PICKING UP THE THREADS: THE STORY OF THE COMMON LAW IN AOTEAROA NEW ZEALAND

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The following is the edited version of a speech delivered by the Chief Justice of New Zealand, Dame Helen Winkelmann, as the annual Robin Cooke Lecture at Te Herenga Waka–Victoria University of Wellington on 2 December 2020.

I INTRODUCTION

Lord Cooke was an outstanding jurist and scholar. A frequent theme of his extra-judicial writing was the common law – how it works, how it has developed, and its potential for change.

He was keen to debunk the notion that judges are only required to discover and apply law which has existed since time immemorial. He wrote and spoke of the broad themes in the change underway in the law. Approving of New Zealand's movement away from unquestioning adherence to English law, he encouraged judges to develop, and lawyers to advocate for, law appropriate to the circumstances of New Zealand. He suggested that we should, freed from lockstep with Britain, look to other countries – to Australia, the United States of America and Canada, and to international instruments – for ideas as to how New Zealand could begin to make a law fit for its own context.

By the late 1980s – a period of time during which as President of the Court of Appeal, Lord Cooke dominated the New Zealand legal world – New Zealand law had set off down a distinctive path. This was partially in response to litigation in connection with the Treaty of Waitangi, but also in response to other aspects of New Zealand society: its institutions of power, economy, environment and its media. A distinctive jurisprudence developed in relation to judicial review, directors' duties and the tortious duty of care, with Lord Cooke playing a key role in these developments.

We are now at a point in time when there are calls for change to our law, our courts and our justice system; calls that they all change to respond to the needs of this country. And there is a sense that

* Chief Justice of New Zealand. My thanks to my clerks, Imogen Little and Josie Butcher, for their outstanding assistance with this lecture. I also wish to thank Professor Mark Hickford for his helpful comments. All errors and omissions are of course my own.

change is possible, if not inevitable. Since 2004, New Zealand has had its own Supreme Court, formed with the purpose of recognising that New Zealand is an independent nation with its own history and traditions. New Zealand has an increasingly diverse judiciary and legal profession. New Zealand is finding its feet, culturally and economically, as a South Pacific nation – few would now see England as the "home country".

This lecture attempts a quick and thematic sketch of the history of the common law in New Zealand. It really is a sketch, as this is a subject which justifies more extensive treatment than a lecture allows.

I am going to address three broad themes. First, I will describe my own conception of how the common law is made – which I refer to, not originally, as the common law method. When I refer to the common law method, I mean more than just the method judges use when they decide cases by reference to precedent, or by interpreting and applying statute law. This is one aspect of the common law method, but it also includes the work judges do in applying the values and associated concepts that shape our law, and which run deeper than any individual precedent. I also include in that method the basic procedural and operating model used by courts in Aotearoa New Zealand and other common law jurisdictions.

The underlying processes and principles of the common law are the threads I refer to in the title to this lecture. I will explain how, through continuity of process and principle, the common law method both provides the stability and cohesion that underpins our society, and enables change, ensuring that the law and its processes remain connected to the community it serves. That ability to change lies at the heart of this method and, as I explain, at the heart of judicial legitimacy.

I will then describe how the common law method developed in New Zealand, identifying how it responded – or more frequently, failed to respond – to the unique circumstances that existed in 19th and early 20th century New Zealand. In this context, I explore case studies of where it can be said that the method failed, identifying common threads that characterise that failure.

Finally, looking forward to the future of New Zealand's common law, I address one of the most pressing challenges for the common law method (indeed for our society): repairing the criminal justice system. Although many criminal justice issues lie beyond the power of the judiciary, the courts are part of the criminal justice system. And so the judiciary must play its part in addressing this challenge. To do otherwise would be a failure of the common law method. I outline how it is that the common law has the content and methodology to assist us as we frame our response to this challenge, and the lessons we should carry forward from the past as we do so.

II THE METAPHOR

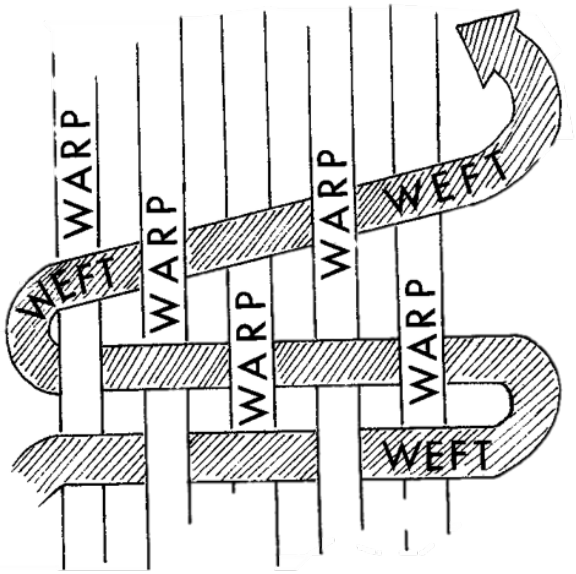
I chose the metaphor of threads because fabric metaphors have always seemed to me particularly apposite to the law – looking back, I have noticed a tendency to use them in my own judgments. It is easy to think of the law as a fabric, and the way it is created as something like weaving. Perhaps these

fabric metaphors resonate with me due to my own whakapapa. My family has been engaged in the textile trade here and in various parts of Europe for at least the last 200 years.

A fabric metaphor is especially apt for our context here in Aotearoa New Zealand. The art of weaving is a Māori taonga, and is full of symbolism and meaning. This metaphor has been incorporated into our new ceremonial judicial robes (see pictures below), designed to reflect the two founding cultures of New Zealand. The garment is based on the traditional black gowns worn by barristers and judges to reflect our common law heritage, but the fabric from which it is constructed incorporates elements that reflect our unique heritage and traditions. Kauri cones and leaves are the underlying design embedded in the black weave of the fabric. The braid on the edge of the robe is a poutama pattern, used to construct woven tukutuku panels and in other Māori art forms, symbolising whakapapa as well as the progressive levels of learning and intellectual achievement. To some, it represents the steps the god Tāne ascended in climbing to the highest of the heavens in his quest for knowledge. There, he retrieved three baskets of knowledge: te kete tuatea (the basket of light), te kete tuauri (the basket of darkness) and te kete aronui (the basket of pursuit). The imagery of these three woven kete has been captured on the shoulder of the judicial gown, an apt parallel to the different bodies of knowledge that judges must draw upon in their task: knowledge of precedent, knowledge of their societies and knowledge of the direction in which the law is developing.

Pictured Left – the judicial gown with the poutama pattern braid.
Pictured Right – the shoulder of the judicial gown with the three kete.

The traditional method of fabric construction involves the use of two types of thread: the warp and the weft. The warp are the lengthwise threads that run through the fabric. They are limited in number and give the fabric shape and stability. The weft are the thousands of threads that are woven in and out of the warp. The weft gives the fabric colour and texture. As pictured below, I see the underlying values and concepts that run through the law as the warp, providing the law with its basic shape and giving it coherence and stability. The individual cases and the judgments that result are the weft, providing the detail and texture of the law.



This metaphor helps reveal something about case law and how it is used in the common law method. Even binding precedent does not provide a code containing all the answers. That is because the common law, although contained in the detailed precedent deriving from individual cases, is made up of values that are big enough and flexible enough to allow the law to change to meet the needs of place, people and times. And because these values and concepts (the warp of the law) contain big and flexible ideas, they must be applied carefully to the facts of each case. It is this concern – a concern to ensure that the values and concepts that determined the outcome in the case cited as precedent also apply in the case before the court – that lies behind the common law technique of distinguishing cited case law.

In the 18th century, Lord Mansfield identified the values underlying the common law as morality, honest dealing and good faith.[1] Today, we would agree at least with the values of honest dealing and good faith. We would add in new values such as fairness and its procedural sister natural justice. We would add values and concepts such as restraining the abuse of power, reasonableness, proportionality and predictability (stability).

These values and concepts are captured in legal concepts throughout the law. They are the source of the doctrines of good faith, undue influence, unconscionable conduct, duties of care and the law of misrepresentation, to name but a few.

The fabric metaphor and the associated idea of the warp and the weft also helps reveal the key task of the common law method – maintaining the balance between continuity and change. The incorporation into the underlying common law of new ideas, concepts and values from the sources discussed below leads to change in the law. Because of the steadying effect of precedent, the change may be incremental – but it is not inevitably so. The common law can be creative and even dynamic in responding to the needs of society. The development of the duty of care, which imposed duties owed to those foreseeably harmed by a defendant's actions, was a radical development. But it was necessary to respond to the complexity of relationships in an urbanised and industrialised society.

Closer to home, an example of speedy development of the law can be found in the application of the doctrine of constructive trusts to address distribution of property occurring on the breakup of de facto relationships. This development responded to the rise in the number of relationships outside of marriage, and the absence of a statutory property sharing regime for this situation. Constructive trusts were used to address the resulting injustice where property was divided simply in accordance with legal title.[2] The common law, then, can respond to challenge and change within a society.

But the common law must also be stable – it plays a role in the regulation of behaviour and maintenance of societal order.[3] That stability ensures that the law does not twist and turn with every passing craze that momentarily grips society. It can be protective against majoritarian pressure, from whatever source, where that pressure is for outcomes that offend against fundamental concepts of justice. To fulfil this stabilising role, the common law must develop through evolution, not revolution.

The common law method, therefore, brings stability through the doctrine of precedent, while also allowing for the injection of new ideas and for the creation of new responses as required.

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1 Norman S Poser *Lord Mansfield: Justice in the Age of Reason* (McGill-Queen's University Press, Montreal, 2013) at 228–229, citing Bernard L Shientag "Lord Mansfield Revisited – A Modern Assessment" (1941) 10 Fordham L Rev 345 at 351.

2 See Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 22–23.

3 Carleton Kemp Allen *Law in the Making* (7th ed, Clarendon Press, Oxford, 1964) at 37.

III THE WEFT: SOURCES OF THE COMMON LAW

New Zealand courts have affirmed the application of English law from the creation of the colony.[4] The position was clarified, if retrospectively, by the English Laws Act 1858, which made clear the English law that applied was both statute and common law.

A Case Law

Once we acknowledge that complex legal problems can have more than one possible answer and may require consideration of not only strict logic and formal law, but also relevant principle and policy, the necessity to record judicial reasoning comes to the fore. As Justice Michael Kirby has said, the reality of choice means that judges are duty-bound to explain the considerations that have led them to select one decision over another.[5] It also informs how judges who follow after them will apply those decisions. Therefore, both the outcome and the judicial reasoning within cases must be recorded and accessible in order for the common law to develop by way of the doctrine of precedent.

It follows that for the common law method to operate as it should, it must be reliant on something as prosaic as the availability of law reports and textbooks. Early New Zealand did not, of course, have law libraries. The first lawyers in New Zealand arrived from England with copies of the various English law reports in their portmanteaus. These law reports were very much their tools of trade. They were both the product of the common law method, and the repository of the common law. It is not to over speak to say that law reporting is essential to the operation of the common law method.

In England, law reporting has existed, in some form, since the 13th century.[6] Prior to that, there is evidence that judges applied what they had heard or remembered about the decisions of other judges in their legal reasoning.

While courts in New Zealand soon began generating their own case law, formalised reporting of those cases did not get underway here until 1861, when a Mr James Macassey began publishing a private set of reports, the New Zealand Reports. Even then, these reports, which continued until 1872, contained only decisions from the Otago courts. Mr Macassey did not, and indeed could not, report on cases from other districts. In the 1860s, there were only primitive communication networks and judges travelled from town to town on horseback or foot. We are, therefore, missing the case law from the areas of the early encounters in New Zealand – when Pākehā and Māori were forming new kinds

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4 See Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 53, and the cases cited at fn 37.

5 Michael Kirby *Judicial Activism: Authority, Principle and Policy in the Judicial Method* (Sweet & Maxwell, London, 2004) at 30.

6 Michael Bryan "Early English law reporting" (2009) 4 University of Melbourne Collections 45 at 45. Semi-official and official reports were not produced in England until the second half of the 19th century. But for several centuries before that, judges and practitioners relied on a variety of private reports. For a discussion of this history, see Allen, above n 3, at 221–230.

of communities, new types of business enterprise and early dealings in land. Over time, other minor series of reports came and went, but these were all private enterprises that struggled and ultimately failed.[7]

In the absence of law reports, there was newspaper reporting of decided cases. This was an important record of case law, informing the public of what was going on in the courts, and also one imagines, informing lawyers and judges of what was going on in other districts. But newspaper reports did not necessarily record the finer details of legal reasoning or narrate the detail of the evidence which provided necessary context to that.[8]

It was not until a Council of Law Reporting was formed in 1880, comprising the Attorney-General, the Solicitor-General, and various other worthies of the legal profession, that the creation of a nationwide official set of reports got underway. The Council was charged with revising, editing and publishing reports received from the district law societies. A system of law reporting covering all senior courts began with the first volume of the New Zealand Law Reports, issued in 1883.[9] Both of these institutions, the Council of Law Reporting and the New Zealand Law Reports, continue to this day.

Even with official status, the New Zealand Law Reports struggled in the first few decades with a lack of financial backing. They hit a particularly rocky period when, in 1912, warehouses storing almost the entire stock of printed copies were destroyed by a fire. Facing financial ruin, the Law Reports formed a commercial arrangement with Butterworth and Company for the publishing and distribution of the reports.[10] Butterworths remains the publisher of the New Zealand Law Reports over 100 years later, although now of course trading under the name LexisNexis.

The overall picture is, then, that practitioners did not have the benefit of law reports, with the limited exception of the Macassey Reports, until the 1880s. Given the centrality of law reports to the common law method, we can at least hypothesise that the absence of that record would have played a part in the development, or rather the lack of development, of the common law in responding to the local circumstances.

B Custom

From the earliest times, custom has been a source of the common law. Custom is reflective of societal values that the common law method seeks to embed into the warp of the law. But it can also be a source of detailed rules regulating social and economic relations.

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7 Peter Spiller "The Development of Law Reporting in New Zealand" [1994] NZLJ 75 at 76.

8 Although it must be acknowledged that on occasions, early newspapers did contain very full reports of cases.

9 Spiller, above n 7, at 76–77.

10 Hugh C Jenkins "The History of Law Reporting in New Zealand" (1926) 1 NZLJ 291 at 292–293.

Lord Mansfield famously convened juries of businesspeople to provide evidence to him of commercial custom, so that he could weave that custom into the common law. He did that because at that time, the 18th century, the common law was devoid of the values, ideas and forms of action needed to support the English economy as it transitioned from a feudal agriculture-based economy into one based on trade and finance.[11]

There was, as this law arrived in one piece from another hemisphere, every reason to expect that it would develop to its new context. The English Laws Act 1858 even made room for the possibility of circumstances in New Zealand which the English laws would have to accommodate. Justice Joe Williams has explained how that law arrived into a country that had its own customs, regulating the lives of the inhabitants, setting out duties and expectations and providing for the consequences of infractions of societal norms and values just as surely as did English common law and statute.[12]

Kupe's law (as Justice Williams has named it) was a potential source of new values for the common law. There was potential also for the development of new or amended rules within that law to support just outcomes for Māori and settlers. But tikanga as a source of law received a patchy reception. It did receive some recognition. In *Public Trustee v Loasby*, Mr Loasby, a Pākehā, successfully recovered the cost of goods he supplied for a tangihanga from the estate of the Māori Chief Mahupuku, on the basis that such payment was in accordance with Māori custom.[13] There was also early recognition, albeit limited, of Māori customary interests in land.[14]

It is a fair account, however, to say that after the New Zealand Wars, Māori struggled to gain recognition of customary title, even in the face of statutory acknowledgment of those rights. In 1877, the Supreme Court (now the High Court) went so far as to say that "no such body of [Māori customary] law existed",[15] setting into motion the unfortunate course the law was to take for at least the next several decades.[16]

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11 Allan C Hutchinson *Laughing at the Gods: Great Judges and How They Made the Common Law* (Cambridge University Press, Cambridge, 2012) at 37–40.

12 See Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1; and Joe Williams "Build a Bridge and Get over It: The Role of Colonial Dispossession in Contemporary Indigenous Offending and What We Should Do about It" (2020) 18 NZJPIL 3.

13 *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC).

14 *R v Symonds* (1847) NZPCC 387 (SC).

15 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC) at 79.

16 See for example *Nireaha Tamaki v Baker* (1894) 12 NZLR 483 (CA) at 488 per Richmond J; *Solicitor-General v Bishop of Wellington* (1901) 19 NZLR 665 (CA) at 685–686 per Williams J; and *Hohepa Wi Neera v Bishop of Wellington* (1902) 21 NZLR 655 (CA) at 667 per Stout CJ and 671–672 per Williams J.

In taking the long view, however, it is appropriate to recognise that in the 1901 case *Nireaha Tamaki v Baker*, the Privy Council rejected the idea that a court could not recognise Māori customary law.[17] Also, in the *Loasby* case, the Supreme Court (now the High Court) developed a three-part test to determine when an aspect of tikanga could be recognised by the common law,[18] a test that was applied in later cases.[19] And, recently, in *Takamore v Clarke*, the Supreme Court confirmed that tikanga forms part of the common law, as a value or relevant consideration that impacts and informs other common law rules.[20]

The evolution of the role of tikanga in the common law will continue. Tikanga presents a unique opportunity for the development of the common law in New Zealand. Tikanga can contribute new ideas and values to our law that are grounded in and come from this whenua. And it can remind us of communitarian values that in the common law have been obscured by the weight of precedent.

It is appropriate to proceed with caution – the caution with which the common law is accustomed to move. As a living and, therefore, changing body of customary law, great care is needed in how the common law approaches issues of tikanga. The risk that the processes of the law will damage tikanga should not be lightly put to one side.[21] But I am hopeful that we are starting to see both the judiciary and the profession approach this task with the care and humility it requires, beginning as we must, with a desire to understand.

C Statute Law

The relationship between the common law and statute is complex. Statute law typically draws upon the common law, codifying it, or enacting an improved version of it.

Statutory interpretation itself is an application of the common law method, engages common law values and is productive of common law content.[22] This no doubt at times to the irritation of legislators. As Dicey puts it:[23]

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17 *Nireaha Tamaki v Baker* [1901] AC 561 (PC) at 577–578.

18 *Public Trustee v Loasby*, above n 13, at 806.

19 See for example *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 215; and *Proprietors of Parininihi Ki Waitotara Block v Ngaruahine Iwi Authority* [2004] 2 NZLR 201 (HC) at 206.

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

21 For a discussion of this risk, see Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" [2015] NZ L Rev 1 at 29–33.

22 For a fuller discussion on this, see John Burrows "Common Law Among the Statutes: The Lord Cooke Lecture 2007" (2008) 39 VUWLR 401.

23 AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan, London, 1959) at 413–414.

> Parliament is supreme legislator, but from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges of the land, who are influenced by the feelings of magistrates no less than by the general spirit of the common law, are disposed to construe statutory exceptions to common law principles in a mode which would not commend itself either to a body of officials, or to the Houses of Parliament …

It is also true, however, that statute law has increasingly influenced common law developments.[24] Policy-makers have resources that the judiciary is unable to call upon: statisticians, social policy analysts, economists, and the benefits of wide public consultations. Statute law has long been looked to as a source of the values that can be incorporated into the law, and legitimately so since it is the product of the democratic process. It is also looked to as a source of ideas.

This trend has accelerated with the increased complexity of society and increased legislative output. New Zealand statute law, and sometimes statutes from overseas, provide models of how the common law can respond in analogous situations. In 1992, President Cooke (as he then was) recognised that "[t]he analogy of a statute may properly influence the development of the common law".[25]

D Te Tiriti

The Treaty of Waitangi is another source to which judges look for the content of the law. The Treaty is incorporated into New Zealand law through the Treaty of Waitangi Act 1975, under which the Waitangi Tribunal has the task of interpreting the two language versions. But in cases raising issues of statutory interpretation, and often in judicial review proceedings, the mainstream courts are required to apply the principles of the Treaty – the Treaty or its principles are referred to in over 35 principal Acts.[26] These statutes require decision-makers to "give effect to" the Treaty principles, to not "act in a manner that is inconsistent" with the principles, to "ensure full and balanced account is taken" of the principles or to "uphold" the principles of the Treaty.

The nature of the principles to be applied by the courts has emerged and developed from case law. In the 1987 *New Zealand Maori Council* (*Lands*) case,[27] the Court of Appeal found that these principles include partnership, active protection, informed decision making, redress and rangatiratanga. Since this case, the Treaty principles have continued to evolve in both the courts and the Waitangi Tribunal.

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24 See the discussion in Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 732–740.

25 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 298.

26 Joseph, above n 4, at 89.

27 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

E International Law

New Zealand has always looked beyond its borders for its jurisprudence. While this traditionally led to steadfast reliance on English precedent, today it is international law, not colonial law, that dominates as a source of extra-territorial inspiration.[28]

The reception that international law has received on the New Zealand stage is shaped by our identity as a small island nation with a constitutional culture of reciprocity and openness to outside influences.[29] Professor Janet McLean describes how New Zealand has consistently sought out broader communities to belong to.[30] New Zealand could be said to have moved reluctantly to independence from England, waiting 16 years to take up the opportunity to become fully self-governing offered by the Statute of Westminster in 1931. Even then, the New Zealand Parliament was not fully independent of England until the Constitution Act was passed in 1986.[31]

The pace at which New Zealand courts have engaged with international law has accelerated – as Professor Claudia Geiringer observes, the phrase "international law" appeared in eight cases in the New Zealand Law Reports from 1966 to 1975; 15 from 1976 to 1985; 20 from 1986 to 1995; and then 63 from 1996 to 2005.[32] Part of this acceleration can be attributed to various pressures of the day: the growth in the number of international treaties and instruments (particularly post-World War II); the enactment of the New Zealand Bill of Rights Act 1990 (an Act "to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights");[33] a receptive government; New Zealand's participation in international treaty drafting; and global events such as the end of the Cold War and the Rwandan genocide.

New Zealand's international obligations provide values, norms and principles that have shaped and will continue to shape the common law's development. It is now a settled presumption of statutory interpretation that legislation should be read, so far as possible, consistently with New Zealand's

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

29 Treasa Dunworth "International Law in New Zealand Law" in Alberto Costi (ed) *Public International Law: A New Zealand Perspective* (LexisNexis, Wellington, 2020) 597 at 603–604.

30 See the discussion in McLean, above n 28, at 163–167.

31 What seems now an inevitable step was the subject of deep reflection within academic circles: see for example JC Beaglehole (ed) *New Zealand and the Statute of Westminster* (Victoria University College, Wellington, 1944).

32 Claudia Geiringer "International law through the lens of Zaoui: Where is New Zealand at?" (2006) 17 PLR 300 at 309. See also Dunworth, above n 29, at 602 fn 27, noting that this result has also held steady in more recent years.

33 New Zealand Bill of Rights Act 1990, long title.

international obligations.[34] And as Justice Susan Glazebrook, writing extrajudicially, has said, it would be "particularly churlish if judges in interpreting legislation took cognisance of international obligations but refused to do so in the development of the common law".[35]

For instance, the fact that the right to privacy is not recognised in our Bill of Rights did not prevent the common law from developing consistently with the protection of that right under art 17 of the International Covenant on Civil and Political Rights.[36] In recognising the existence of a tort of privacy in New Zealand in the case of *Hosking v Runting*, Gault and Blanchard JJ noted the "increasing recognition of the need to develop the common law consistently with international treaties to which New Zealand is a party", and that to "ignore international obligations would be to exclude a vital source of relevant guidance".[37]

F The Lawyers and the Judges

The common law method I have described is not a mechanical process, but depends upon the inputs of knowledgeable and skilled human actors – principally upon the inputs of lawyers and judges. For the law to develop, the right arguments must be made by counsel. For their part, the judge must be knowledgeable about the law, particularly about the deep values that underpin it and run through it. They must also know about their society, so they understand the context in which they come to apply those values. Indeed, so profound is this human element in the law that there is an alternative account waiting to be written which plots the development of the law by reference to pivotal actors.

Judicial leaders now acknowledge that the path judges have walked through life and through the law shapes how they will approach the application of the values underpinning the law to the individual case. They acknowledge that who the judges are matters. I believe that it is because of the recognition of this human element that our concept of the ideal judge, and even of ideal judicial behaviour, has changed. There is now consensus that ideally, at a collective level, a judiciary should be drawn from diverse parts of society and have diverse experience in life, including diverse experience of working within the law.

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34 *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475 at [96], citing *New Zealand Air Line Pilots' Assoc Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289; *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24] per Blanchard, Tipping, McGrath and Anderson JJ; *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383 at [40]; and *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at [143] per McGrath J and [207] per Glazebrook J.

35 Susan Glazebrook "Cross-Pollination or Contamination: Global Influences on New Zealand Law" (2015) 21 Canta LR 60 at 67.

36 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

37 *Hosking v Runting* [2005] 1 NZLR 1 at [6].

A review of judicial appointments to the Supreme Court (now the High Court) between January 1946 and December 1972, conducted by Jack Hodder and published in the New Zealand Law Journal, examined the demographics of the 36 appointees during that period.[38] Hodder found:[39]

> … the person appointed to be a Judge in New Zealand in the years since the Second World War is a middle-aged Caucasian male; he is well-educated; and he is a successful and prominent member of the legal profession and, as such, is almost certainly wealthy, a member of the upper-middle class, and lives in an urban environment.

His conclusion, based on these findings, was that there was a "perhaps unhealthy uniformity" among those appointed as judges.[40]

This is somewhat unsurprising, given the makeup of the legal profession at the time of Hodder's review. Less than 50 of around 3,000 lawyers at that time were women – under two per cent.[41] Ethnicity statistics from that period are limited, and ethnicity was also a stark omission from Hodder's study. What we do know, from New Zealand Law Society records,[42] is that the first Māori person to be admitted to the profession as a solicitor was Thomas Rangiwāhia Ellison, who began practising in 1891 (and who was also a professional rugby player who captained the first official New Zealand team in 1893).[43] The first Māori man to be admitted to the bar was Sir Āpirana Ngata in 1897. The first Māori woman was admitted to the profession in 1972, with Dame Georgina te Heuheu.[44] The first lawyer of Chinese descent to be admitted to the profession was Henry Ah Kew in 1924,[45] and the first lawyer of Indian descent was Lalbhai Patel in 1950.[46] By 2002, out of a total of 8,345 New Zealand lawyers who held practising certificates, only 156 were Māori, 130 were Chinese, 81 were Indian, 22 were "Other Asian", 37 were Samoan, four were Cook Island Māori, seven were Tongan, and seven were "Other Pacific Island".[47]

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38 JE Hodder "Judicial Appointments in New Zealand" [1974] NZLJ 80.

39 At 85.

40 At 88.

41 At 85.

42 Wellington District Law Society "Wellington" in Robin Cooke (ed) *Portrait of a Profession: The Centennial Book of the New Zealand Law Society* (AH & AW Reed, Wellington, 1969) 388 at 394–395.

43 Atholl Anderson "Story: Ellison, Thomas Rangiwāhia" (1993) Ngā Tāngata Taumata Rau | Dictionary of New Zealand Biography <www.teara.govt.nz/en/biographies>.

44 Geoff Adlam "A Changing Profession: New Zealand Law Society 1869–2019" (2019) 932 LawTalk 18 at 29.

45 At 23.

46 At 27.

47 "Our changing profession: a look at the statistics" (2002) 538 LawTalk 18.

Our profession looks very different today, and although we do not yet have a judiciary that is appropriately reflective of the community it serves, the makeup of our judges is well on the path to change. Today, across all benches, 18 per cent of our judiciary identify as Māori, 40 per cent are female, 12 per cent have a disability, 3.5 per cent identify as homosexual or bisexual, 10 per cent are immigrants to New Zealand, and 15 per cent had two parents who did not finish secondary school.[48] This diversity of background and life experience will continue to grow as long as we remain committed to it.

More than life and legal experience acquired up to the date of appointment is needed to judge in a diverse and changing society. Judges are expected to continue to learn about their society throughout their judicial career. For this reason, they must remain connected to their communities – judges are no longer required to withdraw to an ivory tower on appointment. But even ongoing connection with society is not enough – judges must continue to actively learn about their society and its values after appointment, as this knowledge feeds directly into the law.

In recognition of this, increasingly sophisticated educational institutions have developed in most common law countries over the last 20 years, charged with offering educational programmes to the judiciary. In New Zealand, we have our own – Te Kura Kaiwhakawā, the Institute of Judicial Studies. Te Kura Kaiwhakawā operates effectively as an educational institution for judges, addressing core judicial competencies such as judgment writing, evidence and procedure, but also broader issues of social context – issues such as mental health, neuro-diversity and linguistic deficits that affect many court participants; the impacts of trauma and of sexual and family violence, and how these can affect the behaviour of complainants and witnesses; and the relevance of the diverse ethnic and cultural backgrounds of those who come before the courts.

Deciding a case under the common law method entails the judge bringing to bear, at the point of decision, all of these sources. Their own knowledge of the warp and the weft of the law. Their own knowledge and experience of life and their society to decide, for example, what is fair and reasonable, and what is an abuse of power. It entails the judge having sufficient knowledge of the case before them to apply those concepts in accordance with the underlying values. For this reason, judges need information as to the context in which they make their decision – the context of the individual they have before them and the context of the community from which that individual comes. Lord Cooke recognised the centrality of the judge's knowledge and experience when he expressed the view that "an understanding impartiality" is the most important judicial quality – and he acknowledged that "true impartiality does not come easily or naturally: it has to be striven for".[49]

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48 These statistics are held on file with the author and have been updated to be current as of October 2021.

49 Robin Cooke "FW Guest Memorial Lecture: The Courts and Public Controversy" (1983) 5 Otago LR 357 at 366. This view has jurisprudential antecedents: see Ronald Dworkin "Hard Cases" (1975) 88 Harv L Rev 1057 at 1083 and following for his discussion of the judge as Hercules.

G Process and Procedure

I have described where judges look to for the content of the law. But the common law method also depends upon process. At the heart of those processes lies the notion of a fair and public hearing – a hearing at which all parties have equal opportunity to participate and at which the parties and the public can see the processes of the court play out in a fair manner.

New Zealand society is based upon the premise of the equal application of the law to all – the defining characteristic of a society that is under the rule of law. In hearings before our courts, counsel argue for the equal application of the law to their client's circumstances.

The common law principle of natural justice guarantees to each party that they will be heard on matters that affect their interests. That requires in turn that each party to the litigation be able to participate as effectively as all others, should they choose to do so.

The notion of an impartial and passive judge is also vital to this model. Impartiality prevents a view being reached on a case too quickly, without all the evidence having been properly weighed. As Dame Hazel Genn puts it, having different lawyers persuasively argue the issues from each side helps to combat confirmation bias – the natural human tendency of hearing and evaluating evidence to conform to our pre-existing beliefs, rather than allowing our beliefs to be formed by the evidence.[50]

It follows that legal representation is another vital element of common law court procedure: lawyers are central to a judge's role in the adversarial process. If one party is without an effective advocate, there is a risk that the judge becomes a participant in the dispute in order to make up for the inevitable knowledge and presentation deficit.

The rising number of self-represented litigants appearing before our courts, therefore, raises concerns. There is the concern that self-represented parties will not be able to participate as effectively as others, which is a threat to the ideals of natural justice. There is the concern that the judge's adjudicative task may be affected in attempting to level the playing field in response. There is the concern that many of our self-represented litigants are of that status involuntarily – they cannot afford legal representation, nor do they qualify for legal aid. And there is the concern that many would-be litigants forego bringing proceedings due to cost, and, therefore, many have an unmet need for justice.

Another procedural underpinning of the common law method is open justice. The requirement that justice be administered in a manner which renders it open to public scrutiny is the surest means of check on the proper exercise of judicial power. The principle that proceedings must be conducted in public is embedded in the common law. It is not open to the parties to agree to private hearings, to the sealing of the court file or to suppression of the judgment.

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50 Hazel Genn "Do-it-yourself law: access to justice and the challenge of self-representation" (2013) 32 CJQ 411 at 425–426.

The common law process is also a human process. I have already made the point that it matters who the judges are because of the contribution judges make, as a collective, to the content of the law. It also matters how they act. The common law is a human system, made up of face to face, kanohi ki te kanohi interactions. When the parties and a judge meet in the courtroom, the procedural justice applied in the hearing enables acceptance of the ultimate judgment. The judge affords dignity to the participants and the proceedings by diligently paying attention and reacting in a human way to what unfolds in the courtroom.

The humanity in this process is its most essential feature. The judiciary's claim to legitimacy rests in large part upon its ability to provide equal treatment before the law, and its commitment to affording all those who come before the courts the dignity of a fair hearing.

The detailed processes of the courts are based around the face to face model of justice. They are designed to support the two objectives of a fair and open hearing. However, the standard operating model is still that brought with the settlers from England. While most of these processes remain valuable, we do not need to carry every aspect of this model with us into the future. As we find our feet on the soil of this Pacific nation, we are growing in confidence to change the processes of a public hearing so that our courts best serve this time and place – reflecting our country's cultures and values.

Over the last 10 years, court processes have begun to shift to make room for our other founding culture. As mentioned, we have quite literally woven both cultures into the ceremonial robes of the senior courts. Court openings and closings are bilingual, and counsel too are encouraged to introduce themselves in that way. Aspects of tikanga are being incorporated. There is more flexibility as to where hearings are conducted, with hearings conducted on marae, or in large public buildings if necessary, to accommodate the community.

As we look ahead to the courthouses to be built in the future, we imagine them as community places, where community representatives are given space to work along with government agencies to support the operation of the courts, and to support and create connections with victims, defendants and their whānau. This is an evolutionary process, and I welcome it. These developments do not undermine the vital common law threads of fair trial and open justice, but rather strengthen them.

IV THE STORY SO FAR

Having described the common law, I now sketch out just how that method has operated in New Zealand, measuring that operation against the ideals outlined. Of particular interest is how the common law, itself a new immigrant when it arrived in Aotearoa, responded to this new society – a society with a mixture of peoples, pre-existing customs and law,[51] and in a remote part of the world; away from the news, everyday dispatches and influences of England.

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51 "Kupe's law", as Justice Joe Williams has named it: see Williams "Lex Aotearoa", above n 12, at 7.

A Aotearoa New Zealand's Common Law Delayed: A Failure of Precedent

From the first days of the nation created by the Treaty of Waitangi, there was an opportunity and a need for the law to adapt to meet the very special circumstances of this new nation. As Professor Shaunnagh Dorsett says, it is hardly a matter of contestation that Aotearoa was a bi-jural world in the Crown colony period – the British brought with them their law, and tikanga Māori was already the law of the place and its inhabitants.[52] New Zealand, after all, had an established population when English law arrived, a people who had in place a developed set of customs and usages, and a very different economy and social structure. While it is true that the early judges inherited English statutes, they were instructed, in the very statute which brought those Acts into force in New Zealand, that they should only apply those Acts of Parliament "so far as applicable to the circumstances of the Colony".[53]

And in the early days of English settlement post-1840, there was evidence of rapid evolution. In a sense, this was inevitable – for almost 20 years after 1840, the Māori population outnumbered settlers, and many European settlers relied on trading with Māori for their food.[54]

An example of rapid evolution is the Native Exemption Ordinance of 1844, which introduced modifications to the criminal law as it applied to Māori by incorporating the principle of utu, or compensation for injured parties, into an English framework focused on punishment of offenders. Where a Māori offender was charged with any crime other than rape or murder, they were allowed to go free on payment of a deposit of up to £20, which could then be paid to the victim if the offender did not later appear for trial.[55] Similarly, a Māori offender convicted of theft could avoid sentence by paying four times the value of the goods stolen.[56] The Ordinance also provided that no Māori would be imprisoned for a civil offence.[57]

The Ordinance also recognised rangatiratanga, providing that in disputes involving Māori alone, a summons or arrest warrant could only be served if two chiefs of the injured party's hapū laid an information. The summons or warrant was then to be delivered to two chiefs of the offender's tribe

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52 Shaunnagh Dorsett "Two Cultures, Two Laws" in John Burrows and Jeremy Finn (eds) *Challenge and Change: Judging in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) 3. See also Shaunnagh Dorsett *Juridical Encounters: Māori and the Colonial Courts, 1840–1852* (Auckland University Press, Auckland, 2017) at 2–3.

53 English Laws Act 1858, long title. This provision is consistent with the common law presumption of the continuity of indigenous laws as found in *Campbell v Hall* (1774) 1 Cowp 204, 98 ER 1045 (KB).

54 See Brian Easton "The Māori economy: a history" (1 September 2016) Te Ara – the Encyclopedia of New Zealand <www.teara.govt.nz>.

55 Native Exemption Ordinance 1844 7 Vict 18, cls 6–8.

56 Clause 9.

57 Clause 12.

for execution.[58] Where a Māori offender, living outside the limits of a town, offended against a European, the summons or warrant would likewise be directed to the two principal chiefs of the offender's hapū.[59]

In addition, Governor Robert Fitzroy instructed the magistrates that even where not specifically provided for by statute or ordinance, Māori need not be treated exactly the same as settlers in every court case.[60]

The early period following the Treaty was undoubtedly dynamic, as critical social and economic relationships were shaped. Policies and institutions were developed and evolved in response to the particular circumstances of the nation and its peoples. Alan Ward, Damen Ward, Mark Hickford and other scholars have explored the context for court related initiatives (in the lower courts – not reaching the then-Supreme Court) as well as legislative and other public policy ventures that sought to accommodate indigenous norms and laws in the incoming colonial regime.[61]

In his book *Lords of the Land, Indigenous Property Rights and the Jurisprudence of Empire*, Professor Mark Hickford describes how the bi-jural world of first contact quickly became a multi-jural world where new institutions, the courts and hapū were exercising jurisdiction in parallel, applying in varying proportions English common law, ordinances and statutes and tikanga.[62] But Professor Hickford also describes how the courts played a lesser role from the 1840s through the 1860s in resolving the critical issues confronting the colony, including the issues of native title and the electoral franchise.[63] Allowing for a few notable exceptions, the courts contributed little to the development of the law to accommodate and meet New Zealand circumstances prior to the 1960s.

Moreover, as already noted, the output of the courts in the early decades after the signing of the Treaty was not captured in law reports available to the judges and lawyers of the day. In the absence

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58 Clause 1.

59 Clause 2.

60 Alan Ward *A Show of Justice: Racial 'amalgamation' in nineteenth century New Zealand* (Auckland University Press, Auckland, 1973) at 63.

61 At 63. See also, for example, Damen Ward "A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia" (2003) 1 History Compass 1; Damen Ward "The Politics of Jurisdiction: 'British' Law, Indigenous Peoples and colonial government in South Australia and New Zealand, c 1834–60" (DPhil thesis, Oxford University, 2003); Damen Ward "Civil Jurisdiction, Settler Politics, and the Colonial Constitution, circa 1840–58" (2008) 39 VUWLR 497; Mark Hickford *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, Oxford, 2011) at 11–12, 215–283, 284–286, and 334–359; and Mark Hickford "Framing and Reframing the *Agon*: Contesting Narratives and Counter-Narratives on Māori Property Rights and Political Constitutionalism, 1840–1861" in Saliha Belmessous (ed) *Native Claims: Indigenous Law against Empire, 1500–1920* (Oxford University Press, Oxford, 2012) 152.

62 Hickford *Lords of the Land*, above n 61, at 461.

63 At chs 4–7.

of any formal record, the practical reality was that these early decisions could not shape the decisions of later courts called upon to decide cases in the aftermath of war between Māori and settlers, and in the heat of settler demand for land.

Perversely, then, it could be said that it was the lack of precedent (rather than the conservative tendency of precedent) that obstructed the law's evolution. Without precedent, the common law method was hamstrung – the law could not develop. If effective law reporting had been in place in the 1840s, then decisions made at the time of the early and hopeful encounters between two peoples may have affected the course that the New Zealand common law took. But for as long as the common law of England remained the dominant source of precedent in New Zealand, the law was constrained by the values and needs of English society and would not change to meet the needs of the society it served.

As a nation, we owe a debt of gratitude to the Lost Cases Project,[64] which has involved the systematic search for, and collation of, early New Zealand cases found in newspapers, manuscript collections, archives and judges' notebooks.[65] To date, this project has retrieved all Supreme Court (now the High Court) and Court of Appeal cases for the period between 1842–1869. This is no small feat and the work is a taonga for our legal community. More recently, Professor Shaunnagh Dorsett's account of the ways in which Māori engaged with early New Zealand courts,[66] and Professor Richard Boast's work on Māori land alienation and Native Land Court cases,[67] have also richly added to our understanding of this period.

In addition to the works of Richard Boast, Shaunnagh Dorsett, Mark Hickford, Paul McHugh and Damen Ward, for example,[68] earlier historians and legal historians also made important contributions,

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64 Members of the project were Richard Boast, Dr Shaunnagh Dorsett, Dr Geoff McLay, Dr Damen Ward and Dr Mark Hickford, with exemplary research support provided by Megan Simpson.

65 See "New Zealand's Lost Cases" Victoria University of Wellington <www.wgtn.ac.nz/law/nzlostcases>.

66 See Dorsett *Juridical Encounters*, above n 52.

67 See Richard Boast *Buying the Land, Selling the Land: Governments and Māori Land in the North Island, 1865–1921* (Victoria University Press, Wellington, 2008); and Richard Boast *The Native Land Court, 1862–1887: A Historical Study, Cases and Commentary* (Brookers, Wellington, 2013). See also the following two volumes of this work: Richard Boast *The Native Land Court 1888–1909: A Historical Study, Cases and Commentary* (Thomson Reuters, Wellington, 2015); and Richard Boast *The Native/Māori Land Court 1910–1953: Collectivism, Land Development and the Law* (Thomson Reuters, Wellington, 2019).

68 For helpful summaries, see Shaunnagh Dorsett "Traditions: Tracing Legal History, Aboriginal/Indigenous Law (Australia/New Zealand)" and Richard Boast "Adjudication of Indigenous-Settler Relations" in Markus D Dubber and Christopher Tomlins (eds) *The Oxford Handbook of Legal History* (Oxford University Press, Oxford, 2018) 799 and 1061 respectively; Mark Hickford "Colonial and Indigenous 'Laws' – The Case of Britain's Empires, *c* 1750-1850" in Heikki Pihlajamäki, Markus D Dubber and Mark Godfrey (eds) *The Oxford Handbook of European Legal History* (Oxford University Press, Oxford, 2018) 876; Paul G McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland,

plugging some of the gaps left by the lack of law reporting. A few examples (of many) are John Beaglehole's writings on early English settlement in Aotearoa and the English laws that followed (albeit now superseded in many respects),[69] and Alan Ward's research into the underlying values, attitudes and responses of Māori and Pākehā towards law and administration affecting Māori.[70]

In his extrajudicial writing, Lord Cooke highlighted the drift away from reliance upon English precedent in New Zealand case law, which was discernible by the 1960s.[71] But even when I was at law school in the 1980s, the cases I was taught were almost exclusively English. This drift away came very late in our history.

In some ways, the New Zealand common law has been pushed to stand on its own feet, on its own lands, trailing in the constitutional wake of social and cultural developments. Following World War II and its eventual ratification of the Statute of Westminster in 1947, New Zealand undoubtedly began to chart its own path in trade and international relations. There was also an explosion of creativity in New Zealand, in literature, art, music composition and the study of New Zealand's history. In architecture, Group Architects created a vernacular form of architecture, responding to New Zealand's unique environment and identity.[72] There was a new interest in understanding, but also in developing, a distinctive New Zealand identity.

This creativity was not initially matched in the common law. It was rather the growing body of New Zealand statute law that began to reduce the relevance of English authority, a trend accelerated by the United Kingdom's entry into the European Common Market in the 1970s and the increased influence membership of the common market had on English authority. The common law's application and interpretation of statute law was also, perhaps perversely, a powerful force in developing a distinctive New Zealand common law.

The creation of the Waitangi Tribunal in 1975 and the expansion of its jurisdiction in the 1980s highlighted the uniqueness of the issues that needed to be addressed in this country.[73] This led to the re-emergence in public discourse of contested views as to the meaning of the Treaty. The inclusion in the State-Owned Enterprises Act 1986 of s 9, and the effect given by the Court of Appeal to the words

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1991); and PG McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford University Press, Oxford, 2004).

69 See for example JC Beaglehole *New Zealand: A Short History* (George Allen & Unwin, London, 1936); and Beaglehole, above n 31.

70 See for example Ward, above n 60.

71 See "Court of Appeal President: An Interview with Rt Hon Sir Robin Cooke" [1986] NZLJ 170 at 174; and Robin Cooke "Divergences – England, Australia and New Zealand" [1983] NZLJ 297.

72 See Julia Gatley (ed) *Group Architects: Towards a New Zealand Architecture* (Auckland University Press, Auckland, 2010).

73 Treaty of Waitangi Act 1975; and Treaty of Waitangi Amendment Act 1985.

"nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi", added impetus and urgency to Treaty claims.[74] Important also, with the advantage that distance from events gives us, was the decision of Chilwell J in the High Court in *Huakina Development Trust v Waikato Valley Authority*, in which he said that the Treaty of Waitangi is "part of the fabric of New Zealand society" so that where possible, statutes should be interpreted consistently with its requirements.[75]

All of this, critically, occurred against the backdrop of the Māori renaissance following World War II – the revival of the Māori language and the growth of the Māori protest movement, demanding respect for the Māori culture and language and justice in respect of the loss of Māori land.[76] All of these intersected with the law.

The next critical step in this narrative is the abolition of appeals to the Privy Council and the creation of a New Zealand-based final court of appeal. This step was not an entirely confident one. Many within the profession considered we needed the legal talent and independence that only an English-based court could give us. But the strong case for the Supreme Court was eloquently put in the purpose provision of the Supreme Court Act 2003:[77]

> (1) The purpose of this Act is —
>
> (a) to establish within New Zealand a new court of final appeal comprising New Zealand judges —
>
> (i) to recognise that New Zealand is an independent nation with its own history and traditions; and
>
> (ii) to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history, and traditions; and
>
> (iii) to improve access to justice; …

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74 *New Zealand Maori Council v Attorney-General*, above n 27.

75 *Huakina Development Trust v Waikato Valley Authority*, above n 19, at 213 and 217–219.

76 The phrase Māori renaissance is a term commonly used to refer "to a period in the late twentieth century when Māori engaged in notable activism against the state and against assimilation": Lara Greaves "Māori Political Histories" in Janine Hayward, Lara Greaves and Claire Timperley (eds) *Government and Politics in Aotearoa New Zealand* (7th ed, Oxford University Press, Melbourne, 2021) 24 at 30. I acknowledge, however, reservations expressed regarding the word renaissance as it suggests revival or renewal whereas in Māori society, there was continuous awareness of these sources of injustice: see Richard S Hill *Maori and the State: Crown–Maori Relations in New Zealand/Aotearoa, 1950–2000* (Victoria University Press, Wellington, 2009) at 150–151.

77 Supreme Court Act 2003, s 3(1).

It is a matter of regret for me that these eloquent words were not carried across to the Senior Courts Act 2016, which repealed and replaced the Supreme Court Act.

The existence of a New Zealand Supreme Court has been an important step to further realising the aspiration of a law appropriate to New Zealand's circumstances.[78] Now, lawyers and judges look to the decisions of New Zealand courts. Student casebooks overwhelmingly contain New Zealand cases. When we look wider afield, we look, in a discerning way, to the best ideas in other jurisdictions. Adopting a comparative approach, judges are happy to pick up the best and most appropriate solutions for New Zealand from the case law of many nations.

What this sketched history of the common law in New Zealand shows is that the common law method did not operate as it should in the initial 120 or so years after the signing of the Treaty of Waitangi. Sources of law that were available to drive its development either were not drawn upon or were not available to be drawn upon. There is, however, only so much that can be learned from a broad historical sweep such as this – as is so often true in history, it is necessary to undertake a far more detailed analysis of events to draw lessons that can be useful to us today. Professor Mike Taggart's strong concern for historical context and commitment to integrating stories of legal history into his influential scholarship is a model for us in this regard.[79] So too the scholarship of Professor Janet McLean QC.[80] It is appropriate, therefore, to follow the model of scholarship, to consider some case studies of where the common law method has gone awry.

B Some Case Studies in the Failure of the Common Law Method

A careful review of instances where we can say, with the comfortable distance from events that time can provide, that the common law method has failed reveals that it is the human element within the common law method that has failed.

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78 Until New Zealand had its own final court of appeal, there remained the risk that any divergence from the English common law would be corrected on appeal: see for example *Petrocorp Exploration Ltd v Minister of Energy* [1991] 1 NZLR 641 (PC) at 655–656; and *O'Connor v Hart* [1985] 1 NZLR 159 (PC) at 165 and 174. Compare, however, cases such as *Mahon v Air New Zealand Ltd* [1984] AC 808 (PC) at 817; and *Lange v Atkinson* [2000] 1 NZLR 257 (PC) at 262.

79 See for example Michael Taggart "The Impact of Freedom of Information Legislation on Criminal Discovery in Comparative Common Law Perspective" (1990) 23 Vand J Transnatl L 235; Michael Taggart "Gardens or Graveyards of Scholarship? *Festschriften* in the Literature of the Common Law" (2002) 22 OJLS 227; Michael Taggart "The Impact of Apartheid on Commonwealth Administrative Law" [2006] AJ 158; and Michael Taggart "Proportionality, Deference, Wednesbury" [2008] NZ L Rev 423.

80 See for example Alison Quentin-Baxter and Janet McLean *This Realm of New Zealand: The Sovereign, The Governor-General, The Crown* (Auckland University Press, Auckland, 2017); and Janet McLean "Crown, Empire and Redressing the Historical Wrongs of Colonisation in New Zealand" [2015] NZ L Rev 187.

When I was at law school in the 1980s, we studied a series of decisions of the House of Lords, beginning at the end of the 19th century, in which the power of the unions was attacked.[81] In the first case, *Allen v Flood*,[82] the Court of Appeal had held there was a tort of conspiracy where unions pressed for the sacking of an employee despite no breach of contract having occurred.[83] On appeal to the House of Lords, Lord Halsbury found that only two of the seven-judge panel were willing to support him in upholding the Court of Appeal decision. Without consultation, he called up High Court judges, selected for their conservative views, to offer their advice to the House of Lords – a constitutional device which had not been used since the courts had been reformed two decades previously.[84] Lord Halsbury's plan did not succeed on this occasion, and the majority of the House of Lords overruled the Court of Appeal decision.

Three years later, the case *Quinn v Leathem* raised the issue of whether *Allen v Flood* had made boycotting legal.[85] This time, Lord Halsbury carefully selected a conservative hearing panel and succeeded with his objective: The House of Lords held that boycotting was an actionable conspiracy to injure. In *Taff Vale Railway Co v Amalgamated Society of Railway Servants*,[86] Lord Halsbury again selected a conservative panel to overrule a Court of Appeal decision which had held that an injunction was not available against the threat of a strike, and that the officers of a union could not be personally responsible for damages flowing from such a strike.

Lord Halsbury was waging a campaign, using precedent and procedure, to defeat the power of the unions. Case outcomes in this line of authority were driven by the views of judges, and by the efforts of one particularly powerful personality. In applying precedents and in particular in weighing the values underpinning that precedent, the judges weighed the interests of one side of society only – those on the capital rather than labour side of the employment relationship.

It is less comfortable, but more important, to look at missteps closer to home.

The case of *Wi Parata v Bishop of Wellington* is often cited as a case where the common law went wrong.[87] The Supreme Court (now the High Court) was asked to apply a section of the Native Rights

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81 See the discussion in Robert Stevens *The English Judges: Their Role in the Changing Constitution* (Revised ed, Hart, Oxford, 2005) at 17–18.

82 *Allen v Flood* [1898] AC 1 (HL).

83 *Flood v Jackson* [1895] 2 QB 21 (CA).

84 Stevens, above n 81, at 17.

85 *Quinn v Leathem* [1901] AC 495 (HL).

86 *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426 (HL).

87 *Wi Parata v Bishop of Wellington*, above n 15.

Act 1865 which gave the Court jurisdiction in relation to the persons and property of Māori and in relation to all cases "touching the titles to land held under Māori Custom and Usage".[88]

Prendergast CJ, writing for the Court, declined to give effect to customary title, famously opining that a phrase in a statute cannot call what is non-existent (Māori customary law) into being.[89] To reach that conclusion, the Chief Justice had to disapprove the unreported 1847 decision of Martin CJ and Chapman J in *R v Symonds*, recognising the existence of native title in land as part of New Zealand law.[90] Although *R v Symonds* was decided before even unofficial reports, it was widely reported at the time – it was published in the New Zealand Gazette in 1847,[91] and it appears in *British Parliamentary Papers Relative to the Affairs of New Zealand* as the enclosure in the Despatch from Governor Grey to Earl Grey dated 5 July 1847.[92]

If the precedent of *Symonds* had been followed in *Wi Parata*, it logically would have compelled a different decision.[93] But the *Wi Parata* case was decided in the aftermath of armed conflict, at a time when the settler population had come to outnumber Māori, and against a continuing background of settler pressure for land as a tradeable resource.

The Chief Justice was applying the common law method – he did not abandon conventional reasoning processes. But the human element is an inseparable part of that method. The decision reveals a perspective shaped only by the settler view of society, by their values and by their interests. The Judge's failure to weigh, or to be aware of, critical facts about his society meant that he did not, to quote Lord Cooke, reach his decision applying "an understanding impartiality". And that caused the common law method to fail.

I do not intend to suggest that the judges deciding *R v Symonds* were motivated by a concern to protect the interests of hapū, that they were not also affected by the pressures of the age, or indeed that the decision is an unalloyed good in terms of its treatment of the scope of native title.[94] Mine is

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88 Native Rights Act 1865, s 3.

89 *Wi Parata v Bishop of Wellington*, above n 15, at 79.

90 *R v Symonds*, above n 14. Prendergast CJ had to resort to parliamentary papers to find the reasoning of the Court in that case.

91 (6 July 1847) 7(1) *New Zealand Government Gazette* 63.

92 *Papers Relative to the Affairs of New Zealand: Correspondence with Governor Grey* (C (1st series) 892, December 1847) at 64.

93 When combined with the provisions of the Native Rights Act 1865.

94 For a discussion which places these decisions within their full historical context, see David V Williams "*The Queen v Symonds* reconsidered" (1989) 19 VUWLR 385; Mark Hickford "John Salmond and Native Title in New Zealand: Developing a Crown Theory on the Treaty of Waitangi, 1910–1920" (2007) 38 VUWLR 853 at 876–877; and Hickford *Lords of the Land*, above n 61, at 202–215.

not an account of heroes and villains. The critical point is that *Symonds* was authority for the principle, ignored in *Wi Parata,* that native title existed and was recognised by the courts.[95]

Another test of the common law method came during the two world wars. In both wars, regulations were passed restricting freedom of speech. The courts enforced these regulations with enthusiasm, sentencing those convicted harshly. John Burrows, who has studied the prosecutions, cites a number of examples in which intemperate language was used by judges to condemn the charged conduct, and unusually harsh sentences were imposed.[96] The Reverend Ormond Burton had served in World War I and been decorated for bravery. At the end of his service, he returned to New Zealand and entered the Ministry. On the outbreak of World War II in 1939, he campaigned against the war, and for this he was imprisoned several times. On one occasion, Blair J sentenced him to up to two and a half years' reformative detention. The Judge used a provision in the Crimes Act to get around the fact that the regulations under which Burton had been charged carried a maximum penalty of one year. Archibald Barrington, a Methodist layman, was sentenced to the full 12 months for a subversive publication. It is not to over speak to say that these judges were "more executive minded than the executive".[97]

The treatment in New Zealand of those who protested war was harsh, far harsher than that meted out in the courts of New Zealand's allies. When Burton was sentenced, several members of the British House of Commons and House of Lords wrote in protest. Protests also came from other jurisdictions: Australia, Canada and the United States of America. John Burrows says:[98]

> There was no doubting the prevailing public mood, and the judges shared it.
>
> But this still does not answer the question of why the desire to suppress dissent seemed to be stronger in New Zealand than in some other countries.
>
> …
>
> Whatever the reason, the judges' support for the cause in those wartime cases certainly places them at the "government" end of the spectrum. The judges' acknowledgment that doubt should be resolved in favour of the state, and their harsh treatment of those who came before them, may seem striking to us today.

I noted above that a key task of the common law is its role in holding firm to those principles and values that provide the stabilising structure of the law – what I have referred to as the warp of the law. While this instance represented a significant failure of the common law method, it also constituted a failure of the judges in question to uphold the rule of law. By that, I mean to ensure the same principles

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95 I acknowledge that *R v Symonds* did not necessarily resolve the issue of the justiciability of those rights.

96 John Burrows "The Courts, Emergency and Unrest" in John Burrows and Jeremy Finn (eds) *Challenge and Change: Judging in Aotearoa New Zealand (*LexisNexis, Wellington, 2022) 157.

97 To quote Lord Atkin in *Liversidge v Anderson* [1942] AC 206 (HL) at 244.

98 Burrows, above n 96, at 166–167.

and values apply no matter the passing pressures or prejudices.[99] In this instance, the common law method failed – the judges were swept up in the views of the time.

V MEETING THE CHALLENGES OF TODAY

The lessons we learn by looking back over the course of Aotearoa New Zealand's common law are of more than theoretical interest. The question becomes, how can the common law method respond to the challenges of today or the future?

Today, the legal system faces a number of challenges and calls for change, but I wish to focus on one of these: the task of building a criminal justice system that restores and keeps communities safe and prevents reoffending by repairing the lives of the offenders. This can act as a case study for the purposes of the analysis and approach I suggest.

Beginning in the 1980s, a series of reports have described failings of the criminal justice system, some characterising that system as broken.[100] We are told that it harms families, particularly Māori families. It seldom prevents reoffending, but perversely creates the conditions for recidivism. It harms the whānau of the offender, and in so doing, continues inter-generational harm. Victims of crime do not feel safe, listened to, informed or supported at each stage of the system. Some say they were further harmed by the justice system.

We are told the criminal justice system does not meet the diverse needs of Māori, Pacific, refugee and migrant, disabled and LGBTQ+ communities. It is constructed according to Anglocentric ideas of law and justice, and it alienates those who engage with it. We are told that the system is confusing and slow, and that delay itself is a source of harm to defendants and to victims. Many leave the court feeling that they have not been heard, or that they have not understood what has happened in the courtroom.[101]

We also know that many within the prison population are themselves past victims of violence or trauma or are struggling with addiction, cognitive deficits or mental health disorders. We have high

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99 As Lord Atkin said in *Liversidge v Anderson*, above n 97, at 244, the laws "speak the same language in war as in peace".

100 The reports I refer to – *Puao-te-Ata-tu: The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (September 1988), *The Maori and the Criminal Justice System: A New Perspective, He Whaipaanga Hou* (Department of Justice, February 1987) and *Prison Review: Te Ara Hou, The New Way* (Committee of Inquiry into the Prisons System, 1989), drafted by John Rangihau, Dr Moana Jackson and Sir Clinton Roper respectively, and released more than 30 years ago now, and more recently Te Uepū Hāpai i Te Ora | Safe and Effective Justice Advisory Group *Turuki! Turuki! Move together! Transforming our criminal justice system* (12 December 2019) [*Turuki! Turuki*! Report], published by the Safe and Effective Justice Advisory Group in December 2019 – do not make for easy reading.

101 See generally *Turuki! Turuki!* Report, above n 100.

rates of imprisonment, and staggering rates of Māori imprisonment.[102] This is highlighted by the following figures: one in 12 New Zealand males born in 1981 had spent time in prison by the age of 35. For Māori males, the same statistic is one in five.

There is a perception that one of the impediments to a more enlightened criminal justice system is a punitive public sentiment which prioritises punishment over other values. However, we know that this view, as often discussed as it is, does not necessarily represent the views of most New Zealanders. The recent New Zealand Crime and Victims survey found that helping offenders not to reoffend, and supporting people so they do not offend in the first place, were seen as more important aims of the justice system than punishing people who have committed crime.[103]

Repairing the criminal justice system is one of the most pressing challenges for our society. But it is a complex system and the judiciary is responsible for only a part of it. Moreover, the answers do not all lie within the criminal justice system – they also lie in the areas of health, housing, employment and education. A hui Māori held in Rotorua in April 2019 told us the importance of understanding that the justice pipeline starts at birth.[104] In her Shirley Smith address, the then Chief Justice, Dame Sian Elias, quoted Shirley in saying that it is society that creates criminals, and society must reflect on the conditions that do so.[105]

Nevertheless, the court system is involved in the processes and circumstances that have produced the criminal justice crisis. And so, the judiciary must play its part in addressing this challenge. If it does not, that would represent a failure of the common law method. In responding, the courts can look to the lessons I have canvassed in the first part of this lecture.

One such lesson is that a fair hearing requires "an understanding impartiality". When so many of the defendants who appear before us have cognitive deficits or other disadvantages, the ideal of a fair hearing is in peril. The common law judge must strive to understand what is needed to ensure the defendant can participate in the hearing, and what is required to rehabilitate the defendant and to restore the community.

If the defendant is unable to participate in the hearing, and so is unable to provide relevant information to the judge, the judge will not have the information required to ensure the law is applied equally to that defendant. Moreover, and just as fundamentally, the content of the common law will lack the detail and pattern – the weft I mentioned at the outset – to respond to society's needs.

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102 See Williams "Build a Bridge and Get over It", above n 12, at 8–9.

103 New Zealand Crime and Victims Survey *Social wellbeing and perceptions of the criminal justice system: Cycle 2 (October 2018 – September 2019)* (Ministry of Justice, 2020) at 58.

104 See *Ināia Tonu Nei: Hui Māori Report* (July 2019).

105 Sian Elias "Blameless Babes" (2009) 40 VUWLR 581 at 582.

Looking back at the threads of the common law also reminds us that the law must evolve to meet unique circumstances and challenges. We see this happening in the growth of restorative justice.[106] We see it in the development of a solution-focused model of justice – characterised by support and rehabilitation for the defendant, their whānau and the victim, as well as the use of information about each defendant to facilitate their full participation in the process.

In New Zealand, we have many courts operating a solution-focused model of criminal justice. These include the Family Violence Courts,[107] the Youth Drug Court,[108] the Matariki Court,[109] the Pasifika Courts,[110] the New Beginnings Court,[111] the Special Circumstances Court,[112] the Alcohol and Other Drug Treatment Court,[113] the Sexual Violence Pilot Court,[114] the Intervention Court,[115]

106 The first state-sponsored model of restorative justice in New Zealand was the use of family group conferences in the youth justice system: see Chris Marshall "Restoring What? The practice promise and perils of restorative justice in New Zealand" (2014) 10(2) Policy Quarterly 3 at 5.

107 Through these courts, family violence cases are gathered into a single list and heard at dedicated court sittings, where access to appropriate services and programmes is on hand.

108 Established in Christchurch in 2002 to address the particular issues of youth offending and its links with alcohol and other drug dependency.

109 A specialist court in Kaikohe established to increase the use of s 27 of the Sentencing Act 2002, which enables sentencing judges to be better informed about an offender's background.

110 The Pasifika Courts are held in Pasifika community centres in Auckland. They involve elders and aim to reconnect young offenders with their cultural heritage.

111 This Court is based in Auckland and was established in response to the prevalence of homelessness, mental impairment and drug dependency amongst offenders. It aims to connect offenders to social and health supports, to address the underlying causes of homelessness and offending.

112 Established in Wellington to address similar issues to the New Beginnings Court.

113 An initiative led by the government and the judiciary, targeting offenders who would otherwise be imprisoned, but whose offending is being fuelled by unresolved addiction or dependency.

114 Introduced with the aim of reducing pre-trial delays and mitigating further trauma for complainants and vulnerable witnesses.

115 A Gisborne court focusing on family violence, where participants are required to address the underlying causes of their offending.

the Personal Individual Needs Court,[116] the Criminal Procedure (Mentally Impaired Persons) Court[117] and the Young Adult List Court.[118]

These courts apply the standard law but have been developed by judges in response to the particular needs and circumstances of the groups they serve. They have become known as centres of best practice. They provide a way in which the courts can draw on the knowledge of subject-matter experts, and most importantly the community, using that knowledge in the court process to the benefit of all.

Judges of the District Court wearing the Te Ao Mārama judicial gown at the Whangara Marae, Gisborne, 4 December 2021.

The use of pilot courts such as these is a good way of testing out new operating models. But now, these pilot courts have made their case that they are a better version of criminal justice. However valuable these courts are individually, at present, they serve only a tiny portion of the defendant

116 This Court was set up in Masterton in response to recidivist, low-level offending.

117 Designed for particularly vulnerable defendants, to reduce the time the Criminal Procedure (Mentally Impaired Persons) Act 2003 process takes and avoid people being unnecessarily subjected to psychiatric reports.

118 This Porirua Court separates 18–25-year-olds from the ordinary criminal list and focuses on engaging the young person in the process and upholding procedural fairness, providing extra support for the young person when required.

cohort. They have not been integrated into our mainstream criminal justice system and that fact alone risks undermining the foundational common law principle of equal access to justice.

The Chief District Court Judge Heemi Taumaunu has described the vision of a new model of criminal justice, called Te Ao Mārama.[119] The vision is that the best practice established through these specialist courts will become the mainstream model for the District Court. It is that the court will become a place where all people can come to seek justice, no matter their means, ability, culture or ethnicity. Properly resourced and implemented, the mainstreaming of the fundamental concepts underpinning solution-focused courts will provide judges with the information – and courts with the connections – to serve defendants, victims and their families and communities. It will be a criminal justice system fit to meet the diverse needs of Aotearoa New Zealand.

You will have noticed that on my account, part of the warp or stabilising principles of the common law is its humanity, and face to face content. The very possibility of the Te Ao Mārama model depends upon the defendant being present in the courthouse. It is at the courthouse that counsel can engage with their client and make key assessments as to underlying issues that need addressing. It is only at the courthouse where the insights gained can be tested with the family who attend in support, who may bring different and valuable perspectives.

The time for this model has come. But as we work on its design, it is important we build its detailed patterns around the threads that make up the warp of the criminal justice system. First, the thread of equal access to justice, a fundamental thread of the law. This requires that the movement to mainstreaming happen deliberately and with some speed. A system under the rule of law cannot tolerate postcode justice.

Secondly, although this new model makes way for the community to provide therapeutic interventions, the fundamentals of a fair trial must not be compromised by it. One of the aspects of a fair trial is the presumption of innocence. We need to take care to ensure that a guilty plea is not the price of receiving therapeutic assistance. We need to watch carefully how systemic incentives operate, lest they operate to compel a plea of guilt.

Finally, although in this solution-focused model we will be making room for others to assist the defendant and to provide information to the judiciary, the common law model requires that the processes be open to scrutiny by the defendant, the victim and the public.

The values that are reflected in our criminal justice system are powerful – they go to the heart of how a society functions and how it thinks. The creation of this model of justice will be demanding of resource, and of all within the criminal justice system. It is a new pattern in the fabric of the law, and

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119 Heemi Taumaunu, Chief District Court Judge "Calls for transformative change and the District Court response" (Norris Ward McKinnon Annual Lecture 2020, University of Waikato, Hamilton, 11 November 2020).

we must take great care with its weaving. As with the steps represented in the poutama pattern in the robes we wear, our task as we weave is to strive for greater levels of understanding of the community we serve. Because this is a human system, based on human interactions. That is its greatest strength.

I, therefore, leave you with this whakataukī:

Nā ōku kuia tēnei kākahu i whatu
Ko te remu kei a au, kei aku mokopuna a muri iho.

It was my grandmothers who wove this fine cloak
I will work on the hem, as will my grandchildren after me.