THE FUTURE OF PUBLIC LAW IN AOTEAROA NEW ZEALAND

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This is a lightly edited version of the 21st Robin Cooke lecture delivered by Professor Jason Varuhas at the Faculty of Law, Te Herenga Waka—Victoria University of Wellington, on 13 December 2023.

I INTRODUCTION

E ngā nui, e ngā rahi, tēnā tātou katoa
E ngā mate, haere atu rā
E te haukāinga, tēnā koutou
E ngā rangatira, tēnā koutou
E te whānau Cooke, tēnā koutou
E Te Herenga Waka, tēnā koutou
Ko Jason Varuhas ahau, nō Kiriki, nō Te Whanganui-a-Tara hoki ahau
Nau mai haere mai ki taku kauhau

I would like to acknowledge the Cooke family. I am delighted you are here this evening. And I acknowledge my own family.

It is a great honour to deliver the Robin Cooke lecture. It has special meaning for me for several reasons.

Victoria University of Wellington is my alma mater. This lecture theatre and the one next door are where I first learned the legal craft, taught by many of those who are in the room this evening.

Wellington is my home town, and it is special to deliver this lecture to an audience which includes family and so many longstanding friends and colleagues.

And it is a privilege to deliver this lecture in honour of Lord Cooke. My lecture will address the future of public law in New Zealand with a particular focus on judicial method. And those are apt topics for a lecture in Lord Cooke's honour. I recently had occasion to read the Privy Council decision

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in *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon*, decided in 1983. Lord Diplock sitting in London observed that, while there were procedural differences, the principles of judicial review in New Zealand were *the same* as those in England.[1] The claim was dubious at the time, but today no one would even think of making such a claim. And that is in large part because of the changes effected by President Cooke and the Cooke court through the 1980s and 1990s. Building on what had gone before, President Cooke and his court put in place the essential building blocks of a distinctive public law for Aotearoa: "a truly distinctive body of principles and practices, reflecting a truly distinctive outlook".[2]

It was through that period that the Court of Appeal issued many administrative law decisions now viewed as canonical.[3] The Court was confronted in 1990 with the New Zealand Bill of Rights Act 1990 (the Bill of Rights) and forged the beginnings of a new human rights jurisprudence.[4] And the Court issued a series of totemic decisions on Te Tiriti o Waitangi, *New Zealand Māori Council v Attorney-General* (*Lands*) being the one that towers over the legal landscape.[5] It was the advent of the Bill of Rights, and the emergence of statutory directions in relation to Treaty principles, which Lord Cooke considered the "two most profound developments in the role of the Court of Appeal".[6]

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1 *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon* [1983] NZLR 662 (PC) at 668. Contrast *Budget Rent A Car Ltd v Auckland Regional Authority* [1985] 2 NZLR 414 (CA) at 418 per Cooke J:"The time has probably come to emphasise that New Zealand administrative law is significantly indigenous".

2 Robin Cooke "The New Zealand National Legal Identity" (1987) 3 Cant L Rev 171 at 182.

3 *Daganayasi v Minister for Immigration* [1980] 2 NZLR 130 (CA); *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon (No 2)* [1981] 1 NZLR 618 (CA); *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA); *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA); *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA); *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA); *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA); *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159 (CA); *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA); and *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 (CA).

4 *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439 (CA); *Ministry of Transport v Noort; Police v Curran* [1992] 3 NZLR 260 (CA); *R v Kirifi* [1992] 2 NZLR 8 (CA); *R v Butcher & Burgess* [1992] 2 NZLR 257 (CA); *R v Goodwin (No 2)* [1993] 2 NZLR 390 (CA); *R v Te Kira* [1993] 3 NZLR 257 (CA); *R v Jefferies* [1994] 1 NZLR 290 (CA); *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's Case*]; and *Martin v Tauranga District Court* [1995] 2 NZLR 419 (CA).

5 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands*]; *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA) [*Forests*]; *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA); *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA); *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129 (CA) [*Radio Frequencies*]; *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 (CA) [*Broadcasting Assets*]; and *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA).

6 Lord Cooke "Foreword" in Peter Spiller *New Zealand Court of Appeal 1958–1996: A History* (Brookers, Wellington, 2002) v at x.

In terms of judicial method, Lord Cooke's judgments twinned a deep understanding of the law's bedrock commitments with a remarkable deftness of touch, characteristic of someone who is a master of their craft.

And whether or not one always agreed with particular judgments or arguments advanced in his extra-judicial writing, one could always respect the craft – the mastery of legal reason. So it is appropriate that this lecture should take as its topic the future of New Zealand public law, with a focus on judicial method and legal reason.

II PUBLIC LAW IS ON THE MOVE

New Zealand public law is on the move.

Over the last five years, we have witnessed a significant wave of legal development, led by the Supreme Court. Change has not been confined to one facet of public law. Rather, there has been significant change across public law fields, including common law, the Bill of Rights, the Treaty of Waitangi and tikanga (Māori customary law). These changes have occurred within a concentrated period of time. They have marked constitutional implications for the present and future of New Zealand public law. The developments reflect a concern to fully realise a vision of a distinctive public law, responsive to the New Zealand context. If past moves towards a distinctive "national legal identity" were not "self-conscious" and spurred principally by legislative change,[7] the current phase feels more deliberate and relatively-speaking driven in larger part by the judiciary.[8] The developments are also reflective, I think, of a Supreme Court establishing its place in the broader constitutional order.[9]

This lecture takes these changes as its starting point. So I will begin by summarising the case law developments. I will then move to my main focus, which is judicial method. The current phase of legal development serves as a prompt for an exploration of judicial methodology and specifically the role of values in legal reasoning.

My motivating concern is, noting that New Zealand public law is on the move, to ensure that the judicial methodology by which legal change is effected is constitutionally appropriate.

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7 At x–xi; and Cooke, above n 2, at 172.

8 See Helen Winkelmann "The Power of Narrative – Shaping Aotearoa New Zealand's Public Law" in Eoin Carolan, Jason NE Varuhas and Sarah Fulham-McQuillan (eds) *The Making and Re-Making of Public Law* (Hart, Oxford, 2024) (forthcoming). And see Williams J's discussion of "law-making *as* nation-building": Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato L Rev 1 at 12 (emphasis in original).

9 In this connection, the Chief Justice has recently characterised the Supreme Court as a "constitutional court": see Helen Winkelmann "The Supreme Court: A View from the Top" in Michael Littlewood and Janet McLean (eds) *The New Zealand Supreme Court: The Second Ten Years* (LexisNexis, Wellington, 2024) 521.

If the method by which change is effected is sound, then the developments themselves are more likely to be viewed as legitimate, and therefore capable of withstanding the pressures of the day and the test of time.

If the method by which change is effected is unsound, then the developments shall be open to critique as illegitimate, and have a precarious status within the legal system, being liable to reversal by Parliament or a future court.

The lecture is not a critique of particular decisions or doctrines. It is about something more fundamental, more basal in nature. It is concerned with *the way in which* judges reason to outcomes and *the way in which* they develop the law; their judicial method. It takes the present phase of legal development as a prompt to make a future looking argument for a particular approach to judicial decision-making which will help to secure the legitimacy of the advances made.

As such, this is a lecture on the nature of legal reason, made in the context of public law in Aotearoa.

III THE SUPREME COURT'S EMERGENT PUBLIC LAW JURISPRUDENCE

Turning first to the developments of the last five years, which provide necessary context for the discussion of judicial method.

In the Bill of Rights context, the Supreme Court in *Attorney-General v Taylor* asserted the jurisdiction to grant declarations of inconsistency where statutes are found inconsistent with human rights,[10] this power then being exercised in *Make It 16 Ltd v Attorney-General*.[11] The case of *Fitzgerald v R* marks an apparent reset of the interpretive approach under the Bill of Rights,[12] and *Moncrief-Spittle v Regional Facilities Auckland Ltd* made some progress towards explaining how the Bill of Rights applies to discretion.[13]

In the Treaty of Waitangi context, *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* seems to have established a general presumption that statutes will be interpreted consistently with Treaty principles.[14] More generally, the courts have increasingly intervened in

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

11 *Make It 16 Inc v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683. See Jason NE Varuhas "Declarations of Inconsistency in the Supreme Court" [2024] NZLJ 122.

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

13 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459.

14 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801.

matters before the Waitangi Tribunal and Treaty settlement processes, in cases such as *Wairarapa Moana ki Pouākani Inc v Mercury NZ Ltd* and *Ngāti Whātua Ōrākei Trust v Attorney-General*.[15]

Arguably the most significant decision over the last five years is *Ellis v R*, which followed on from previous cases such as *Takamore v Clarke*,[16] and which seeks to address the interrelationship between tikanga and the common law.[17]

At common law, we have seen the rise of the principle of legality, which aims to ensure statutes are interpreted consistently with basic common law norms.[18]

In regard to international law, perhaps most notable is the rise of campaigning environmental litigation, in which plaintiffs seek to convince the courts to enforce environmental standards derived from international law against government and corporations, in parallel to statutory systems of regulation, with the courts cast as a type of environmental regulator.[19]

IV THE RISE OF VALUES

Much can be said and has been said about each of the developments described. In a nutshell, there is a lot going on.

My interest in this lecture is in a golden thread which runs through the emergent jurisprudence – the rising prominence of a discourse of fundamental values or principles. Judges are increasingly reasoning by reference to values. These might be common law values, human rights values, Treaty principles, tikanga values, or values derived from international law.

Values here can be defined as ideas. Values as ideas tend to be broad, abstract and open-textured. For example in the Treaty context, these ideas include partnership and good faith. Human rights values include dignity and equality. Common law values include physical integrity and liberty, and

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15 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 24; and *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142, [2022] 1 NZLR 767.

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

17 *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239.

18 *D v Police* [2021] NZSC 2, [2021] 1 NZLR 213. See Jason NE Varuhas "The Principles of Legality in Aotearoa New Zealand" (2023) 34 PLR 296.

19 *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5, [2024] 1 NZLR 134 (formulated as a claim in public nuisance, but the final injunctive relief claimed, if given at trial, would in substance create a non-statutory regulatory scheme for enforcement of international climate commitments); and *Smith v Attorney-General* CA404/2022 (judgment reserved).

institutional values such as the rule of law and separation of powers. Tikanga values include whanaungatanga, mana, hara and ea.[20]

The current phase of legal development is at an early stage, and could proceed along different possible trajectories. That is why now is the time to consider the proper place of values in legal reasoning, and specifically the proper place of values in judicial decision-making, to ensure the modes of reasoning employed are legitimate. We need to ensure that legal development proceeds on the right footing.

The way I propose to analyse the issue of judicial method is to set out three different models of judicial reasoning, each of which gives values a different role. It is important to be clear that the models are presented as ideal types. But in developing them, I have been informed by modes of adjudication observable in comparative jurisdictions. I do not say that any jurisdiction fully conforms to the ideal types. Rather, different systems have greater propensities towards given modes of reasoning, while the degree of adherence to any one model is liable to vary over time. In looking to other jurisdictions, I share Lord Cooke's view that as we develop our law in line with our own national identity, we should not make the mistake of closing our eyes to what can be learned from abroad.[21] A mature legal system is one that has a firm understanding of what it is about *and* is open to learning from elsewhere.

Critical reflection on each of the three models will help us to identify which model we should favour. In summary, the three models are:

1. *Legalism* – a mode of reason which largely rejects any role for values in legal reasoning, and which I associate with a persistent majority of the High Court of Australia over the last 25 years.
2. *Normativism* – an adjudicative model within which values take centre stage. On this approach, cases are determined by courts balancing values on the facts of the case, a model

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20 The Statement of Tikanga appended to the judgment in *Ellis*, above n 17, explains whanaungatanga as focused on maintenance of properly tended relationships (at [96]); mana as relating, inter alia, to authority, prestige and reputation (at [76]); hara as denoting a violation of tikanga resulting in an imbalance (at [59]); and ea as involving a state where balance is restored (at [59], [101]).

21 Cooke, above n 2, at 182. While of course having regard to contextual differences between jurisdictions: Cheryl Saunders "Transplants in Public Law" in Mark Elliott, Jason NE Varuhas and Shona Wilson Stark (eds) *The Unity of Public Law?* (Hart, Oxford, 2018) 257.

which has exerted some influence in Canada,[22] albeit with some recent signs of retreat,[23] and which was beginning to take hold in the United Kingdom until recent course-correction by the United Kingdom Supreme Court.[24]

3. *Common law reason* – within the common law model, judges decide cases on the basis of reasonably determinate, detailed rules or principles. In turn, these rules and principles are manifestations of deeper values.

So within each model, values play a different role.

I will argue that legalism and normativism should both be rejected. Legalism is an impoverished form of legal reason, which risks adjudication becoming unmoored from any idea of what law is for. Normativism raises serious legitimacy concerns because it tends to collapse any meaningful distinction between law and politics.

The path forward lies in the common law method, which has stood the test of time for good reason. Setting the common law method side by side with legalism and normativism helps us to more fully understand the common law method and appreciate its comparative advantages.

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22 See for example the rise of a values-based discourse around the Canadian Charter of Rights and Freedoms, the broad balancing approach adopted in respect of Charter damages, and emergence of unwritten constitutional principles: *Doré v Barreau du Québec* 2012 SCC 12, [2012] 1 SCR 395 (not displaced in *Canada (Minister of Citizenship and Immigration) v Vavilov* 2019 SCC 65, [2019] 4 SCR 653 at [57]); *Vancouver (City) v Ward* 2010 SCC 27, [2010] 2 SCR 28; and *Reference re Secession of Quebec* [1998] 2 SCR 217.

23 There have been moves to tie down the role of unwritten constitutional principles, and possible signs of a move away from *Doré*: *Toronto (City) v Ontario (Attorney General)* 2021 SCC 34, [2021] 2 SCR 845; and *York Region District School Board v Elementary Teachers' Federation of Ontario* 2024 SCC 22 at [61]–[72] (but see *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)* 2023 SCC 31).

24 Principally in the context of the principle of legality, and associated discourse of constitutional values: Jason NE Varuhas "The Principle of Legality" (2020) 79 CLJ 578. And see the important report, Lord Faulks and others *Independent Review of Administrative Law* (Ministry of Justice, CP 407, March 2021) especially at [3.29]–[3.34]. However, note recent judicial reassertion of "ordinary" principles of statutory interpretation ahead of the principle of legality (but quaere whether there has been an *over*-correction): *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255; *R (Coughlan) v Minister for the Cabinet Office* [2022] UKSC 11, [2022] 1 WLR 2389; *Re Judicial Review (Northern Ireland)* [2023] UKSC 5, [2023] 2 WLR 457. Simultaneously, courts have more recently demonstrated greater discipline in regard to recognition or development of common law constitutional values and principles: *Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10, [2021] AC 937; *Re McQuillan* [2021] UKSC 55, [2022] AC 1063 at [215]; *Reference by the Lord Advocate of Devolution Issues under Paragraph 34 of Schedule 6 to the Scotland Act 1998* [2022] UKSC 31 at [84]–[91]; and *R (AAA (Syria)) v Secretary of State for the Home Department* [2023] UKSC 42, [2023] 1 WLR 4433 at [142].

V COMMON LAW REASON

I will start with an account of legal reason in the common law tradition before going on to consider legalism and normativism.

Fundamental to understanding orthodox legal reason is a distinction between the detailed rules and principles that operate at the surface level of the law, and the law's deep-lying commitments.[25]

What I would refer to as first-order propositions or norms are the detailed legal norms on the basis of which judges decide cases. These might be called rules, principles, doctrines or tests. For example, the improper purpose doctrine or irrelevant considerations doctrine in judicial review or elaborate doctrines of causation and remoteness in tort. These rules and principles provide the legal as opposed to the factual basis for why cases are decided one way or the other.

Lying beneath these surface level rules and principles are the deeper commitments of the legal system, which can be referred to as second-order, deep or archetypical propositions or norms.[26] These deep-lying commitments stand behind, explain and justify first-order propositions. First-order propositions can be explained as detailed expressions of second-order propositions. Or put another way, deeper commitments are concretised in or mediated through detailed rules and principles.

So for example, the rules of natural justice, such as no bias and knowing the case against you, are first-order propositions. Underpinning those propositions might be said to be a deeper commitment to dignity. This deeper commitment provides the reason or justification for the rules of natural justice. Giving a person notice of the case against them and giving them an opportunity to be heard is to respect their dignity as human beings possessed of agency.

Identification of second-order propositions in turn imbues first-order propositions with further layers of meaning; we see the hearing rule in a particular light once we understand it as a manifestation of a deeper commitment to respecting dignity. On the other hand, examination of first-order propositions helps us to render determinate the particular conception of the deep-lying commitment embedded in the historical system – the first-order propositions give shape and content to what would otherwise be amorphous abstractions.

Second-order propositions are sometimes referred to as values. I prefer the notion of deep-lying commitments, as it makes clear that these second-order propositions are sourced from within the closed system of the law. They are commitments of the system, concretised in particular ways within the historic legal order – not ideas floating somewhere out there in the ether.

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25 See Gerald J Postema "Law's System: The Necessity of System in Common Law" [2014] NZ L Rev 69.

26 JW Harris "Legal Doctrine and Interests in Land" in John Eekelaar and John Bell (eds) *Oxford Essays in Jurisprudence, Third Series* (Clarendon Press, Oxford, 1987) 169; and Postema, above n 25.

But even if one conceptualises second-order propositions as values, the proper or accepted role of values in common law reasoning is as deeper commitments which underlie and are manifested in more detailed first-order rules and principles. Indeed, it is by studying the detailed rules and principles, and the patterns that they form, that one interpolates the deeper commitments that inform those rules and principles. Generalisations are drawn from particulars.[27]

To give another example, the common law's deep historic commitment to protection of property manifests in a legal right to exclusive possession and the allied action of trespass, with its detailed architecture which includes per se actionability, strict liability, defences, and damages rules. So the common lawyer does not go to court and plead the general idea of property as a philosophical precept; one goes to court and pleads trespass, addressing the detailed elements of that action. But the reason we have the trespass action is because of the common law's deeper commitment to protection of a particular conception of property: trespass is a manifestation of this deeper commitment.

This distinction between first-order propositions – the detailed rules and principles – and second-order propositions – deep-lying commitments – helps us to understand the nature of legal categories, such as judicial review, contract law, the law of torts, equity and so on. Legal thought is organised according to these categories or units.[28] Each of these categories represent a cluster of detailed rules and principles that are unified by a common purpose; that is, unified by the same deep-lying set of commitments.[29] Consider the rules of contract law: offer, acceptance, consideration, expectation damages and so on. These are all grouped together under the category of contract law because they share a common commitment to a particular goal. On one view, that goal is the performance of promises. Similarly, all of the norms collected in human rights law, such as free expression or the right to life, are unified by a shared commitment to protecting the most basic aspects of human wellbeing.

There is coherence in these categories in a substantive or deep sense, in that the detailed rules and principles collected in each category are bound together by a shared purpose. Coherence here is not, as is sometimes thought, a merely formal quality. Coherence is a manifestation of rationality and rational ordering. A legal system would be marked by irrationality if the way it was ordered was random or revealed no logic. Similarly, a legal system would be marked by irrationality if the detailed

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27 Paraphrasing Benjamin N Cardozo *The Nature of the Judicial Process* (Yale University Press, New Haven, 1921) at 23.

28 As Dicey observed, these categories bring "the chaotic mass" of cases into "some sort of form": AV Dicey, *Can English Law Be Taught at the Universities?* (MacMillan, London, 1883) at 18. We very much owe this ordered way of thinking to the early treatise writers: AWB Simpson "The Rise and Fall of the Legal Treatise" (1981) 48 U Chi L Rev 632.

29 The deeper principle "unifies and rationalizes": Cardozo, above n 27, at 31.

rules and principles worked at cross-purposes with the law's deeper commitments – that is, if the detailed rules did not match with the deeper commitments.

It is apposite at this stage to note the issue of contestability. There may be disagreement as to what deep-lying commitment underpins a particular first-order rule or principle, or field of law. For example, above I explained the rules of natural justice on the assumption that they reflect a concern for dignity. But there are other plausible views, including that the justification for natural justice requirements is that they facilitate good decision-making.

It is not possible in this lecture to provide a full account of how such questions can be resolved. However, elsewhere I have articulated an interpretive methodology by which such disagreements can be settled.[30] In a nutshell, the best justification is that which most convincingly explains the law as we find it; that is, the justification which best "fits" significant features of the given legal phenomenon.[31] This involves detailed exegesis of primary legal materials so as to develop an account of those commitments immanent in received legal practices: the commitments must "emerge from the case law".[32] It is of signal importance to emphasise that the best justification is not that which we would subjectively find most appealing. To approach legal materials in that way is to superimpose one's own normative commitments. Interpretation is an enterprise disciplined by the object of interpretation. The concern is not to uncover one's own commitments, but to uncover those immanent in the historic system. In this way, it is a defining characteristic of legal reason that it is a constrained or disciplined form of reason.[33]

Together, first-order and second-order propositions form a cohesive framework within which legal questions can be resolved and on the basis of which the law can develop and evolve.

The more detailed rules and principles provide reasonable guidance, so that law can perform its vital role of guiding conduct and providing a basis on which people can plan their lives. They provide a determinate and persistent set of tools on the basis of which disputes can be framed, argued and determined. They act as a kind of *lingua franca* for the legal community.

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30 Jason NE Varuhas "Mapping Doctrinal Methods" in Paul Daly and Joe Tomlinson (eds) *Researching Public Law in Common Law Systems* (Elgar, Cheltenham, 2023) 70.

31 As explained in Varuhas, above n 30, the "legal phenomenon" here is an account of the received body of legal practices accepted as plausible by the legal professional community.

32 *Ellis*, above n 17, at [165].

33 The idea of legal reason as a constrained form of reason within a closed system has been associated with "formalism", as a variety of legal reason: Frederick Schauer "Formalism" (1988) 97 Yale LJ 509. However, choice constrained by the historic system is a defining feature of legal reason in general, and as such legal reason is *necessarily* formal in that sense. See Varuhas, above n 30, at 71–73.

In a sophisticated legal system, most cases can be resolved on the basis of first-order norms. But second-order propositions are constantly operating in the background, shaping how the rules and principles are conceptualised and applied.

When it comes to developing new rules, a court will first ask what rule would fit or cohere with the surrounding first-order rules and principles. Most cases of legal development can be resolved on that basis, that is, would the new rule be intelligible when set alongside the existing rules? But in the sorts of hard cases that come before higher courts, consideration of neighbouring rules and principles may not be capable of resolving the issue. This is where the deeper commitments come to the fore. In these cases, the law's deeper commitments provide navigation lights; they channel and discipline legal development. New developments need to be capable of rationalisation as against the basic goals of the system, they need to be understood as being initiated into an ongoing enterprise.[34] In the vast majority of cases, new developments are out-workings or extrapolations from the pre-existing system in light of new factual situations that come before courts.

Overall, one can understand the legal system as a giant mosaic made up of thousands of tiles.[35] The tiles are the first-order propositions. Grouped rationally, they form discernible patterns. When a new tile is added, it must be placed in such a way as to conform with the pre-existing pattern.

I will return to the issue of legal change and development at the end of the lecture. But for now, that is a sufficient sketch of legal reason in the common law tradition.

I want to next contrast the orthodox common law model with a possible rival, which I term "legalism".

VI LEGALISM

The defining feature of this model is that judges are generally uninterested in the deeper commitments of the legal system. Common law reason involves an interplay between first-order and second-order propositions. In contrast, the legalist mode is focused almost exclusively on first-order propositions. Deep commitments play little or no role in judicial reasoning.

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34 Postema, above n 25, at 80. This idea was captured famously in Dworkin's metaphor of the chain novel: Ronald Dworkin *Law's Empire* (Hart, Oxford, 1998) at ch 7 (a contemporary analogue would be the Marvel Cinematic Universe). Note that while my account of legal interpretation draws upon Dworkin's account, I do not agree with him that interpretation "aims to impose purpose over the text or data or tradition being interpreted" (at 228), nor that "fit" can be traded off against "justification", to enable adoption of justifications one finds subjectively appealing (for example at 67–68). Legal interpretation involves deriving those commitments embedded in the system, not superimposing one's own commitments. If one disagrees with the commitments so revealed, one is free to critique them. See Varuhas, above n 30, at 97–100.

35 Robert Goff "The Search for Principle" (1983) 69 Proceedings of the British Academy 169 at 186. And see similarly, Dicey, above n 28, at 19–25.

So for example, the judgments of a persistent majority of the High Court of Australia over the last 25 years have often demonstrated resistance to zooming out from the detail of first-order norms to consider the system's deeper commitments, this trend arguably reaching its nadir over the last six years. Of course, the trajectory of the jurisprudence is not neat, and there are counter-examples.[36] But the dominant trend has been the rise of a new legalism. This legalist style is often said to preference "bottom-up" ahead of "top-down" reasoning. The instinct is sound, in that legal interpretation should start with primary materials rather than big ideas. But the problem is that Australian legal culture, over which the High Court exerts considerable influence, demonstrates limited appetite for the "up" dimension.

Some will argue legalism is an inevitable function of the particular Australian constitutional context. And indeed context matters, particularly when it comes to understanding why phenomena are the way they are. Legalism has pedigree in Australia.[37] And key aspects of legal context are important to understanding the new legalism, including the written Constitution, an increasing fixation upon statute and statutory interpretation, and the rise of the Federal Court over the last 45 years, which has a statutory jurisdiction, and from which a majority of recent High Court appointments have been made.[38]

It is no coincidence that the new wave of legalism has marched in lockstep with an increasingly intense focus on authoritative text. The fixation on statute has been accompanied by a form of stark deductive reasoning which is presented as value-free and almost mechanistic. In turn, this encourages a mindset within which legal conclusions do not depend on or derive legitimacy from the normative

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36 In terms of counter-examples, consider the values-based discourse associated with the principle of legality that rose to prominence during the French court. Consider also the normatively-rich approach to executive power in *Pape v Commissioner of Taxation* [2009] HCA 23, (2009) 238 CLR 1 and *Williams v Commonwealth of Australia* [2012] HCA 23, (2012) 248 CLR 156; to ouster clauses in *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2, (2003) 211 CLR 476; and to the "constitutional writs" in *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57, (2000) 204 CLR 82.

37 Often associated with Sir Owen Dixon's statement that "[t]here is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism" ("Address on Taking Office as Chief Justice of the High Court" in Susan Crennan and William Gummow (eds) *Jesting Pilate* (3rd ed, Federation Press, Sydney, 2019) 287 at 289). While the phrase "strict and complete legalism" has taken on a mantra-like quality for some, Dixon's conception of judicial method was of course more nuanced than any single phrase could encapsulate. Consider his recognition of the rule of law as an assumption underpinning the Constitution: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193. And see Dixon's view that legal development may proceed from "deeper, more ordered, more philosophical and perhaps more enduring conceptions of justice": "Concerning Judicial Method" in Crennan and Gummow at 122.

38 Note, however, that there are prominent examples of the Federal Court engaging with deeper commitments to address pressing, complex issues, such as the applicability of judicial review to non-statutory power, which the High Court has, despite the Federal Court's prompts, omitted to address. Compare *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 213, (2021) 288 FCR 23; and the joint judgment in [2023] HCA 10, (2023) 179 ALD 1.

strength of the reasons that support them, but simply the fact they emanate from a source of authority;[39] in turn, this can lead to conclusory reasoning. In this, there is an echo of judicial reasoning observable in some civilian systems, which are similarly dominated by interpretation of text, in the form of codes. In the Australian setting, this approach may be attractive as it enables courts to maintain the appearance of compliance with the strict conception of the judicial role under the Australian Constitution.

But while context is important to understanding trends within a legal system, context cannot operate as apology. That legalism is inevitable in Australia is falsified by the fact past High Court Chief Justices such as Sir Gerard Brennan and Sir Anthony Mason, and their courts, understood that judging on an apex court requires engagement with the law's bedrock commitments, as do judges of the current Court, but who have been in a minority in terms of their judicial method.[40]

The bedding in of a stark deductive, legalist style associated with interpretation of text can leave courts ill-equipped to deal with common law adjudication. But in addition, interpretation of legal text does not involve shutting out deeper commitments, or the common law mode of reasoning. Properly conceived, statutory interpretation is dependent on both. First, statutory rules and principles give effect to normative goals, just as detailed rules and principles at common law do. In the same way, deeper commitments are immanent in the written Constitution.[41] As such, statutory interpretation necessitates application of the common law method which integrates understanding of both first- and second-order propositions. Second, statutes are not self-executing and nor do they represent autonomous islands of law. Statutes are initiated into an existing normative endeavour – they must find their place within and be integrated into the *corpus juris*, to derive their full meaning and maintain

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39 Other aspects of Australian legal culture are also suggestive of a "culture of authority". Consider the High Court's judgment in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 230 CLR 89, which adopts the challenging idea that lower courts are bound to follow obiter dicta of the High Court, where seriously considered. The case includes further statements which suggest significant legal developments are for the High Court alone. Contrast the more collaborative approach contemplated by Miller J, which seems more consistent with the traditional common law perspective that the ultimate authority of a rule depends on the convincingness of the reasons that support it: Forrie Miller "Reflections on the Roles of Apex and Intermediate Courts in New Zealand" (2022) 4 Amicus Curiae 1.

40 See recently: Gordon and Edelman JJ's judgments in *Nathanson v Minister for Home Affairs* [2022] HCA 26, (2022) 276 CLR 80 and *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17, (2021) 273 CLR 506 (Gordon and Steward JJ writing a joint judgment); and Gageler, Gordon and Edelman JJ's judgments in *Smethurst v Commissioner of Police* [2020] HCA 14, (2020) 272 CLR 177. And see the very recent majority judgment in *YBFZ v Minister of Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40, especially at [3]–[19] (Gageler CJ and Gordon, Gleeson and Jagot JJ).

41 For recent discussion, see Rosalind Dixon (ed) *Australian Constitutional Values* (Hart, Oxford, 2018), and in particular the Foreword by Sir Anthony Mason.

the system's inner logic.[42] This "systemic integration" involves the traditional legal methods I have described herein as common law reason.[43]

Furthermore, recourse to second-order propositions, as an essential aspect of common law reason, does not involve transgression of the proper judicial role; it involves courts in their most basic role of discerning the law.

Put simply, nothing in the Australian constitutional context demands judges adopt an impoverished form of reasoning.

One might ask why a consideration of legalism is relevant to a lecture on the future of New Zealand public law, given the trend in our Supreme Court is towards a discourse of values.[44] Our Justices do not seem at risk of falling into a legalistic method – quite the opposite.

However, I want to give a complete account of available models of reasoning, and I want to make clear what I am *not* arguing for. It would be all too easy for my opposition to normativism (discussed below) to be dismissed as a preference for legalism. There is a further important reason for considering legalism. There are patterns observable in comparative case law that where courts push values-based reasoning too far, this may lead to legitimacy concerns and strike-back from government and other actors, which results in courts over-correcting by resorting to legalism.[45] That is a caution to bear in mind for a court experimenting with values-based reasoning. And I note that in response to the New

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42 Postema, above n 25, at 79–84; and Gerald J Postema "Philosophy of the Common Law" in Jules L Coleman, Kenneth Einar Himma and Scott J Shapiro (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford, Oxford, 2004) 588 at 588. Sir Owen Dixon observed of adjudication under the Australian Constitution: "constitutional questions should be considered and resolved in the context of the whole law, of which the common law, including in that the doctrines of equity, forms not the least essential part" ("The Common Law as an Ultimate Constitutional Foundation" in Crennan and Gummow, above n 37). On that theme, see as paradigm examples, Gageler J's judgment in *Smethurst* (above n 40) which relies on common law fundamentals in elaborating constitutional meaning, and the plurality judgment in *YBFZ*, above n 40, at [6]–[19].

43 Postema, above n 25. See as illustrative example the plurality judgment in *Robinson*, interpretating statutory arrest powers in light of longstanding common law principles: *New South Wales v Robinson* [2019] HCA 46, (2019) 266 CLR 619 at [88] and following (Bell, Gageler, Gordon and Edelman JJ).

44 See, charting the New Zealand journey away from legalism: Robert Fisher "New Zealand Legal Method: Influences and Consequences" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) 25. See also Cooke, above n 2, at 171 ("pretence of legal formalism" has been abandoned in New Zealand).

45 In Australia, the perception of over-expansionism on the part of the Mason and Brennan courts is an important contextual feature in understanding the legalist phase that has followed since. In the United Kingdom, the perception of over-expansionism on the part of the Supreme Court through the 2010s (principally a series of judgments on the principle of legality discussed in Varuhas, above n 24), is an important contextual feature in understanding the Court's present approach to public law cases, which has involved course-correction.

Zealand Supreme Court's case law, there was a recent article in *The Post* entitled "Judges beware, a black letter law day could be coming".[46]

The central problem with legalism is that such reasoning proceeds on the basis of a radically incomplete understanding of law. One cannot claim full understanding of a rule without understanding the reason for the rule. One cannot understand a field such as judicial review or contract without understanding the purposes the field is constituted to serve.[47] In other words, legalistic reasoning involves at best a surface level understanding of law.

The arid nature of legalistic reasoning in turn leads to a host of problems.

First, it leads to conclusory reasoning. Many judgments of the High Court of Australia proceed by setting out case law authorities and statutory provisions in near-extreme detail, then a legal conclusion or new rule materialises without serious operative reasoning.[48] The reason for this pattern is that in the sorts of hard cases apex courts deal with, without an understanding of deeper commitments, courts shall lack the intellectual resources needed to rationalise new developments or resolve conflicts between lines of precedent.

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46 Luke Malpass "Judges beware, a black letter law day could be coming" *The Post* (online ed, New Zealand, 18 November 2023). One can see the beginnings of a movement for reassertion of legalism in recent criticisms of the Supreme Court by some practising lawyers and think tanks. This commentary has often been overblown and is flawed in critical respects. However, this emergent discourse illustrates the risk of a legalist over-correction.

47 For example, repeating as mantra that judicial review of administrative action is about "legality" or "jurisdictional error", as is common in Australian administrative law discourse, does little to advance understanding of *why* we have principles of natural justice and reasonableness, or core doctrinal features such as standing, scope of review or remedial discretion. Is it not the case that *all* law could be said to have "legality" as its purpose?

48 The paradigm contemporary example is the materiality doctrine, which materialised from the ether, as did the principle that the applicant must prove materiality: *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34, (2018) 264 CLR 123; *MZAPC*, above n 40. And consider the assertion of counterfactual analysis to significantly limit damages for false imprisonment, absent serious engagement with the strict nature of that tort, the tort's function of protecting liberty, or the historical absence of authority for application of "but for" reasoning in false imprisonment to completely deny damages: *Lewis v Australian Capital Territory* [2020] HCA 26, (2020) 271 CLR 192; and Jason NE Varuhas "Valuing Freedom: *Lewis v Australian Capital Territory*" (2020) 42 Syd L Rev 123. See also the retrogressive approach to scope of judicial review, absent serious engagement with framing principles, in: *NEAT Domestic Trading Pty Ltd v AWB Ltd* [2003] HCA 35, (2003) 216 CLR 277; and *Griffith University v Tang* [2005] HCA 7, (2005) 221 CLR 99 (contrast Kirby J's dissents in each case which, whether one agrees with the substance of the analysis or not, does transparently reason from normative concerns that plausibly underpin judicial review).

This may explain why, consistent with the Australian experience, legalism can result in judgments that are very long. If one understands the reason for a rule, one can cut to the heart of the matter.[49] But absent such understanding, as Taggart explained, the risk is that one can end up lost in the dense woods of first-order rules and principles, unable to see the larger picture.[50]

Second, legalism is generally marked by a lack of transparency. As I have said, within a legalistic paradigm, conclusions often materialise absent serious justificatory reasoning, like a rabbit pulled out of a hat.[51] The reasoning is marked by leaps of logic or gaps, because the court lacks the normative resources to fill in the blanks.[52] In turn, the failure to articulate the core premises for decisions will almost inevitably lead observers to speculate that the judges are pursuing an unstated ideological agenda; that instead of being led by the commitments of the system, the judge is instead informed by personal values.[53]

Third, because of the lack of transparency in legal reasoning, it becomes difficult to hold courts to account. The scholar and everyone else are left to speculate what really lies behind given decisions or adoption of given rules. Moreover, because the larger structure of the law is obscure, it becomes difficult to test judicial outputs as against a broader framework of bedrock commitments.

Fourth, it is often assumed that one benefit of a legalistic approach is that, whatever its disadvantages, it shall promote rule of law principles of certainty, predictability and consistency. The claim is implausible. How can the system be certain, predictable or consistent when there is the absence of a larger framework of principle to discipline judicial decision-making and condition legal development – what Sir Gerard Brennan called the "skeleton of principle which gives our body of law its shape and internal consistency".[54] There is no articulated mission for given fields, so how can decision-making within a field be joined up. How can courts ensure new developments are

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49 As Harlow observes, conceptual mapping "establish[es] paths and perimeters" for thinking and reasoning: Carol Harlow "Changing the Mindset: The Place of Theory in English Administrative Law" (1994) 14 OJLS 419 at 430. And see Dicey, above n 28, at 18–25, regarding the clarity of thought that may be obtained through distillation of principle.

50 Michael Taggart "'Australian Exceptionalism' in Judicial Review" (2008) 36 Fed L Rev 1.

51 The declaratory style associated with High Court of Australia judgments in recent years may be contrasted with the style of previous Courts, which more openly acknowledged that hard cases require exercise of normative judgement: see Jason NE Varuhas "The Public Law Legacy of Sir Gerard Brennan" (2023) 33 PLR 301; and Stephen Gageler "Legalism" in Anthony Blackshield, Michael Coper and George Williams (eds) *The Oxford Companion to the High Court of Australia* (Oxford, Oxford, 2001) 429.

52 In this connection, note the persistence in Australian administrative law of conclusory labels such as "jurisdictional error" and the law/merits distinction, which are often invoked in lieu of operative reasoning.

53 This will be especially so, when there is a discernible trend in judicial decision-making, such as reducing protection of basic rights and interests in the face of government interference.

54 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 29–30 and 45.

reconcilable with the pre-existing system if one does not know what the system is for? If we do not have an idea of the larger patterns of the mosaic, how will we know where to place the new tile, to ensure the pattern remains coherent?

Put simply, judges shall lack a set of common premises for thinking about the law, or particular areas of law, which in turn will lead to different judges proceeding from a range of different and contradictory premises. One way to put this is that the law shall be aimless or rudderless, lacking a sense of direction. That is a recipe for arbitrariness.

Fifth, without an understanding of the law's deeper commitments, judging shall proceed absent an appreciation of what really matters. It follows that within a legalistic model of judging, fundamental principles are at serious risk of being misplaced, neglected and worn down over time.[55] At worst, legalism can result in judicial abdication.

Ultimately, absent a sense of what law is for, legal reasoning and decision-making shall come to resemble an elaborate parlour game with no idea why the game is being played.

VII NORMATIVISM

At the other end of the spectrum, often set up in contradistinction to legalism, is a model of adjudication I term "normativism". Or perhaps, unbounded normativism.

This is a model increasingly in vogue with some courts around the common law world, and favoured by some sections of the academy. Albeit the adjudicative style may often be associated with public law, in jurisdictions where normativism has exerted influence, it has also come to influence private law adjudication.[56]

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55 See *Lewis*, above n 48 (limiting principles asserted in relation to damages for violation of liberty); *Roy v O'Neill* [2020] HCA 45, (2020) 272 CLR 291 (expansion of common law licences to permit police entry to private residences where statutory powers did not permit entry); *Smethurst*, above n 40 (failure by plurality to engage with rights and rule of law dimensions of constitutional injunction); *MZAPC*, above n 40 (assertion of materiality principle, rendering many legal errors potentially non-jurisdictional, and placing onus on applicant to prove materiality); and see cases concerning protection of liberty, such as *Al-Kateb v Godwin* [2004] HCA 37, (2004) 219 CLR 562; *Garlett v Western Australia* [2022] HCA 30, (2022) 277 CLR 1; *Commonwealth v AJL20* [2021] HCA 21, (2021) 273 CLR 43. But note recent significant decisions in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37, (2023) 415 ALR 254 reversing *Al-Kateb*, and *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12, which rows back on the materiality doctrine. While these judgments have *the effect* of carrying forward fundamentals, such as liberty and the rule of law, the reasoning continues to be marked by reluctance to transparently connect legal analysis to deeper commitments. *YBFZ*, a follow-up judgment to *NZYQ*, begins to more explicitly elaborate a framework of fundamental principle: *YBFZ*, above n 40, at [3]–[19].

56 In Canada, a broad meta-value of good faith has been recognised in contract: *Bhasin v Hrynew* 2014 SCC 71, [2014] 3 SCR 494. In the United Kingdom, consider the rise of an open-ended approach to vicarious liability according to which courts weigh broad values and policy goals case-by-case. The United Kingdom Supreme

I argue normativism should be rejected. Normativism is often presented as an enlightened, modern or even progressive approach compared to legalism. But I will show that it suffers the very same problems as legalism, albeit those problems manifest in different ways.

The model is effectively the inverse of legalism. Legalism is focused on first-order rules and principles to the exclusion of deeper commitments. In contrast, normativism would largely do away with first-order norms. In their place, *values* as deeper commitments of the legal system are elevated from the substratum of the legal system, to now operate at the surface level of the law.

Within the normativist model, values are *not* concretised in detailed rules and principles, but rather form the direct basis for adjudication. Judges determine cases by identifying those values they think are implicated, apportioning values weight, and balancing those values, to reach a conclusion on the facts. Legal reason, on the normativist conception, does not proceed according to rules and principles, but is based on very broad ideas.

Our Supreme Court has not gone down this path. But there is a risk that it might, given the Court's increasing interest in values-based reasoning. This risk is exacerbated by a strong strain of pragmatism in New Zealand legal culture,[57] which can manifest in judicial preference for broad discretion and resistance to determinate legal frameworks.[58] As such, it is important to make clear the pitfalls of the normativist model, and why it should be rejected.

Court has recently begun to row back on this approach, reverting to more determinate legal tests (which give effect to clearly defined commitments): Jason NE Varuhas "Vicarious Liability" in *Balkin & Davis Law of Torts* (6th ed, LexisNexis, Sydney, 2021) at [26.16]–[26.17] and [26.63]; and *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB* [2023] UKSC 15 at [30]–[58] ("the tests invoke legal principles that in the vast majority of cases can be applied without considering the underlying policy justification for vicarious liability. The tests are a product of the policy behind vicarious liability and in applying the tests there is no need to turn back continually to examine the underlying policy"). See further Jason NE Varuhas "The Socialisation of Private Law: Balancing Private Right and Public Good" (2021) 137 LQR 141, discussing, inter alia, the rise of balancing approaches in private law.

57 Matthew SR Palmer "New Zealand Constitutional Culture" (2007) 22 NZULR 565. On the other hand, other observed aspects of our legal culture, such as scepticism towards abstraction and the metaphysical, may work against a discourse of broad ideas, albeit this antipathy to "theory" tends to be deployed selectively.

58 This is perhaps most evident in the persistent preference of higher court judges for very broad principles, discretion and "contextualism" in administrative law, and concomitant resistance to development of even rudimentary doctrinal frameworks. See Lord Cooke "The Discretionary Heart of Administrative Law" in Christopher Forsyth and Ivan Hare (eds) *The Golden Metwand and the Crooked Cord* (Oxford, Oxford, 1998) 203; Sian Elias "The Unity of Public Law?" in Elliott, Varuhas and Stark, above n 21, 15 at 34–36. See the discussion in Michael B Taggart "The Contribution of Lord Cooke and Scope of Review Doctrine in Administrative Law" in Paul Rishworth (ed) *The Struggle for Simplicity in the Law* (Butterworths, Wellington, 1997) 189 at 201–202 (including n 74); and Knight's discussion of the "contextualist" model of judicial review: Dean R Knight *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press, Cambridge, 2019) at ch 5.

Values have a place in legal reason. But their proper place is as deeper commitments which manifest in detailed rules and principles. To mainstream open-ended case-by-case balancing will almost invariably lead to the judiciary's legitimacy being put in doubt.

What are the problems with the normativist methodology?

First, on this approach, it becomes impossible to meaningfully hold courts to account. If every case comes down to striking a balance, then critiques of judgments can be dismissed on the basis that while the critic would balance the values one way, the judges have simply taken a different view. No one will be able to say one view is right or closer to the truth of the matter. The reason being that there is no persistent framework of norms against which judicial outputs can be meaningfully tested – everything is continually up for grabs, as everything depends on weighing broad values on the facts. As one colleague has put it to me, engaging with the law will resemble wrestling a giant marshmallow – it cannot be pinned down.

This leads to the second problem: the law shall risk aimlessness. Rather than particular categories of law such as judicial review or negligence being understood to serve a discrete set of defined goals, the normative priorities of each field may be reinvented from one case to the next depending on which goals the courts think carry greatest weight on given facts. It does not seem coincidental that in systems where courts are emerging from a normativist phase, one finds renewed focus on precedent, and the historic system as meaningful constraint.[59]

Third, values-based reasoning is sometimes praised on the basis that it renders transparent the normative assumptions underpinning decision-making. But the fact is that it often leads to conclusory reasoning. Values are often invoked in lieu of proper justificatory reasoning. We have all read judicial statements to the effect that "the rule of law demands X" or "what good faith demands here is Y". The value is a placeholder for justificatory reasoning, that is never forthcoming. It is a label attached to preferred conclusions.[60]

When it comes to balancing – that is, weighing values – the final outcome will generally come down to a judgement call: the judge will simply see one value as exerting greater force on the facts

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59 See in the United Kingdom: Lord Reed "Departing from Precedent: The Experience of the UK Supreme Court" (Speech to the International Conference on Implementation of the Rule of Law, Supreme Court of Ukraine, 20 January 2023); Lord Burrows "Precedent and Overruling in the UK Supreme Court" (Lord Toulson Memorial Lecture, University of Surrey, 20 March 2024); and Lord Leggatt "Precedent in English Law" (Harris Society Annual Lecture, Keble College, Oxford, 26 April 2024). And see for example the United Kingdom Supreme Court's renewed emphasis on incrementalism in relation to identification of constitutional values (see above n 24), and assessment of claims for novel duties of care in negligence: *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4 at [21]–[30].

60 Broad concepts operate as a "principled patina": Thomas Poole "Between the Devil and the Deep Blue Sea: Administrative Law in an Age of Rights" in Linda Pearson, Carol Harlow and Michael Taggart (eds) *Administrative Law in a Changing State* (Hart, Oxford, 2008) 15 at 40.

than others. So the ultimate balance struck often lacks rationalisation, and that is because it cannot be rationalised as anything other than a captain's call. And in turn, it will almost inevitably follow that judges will be criticised for decision-making based on personal predilection.

In contrast, where judges operate within a determinate framework of principle, they will be able to demonstrate that their decisions are capable of rationalisation as against a constellation of detailed norms; decisions are intelligible as against the pre-existing framework. But in a normativist model, there is no detailed framework – just a soup of values.

Fourth, a discourse of values is liable to take on a life of its own, unmoored from the historic system. In other words, judges may simply assert preferred values, rather than limit themselves to values immanent in the historic system. Normativism has a self-fulfilling quality in this regard. The more that a determinate legal framework gives way to a set of broad ideas, then we shall lack concrete doctrinal structures against which to test values for "fit" with the historic system. Rather, everything fits, and legal reasoning loses its essential feature of being a disciplined or constrained form of reason. In turn, it is almost inevitable that judges will feel at liberty to insert exogenous values into the mix. It is a common feature of normativism that one finds judges (and academics) asserting their own preferred laundry lists of values, untethered from serious doctrinal exegesis.

Fifth, normativism would be a tragedy for the rule of law. Judges are public officials who exercise the coercive power of the state. As state actors administering state law, they must abide by the rule of law. Indeed, judges should be exemplars of the rule of law, setting an example for government and society as a whole. But in a normativist model, the rule of law would be in tatters. The legal system would be marked by radical uncertainty, unpredictability and inconsistent decision-making.

If what the law demands of people regularly comes down to how a judge balances values on the facts, then people will be unable to plan their lives, and law shall fail to perform its vital function of guiding conduct. We will be like sailors adrift on the high seas bereft of the equipment necessary for navigation.[61]

It will be very difficult to predict outcomes. That is because what outcome judges arrive at will depend on what values they consider to be engaged, how they conceptualise those amorphous ideas, the weight they apportion different values, and how they strike balances. It might be argued that patterns will emerge over time which can facilitate predictability. But balancing approaches are not

61 Paraphrasing Peter Birks "Preface" in Peter Birks (ed) *The Classification of Obligations* (Clarendon Press, Oxford, 1997) at vi. And see Dixon "Concerning Judicial Method", above n 37, at 123 (abandonment of "received technique" in favour of appeal to personal standards or broad ideas of justice or convenience would cast judges "adrift with neither moorings nor chart").

intended to settle down – they are to be kept fresh for the next exercise.[62] As such, unpredictability and uncertainty are features rather than bugs.

It might suit judges to keep their powder dry for each new case. But it does not suit anyone trying to understand what the law requires of them. Under a normativist model, lawyers will prosper as people will have to litigate to find out what the legal position is in their case – and tenuous claims will be encouraged as nothing can be ruled out conclusively. Ultimately, it is society that will pay the cost, and most people cannot afford to pay.

Inconsistency will be unavoidable as different judges assert different values, conceptualise values differently, apportion different weight to different values, and strike balances differently.

A significant reason why normativism runs into these rule of law issues is because it eschews a detailed doctrinal superstructure of rules and principles, which could otherwise provide reasonably determinate guidance, discipline decision-making, and ensure like issues are dealt with according to a common framework characterised by reasonable stability over time.

Sixth, this sort of open-ended values-based reasoning is likely to lead to errors and sloppy conceptual thinking. It tends to convert everything into a value to be weighed. But not everything is a value. Some things are absolute rules – such as parliamentary sovereignty. Parliamentary sovereignty is not to be weighed against anything else – it is the ultimate rule of the system.[63]

Similarly, parliamentary privilege is an absolute jurisdictional bar, which preserves Parliament's capacity to perform its constitutional function. It is a category error to conceptualise parliamentary privilege as a value or principle that can be limited in the face of countervailing values: "Parliamentary privilege is like an eggshell; one cannot break it just a little."[64]

In the common law tradition, a right is not a value.[65] A right is an entitlement held against another who owes a correlative duty of compliance. To treat a right as a mere idea, a philosophical abstraction, is to risk watering down fundamental legal protections. That is arguably what has occurred in Canada where the Supreme Court has transformed Charter rights into "Charter values", with the result that Charter rights are – as applied to the executive – not entitlements, but factors for public officials to

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62 Peter Birks "Three Kinds of Objection to Discretionary Remedialism" (2000) 29 UWALR 1 at 13.

63 Contrast *R (Miller) v Prime Minister* [2019] UKSC 4, in which parliamentary sovereignty is repeatedly described as a "principle", rather than a rule, and there are suggestions that deviation from the "principle" may be capable of justification (at [41]–[42] and [50]–[51]). These aspects of *Miller* are best viewed as aberrations. But they are illustrative of the way in which the fuzziness of an approach based in broad principles and balancing can result in conceptual error and mislaying of fundamentals.

64 *Attorney-General of Canada v Power* 2024 SCC 26 at [354]. Contrast the majority approach in *Power*, which treats parliamentary privilege as contingent and subject to balancing against other values, in a calculus in which no value is *a priori* hierarchically superior to any other – so no value can therefore be absolute.

65 Lord Sales "Constitutional Values in the Common Law of Obligations" [2024] CLJ 132.

weigh up in their decision-making alongside myriad other factors, subject to a deferential reasonableness standard derived from administrative law.[66] As former Canadian Chief Justice McLachlin has emphasised, the better view is that while values may inform the content of rights, it is the right itself that receives protection under the Charter.[67]

There are thus many reasons to reject unbounded normativism. But the most powerful reason remains to be stated. Open-ended values-based reasoning is difficult to distinguish from political reason. When politicians debate in the House of Representatives, what they debate is the values they believe in, what values are most important, and how they would strike balances. A pure discourse of values is a discourse of politics, not law. In turn, if judges embrace normativism they shall imperil their legitimacy, because it will be difficult to say in what sense their judgments are the product of *legal* reason. Their decisions shall not be recognisable as *legal* decisions.

VIII BRINGING THINGS TOGETHER

So where does this leave us?

I say the judiciary should reject legalism, a style of reasoning that lacks an understanding of what law is for.

And I say the judiciary should reject normativism, a form of reasoning that collapses the division between law and politics.

The judges must navigate between these twin perils, their task similar to that of the hero Odysseus who had to manoeuvre his ship between Scylla and Charybdis, one a terrible monster and the other a deadly whirlpool.

The path forward for public law lies in the orthodox common law method, a form of reason that is recognisably legal, and which proceeds according to a framework of principle that is reasonably determinate *and* normatively rich. On this approach, the judiciary shall avoid the pitfalls of legalism and normativism, and the legitimacy risks associated with each.

The common law method in practice is not perfect. We know the common law has never been perfectly certain, determinate or coherent. But the *ideal* of common law reason is what we ought to strive for.

Importantly, mine is not an argument against any role for values in legal reason. It is an argument about the *proper role* of these deeper commitments in legal reason. Values do not form a direct basis

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66 See *Doré*, above n 23, and its progeny, including recently, *Commission scolaire francophone*, above n 23.

67 *Law Society of British Columbia v Trinity Western University* 2018 SCC 32, [2018] 2 SCR 293 at [115], and see the more general critiques by the minority of the rise of a discourse of values, which echo many of the points made herein: especially [115]–[119], [162]–[208] and [302]–[314].

for bringing claims or adjudicating claims.[68] One does not go to court and plead an idea and ask for a remedy because something has been done which does not "vibe" with that idea. Rather, the role of values is that they inform the content and provide the justification for more particularised first-order rules and principles; and it is on the basis of those more detailed rules and principles that legal claims are properly made and adjudicated.

In turn, this balance between an understanding of the law's deeper commitments in combination with more particularised norms which are capable of guiding conduct and disciplining legal decision-making, avoids the major pitfalls of both legalism and normativism. Common law reasoning is *both* normatively rich and recognisably legal.

There is no shortage of values, whether common law values such as the rule of law, broad ideas of human rights, Treaty principles such as partnership, or tikanga values. Those are our basic normative resources; the basic building blocks of the system. But they need to manifest in a reasonably stable body of reasonably determinate rules and principles. As Lord Cooke put it, "aspirations" are given "practical content and operation" via doctrinal rules and principles.[69]

Some parts of public law are clearly defined, and significant progress has been made in other areas of public law towards greater particularity, but other parts of public law are in a state of development or need a lot of work. The task is not easy, but it carries significant benefits. A detailed corpus of rules and principles allows citizens and government to gauge what the law demands with reasonable certainty. Such a framework conditions and disciplines judicial decision-making, and offers a basis for holding judges accountable for their decisions. It ensures compliance with the rule of law, and that judges are an exemplar of the rule of law. And most importantly of all, for the legitimacy of the judicial enterprise, on the common law model, judicial decision-making shall be defensible as based in reason that is recognisably *legal*.

IX JUDICIAL METHOD AND LEGAL CHANGE

Having addressed legal method in general, I want to briefly address judicial development of the common law, that is, legal changes effected by the judiciary.

When judges or scholars discuss the principles that should govern legal development, legal change is often discussed as if there is one type of change. People will say: change in the common law tradition has the following characteristics, x, y, z. But change is not monolithic. Rather, there are

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68 *Toronto (City) v Ontario (Attorney General)*, above n 23, at [49]–[84], particularly [84]. Contrast [170]. For completeness, I agree with the spirit of the minority judgment regarding the importance of deeper commitments to understanding of law including full understanding of the Constitution (for instance, at [168]). However, I am skeptical of suggestions that those deeper commitments may be free-standing and could be relied on, independent of specific constitutional provisions, to impugn legislation.

69 Cooke, above n 6, at xi.

different types of change, and these different types of change have different implications and call for different approaches.[70]

At least three types can be distinguished.

A Ordinary Legal Development

First, there is ordinary legal development. This is where legal change is an extrapolation of, and reconcilable with, the established legal framework. This involves running changes to first-order or surface level rules and principles, each of which is reconcilable with deeper commitments. So, for example, a rule might be departed from because it turns out it is incoherent when considered against adjacent rules and principles, and deeper commitments. Or a new exception might be established or the content of a rule refined in light of novel fact patterns. All of these types of changes would in principle be capable of rationalisation in light of the law's deeper commitments. This sort of legal change accounts for the vast majority of legal change, and is entirely orthodox. The law develops in light of new social, cultural, economic, environmental and technological issues placed before courts. But there is continuity and reasonable stability as each individual change is reconcilable with the basic logic of the existing system, and does not reduce to fundamental recalibration of basic values.

Judges will generally be on sure ground in effecting such changes, as these sorts of changes are generally accepted and discernibly legal in character as they cohere with the existing system. Sometimes, judges might push the envelope by developing rules and principles in ways that appear to stretch the logic of the system. In such cases, their legitimacy may be put in doubt, but the judges may consider this cost is warranted given the importance of what is at stake. What I would say about this is that courts need to ensure they carefully accumulate political capital over time, so that when they need to expend it, they have something to expend.

B Change to Deeper Commitments

Ordinary legal development can be contrasted with another type of change: change to deeper commitments. When it comes to that sort of change, time operates slowly.[71] Change is tentative and when done properly ought to be almost imperceptible over time; such change has an organic quality, rather than appearing as the product of deliberate design or "a pre-determined agenda", "self-conscious", "strained" or "abrupt".[72] Judges do not change deeper commitments in a direct manner;

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70 Lord Bingham observed that there are a range of "road signs" for judges governing different types of legal change, "ranging from 'No entry' and 'Stop' to 'Give way' and 'Slow'": "The Judge as Lawmaker: An English Perspective" in Rishworth, above n 58, 3 at 9–10.

71 Lord Sales "Long Waves of Constitutional Principle in the Common Law" in Carolan, Varuhas and Fulham-McQuillan, above n 8. See also Bingham, above n 70 and Dixon "Concerning Judicial Method", above n 37, at 117, on different types of change.

72 Cooke, above n 2, at 172; Dixon "Concerning Judicial Method", above n 37, at 117; and Bingham, above n 70, at 10–12.

rather, shifts emerge naturally over time, a product of the court performing its principal function of resolving disputes, as the law is applied to, tested against and developed on concrete facts, case-by-case. Over a significant time period, the aggregation of incremental changes may be recognised as having subtly shifted deeper commitments.

Incrementalism and stability are particularly important in regard to constitutional fundamentals, as these set the basic framework for the legal system as a whole, and government and society more generally; constitutional norms form the premises on which all legal and political action occurs.[73] As such, "the more deeply a rule is embedded … the more profound the process required to effect a change in it and the longer it may take for a wave to build to alter it".[74] Indeed, as discussed below, there are some types of constitutional change that cannot be effected via judicial process.

There are at least two key reasons why change to deeper commitments at common law proceeds in slow motion and according to incrementalism.

First, if judges radically change deep-lying commitments in one fell swoop, they are likely to create a disjuncture between all of the first-order rules and principles which were premised on the older commitments, and the new commitments which the judges have endorsed. The result would be that the status of the detailed rules and principles would be thrown into doubt; they continue to exist but their place is precarious because it is not clear they can be reconciled with the newly minted second-order propositions. It is as if the rug has been pulled out from under the doctrinal superstructure. The legal system will be pushed into a state of significant or radical instability, as people will not know what rules they can safely rely on: all rules become candidates for revision or reconsideration in light of the new deeper commitments. That is why courts should not seek to effect paradigm shifts in single judgments.

In this connection, consider the *Ellis* case, which addressed the relevance of tikanga to the question whether an appeal against conviction should continue following the accused's death.[75] An incremental approach would have involved the Supreme Court simply addressing the relatively narrow question of how tikanga values informed or were concretised within doctrinal rules and principles governing continuance on the facts, allowing for the jurisprudence to develop by analogy case-by-case thereafter.[76] Instead, some of the majority judgments, while proclaiming adherence to incrementalism, include a multiplicity of very broad headline statements as to the interrelation

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73 Sales, above n 71.

74 At 214.

75 *Ellis*, above n 17.

76 This would perhaps have been assisted by waiting for a case in which the question of the relevance of tikanga did not arise obiter, as was the case in *Ellis*.

between tikanga and the common law, which signal a fundamental paradigm shift,[77] while simultaneously providing little guidance as to how to navigate this new paradigm. That is a recipe for the sort of instability I have discussed above. An incremental approach may be less exciting, but it has the benefit of securing the legitimacy of legal development. Incrementalism is particularly apt when dealing with complex questions, which resist straightforward answers *in abstracto*; better to allow the law to develop in the face of concrete facts, with determinate answers to larger questions emerging over time, with the benefit of experience. One unfortunate consequence of the very broad judicial statements in *Ellis* is that they have led some to necessarily associate tikanga with rule of law concerns and instability. But that was not inevitable: as the Law Commission has convincingly demonstrated, rule of law issues are *not* inherent in tikanga or its internal methodology.[78]

The second reason courts must move slowly in relation to deeper commitments is because of the institutional limits on courts. A common prompt for courts to adapt the deeper commitments of the legal system is changes in social norms, values or expectations, the idea being that the law's bedrock commitments should not fall out of step with what society considers important or right.

However, courts are not particularly well placed to judge social mores. That is why courts only take cognisance of social values which have a degree of permanence and around which there is a significant degree of consensus in society.[79]

Courts have to be careful in this regard. Social phenomena which might appear permanent might turn out to be passing fads. There are dangers in judges simply mirroring society, because social mores may be oppressive or whimsical. And judges need to be conscious that we live in an age of political polarisation, where it is difficult to say that there is consensus around anything: judicial consensus is not the same as societal consensus. Being seen to preference one set of political commitments ahead of others can be massively de-legitimising.[80] Another reason for a tentative judicial approach is that other institutions are better placed to speak for society, namely Parliament.

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77 Despite the judgments simultaneously acknowledging that tikanga was already part of the common law.

78 Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) in particular chs 3 and 8. The Statement of Tikanga appended to the *Ellis* judgment says of tikanga (at [24]): "It is a system of law that is used to provide predictability and are templates and frameworks to guide actions and outcomes".

79 Sales, above n 71, at 212 ("a judge has to be confident that there is a solid and sustained preponderance of view in favour of change, rather than react to more epiphenomenal shifts on the surface of public debate"), and 217 ("long-term values of society"); *Ellis*, above n 17, at [165]–[167]; and *Mabo*, above n 54, at 41–42 (terra nullius a doctrine that was racially discriminatory, and thus so obviously anathema to societal norms it had to be expunged).

80 As such, it is advisable to avoid adoption of legal tests which place courts in the position of having to stand in direct judgement upon different types of political commitments: Jane Calderwood Norton "Controversial Charities and Public Benefit" [2018] NZLJ 64.

There can be frustration as a result at the pace of change at common law. But the common law is necessarily behind the curve as change must be incremental, given the legitimacy constraints on judicial law-making. As Sir Owen Dixon observed, "[i]mpatience at the pace with which legal developments proceed must be restrained because of graver issues".[81]

Great leaps are for Parliament. And Parliament has been responsible for significant innovations, including the creation of the Waitangi Tribunal, introduction of the concept of Treaty principles,[82] enactment of the Bill of Rights and Human Rights Act 1993, introduction of tikanga into the state legal system in a significant way,[83] enactment of a range of legal protections for workers' rights, adoption of the MMP voting system (following referenda),[84] and abolition of appeals to the Privy Council and establishment of the Supreme Court.[85]

This is not an argument for the Justices to close their eyes to the world beyond the courtroom. But it is an argument for caution when it comes to reshaping deep commitments, a caution characteristic of the common law's tradition of incrementalism, and which has helped to foster judicial legitimacy over time.

C Changes Judges Cannot Make

There are some types of legal change the judges cannot make.[86] One example is that the judges cannot unilaterally alter parliamentary sovereignty.[87] Parliamentary sovereignty is the rule of recognition or grundnorm of our system: it is the rule on which everything else depends. And it is a rule grounded in fundamental democratic principle. If the polity is to relinquish a degree of popular sovereignty, then that must be a choice for the polity.

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81 Dixon "Concerning Judicial Method", above n 37, at 11.

82 Treaty of Waitangi Act 1975.

83 See Law Commission, above n 78, at, chs 6–7; *Ellis*, above n 17, at [100]–[102]; and Williams, above n 18, at 17–32.

84 Electoral Act 1993.

85 Supreme Court Act 2003 (repealed). See now: Senior Courts Act 2016, Pt 4.

86 As Brennan J put it in *Mabo*, any change must not be such as to fracture the basic skeleton of legal principle that gives the law its coherence. In that case Brennan J considered that reopening the doctrine of tenure, which underpins the whole of land law, was off limits: *Mabo*, above n 54, at 45.

87 Contrast: Robin Cooke "Fundamentals" [1988] NZLJ 158; *Fraser*, above n 3, at 121; *Taylor v New Zealand Poultry Board*, above n 3, at 398. As Kós J has explained, these extrajudicial statements and dicta, appearing to question parliamentary sovereignty, are properly understood as "judicial cautions", uttered at a "time of increasingly fragmented constitutional order": 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 at 132.

Another example is that it is questionable whether the courts are able to effect a fundamental change to the legal status of the Treaty of Waitangi. The most obvious change would be for the Treaty to be directly actionable in state law. We need to think carefully about this.

If such a change were to occur, then the process by which change is achieved should be one that itself abides by the Treaty principles; that is, the process would have to be characterised by good faith and partnership, including broad-based participation of and consultation with Māori, and society at large, on a range of matters, including large questions such as whether it is the principles or the text or both that are actionable, and by whom. The proposed process might well be properly vetted by the Waitangi Tribunal.[88] It is, therefore, questionable whether litigation would be the right procedural form for effecting a change of such moment for our society, and particularly for Māori.

The question of direct actionability of the Treaty engages fundamental questions over organisation of our constitutional arrangements. As our current arrangements illustrate, the place of the Treaty as constitutional does not depend on direct actionability in law. The Treaty is already constitutional. It is our founding document, sits at the core of our constitutional morality, and the Treaty manifests in the legal system in specific ways. The Treaty casts a political burden of justification for all Crown action, with the Waitangi Tribunal playing a vital accountability role, and provides an enduring framework for government and society.

The United States style of legal constitutionalism, according to which society's big social and political questions are routinely reduced to interpretive disputes between lawyers, to be determined conclusively by state courts, is not the only model of constitutionalism, and it has well-known drawbacks. There are a range of different models of constitutional design, including bottom-up models focused on facilitating voice and meaningful community engagement and buy-in in relation to significant issues, which may better fit our history, culture and circumstances, compared to removing those issues to the legal profession and state courts for top-down determination.

That the question of direct actionability of the Treaty engages heavily contested, deep questions of constitutional design, in respect of which there are no clear right answers, only competing visions, reinforces that courts and litigation are unlikely to be the appropriate vehicle for determining such matters in the name of the polity.

X CODA

Judging is not easy. Each day, judges must make decisions which affect the lives of strangers, affect important relationships in society, and are of great moment for our polity. They have the heavy responsibility of upholding constitutional fundamentals. My remarks have been motivated by a concern to maintain the legitimacy of the judicial enterprise into the future. I am not the only one

88 Note that the Waitangi Tribunal is presently carrying out its constitutional kaupapa inquiry, *Tomokia ngā tatau o Matangireia: Constitutional* (Wai 3300).

thinking about these issues. Many in our system are thinking about them, and I am sure the judiciary is too. Mine is one contribution to the discourse. I firmly believe we are most likely to reach right answers when we are all as a legal community engaged in rigorous and respectful debate and discussion of the big issues faced by the legal system. So, as ever, the conversation continues.

Nō reira, e ngā nui, e ngā rahi, tēnā tātou katoa