Dame Helen Winkelmann, Chief Justice of New Zealand

The power of narrative – shaping Aotearoa New Zealand's public law[1]

"The Making (and Re-Making) of Public Law" Conference
Dublin 6-8 July 2022

When we look for the forces at work in the making of Aotearoa New Zealand's public law, it is right, as some commentators have done, to acknowledge the importance of a national psyche and culture which favours pragmatism and simplicity over complex theoretical frameworks.[2] This is a culture that values compliance with the law and representative government but is not necessarily all that interested in what it is that secures the rule of law.[3]

It is important also to describe New Zealand's constitutional history. Its initial reluctance to accept full nationhood and its search for a place in the international order. The relative informality of much of its constitutional structure and in particular the absence of a formal constitutional charter. This leaves a constitutional landscape that is constantly being reshaped — by legislation, by court decisions, and by significant events. The lack of a constitutional charter means that, as Professor Geiringer puts it, "we are constantly reconstituting ourselves. There is no constitutive moment: just a series of constitutive iterations".[4]

It is relevant to understand that there are few formal barriers to accessing the courts in the realm of public law (I say nothing of obstacles created by expense and complexity of law). Statutory bars or barriers to seeking judicial review are few, the principles applied as to standing are fairly described as permissive, and the courts have taken a broad view as to what is amenable to judicial review.[5] Some scholars have remarked also upon what they see as a feature of our public law – a tendency (regrettable on their account) of New Zealand judges to under theorise issues such as grounds of review or intensity of review[6] – a legacy, perhaps, of a search for simplicity and accessibility in the law.[7]

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[1] I am also deeply indebted to the work of my clerk, Josie Butcher, for her assistance in the preparation of this paper.

[2] Michael Taggart "The New Zealandness of New Zealand public law" (2004) 15 PLR 81.

[3] See, for example: Sian Elias "Transition, Stability and the New Zealand Legal System" (2004) 10 Otago LR 475 at 475; Geoffrey Palmer "The Bill of Rights fifteen years on" (paper presented to the Ministry of Justice Symposium, Wellington, 10 February 2006) at [39] and John Priestley "Chipping Away the Judicial Arm?" (2009) 17 Waikato L Rev 1 at 23.

[4] Claudia Geiringer "What's the story? The instablility of the Australasian bills of rights" (2016) 14(1) 156 IJCL at 171. See also Janet Mclean "The Unwritten Political Constitution and its Enemies" (2016) 14(1) IJCL 119.

[5] Sian Elias "Judicial Review and Constitutional Balance" (2019) 17 NZJPIL 1 at 9. See also Matthew S R Palmer and Dean R Knight *The Constitution of New Zealand* (Hart Publishing, Oxford, 2022) at 168.

[6] Dean R Knight *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press, Cambridge, 2018) at 255-256. See also Elias, above n 5, at 4.

[7] Referring to Lord Cooke's quest for a fairness and simplicity in Aotearoa New Zealand's public law: Robin Cooke "The Struggle for Simplicity in Administrative Law" in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s* (Oxford University Press, Auckland, 1986) 1. For further explanation of Lord Cooke's

As a working judge my interest is inevitably captured by the issues the courts are being called upon to decide and by the arguments we hear. This has led me to the reflection that it is historical and social forces, operating as they do within a system without a constitutional charter, that are today the major forces shaping New Zealand's public law. In this paper I consider how Te Tiriti o Waitangi (the Treaty which lies at the beginning of the story of New Zealand as a nation), tikanga (New Zealand's first law), our statutory bill of rights and New Zealand's commitment to the international order have all shaped and continue to shape our public law. I describe how it is that these forces have shaped and reshaped dynamics between Parliament, the Executive and the courts. Their impact can be seen in the development of common law presumptions guiding statutory interpretation, in the reassessment of the requirements of comity between the branches of government and in the development of remedial responses to breaches of our statutory bill of rights.

A little historical and constitutional context

The creation of a new nation

English settlers began to arrive in New Zealand in numbers in the early part of the 19th century. They found that the land was already occupied by Māori, who had sophisticated social structures, strong tribal affiliations, and complex rules regarding social relations, their relationship with the land, and the achieving of balance following any wrong. These customs, rules, and values are collectively referred to as tikanga. They had (and continue to have) such status in Māori society that tikanga is now recognised as New Zealand's first law.[8]

In 1840 the British Crown entered into a treaty with Māori Rangatira (chiefs), representing various hapū (subtribes). Drafted by Crown officials with the assistance of Anglican missionaries, it was prepared in both the English (this version is commonly referred to as the Treaty) and Māori language (referred to as Te Tiriti). Te Tiriti was signed by 540 rangatira, but only 39 of those signed the English version.

In the (English text) of the Treaty Māori ceded to the Queen all rights of sovereignty which they possessed and granted to the Crown rights of pre-emption in relation to their lands. Māori were guaranteed in return "the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties which they may collectively or individually possess" and the rights and privileges of British subjects.[9]

However, the document written in te reo Māori (Te Tiriti), conveyed different concepts. It guaranteed Māori tino rangatiratanga (unqualified chieftainship) over their lands, villages and all their treasures (taonga). It ceded to the British, only kāwanatanga, which could be

influence in New Zealand's public law see in Dean R Knight "Simple, Fair and Discretionary Administrative Law" (2008) 39 VUWLR 99 at 102.

[8] Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato L Rev 1 at 2-5 [Lex Aotearoa]. See also *Re Edwards (Te Whakatōhea No 2)* [2021] NZHC 1025 at [69]; *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291, [2021] 2 NZLR 1 at [2] and [43].

[9] Treaty of Waitangi 1840, art 2 (English text).

construed as governorship. The exact terms of what was agreed has been the subject of debate since that time.

The history that ensued did see the Crown establish sovereignty over the country, with New Zealand becoming a colony within the British Empire.[10] Within this new colony land became a flash point in relations between Māori and settlers.[11] Settlers wished to acquire land from Māori, but in accordance with tikanga, land was not a commodity to be bought or sold. The loss of land by Māori lies near the beginning of a long and complex history of dispossession, leading to the economic and social marginalisation of the Māori people. Their social structures were damaged or destroyed, particularly through the loss of chiefly authority (tino rangatiratanga) and damaging of iwi (tribes) and hapū (subtribes) communities, with Māori becoming the most imprisoned people in New Zealand.[12]

A calling to account for past and present wrongs

Although Māori have maintained calls for justice for breaches of the promises made to them in 1840, for a long time there was little political interest in admitting these wrongs, confronting these consequences, and attempting to address them. This began to change with the creation of the Waitangi Tribunal, established in 1975 under the Treaty of Waitangi Act 1975, to enquire into breaches of the Treaty. The Tribunal's jurisdiction was expanded in the 1980's to enquire into historical wrongs. The work of the Waitangi Tribunal undoubtedly contributed to the role Te Tiriti/the Treaty has played as a major engine driving the development of public law in New Zealand. Along with this has been the question, asked more insistently in the last decade, as to the place of the first law of New Zealand, tikanga, in our legal order.

Constitutional settlement

Representative government was established in New Zealand in 1853. Although full self-government was offered by the Statute of Westminster in 1931, New Zealand can be said to have moved reluctantly to independence from England, waiting 16 years to take up that opportunity. Even then, the New Zealand Parliament was not fully independent from England until the Constitution Act was passed in 1986.

The New Zealand court system waited longer for full independence. It was not until 1 January 2004 that the right to appeal to the Privy Council was removed and a final court of appeal established within New Zealand – the Supreme Court .[13] The establishment of the court was recognition, in the words of the relevant legislation, that New Zealand is an independent

[10] The Waitangi Tribunal has concluded that the Crown did not acquire sovereignty through the signing of Te Tiriti – whilst also acknowledging that sovereignty had been acquired at some point: Waitangi Tribunal *He Whakaputanga me te Tiriti: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 526-527.

[11] With the British forces ultimately bringing arms against iwi in order to pursue the colonial project leading to significant loss of life and land for Māori.

[12] Te Uepū Hāpai i te Ora | Safe and Effective Justice Advisory Group *He Waka Roimata – Transforming our Criminal Justice System* (2019) at 6.

[13] Supreme Court Act 2003, s 42. There were transitional provisions, see ss 50-51. This Act has since been repealed, however, these provisions have been retained in the Senior Courts Act 2016, sch 5, pt 1.

nation. The court was established with the intention that it "would enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history, and traditions."[14]

A late addition to our constitutional settlement – a statutory Bill of Rights

The enactment of the New Zealand Bill of Rights Act in 1990 certainly created the potential for a judicial voice to be heard more loudly in relation to New Zealand's constitutional settlement. The purpose of the Act was to affirm, protect and promote the rights and freedoms recorded there and to give effect to New Zealand's commitments under the International Covenant on Civil and Political Rights.[15] It was conceived as a supreme law, but not enacted in that form. As enacted, the Bill of Rights excludes the possibility of legislation being repealed, amended or disapplied by reason only of inconsistency with the Act's provisions.[16] New Zealand is one of six commonwealth jurisdictions to have adopted a statutory bill of rights – along with Canada (its Statutory Bill of Rights was superseded by the Canadian Charter of Rights and Freedoms), the United Kingdom, the Australian Capital Territory, and the Australian States of Victoria and Queensland.

Constitutional Culture

Aotearoa's unicameral parliament and its lack of any federal constitution means that its constitutional arrangements are different to those of the United Kingdom, Australia and Canada, contributing to a powerful executive branch. Academics such as David Williams and Mark Hickford argue that as a result of Aotearoa's unwritten constitution, constitutional matters are largely governed by what they refer to as "political constitutionalism".[17] Political constitutionalism refers to the effect of the constitution in terms of its political operability in practice rather than its legal description in positive law terms.[18]

Academics suggest that as a result of the enhanced role of politics in our constitutional settlement, judges in Aotearoa tend to show considerable "judicial restraint" and deference.[19] Sir Geoffrey Palmer characterises the judiciary as "cautious" and "leery of" constitutional issues.[20]

[14] Supreme Court Act, s 3(1).
[15] New Zealand Bill of Rights Act 1990, long title.
[16] New Zealand Bill of Rights Act, s 4.
[17] David V Williams "Justiciability and tikanga: towards "soft" legal constitutionalism" (2021) 29 NZULR 649 at 650 referring to the use of the term in Mark Hickford "The Historical, Political Constitution — Some Reflections on Political Constitutionalism in New Zealand's History and its Possible Normative Value" [2013] NZL Rev 585 at 586. See also Edward Willis "Political Constitutionalism: The 'Critical Morality' of Constitutional Politics" (2018) 28 NZULR 237 at 238.
[18] As above.
[19] See, for example, Williams, above n 17, at 659 and Claudia Geiringer and Andrew Geddis "Judicial deference and emergency power: a perspective on *Borrowdale v Director-General*" (2020) 31(4) PLR 376 at 382-383.
[20] Geoffrey Palmer "What the New Zealand Bill of Rights Act Aimed to Do, Why It Did Not Succeed and How It Can Be Repaired" (2016) 14 NZJPIL 169 at 175.

Whilst history may record few constitutional showdowns between Parliament, the Judiciary and the Executive,[21] there have been points of tension. An examination of recent history shows occasions in which court decisions have led to a swift legislative response to undo or limit their effect.[22] However, there are also instances, some discussed in this paper, where other branches of government have responded constructively to court decisions bearing upon the functions and responsibilities of those branches.

Some have perceived a change in recent times — a movement away from judicial restraint or at least toward a "soft version of legal constitutionalism".[23] Any judge would be 'leery of' (to steal Sir Geoffrey's expression) making such generalisations. But in the cases I touch upon below, there is also an undeniable articulation of common law principle by the courts with structural implications for how statute law will be applied by the courts, and a determined assertion of their constitutional role to interpret and apply the law.

The story of the Treaty I Te Tiriti in New Zealand's public law.

In his article "What a difference a Treaty makes", Paul McHugh comments:[24]

> In the common law jurisdictions of North America and Australasia at the close of the 20th century, no area of public law matched the growth of activity in the aboriginal sphere. Aboriginal law grew like the proverbial beanstalk; its pitch sometimes frenzied, its direction and purpose often difficult to gauge.

McHugh describes how the different legal pathways followed in each jurisdiction can be traced to the existence or non-existence of treaties, and their status in domestic law. The first nations of Australia lack the protection of treaty rights. Canada's Constitution Act 1982 provides for express reference to "existing aboriginal and treaty rights".[25] Ultimately, McHugh suggests, although there are distinctive "national hues" there are also strong parallels between the different jurisdictions.[26]

As to the position in New Zealand, the case of *Te Heuheu Tūkino v Aotea District Māori Land Board* stands as authority for the proposition that Te Tiriti is not directly enforceable in New Zealand courts except in so far as it is made so by legislative authority.[27]

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[21] In the most famous case in which the courts articulated the limits of Executive power, the judge declined to make any remedial orders, allowing rather for a political solution: *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC). See Justice Stephen Kós "The Judiciary and the Executive: Robert Muldoon and the Judges" in John Burrows and Jeremy Finn (eds) *Challenge and Change: Judging in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) 113.

[22] See, for example: *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) and the Foreshore and Seabed Act 2004; *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 and the New Zealand Health and Disability Amendment Act 2013; *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713 and the Parliamentary Privilege Act 2014; *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 and the Child Protection (Child Sex Offender Government Agency Registration) Amendment Act 2021.

[23] Williams, above n 17, at 652. See also Claudia Geiringer "The Constitutional Role of the Courts under the NZ Bill of Rights: Three Narratives from *Attorney-General v Taylor*" (2017) 48 VUWLR 547.

[24] P G McHugh "What a difference a Treaty makes – the pathway of aboriginal rights jurisprudence in New Zealand public law" (2004) 15 PLR 87 at 88 (footnotes omitted).

[25] In the United States there has also, to some extent, been statutory protection of existing treaty rights: McHugh, above n 24, at 98-99.

[26] At 89-92.

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

It was social and political pressure which ultimately led to a political response to the issues of historical and racial justice in New Zealand. The creation of the Waitangi Tribunal in 1975 by the Waitangi Tribunal Act was part of that response. That legislation used for the first time, at least in statutory form, the expression the "principles of the Treaty" - principles which it did not define. Jurisdiction was conferred on the tribunal to inquire into whether "certain matters" were inconsistent with those undefined principles. The Act was statutory recognition that the Crown had obligations to Māori under the Treaty (an idea on which there was no public consensus at that time) and that breaches of those obligations should at least be avoided, even if it stopped short of conferring remedial powers on the Tribunal.[28]

It is hard to overstate the significance of this Act. It ensured that public resource would be devoted to investigating breaches, including, when its jurisdiction was extended in 1986, historical breaches. The historical accounts that were and continue to be recovered and documented by the Tribunal have contributed to our national understanding of these issues and have altered the political landscape.

The concept of "free floating" Treaty principles, not pinned to any expression in the text, broke a log jam created by the conflict between the language of the Treaty and Te Tiriti, and created a path forward through a contested space. As I come to, while the historical and legal legitimacy of these principles is now the subject of debate,[29] the use of the phrase "the principles of the treaty" has led to a body of jurisprudence which has reinforced Te Tiriti as a document of constitutional status.

The courts' engagement with the Treaty began in earnest in 1987 which was sparked by a reference to the principles of the Treaty in the State-Owned Enterprises Act 1986, an Act to enable government activities and assets to be owned and dealt with through companies. The Act raised the possibility that assets subject to Treaty claims could be transferred out of Crown ownership and so beyond the reach of Treaty claimants. Section 9 of the Act included, on the recommendation of the Waitangi Tribunal, that "nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty". In a case — commonly referred to as the *Lands* case — the Court of Appeal found that this provision did indeed require the Crown to act consistently with Treaty principles when transferring state assets which could be subject to a Treaty based claim to state-owned enterprises.[30] The Court found that the Treaty created an enduring relationship of a partnership with responsibilities akin to fiduciary duties, with each party accepting a positive duty to act in good faith, fairly, reasonably and honourably toward each other.[31]

The *Lands* case could have been a point of constitutional conflict. The decision is one of the most consequential in New Zealand's history. The relief granted included a requirement that

[28] Although limited remedial powers were conferred by amendments to the Act in 1989. For an explanation of the legislative history see *Haronga v Waitangi Tribunal* [2011] NZSC 53, [2011] 2 NZLR 53 at [56]-[77].
[29] See for example, the view expressed in Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Melbourne, 2005) 330 at 341-342.
[30] *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (HC and CA) [*Lands* case].
[31] At 664.

the Crown formulate a scheme of safeguards to ensure that Māori were not prejudiced in claims arising from breaches of the Treaty and that this scheme then be submitted to the Court for approval.[32]

Still more significant was how the President of the Court of Appeal, Justice Cooke, framed the decision:[33]

> …The prosaic language of the Court's formal orders should not be allowed to obscure the fact that the Maori people have succeeded in this case. Some might speak of a victory, but Courts do not usually use that kind of language. At the outset I mentioned that each member of the Court was writing a separate judgment. It will be seen that approaching the case independently we have all reached two major conclusions. First that the principles of the Treaty of Waitangi override everything else in the State-Owned Enterprises Act. Second that those principles require the Pakeha and Maori Treaty partners to act towards each other reasonably and with the utmost good faith. That duty is no light one. It is infinitely more than a formality. If a breach of the duty is demonstrated at any time, the duty of the Court will be to insist that it be honoured.

But Cooke P was also described the Court's actions as the orthodox application of statutory provisions – it was the legislature after all which had bound itself to the principles.[34] No constitutional showdown ensued — the Executive complied with the process set out in the decision. Parliament did not repeal s 9. Far from it — Parliament has continued to refer to "Treaty principles" in legislation – those provisions now referred to as a category as "treaty clauses".

Following the *Lands* decision, the Executive and then Parliament began in earnest the work of understanding and acknowledging breaches of Te Tiriti and then, through the Treaty settlement process, providing some form of recompense for those breaches (whether or not adequate).

Over the 35 years since the *Lands* case the courts have also continued to play a role in adjudicating between the Crown and Māori in relation to the rights and obligations arising from Te Tiriti. The impact of the Treaty principles in the area of public law, and in society has been profound.

I highlight two aspects of the engagement by the Courts in this area – in the area of statutory interpretation, and in adjudicating between the Crown and iwi in relation to negotiated Treaty settlements. Each has implications for our constitutional landscape and our public law.

Te Tiriti and Statutory interpretation

Today at least 35 statutes[35] contain explicit references to the Treaty. Public officials are required to act consistently with its principles – a requirement which has given rise to a steady

[32] At 667-668.
[33] At 667.
[34] At 659.
[35] See Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 89.

diet of judicial review proceedings in which the Treaty is invoked directly to challenge Executive decision-making.[36] An example of a treaty clause is s 4 of the Conservation Act 1987 which provides:

> This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi.

The inclusion of clauses such as this affect the interpretation of the Act itself, and of course, the obligations of decisionmakers under it, including the matters that they are obliged to consider, and the processes to be followed.

In recent years there has been a drafting trend towards including in statute how it is that the statutory scheme fulfils the Crown's responsibility under the Treaty.[37] But this trend toward more specificity in statutory expression has not diminished the extent of the obligations that have been found to arise under the Treaty – the courts developing a principle of statutory interpretation that legislation is to be interpreted with reference to the principles of Te Tiriti unless a contrary intention is made clear.[38]

This development began not long after the creation of the Waitangi Tribunal. It was accepted, at least at first instance level, that the Treaty and its principles were relevant to the interpretation of statutes, and that the principles of the Treaty were implicit relevant considerations in the exercise of statutory powers affecting Māori interests.[39] In the case of *Huakina Development Trust v Waikato Valley Authority* [40] Chilwell J said of the Treaty that it was part of the fabric of New Zealand society and "therefore part of the context" in which the court is to interpret and apply legislation.[41] This was an approach which did not turn on the existence of treaty clauses.

In the recent Supreme Court decision *Trans-Tasman Resources Ltd v Taranaki Whanganui Conservation Board (Trans-Tasman)* the impact of this development was made still more

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[36] The Treaty has featured extensively in the law of judicial review in New Zealand. I will not attempt to add to the scholarship of Matthew Palmer in which he provides an analysis of 53 cases in which the Treaty was directly invoked in judicial review proceedings: Matthew S R Palmer "Indigenous Rights, Judges and Judicial Review in New Zealand" in Jason NE Varuhas and Shona Wilson Stark (eds) *The Frontiers of Public Law* (Hart Publishing, Oxford, 2020) 123 at 135.

[37] R I Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) At 697. See also Matthew SR Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 96–101 and 183–184; and Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at ch 5.

[38] [38] See Natalie Coates "The Rise of Tikanga Maori 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 referring to the comments of the Supreme Court in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 (*Trans-Tasman*) at [151].

[39] Paul Rishworth "Writing things unwritten: Common law in New Zealand's constitution" (2016) 14 IJCON 137 at 151

[40] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC). See also *Barton-Prescott v Director General of Social Welfare* [1997] 3 NZLR 179 (HC).

[41] At 210.

explicit.[42] That case concerned an application by Trans-Tasman Resources for consent to undertake seabed mining off New Zealand's west coast. This would involve extracting seabed material from the region's iconic black sands. Up to 50 million tonnes of seabed material would be permitted to be extracted annually under that license.

Local iwi and conservation groups objected to the proposal. One of the principal issues for the court was the relevance of tikanga values and Te Tiriti based customary rights and interests – how were those interest to be weighed in the consenting process, indeed were they to be weighed at all.

The relevant statute, the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) contained a bespoke treaty clause, which particularised the sections that had been included in the Act "[i]n order to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi for the purposes of [the] Act".[43]

It was argued that it was significant to the interpretation of the EEZ Act that there was no general direction requiring the decision maker to give effect to the principles of the Treaty of Waitangi like that contained in the Conservation Act. The argument was made that this different articulation reflected a deliberate choice on the part of Parliament. In rejecting that argument, the Court said:[44]

> …the move to finely tuned subtle wording does not axiomatically give support to a narrow approach to the meaning of such clauses. Indeed, the contrary must be true given the constitutional significance of the Treaty to the modern New Zealand state. The courts will not easily read statutory language as excluding consideration of Treaty principles if a statute is silent on the question… An intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear.

It has been suggested that this analysis brings the principles of the Treaty into the group of values and rights protected by the principle of legality in New Zealand.[45] I reserve my views on that issue for when it arises for decision.

Te Tiriti and constitutional comity

Although this was not the case in the early days of the process, Treaty settlements in New Zealand now take place in accordance with carefully worked out and published treaty

[42] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 [*Trans-Tasman*].
[43] At [140] referring to s 12 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.
[44] At [151] (footnotes omitted).
[45] Coates, above n 38, at 81.

settlement policies, complete with complex fiscal considerations.[46] Settlements that are concluded are then given effect by legislation.

Not infrequently, Treaty settlements give rise to disputes – including in relation to the mandate of those who purport to reach agreement on behalf of potential claimants, and in relation to overlapping claims. The courts have on occasion taken the view that issues are non-justiciable where implementation of the settlement includes legislation (which it usually will), invoking the principle of non-interference in Parliamentary proceedings.

In his article "Justiciability and Tikanga" David Williams describes a narrowing of the areas of recognised non-justiciability in recent cases before the courts.[47]

While there are a number of cases that could be discussed in this area,[48] I focus on two, one at the beginning of the story— *Te Runanga o Wharekauri Rekohu Inc v Attorney General* (also referred to as the *Sealords* case)[49] and one, at the end point (end point only in the sense that it is the most recent in time) – *Ngāti Whātua Ōrākei Trust v Attorney-General (Ngāti Whātua).*[50]

The first, the *Sealords* case, was one of several critical decisions which have, at least until recent times, shaped the relationship between Te Tiriti, Parliament, the Executive and the courts. In *Sealords*, a challenge was brought to a settlement deed between the Crown and certain Māori representatives, expressed to be between the Crown and all Māori, to settle fisheries claims. The settlement was of historic dimensions – it would settle Te Tiriti based claims by Māori to commercial fishing rights.

The deed contemplated the introduction to Parliament of legislation which would carry many of the terms of settlement into effect and when enacted, would bind all Māori. In an affidavit filed in the proceedings the responsible Minister said the Government intended to proceed, as it was contractually obliged to, by introducing legislation to Parliament.

The deed did not define who Māori were, and those who negotiated the deed did not claim to have a mandate on behalf of all Māori, and certainly not on behalf of the claimants in the proceedings. The claimants argued that they were not bound, and that proper process had not been followed to secure their agreement to the settlement.

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[46] For a fuller account of these policies see Williams, above n 17, at n 23 referring to Office of Treaty Settlements, *Healing the past, building a future/A Guide to Treaty of Waitangi Claims and Negotiations with the Crown/ Ka tika ā muri, ka tika ā mua: He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana ki te Tiriti o Waitangi me ngā Whakaritenga ke te Karauna* (Office of Treaty Settlements, Wellington).

[47] Williams, above n 17, at 659-660.

[48] See, for example: *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) [*Sealords*]; *Ngati Apa Ki Te Waipounamu Trust v Attorney-General* [2004] 1 NZLR 462 (CA); *Milroy v Attorney-General* [2005] NZAR 562 (CA) and *Ngāti Te Ata v Minister for Treaty of Waitangi Negotiations* [2017] NZHC 2058.

[49] *Sealords*, above n 48.

[50] *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 [*Ngāti Whātua*].

The relief sought in the High Court and Court of Appeal included declaratory orders that the settlement was not binding or enforceable against Māori, was a breach of the Treaty of Waitangi and/or a breach of the Crown's fiduciary duties. They also sought prohibition orders restraining the Crown and Ministers from introducing legislation to implement the settlement.

Writing for the Court, Cooke P accepted that the deed was "a most unusual document and, perhaps even designedly, obscure in some major respects", observing that the signatories for Māori did not claim to have authority for or intention to bind all Māori.[51] But he reasoned, the deed was plainly not intended to bind the Crown to introduce legislation. Once that was understood it was clear the proceedings were misconceived, because the deed was non- binding on all signatories. As to the relief sought, he continued that it would be "wrong and almost inconceivable for the Courts to attempt to dictate, by declaration or a willingness to award damages or any other form of relief, what should be placed before Parliament".[52]

There are other cases that touched upon where the boundary of this principle of non-interference in Parliamentary proceedings lay. But for the purposes of this paper, I fast forward to *Ngāti Whātua*, a case which again arose in the context of a treaty settlement. The iwi Ngāti Whātua had settled its claims in respect of Tāmaki Makarau Auckland. It sought to challenge Ministerial decisions to transfer land in that region (in which it claimed mana whenua) in order to settle other iwi claims – settlements which would be carried into effect by legislation. Ngāti Whātua challenged both the Ministerial decisions involved and the Crown's settlement policy as to how settlements were to be undertaken in areas where there were overlapping interests. It argued that the settlements were inconsistent with its rights arising in accordance with tikanga and under the treaty. It challenged the application of the Crown's overlapping claims policy in relation to land that was the subject of the settlements, arguing that treaty and tikanga rights must be determined prior to the making of a settlement offer. The Crown sought to strike-out the claim on the basis of non-justiciability – the relief sought would interfere with Parliamentary proceedings.

The Court took a fine grained approach to assesing whether the claim as formulated, or as it could be reformulated, engaged the principle of non-interference with Parliamentary proceedings. Ellen France J, writing for the majority, endorsed the view that it "is a matter of assessing on which side of the line a particular proceeding falls".[53] Analysing the nature of the claims and the remedies sought she identified those in respect of which the Court would be called upon to do no more than fulfil its usual function of declaring rights. And in so doing she signalled a re-setting of that line from where earlier decisions had placed it:[54]

> It is, nonetheless, appropriate to sound a note of caution at the extent to which the principle of non-interference in [P]arliamentary proceedings has been held to apply to decisions somewhat distant from, for example, the decision of a minister to introduce a Bill to the House or from debate in the House. It would be overbroad to suggest that the fact a decision may, potentially, be the subject of legislation would always suffice

[51] *Sealords,* above n 48, at 307.
[52] At 308.
[53] *Ngāti Whātua*, above n 50, at [44] citing Simon France J in *Te Ohu Kai Moana Trustee Ltd v Attorney General* [2016] NZHC 1798, [2016] NZAR 1169 at [24].
[54] At [46].

> to take the advice leading up to that decision out of the reach of supervision by the courts. That would be to ignore the function of the courts to make declarations as to rights.

What emerges clearly from *Ngāti Whātua* is how important the formulation of the claim is. Seeking declarative relief as to rights or interests, or even as to the lawfulness of the application of the very policy engaged in a settlement may not fall on the wrong side of the line if the relief is not directed to Parliamentary proceedings, nor to the very decisions (the ministerial decisions to settle) which led to the initiation of those proceedings.[55] The courts will not be precluded by the principle of non-interference with Parliamentary proceedings from declaring the law merely because contemplated legislation lies somewhere in the factual matrix of the dispute between the parties.

Te Tiriti and the future

This narrative of these cases makes clear that while the principle in *Te Heuheu* (that the Treaty is not directly enforceable before the courts unless incorporated by statute) remains part of our law, the tide of public law has flowed around it — one commentator has described the principle in *Te Heuheu* as "a crumbling façade".[56] Today few would challenge Te Tiriti as one of the engines driving developments in our public law.

Perhaps the next chapter has already been written with the creation of the 2019 Cabinet Circular "Te Tiriti o Waitangi Guidance".[57] The circular sets out guidelines agreed by Cabinet for policy-makers to consider the Treaty in their work.

In New Zealand, the Cabinet Manual is perhaps the most authoritative statement in a single document of how our constitution works in practice. It guides and shapes the actions of Ministers and public servants.[58] Although it does not create justiciable rights[59]the Cabinet Manual has been treated as relevant to assessing the lawfulness of Ministerial actions.[60]

The manual lists the Treaty as one of the "major sources of the constitution" and describes the ways in which the executive must take the Treaty into account in formulating policy and when submitting bills. The 2019 Cabinet circular signals a deliberate move away from the concept of the free-floating treaty principles guiding executive action, and toward a focus upon the text: "whilst the courts and previous guidance have developed and focussed on the principles of the Treaty, this guidance takes the text of the Treaty as its focus."[61]

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[55] And on the other side of the coin, in the determination of the remitted proceeding *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843 Palmer J at [609] cautioned that it would be inconsistent with the honour of the Crown were the Crown to attempt to cloak its actions in Parliamentary proceedings for the deliberate purpose of avoiding judicial review of actions it knew were inconsistent with the Treaty of Waitangi.
[56] Coates, above n 38, at 81.
[57] Cabinet Office Circular "Te Tiriti o Waitangi/Treaty of Waitangi Guidance" (22 October 2019) CO19/5.
[58] Cabinet Office *Cabinet Manual 2017*.
[59] *Rabson v Attorney-General* [2016] NZHC 2876.
[60] See, for example *Peters v Attorney General* [2021] NZCA 355, [2021] 3NZLR 191.
[61] Cabinet Office Circular, above n 57, at [17].

Tikanga

Any discussion of the development of the law in New Zealand to meet the needs of this nation must address the status of tikanga as a source of law. The story is one of delayed development. In the century and a half after the signing of Te Tiriti, tikanga's status as law, and even its existence was seldom acknowledged by the courts.

There is now a reckoning with this history. In case after case, tikanga's status as a source of values, and even of law, is acknowledged.[62] It is acknowledged that tikanga was the first law of New Zealand and was not displaced or extinguished by the arrival of the English common law, the latter applying "only insofar as it is applicable to the circumstances of New Zealand".[63] Tikanga is acknowledged as relevant to the development of the common law because tikanga has continued to shape and regulate the lives of iwi, hapū and whānau up until the present day.[64] Increasingly also it has shaped the values of the broader New Zealand society particularly in relation to attitudes to the environment, and to family.[65] In the public law realm it is especially relevant because of the extent to which statutes require decisionmakers to take into account tikanga, or particular aspects of tikanga.[66] For example, in the Education and Training Act 2020 school boards are required under ss 9 and 27 to ensure their schools' curriculum and policies reflect tikanga Māori, mātauranga Māori (Māori knowledge) and te ao Māori (the Māori world).

The place, and force of tikanga in Aotearoa's common law is now evolving quickly. The cases in which tikanga values are mandatory or discretionary considerations are fertile grounds for judicial review, requiring judges to engage in this area. But even where it is not a stipulated consideration, it has been argued and accepted that aspects of tikanga can be relevant to statutory decision-makers. In *Tukaki v Commonwealth of Australia,* for example, the Court of Appeal accepted that tikanga precepts that guided and shaped the applicant's life were relevant to the court's assessment of whether he was ineligible for surrender on the grounds that to order it would be oppressive.[67] Another recent example, the decision of Palmer J in *Sweeney v Prison Manager, Spring Hill Corrections Facility,* in which, following a successful judicial review of a prison manager's decision to revoke a prison permit, the judge explicitly granted relief on the basis that the decision affected the mana of the plaintiff.[68]

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[62] See for example: *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94]; *Ngāti Whātua Ōrākei Trust v Attorney-General,* above n 50, at [77]; *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654, [2021] 2 NZLR 142 at [103]; *Sweeney v Prison Manager, Spring Hill Corrections Facility* [2021] NZHC 181, [2021] 2 NZLR 127; *Trans-Tasman Resources Ltd,* above n 42, at [167].

[63] *Takamore v Clarke,* above n 62, at [150] per Tipping, McGrath and Blanchard JJ, citing *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 at [18] per Elias CJ, Blanchard and Tipping JJ and [105] per McGrath J. See English Laws Act 1858, s 1; and English Laws Act 1908, s 2, the effect of which is preserved by the Imperial Laws Application Act 1988, s 5.

[64] *Tukaki v Commonwealth of Australia* [2018] NZCA 32454, [2018] NZAR 1597.

[65] Lex Aotearoa, above n 8, at 17-26.

[66] See, for example the Oranga Tamariki Act 1989, the Resource Management Act 1991 and the Marine and Coastal Area (Takutai Moana) Act 2011.

[67] *Tukaki,* above n 64, at [38].

[68] *Sweeney v Prison Manager, Spring Hill Corrections Facility,* above n 62.

Another significant milestone in the development of jurisprudence relating to tikanga in the common law is, again, the recent Supreme Court decision in *Trans-Tasman*.[69] In that case, which involved a question of statutory interpretation, all five judges agreed that tikanga formed part of the statutory words "any other applicable law".[70]

Tikanga and the future

There is debate about the place of tikanga within New Zealand's common law and the methodology the courts should use in applying tikanga to the facts of any case and in the development of principle. Much of that debate is about the risk of eroding the integrity and content of tikanga.[71] I make no comment about how these issues will be resolved – that is a task for the common law method.

David Williams argues that the recent appellate decisions in *Ngāti Whātua* and *Trans-Tasman,* along with other recent decisions, set the stage for further evolution in Aotearoa's treatment of the Treaty and tikanga Māori, particularly in the public law sphere. As Williams argues:[72]

> …. there are now two threads of authority that suggest a definite sea change in constitutional jurisprudence and somewhat less concern for constructive abeyance. First, there are cases where the courts have been less deferential to the executive and to the Waitangi Tribunal than heretofore in litigation involving Treaty of Waitangi settlement disputes. Secondly, there is a steady flow of decisions that indicate tikanga Māori is a source of the common law in this realm, and one or two decisions where application of tikanga has been determinative of the outcome in the case. It is suggested that the new developments in these two lines of authority are interconnected.

I have no doubt that the place of tikanga in the development of public law will continue to evolve. We have yet to see much in the way of public law challenge to decision-making by the various types of incorporated bodies which administer and hold iwi assets, and settlements.[73] Or to see explored the impact of tikanga on notions of procedural fairness – a critical aspect of tikanga is the tika (right) way to go about binding hapū and iwi members to decisions, reaching agreement, and resolving disputes.

One aspect that has undoubtedly slowed the development of the law has been a lack of knowledge on the part of judges and lawyers of tikanga concepts and values, or knowledge of the processes by which tikanga is applied to assist decision-making and resolve disputes. It is only in recent years that Māori have been joining the profession in numbers – still more recent has been the appointment of Māori in numbers to District and Senior Courts.[74] It is

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[69] *Trans-Tasman Resources,* above n 42.

[70] At [169] per William Young and Ellen France JJ, [237] per Glazebrook J, [296]–[297] per Williams J and [332] per Winkelmann CJ.

[71] Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" [2015] NZ L Rev 1.

[72] Williams, above n 17, at 662.

[73] Lex Aotearoa, above n 8, at 31-32.

[74] For a breakdown of the current diversity within the judiciary see Chief Justice of New Zealand | Te Tumu Whakawa o Aotearoa *Annual Report: 1 January 2020-31 December 2021* (Te Tari Toko i te Tumu Whakawa | The Office of the Chief Justice, March 2022) at 11-16.

only in the last 7 years that judges have been receiving education in relation to tikanga. I believe that the profession has lagged further behind in this regard, but this is about to change. The 7th of May 2021 was a historic day — the day in which the New Zealand Council of Legal Education resolved that Te Ao Māori (Māori worldview) concepts, particularly tikanga Māori, would be taught in each of the core law subjects in New Zealand Universities.[75]

The New Zealand Bill of Rights Act

The long title to the New Zealand Bill of Rights Act 1990 states that it is an Act to affirm, protect and promote human rights and fundamental freedoms in New Zealand and to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights. As mentioned earlier, its original conception as supreme law was not carried into effect. And unlike other statutory bills of rights, the Act did not provide expressly for declarations of inconsistency.

The story of the Bill of Rights Act is a complex one in New Zealand's public law. Sir Geoffrey Palmer, the architect of the original Bill has expressed disappointment that, after what seemed a promising start, the courts have failed to realise the potential, as he saw it, in the Act.[76] There are certainly many narratives to be explored in relation to it. There is the impact on the development of the law of the decision *R v Hansen,* in which the New Zealand Supreme Court eschewed the robust approach of the House of Lords to a statutory presumption of rights consistency even though s 3 of the United Kingdom Human Rights Act 1998 was modelled on our own s 6 (which directs the courts to give an enactment a meaning that is consistent with the rights and freedoms contained in the Bill whenever that can be done).[77] There is the perhaps related on-going exploration of the relationship between the principle of legality, and the s 6 direction.[78] And there is the impact the Act has had on administrative decision-making, which has yet to be fully settled.[79]

An important narrative is the courts' development of remedies for breaches of the Bill of Rights Act. The courts quite quickly moved to develop the remedy of damages for breaches

[75] The Council is an independent statutory body with responsibility for, amongst other things, setting the educational requirements for admission as a barrister and solicitor in New Zealand, and the quality and provision of legal education: Lawyers and Conveyancers Act 2006, pt 8.

[76] Palmer (2016), above n 20.

[77] *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 in which the Court unanimously departed from the approach in *R v Lambert* [2001] UKHL 37, [2002] 1 AC 545. However, the approach in *Hansen* has been the subject of some academic critique. See, for example: Andrew Butler "Interface between the Human Rights Act 1998 and Other Enactments: Pointers from New Zealand" (2000) 3 EHRLR 249 at 251 and Claudia Geiringer "The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*" (2008) 6 NZJPIL 59 at 73.

[78] See, for example: *D v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [75]-[82] per Winkelmann CJ and O'Regan J and [165]-[167] per Glazebrook J and *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [51]-[57] per Winkelmann CJ and [207]-[217] per Arnold and O'Regan JJ and [251]-per Glazebrook J and [327] per William Young J.

[79] For initial predictions as to the impact see J McLean, P Rishworth and M Taggart "The Impact of the New Zealand Bill of Rights on Administrative Law" in Legal Research Foundation *The New Zealand Bill of Rights Act 1990* (1992) 62. For discussion of the application to administrative decision making see Janet McLean "The Impact of the Bill of Rights on Administrative Law Revisited: Rights, Utility, and Administration" (2008) NZ L Rev 377; Claudia Geiringer "Sources of Resistance to Proportionality Review of Administrative Power under the New Zealand Bill of Rights Act" (2013) 11 NZJPIL 123 and Hanna Wilberg "The Bill of Rights in Administrative Law Cases: Taking Stock and Suggesting Some Reassessment" (2013) 25 NZULR 866.

by the Crown of protected rights.[80] However, the courts took a far more cautious approach to asserting the right to make formal declarations of inconsistency in the absence of a statutory provision conferring that power. The possibility of that step was first discussed by Cooke P in 1992, shortly after the enactment of the New Zealand Bill of Rights Act, in the decision of *Temese v New Zealand Police.*[81] In *Moonen v Film and Literature Board of Review* the Court of Appeal came close to deciding that it had the power to make such a declaration but declined to finally determine the issue.[82] Sir Geoffrey has summarised the case law after *Moonen* as exhibiting a "pronounced judicial reluctance" to make any such declaration.[83] In the *Saxmere* case, Hammond J even pondered that it was "curious" no courts in Aotearoa had issued a declaration of inconsistency.[84]

The issue finally came to a head in the case of *Attorney-General v Taylor.*[85] In that case, several prisoners challenged the Bill of Rights consistency of a statutory blanket ban on voting for prisoners sentenced to three years or more imprisonment. The Attorney General's report to Parliament, required under s 7 of the Bill of Rights Act, reported that the ban was an unjustified limit on the right to vote under s 25 of the Act.[86] The prisoners sought a declaration of inconsistency. Each of the High Court, Court of Appeal and Supreme Court accepted arguments that there was jurisdiction for such declaration to be made, and that this was a correct case in which to exercise that power.

The majority emphasised the importance of having a judicial response to a breach of rights, adopting what has been called "no right without a remedy" approach.[87] Glazebrook and Ellen France JJ characterised the exercise of declaratory powers as nothing more than a natural extension of the existing law.[88]

Chief Justice Elias said that the need to declare inconsistences was a matter of "constitutional obligation".[89] She said that the availability of declaratory relief followed from the scheme of the New Zealand Bill of Rights Act and its requirement that the rights recognised apply to the acts of the legislature. While issuing a declaration of inconsistency is "constitutional innovation", it was a consequence of the enactment of s 3 of the Act which made clear that the Act applied to the legislative branch.[90]

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[80] *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's Case*]. See also *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.
[81] *Temese v Police* (1992) 9 CRNZ 425 (CA) at 427.
[82] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).
[83] Geoffrey Palmer "The Bill of Rights after Twenty-One Years: The New Zealand Constitutional Caravan Moves On?" (2013) 11 NZJPIL 257 at 287.
[84] *Wool Board Disestablishment Co Ltd v Saxmere Co Ltd* [2010] NZCA 513, [2011] 2 NZLR 442 at [140].
[85] *Taylor v Attorney-General* [2014] NZHC 1706, [2015] 3 NZLR 791 (HC); *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 (CA) and Attorney-General v Taylor [2018] NZSC 104, [2019] 1 NZLR 213 (SC).
[86] Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill (2010).*
[87] Andrew Geddis "Prisoner Voting in New Zealand's Supreme Court" (2019) 30 PLR 3 at 3.
[88] *Attorney-General v Taylor* (SC), above n 85, at [53].
[89] At [117].
[90] At [117]

The majority distinguished the approach taken by the High Court of Australia in *Momcilovic v R* in which the Court held that granting a declaration of inconsistency under the Victorian Charter of Human Rights and Responsibilities Act 2006 was not a judicial function.[91] Both majority judgments held that *Momcilovic* had limited relevance given Australia's "very different constitutional and legislative circumstances".[92] As noted by Professor Joseph "the constitutional separation of powers in Australia lacks any comparison under New Zealand's flexible constitutional arrangements".[93]

The decision is also notable for the argument advanced for the Attorney-General in the hearing that there was no breach of rights in the enactment of inconsistent legislation since the legislation itself in abridging the right had changed the scope of the right preserved in the New Zealand Bill of Rights Act. In rejecting the argument, the Chief Justice said it denied the fundamental nature of the enacted rights and said it was:[94]

> …inconsistent with indications, contained for example in the Cabinet Manual, that legislation such as the New Zealand Bill of Rights Act, occupies a position properly described as 'constitutional'. Nor is the argument easy to reconcile with the principle of legality, which requires Parliament to speak unmistakably when limiting fundamental rights recognised by the common law.

This echoes of the remarks of Laws LJ in *Thoburn v Sunderland City Council* that while ordinary statutes may be impliedly repealed, constitutional statutes may not.[95]

As a result of the Supreme Court's decision, the Minister of Justice has introduced the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020. The purpose of the Bill is to provide a mechanism by which Parliament can consider, and if it wishes to, respond to a declaration of inconsistency made by the courts under either the New Zealand Bill of Rights Act or the Human Rights Act (the latter Act having provision for the making of such declarations in limited circumstances).[96] The explanatory note of the Bill of Rights (Declarations of Inconsistency) Amendment Bill states that one of its purposes is to "further the constitutional relationship of mutual respect between Parliament and the Judiciary". The explanatory note acknowledges that declarations of inconsistency are of high public and constitutional significance, and that it is vital that in creating laws and administering them the legislative and executive branches, respectively, are both seen by the public to (and do in fact) consider such declarations properly**.** It is significant that the Bill has broad cross-party support.

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[91] *Momcilovic v The Queen* [2011] HCA 34, (2011) 245 CLR 1.

[92] *Attorney-General v Taylor* (SC)*,* above n 85, per Elias CJ at [111] and Glazebrook and Ellen France J at [60]-[63].

[93] Phillip A Joseph "Declarations of Inconsistency under the New Zealand Bill of Rights Act 1990" (2019) 30 PLR 7 at 9.

[94] *Attorney-General v Taylor* (SC)*,* above n 85, per Elias CJ at [103]

[95] *Thoburn v Sunderland City Council* [2003] QB 151, [2002] EWHC 195. See also Joseph (2019), above n 93, at 10.

[96] The Human Rights Review Tribunal was given the power to make declarations, but only in relation to unjustified breaches on the right in s 19 of NZBORA to freedom from discrimination: See Human Rights Act 1993, s 92J, introduced by the Human Rights Amendment Act 2001.

The enactment of this Bill illustrates the gradual and collaborative elaboration between Parliament and the courts of New Zealand's constitutional arrangements – an elaboration born in part of the courts' assertion of their constitutional role (obligation) to determine and apply the law, even to the extent of declaring an Act of Parliament inconsistent with statutorily affirmed rights.

The Role of International Law in Aotearoa's Public Law

New Zealand exists in a far-flung part of the globe. As noted by Sir Geoffrey Palmer it "is a country impelled by its circumstances to be internationalist in outlook".[97] It eventually accepted the offer of independence contained in the Statute of Westminster, although, as mentioned earlier, it did so reluctantly. Today it is international law and not colonial law that dominates as a source of extra territorial inspiration.[98] In the area of public law, the influence of international law is seen most clearly in statutory interpretation, and in the area of administrative law. New Zealand courts apply a principle of statutory interpretation that domestic statutes ought to be interpreted, so far as possible, consistently with New Zealand's international obligations.[99] This presumption applies whether the source of the international obligation is a treaty or lies within customary international law.[100] In contrast to some jurisdictions there is no requirement that there be any ambiguity in the statute for the presumption to be enlivened.[101]

The presumption of consistency with unincorporated international instruments has been applied to restrict or expand the meaning of general words or provisions conferring discretionary powers. In *Sellers v Maritime Safety Inspector,* the Court of Appeal found that general words conferring a discretion on the Director of Maritime Safety under the Maritime Transport Act 1994 should be read down to comply with international law as to freedom of the high seas.[102] And, it commented, that reading could only be widened to the extent that international law allowed. Keith J writing for the Court made clear just how significant a principle this was:[103]

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[97] Sir Geoffrey Palmer "Rethinking Public Law in a Time of Democratic Decline" (2021) 52 VUWLR 414 at 428.

[98] Janet McLean "From Empire to Globalization: The New Zealand Experience" (2004) 11 Ind J Global Legal Stud 161 at 167.

[99] *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104; *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 and *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475 at [96], citing *New Zealand Air Line Pilots' Assoc Inc v Attorney-General* [1997] 3 NZLR 269 (CA).

[100] Treasa Dunworth "Sources of International Law in Aotearoa New Zealand" in An Hertogen and Anna Hood (eds) *International Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2021) 15 at 22-23, referring to numerous cases affirming this approach.

[101] *New Zealand Air Line Pilots' Assoc Inc v Attorney General,* above n 99; *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129 (CA); *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA). Contrast with the approach in Australia: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (HC) at 287 per Mason CJ and Deane J and *Plaintiff (S157/2002) v Commonwealth* (2003) 211 CLR 476 (HC) at [29] per Gleeson CJ and the approach in the United Kingdom: *Assange v Swedish Prosecution Authority* [2012] UKSC 22, [2012] 2 AC 471; *R (Yam) v Central Criminal Court* [2015] UKSC 76, [2016] AC 771.

[102] *Sellers v Maritime Safety Inspector,* above n 101, at 62.

[103] Above at 62. For example, in *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69 at [94] Winkelmann CJ and O'Regan J found that the presumption of consistency with New Zealand's obligations applies retrospectively to legislation enacted before the ratification of the relevant treaty.

> To repeat, for centuries national law in this area has been essentially governed by and derived from international law with the consequence that national law is to be read, if at all possible, consistently with the related international law. That will sometimes mean that the day-to-day (or at least year-to-year) meaning of national law may vary without formal change.

In *Zaoui v Attorney-General (No 2)* the Court addressed the relationship between New Zealand's obligations under international law and the requirements of domestic statutes. Mr Zaoui was a refugee, but the Minister wished to deport him on the grounds he was a threat to national security. Mr Zaoui feared that on return to his home country he would be subject to the threat of torture or the arbitrary deprivation of his life. An issue for the Court was the relationship between New Zealand's non-refoulement obligations under Article 33 of the United Nations Convention Relating to the Status of Refugees 1951 and s 72 of the Immigration Act 1987 which allowed the relevant Minister to order deportation where they considered the refugee's continued presence constituted a threat to national security. The Supreme Court noted the interplay between the interpretive presumption in s 6 of the Bill of Rights and international law:[104]

> As directed by s 6 of the Bill of Rights, s 72 is to be given a meaning if it can be, consistent with the rights and freedoms contained in it…Those rights in turn are to be interpreted and the powers conferred by s 72 are to be exercised, if the wording will permit, so as to be in accordance with international law, both customary and treaty-based.

The Court found nothing in the words of s 72 or the scheme of the Immigration Act prevented s 72 being read consistently with New Zealand's obligations under the ICCPR, the Torture Convention and the Bill of Rights Act.

Again, the question arises, does this statutory presumption provide yet another national hue to the principle of legality? Professor Geiringer suggests that the Supreme Court in *Zaoui* treated the presumptions in s 6 of the Bill of Rights Act, and the presumption of consistency with New Zealand's international obligations as of essentially the same character.[105] But against that we have to weigh the careful contextual analysis that Keith J outlined in *New Zealand Air Line Pilots' Association Inc v Attorney-General* as relevant to the operation of the presumption.[106]

Concluding on this point, as Andrew Geddis points out, the push and pull effect of these various presumptions on the relationship between the different branches of government can be seen in the government's own *Legislation Guidelines*, which are intended to provide best practice advice for those involved in the creation of proposed legislation. The relevant part of the guidelines state that:[107]

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[104] *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [90] (footnote omitted).

[105] Claudia Geiringer "International law through the lens of Zaoui: Where is New Zealand at?" (2006) 17 PLR 300 at 317.

[106] *New Zealand Air Line Pilots' Assoc Inc v Attorney-General,* above n 99.

[107] Andrew Geddis "Parliament and the Courts: Lessons from Recent Experiences" in John Burrows and Jeremy Finn (eds) *Challenge and Change: Judging in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) 135 at 139.

> Fundamental constitutional principles and values in New Zealand Law and practice run so deep that the courts will often draw on them when interpreting legislation or otherwise deciding cases. If new legislation is inconsistent with or challenges one of these fundamental principles, it will become the subject of concern and increased scrutiny of Parliament, the public, and often the courts.

The Courts have also been prepared to apply international law as a constraint on the exercise of administrative power. The role of international law in judicial review has been described by Treasa Dunworth as "the central aspect of the relationship between international law and New Zealand domestic law".[108]

Just how important international law would be in this context was established in *Tavita v Minister of Immigration*.[109] In that case Mr Tavita sought judicial review of the Minister's decision to issue a removal warrant. The Crown argued the Minister was entitled to ignore Aotearoa's international treaty obligations relating to the rights of the child and rights to a family.[110] In rejecting this argument the Court of Appeal affirmed that "some international obligations are so manifestly important that no reasonable Minister could fail to take them into account".[111]

The Court was not required to finally decide the matter in *Tavita* as it was adjourned so the Minister could consider the interests of the child. However, the comments made by the Court about the relevance of international instruments have been seminal in the development of judicial review jurisprudence. In many cases after *Tavita,* international human rights norms and international instruments have been held to be mandatory considerations for Ministers and Officials in the exercise of discretion.[112]

Conclusion

As I stated at the outset of this paper, my understanding of and perspective on Aotearoa's public law is necessarily conditioned by my position as a working judge. Judges address the issues that arise in the cases that come before them and strive to find, in accordance with the law, a resolution that serves today's society.

But my reflections today have all returned to the same point: Aotearoa's history. The history of our nation — as home to Māori, as a settler colony, as an independent nation finding its place in an international order, and in the South Pacific — continues to be played out in our society. As such, it has had and will continue to have a profound effect on the shaping of our public law. The topics I have touched upon, of common law presumptions in statutory interpretation, judicial review, the application of statutory bills of rights, and of international

[108] Dunworth, above n 100, at 24.
[109] *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).
[110] At 261 referring to Arts 23(1) and 24(1) of the ICCPR.
[111] At 266.
[112] See, for example, *Elika v Minister of Immigration* [1996] 1 NZLR 741 (HC); *Mil Mohamud v Minister of Immigration* [1997] NZAR 223 (HC); *Patel v Minister of Immigration* [1997] 1 NZLR 252 (HC) and *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104.

law, are all recognizable to any common law audience. But as the cases I have discussed show, these areas of law are now acquiring a distinctive Aotearoa New Zealand hue.

My final reflection is that the task of ensuring that our public law continues to be fit to regulate our institutions and to serve the people of Aotearoa New Zealand requires lawyers and judges to be grounded in the present but with a deep understanding of what has come before.