

Indigenous Rights, Judges and Judicial Review

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E ngā mana, e ngā waka, e ngā reo, tēnā koutou, tēnā koutou, tēnā koutou katoa. My respects to the traditional owners of the land, the Wurundjeri peoples of the Kulin nations.

Introduction

In most nations now, indigenous peoples are a minority of the population. Yet they claim rights not only on the basis of being a minority but also on the basis of being indigenous. Indigeneity adds an additional layer to claims in terms of morals, politics and law. The deterioration of an indigenous people, or their culture, reduces the cultural diversity of the world. There are many ways in which indigenous rights can be protected by means of constitutional design and law. But, at a macro-constitutional level, there is a choice to be made between protection of indigenous rights being essentially political or essentially legal.

In this paper, I ask the question: how do law and the judicial branch of government contribute to protection of indigenous rights in New Zealand, an essentially political constitutional system? I examine three different answers.

The first answer is that, in deciding legal cases brought by indigenous people, the fundamental conventional role of the judiciary is to use reason to apply the law to the facts of specific contexts giving rise to indigenous claims. I suggest two fundamental aspects of judicial decision-making are important and distinctive in this: using reason;

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and applying the law in specific factual contexts. Both these aspects of judicial decision-making, vis-à-vis political decision-making, may be under-appreciated. The conventional judicial role, in a common law system, also gives rise to the two other ways in which the judiciary can play a role in upholding indigenous rights.

Second, even in a constitution where indigenous rights are ultimately protected by politics rather than by law, the process of constitutional dialogue provides a role for the judiciary in shaping constitutional protection. This only requires the judiciary to fulfil its conventional constitutional role of deciding specific cases. But taking the iterative dynamic perspective of interactions between the judiciary and the political branches of government reveals a judicial contribution to constitutional change. In New Zealand, the judiciary has contributed significantly to a constitutional dialogue from the 1970s to the 1990s which reinterpreted the meaning and the legal status of the Treaty of Waitangi.

Third, the law of judicial review is a primary avenue by which the judiciary adjudicates on claims of indigenous rights. In this paper I examine the contemporary cases of judicial review in New Zealand that have invoked the Treaty of Waitangi. The largest grouping of cases are challenges to divestment of land and assets that could otherwise be used to satisfy Māori Treaty claims. Another group of cases challenges resource management and conservation decisions. Another group challenges Treaty settlement processes themselves. One case, challenging the management of the Māori Electoral Option, is more constitutional. My overall conclusions are about the nature of judicial review law.

Indigenous Rights in New Zealand

The Treaty of Waitangi

First, I need to explain something of the Treaty of Waitangi and the New Zealand constitution and law. The Treaty of Waitangi was signed by the Crown and Māori during the course of 1840. It was preceded by a complex evolving context of contrasting private settler and missionary political pressure in London, increasing law and order problems for Māori, land sales in Aotearoa New Zealand, and Colonial Office

wavering about what to do.¹ What they eventually did was dispatch Captain Hobson to treat with Māori. The Treaty was first signed on 6 February 1840 at Waitangi and then hawked around the country by the Crown which gathered, by September 1840, some 530 signatures of Māori rangatira. In May 1840 Captain Hobson proclaimed sovereignty anyway. The Treaty was prepared in English and te reo Māori, but all except 39 of the signatures were to the Māori language version of the Treaty.

The three simple articles of the Treaty contain serious linguistic and interpretive ambiguities:

- The preamble recited Queen Victoria's interest in protecting Māori rights and property (in the English version) or preserving their rangatiratanga and land (in the Māori version) and her appointment of Captain Hobson to treat with Māori for recognition of her Sovereign authority (in English) or establishment of her kāwanatanga (in Māori).
- In the first article the rangatira gave to the Queen all the rights and powers of Sovereignty (in English) or complete kāwanatanga of their land (in Māori).
- In the second article the Queen guaranteed to rangatira the full, exclusive and undisturbed possession of their lands, estates, forests, fisheries and other properties (in English) or their unqualified exercise of rangatiratanga over their whenua, kainga and taonga (lands, villages and treasures). The rangatira also gave to the Queen the exclusive right of pre-emption (in English) or sale (in Māori) of such lands as they were willing to sell.
- In the third article the Queen guaranteed Māori her protection and imparted to them the rights and privileges (in English) or tikanga (customs) (in Māori) of British subjects.

¹ Claudia Orange *The Treaty of Waitangi* (Wellington, Allen & Unwin, 1987); Waitangi Tribunal *He Whakaputanga me te Tiriti: The Declaration and the Treaty* (Wai 1040, 2014); Matthew S R Palmer "Indigenous Rights: the changing place of the Treaty of Waitangi in the constitutional context of New Zealand" in David S Law (ed) *Constitutionalism in Context* (Cambridge University Press, Cambridge, forthcoming 2019) [Palmer, *Indigenous Rights*].

In essence, the Crown acquired sovereignty, or *kāwanatanga*, a transliteration of governorship. It guaranteed Maori *tino rangatiratanga*, or full chieftainship over their lands villages and treasures. As you can see, there was room for disagreement as to what the Treaty meant even in 1840, let alone once British settler demand for land exploded in the 1850s and 1860s.

New Zealand's political constitution

In the long term, of course, the rights of any group in a society are protected by and exposed to social, political and constitutional norms that evolve over time. Rights enforcement, even under written constitutions, is only as strong as the relationships between the groups of people who tolerate and influence the power arrangements constituting their polity. In the shorter term, individual decisions by those with power over the enforcement of rights have to take wider constitutional structure and processes as a given. In most western democracies, the key constitutional fault-line is that separating political and judicial powers. Which is stronger is a matter of constitutional design and evolution.

So, for example, Canada and New Zealand share marked similarities in their systems of Westminster government and their approach to relationships between the state and indigenous peoples. Yet since the 1980s, they have diverged just as markedly in their respective reliance on political or judicial means of protecting indigenous rights.² I do not argue either is necessarily better or more effective. Rather, each means of protection reflects and responds to the circumstances of the jurisdiction in which they develop. In each jurisdiction, as in most others around the world, indigenous claims to existence have bubbled up through the relevant legal system. The legal source, nature and scope of these manifestations has been shaped by the constitutional culture of each jurisdiction and the pressure points accessible to indigenous peoples. Treaties have provided leverage where they exist, in Canada, New Zealand and the United States. The common law of aboriginal title, shaped by judicial perceptions of the interests of

² Matthew S R Palmer “Constitutional Realism about Constitutional Protection: Indigenous Rights under a Judicialized and a Politicized Constitution” (2006) 29 Dal LJ 1.

justice in the individual case, has been an alternative source of leverage in Canada, the United States and Australia. Political power has provided leverage in New Zealand.

The comparison between Canada and New Zealand is particularly instructive. The Canadian Parliament passed the Constitution Act 1982 encapsulating the Charter of Rights and Freedoms, against which the judiciary was suddenly empowered to strike down inconsistent legislation. Section 35(1), unqualified by s 1's balancing provision or the s 33 legislative override, provides "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Judicial protection of indigenous rights has been entrenched ever since.

Three years later, in 1985, a New Zealand government proposed a Bill of Rights including the Treaty of Waitangi, against which the judiciary would have been empowered to strike down inconsistent legislation. In 1988, after two years and 438 submissions, the Justice and Law Reform Committee of the House of Representatives reported their conclusion that New Zealanders just didn't like the idea of such a supreme law.³ As Paul Rishworth said, "[s]everal distinct strains of objection emerged, but foremost among them was that a constitutional bill of rights would elevate judicial power over parliamentary power, and be anti-democratic."⁴ Indeed, there was a significant view among Māori that putting the Treaty of Waitangi into any law passed by Parliament would *diminish* its status. The Treaty would be transformed from a powerful normative symbol with moral legitimacy into a mere legal instrument.

The New Zealand Bill of Rights Act 1990 (Bill of Rights), which was passed and is still in force, explicitly disavows the ability of a court to hold any provision of any enactment to be impliedly repealed or revoked or in any way invalid or ineffective or to decline to apply any provision of the enactment.⁵ New Zealand courts long flirted with the idea they had jurisdiction even to declare legislation inconsistent with the Bill of Rights, albeit it would still be enforceable. It was not until 2015 that the High Court

³ Justice and Law Reform Select Committee "Final Report on a White Paper on a Bill of Rights for New Zealand" [1987–1990] XVII AJHR I8C.

⁴ Paul Rishworth "The New Zealand Bill of Rights" in Paul Rishworth and others *The New Zealand Bill of Rights* (Melbourne, Oxford University Press, 2003) at 7.

⁵ New Zealand Bill of Rights Act 1990, s 4.

did so.⁶ In 2016 the Court of Appeal confirmed that on appeal.⁷ The Crown has been granted leave to appeal to the Supreme Court,⁸ though the Government also announced its intention to introduce legislation providing specifically for such jurisdiction, along with a process by which Parliament would respond to declarations of inconsistency. This would be constitutional dialogue indeed, but none of it touching the legal validity of legislation.

So there is no supreme law in New Zealand. The judiciary have no legislatively acknowledged power to strike down legislation. Once the New Zealand Parliament attained the ability to amend its own constitution, and the Governor and Britain stopped refusing assent to legislation, there were no legal checks on Parliament's power to legislate away indigenous rights, including inconsistently with the Treaty. Furthermore, there is only one, relatively small, house of Parliament, of 120 members. With tight party discipline from the 1930s and the abolition of the upper house, the Legislative Council, in 1950 the executive branch acquired "unbridled power" in New Zealand.⁹

What New Zealand did do was pursue political, rather than judicial, checks on the power of executive government. In 1985 the same concerns that led to the Bill of Rights White Paper also led to the establishment of a Royal Commission on the Electoral System. The Commission issued a comprehensive report in December 1986.¹⁰ It recommended New Zealand reform its plurality or "first past the post" electoral system by adopting a system of mixed member proportional (MMP) representation along the lines of the West German model. The Royal Commission's report gathered dust in the face of two political parties unwilling to dilute their power. But by the early 1990s there was a public mood to restructure the political system. In 1996, after referenda in 1992 and 1993, the Royal Commission's proposal for electoral reform was enacted.¹¹

⁶ *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791.

⁷ *Taylor v Attorney-General* [2017] NZCA 215, [2017] 3 NZLR 24.

⁸ *Attorney-General v Taylor* [2017] NZSC 131.

⁹ Geoffrey Palmer *Unbridled Power? An interpretation of New Zealand's constitution and government* (Oxford University Press, Wellington, 1979).

¹⁰ *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (House of Representatives, H3, December 1986).

¹¹ Electoral Act 1993.

As political science predicts, MMP destroyed the two-party duopoly on power. This has had fundamental constitutional effects in New Zealand. There must be bargaining between parliamentary parties to form a government, to formulate policy and to pass legislation. The system of government has slowed down, the executive has less power, and Parliament has been revitalised. The effects of this change have changed the basic dynamics of power in New Zealand government. Under MMP every policy and legislative initiative is the subject of negotiation between parties in the search for a majority position in the House of Representatives. Government decision-making is now transactional. There are more pressure points at which various groups in society can influence the exercise of government power. A greater range of political opinion is represented in Parliament, is heard in public political debate, and can influence New Zealand government decisions. Power has been at least somewhat bridled, through political rather than legal mechanisms.¹²

Political protection of indigenous rights

Given the constitutional arrangements, indigenous rights are, ultimately, protected politically in New Zealand. But, compared with First Nations' share of four per cent of the population of Canada, Māori are 15 per cent of New Zealand's population. Māori therefore represent a sizable portion of the electorate and their party votes have a direct influence on who is able to form a government. Furthermore, since 1867, a number of seats in the House of Representatives have been reserved for Māori, originally as "a useful way of rewarding Maori loyalists and placating Maori rebels, while also assuring critics in Britain that the colonists would look after Maori interests."¹³

From 1994, the number of Māori seats has varied with the number of Māori choosing to enroll on the parallel Māori electoral role rather than the general roll. It is no exaggeration to say Māori votes in the House have been crucial to the formation of successive governments since then. Currently, after the 2017 election, there are more Māori members in Parliament, and in government, than ever before. At least 27 of the

¹² Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford University Press, Auckland, 2004).

¹³ MPK Sorrenson "A History of Maori Representation in Parliament" Appendix B to the *Report of the Royal Commission on the Electoral System: Towards a Better Democracy*, above n 10, at B-20.

120 MPs are Māori.¹⁴ At least 19 of 63 members of parliamentary caucuses supporting the government are Māori. Eight of 28 ministers are Māori. The Deputy Prime Minister and Leader of the Opposition are Māori. At least six of nine party leaders and deputy leaders in Parliament are Māori.

New Zealand's constitution, and its constitutional protection of indigenous rights, is fundamentally political. That is so not only in the ultimate sense in which generational shifts in constitutional norms are extra-legal, but in the sense that conflicts between Māori and the Crown are primarily resolved through political means: legislation and settlement negotiations.

The Bill of Rights does not, as first proposed, include the Treaty of Waitangi. The Treaty is generally incorporated into New Zealand law, in the Treaty of Waitangi Act 1975. That allocates to the Waitangi Tribunal the role of interpreting the two language versions of the Treaty and empowering it to make recommendations about breaches of the Treaty. In relation to some former Crown land and forestry assets those recommendations have binding force, otherwise they do not. The Treaty can also be said to be reasonably fully incorporated into New Zealand law in relation to Māori language, Māori land and Māori fisheries by the relevant legislation governing those important dimensions of te ao Māori.¹⁵

Otherwise, the Treaty is part in and part out of New Zealand law.¹⁶ The “principles of the Treaty of Waitangi” are currently referred to by 25 Acts of the New Zealand Parliament other than those implementing Treaty settlements. Under various pieces of legislation decision-makers are required to “give effect to” the principles, “not act in a manner inconsistent” with the principles, “ensure full and balanced account is taken” of the principles, “give particular recognition”, “take into account”, “have regard to” and “acknowledge” the principles of the Treaty of Waitangi. Such bare unelaborated references are more than lip service. Such a savings clause in s 9 of the State-Owned Enterprises (SOEs) Act 1986 was interpreted and applied with significant effect by the

¹⁴ Some additional MPs have Māori heritage but do not appear to self-identify as Māori.

¹⁵ Te Ture Whenua Maori Act 1993; Maori Fisheries Act 2004; Te Ture mō Te Reo Māori 2016.

¹⁶ On the legal status and force of the Treaty in New Zealand law, see Matthew S R Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Wellington, Victoria University Press, 2008) [Palmer *The Treaty of Waitangi*] at ch 4.

Court of Appeal as discussed below. These Acts particularly concern natural resources and the environment, but also social services and local government. After 2000, there was a trend for more expansive legislative provisions about what the Treaty means in relation to a particular area of law.¹⁷

As I argued in a book in 2008, the overall effect of the Treaty in New Zealand law is incoherent.¹⁸ The Treaty is part of New Zealand law for some purposes and not others. What it means, and what effect it has in practice, depends on how the judiciary interprets particular laws, in the particular factual context in which a case is brought. Hence the question: how does the judiciary contribute to protection of indigenous rights in an ultimately political constitution?

1 Context and reason

The first and simplest answer is the fundamental conventional role of the judiciary: to use reason to decide disputes about legal rights in specific factual circumstances. That includes disputes between indigenous peoples and the state. Two fundamental aspects of judicial decision-making seem to me to be particularly important to how the judiciary adjudicates in a common law system: the judiciary applies the law in specific factual contexts and it uses reason in decision-making. Both of these aspects are important. Their power may be under-appreciated. And they distinguish judicial from political decision-making.

I started my career as a policy adviser in the Treasury and then the Ministry of Justice. As a practitioner before the courts, but particularly since I became a High Court judge in 2015, it has struck me with some force that a court's perspective of a law is very different from that of Parliament or the public service.

Decision-making about law by the political branches of government — the executive and legislature — results in legislation. Legislation is usually drafted generally: a

¹⁷ New Zealand Public Health and Disability Act 2000; Local Government Act 2002; Land Transport Management Act 2003; Public Records Act 2005. See Palmer *The Treaty of Waitangi*, above n 16, at 100-101.

¹⁸ Palmer *The Treaty of Waitangi*, above n 16.

general rule, generally stated. But, in applying the law, the judiciary confronts the meaning of legislation in a messy factual context of humanity. That is the context in which the meaning of a general rule is tested in court. In interpreting the law when doing so, the judiciary has to be alive to the effects of applying the bare words of the text of an Act in a particular case. Does that result in an outcome consistent with Parliament's purpose in passing it? Or does the factual context make that case an exception to Parliament's purpose even though it appears to be caught by the text of the law? As the New Zealand Supreme Court has stated:¹⁹

It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

Perhaps there is a clue here as to why a common law judiciary is relatively more assertive in interpreting law in relation to some subject matters than others. A way of thinking that emphasises the factual context of specific cases based on past precedent is not well-suited to analysing general issues of social and economic policy which, of necessity, require empirical social science data and conceptual frameworks of analysis. But such a case-specific approach — the common law approach — does feel more confident in testing the law against specific cases of injustice focusing on the rights of people vis-à-vis the state.

The effect of a contextual perspective can be seen in courts' approaches to Treaty issues in New Zealand. For example, the original *SOEs Case* in 1987 involved a law that stated generically that nothing in the SOEs Act permitted the Crown "to act in a manner that is inconsistent with the principles of the Treaty of Waitangi".²⁰ The New Zealand Māori Council successfully enjoined the Crown from transferring almost 4 million

¹⁹ *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22] (footnotes omitted).

²⁰ For an account of the passage of s 9, see Mark Hickford, "Quasi-constitutionality and the Treaty of Waitangi: historicity and the political", in Richard Albert and Joel Colón-Ríos (eds) in *Quasi-Constitutionality and Constitutional Statutes: Forms, Functions, Applications* (Routledge, forthcoming 2018).

hectares of land, worth billions of dollars, to SOEs.²¹ Before transferring any land, the Crown was required to work out a system to safeguard Māori Treaty claims. There was political context here: the Waitangi Tribunal had only been given jurisdiction to hear claims of historical breaches of the Treaty in 1985. The Court directed the plaintiffs to nominate three test cases of the loss of Māori land to illustrate their contention.²² They nominated: a claim by Ngāi Tahu for breach by the Crown of undertakings in taking 600,000 acres of land in Otakou; a claim by the then landless Ngāti Tama for breach by the Crown in unjustly confiscating 462,000 acres of land in 1863; and a claim not yet made by Ngāti Whātua over the taking of some 10,000 acres of land, including urupa (burial grounds), for sand dune reclamation that was no longer required. Affidavit evidence was adduced. Leading counsel for the plaintiffs, later Sir David Baragwanath, considered the evidence of Dame Whina Cooper “pivotal”.²³ Cooke P’s judgment stated the affidavit included “eloquent and moving passages”.²⁴ Richardson J’s judgment traversed the three illustrative cases and was “satisfied that each raises an arguable case for consideration by the Waitangi Tribunal”.²⁵

The effect of context is also felt over time, in the sense that the issues which are litigated change over time. Treaty litigation in New Zealand has gone through several phases, as I explore in more detail below. In contemporary times, since the 1980s, litigation has concerned protection of the possible use of Crown assets in settlements of historical grievances. Initially these cases concerned Crown land and other natural resources such as fisheries, coal, and forests but soon moved to encompass less tangible assets such as broadcasting assets and electric power plants. With settlements of Treaty claims, a second tranche of litigation has involved cross-claims by different claimants being litigated through the Courts. As the context has changed, the courts have had to re-examine the principles set out in earlier jurisprudence about the meaning of the Treaty of Waitangi to see if it still holds. In general it has.

²¹ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 [*The SOEs case*].

²² At 654.

²³ David Baragwanath “Arguing the Case for the Appellants” in Jacinta Ruru (ed) “*In Good Faith*”: *Symposium proceedings marking the 20th anniversary of the Lands case* (New Zealand Law Foundation and Faculty of Law, University of Otago, Dunedin, 2008) at 28.

²⁴ *The SOEs case*, above n 21, at 662.

²⁵ At 674.

So context is important. Fine distinctions, analogies and questions about what is material, according to text and purpose, are at the heart of what judges do. But in distinguishing and analogising, judges use reason. The use of reason in the judicial role is crucial and, as I will suggest further below, distinctive compared with other modes of decision-making. The more I've thought about what constrains me on the bench, the more I think the essence of judging lies in responding to the eternal question of the three-year-old, with which all parents become all too familiar: why? At the core of writing judgments, of delivering judgments, of handing down sentences, of making interlocutory decisions, at the core of everything judges do, our role is to answer the question: why? We provide reasons. Judges explain, in public and for posterity, why the law applied to this case yields a different result than the same law applied to that case.

Paradigmatically common lawyers, including judges, approach an opinion, an argument or a judgment by identifying the issue, identifying the material facts, outlining the relevant law, examining the arguments from both (i.e. two) sides and applying the law to the facts. But the point of doing that in a judgment is to provide a logical chain of reasoning the litigants, and the world, can follow. Giving reasons is core to the public legitimacy of the judiciary, so everyone can see and assess for themselves the rationality of a court's judgment. What is the relevant law? What exactly does the court consider it means? Does it require taking several specified steps in order to be applied? What are those steps? What are the relevant and material facts? How does the law apply to the facts? The requirement to provide reasons for our decisions is a crucial check and balance on the power of the judiciary. x

Reasons and reasoning by the judiciary are also an important component of the certainty required of law by the doctrine of the rule of law. I have previously offered a conception of the rule of law which attempts to zero in on the essence of the concept, which centres on certainty and freedom from arbitrariness.²⁶ That is achieved, in important part, by requiring a judge to give the reasons for his or her decisions. To be consistent with the rule of law, judicial discretion must not be exercised arbitrarily. It must be trammelled in advance by specification of a rational methodology of analytical

²⁶ For example, see Matthew S R Palmer "Constitutional Dialogue and the Rule of Law" (2017) 47 HKLJ 505 [Palmer, *Constitutional Dialogue*].

steps. There must be logical links of reasoning which chain the law applied and the facts to which it is applied, to the result.

So the role of context and reasoning in judicial decision-making is, I suggest, one dimension of what judges contribute to protection of indigenous rights under a political constitution, simply by exercising the conventional role of a common law judge. I also suggest that role gives rise to two other ways in which the judiciary plays a role in contributing to the protection of indigenous rights.

2 Constitutional dialogue

Dialogue theory

In 1997 constitutional scholars in Canada, including a New Zealander, Peter Hogg, offered a notion of constitutional dialogue in an article entitled “The *Charter* Dialogue between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn’t such a Bad Thing After All)”.²⁷ Peter Hogg and Allison Bushell took a remarkable step for constitutional scholars. They conducted empirical analysis, updated 10 years later with additional help from Wade Wright.²⁸ From 1982 to 2007 they found, in 67 of 89 instances of the Canadian Supreme Court finding an Act invalid, the Canadian Parliament responded by enacting another statute to address its legislative objective in a different way.

Elsewhere, I have offered proposals for enriching the dialogue metaphor as a descriptive, not normative, means of understanding constitutional and legal dynamics.²⁹ I suggest the ordinary exercise by the political and judicial branches of government of their conventional institutional functions, over time, constitutes dialogue not only about constitutional issues but also over more ordinary legal issues. That point is clear in New Zealand, which lacks a written constitution. That requires scholars and judges to discern which decisions about the law by judges and legislators are constitutional in

²⁷ Peter W Hogg and Allison A Bushell “The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn’t Such a Bad Thing After All)” (1997) 35 Osgoode Hall LJ 75.

²⁸ Peter W Hogg, Allison A Bushell Thornton and Wade K Wright “*Charter* Dialogue Revisited — or ‘Much Ado about Metaphors’” (2007) 45 Osgoode Hall LJ 1.

²⁹ For example, Palmer, *Constitutional Dialogue*, above n 16.

nature and which are not. But I consider the point is a generic one. When a judge interprets the meaning of a law passed by Parliament, and Parliament reacts by changing it, that is a form of institutional dialogue about what the law is and should be: legal dialogue. When the point at issue is one of constitutional significance, legal dialogue becomes constitutional dialogue.

Legal and constitutional dialogue occurs quintessentially between a Supreme Court and the legislature. But there is no reason why other institutional actors cannot also be conceived of adding their voices to the mix. In New Zealand, in relation to the Treaty of Waitangi, as I will explain, the Waitangi Tribunal has been an important constitutional interlocutor. Its first four substantive reports were influential on the Court of Appeal in the *SOEs case*. And, as I note below, the Courts have played a role in requiring government to wait for Tribunal reports before making certain decisions. I have also proposed we can extend the metaphor by hearing those engaged in dialogue as speaking more or less loudly or strongly to each other. This provides a way of characterising, descriptively, the strength of voice of one branch of government relative to the others or relative to its own strength in the past or even, comparatively, with the relative strength of voice of branches in other countries.

In New Zealand, I have suggested the judiciary's voice is relatively muted.³⁰ The lack of a written constitution, supreme law or any other generally accepted power in the judiciary to invalidate an act of Parliament has effect. Proposals to create such a role have been rejected, though they are still offered.³¹ The current debate about dialogue through declarations of inconsistency may change that somewhat. The *SOEs case* is one of the occasions on which the New Zealand appellate courts have raised their voice most strongly and repeatedly in the series of cases that followed. But, otherwise, New Zealand judges have become used to their quiet role, occasionally talked over by Parliament. Parliament speaks loudly in New Zealand, from its one house. Its messages are more mixed than they used to be, with the executive's voice moderated by negotiations between political parties necessitated by an electoral system of mixed

³⁰ Palmer, *Constitutional Dialogue*, above n 16, at 516.

³¹ Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at 29; Geoffrey Palmer and Andrew Butler *Towards Democratic Renewal: Ideas for constitutional change in New Zealand* (Wellington, Victoria University Press, 2018).

member proportional representation. But there is no doubt Parliament speaks more loudly than the judiciary in New Zealand.

Extending the dialogue metaphor also provides a way of characterising the different perspectives adopted by different institutions as different languages.³² In particular, in New Zealand, I have suggested the language of the judiciary is the methodology of the common law, characterised by the use of reason and specific factual contexts as I have suggested already. This is an inductive form of reasoning — from the particulars of individual cases towards the general rule. It pays attention to specific factual context of particular cases. It reasons by analogy and looks to past precedents to guide decisions.

By contrast, the paradigm of public policy analysis, spoken by the public service in proposing policy and legislative reform, is quite different. Policy analysts typically start with the government's general objectives. They identify the problem to be resolved. They identify, not just arguments for and against a binary set of outcomes, but all possible options for addressing the problem. They analyse all the options in terms of which will best achieve the general objectives, assessing financial implications, and all other sets of implications. This is deductive reasoning — from the general to the particular. It is more abstract. It is less interested in factual circumstances. Its evidence derives from general social science analysis rather than anecdotes from a particular fact scenario. It looks to the future, not the past. In some ways policy analysis is the direct inverse of legal analysis.

And I have previously suggested politicians speak the language of politics: compromise, negotiation, log-rolling, persuasion: the dark arts of the deal, now taken to an extreme in the United States.³³ While politicians have policy objectives to greater or lesser extents they have difficulty accomplishing them out of office. The need for electoral popularity lends a primacy to public responsiveness that judges and public servants do not experience so directly.

³² Palmer, *Constitutional Dialogue*, above n 16, at 517.

³³ Matthew S R Palmer “Open the Doors and Where are the People? Constitutional Dialogue in the Shadow of the People” in Claire Charters and Dean R Knight (eds) *We, The People(s): Participation in Governance* (Wellington, Victoria University Press, 2011) at 50.

So I suggest, as a positivist descriptive matter, not only do the institutions of government engage in constitutional dialogue through the routine exercise of their functions in affecting the generic exercise of public power, speaking more or less loudly, but they do so in different languages. As a normative matter, I suggest the constitutional health of any government is improved by having the different branches of government which exercise public power thinking and speaking in different languages.³⁴ We want an institution thinking abstractly and generically about the formulation of general policy and legal principles. Separately as a cross-check, we want an institution thinking contextually about how those general principles apply to the reality of specific facts of particular cases. Each perspective checks the other, consistent with the separation of powers and the rule of law. Not only is the context and use of reason in judicial decision-making of value in itself, but I suggest it is distinctive from the perspectives of the other branches of government. Normatively, I note this reinforces the importance of judges considering context and using reason.

The value of the insight available from dialogue theory is that it breaks through the tired old binary question of which branch of government is supreme. Hogg and Bushell's analysis immediately demonstrated the staleness of a static view of parliamentary sovereignty or judicial supremacy. Together with the bells and whistles I suggest, it offers a dynamic alternative to understanding the location, not of supremacy, but of changing relative power between the political and judicial branches of government, exercised over time in a process of constitutional dialogue.

Constitutional dialogue over the Treaty of Waitangi

In the context of this paper, the dialogue metaphor is useful as a means of exploring the development of one of the most significant constitutional developments in New Zealand in the last fifty years: the re-interpretation of the meaning and status of the Treaty of Waitangi.³⁵

³⁴ Palmer, *Constitutional Dialogue*, above n 29, at 523.

³⁵ Palmer, *The Treaty of Waitangi*, above n 16, ch 3.

As you might expect, after its signing there was continuing political and legal contest over the meaning and status of the Treaty of Waitangi.³⁶ There was, eventually, expression of a domestic legal status of the Treaty by the courts. Most definitively, in 1941, the Judicial Committee of the Privy Council appears to have affirmed the Treaty is not part of New Zealand law unless Parliament specifically so provides, as with other international treaties.³⁷

Then, from 1973 to 1993, the institutions of New Zealand government reinterpreted the meaning and legal and constitutional status of the Treaty of Waitangi through a process of constitutional dialogue.³⁸ In the late 1960s and early 1970s there was a renaissance of Māori cultural and political assertiveness. In 1971 the National Cabinet asked for a paper about whether the Treaty should be put into law.³⁹ The recommendation not to do so was accepted. From 1973 to 1975 a committee of the Labour parliamentary caucus made a proposal for investigation of Māori land claims to Cabinet. The first proposal was to set up a select committee to inquire into allegations of breaches of the Treaty. Instead, Cabinet decided to propose legislation, the Treaty of Waitangi Act 1975. The Act created the Waitangi Tribunal to interpret and make recommendations to government about contemporary breaches of the Treaty.

After a delayed start, the Waitangi Tribunal issued four reports from 1983 to 1986 that interpreted the meaning of the Treaty in a contemporary context. The Treaty represented a relational compromise, “...the gift of the right to make laws in return for the promise to do so, so as to acknowledge and protect the interests of the indigenous inhabitants”.⁴⁰

³⁶ See, for example, Helen Robinson “Simple Nullity or Birth of Law and Order? The Treaty of Waitangi in Legal and Historiographical Discourse from 1877 to 1970” (2010) 24 NZULR 259; Mark Hickford “John Salmond and Native Title in New Zealand: Developing a Crown Theory on the Treaty of Waitangi, 1910–1920” (2008) 38 VUWLR 853.

³⁷ *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC). For a contextual view see Alex Frame “Hoani Te Heuheu’s case in London 1940–1941: An Explosive Story” (2006) 22 NZULR 148.

³⁸ Palmer, *The Treaty of Waitangi*, above n 16, at ch 5.

³⁹ Palmer, *The Treaty of Waitangi*, above n 16, at 131-133 and 179; Palmer, *Indigenous Rights*, above n 1.

⁴⁰ Waitangi Tribunal *Report of the Waitangi Tribunal on the Motunui-Waitara Claim* (2nd ed, Wai 6, 1989) at [11.3].

In 1985, Parliament extended the Tribunal’s jurisdiction, retrospectively, to 1840. In 1986, Parliament passed the State-Owned Enterprises Act 1986 to allow the transfer of land and assets from the Crown to SOEs. The s 9 savings clause, which referred to the Treaty, was itself the result of a recommendation by the Waitangi Tribunal while the SOEs Bill was going through the House of Representatives. Section 9 became “a prompt for litigation”.⁴¹ The *SOEs case* was simply the most constitutionally significant judgment in New Zealand’s history. In five separate judgments, using reason and context as described above, the Court of Appeal followed the Tribunal’s lead on the meaning of the Treaty, using the language of “partnership” to describe the relationship between the Crown and Māori. The Court required the Crown and the New Zealand Māori Council to negotiate a regime to protect Māori claims to the Waitangi Tribunal before transferring land to SOEs.

The outcome of these negotiations was legislated for in the Treaty of Waitangi (State Enterprises) Act 1988. The Waitangi Tribunal acquired power to require, compulsorily and at market value, that land be resumed by the Crown from whomever then owned it and be returned to a Māori claimant. Further litigation followed, in relation to other contexts such as transfer of coal and forestry assets. The courts gave the same answers. Further judicial reinforcement of the Court of Appeal’s and Waitangi Tribunal’s approaches to the meaning of the Treaty came in 1993 from the Privy Council in relation to broadcasting assets.⁴²

The context has changed since then as a series of settlements of historical breaches of the Treaty has been negotiated between the Crown and Māori from 1994. Whether that meant a change in the application of law was tested in 2013 when the Crown sought partial privatisation of SOEs without a special regime to protect Māori claims to water. The Supreme Court confirmed the same legal principles still endure.⁴³ But, in the context of the Crown having settled many historic land grievances and giving

⁴¹ Hickford, above n 20.

⁴² *New Zealand Maori Council v Attorney-General [Broadcasting assets case]* [1994] 1 NZLR 513 (PC).

⁴³ *New Zealand Maori Council v Attorney-General [Water case]* [2013] NZSC 42, [2013] 3 NZLR 157.

undertakings as to settlement of water claims, the Court was not this time prepared to stop the partial privatisation.⁴⁴

As even this potted summary makes clear, the reinterpretation of the legal meaning and status of the Treaty of Waitangi from 1973 to 1993 exemplifies a process of constitutional dialogue. Political pressure led the executive to propose and Parliament to create the Waitangi Tribunal which subsequently recommended direct legislative reference to the Treaty. That prompted litigation which gave a contemporary relational meaning to the Treaty and, through negotiation and more legislation, greater legal power to the Tribunal. It has resulted in a reconciliation of authoritative views in the context of contemporary New Zealand social, economic, political and cultural conditions. I suggest judicial participation in constitutional dialogue, through courts simply performing their conventional roles, can contribute to protecting the rights of indigenous peoples in a political constitution.

3 The Treaty of Waitangi and development of judicial review

The final dimension I traverse, of the contribution of the judiciary to indigenous rights, is reflected in the title of this paper. Judges performing their conventional role of applying the law in specific cases leads to development of substantive law, through the development of the common law or the similar process that occurs through judicial interpretation of legislation. This judicial development of the law is the third dimension I identify of the courts' role in protecting indigenous rights. In particular, I am interested in the law of judicial review as an avenue to protect indigenous rights.

I acknowledge, of course, that cases seeking to uphold customary title and aboriginal rights of Māori also seek to uphold Māori rights. So do cases concerning Māori land or other Māori property rights or fiduciary duties. Some of these have been significant in New Zealand. And many cases traditionally viewed as Treaty cases are brought in reliance on statutory provisions that exist because of the background of the Treaty, rather than directly in reliance on the Treaty or its principles.⁴⁵ But my focus in this

⁴⁴ See further Matthew Palmer "Judicial Review" in Mary-Rose Russell and Matthew Barber (eds) *The Supreme Court of New Zealand 2004–2013* (Thomson Reuters, Wellington, 2015).

⁴⁵ For example, the Maori Fisheries Act 1989.

paper is the use and development of the law of judicial review to invoke the Treaty of Waitangi. This is because judicial review is the primary means by which the judiciary supervises the legality of decision-making by those wielding the coercive powers of the state. What do the judicial review cases invoking the Treaty of Waitangi reveal about whether the law of judicial review in New Zealand is fit for that purpose?

I have identified 27 cases which invoke the Treaty directly in judicial review proceedings. I am reasonably confident these include all cases of the Supreme Court and Court of Appeal since the *SOEs case*. My list may currently be missing some High Court cases, but I think it includes the most important of those too. There are, of course, overlaps. One of them also claims a form of breach of contract.⁴⁶ In addition, appeals on the basis of error of law can also effectively be judicial reviews in substance, as illustrated by five cases:

- *Barton-Prescott v Director-General of Social Welfare*: a 1997 appeal of a Family Court decision not to award a grandmother custody of a Māori child being adopted out of the whanau.⁴⁷ A full court of the High Court found all Acts dealing with the status, future and control of children are to be interpreted as coloured by the principles of the Treaty of Waitangi and found family organisation is “among those things which the Treaty was intended to preserve and protect”.⁴⁸ On the facts, however, assessing the “baby’s needs realistically against appropriate factors from the checklist, whilst still bearing in mind the importance of concepts of whanau and whakapapa as discussed above”, the Court concluded the baby’s needs would not be best met by awarding custody to the appellant.⁴⁹
- *Watercare Services Ltd v Minhinnick*: a 1997 appeal of an Environment Court decision under the Resource Management Act 1991 (RMA) to cease construction of a sewerage pipe under a designation, because the ground was

⁴⁶ *Chetham v Mighty River Power* [2014] NZHC 3202.

⁴⁷ *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (Full HC).

⁴⁸ At 184.

⁴⁹ At 190.

wāhi tapu.⁵⁰ The Court of Appeal found the construction was within the designation and the Act's reference to the Treaty did not confer a right of veto.

- *Bleakley v Environmental Risk Management Authority*: a 2001 appeal of an Environmental Risk Management Authority decision to approve testing of a genetically modified organism on Ngati Wairere land.⁵¹ A majority of a full court of the High Court found, while the Treaty imposed a duty of active protection on the Crown, it did not require action beyond what was reasonable in the prevailing circumstances.⁵²
- *Friends and Community of Ngawha Inc v Minister of Corrections*: a 2002 appeal of an Environment Court decision to allow building of a prison on a site said to be occupied by a taniwha.⁵³ The High Court rejected the appeal, finding a requirement in s 8 of the RMA did not require consideration of alternative sites to fulfill the Treaty principle of active protection.⁵⁴
- *Takamore Trustees v Kapiti Coast District Council*: a 2003 appeal of an Environment Court decision to confirm designation of a road over land said to be wāhi tāpu.⁵⁵ The High Court agreed the Environment Court had failed to take into account Treaty principles as required under the RMA.

As appeals, these cases involve law that is effectively the same as the law of judicial review. They are appeals of decisions for error of law. Errors of law tend either to involve inconsistency with substantive legislation, which also constitutes illegality under judicial review, or inadequacy in the decision-making processes as under judicial review of the process of decision-making.

The nature of the decisions judicially reviewed

⁵⁰ *Watercare Services Ltd v Minihinnick* [1998] 1 NZLR 294 (CA).

⁵¹ *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 (Full HC).

⁵² At [82]–[83], citing *Broadcasting Assets Case*, above n 43.

⁵³ *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401 (HC).

⁵⁴ At [55].

⁵⁵ *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496 (HC).

The 27 cases of judicial review that rely on the Treaty of Waitangi include cases of great significance to government and to Māori. The 1987 *SOEs case* itself deferred the transfer of billions of dollars worth of Crown land and assets in pursuance of the government's programme of corporatisation, in an election year. The 2013 *Water case* could have done the same with the partial privatisation of hydro-electricity generation companies which had been a central plank of the government's re-election campaign in 2011. There are also some patterns in the nature of the decisions under challenge in these cases.

The first grouping of judicial reviews, 11 in number, were challenges to divestment of land and assets that could otherwise be used to satisfy Māori Treaty claims. The first four challenges by the pan-Māori New Zealand Māori Council were successful: the 1987 *SOEs case*,⁵⁶ 1989 *Coal case*,⁵⁷ the 1989 *Forestry case*,⁵⁸ and the 1990 *Radio frequencies case*.⁵⁹ The next three challenges were unsuccessful: the 1993 *Broadcasting assets case*,⁶⁰ the 1993 *Hydro-electric dams case* (against local authorities),⁶¹ and the 1996 *Commercial radio assets case*.⁶²

In the 2013 *Water case*, the Supreme Court allowed partial privatisation of electricity-generating former SOEs, as Mixed Ownership Model (MOM) companies, to proceed.⁶³ It held the Crown to its undertakings to settle Treaty claims over water. You might think the subject matter matters. But the difference between success and failure of these claims also appears to be related to whether the Court considered, in the context in which each case was brought, a system of protection over the assets was required for the Crown to fulfill its Treaty obligations. Two other recent challenges by claimants to specific proposed transfers of land by SOEs failed, essentially due to the same distinction:

⁵⁶ *New Zealand Maori Council v Attorney-General* [*SOEs case*] [1987] 1 NZLR 641.

⁵⁷ *Tainui Maori Trust Board v Attorney-General* [*Coal case*] [1989] 2 NZLR 513 (CA).

⁵⁸ *New Zealand Maori Council v Attorney-General* [*Forestry case*] [1989] 2 NZLR 142 (CA).

⁵⁹ *Attorney-General v New Zealand Maori Council* [*Radio frequencies case*] [1991] 2 NZLR 129 (CA).

⁶⁰ *Broadcasting assets case*, above n 42.

⁶¹ *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [*Hydro-electric dams case*] [1994] 2 NZLR 20 (CA).

⁶² *New Zealand Māori Council v Attorney-General* [*Commercial radio assets case*] [1996] 3 NZLR 140 (CA).

⁶³ *Water case*, above n 43.

- a 1999 Tuwharetoa challenge to a transfer of land from an SOE to the Taupo District Council on the basis of inadequacy of the 1988 compulsory resumption regime was rejected;⁶⁴ and
- a 2014 challenge to sale, by an MOM company, of land that was not subject to compulsory resumption.⁶⁵

However the most recent such case in 2016, of *Ririnui v Landcorp Farming Ltd*, is more opaque and more interesting.⁶⁶ A majority of the Supreme Court held a decision by Landcorp, an SOE, to sell land was judicially reviewable given one of its legitimate activities was to assist the Crown to meet its Treaty obligations. It held ministers were legally entitled to ask Landcorp to halt a tender process to give Ngāti Mākino an opportunity to purchase the land and Landcorp did not act improperly in acceding to that request. However the ministers' decision not to intervene similarly on behalf of Ngāti Whakahemo was held to be based on an error of law, in that they wrongly believed Whakahemo's Treaty claim had been settled. A different majority of the Court decided it was not appropriate to set aside the sale. The first paragraph of the judgment of Elias CJ and Arnold J, who were in the majority except on relief, was:

This is a judicial review case. Judicial review is a supervisory jurisdiction which enables the courts to ensure that public powers are exercised lawfully. In principle, all exercises of public power are reviewable, whether the relevant power is derived from statute, the prerogative or any other source. The courts acknowledge limits, however. These limits are reflected primarily in the notions that the case must involve the exercise of a public power, that even if the court has jurisdiction, the exercise of power must be one that is appropriate for review and that relief is, in any event, discretionary. It is the scope of these limits that is at issue in the present case.

In a second grouping of seven cases, challengers of resource management and conservation decisions often achieved some success:

⁶⁴ *Te Heu Heu v Attorney-General* [1999] 1 NZLR 98 (HC)

⁶⁵ *Chetham v Mighty River Power* [2014] NZHC 3202.

⁶⁶ *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056.

- In 1987, in *Huakina Development Trust v Waikato Valley Authority*, the Huakina Development Trust challenged resource management decisions by the planning tribunal. The appeal was allowed in part.⁶⁷
- In 1990, in the *Fisheries case*, the iwi of Muriwhenua challenged the use of fisheries quota. They were successful in obtaining interim relief, resulting in settlement instead of a substantive hearing.⁶⁸
- In 1995, in *Ngai Tahu Maori Trust Board v Director-General of Conservation*, Ngāi Tahu successfully challenged the Director-General of Conservation’s decision to issue a competing whale-watching permit.⁶⁹
- In 1998, in *Ngatiwai Trust Board v Minister of Conservation*, Ngāti Wai successfully challenged the Minister’s decision to ban all fishing, including customary fishing, in a marine reserve.⁷⁰
- In 2002, in *Glenharrow Holdings Ltd v Attorney-General* Ngāi Tahu succeeded in opposing the issuance of new mining licences to Glenharrow on the basis of their Treaty settlement legislation.⁷¹ But because there was no Treaty clause in the Mining Act, the Act would prevail if inconsistent with Treaty principles and the Crown’s obligations under the Treaty.
- In 2007, in *Reihana v Director-General of Conservation*, Mr Reihana unsuccessfully challenged the process by which regulations governing the customary taking of titi (also known as “muttonbirds”).⁷²
- In 2017, in *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation*, Ngāi Tai interests unsuccessfully claimed tourism permits should not have been granted to

⁶⁷ *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC).

⁶⁸ *Te Runanga o Muriwhenua Inc v Attorney-General [Fisheries case]* [1990] 2 NZLR 641 (CA).

⁶⁹ *Ngai Tahu Maori Trust Board v Director-General of Conservation [Whalewatching case]* [1995] 3 NZLR 553 (CA).

⁷⁰ *Ngatiwai Trust Board v Minister of Conservation* HC CP39/98, 22 December 1998.

⁷¹ *Glenharrow Holdings Ltd v Attorney-General* [2003] 1 NZLR 236 (HC).

⁷² *Reihana v Director-General of Conservation* HC Invercargill CIV-2005-425-75, 19 December 2007.

non-Māori interests over the islands of Rangitoto and Motutapu.⁷³ The principle of active protection was held not to be impaired by a short-term continuation of the status quo.

The penultimate group of eight judicial review proceedings relying on the Treaty of Waitangi concern the process of settling Treaty claims itself, with which the Courts are singularly reluctant to get involved:

- In 1993, the *Sealords case* was an unsuccessful challenge to a settlement by the Crown and Māori of fisheries claims.⁷⁴
- In 1998, in *Ngati Koata No Rangitoto ki te Tonga Trust v Minister of Transport*, interim relief was refused on a challenge to a Crown decision that would have changed the value of land that could potentially be the subject of a later Treaty settlement.⁷⁵
- In 2000, *Ngati Apa ki Te Waipounamu Trust v R* was a successful challenge to a Māori Appellate Court decision in favour of Ngāi Tahu in order to pre-empt impediments to their own settlement negotiations.⁷⁶
- In 2002, in *Pouwhare v Attorney-General*, a Treaty claimant unsuccessfully challenged the decision of the Minister in charge of Treaty of Waitangi Negotiations about a settlement with Ngāti Awa on grounds it would prejudice any potential settlement with its own iwi.⁷⁷
- In 2004, in *Ngati Apa Ki Te Waipounamu Trust v R*, Ngāti Apa claimants unsuccessfully challenged a decision determining tribal boundaries with other South Island iwi on grounds of natural justice.⁷⁸ The Court of Appeal held

⁷³ *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2017] NZCA 613, [2018] 2 NZLR 453.

⁷⁴ *Te Runanga o Wharekauri Rekohu Inc v Attorney-General [Sealords case]* [1993] 2 NZLR 301 (CA).

⁷⁵ *Ngati Koata No Rangitoto ki te Tonga Trust v Minister of Transport* CA296/98, 18 December 1998.

⁷⁶ *Ngati Apa Ki Te Waipounamu Trust v R* [2000] 2 NZLR 659 (CA).

⁷⁷ *Pouwhare v Attorney-General* HC Wellington CP78/02, 30 August 2002.

⁷⁸ *Ngati Apa Ki Te Waipounamu Trust v Attorney-General* [2004] 1 NZLR 462 (CA)

additional duties said to arise from the principles of the Treaty were “encompassed within the principles of natural justice and fairness”.⁷⁹

- In 2005, a claim similar to *Pouwhare*, challenging the advice leading to a settlement deed with another iwi said to prejudice pending Tribunal claims, was also dismissed in *Milroy v Attorney-General*.⁸⁰
- In 2009, *Attorney-General v Mair*, a Treaty claimant unsuccessfully challenged the Waitangi Tribunal’s refusal to give urgency to hearing two claims because of possible prejudice by other settlements.⁸¹
- In 2017, in *Ngāti Whātua Ōrākei Trust v Attorney-General*, now before the Supreme Court, the Court of Appeal dismissed a claim on behalf of Ngāti Whātua Ōrākei that transfer of land in areas over which they claim mana whenua to effect other Treaty settlements would breach Treaty obligations.⁸²

Finally, in a class of its own in terms of the nature of the decision being challenged, is *Taiaroa v Minister of Justice* in 1995.⁸³ This was a challenge to the Chief Electoral Officer’s process of alerting and providing Māori with the option of choosing whether to enroll on the Māori Electoral Roll or the General Electoral Roll, which occurs every five years. The Court of Appeal dismissed the challenge, finding the Government’s decision to reject recommendations by the Waitangi Tribunal to allocate more funding to the option was not perfect but “passed the test of reasonableness”.⁸⁴

Grounds of judicial review

If the decisions challenged have, so far, been divestments of assets, resource management and conservation decisions, settlement processes, and the Māori Electoral Option, what have been the grounds of challenge? Identifying the grounds of challenge involves identifying the laws with which challengers say decisions are inconsistent. As

⁷⁹ At [33].

⁸⁰ *Milroy v Attorney-General* [2005] NZAR 562 (CA)

⁸¹ *Attorney-General v Mair* [2009] NZCA 625.

⁸² *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZCA 554, [2018] 2 NZLR 648.

⁸³ *Taiaroa v Minister of Justice* [1995] 1 NZLR 411 (CA).

⁸⁴ At 418.

Dean Knight’s recent book has authoritatively canvassed, “grounds” of judicial review is one available schemata by which the law of judicial review is conceptualised.⁸⁵ It is the dominant conventional schemata in New Zealand. It is important for both potential challengers and potential defenders of challenges to be able to be clear about what are potential grounds of challenge. This is what decision-makers must ensure they do not breach when making decisions. It is what challengers assess in order to decide whether to mount a legal challenge or not. A clear understanding of the grounds of challenge of decisions involving the Treaty of Waitangi, like any other official decisions, is required for the certainty and non-arbitrariness of the rule of law to be maintained.

Unfortunately, it is a lot harder to identify the grounds on which decisions have successfully and unsuccessfully judicially reviewed than it is to identify the nature of the decisions reviewed. As with most judicial reviews, challengers tend to take a “kitchen sink” approach to pleadings — pleading all the grounds they can think of. The grounds pleaded do not always make it into the judgment. And judges are not always clear about which grounds they find persuasive. I have categorised the grounds of judicial review, whether successful or unsuccessful, as treated in the judgments, according to five grounds of judicial review into which they fall, as best as (and if) I can determine. The relevant propositions from the cases are listed in the table below under each of the five grounds:

- illegality, for inconsistency with legislation affirming the principles of the Treaty;
- failure to consider mandatory or relevant considerations;
- breach of legitimate expectations;
- natural justice; and
- unreasonableness.

⁸⁵ Dean R Knight *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press, Cambridge, 2018).

	Successful	Unsuccessful
<p>1. illegality for inconsistency with legislation affirming the principles of the Treaty of Waitangi</p>	<p>a. Transferring assets without establishing a system of protecting Māori Treaty claim.⁸⁶</p> <p>b. Allocating individual transferable fisheries quota despite a legislative savings clause protecting “Māori fishing rights”.⁸⁷</p> <p>c. Deciding whether to transfer forestry assets without consultation.⁸⁸</p> <p>d. Granting a water right without regard to spiritual, cultural and traditional relationships of Māori to water.⁸⁹</p> <p>e. Transferring coal mining rights without protecting Treaty claims.⁹⁰</p>	<p>f. Negotiating and moving to enact the Sealord settlement, putatively with all Māori.⁹¹</p> <p>g. Refusing an urgent Waitangi Tribunal hearing without considering the Treaty principles at all stages of the Tribunal inquiry.⁹²</p> <p>h. Removing a power company from the state owned enterprise regime to the mixed ownership model by sale of shares and so allegedly limiting the Crown’s ability to remedy Treaty breaches in respect of the river, as although consistency with Treaty principles was required, there was no material impact on the ability to take reasonable actions to remedy Treaty breaches.⁹³</p>

⁸⁶ *SOEs Case*, above n 56.

⁸⁷ *Fisheries case*, above n 68.

⁸⁸ *Forestry case*, above n 58.

⁸⁹ *Huakina Development Trust*, above n 67.

⁹⁰ *Coal case*, above n 57.

⁹¹ *Sealords case*, above n 74.

⁹² *Attorney-General v Mair*, above n 81.

⁹³ *Water case*, above n 43.

		<ul style="list-style-type: none"> i. Selling land owned by a company under the MOM regime subject to as yet unresolved Treaty claims, as the company was not subject to Treaty principles, the land in question was private land anyway and the Crown had not assisted in the sale.⁹⁴ j. Transferring dams to new energy companies, allegedly interfering with customary title rights, as Treaty rights did not include electricity generation and so there was no prejudice to potential claims;⁹⁵ k. Transferring land to the local council, as a regime put in place to protect such claims was sufficient to ensure consistency with Treaty principles.⁹⁶ l. Agreeing to a settlement with one iwi, said to prejudice potential settlement with another, as the decision was non-justiciable.⁹⁷
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⁹⁴ *Chetham v Mighty River Power Ltd*, above n 65.

⁹⁵ *Hydro-electric dams case*, above n 61.

⁹⁶ *Te Heu Heu v Attorney-General*, above n 64.

⁹⁷ *Pouwhare v Attorney General*, above n 77.

<p>2. failure to consider mandatory or relevant considerations</p>	<p>a. Consideration of whether disposition of assets would be inconsistent with the principles of the Treaty.⁹⁸</p> <p>b. Consideration of Tainui’s claims before agreeing to transfer coal.⁹⁹</p> <p>c. Consideration of Ngāi Tahu interests and a reasonable degree of preference, subject to overriding conservation considerations;¹⁰⁰</p> <p>d. Consideration that Ngāti Whakahemo’s claim had not been settled.¹⁰¹</p>	<p>e. No need to consider the interests of tangata whenua in transferring dams or of a pending Waitangi Tribunal report or of consultation.¹⁰²</p> <p>f. No need to consider establishing an adequate system or process to protect Māori language and culture before transferring broadcasting assets.¹⁰³</p> <p>g. Failure to consider the plaintiffs’ interests when offering land to others with whom the Crown was settling is overridden by the non-justiciability of a claim which would intrude into Parliament’s processes.¹⁰⁴</p>
<p>3. breach of legitimate expectations</p>	<p>a. Ngati Wai had a legitimate expectation the Crown would consider its position before</p>	<p>b. The expectation that the Crown establish a system or process to protect te reo Māori before transferring broadcasting assets but a</p>

⁹⁸ *SOEs case*, above n 56.

⁹⁹ *Coal case* (Per Casey J), above n 57 at 540.

¹⁰⁰ *Whale-watching case*, above n 69.

¹⁰¹ *Ririnui v Attorney-General*, above n 66.

¹⁰² *Hydro-electric dams case*, above n 61.

¹⁰³ *Broadcasting Assets case*, above n 60.

¹⁰⁴ *Ngāti Whātua Ōrākei Trust v Attorney-General*, above n 82.

	banning customary fishing in a marine reserve. ¹⁰⁵	statement that Cabinet proposals would still proceed could give rise to a legitimate expectation. ¹⁰⁶ c. The expectation of consultation before the Crown terminated a joint venture with local councils. ¹⁰⁷ d. The expectation of consultation before granting a mining licence to others. ¹⁰⁸ e. The expectation Ngati Tuwheretoa would be consulted on transfer of land. ¹⁰⁹
4. natural justice		a. The Treaty does not impose greater obligations than do the principles of natural justice. ¹¹⁰
5. unreasonableness		a. The relationship the Treaty envisages “should be founded on reasonableness, mutual cooperation and trust” but the Crown does not

¹⁰⁵ *Ngatiwai Trust Board v Minister of Conservation*, above n 70.

¹⁰⁶ *Broadcasting Assets case*, above n 60.

¹⁰⁷ *Ngati Koata No Rangitoto ki te Tonga Trust v Minister of Transport*, above n 75.

¹⁰⁸ *Glenharrow Holdings Ltd v Attorney-General*, above n 71.

¹⁰⁹ *Te Heu Heu v Attorney-General*, above n 64.

¹¹⁰ *Ngati Apa Ki Te Waipounamu Trust v Attorney-General*, above n 78.

		<p>have to go beyond what is reasonable in the prevailing circumstances.¹¹¹</p> <p>b. The Treaty did not add anything to the obligations on the Crown to take reasonable steps to publicise the Māori Electoral Option.¹¹²</p> <p>c. The sale of shares in a MOM company would not materially impair the Crown's ability to take reasonable action which it is obliged to undertake, which requires a contextual evaluation.¹¹³</p>
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¹¹¹ *SOEs case*, above n 21 at 518.

¹¹² *Taiaroa v Minister of Justice*, above n 83.

¹¹³ *Water case*, above n 43.

Conclusions on judicial review

My conclusions about this pattern of grounds of judicial review in relation to the Treaty of Waitangi correspond to Lord Cooke's "simple trio" of the substantive principles of judicial review. This trio still guides New Zealand judicial review and holds "that the decision-maker must act in accordance with law, fairly and reasonably".¹¹⁴ I interpret these three principles, perhaps too crudely, as corresponding with the requirements of substantive law, fair process, and substantive reasonableness though I invert the order of my treatment of the last two.

My first conclusion is to note the primary role of the legislation which invokes the Treaty of Waitangi. This makes sense. Much judicial review is simply statutory interpretation. Treaty litigation often seeks to enforce the Treaty to bring its principles to bear directly on decisions. Where a statute invokes the principles of the Treaty, the judiciary's role on judicial review is to interpret the meaning of the principles of the Treaty, apply it and determine whether a decision is inconsistent with the principles. There has been a lot of work for the judiciary to do in interpreting the meaning of the principles, particularly where Parliament has made bare unelaborated references to the Treaty. But that jurisprudence is now well-established and understood as a relatively sophisticated and nuanced body of principled jurisprudence.¹¹⁵

Judicial review on the basis of inconsistency with the principles of the Treaty, via legislation, is the ground of illegality or unlawfulness. Inconsistency with these legal requirements on the Crown constitutes the most important ground of judicial review: review on the basis of illegality or unlawfulness. The same is true of the appeal decisions referred to earlier, since illegality is not only a ground of judicial review but also, of course, a ground of appeal. Comfortingly, for the advocates of Parliamentary sovereignty in a political constitution, the most important measure against which the judiciary reviews government action are the laws passed by Parliament as interpreted by the judiciary.

¹¹⁴ 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) at 1. See Knight, above n 85, at 102-106.

¹¹⁵ Palmer, *The Treaty of Waitangi*, above n 16, ch 3.

My second conclusion about judicial review is that the traditionally neglected ground of unreasonableness has a much bigger role in Treaty judicial reviews than might be expected. In the law of judicial review generally, the ground of unreasonableness is a poor and somewhat despised cousin. Hammond J has characterised it as the destination of the doomed¹¹⁶ Yet reasonableness and unreasonableness pops up regularly throughout the language the courts employ when judicially reviewing decisions in terms of the Treaty of Waitangi. This is because reasonableness on the part of the Treaty partners has been found to be part of the substantive requirements of the Treaty of Waitangi. In the first, seminal case, the *SOEs case* itself, Cooke P said:¹¹⁷

If the Crown acting reasonably and in good faith satisfies itself that known or foreseeable Maori claims do not require retention of certain land, no principle of the Treaty will prevent a transfer.

I use "reasonably" here in the ordinary sense of in accordance with or within the limits of reason. The distinction is between on the one hand what a reasonable person could do or decide, and on the other what would be irrational or capricious or misdirected. Lawyers often speak of *Wednesbury* unreasonableness, in allusion to the case reported in [1949] 1 KB 223, but I think that it comes to the same thing.

And:¹¹⁸

A reasonably effective and workable safeguard machinery is what is required. Further than that the Crown should not be obliged to go... The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected Government to follow its chosen policy. Indeed to try to shackle the Government unreasonably would itself be inconsistent with those principles. The test of reasonableness is necessarily a broad one and necessarily has to be applied by the Court in the end in a realistic way. The parties owe each other co-operation..."

The most authoritative encapsulations of Treaty obligations also emphasise reasonableness. Lord Woolf, for the Judicial Committee of the Privy Council, said this in the *Broadcasting Assets* case:

This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time. For example in times of

¹¹⁶ *Lumber Specialties Ltd v Hodgson* [2000] 2 NZLR 347 (HC) at [144].

¹¹⁷ At 664.

¹¹⁸ At 665-666.

recession the Crown may be regarded as acting reasonably in not becoming involved in heavy expenditure in order to fulfil its obligations although this would not be acceptable at a time when the economy was buoyant. Again, if as is the case with the Maori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action. Indeed any previous default of the Crown could, far from reducing, increase the Crown's responsibility.

And the Supreme Court, in the *Water case*, pointed to and repeated this passage saying:¹¹⁹

In deciding whether proposed Crown action will result in “material impairment”, a court must assess the difference between the ability of the Crown to act in a particular way if the proposed action does not occur and its likely post-action capacity. So impairment of an ability to provide a particular form of redress which is not in reasonable or substantial prospect, objectively evaluated, will not be relevantly material. To decide what is reasonable requires a contextual evaluation which may require consideration of the social and economic climate.

Reasonableness is clearly central to the nature and limits of the substantive obligations of the Crown, and presumably Māori, under the Treaty. Accordingly, reasonableness is not a makeweight ground of judicial review in relation to the Treaty of Waitangi as some think it is in judicial review proceedings more generally. Because of the substantive content of Treaty obligations, reasonableness is a potentially central ground of judicial review proceedings that invoke the Treaty of Waitangi.

Reasonableness has got a bad rap in administrative law partly because of judicial reticence about how to measure it. The circular formulation of unreasonableness in *Wednesbury* has done a lot of damage. But, as I have pointed out in a judgment, there are other forms of unreasonableness.¹²⁰ On the basis of *Edwards v Bairstow*, it seems unobjectionable that material defects in facts underlying a decision, or in the connection between facts and decision, constitute questions of law.¹²¹ They do so because a decision suffering from such deficiencies is unreasonable. There must be other forms of unreasonableness too. Indeed, the language used in some of the judgments analysed above suggests all of the grounds of judicial review could be framed using the language

¹¹⁹ At [89] (footnotes omitted).

¹²⁰ *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508.

¹²¹ *Edwards v Bairstow* [1956] AC 14 (HL).

of unreasonableness. Relying on an irrelevant consideration, or failing to rely on a relevant consideration is unreasonable. Failing to honour a legitimate expectation is unreasonable. But such a conceptualisation of judicial review would be too broad and unreasonably devalue reasonableness as a ground of judicial review.

In some ways it is puzzling that judges generally shy away from assessing decisions for unreasonableness. The reason usually given, including in *Wednesbury* itself, is the perceived illegitimacy of judges making substantive decisions rather than picking up defects in process. But judges are experts in reasons. As I said above, providing reasons is core to the judicial role. Assessing the reasons given by decision-makers is the key task of judges sitting on appeal. If there is one thing in which judges can claim a comparative advantage, vis-à-vis the political branches of government, it is the use and limits of reason. Why should judges not call unreasonableness in administrative decision-making, on judicial review, when they see it? This is a generic question about unreasonableness as a ground of judicial review.

My third conclusion about judicial review is about the procedural grounds of judicial review. Failure to consider relevant considerations appears to do considerable work as a ground of review in the Treaty cases. But closer inspection reveals this to be rather hollow. The successful judicial reviews based on this ground in Treaty cases are really that the decision-maker should have considered the action they took was inconsistent with the principles of the Treaty. That is effectively the same as the ground of illegality. None of the relevant considerations which were said to have grounded successful challenges were procedural. They were substantive, in the nature of illegality.

Indeed, as with reasonableness, principles of good process have been effectively incorporated into the substantive requirements of the Treaty of Waitangi through the judiciary's interpretation of the meaning of the Treaty. The principles of the Treaty are, themselves, deeply rooted in good process. If the Crown were to fail to take into account a relevant consideration, take into account an irrelevant consideration, dishonor a legitimate expectation or breach natural justice, it would probably also be breaching the principles of the Treaty of Waitangi. This flows from the courts' acceptance of the Waitangi Tribunal's perspective of the Treaty in a relational sense.¹²² Procedure looms

¹²² Palmer, *The Treaty of Waitangi*, above n 16, at 125–129.

large in the legal parameters on the relationship between the Treaty partners. The language of partnership and references in the *SOEs case* on the duty of the Treaty partners to act in good faith, fairly and reasonably toward each other resonates deeply with the law of judicial review.

Overall Conclusion

I consider the “boundaries” between the various grounds of the law of judicial review in New Zealand are generally too blurred. In the first judicial review proceeding I heard as a judge I asked counsel for the applicant which particular grounds of judicial review he considered strongest. The adventurous counsel submitted to me the Mexican food analogy to the grounds of judicial review.¹²³ Tex-Mex dishes are folded and wrapped in different shapes and arrangements and called different dishes: enchiladas, tacos, burritos, quesadillas. But they often contain the same ingredients: flour and water, tomato, cheese, avocado, chili. Or a mix of aspects of substantive law, good process and unreasonableness. I was not adventurous enough to put this analogy in my judgment, which may have been a good thing since both the Court of Appeal and Supreme Court disagreed with me in that case (though I hasten to add the overall score was 5 judges against 4).¹²⁴

Now, I like Mexican food. But the problem with dressing up the same ingredients in different legal forms is rather more serious. It can lead to uncertainty in the law. As I said earlier, the rule of law requires that litigants challenging and defending application for judicial review must be able to know what legal principles have to be abided by. Very good books have been written about the various conceptual frameworks which academics try to put on the law of judicial review in order to make it comprehensible, clear and principled.¹²⁵ But that somehow does not often manifest in practice. Often neither counsel nor judges are particularly clear about what the grounds of judicial review are in New Zealand. Are they relying on illegality, any of the myriad

¹²³ Mr Isaac Hikaka.

¹²⁴ *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZHC 220; (2016) 19 ELRNZ 370; *Hawke’s Bay Regional Investment Company Ltd v Royal Forest and Bird Protection Society of New Zealand Inc* [2017] NZSC 106, [2017] 1 NZLR 1041; *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2016] NZCA 411, [2016] 3 NZLR 828.

¹²⁵ Knight, above n 85.

dimensions of lack of fair process or substantive unreasonableness? Too often, it is difficult to tell. This can lend undesirable credence to Philip Joseph's characterisation of judicial review in New Zealand as "instinctual".¹²⁶

The examination of the use of judicial review in relation to the Treaty of Waitangi in this paper might point to a different way of thinking about this. Judicial review for illegality depends on interpretation of the meaning of the relevant statute. That has involved the judiciary in a lot of work in relation to statutory references to the principles of the Treaty of Waitangi. But judicial review for lack of fair process and unreasonableness, in relation the Treaty, derives its characteristics from the nature of the substantive law. Perhaps there is a more general lesson here. Whether an Act or area of law emphasises or plays down the importance of process, or invokes or sets its face against unreasonableness, should tell us what is fair process and what is unreasonable in the circumstances of that act or area of law.

In relation to the Treaty of Waitangi, fair process and substantive unreasonableness have effectively become integrated into the substantive principles of the Treaty. Perhaps recognition of that would allow counsel to argue more clearly and judges to more clearly apply the law of judicial review when the Treaty of Waitangi is invoked. And clarity in the law of judicial review should enhance the judiciary's ability to contribute to constitutional dialogue and to perform their fundamental functions of applying the law to specific factual circumstances, using reason.

Nō reira, tēnā koutou, tēnā koutou, tēnā koutou katoa.

¹²⁶ Philip A Joseph *Exploratory Questions in Administrative Law* (2012) 25 NZULR 73.