. It seems likely that this was intended to refer to the inclusion of tikanga-sourced values in the common law. It might include the idea that "certainty and consistency" are contrary to the very nature of tikanga, and thus inappropriate.[121] If so, that leaves the fundamental question about whether the common law is understood as essentially a body of fairly predictable rules, legitimated by recognition and application over time, and equally applicable to all persons, or not. If it is something else, what is it?

V. THE TREATY OF WAITANGI AND *TE HEUHEU*

The Treaty of Waitangi has achieved increasing legal prominence since the late 1970s. It has received enormous attention in the law schools since then, and has received considerable mention in a range of statutes and prominent court decisions. At the time of writing, *Ellis* is a recent example of the latter. The leading judgment apparently endorsed the proposition that the tino rangatiratanga guarantee in Article Two imports Māori rights to live by and benefit from tikanga.[122]

In this paper, while not focused on the Treaty, I do need to say something of what it has meant in relation to our contemporary laws and the role of our judges.

A useful starting point for my purposes is the Privy Council judgment in *Te Heuheu Tukino v Aotea District Māori Land Board* which held that the Treaty has no legal effect in New Zealand unless expressly incorporated by domestic legislation.[123] This was founded on recognition of the "sovereign power of legislation" and the Article Two "complete cession of all the rights and powers of sovereignty of the Chiefs".[124] That had been settled law for over 60 years when the Supreme Court was established.

In the Advisory Group's 2002 report the Treaty was discussed in relation to various matters:

- It was a prime example of a special and unique area where a local court of final appeal, unlike the Privy Council, would provide a New Zealand perspective.[125]
- It was a matter of constitutional importance (there was a difference of opinion over the addition of the term "fundamental").[126]
- That importance should be reflected in the criteria for leave to appeal to the Court.[127]
- That importance should also be reflected in the membership of the Court so that the overall composition of the Court included at least one judge with a sound knowledge of tikanga Māori.[128]

On *Te Heuheu*, the Advisory Group said that Privy Council decisions should normally be

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121 See at [114] per Glazebrook J.

122 At [98] per Glazebrook J. Her Honour referred to supporting commentaries at n 106 canvassing two different views of tino rangatiratanga, one as a form of self-determination (see Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1) or as an incident of the concept of taonga (see Robert Joseph "Re-Creating Legal Space for the First Law of Aotearoa New Zealand" (2009) 17 Wai L Rev 74). See also the reasons given by the Chief Justice in *Ellis* at [174] referring to the protection "guaranteed to Māori under Article 3 of Te Tiriti o Waitangi".

123 *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590 (PC).

124 At 596 and 598.

125 Advisory Group Report, above n 8, at [48].

126 At [2.2] and [55].

127 At [62].

128 At [58]–[59].

followed.[129] But their report noted that the Māori members (4 of 14) considered that *Te Heuheu* "was no longer credible and consistent with the recognition and protection of the Treaty in modern-day New Zealand".[130]

In the 2003 Parliamentary debates on the Supreme Court Bill, and unsurprisingly, the Treaty did not escape notice. In the third reading debate, the Leader of the Opposition, Hon Bill English, expressed concern:[131]

> … that the primary constitutional difference that [the new Supreme Court] will make is to render the Treaty of Waitangi a virtual constitution for New Zealand. … We need to know whether these judges [who would be on the new Court] … will stick to a judge's job of interpreting the law, not making a new constitution for New Zealand.

A then Labour Party backbencher and Attorney-General in 2016–2022, David Parker MP, was equally direct. In a speech focused on the importance of parliamentary sovereignty, he said:[132]

> I say to our courts, and in particular to our future Supreme Court, that they should not try to fetter the sovereignty of Parliament by overturning the decision in the Te Heuheu Tukino case. To do so would be to usurp Parliament's sovereignty in respect of Treaty issues. The present constitutional status of the treaty in New Zealand has not evolved significantly beyond the principle laid down by the Privy Council in 1941 in the te Heuheu Tukino case. The treaty has the force that Parliament gives to it by statute.
>
> …
>
> If the Supreme Court were so unwise as to try to usurp Parliament vis-à-vis the treaty, then the sovereignty of New Zealand's Parliament would be fettered. That would be outrageous, and I do not think it will happen.

I note that, in this regard, Mr Parker's starting point was consistent with that taken in the *Lands* case (1987), where Cooke P said:[133]

> Two crucial steps were taken by Parliament in enacting the Treaty of Waitangi Act [1975] and in insisting on the principles of the Treaty in the State-Owned Enterprises Act [1986]. If the judiciary has been able to play a role to some extent creative, that is because the legislature has given the opportunity.

Fast forwarding, and limiting myself to the majority judgments in the *Ellis* continuance decision, I summarise the main points made there about the role of the Treaty of Waitangi as follows:

- Statutes are presumed to be interpreted consistently with the Treaty.[134]
- Article Two imports Māori rights to live by and benefit from tikanga.[135]

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129 At [48].
130 At [54].
131 (14 October 2003) 612 NZPD 9099.
132 At 9118.
133 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 668. The other judgements were to similar effect. The High Court decision in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC), delivered four weeks earlier, was for some time a conspicuous outlier in inserting the principles of the Treaty of Waitangi into legislation which did not expressly provide for that. More recently, *Huakina* has been approved by the Supreme Court (and the legislative foundations of *Lands* was not mentioned) in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [150].
134 *Ellis*, above n 84, at [98] per Glazebrook J.
135 At [98] per Glazebrook J.

- It is a manifestation of the Treaty, particularly Article Two, that tikanga and/or tikanga-derived principles are to be seen as part of the fabric of Aotearoa's laws and public institutions.[136]

- Many agencies, including the District Court, now engage with Treaty principles by adopting tikanga-based policies and strategies to improve outcomes for Māori.[137]

- Article Three guaranteed to Māori the protection of the law, and the common law must therefore serve Māori.[138]

- The obligations (of the Crown) under the Treaty provide context for the common law of New Zealand to reorganise and apply tikanga principles.[139]

- The "policy and legislative spheres" have, for decades, incorporated and applied tikanga and the Treaty, and the common law would be brought into disrepute if it reflected colonial notions of (British) racial superiority.[140]

Perhaps most strikingly, in explaining the presumption (declared by the Court) that "statutes are to be interpreted consistently with Te Tiriti as far as possible", Glazebrook J said of *Te Heuheu*, in a footnote:[141]

> While the Privy Council in *Tukino v Aotea District Māori Land Board* [1941] NZLR 590 (PC) (commonly cited as *Te Heuheu Tukino v Aotea District Māori Land Board*) at 596-597 held that courts cannot directly enforce Te Tiriti unless it is incorporated into statute, subsequent decisions have nevertheless "[dealt] a heavy blow to [*Tukino*]'s crumbling façade": see Natalie Coates "The Rise of Tikanga Māori and Te Tiriti o Waitangi Jurisprudence" in John Burrows and Jeremy Finn (eds) *Challenge and Change: Judging in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) 65 at 81 discussing *Trans-Tasman* ….

Indeed, if such a presumption is now entrenched, *Te Heuheu* may have been eroded to near irrelevance notwithstanding that the Court has not (yet) "squarely confronted" and justified overruling it.[142] I recall Mr Parker's use of the term "outrageous", noted above.

More fundamentally, moves by the courts to "constitutionalise" the Treaty involve a profoundly political topic. In 1985, the White Paper on a Bill of Rights for New Zealand proposed that the Treaty be recognised as and affirmed "as part of the supreme law of New Zealand".[143] That proposal failed on the basis of extensive political opposition. It has not been revived. I continue to think that attempts to achieve a comparable outcome by judicial decisions involve significant issues for the political reputation and legitimacy of the courts.

VI. STATUTORY INTERPRETATION

Most of the population may never read an Act of Parliament. Nevertheless, one of the principles of our legal system is that legislation is the primary form of laws and should be accessible to everyone who may be affected by it. In other words, members of the public are presumed by the legislators, to be capable of reading statutes and thus able to act in a way which does not involve contravening statutory prohibitions. In this context, the interpretation of statutes might

136 At [126] per Glazebrook J.
137 At [104] per Glazebrook J.
138 At [174] per Winkelmann CJ.
139 At [109] per Glazebrook J.
140 At [260] per Williams J.
141 At [98] per Glazebrook J, n 104. See also Helen Winkelmann, Chief Justice of New Zealand "The power of narrative – shaping Aotearoa New Zealand's public law" (Public Law Conference, Dublin, 6–8 July 2022) at 12.
142 See *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 131, as cited in *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551.
143 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at 6.

seem an odd area for fundamental legal debate. Nevertheless, it has become a much contested area: something of a quiet constitutional battlefield.

In very large part, our legal system involves the application of statutory provisions to almost any aspect of private or public activity. The statutes are the end result of the legislative process, but almost always reflecting decisions made by the executive branch of government – the democratically accountable branches of government.

The role of the judicial branch of government is to interpret and apply such statutes. As all branches of our government operate in the English language, and statutes are professionally and carefully drafted, a non-lawyer should be forgiven for assuming (as I suspect most would, if they thought about it) that statutory interpretation is a straightforward and relatively predictable aspect of the legal system. They would be wrong.[144]

Yet adherence to the primacy of text has been diverted by ready resort to the troublesome s 6 of the New Zealand Bill of Rights Act 1990 (NZBORA):[145]

> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other reasoning.

This paper is consciously not venturing very far into the jurisprudential swamp created by enactment of the NZBORA, save to note that:

- The effect of s 6 *was* to change the meaning of earlier Acts.[146]

- While it has been said (by McGrath J) that s 6 does not justify taking up a meaning that does not reflect (now) s 10(1) of the Legislation Act,[147] that is by no means entrenched by the Court's subsequent case law.

Legislative intention

The orthodox view of the judicial role in statutory interpretations is one of duty. As Lord Bingham said in 2004:[148]

> It is the duty of the court to give full and fair effect to the meaning of a statute … If a statutory provision is clear and unambiguous, the court may not decline to give effect to it on the ground that its rationale is anachronistic, or discredited, or unconvincing.

Thus the core notion is that statutory language should be taken to have a tolerably clear meaning for legislators and for those subject to the legislation. On what might be called the "supply side", and in the words of the Bennion text:[149]

144 This is troubling not only for those of us in the legal predictions business but also for politicians and the public.

145 I see s 6 of the New Zealand Bill of Rights Act 1990 as troublesome because it entangles social and political issues in the distorting language of "rights"; expects judges to attempt to reconcile incommensurable factors, risks specious interpretation of statutory provisions, and causes confusion about parliamentary sovereignty. This reads far too much into a non-exhaustive ordinary Act of Parliament when the non-enumerated "rights" included the constitutional bulwark of parliamentary sovereignty, itself a "fundamental customary right of the subject": see Goldsworthy, above n 7, at 190. Elaboration would require a very lengthy analysis, but see generally, for example, Tom Campbell, Keith Ewing and Adam Tomkins (eds) *Sceptical Essays on Human Rights* (Oxford University Press, Oxford, 2001); Nigel Biggar *What's Wrong with Rights?* (Oxford University Press, 2020); and Griffith, above n 57.

146 RI Carter *Burrows and Carter Statute Law in New* Zealand (6th ed, LexisNexis, Wellington, 2021) at 478–479.

147 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [252].

148 *R v J* [2004] UKHL 42, [2005] 1 AC 562 at [15]. See also Goldsworthy on the courts' "obligations" regarding legislation, below n 175.

149 Diggory Bailey and Luke Norbury *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed, LexisNexis, London 2020) at [11.3]–[11.4].

- The legislature is taken to be rational, reasonable and informed and pursuing a clear purpose in a coherent and principled manner.

- Legislation is taken to have been competently and grammatically drafted.

These are longstanding working presumptions which both confirm the settled roles of the legislature and the courts yet allow some degree of flexibility for the courts when the "evidence" (occasional lack of the coherence of the legislative drafting) serves to rebut the presumption. However, there are other "presumptions" which involve relatively recent expansion of the judicial role.

The "principle of legality"

In 1999, Lord Hoffmann described the "principle of legality" as follows:[150]

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. … The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

This paragraph, and its declaration of what has become known as "common law constitutionalism", has been endorsed by our Supreme Court.[151] It deserves close reading. The core justification offered, of too great a risk that the full implications of the meaning of the general or ambiguous language may have passed unnoticed in the democratic process, was remarkably disrespectful of the "democratic process". It was not supported by evidence nor accompanied by any explanation of how this was not effectively calling into question the proceedings in Parliament, contrary to art 9 of the Bill of Rights 1688. Moreover, in the New Zealand context at least, this reasoning would disregard the Attorney-General's report on any Government Bill's apparent inconsistency with the rights and freedoms contained in NZBORA.[152]

Lord Hoffmann's final sentence was striking in both its boldness and its errors. It asserted that, while acknowledging parliamentary sovereignty, the courts can limit legislators in the same manner as occurs in countries where this is the consequence of a written constitution. That inevitably brings to mind the United States of America. But the ability of US courts to declare legislation invalid because it contravenes the

150 *Simms*, above n 142, at 131.

151 For example, *Fitzgerald*, above n 142; and *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213. This "constitutionalisation" can also be described as "judicialization", on which see, for example, Finnis, above n 19; Griffith, above n 57; Allan, above n 57; and Ran Hirschl "The Judicialization of Mega-Politics and the Rise of Political Courts" (2008) 11 Ann Rev Pol Sci 93. More generally, see James Allan *The Age of Foolishness: A Doubter's Guide to Constitutionalism in a Modern Democracy* (Academia Press, Washington, 2022).

152 See New Zealand Bill of Rights Act 1990 [NZBORA], s 7.

Constitution is precisely what parliamentary sovereignty does *not* permit.[153]

In any event, Lord Hoffmann's formulation leaves troublesome questions: What are "fundamental" rights? What does "squarely confront" mean? Is vigorous debate in the legislative chamber sufficient? Is that an appropriate inquiry for the courts to embark on, given art 9 of the Bill of Rights 1688? And how do the courts themselves "squarely confront" and "accept the … cost" if they erode fundamental principles such as parliamentary sovereignty?

Further, does "express language" mean more "express" than "general or ambiguous words"? Or does it require the legislation to say: "Notwithstanding any other statute or rule of law …"?[154] Or "Notwithstanding each section of the New Zealand Bill of Rights Act 1990…"?

The answers to those questions, and the legitimacy of this view of "legality", matter in an era where political (and moral and historical) debates are regularly framed in terms of "rights", and judges are invited to adjudicate them.[155]

It might be thought that commonsense and judicial restraint would invariably prevail when plainly "political" issues are litigated in this way. That was the approach taken by the Court of Appeal in 2022 in *Make it 16 Inc v Attorney-General*, declining to make declarations of inconsistency about voting age limits in the Electoral Act 1993 and Local Electoral Act 2001:[156]

> It is an intensely and quintessentially political issue involving the democratic process itself and on which there are a range of reasonable views.

However, the Supreme Court took the contrary view, and issued a declaration of inconsistency.[157] It declined to accept that Parliament had superior institutional competence to address the voting age limit.[158] It thought it relevant that Parliament had not considered the topic "frequently".[159] And it saw the "minority" status of those represented by the applicant as a strong factor in support of making the declaration.[160] While the Court emphasised that it could not and did not express a view on what the voting age should be,[161] that was of course lost in the news media coverage of the judgment.[162]

Legislative discontent

The early months of 2021 saw small stirrings of legislative irritation with the Court's "principle of legality" approach to statutory interpretation. In February 2021, the Court issued its judgment in *D (SC 31/2019) v New Zealand Police*.[163] This allowed an appeal against a District Court decision (affirmed on appeal to the High Court and the Court of Appeal) to make an order against "D" under the Child Protection (Child Sex

153 As Professor Goldsworthy has explained, the US revolution involved a rejection of legislative sovereignty and its replacement with written constitutions, adopted by special conventions, and enforceable by the judiciary. That has never been adopted in the UK or New Zealand. See Goldsworthy, above n 7, at 233.

154 Apparently not. For a majority of the Court in *Fitzgerald*, above n 142, the words "Despite any other enactment" in s 86D(2) of the Sentencing Act 2002, were not sufficient to oust s 9 of NZBORA (providing for the right to be free from torture, or cruel, inhuman or degrading treatment or punishment).

155 See, again, Griffith, above n 57.

156 *Make it 16 Inc v Attorney-General* [2021] NZCA 681, [2022] 2 NZLR 440 at [62].

157 *Make it 16 Inc v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683.

158 At [66]. The Court "acknowledge[d] the particular institutional competence of Parliament in these matters", but said "this is not a case of such complexity in terms of its resolution as to mean the Court is hampered in fulfilling its usual function [that is, to declare the law]". It was relevant that the case did not "involve a complex regulatory scheme": at [66], n 78.

159 At [64].

160 At [67].

161 At [57], [68] and [70].

162 See for example Vita Molyneux "Supreme Court rules in favour of lowering voting age to 16 in case by 'Make it 16' group" *The New Zealand Herald* (online ed, 21 November 2022).

163 *D (SC 31/2019)*, above n 151.

Offender Government Agency Registration) Act 2016. The Court held (unanimously) that registration was a penalty, and by 3:2 that, as the qualifying offence pre-dated the Act's commencement, a presumption against retrospective penalties applied to make the appellant ineligible for registration.

On the second point, after citing Lord Hoffmann's description of the "principle of legality", the leading judgment identified the apparent parliamentary intention in fact (ie, legislating *for* retrospectivity), but concluded that the Act was not sufficiently clear in signalling by express words a necessary implication that the presumption against retrospectivity was being displaced.[164]

One of the Judges dissenting on the point considered that the text and purpose of the Act were clear, and that the Court could not properly interpret a statutory provision to produce a result inconsistent with the text and purpose.[165]

Some five weeks later, under urgency, the House of Representatives passed all stages of an Amendment Bill in one day (by a 110–10 vote, with the Green Party opposing), effectively reversing the Court's analysis as inconsistent with Parliament's original (and continuing) intent.[166]

For the most part, MPs were content to debate the Bill as dealing with an earlier drafting error.[167] That was generous. However, there were signs of legislators' discontent with the Court:

- There were references to the lower Courts, and the Supreme Court minority Judges, being very clear about Parliament's original intent.[168]
- There were also mentions of the Amendment Bill being the third time that Parliament had addressed the issue, with consistent views.[169]
- Several MPs were adamant that registration was not a punishment.[170]
- The Opposition's Shadow Attorney-General saw a "very fundamental question … of who makes the rules, as a distinct question from who makes the rulings".[171] He added that, "Comity goes both ways".[172]
- A Government MP explained that MPs had clearly conducted the "rights balancing exercise" required.[173] Another Government MP answered the question, "Who makes the rules?" with: "Obviously, Parliament … is supreme".[174]

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164 At [75]–[82] per the Chief Justice and O'Regan J. The leading judgment recorded that interpreting the statutory regime to apply retrospectively to the appellant would "bring a coherence and consistency to the retrospectivity provisions" and also reflects "what appears to have been the parliamentary intention" as revealed in the speech of the responsible Minister and during the passage of subsequent amending legislation. Even so, their Honours held Parliament had not spoken with sufficient clarity to oust the presumption against retrospectivity, and that "clumsy parliamentary drafting is an insecure basis for finding a necessary implication": at [81].

165 At [281]–[286] per William Young J. Glazebrook J also dissented. Her Honour identified parliament's intent (to legislate retrospectively) from the history of the enactment and later amendments: at [190]–[199] and [214]–[223]. That history informed the analysis of the statutory text and purpose, leading Glazebrook J to ultimately conclude that Parliament "sought to enact a scheme that would apply to all those convicted after the [Act] came into force" and the majority's interpretation "runs counter to this purpose": at [248].

166 See the Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2021. In opposing the Bill, a Green Party MP invoked the Chief Justice's judgment as supporting the inefficacy of the Act: (17 March 2021) 750 NZPD 1533.

167 See for example (17 March 2021) 750 NZPD 1495–1496, 1498–1499, 1502, 1512 and 1537.

168 See at 1499 and 1503.

169 At 1503 and 1512. See also at 1509–1510.

170 At 1506–1507, 1513 and 1515–1516.

171 At 1523–1524.

172 At 1524.

173 At 1537.

174 At 1530.

In other words, within the debates on that Amendment Bill, there was recognition of what Professor Goldsworthy has described in more scholarly terms:[175]

> The courts' legal obligation [under parliamentary sovereignty] is … to interpret and apply every statute in a way that is consistent with Parliament's legal authority to enact it, and their corresponding obligation to obey it. In a small number of cases, what is called "interpretation" might be tantamount to disobedience under cover of a "noble lie". But if that were to become more routine, and generally condoned by the other branches of government, Parliament would no longer be sovereign.

Governments and legislators could justifiably query the cumulative effect of the relatively modern presumptions that legislation will not be interpreted according to its plain meaning and purpose unless it passes a series of presumptions of compliance with: (1) Treaty principles; (2) international instruments; (3) the NZBORA; and (4) rights within the principle of legality.[176] Standing back, I doubt that the Court's current approach to statutory interpretation fits with Lord Bingham's "duty" to give full and fair effect to the meaning of a statute. Rather, it indicates a relatively new tension between the branches of our government. It extends beyond the traditional protection of a special class of rights which everyone living under a democracy under the rule of law should enjoy.[177] More fundamentally, it demonstrates inconsistency with wider public assumptions about just who does (and should) make the law.

VII. "COUNTER REVOLUTIONARIES"?

No one can read the Advisory Group report or the debates in Parliament on the Supreme Court Bill and sensibly conclude that the executive and legislative branches of government sought a "legal revolution" from enactment of the 2003 Act.[178] Any general expectation that the 2003 Act provided the key to our courts escaping from the "Least Dangerous Branch" box and becoming leading agents of societal change would have involved major political ructions. It would also have prompted widespread concerns by advocates and other lawyers about the predictability of the law, and the associated erosion of a key aspect of the rule of law.

Indeed, as noted earlier, s 3(2) of the 2003 Act expressly referred to "New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament". That was and is the Parliament that has full powers to make laws under s 15 of the Constitution Act 1986; and whose proceedings "ought not to be impeached or questioned in any court" under article 9 of the Bill of Rights 1688.[179]

The Sovereignty of Parliament

As Goldsworthy observed:[180]

> When judges question the doctrine [of parliamentary sovereignty], the potential threat posed by judicial activism to the powers of the legislature and executive is much more serious [than judicial review of executive actions]. What is at

175 Jeffrey Goldsworthy *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, Cambridge, 2010) at 225.

176 I have not addressed the first three of those in this paper, for reasons of space, but see, for example, the Finnis/Glazebrook exchange, above n 19.

177 See *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255 at [43], citing *R v Lord Chancellor, ex parte Lightfoot* [2000] QB 597 (CA) at 609.

178 To borrow Lord Reid's phrase: see above at n 66, at 25.

179 Bill of Rights 1688 (Imp) 1 Will & Mar Sess 2 c 2, art 9, which continues to apply in New Zealand pursuant to sch 1 of the Imperial Laws Application Act 1988 and is supplemented by s 9 of the Parliamentary Privilege Act 2014 (specifying that art 9 of the Bill of Rights continues to have effect in the manner prescribed by subpart 2 of the Parliamentary Privilege Act 2014).

180 Goldsworthy, above n 7, at 3.

> stake is the location of ultimate decision-making authority – the right to the 'final word' – in a legal system.

As will already be plain, I consider that the legislative statement of New Zealand's "continuing commitment" to parliamentary sovereignty *is* the "final word". Further, it involves definitive rejection of the contrary views of dissenters, not least Lord Cooke of Thorndon, which were well known at the time of the enactment of the Supreme Court Act 2003.

Nevertheless, by 2005, Goldsworthy was writing as follows:[181]

> Today, a number of judges and legal academics in Britain and New Zealand are attempting a peaceful revolution, aimed at toppling the doctrine of parliamentary sovereignty and replacing it with a new constitutional framework in which Parliament shares ultimate authority with the courts. They describe this framework as "common law constitutionalism", "dual" or "bi-polar" sovereignty or as a "collaborative enterprise" in which the courts are in no sense subordinate to Parliament. But they deny that there is anything revolutionary, or even unorthodox, in their attempts to establish this new framework.
>
> …
>
> It is sometimes unclear just how radical the revolutionaries' conclusions really are. There are three claims they might be making: first, that Parliament never was sovereign — that the doctrine of parliamentary sovereignty has always been mistaken as a matter of law; secondly, that even if Parliament was sovereign, recent developments mean that it no longer is; and thirdly, that even if Parliament is still sovereign, times are changing and the judiciary is unlikely to recognise its sovereignty much longer.

Goldsworthy's New Zealand "revolutionaries"[182] were the Chief Justice, Dame Sian Elias, by then presiding over the Supreme Court; Sir Edmund Thomas, by then an acting judge of the Supreme Court; and Professor Philip Joseph.[183] Professor Goldsworthy was responding to earlier extra-curial writing by those who were members of the Court.

The Supreme Court Bill was introduced and received its first reading in December 2002.[184] It made no mention of parliamentary sovereignty.[185] However, in March 2003 the Chief Justice, Rt Hon Dame Sian Elias presented a paper in Melbourne on "sovereignty" (being the same

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181 Jeffrey Goldsworthy "Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty" (2005) 3 NZJPIL 7 at 8–9 (footnotes omitted). See also his article "Parliamentary Sovereignty and Popular Sovereignty in the UK Constitution" (2022) 81 CLJ 273.

182 Perhaps "counterrevolutionaries" if it is accepted (as I do) that the assumption of British sovereignty in and after 1840 was revolutionary: see FM Brookfield *Waitangi & Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 1999) at 35 and 171; and Jack Hodder "Capitalism, revolutions and our rule of law" (2012) 12 OLR 627 at 632–636.

183 Referring to extra-curial writing by Sian Elias "Sovereignty in the 21st century: Another spin on the merry-go-round" (2003) 14 PLR 148 and by Edward W Thomas "The Relationship of Parliament and the Courts" (2000) 31 VUWLR 5, and to writing by Philip A Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 KCLJ 321.

184 Supreme Court Bill 2002 (16-1). The Bill's First Reading occurred on 17 December 2002.

185 Members of the Opposition raised significant concerns in the First Reading debate regarding the relationship between the Supreme Court and Parliament. The National Party spokesperson for the Justice portfolio in 2002, Simon Power, highlighted the significance of the constitutional change brought about by the establishing of the Supreme Court, not least of which was the Court's power and authority to shape how legislation is interpreted.

paper Professor Goldsworthy wrote in opposition to).[186] This did not go unnoticed.

Slouching towards *Marbury*?

One of the radical aspects of departing from parliamentary sovereignty would be to transform the final appellate court into the position of a "constitutional" court such as the Supreme Court of the United States of America. There, with an originally revolutionary *written* constitution, Marshall CJ was able to say, as long ago as *Marbury v Madison* (1803), that the Supreme Court would declare what is required by "the *supreme* law of the land" — the Constitution itself — and that legislation repugnant to the constitution would be void.[187]

It is worth remembering that the *Marbury* reasoning involved a logical progression: from "the people"[188] and the right to establish fundamental principles for their future government; to a written constitution reflecting such principles (a superior, paramount law, unchangeable by ordinary means); to the judicial province and duty under the constitution to say what the law is; to the judicial power to declare that the legislature has failed to comply with the requirements of the constitution; and the consequence — that any such enacted legislation is void.

It is equally worth remembering that such logic, based on the "people", simply does not apply to our "unwritten" constitution. Attempts to bootstrap judicial power in that context invites conflict between the judicial branch of government and the (democratically accountable) other branches.

This is a matter of contemporary dispute in Israel, which also lacks a written constitution. The self-justificatory analysis of the former Chief Justice Aharon Barak prompted memorable surprise even in the United States of America. Judge Richard A Posner, reviewing Barak's book in 2007, wrote extrajudicially of Barak that he:[189]

> … takes for granted that judges have inherent authority to override statutes. Such an approach can accurately be described as usurpative. … It is thus the court that makes Israel's statutory law, using the statutes themselves as first drafts that the court is free to rewrite.

Posner's prose captures well Goldsworthy's "final word" point noted above:[190] Is the language settled at the end of the legislative process merely a "first draft" that the courts can rewrite?

Returning to New Zealand, another radical aspect of a departure from parliamentary sovereignty would be an intense focus on the identity of judges and appointment processes.[191] The past and current anonymity of our senior judges would be unlikely to continue. There would be demands for some transparent appointment process, perhaps along the lines of the United States Senate Judiciary Committee's role. The effective curtailing of parliamentary sovereignty, once widely recognised, would make demands for this both inevitable and justifiable. It would be the minimum democratic price payable for acceptance that we are moving or have moved to public policy decision-making being substantially regulated or determined by "unelected officials" — sometimes labelled "hero judges".[192]

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186 Elias, above n 183.

187 *Marbury v Madison* 5 US 137 (1803) at 177 and 179–180.

188 Echoing Alexander Hamilton a few years earlier: "[W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter … by the fundamental laws": see "Federalist No 78", above n 1.

189 Richard A Posner "Enlightened Despot" *The New Republic* (online ed, 23 April 2007), reviewing Aharon Barak *The Judge in a Democracy* (Princeton University Press, Princeton, 2008) at 233. See also Robert H Bork "Barak's Rule" (2007) 27 Azure 125.

190 See n 180 above.

191 As noted above at n 185, similar concerns were raised by members of the Opposition during the First Reading debate on the Supreme Court Bill.

192 On which, see John Gava "The Rise of the Hero Judge" (2001) 24 UNSWLJ 747. Gava asserted at 747 that his title identified "a catastrophic

The Supreme Court Bill

The potential for a *Marbury*-like transformation through a new court of final appeal here did not go completely unnoticed in the legislative process. For example, the Opposition's contributions opposing the Supreme Court Bill, noted earlier. Independently, I and others submitted to the select committee that a revised purpose statement should be added to the Bill (which, when introduced, had nothing like what became s 3(2)).[193]

In the end, after the select committee report, the provision that became the s 3(2) "commitments" was added prior to enactment of the 2003 Act.

Within a relatively short time, the concern level had risen. The Deputy Prime Minister, Hon Dr Michael Cullen entered the fray. In an address to the 2004 Public Law Conference, he noted the rejection of the 1980s Palmer proposal for entrenching a "higher law", adding that: for the Courts to now "find" that a "higher law exists which modifies the constitutional status of the New Zealand Parliament" would "amount to constitutional change by stealth".[194]

Dr Cullen went on to categorise parliamentary sovereignty as an "assertion", and not (as Dame Sian Elias had earlier suggested) an "assumption". He said it was the assertion:[195]

> … that has been the major driving force of English constitutional history, namely that executive and legislative power should be exercised by a representative and democratically elected body, rather than a monarchy, aristocracy or even a meritocracy.

If constitutional change was to occur, it should be:[196]

> … subject to the democratic process — as it has been in the past — and not through decisions of appointed Judges. It is for the people to grant the Courts a broader constitutional mandate.

In his "revolutionaries" article, Professor Goldsworthy agreed with Dr Cullen, but also anticipated more subtle lines of challenge to parliamentary sovereignty which are, I think, more recognisable now some two decades on.[197] First:[198]

> … the tendency to describe important common law principles—and now statutes—as having 'constitutional' status, which entitles them to special protection when statutes that might otherwise impinge on them are interpreted.

Second, the recognition of the existence of "constitutional rights" by "the common law". He rather generously considered explanations other than that this is a cynical use of the declaratory theory (yes, there is a "cave"). But the legitimate and necessary alternative explanation would have to be a consensus of "senior legal officials" (*not* limited to judges) that the relevant rules of recognition had changed.[199]

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development", but observed that: "It is hardly surprising that those within academia and the media who see themselves as progressives view [activist] judges in heroic terms. After all, the discovery of rights and a suspicious attitude to the past is appealing to the progressive mind."

193 See Supreme Court Bill 2003 (16-2) (select committee report) at 22–24.

194 Michael Cullen "Parliamentary Supremacy over Fundamental Norms" (address to the Public Law Conference, Legislative Council Chamber, New Zealand Parliament, 29 October 2004), subsequently published in [2004] NZLJ 243. References are to the New Zealand Law Journal publication.

195 At 243. Compare Goldsworthy's "political fact" analysis: Goldsworthy, above n 7, at 234.

196 At 243. In his speech notes, Hon Michael Cullen added that it is "not for the Courts to build [a broader constitutional mandate] upon an interpretation of constitutional history".

197 Goldsworthy "Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty", above n 181, at 37.

198 At 33.

199 At 35–36.

Goldsworthy also anticipated how revolutionary victors could rewrite history:[200]

> If [Parliament] does lose its sovereignty, the law books will no doubt be retrospectively rewritten. In cases of revolution, as in cases of war, history is written by the victors. If the legal revolution succeeds, it will not be acknowledged to have been a revolution. It will be depicted either as a judicial discovery, or rediscovery, of what the law had always been or as the exercise of authority, which the judges have always possessed, to develop the "common law constitution".

VIII. A MURKY CRYSTAL BALL

Our Supreme Court was legislated into existence in 2003. It was designed to replace the Privy Council as New Zealand's court of final appeal, but to act within the traditional judicial decision-making role. In reflecting on the Court's first two decades of operation, I am unable to quell a sense of unease. This reflects my perception of occasional but important departures by the Court from consistent reinforcement, including by clarification, of the predictability — and hence legitimacy — of the rules enforceable within our legal system.

At least in part, I perceive such departures as reflecting a simple but flawed line of reasoning which goes: New Zealand has an unwritten constitution; that constitution is part of our law; the courts have the authority to declare what the law is; the courts inevitably make or "develop" the law; and thus the courts can remake the (unwritten) constitution — including by redefining, among other things, the rule of law, the sovereignty of Parliament and the nature of the common law. All of which may be used to justify moves to, for example, constitutionalise the Treaty, to constrain the scope of statutory language and to present the Supreme Court as a sophisticated law reform agency or diviner of societal values.

Others of us recall the rejection of similar reasoning in response in the 1980s "supreme law" Bill of Rights proposal. We have also seen that as reinforced by the Supreme Court Act's (and now the Senior Courts Act's) explicit recording of New Zealand's "commitment to the rule of law and the sovereignty of Parliament". Those commitments both reflect and underpin the core ideas of predictability and democratic legitimacy at the heart of our legal system. Losing sight of these core ideals, or being tempted away from them by the flawed logic noted earlier, risks transforming our judiciary away from its traditional, apolitical and appropriate "Least Dangerous Branch" place.

Attempting to summarise two decades of work by the Supreme Court is an impossible mission. Attempting to predict what may happen in the next two decades involves a greater degree of impossibility. Nevertheless, given the Court's apparent direction of travel in the recent past, my crystal ball sees murky outlines of less predictable law, and of an increased and unprecedentedly sharp political debate about the role of the Court.

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200 At 37.