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Common law courts as regulators, an exposition: The Judiciary as a regulatory mechanism

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Abstract: An exposition on a new regulatory theory; Common law courts as regulators – the judiciary as a regulatory mechanism. In this paper the author ascribes to the judiciary/courts specific regulatory powers with regards to fundamental rights, the Bill of Rights and upholding and adjudicating constitutional norms. Via judicial regulation, courts can exercise power outside of the *lis* in disputes of distinction.

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> Constitutional law is the law of the powers and responsibilities of the main branches of government, and of the relationship among them; constitutional law is the law of human rights and freedoms. Under this understanding of constitutional law, there is constitutional law even without a written constitution… The relevant question is: …What is the court's contribution? What problems does this contribution pose for the courts? How is the judicial discretion exercised?[1]
>
> The Hon. Justice Aharon Barak, Supreme Court of Israel (May 1987)

I Introduction and New Regulatory Outlook

[1] This paper boldly concludes that courts regulate constitutional rights. As such, some may be nonplussed and attribute to its author little in the way of revolutionary legal scholarship. 'Do Courts regulate?' appears to the uninitiated a rhetorical question because when courts make decisions, and decisions are regulations, then courts must be regulators. And so the syllogistic answer to the above question is superficially yes; of course courts are regulators, and, "So what?" [2] However, therein lies an overlooked consideration; although clearly courts do regulate, what is meant by regulation in the judicial context and where does that power originate? What exactly do courts regulate and is it a legitimate exercise, or a mislabeling of judicial activism?[3] Courts will regulate at certain times and not all decisions are regulations, some decisions are in a

[1] Justice Aharon Barak "Constitutional Law Without a Constitution: The Role of The Judiciary" in Shimon Shetreet (ed) *The Role of Courts in Society* (Kluwer Academic Publishers, The Netherlands, 1988) 448 at 449.

[2] The syllogism suffers from a clear fatal flaw and the question is no longer rhetorical. A syllogism is a form of deductive argument based on a conclusion following from two (or more), asserted or assumed truthful – although not necessarily so, propositions.

[3] Frederick Schauer "Do Cases Make Bad Law?" (2006) 73 U Chi L Rev 913 at 915; and Emily Sherwin "Judges as Rulemakers" (2006) 73 U Chi L Rev 919 at 921.

constitutional or rights class and are further identifiable as a '*lis* of distinction'[4] in their regulatory import. A judicial regulatory mechanism exists which can further rebut the rhetorical sentiment – 'Do Courts regulate?' This paper is an exposition of the judiciary as a regulatory mechanism and acknowledges an unsubstantiated norm that common law courts, like other classical regulators, regulate directly and that the judiciary regulates specifically in the rights and constitutional arena wider than the *lis* in particular *inter se*[5] disputes. I use four illustrations, comparative jurisprudence, and the descriptive reasoning necessary of a new theory in regulatory law.

[2] Throughout this exposition I explore rights-based constitutionalism from a regulatory perspective. I argue that traditional common law and judicial conceptualisations of the legal system and New Zealand's constitution are regulatory in nature. The courts' regulatory mechanism is the protection of aggregate, often fundamental, rights through legal actions - the *lis* - which affects society much wider than the individual *lis* between *inter partes*. Courts can regulate social rights en mass via a *lis* of distinction. An "essential difference is that the ambit of judicial law-making is narrower than that of parliamentary law-making"[6] and I identify the judiciary specifically regulating fundamental and constitutional rights as a legitimate function.[7] It is for the judiciary to manage the domain of rights as a regulatory exercise, "the legislative role of the Courts is interstitial… [t]hey effect just and efficient legislative outcomes in ways that reconcile the institutional values of the legal system".[8] The judicial regulatory mechanism is only identifiable with an understanding of the inherent political nature of law and the judicial enterprise, of which this paper explores.

[3] In summary I propose a new regulatory theory ascribed to the courts and judiciary, where they are a regulatory mechanism, and regulate rights with a broad mandate between parties; in society; aggregate rights; human rights and Bill of Rights 1990 rights. Courts are not judicial activists or judicial supremacists,[9] in the pejorative sense, as there is a "fundamental political-judicial dialogue that secures the constitutional

[4] *Lis* or *lis pendens* meaning a lawsuit or formal notice of pending legal action: John Gray *Lawyers' Latin: A Vade Mecum* (Robert Hale, London, 2006). A *lis* of distinction is a phrase I have coined to describe and demarcate a *lis* of particular importance to common law courts as regulators theory, for example "there are many *lis*' but few *lis*' of distinction in relation to rights regulation".

[5] *Inter se* or *inter partes* meaning between the parties or amongst themselves. See Gray, above n 4.

[6] Phillip A Joseph "Parliament, the Courts, and the Collaborative Enterprise"(2004) 15 KCLJ 321 at 338.

[7] At 345.

[8] At 345.

[9] R Ekins "Judicial Supremacy and the Rule of Law" (2003) 119 LQR 127 at 127.

balance"[10] as evidenced though the judicial regulatory mechanism explored in this paper. In other words, common law courts, as rights' regulators, serve a legitimate function within the common law world. Courts regulate conduct more generally than the *State v Citizen lis*, so that in a *lis* of distinction,[11] by adjudicating a rights dispute between *A v B,* the judiciary make social policy precedent far wider than the *inter se/inter partes* dispute before them. This is a new theory in regulatory discourse; the judiciary as, or exercising, a distinct regulatory mechanism. I do not seek to provide direct rebuttal to skeptics of common-law constitutionalism or Bill of Rights interpretation.[12] Orthodox theorists may always ascribe some illegitimacy to constitutional/supremacy regulation by the judiciary,[13] and the orthodoxy fails to address a legitimate reproach to its attack on constitutionalism. This exposition presents regulatory motivations which are neither activist nor supremacist in nature thus making this new theory worthy of exploration.

A Outlook on the Classical Regulators

[4] Outside the wide folds of the Commerce Act 1986[14] 'courts as regulators' appears an unwieldy concept, insofar as the regulatory body, the courts, are not directed to regulate, mandated or ascribed regulatory powers in a demarcated area such as the Commerce Commission. Common law Courts must wait for a *lis* to be brought. They cannot regulate or investigate of their own accord like many traditional regulators or some Civil law inquisitorial courts.[15] The Commerce Commission is a classical regulator. It undertakes agency activity regulating prices under its Act[16] and is distinct from broader notions of regulation. It exists in its own "regulatory area" with "boundaries which demarcate regulatory space…encompassing a range of regulatory issues

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[10] Joseph "Parliament, the Courts, and the Collaborative Enterprise", above n 6, at 345.

[11] For the definition of "*lis* of distinction" see above n 4.

[12] For an example of the debate erring on the side against common-law constitutionalists see Ekins, above n 9.

[13] Christopher Forsyth and Linda Whittle "Judicial Creativity and Judicial Legitimacy in Administrative Law" (2002) 8 Canta LR 453 at 459–460; Andrew Halpin "The Theoretical Controversy concerning Judicial Review" (2001) 64 MLR 500; and Conor Gearty "Reconciling Parliamentary Democracy and Human Rights" (2002) 118 LQR 248.

[14] Part 1 focusing on the Commerce Commission, Part 2 Restrictive trade practices, Part 3 Acquisitions, Part 4 Regulated goods and services.

[15] Commerce Act 1986, s 74B. See for example the French Juge D'Instruction: Jacqueline Hodgson "The Police, the Prosecutor and the Juge D'Instruction: Judicial Supervision in France, Theory and Practice" (2001) 42 Brit J Criminol 342.

[16] See the definition of Price Fixing in Commerce Act 1986, s 30, and Part 2 'Restrictive trade practices'. See also J Black "Talking about regulation" in Bronwen Morgan and Karen Yeung (ed) *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) 176 at 181, where at [4.3.1] the author outlines observational studies of agency behaviour.

in a community".[17] Whereas courts regulate our private and public or state interactions through tort, contract and administrative law, having superior jurisdiction over the "general laws".[18] In New Zealand ("NZ"), one does not normatively speak of regulation by the courts, due to their unrestricted demarcation/jurisdiction over all law. I suggest otherwise. The courts, like the Commerce Commission, have exceedingly wide regulatory reach when a *lis* is brought before it; both can be omnipresent regulators, with their reach touching on almost all areas of society.[19] I focus in particular on courts regulation of rights and constitutional norms as a demarcated area.

[5] In a Legal Systems course,[20] to answer the question 'what do courts do?' with the statement, 'they regulate' at first glance demonstrates a fundamental misunderstanding of both *stare decisis*[21] and a Westminster model of parliamentary sovereignty.[22] A prime-facie regulatory answer

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[17] Ayres and Braithwaite "Responsive regulation" (1992) in Bronwen Morgan and Karen Yeung (ed) *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) 54 at 63–64.

[18] When I use the term 'courts' in the paper I am referring to the members of the High Court bench and above. Members of the District Court bench are of "inferior jurisdiction" and their powers stem from statute not the common law – although this does not mean they cannot regulate: see District Court Act 1947, s 29; and Judicature Act 1908, s 2 definition of "inferior court". All Judges of the High Court, Court of Appeal and Supreme Court have a general supervisory jurisdiction stemming from common law and those courts are constituted as supreme courts of judicature: Judicature Act 1908, s 16.

[19] Commerce Act 1986, s 1A: "The purpose of this Act is to promote competition in markets for the long-term benefit of consumers within New Zealand", the Commission has exceedingly wide scope in order to achieve that aim for example Part 2 'Restrictive Trade Practices' which can apply to both small and large business.

[20] The simplest explanation of a legal system is often the most telling and informative, it starts with the basic building blocks such as rule of law and the separation of powers. At Victoria University of Wellington the course is entitled 'LAWS121 Introduction to New Zealand Legal System'. At the University of Auckland the paper is 'LAWS121G Law and Society' both having Grant Morris *Law Alive: The New Zealand Legal System in Context* (3rd ed, Oxford University Press, Melbourne, 2015) as recommended text. It was with the 1st edition of that book and the 14th edition of Glanville Williams and ATH Smith ed *Glanville Williams: Learning the Law* (14th ed, Sweet & Maxwell, London, 2010) which I started my legal education. *Learning the Law* is now on its 15th edition, first published in 1945, it has been a staple text in the Common Law universities most notable for coining the topic of "the English Legal System": Peter Clinch *Teaching Legal Research* (2nd ed, UK Centre for Legal Education, University of Warwick, Coventry, 2006) at 13.

[21] Judges created the common law however the concept of regulation does not fit entirely with stare decisis as very few regulators are bound by a strict system a precedent, non-court regulation is unlikely to be cumulative in the strict precedential sense – more in line with *jurisprudence constante*, there is regulation and it is made and applied consistently but it can be changed. Of common law regulation and common law decision making Justice McHugh remarked in *Perre v Apand Pty Ltd* [1999] HCA 36, 198 CLR 180 "[T]hat is the way of the common law, the judges preferring to go 'from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point, and avoiding the dangers of the open sea of system or science.'" The phrase origionally coined by Lord Wright "The Study of Law" (1938) 54 LQR 185 at 186.

[22] Post the United Kingdom's acceptance of the ECHR it would be technically incorrect to compare NZ and the UK jurisdictions as both operating along the lines of parliamentary supremacy, although they both are based on the Westminster system: Walter Bagehot *The English Constitution* (Chapman & Hall, London, 1867) at 187 and 212.

may be applicable to jurisdictions with a supreme-law constitution such as the USA and Germany, where superior courts such as the United States Supreme Court ("US SC") and the German Bundesverfassungsgericht [23] are able to regulate on constitutional grounds, and have immense power over, and stemming from, their constitution.[24] Such courts regulate by blocking, critiquing and, in certain instances, creating new substantive laws of the state; promulgating orders and striking down laws and on an 'is or is not constitutional' test. NZ courts do not directly ask what 'is or is not' constitutional, and do not classically regulate from that perspective. NZ courts lack the direct power to do so due to our constitutional foundations. Regulatory power is inherently exercised by a court through its constitutionalism[25] its place in society and its system of adjudication of rights and obligations. NZ's Supreme Court (and Privy Council/Court of Appeal before 2003) sits at the apex of appellate constitutional regulation vis-à-vis rights, state and citizen. Even without supreme law constitutionalism, NZ's outcomes in relation to court adjudicated constitutional matters are not so distinct from the US SC and any exploration of NZ's courts regulatory mechanism merits attention from a comparative perspective.

[6] Ostensibly the predominate and classical regulatory powers are the executive and legislative branches of government. Conceptually when regulation works, individuals and firms are induced to outcomes, which in the absence of the regulatory instrument they would not have attained, or attained as quickly or to such a degree.[26] This is both a regulatory function and aim of those branches. Yet, confirmed by Professor Ogus, an oft overlooked and underlying regulatory branch is the judiciary.[27] In as much as Ogus confirms the courts are an overlooked regulatory branch, meriting of further scholarship, I argue that courts, whether appellate or first-instance, [28] whilst traditionally considered as adjudicators of disputes *inter se* also have a general constitutional function

[23] The Federal Constitutional Court of Germany (BVerfG).

[24] Ogus "Comparing regulatory systems: Institutions, processes and legal forms in industrialised countries" in Bronwen Morgan and Karen Yeung (ed) *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) 135 at 138.

[25] Constitutionalism is an adherence to a system of constitutional government – I further discuss this image, and the extent of its adherence, in relation to New Zealand's constitutional norms and the function/role of the court i.e. its constitutionalism.

[26] Ogus "Comparing regulatory systems: Institutions, processes and legal forms in industrialised countries", above n 24, at 135.

[27] At 135.

[28] Technically the *res* is different at first instance than on appeal, unless the appeal is heard under the *de novo* exception as the judgment reads *Valerie Morse v The Police* [2011] NZSC 45 even if the *de novo* rule was not actually applied in that case (*Morse* is discussed in Part III (K)). For the purposes of this paper I look to the wider issue of the dispute as opposed to the specific appeal pleadings and leave the issue of the distinction between judicial regulators at first instances versus appeals courts to another paper.

of regulating both societal conduct and the conduct of governments. This is over and above the delineated economic actions to which Ogus refers. I suggest that an underlying intent for the court as part of its constitutional regulatory function is to achieve an aggregate social best result in constitutional matters, far broader than resolving a particular *lis* between *Person A v Person B,* or *Citizen v State.* Secondly; the judiciary, as a branch of government and society, regulate via self-imposed and self-regulated discretion in a manner discrete from archetypal regulatory bodies, [29] which makes them a particularly powerful regulatory mechanism and one worthy of due recognition.

B Structure of this Exposition

[7] This paper, in four parts, outlines the fiat that 'courts regulate' to further a nascent exposition of the judiciary as a regulatory mechanism and to provoke further discussion in the subject area; what is this regulatory mechanism that courts possess? I present four illustrations of judicial regulatory conduct, *lis'* of distinction far beyond the broad traditional brocade of common law theory that judges 'make law'.[30] In other words "judges have much scope for agency in their decision making".[31] This paper is in part a political science based challenge, in that it recognises the political nature of law, to the legal scholarship model that "tends to examine the quality of legal reasoning, focusing on whether a court reached the correct decision or whether its opinion provides legal certainty", and a regulatory analysis of public law and adjudicative theories.[32] This 'new' regulatory theory is multidisciplinary in nature.

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[29] Ayres and Braithwaite, above n 17, at 56: The authors describe classical enforcement regulatory agencies. NZ examples would include the Commerce Commission, Financial Markets Authority and the Takeovers Board.

[30] Of the brocade *Glanville Williams* above n 18, at 24, suggests "Occasionally, however, the invocation of the common law refers not to previously existing law but to the power of the judges to create law under the guise of interpreting it"; Aharon Barak *The Judge in a Democracy* (Princeton University Press, Princeton 2009) at 155, Chapter 6 discusses the development of the common law and the idea of the common law as judge made law. This can be contrasted against the common law "myth" of judges discovering the law See: Frédéric Gilles Sourgens *A Nascent Common Law* (Koninklijke Brill NV, The Netherlands, 2014) at 28; See also Jeffery Goldsworthy "The Myth of the Common Law Constitution" in Douglas E Edlin (ed) *Common Law Theory* (Cambridge University Press, Cambridge, 2007) 204; Jeffrey A Segal and Harold J Spaeth *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press, Cambridge, 2002).

[31] Ronda L Evans and Sean Fern "From Applications to Appeals: A Political Science Perspective on the New Zealand Supreme Court's Dockets" in Mary-Rose Russell and Matthew Barber (ed) *The Supreme Court of New Zealand: 2004-2013* (Thomson Reuters, Wellington, 2015) 33 at 35.

[32] At 35.

II Constitutional Norms

[8] Courts and judiciary often act as national risk and right allocation-systems,[33] either apportioning risks individually between *Person A v B, Citizen v State*, or in certain constitutional cases regulating outside the *lis* and realigning rights and risks between the *State v All Citizens*. Allocating risk(s) and reward(s)[34] is a foundational regulatory function and the courts must do so with due respect to the norms of the constitutional system.

[9] The judicial mechanism sews this function in large swathes via constitutional adjudication. A citizen may take a *lis* against the state which leads to a change in the interaction/rights/obligations between all citizens and the state – leading to an outcome outside of the *lis inter se*. The national risk system analysis takes into account the cultural and constitutional context of the regime[35] because the court regulation mechanism is both a product of, and regulator of, the regime. Morgan and Yeung adopt the approach of regulation being inherent in, and brought to the fore by, "political and constitutional context…the social structures and institutions that allocate power".[36] The courts are a *deus ex machina* in a non-theatrical sense;[37] they are from and for the constitution and exist to apportion resolutions to constitutional and rights problems. However the judicial regulatory mechanism is not infallible as the courts are not 'cure all' corrective devices[38] - courts regulate some of the time and regulate well even less. Not all law is regulation, especially in this regulatory analysis of public and adjudicative legal theories.

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[33] Ogus "Regulation" (2004) in Bronwen Morgan and Karen Yeung (ed) *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) 18 at 24.

[34] Karen Yeung "Government by publicity management: Sunlight or spin? Regulatory instruments and techniques - publicising compliance performance ("exclamation and excoriation")" (2005) in Bronwen Morgan and Karen Yeung (ed) *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) 96 and 143 at 100-101.

[35] Ogus "Comparing regulatory systems: Institutions, processes and legal forms in industrialised countries" above n 24, at 135.

[36] Bronwen Morgan and Karen Yeung "Introduction" in Bronwen Morgan and Karen Yeung (ed) *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) 1 at 4.

[37] 'God from the machine': Edward Stringham *Private Governance: Creating Order in Economic and Social Life* (Oxford University Press, Oxford, 2015) at 10.

[38] At 10.

C Define 'Constitutional Norm'?

[10] A comparison, and evaluation of scope and/or effectiveness can be drawn between two "national risk systems"[39] (jurisdictions). The ways in which each jurisdiction regulates conduct via the courts will differ due to the constitutional basis, or norms, of the system. A comparison will be superficial if "no account is taken of the cultural and constitutional context in which the regime is to be found".[40] A basic norm is a rule, principle or socio-legal context that underlies the foundation of the legal system. I use the term more liberally than Kelsen in so far as there are norms within the NZ constitutional framework and society, which, when brought together, form the 'norms' of the NZ legal system – I do not subscribe to a single or superior grundnorm.[41] As discussed later, it is an entirely subjective viewpoint whether Parliamentary Sovereignty is NZ's grundnorm, or whether Parliamentary Sovereignty is absolute or ostensive. In a rhetorical sense, the various substantive constitutional norms, *inter alia;* a free and independent judiciary and the Bill of Rights Act 1990 *et al* are those without which we would have no system, or a wholly different system. The judicial mechanism is both a norm, and creature of the norms – this is key to understanding the exposition.

[11] Judicial adjudication "…may depend not only on the merits of the applicants and the use of highly detailed legislative or administrative criteria…" but also on the basis of the system, the aforementioned "substantive constitutional norms" that exist alongside other significant considerations.[42] The "cultural variables of the system" or "national peculiarities", as Hancher and Moran explain, inform both regulation and the regulatory system, as fundamentally, "place matters".[43] Regulation, and the courts mechanism, is therefore the reason for, and a product of the court system, the court itself, why the court system was created, and the underlying social norms, the "national peculiarities", in the context of society, and has informed its past historical development. In terms of sewing a basis for a courts regulatory mechanism, it is primarily found in the jurisdiction's constitution writ large, written or

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[39] Ogus "Comparing regulatory systems: Institutions, processes and legal forms in industrialised countries" above n 24, at 135.

[40] At 135.

[41] Hans Kelsen *Pure Theory of Law* (University of California Press, California, 1967); H. L. A Hart would describe these norms as the "living reality of the system" and either explanation is fine: H. L. A Hart *The Concept of Law* (Clarendon Press, Oxford, 1961) at 293; Although W. B. Simpson *Reflections on the Concept of Law* (Oxford University Press, Oxford, 2011) at 127, outlines that the idea validity of 'norms' as derivative of a superior grundnom as "the ultimate *ricciculus mus*".

[42] Ogus "Comparing regulatory systems: Institutions, processes and legal forms in industrialised countries" above n 24, at135.

[43] Hancher and Moran "Organizing regulatory space" (1989) in Bronwen Morgan and Karen Yeung (ed) *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) 54 and 106 at 65.

unwritten. If a court system is "simply an instrument facilitating government control of the economy" versus a system "enshrine[ing] a general principle of freedom of economic activity",[44] then the way in which the mechanism deals with decidedly non-economic questions, regulating questions and outcomes 'rights based' in nature will generally follow similar lines. All instances of adjudication are informed by the peculiarities of the place and historical development of the adjudication system.

[12] The judicial regulator's role is "…enforcing rights to property, to exchanges of property, and of policing the simple and complex exchange processes among competing free men".[45] This is part of the Hobbesian tradition, which informs constitutional norms, whereby a court system is required to regulate the market to avoid chaos.[46] The court system in the regulatory context is best viewed as a market, and on an extended Hobbesian view regulating both commercial and other more 'human', rights. What is important is that this 'market' is contextual, and exists influenced by societal norms.

D From Great Constitutional Constraint Comes Great Regulatory Power

[13] The executive and the legislature are both constrained by the constitution and from this constraint the judiciary gains regulatory force.[47] By enforcing constitutional constraints against expanding intrusive regulation[48] into citizens' rights, emanating from the government/legislative/executive (be it economic or social regulation), the judicial branch is itself creating regulation by upholding, altering or furthering social, or rights based norms. From the US perspective "…this will depend on the set of politico-economic values to which that [Constitutional] document gives expression…"[49] By contrast, the NZ

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[44] At 65.

[45] James Buchanan *The Limits of Liberty: Between Anarchy and Leviathan* (University of Chicago Press, Chicago, 1975) at 163.

[46] Thomas Hobbes *Leviathan: Or, The Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil* (4th ed, George Rutledge and Sons, London, 1894) at 197: "…any by this means destroying all laws, both divine and human, reduce all order, government, and society to the first chaos of violence and civil war".

[47] Regulatory force within the judicial branch is, within a common law society, also inherent. For example the writ of *habeas corpus ad subjiciendum*, which in NZ exists and preexists the constraint on the Executive via the Habeas Corpus Act 2001. In s 5(a) the first purpose of the Act is stated as "to reaffirm the historic and constitutional purpose of the writ of habeas corpus as a vital means of safeguarding individual liberty:", the fourth purpose of the Act is to "(d) abolish writs of habeas corpus other than the writ of habeas corpus *ad subjiciendum*."

[48] I define regulation in part F.

[49] Ogus "Comparing regulatory systems: Institutions, processes and legal forms in industrialised countries" above n 24, at 136.

constitution is unwritten and our courts must take an "open textured approach" to constitutional matters.[50]

[14] The parameters of NZ's constitution are undefined and at its core, interpretation rests on socio legal context and on a malleable set of documents and contextual analysis, for example the Judicature Act 1908 and the Treaty of Waitangi. This is a type of administrative regulation via "methods of statutory interpretation that seek to protect underrepresented interests or that force[s] explicit deliberation and disclosure"[51] in an extended sense. In essence it requires both an open conversation of what is the constitution and what is in the constitution and which parts are applicable to the regulatory endeavor. This is in contrast to the style of written regulation, as found in the Commerce Act 1986 and promulgated by its Commission, which tends to have a high level of precision in order to protect against writ-large judicial interpretation and is therefore formulated in very specific terms.[52] NZ courts "continue to uphold the principle of comity [with Parliament] while acknowledging the necessity for judicial sovereignty [in BORA matters]."[53] The very point of our "open textured" approach is to provide for the undefined parameters, this does not mean it is any less precise on application – or not regulatory – it is a discernably different methodology formulated due to the context of NZ norms and the context of the Constitutional Regulator: the Judiciary.

[15] The Judiciary, as Regulator, acts as a duel functionary both as a regulatory implementer and a regulatory designer.[54] Uniquely it is the Regulator (judiciary) who adopted, formulated and implemented the "open-textured" approach.[55] The regulatory power in the NZ judicial mechanism emanates from the open textured constitution which necessitated a similar approach be taken towards a fundamental

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[50] The phrase possibly first coined by Paul Rishworth "Human Rights - from the Top" (1997) 60 Modern Law Review 171; See also Mark Henaghan "The changes to final appeals in New Zealand since the creation of the New Zealand Supreme Court" (2011) 12 Otago Law Review 579, where the author uses the phrase an umpteen number of times. "Open textured" is now part of the New Zealand legal lexicon.

[51] Stephen Croley "Theories of regulation: Incorporating the administrative process" (1998) in Bronwen Morgan and Karen Yeung (ed) *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) 44 at 46.

[52] Ogus "Comparing regulatory systems: Institutions, processes and legal forms in industrialised countries" above n 24, at 139.

[53] Petra Butler "Bill of Rights" in Mary-Rose Russell and Matthew Barber (ed) *The Supreme Court of New Zealand: 2004-2013* (Thomson Reuters, Wellington, 2015) 255 at 256.

[54] Hancher and Moran "Organizing regulatory space" above n 43, at 62 and 66; Tony Prosser "Nationalised industries and public Control" (1986) in Bronwen Morgan and Karen Yeung (ed) *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) 37 at 40.

[55] See Rishworth "Human Rights – From the Top" above n 50; Henaghan "The changes to final appeals in New Zealand since the creation of the New Zealand Supreme Court" above n 50.

constitutional norm, the Bill of Rights Act. This gives a flavor of a different style of power, admittedly less awe inspiring, and more indirect than the judiciary in countries with an entrenched and supreme constitution. The judiciaries' power is less self-effacing. The result is that in NZ there is scope for inclusion or exclusion of constitutional norms. Therefore the ultimate composition(s) of the constitution by the judiciary in a *lis* of distinction/constitutional importance is formulated by both an "open textured" approach to BORA, and the constitution itself, as the approach and the judicial mechanism is part of the constitution. The US SC has supreme-law power, exercised conspicuously by annulling legislation,[56] far in excess of NZ's superior courts. However arguably NZ courts have greater interpretive scope, for example interpreting the ability of citizens to carry firearms in the context of the twenty-first-century. Such rights are not enshrined in a document and are therefore limited in interpretive scope.[57] Therein lies an element of the NZ judicial mechanism: greater interpretive discretion weighted against less power. This regulatory "imprecision is consistent with the natural desires of judges to leave themselves…flexibility in future cases".[58]

[16] NZ, as one of only three countries in the world with an unwritten constitution,[59] cannot be accused of inadequate constitutional legislative provision, but successful constitutional regulation by the courts. The unwritten and open textured approach to our constitution, imprecise in nature, and possibly wide in scope, is a conscious choice by all branches of government. Codification and proclamation could be undertaken most easily via common law dicta. This was done by Cooke P, in enumerating the principles of the Treaty of Waitangi,[60] in the *Lands Case,* itself an exercise of the judicial regulatory mechanism. Codification writ large is not the norm in NZ due to the appreciation of contextualisation in NZ constitutionalism. A cynic might argue that there was no appreciation of contextualization in situations like s 9 of the State

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[56] Ogus "Comparing regulatory systems: Institutions, processes and legal forms in industrialised countries" above n 24, at 138: Ogus comments that there is a persuasive case for the Indian judiciary to be crowned most active.

[57] The Second Amendment to the United States Constitution is codified and "…the right of the people to keep and bear arms, shall not be infringed", while the US SC can strike down offending legislation as 'unconstitutional' and one of its major regulatory roles is to interpret the constitution it is bounded in by the documentary fundamentalism inherent in the text.

[58] J. C. Coffee Jr "Paradigms lost: The blurring of the criminal and civil law models - and what can be done about it" (1992) in *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) 204 at 206.

[59] The United Kingdom and Israel being the other two. I purposefully do not use the term 'lacking'.

[60] *New Zealand Māori Council v Attorney-General (the Lands Case)* [1987] 1 NZLR 641.

Owned Enterprise Act 1986,[61] which triggered the *Lands Case*. Rather, Parliament was paying lip service to the Treaty without actually intending for the courts to give it substantive legal expression. Yet it was the judiciary who decided, in NZ's constitutional dialogue, that it was Parliament's intent for the courts to adjudicate that *lis (*on constitutional grounds as opposed to a purely limited *inter se* adjudication) in NZ's constitutional dialogue Parliament's intent is for the courts to the decide. Nevertheless the court, acting as regulatory implementer and designer, is highly efficient in responding to changing circumstances, and NZ is lucky to be afforded such bespoke tailoring. Indeed the Constitutional Advisory Panel's key recommendation to the Government was to "actively support a continuing conversation about the constitution",[62] and in essence to further develop the contextual and open textured nature of NZ's unwritten text.

[17] New Zealanders are not constitutional documentary fundamentalists.[63] On this premise our courts are less encumbered than US counterparts as we lack a restrictive document and are free to fetter in our ethereal restraints.[64] This is enshrined in ss 4 and 5 of our Bill of Rights Act 1990 ("BORA") which provides that other legislative enactments are not affected and parliament may place limitations – limitations are justified in a free and democratic society - on rights and freedoms.[65] Our open textured approach exists in the ebb and flow of s 6 where an interpretation consistent with BORA is to be preferred. The judicial mechanism can be both hampered by lack of documentary force majeure, for it has no supreme-law constitution to fall back on, but strengthened

[61] Section 9 provided that the courts must take into account "the principles of the Treaty of Waitangi".

[62] Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation,* (New Zealand Government, 2013) at 9: The report was commissioned by the Hon. Bill English and Hon. Dr Pita Sharples, Ministers for Constitutional Affairs. The co-chairs of the report were Emeritus Professor John Burrows QC and Sir Tipene O'Regan (Ngai Tahu).

[63] In so far as certain rights exist, such as the right to keep and bear arms, because the context at the time the document was written necessitated it' See Morton Horwitz "Foreword: The Constitution of Change: Legal Fundamentality without Fundamentalism" (1993) 32 Harvard Law Review 107; See also Dennis J Goldford *The American Constitution and the Debate Over Originalism* (Cambridge University Press, 2005) at 76.

[64] This paper has not focused on the Canadian Charter of Rights, which NZ's BORA was modeled on. The Canadian charter is supreme and is highly flexible; see *Carter v Canada* 2015 SCC 5; See also the quote at the start of this paper: Barak "Constitutional Law Without a Constitution: The Role of the Judiciary" above n 1, at 449.

[65] It is not the purpose of this paper to discuss the interplay of rights limitations in BORA, for example whether one subscribes to the *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) or *R v Hansen* [2007] 3 NZLR 1 (NZSC) test; See Andrew S Butler "Limiting Rights" in Carter and Palmer (ed) *Essays in Honour of Sir Ivor Richardson* (Victoria University of Wellington Press, Wellington, 2002) 113 at 113; See also Claudia Geiringer and Steven Price "Moving from Self-Justification to Demonstrable Justification" in Jeremy Finn and Stephen Todd (ed) *Law, Liberty, Legislation* (Lexis Nexis, New Zealand, 2008) 295.

by the open interpretive scope of its rights regulatory framework.[66] This is a perplexing balance for which ultimately NZ's apex court will regulate. Lord Cooke, on the establishment of the Supreme Court noted the "academic (perhaps) question of collision under section 3(2) of the Supreme Court Act 2003", that "Nothing in this Act affects New Zealand's continuing commitment to the rule of the and the sovereignty of Parliament", finding that those two concepts could conceivably clash.[67]

E The New Zealand Bill of Rights Act 1990 a Fundamental Norm

[18] The courts have always been required to perform a gap-filling role of pronouncement of applicability and enforcement,[68] and indeed to self populate NZ's rights mechanism. The government enacted selected preexisting common law rights into statute law[69] without a private-enforcement mechanism in the statute. Minister Palmer,[70] when formulating the policy behind BORA, did not specify an enforcement mechanism for the rights contained in the Act nor any quantum(s) of damages, should they even be available. This came later when the court regulated executive conduct/abuses in *Baigents Case.*[71] The private enforcement mechanism of the various rights contained in BORA arose due to the inability of Parliament at the time to enact a supreme-law Bill of Rights. Government policy was ineffective to protect and regulate rights[72] and courts now regulate these rights, their holders—the citizens, and infringers—the state.[73]

[19] Courts are surgical in their rights intervention. Not only does a 'right exist' or is a 'right breached' (either by act or omission) but policy

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[66] See the Interpretations Act 1999, s 5: where "The meaning of an enactment must be ascertained form its text and in the light of its purpose" this is a version of the golden rule/thread running through most judicial interpretation of statutes.

[67] Lord Cooke of Thorndon "The Basic Terms" (Remarks at the final session of the Supreme Court Conference) (2004) 2 NZLPIL 114 at 114.

[68] Patrick Luff "The Political Economy of Court-Based Regulation" (2013) in Ugo Mattei (ed) *Research Handbook on Political Economy and Law* (Edward Elgar Publishing, Cheltenham, 2015) chapter 20 at 13.

[69] See Bill of Rights Act 1990, s 28, for express recognition of the other forgotten pre-existing common law rights existing outside of the Act.

[70] Currently the Rt. Hon. Sir Geoffrey Palmer, QC, AO, KCMG, former Minister of Justice, Attorney-General, Prime Minister, Law Commissioner, and current Distinguished Fellow, Faculty of Law, Victoria University of Wellington.

[71] Law Commission *Crown Liability and Judicial Immunity* (NZLC - Report 37): specifically *A response to Baigent's case and Harvey v Derrick - 3 The Bill of Rights Act, Baigent's case and its implications*; *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667 (CA).

[72] Patrick Luff "Risk Regulation and Regulatory Litigation" (2011) 64 Rutgers Law Review 73.

[73] Bill of Rights Act, s 3: limits the applicability of the rights to acts done by either of the three branches of government or those exercising a public function, power or duty by or pursuant to law.

intervention is formulated in the form of remedy awarded. BORA remedies are discretionary and do not exist as a right once a breach is established. Our courts act by implication with their regulatory policy directives; allowing monetary damages, the threat of future damages or a declaration speak for itself. The court may not direct legislative conduct, although it can declare a breach[74] and notionally penalise it - via a declaration (a stern admonition) or *Baigents* damages. The position is deserving of some criticism as the court cannot prohibit, in the form of an order (mandamus), the executive or legislative action from occurring again, in so far as striking down the offending statute. This is because the court has no control over the legislature and the executive is often acting pursuant to legislature enablement/Acts of Parliament. Only the threat of future judicial condemnation exists to stop the legislature trampling rights, or pragmatically in NZ's executive dominated legislature – judicial condemnation of the government of the day, which usually holds both executive and legislative majority. This may appear 'soft' regulation, but it is more forceful when considering that BORA contained no remedy provisions whatsoever from the Acts outset. Both *Baigents* damages and declarations are creatures of the courts' design and implementation mechanisms created by the court within the bounds of NZ's constitutional arraignment. Parliament, although yet to be tested, is ostensibly sovereign.[75]

[20] The judiciary regulates conduct. When adjudicating fundamental rights, their regulatory reach can have aggregate effect on all rights in the state/market not just in the *lis* before the court. "Law structures conversations about regulation"[76] but also allows for its implementation writ large. This mechanism allows an analysis of issues in a way that would be "impossible when we dismiss out of hand the entire judicial regulatory enterprise as illegitimate judicial activism".[77] Courts do more than simply adjudicating disputes *inter se*, and, when they do so, it is not necessarily to be dismissed as illegitimate activism.[78] That said, concerns regarding courts as regulators do not "dispose of the concerns of legitimacy and efficacy that attend judicial policymaking".[79] I am confident that the ability for the judiciary to regulate in the field of rights,

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[74] *Taylor v Attorney-General* [2015] NZHC 1706.

[75] As specifically stated in the Supreme Court Act 2003, s 3(2). Although Lord Cooke of Thorndon "The Road Ahead for the Common Law" (2004) 53 International and Comparative Law Quarterly 273 at 11, is of the view that "the supremacism of either [Court or Parliament] has no place".

[76] Bronwen Morgan and Karen Yeung "Regulation Above and Beyond the state: Legitimation" in Bronwen Morgan and Karen Yeung (ed) *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) 303 at 323, 6.4.1.

[77] Luff "The Political Economy of Court-Based Regulation" above n 68, at 19.

[78] Morgan and Yeung "Regulation Above and Beyond the state: Legitimation" above n 76, at 331, 6.5.2.

[79] Luff "The Political Economy of Court-Based Regulation" above n 68, at 19.

and the public's acceptance of this, is part of the legitimate function of the common law.[80] In NZ this stems perhaps not from BORA in the 1990s, or primarily from common law principles immemorial,[81] but in part due appreciation in both the public and legal fields of statements from Sir Robin Cooke,[82] a judicial talisman in NZ rights discourse who has left his mark on many a constitutional norm. Sir Robin is not the jurisdictional authority whom NZ courts rely on to allow them to regulate rights but he is a guiding influence in this area and provides judicial direction to his brethren as to how far the NZ bench could go in the field of rights regulation – stemming from the common law – and now BORA.

F All that being said and done, what then is Regulation?

[21] Presenting most difficulty is classifying 'regulation' within a legal system.[83] Even Morgan and Yeung admit that from a legal perspective regulation is "notoriously difficult to define with clarity and precision".[84] At one end, regulation is not entirely black letter law; at the other end it is discernable that the Takeovers Code[85] is regulation. The widest perspective is that all common law is a form of regulation, especially when common law is used as or effects social control/order and has coercive power.[86] But not all air is breathable, and not all law is regulation or regulatory in nature. The exact formula is a paradigm I may not successfully resolve, and nor do I suggest that an attempt to define and demarcate 'regulatory law' is a fruitful exercise. I focus on 'Rights law'[87] as inherently upheld and protected by the courts as a discrete form of judicial common law regulation.

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[80] S. Breyer "Regulation and its reform: Changes in Liability Rules" (1982) in Bronwen Morgan and Karen Yeung (ed) *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) 106 at 90: Breyer describes this in regulatory terminology as the non-economic or moral factors in the common law in the context of the difficulty of always achieving an efficient economic ends in liability rules.

[81] Developing from the Norman conquests or perhaps since recorded in the volumes of the Selden Society.

[82] Robin Cooke, Baron Cooke of Thorndon. New Zealand's only judge to have ever sat in the House of Lords and one of this countries most influential jurists.

[83] Ogus "Comparing regulatory systems: Institutions, processes and legal forms in industrialised countries" above n 24, at 138.

[84] Morgan and Yeung "Introduction" (A legal perspective on regulation) above n 35, at 3

[85] Takeovers Act 1993, s 28 (3); The Takeover Code issued pursuant to the Takeovers Code Approval Order 2000 (SR 2000/210). Available at wwwtakeovers.govt.nz.

[86] Morgan and Yeung "Introduction" above n 35 at 4.

[87] Rishworth "The Legal Protection of Human Rights in NZ: A Short History and Overview of the Contemporary Scene" above n 68, at chapter 3.

[22] In terms of a definition of *regulation*, it is an almost ethereal phrase.[88] Regulation is "a rule prescribed for the management of some matter, or for the regulating of conduct; governing precept or direction; a standing rule".[89] Furthermore although it is not every rule, as defined by Hood et al, regulation exists due to its "… capacity for standard-setting, to allow a distinction to be made between more or less preferred states of the system…there must be some capacity for behavior-modification to change the state of the system".[90] Rights law and constitutional norms fit comfortably within the Hood et al definition. Logically 'what is the system?' is addressed in this paper in terms either *the courts* and *judiciary* or their underlying constitutional function, both adjudicators and rights protectors. It is this class which I focus on as an under recognised entity which legitimately modifies aggregate behavior via the *lis* before them.

[23] Courts and the judiciary are unique regulators. When a citizen takes action in court against the state to enforce a fundamental right, or a tortious or contractual right, the court regulates that right; either in its existence, its enforcement, or the degree of its utility to the citizen and inconvenience for the state in remedy awarded, financial or otherwise.[91] There will always be one party better off and one party worse off when the *lis* involves any sort of right. This is especially so when the right is fundamental because such rights are termed 'core' and 'inalienable' and 'human' for reasons that they are intrinsic to our very sense of self. In this relationship between citizens and state the court sits betwixt implementing and designing. The judiciary are not role-playing 'actors' or mere functionaries – civil servant bureaucrats – who exist to give effect to the system, rather, the judicial mechanism exists because of the right to justice.[92] It is *sui generis* with nothing else. Such a right is the regulation of conduct between citizen and state, in and of itself, and is informed by the constitutional structure. This is why there exists judicial regulators with a judicial mechanism as opposed to a 'judicial or arbitrator functionary'. It is an important distinction; the latter is to merely adjudicate disputes with no recognition of the wider effect of the *lis* or

[88] The easiest way for a black letter lawyer to describe or 'point to' regulation is 'legislative instruments' as defined by s 4 Legislation Act 2012. Although to answer for the purposes of this paper that delegated legislation are regulations is a very narrow scope indeed; for further discussion see Carter, Carter, McHerron and Malone *Subordinate Legislation in New Zealand* (LexisNexis, Wellington 2013).

[89] The *Oxford English Dictionary* (Oxford University Press, Oxford, 2009), "regulation".

[90] Christopher Hood, Henry Rothstein & Robert Baldwin *The Government of Risk* (Oxford University Press, Oxford, 2001) at 23.

[91] Such incursion can be into settled substantive law and legal doctrine which may require Government departments to alter their policies. Or as the NZ Parliament is supreme, court intrusion may result in subsequent corrective legislative action.

[92] The right to justice is both a fundamental common law right, which both underpins the system, exists in and is part of our open-textured constitution and is enshrined in statute in s 27 of the New Zealand Bill of Rights Act 1990.

its contextual constitutional function and is comparable to various small claims or limited disputes tribunals who only affect the parties before them. In this regulatory thesis the judiciary and courts are part of, and can change, the system (norm). On the other hand, a judicial functionary or arbitrator cannot change the system and only serves to enforce it in a limited sense as even in enforcing the system it is limited in developing it. Dispute referee's in tribunals have very limited jurisdiction and do not set precedent even amongst other tribunals on the same hierarchy.[93]

[24] A criticism is that higher rights-based principles are more relevant in judicial decision-making and that economic rationality is not the prevalent value in legal decision-making.[94] Such a view overlooks the distinction that there exists a quasi-market for 'rights' also within the regulatory sphere due to laws threat and umpire regulatory contributions. Law engages with a variety of roles in the regulatory endeavor;[95]

> At the level of national regulation, both the law's facilitative and expressive dimension are reflected in its related but distinct contributions to regulation, encapsulated by two images: the law as a threat and the law as an umpire.

A market for rights is not the same as economic rationality. Enforcement of, or a *lis* for, a right may be contrary to the rational act or principle.[96] This does not preclude that there is both a limited supply of rights and unlimited demand for them,[97] and that there exists a market. While all people inherently possess the same (human/fundamental) rights as others, people are not born into substantive equality. A market approach to rights realises that recognition of inherent rights is often a distributive role of the state which has limited resources. An incorrect definition of a 'market' is that there must be a willing buyer and a willing seller; that is in fact a theoretical definition of pure laissez-faire capitalism. A market is simply a system of exchange.[98] Part of the courts' role is inherently distributive in ensuring equilibrium rights distribution between citizen and state. Rules against vexatious litigants protect

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[93] Disputes Tribunal Act 1988, s 10 subject to the Limitation Act 2010; Motor Vehicle Sales Act 2003, s 21.

[94] Hector Fix-Fierro *Courts Justice and Efficiency* (Hart Publishing, Portland, 2003) at 28.

[95] Bronwen Morgan and Karen Yeung (ed) *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) at 339 ("Chapter 7 Conclusion").

[96] That individuals maximize their economic utility in every decision they make, they would not for example sue someone for the 'principle of the matter'.

[97] The right for refugee seekers to live in New Zealand is current limited to 750 (+- 10%): Department of Immigration "New Zealand Refugee Quota" (5 September 2015) <www.immigration.govt.nz/migrant/general/generalinformation/media/refugeefactsheet.htm>

[98] Scott "Regulation in the age of governance: The rise of the post-regulatory state" (2004)" in Bronwen Morgan and Karen Yeung (ed) *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) 129 at 130; See also Morgan and Yeung "Introduction" (A legal perspective on regulation) above n 35, at 5. All the authors overcomplicate the system of exchange principle, but their inherent recognition of it is clear.

citizens and the state against those who may have a claim for a right/obligation but who do so for motives which the court considers impure.[99] The demand for rights increases, for example the right to 'life, liberty and the pursuit of happiness', is becoming rarer and is not granted easily to non-citizens or those from outside the regulated area.[100] The role of the judiciary, as a regulatory mechanism and part of the foundational norms, then becomes ever more important in modifying behavior to change the state of the system.[101]

[99] Judicature Act 1908, s 88B; see *The Attorney-General v Vincent Ross Siemer* [2014] NZHC 859, where Mr. Siemer was declared a vexatious litigant after Mr. Siemer took 19 proceedings of which the court found 15 vexatious.

[100] See in September 2015 the issue of Syrian refugees attempting to cross the Mediterranean for asylum in Europe and the differing responses of EU Countries. Prosperous Germany allowing free entry and providing 'rights' such as housing, and others such as Hungry building a wall to keep refugees away from accessing EU mandated aid: Anne Bernard and Karam Shoumali "Image of Drowned Syrian, Aylan Kurdi, 3, Brings Migrant Crisis Into Focus" *New York Times* (4 September 2015) A1.

[101] Hood et al *The Government of Risk* above n 90, at 23.

III Protecting the Suspect Classes – Regulating via a lis of distinction

[25] The reality "of the separation of powers remains problematic in New Zealand, with a small unicameral legislature still largely dominated by the executive in ways that are even more extreme than executive domination of Parliament in the UK".[102] It is no accident that "inherent in the act [and role] of judging, the role of law may be the result of contextual factors"[103] and a recognition that "…judges have much scope for agency in their decision making" to protect rights.[104] The classic criticism of judicial regulation is that, "The power of judges to decide important questions of public policy seems to run counter to the democratic ideal that reserves such decisions to democratically elected representatives"[105] and that such judicial power illegitimately extends beyond adjudicating the *lis* before them into wider constitutional matters.[106] This concern is built on a foundation of misunderstanding.

[26] From the perspective of a Commonwealth Lawyer[107] the powers of the Supreme Court of the United States of America ("US SC") seem arcane and foreign. That court routinely makes important decisions of public policy that would often be left to a democratically elected parliament within Commonwealth jurisdictions.[108] The US perception of the judiciary is different to their NZ counterparts; primarily as in various States of the Union the bench has political appointments and elections. However on the Federal Circuit it has a comparable Judicial Oath with NZ; to uphold the Constitution and laws (of the United States),[109] and

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[102] Jeremy Waldron "Forward" to Mary-Rose Russell and Matthew Barber (ed) *The Supreme Court of New Zealand: 2004-2013* (Thomson Reuters, Wellington, 2015) vii at viii.

[103] Evans and Fern "From Applications to Appeals: A Political Science Perspective on the New Zealand Supreme Court's Dockets" above n 31 at 57.

[104] At 35.

[105] Norman Redlich "Judges as Instruments of Democracy" in Shimon Shetreet (ed) *The Role of Courts in Society* (Kluwer Academic Publishers, The Netherlands, 1988) 149 at 149.

[106] At 149.

[107] Subscribing to the United Kingdom Commonwealth of laws as opposed to the United States Commonwealth.

[108] Redlich "Judges as Instruments of Democracy" above n 105, at 149; The recent US SC decision on gay marriage *Obergefell v Hodges* 576 U.S. 14-556 (2015), is prime example.

[109] Judicial Oath 28 U. S. C. § 453: "I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God."

the US SC is the symbolic tertiary-level classical regulator.[110] Evens and Fern provide a comparison that;[111]

> the Supreme Court of Canada is charged with granting leave to cases that raise questions of "public importance" and the SCOTUS [Supreme Court of the United States] is supposed to grant certiorari… to cases that involve "important federal matters… [And] these criteria do not differ greatly from those that apply to the Supreme Court in New Zealand

A recent analysis of the NZ Supreme Court found that in public law/rights cases the court was prepared to both cite and use decisions of other jurisdictions, the most prevalent being the US.[112]

[27] The US SC merits comparative analysis as a touchstone with NZ's system even though respective perceptions (political versus apolitical) are different. Furthermore Evens and Fern conclude that North American theories of judicial decision making give the most persuasive account of how the NZ Supreme Court selects appeals for review.[113] However I doubt the allegation of 'governance by the judiciary' could ever be levied in NZ. Some may point to the potential for such an occurrence stemming from Cooke P's hallowed dicta in *Taylor v New Zealand Poultry Board*[114] but that was by comparison no *Roe v. Wade,*[115] *Marbury v. Madison*[116] or the more recent *Obergefell v. Hodges.*[117] *Poultry Board* was an extrapolation of NZ's judicial reserve power, not an attempt at judicial governance.

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[110] A tertiary-level regulator comparable to the British Commonwealth system; See Herbert Hovenkamp "Capitalism: The Supreme Court as Regulator of Business" in Hall, Ely and Grossman (ed) *The Oxford Companion to the Supreme Court of the United States* (2nd ed, Oxford University Press, New York, 2005) 138 at 138, 146; See also Black "Talking about regulation" above n 16, at 176.

[111] Evans and Fern "From Applications to Appeals: A Political Science Perspective on the New Zealand Supreme Court's Dockets" above n 31, at 35.

[112] At twenty-two cases: Waldron "Forward" above n 102, at x. Waldron suspects that "the emergence of the Supreme Court a an independent institution has contributed to its willingness to take this stance of dialogue and deference to the work of other courts around the world particularly on the issues of rights" at xi.

[113] Evans and Fern "From Applications to Appeals: A Political Science Perspective on the New Zealand Supreme Court's Dockets" above n 31, at 35, 55; See texts such as Jason L Pierce *Inside the Mason Court Revolution* (Carolina Academic Press, Durham NC, 2006) at 221.

[114] *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394. It hardly need repeating for a student educated at Victoria University of Wellington that "…some common law rights presumably lie so deep that even Parliament could not override them". Cooke's fundamental principles have had somewhat of an impact on the Canadian Supreme Court with McLachlin CJ presenting the 2005 Lord Cooke of Thorndon Lecture at Victoria University: McLachlin CJ "2005 Lord Cooke of Thorndon Lecture" (2006) 4 NZJPIL 147 at 163, concluding that "Ignoring one's judicial conscience is not about staying within one's role, but instead about abdicating one's responsibility to the law. There do indeed exist unwritten principals without which the law would become contradictory and self-defeating, and it is the duty of judges not only to discover them, but also to apply them. To forsake them, in Robert Bolt's phrase, is indeed to take the short route to chaos."

[115] 410 U.S. 113 (1973).

[116] 1 Cranch 137 (1803).

[117] *Obergefell v. Hodges* above n 108 is the case which declared the ban on gay marriage unconstitutional. *Obergefell* is not a case name yet instantly recognisable, however it likely will be soon.

G The Theory of Courts Providing Protection

[28] Dworkin advanced the theory that the judiciary has the role to further morality in the law, this was his "fusion of constitution law and moral theory".[118] Alexis de Tocqueville's classic political theory concluded that, "political questions in American politics are ultimately framed as judicial ones".[119] If both mould together it appears that the judiciary are either the moral visionaries or provide the moral equilibrium of society. I don't propose to debate Professors Raz and Waldron on inter-authority relationships and which branch should be deferential to whom, in either having or exercising morals, or which of courts versus Parliament are justified in their respective authority and why.[120] These are valid concerns for another paper. It is sufficient to proceed on the premise that it is a legitimate function of the courts to regulate so as to protect those, who, in the words of Justice Stone in *Carolene Products,*[121] are members of the "suspect classes". It is the courts in most democracies who have taken priority in protecting rights and as Shapiro concludes citizens often seek out the courts to protect or achieve their own "political morality" when the utilitarian nature of democracy goes the opposing way.[122]

[29] Often minority groups are disrespected, marginalised, by the democratic process or not afforded fair hearing rights.[123] Many theories are seemingly premised on the basis that government and laws represent the majority and the judiciary acts in certain cases to overturn the majority position for 'moral' reasons, to protect the "suspect classes" and they are therefore counter-majoritarian.[124] In this vein Justice Kennedy of the US SC writing for the majority in the marriage-equality case *Obergefell v. Hodges* held;[125]

> The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a

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[118] Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge MA, 1977) at 149.

[119] Kenneth D Ward "The Politics of Disagreement: Recent Work in Constitutional Theory" (2003) 65 The Review of Politics 425 at 425 The author quotes Alexis de Tocqueville a French Revolutionary era political theorist who is most well known for his work *Democracy in America* (1835).

[120] Nicole Roughan *Authorities* (Oxford University Press, Oxford, 2013), "The Waldron-Rax Exchange" at 89.

[121] *United Staves v Carolene Products Co.,* 304 U.S. 144, 152 Note 4 (1938)

[122] Martin Shapiro "Who guards the guardians? Judicial control of administration" (1988) in Bronwen Morgan and Karen Yeung (ed) *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) 260 at 262.

[123] Redlich "Judges as Instruments of Democracy" above n 105, at 151 discussing Justice Stone's theory.

[124] At 152.

[125] *Obergefell v. Hodges* above n 108, at 24.

> right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act.

I query if such forceful sentiment would be issued from the NZ Supreme Court[126] even on questions of democracy and fundamental rights. Not least because of our fundamentally different 'charters', but due to the underlying "dynamic" of our constitutional system. Indeed in *Quilter v Attorney-General*[127] the Court of Appeal, then our apex domestic appeals court, specifically left the matter of the definition of "marriage", 'man and woman' in the Marriage Act 1956, to Parliament. As Joseph explains "This decision checked the potential of s 6 to revisit established statutory meanings… the Court would not rewrite the legislation under guise of applying the Bill of Rights",[128] this was even though the court had interpretative scope under BORA to do so. It took until 2013 for parliament to extend the definition.[129] The NZ constitutional charter is unwritten and changing, but no less tangible as NZ has a constitution. Whether pointing specifically to BORA, the Electoral Act 1993 or something unwritten, individuals in NZ still have a personal stake in the norms of our constitution and courts take a position in regulating rights and norms.

[30] Asking then of NZ's constitutional dynamic three questions present themselves; (i) Do individuals in NZ need to await legislative action before asserting a fundamental right - thus is something asserted not a 'right' nor 'fundamental' in our jurisdiction unless Parliament has actioned or breached it? This is the view of Dworkin, and influences Kennedy J in *Obgerfell*; that the evolving nature and development of constitutional rights are based on norms of political morality; that "…legal practice in Anglo-American political Culture demands the integrity of law. Integrity is a moral virtue of the law irrespective of outcomes".[130] Dworkin's examples revolve around rights that were never explicitly stated in the US Constitution nor covered by legislation, such as marriage-equality. His thesis, most apparent in *Laws Empire*, was that the US SC had a constitutional mandate through his 'law as political morality framework'; concluding that you cannot be discriminated on the

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[126] Although see Elias CJ's extrajudicial statements in Elias CJ "Sovereignty in the 21st century: Another Spin on the Merry-Go-round" (2003) 14 P.L.R. 148; Also see the Court of Appeal decision in *Quilter v Attorney-General* [1998] 1 NZLR 532, (1997) 16 FRNZ 298 (CA) where the court specifically left the matter for Parliament.

[127] *Quilter* above.

[128] Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2013) at 1276, 28.4.6.

[129] Marriage (Definition of Marriage) Amendment Act 2013. The Bill was commonly known as the 'same sex marriage bill'; state approved civil unions have been legal between all sexes in New Zealand since the Civil Union Act 2004.

[130] Siri Ratnapala *Jurisprudence* (Cambridge University Press, Cambridge, 2009) at 182.

basis of sexuality,[131] ultimately reflected in the *Obgerfell* decision. Dworkin's definition of popular morality was "the set of opinions about justice and other political and personal virtues that are held as matters of conviction by most members of a community".[132] This is exemplified in his ultimate conclusion that the duty of a citizen to submit to the authority of law is a moral duty.[133] On this founding it must be for the courts to regulate 'law as political morality'.

[31] Applied to the NZ context (ii) is our constitutional model not *ostensibly* of Parliamentary Supremacy? Yes, but with caveats that provide a 'last resort' regulatory scope/power for the court. And therefore (iii) is the NZ judicial regulation of rights, the mechanism, poorer than the USA? The answer is no. I argue that outward displays of power and forceful oral sentiments from the bench are the wrong premise for the question – it would not be in keeping with NZ norms. Our constitutional dynamic differs but the ability of the courts to protect fundamental rights is still a fundamental norm. These questions will be explored later with reference to NZ's law of privacy where the court looked to the common law to give effect to privacy rights, which could be founded in common law, but were explicitly excluded from BORA by the legislature.[134]

[32] Justices Kirby and Cooke[135] have shared differing opinions on this matter of parliamentary sovereignty. Neither is fallacious and it may well be true that "…the moral significance of the ideal of the rule of law provides justification for judges to reject legislative supremacy and institute judicial supremacy".[136] It is perhaps less of a matter of scholarship than ones own inherent *corpus* constitution. A third dimension is found in a long forgotten foreword by Justice Mahon, who, critically commenting on the white paper for NZ's proposed Bill of Rights Bill wrote;[137]

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131 At 173

132 Ronald Dworkin *Laws Empire* (Harvard University Press and Fontana Press, Cambridge MA, 1986) at 97, 93.

133 At 191.

134 *C v Holland* [2012] NZHC 2155; *Hosking v Runting & Others* [2004] NZCA 34.

135 Justice Michael Kirby "Deep Ling Rights – A Constitutional Conversation Continues" (Paper presented to The Robin Cooke Lecture 2004, Wellington, New Zealand, 25 November 2004); See also the earlier paper Justice Michael Kirby "Lord Cooke and Fundamental Rights" (Paper presented to the New Zealand Legal Research Foundation Conference, Auckland, 4-5 April 1997).

136 Ekins "Judicial Supremacy and the Rule of Law" above n 9, at 127: Although Ekins holds the opposite view.

137 Jerome B Elkind and Anthony Shaw *A Standard for Justice: A Commentary on the Draft Bill of Rights for New Zealand* (Oxford University Press, USA, 1986) at ix: Mahon J made these comments five years after his report into the Erebus disaster, where his Honour alleged an "orchestrated litany of lies" conspiracy and two years after the Privy Council dismissed his accusations as unfounded against Air New Zealand airline executives; See Royal Commissioner Hon. Mahon J *Report of the Royal Commission to inquire into the Crash on*

> As an alternative to the Westminster style, there is another way of controlling executive power. Leave it to the judges to consider whether an act is unlawful or invalid under a Human Rights Act, as infringing a declared human right. The rights of …[various human rights…] are too plain to require attention but they may be and have been within my memory intruded on and eroded by executive power and by uncontrolled parliamentary supremacy… I am in favour of the proposal [for a supreme law Bill of Rights]. I know exactly how the judicial system of New Zealand works. I know of no judge, neither High Court nor Appellate judge, who would knowingly violate his judicial oath by yielding to government pressure.

New Zealanders may rest easy that the as of yet 'in reserve' constraints on Parliamentary power are "theoretical" and "extrajudicial"[138] although this may not always be the case.

[33] Perhaps the advent of MMP and NZ's somewhat "*Bridled Power*"[139] would have tempered Mahon J's suspicion, it is doubtful. Minister Palmer did not succeed in passing a supreme-law Bill of Rights which would allow courts to regulate rights and norms and strike offending rights inconsistent legislation down (akin to the US SC), much to Sir Geoffrey's lament.[140] The thing asserted, a right, such as 'to life',[141] predates the rights statute and emanates either time immemorial or from the common law.[142] BORA provides an accepted societal mechanism, a legislative/regulatory framework, for settling disputes over those rights, i.e. the judiciary by regulating them; by founding their substantive existence in documentary text – codified written regulations. In Mahon J's view, such rights are best governed and adjudicated by the judiciary without a restrictive legislative/regulatory framework and as clear from his lived experience are most trampled by executive/legislative power.[143] The Judicial Oath specifies that the judge will serve His/Her Majesty "according to law", and "…will do right to all manner of people after the laws and usages of New Zealand".[144] The law before The Bill of Rights

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Mount Erebus, Antarctica of a DC10 Aircraft operated by Air New Zealand Limited (Wellington, Government printers, 1981) at [377]; and *Mahon v Air New Zealand Limited & Ors* (New Zealand) 1983 UKPC 29.

[138] See *Cooper v Attorney-General* [1996] 3 NZLR 480 at 484; *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 at 158 (quoting *Cooper*).

[139] Geoffrey WR Palmer and Matthew Palmer *Bridled Power* (Oxford University Press, Auckland, 2004); See in contrast the earlier work Geoffrey WR Palmer *Unbridled power* (Oxford University Press, Auckland, 1987).

[140] Geoffrey WR Palmer *New Zealand's constitution in crisis* (John McIndoe, Dunedin, 1992) at 60: Sir Geoffrey opines of its "...relatively humble status as an ordinary act" but does conclude that even though it does not allow courts to strike down Acts it still "changes a great deal".

[141] Bill of Rights Act, s 8.

[142] Immemorial or to ascribe a date; with the invasion of the Normans in 1066AD and refined by the Plantagenet's in 1154AD.

[143] Likely referring to one particularly long executive tenure, that of Prime Minister Sir Robert Muldoon from 1975 to 1984.

[144] Oaths and Declarations Act 1957, s 18, the Judicial Oath remains substantively the same as in the Promissory Oaths Act 1908 s 4 (151).

Act, qua rights were common law rights/freedoms, now our law is both common law rights and BORA[145] - it is the mechanics of enforcement in the NZ environment that has changed. The "according to law and usages" of NZ provides now that when it comes to courts regulating rights it is primarily through the current BORA framework. BORA is part of the regulatory framework for rights in NZ, and what rights may lie deeper, regarding the common law of NZ, is easy to discern (as not even parliament can disturb them) but difficult to action. Fundamental rights exist outside the BORA framework[146] but is easier for courts to adjudicate inside BORA then out, as a regulatory framework exists.[147] Citizens come to court, as Shapiro suggests, in order to use the framework, BORA, to affect their personal morality.[148]

H ILLUSTRATION: Taylor v Attorney-General - Disenfranchising the Disenfranchised

[34] *Taylor v Attorney-General*[149] was indeed a case of affecting personal morality. A group of citizens wished to affect their personal morality and assert a personal stake in a constitutional norm – universal suffrage. Heath J was faced with the following questions; "…whether Parliament has passed legislation to deny serving prisoners the right to vote in a manner inconsistent with the Bill of Rights, and not justifiable in a free and democratic society. [And]… whether this Court should formally declare that to be so."[150] The framework in this *lis* of distinction was BORA, and it is through "The use of judicial adjudication within a regulatory framework [that] provides scope for private enforcement".[151]

[35] The Attorney-General found the legislation to be inconsistent with BORA and went so far as to state that "The objective of the Bill is not rationally linked to the blanket ban on voting. [As] It is questionable that every person serving a sentence of imprisonment is necessarily a serious

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[145] Bill of Rights Act, s 28.

[146] Above.

[147] Hancher and Moran "Organizing regulatory space" above n 43, at 66

[148] Shapiro "Who guards the guardians? Judicial control of administration" above n 122, at 262.

[149] *Taylor v Attorney-General* above n 74.

[150] At [4].

[151] K. Yeung "Privatising competition regulation" (1998) in Bronwen Morgan and Karen Yeung (ed) *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) 210 at 210: Although Yeung is analysing competition law, her regulatory framework methodology is equally applicable BORA. Her argument is that there was an absence of private enforcement rights in UK competition law, and therefore no framework – as such a framework is needed to enable judicial adjudication in a regulated area.

offender".[152] In this instance majority policy trumped trammeled minority rights.

[36] Faced with the possibility of making the first court declaration of BORA inconsistency in NZ's history,[153] Heath J emphasised that for the High Court to do so would be a "solemn finding".[154] He referred to the framework holding that;[155]

> …the Court is required to take into account quasi-political considerations, to determine whether an inconsistency is "demonstrably justified in a free and democratic society".[156] That is not the type of analysis in which the Courts of this country could legitimately indulge before the Bill of Rights came into force. The power to do so was conferred by Parliament, when s 5 was enacted.

The courts have long questioned the power to declare statutes inconsistent[157] and this is an example of the judicial mechanism self-regulating, as the power to declare is not explicitly provided in BORA, but through implied interpretive reference in s 4. Professor Rishworth explored such a remedy in 1998 and suggested that "But one thing it [s 4] does not do is preclude comment and proclamation".[158] Rishworth concluded and Heath J added emphasis that "…once again *there is room for judicial choice as to where our Bill of Rights should be located on the spectrum of constitutional significance*".[159] Health J placed it high on the mantel.

[37] Professor Geiringer once believed "the prospects for the development of a formal declaratory jurisdiction of this kind in New Zealand are, if anything, receding".[160] Conversely Waldron predicted the NZ Supreme Court "…heading in the direction of something like a UK-style

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[152] Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill* (New Zealand Government, 2010) at [16]–[18]: The effect of the ban was that a person who was imprisoned for a short sentence that happened to fall during the polling period was disenfranchised. It should be pointed out that the Attorney-General did not necessarily himself write the report, all he must do is present it to parliament. Often the job is delegated to the Ministry of Justice.

[153] *Taylor v Attorney-General* above n 74, at [36]. In *R v Poumako* [2000] 2 NZLR 695 (CA) Thomas J at paras [86]-[107] was of the view that "nothing less than a formal declaration will suffice to maintain the constitutional integrity of the Bill of Rights".

[154] *Taylor,* at [30].

[155] At [43].

[156] Emphasising s 5 Bill of Rights Act 1990; "subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject to only such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society", s 4 reads that no other enactments are affected and thus BORA is not supreme-law.

[157] First suggested by F M Brookfield "Constitutional Law" (1992) NZ Recent Law Review 231 at 239.

[158] Paul Rishworth "Reflections on the Bill of Rights after *Quilter v Attorney-General*" (1998) New Zealand Law Review 683 at 693, cited in *Taylor v Attorney-General* above n 74, at [47].

[159] *Taylor v Attorney-General* above n 74, at [47].

[160] Claudia Geiringer "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613, summary of article.

Declaration of Incompatibility",[161] he was only a few months off and tellingly rights declarations are not limited to our apex, Supreme Court, but those lower down. *Taylor* adds to a linage of courts self-regulating their power, by extending rights protecting scope. In *Baigent's Case* the view of the court, on finding that damages could be awarded as a remedy, or indeed that there were in fact remedies available, for a breach of BORA was summarised by Casey J. He noted that it would be odd if, in implementing BORA, Parliament intended citizens to fly to the UN for redress but not attend NZ courts.[162] The judicial mechanism developed within the framework (BORA) to provide for "*Ubi jus ibi remedium*, where there is a right there is a remedy, [which] has a long history," in NZ.[163]

[38] Heath J explicitly regulated outside of the *lis* in *Taylor,* and added definition to the relationship between citizen and state and the regulatory role of the court. Holding that "there is a need for a Court to fashion public law remedies to respond to the wrong inherent in any breach of a fundamental right".[164] It was, according to his Honour's interpretation, the "clear" intention of Parliament for the courts to engage "in this type of quasi-political analysis required by that section".[165] Heath J, via *Taylor*, expanded the courts regulatory reach and like Mahon J before him, recognising the solemnity of the occasion, performed his judicial function "without fear or favour".[166] This is a strong statement from a NZ judge. The case concluded with a declaration of inconsistency ordered [167] and the reasoning that if a declaration (a discretionary remedy) was not made, then "it is difficult to conceive of one when it would be".[168] The market for a remedy once thought 'receding' is now on the rise.[169]

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[161] Waldron "Forward" above n 102, at viii.

[162] *Baigent's case* above n 71, at 701.

[163] *Baigent's case* as above at 717 referencing *Ashby v White* (1703) 2 Ld Raym 938 at 953-954 per Holt CJ "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it".

[164] *Taylor v Attorney-General* above n 74, at [61]: His Honour noted that this would not be any different if the breach was committed by the legislative branch of government as opposed to the executive.

[165] At [61].

[166] At [61] per Heath J: "I do accept that the Court should be fearful about making a formal declaration of inconsistency because of the possibility that such an order might be "ignored with disdain or impunity". There are two answers to that point. The first is that the judicial oath requires me to do right "without fear or favour". The second is that I am not making a political statement in an endeavor to persuade Parliament to change its mind. My function is firmly grounded in the obligation of the Court to declare the true legal position. Any political consequences of my decision can be debated in the court of public opinion, or in Parliament."

[167] At [79].

[168] At [77a].

[169] Professor Andrew Geddis analysed the judgment in his blog post on Pundit: Professor Andrew Geddis "Bliss that it was dawn to be alive" *Pundit* (24 July 2015) <www.pundit.co.nz/content/bliss-was-it-in-that-dawn-to-be-alive>; He also made similar comments to the Justice and Electoral Select Committee after Taylor and in the mainstream media See Andrew Geddis "Message on prisoner voting rights 'unequivocal'"

I But a Poor Mans Remedy?

[39] And yet one may wonder what is the point, pragmatically, of a declaration of inconsistency, what function does it serve; does the declaration serve any rational or practical purpose? Bar the catharsis of airing grievances in public, what do stern words from the bench have, bar the practicalities that costs are likely to be awarded against the Crown.[170] Will the public petition their MPs to remedy the pro tanto rights inconstant law? I suggest not; Arthur Taylor is a member of a very suspect class – over 150 convictions and a sentence end-date in 2022 is unlikely to merit majority sympathy.[171] Is a declaration without a consummate order a poor man's succor for a real remedy?

[40] I contrast, from a regulatory perspective, the constitutional premise in *Taylor* (NZ) with the active protection premise in *Obergefell* (US) as stated by Justice Kennedy; "*An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act.*"[172] If the underlying constitutional protection as enshrined in BORA,[173] and the courts can do little but declare that right breached when a minority, prisoners, especially those who are non-violent and incarcerated for a period which happens to fall on polling day, then do New Zealanders have a right to constitutional protection? Clearly yes, as will be discussed, as it fell to Heath J to regulate the extent of protection. On still may ask is how NZ regulates its fundamental rights in this instance a regulatory failure?[174] In terms of the court issuing mandamus, a remedy available in the USA, whilst rights have been breached this is not a tool normally within the NZ judicial armory. There is nothing stopping the legislature continuing to breach the right, indeed the legislature repealing the infringing Act is unlikely – it is a Westminster style government policy.[175] The courts foundational mechanism lies in regulating that breach.

[41] Taken to the extreme should Parliament pass a capital punishment amendment to the Crimes Act,[176] or as Cooke theorised require the courts to receive in evidence "…any statement appearing to be a

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New Zealand Herald (28 July 2015) <http://www.nzherald.co.nz/opinion/news/article.cfm?c_id=466&objectid=11488139>.

[170] *Taylor v Attorney-General* above n 74, at [80].

[171] Kirsty Johnston "Career crim Arthur Taylor confident of Parole" *Stuff.co.nz* (4 September 2013).

[172] *Obergefell v. Hodges* above n 108, at 24.

[173] Section 12, universal suffrage.

[174] Gunther Teubner "Dilemmas of law in the welfare state" (1986) in Bronwen Morgan and Karen Yeung (ed) *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) 70, at 72.

[175] One of the most important features of a Westminster style Government is Executive majority in the legislature.

[176] By reenacting ss 14-16 of the Crimes Act 1993.

confession of a crime, whether or not obtained by force or any other from of compulsion"[177] is the only 'remedy' available a) *Baigent's* damages (unhelpful to the dammed) and or b) a declaration of inconsistency.[178] Or would common law rights lie so deep?[179] Significant in the NZ democratic dialogue is that the courts, by declaring an inconsistency are sending a signal to the public/legislature/executive. Valid criticism is that three years is a long time between rights breach and elections,[180] and this presumes that the democratic majority is prepared to protect the rights of the 49%. The Governor-General, through the reserve power safeguard is unlikely to refuse assent to a fundamental-rights infringing Bill.[181] The courts are the last bastion to Government or majority rule rights infringement and as such, rights protector of the minority - of which have no less value in their rights being infringed than the majority. Judicial regulation of rights is fundamental constitutional protection, and part of the regulatory mechanism.

[42] So can courts regulate the breach? Inherent in NZ's judicial mechanism is that regardless of its efficacy or success in each instance, a declaration in *Taylor* will not allow Mr. Taylor to vote. Courts can choose their battles when seeking overall/aggregate rights equilibrium. Reintroducing capital punishment might be an infringement which the courts would be prepared to question Parliament's ostensible sovereignty and go further than a declaration, prisoner disenfranchisement was not.[182] I suggest there are reserve powers in the judicial armory and it is a matter of public perception of the remedy awarded whether it is *successful* judicial regulation, but it is regulation nonetheless.

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[177] Robin Cooke "Fundamentals" (1988) NZLJ 158 at 164: The other fundamental breach examples were stripping Jews of their citizenship and disenfranchising women (or men).

[178] Interpretation can also be a remedy; such as reading down the offending statute so that it is rights compliant. However this example is based on the premise that Parliament has drafted the statue in the strongest and clearest terms so that interpretation as rights consistent would not be possible; See Janet L. Hiebert "New Constitutional Ideas: Can new Parliamentary Models Resist Judicial Dominance When Interpreting Rights?" (2003-2004) 82 Tex L Rev 1963; J McLean "Legislative invalidation, human rights protection and s 4 of the New Zealand Bill of Rights Act" (2001) NZL Rev 421 at 429-430.

[179] As suggested by Cooke P in *Taylor v New Zealand Poultry Board* above n 114.

[180] Electoral Act 1993, s 17: The three year term provision is entrenched by s 268 and can only be amended by a 75% majority in the House of Representatives, although s 268 itself is not double entrenched.

[181] Governor-General Sir Anand Satyanand "Speech to launch Dame Catherine Tizard's memoirs" (Speech at Government House Auckland, 16 September 2010) available at ,https://gg.govt.nz/content/cat-amongst-pigeons-book-launch.: Sir Anand reminded that audience of a "particular piece of legislation [that] did not appeal to Dame Cath at all. She asked the question of her responsible official and asked the question of herself and finally said (apparently). *"All right, I will sign my assent, but I will do it in black ink!"* A special bottle was obtained and used for the purpose!"; See also Gavin McLean *The Governors: New Zealand's Governors and Governors-General* (Otago University Press, Otago, 2006).

[182] Cooke "Fundamentals" above n 177, at 163.

On the question of fundamental regulation of citizen rights qua the state Cooke asked of this "question of perennial fascination" - "is it at bottom only interpretation [in relation to Acts of Parliament] or is there something more?"[183] His ultimate conclusion and concern was that there was something more, and this is in part what I ascribe as unique to judicial regulation. Sir Robin concluded that "The Judge's work is part of the pathology of society. With luck one can go through a judicial career without having to confront the really big choices about constitutional power". [184] He found it "ultimately an inescapable judicial responsibility",[185] not as "an incitement to judicial activism",[186] but to identify the fundamental rights and to protect them. This power within the judicial mechanism lies in reserve, the ability to, in only rare instances limit legislative power.[187] This is at the core of the judicial regulatory mechanism in NZ – that there is something more to 'it' than other regulatory mechanisms. The judicial mechanism is entwined with the responsibility to protect constitutional and fundamental rights even at the expense of other norms such as legislative power. It can question its demarcated area. This is a responsibility to be used only on rare occasions and is distinct from all other regulators which may not step outside or question their regulatory area demarcations. Should the Commerce Commission attempt to regulate charities it would suffer from a Judicial Review challenge on the grounds of ultra vires.

[43] There is uniqueness in the NZ judicial-regulatory dynamic when contrasted with the US. As *Taylor* exemplifies vindication of the personal stake in the charter – occasionally breached – may be just as important as substantive remedy for the breach. For should mandamus be always available within the BORA framework (as opposed to being held in reserve for breaches of deep ling rights) than a fundamental norm of our system would have been dramatically altered; that is parliament is sovereign in all but some reserve instances. Individuals in NZ need not await legislative action before asserting a fundamental right but there are differing classes of rights which can be breached. I suggest entwined in the judicial regulatory mechanism is an element of pragmatism. The various theories underlying the provision of protection to the infringed or "suspect classes" all subscribe to the view that what is infringed, is from a majoritarian perspective, framed as a 'political' question as opposed to a constitutional question, and this is further explored in the next section. The regulator must act politically and pragmatically whilst

[183] At 159.
[184] At 159.
[185] At 165.
[186] At 164.
[187] At 164.

still apportioning law and 'rights' in the market – a declaration of inconsistency as awarded in *Taylor* was the right balance.

J Waldron's Process Based Approach Renewed to Judicial Regulation

[44] Waldron's Process Theory argues that political institutions are faced with "circumstances of integrity"[188] as within diverse democracies passionate moral sentiments will differ.[189] Rawls and Hume identified moderate scarcity and limited altruism as the circumstances of justice,[190] when people invariably disagree about moral sentiments (for example euthanasia)[191] then procedures and frameworks must be developed to address the conflicts arising from those conditions and "in a manner that respect the fact of disagreement".[192] The fundamental rights procedure and framework for disagreements between government and citizen, in NZ, is judicial regulation by the court, within the confines of BORA and reserve remedies. It is important that judges are not instruments of popular will and are, when required converse to democracy: their BORA verdicts often anti majoritarian policy. Thus, the fact that NZ judges exist in their positions 'un-democratic' and their adjudication can be anti-democratic is a vital feature of democracy itself. Parliament does not solely own "the democratic mantel".[193] The judiciary is the regulator for social justice and 'circumstances of integrity' en mass when a *lis* of constitutional/rights distinction presents itself.

[45] The judiciary can act both as a counter-weight to the abuses of government, executive branch and also to the inherent majority swing of democracy and "all are partners in the common endeavor of representative government."[194] There are successive popular instances where the judiciary acts as the enforcer of the democratic will when it perceives the interpretation of rights is not reflected in the policy of the Government. An extrajudicial comment from Justice Blackmun who wrote leading judgment in *Roe v. Wade*[195] expressed personal concern, and that of some of his brethren of pandering to perceived citizen majority influence;[196]

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[188] Jeremy Waldron *Law and Disagreement* (Clarendon Press, London, 1999) at 191.

[189] At 207.

[190] At 198. See Hume *A Treatise of Human Nature* (1738) Book III, Part II, s. ii at 495–496. See also John Rawls *A Theory of Justice* (Harvard University Press, Cambridge MA, 2005).

[191] See *Seales v Attorney-General* [2015] NZHC 1239.

[192] Ward "The Politics of Disagreement: Recent Work in Constitutional Theory", above n 119, at 431. Redlich "Judges as Instruments of Democracy", above n 105, at 152.

[194] At 156.

[195] *Roe v Wade*, above n 115.

[196] Justice Harry A. Blackmun "Justice and Society" in Shimon Shetreet (ed) *The Role of Courts in Society* (Kluwer Academic Publishers, The Netherlands, 1988) 439 at 442: You only need look at images of protestors standing outside the US SC waving flags, chanting and waiving banners when the Court debated

> How powerful – at least in my country – is the bench… I am struck indeed with the "awefullness" of that power…[the judiciary should] refrain from excessive use of that power and yet – yes – utilize it when it is necessary so to do …[there can be an] exercise of raw Judicial power.

His colleague on the bench, Justice White remarked, "The system works, but why?"[197] That the NZ judiciary lacks the "awefullness" of that power is both cause for celebration and concern, especially should, if in instances of reserve, they need to exercise power and find it difficult. The underlying sentiment from Justice Blackmuns' erstwhile need to pick the mood of the public and self-censor the "raw Judicial power", are manifestly overt political considerations, or in judicial parlance 'policy considerations'. The NZ judiciary does not grapple with such considerations the same degree because they lack the same outward power, although of necessity they may hold it on reserve.

[46] Courts are often portrayed as "passive" in so far as they are "institutions" which can set their agendas "in only the most limited sense" as they respond to "actual controversies brought before them by real litigants", the *lis*.[198] This is incorrect in relation to courts in general,[199] and to the NZ Supreme Court specifically. It has an institutional role it has self-constructed very similar to the agenda setting of the North American Courts, US SC and the Canadian Supreme Court.[200] The NZ Supreme Court exercises discretionary jurisdiction choosing cases and shaping the law via *lis'* of distinction – regulating outside the *lis* to affect constitutional change en mass.[201]

[47] *West Virginia State Board of Education v. Barnette*[202] is a notable US SC decision and an example of a courts institutional role. The majority held that the freedom of speech clause in the Constitution granted protection from mandatory swearing-saluting allegiance to the flag.[203] Justice

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gay marriage in *Obergufell v Hodges* to understand the potential for citizen influence, although from a particular segment of mobile society. Similar images are not unheard of, but not normally seen outside the New Zealand Supreme Court on Lambton Quay, Wellington.

[197] At 443.

[198] HW Perry *Deciding to Decide: Agenda-Setting in the United States Supreme Court* (Harvard University Press, Cambridge, MA, 1991) at 11; Dame Sian Elias (Chief Justice of New Zealand) "Speech at the Special Sitting of the New Zealand Supreme Court" (Supreme Court of New Zealand, Wellington, 1 July 2004).

[199] Evans and Fern "From Applications to Appeals: A Political Science Perspective on the New Zealand Supreme Court's Dockets" above n 31, at 55.

[200] At 55.

[201] There is no right of appeal to the Supreme Court, applicants must seek leave and the court picks cases in the public interest or of general importance in developing the law: Supreme Court Act 2003, s 13(1),(2). Lower courts can also exercise this institutional function by adjudicating many cases and picking particular judgments by which to shape the law.

[202] 319 U.S. 624 (1943).

[203] The case is notable because it highlights the supremacy of the First Amendment right, even with regards something considered so very American and patriotic at a time when the country was at war.

Fankfurter in his minority dissent articulated a view not often seen in court arbitrating constitutional decisions;[204]

> The tendency of focusing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy….

In his opinion there was something greater at stake than the fundamental rights of freedom of speech and expression provided for in the Constitution. Ergo the US's underlying fundamental charter may not always align with typical judicial concerns such as fairness, equity, justice and wisdom and there may be at times a justifiable imbalance[205] between state and citizen rights.

[48] Frankfurter J's *Barnette* dissent is most notable for explicit reference to his Judaic background as a way of preempting public criticism for not deciding along his presumed personal bias in supporting First Amendment rights. The group who refused to swear allegiance to the flag where religious minorities objecting on expression and religious grounds;[206]

> But [*as if to preempt criticism*] as judges we are neither Jew nor Gentile, neither Catholic nor agnostic…As a member of this Court I am not justified in writing my private notions of policy into the Constitution…. It can never be emphasized too much that one's own opinions about the wisdom or evil of law should be excluded altogether when one is doing one's duty on the bench.

It is an explanation of which J.A.G Griffith would be skeptical,[207] but one exemplified in and reminiscent of both Heath and Mahon JJ's references to their judicial oaths.

K ILLUSTRATION: Valerie Morse and Free Expression

[49] The NZ Supreme Court regulated a comparable *lis* to *Barnette* providing a similar exemplification of its institutional role. Yet it regulated in a decidedly different way in *Valerie Morse v The Police*[208] thus highlighting our unique, almost indirect, but no less successful, regulatory mechanism. Ms. Morse burned the NZ flag on the grounds of the Victoria University of Wellington Law School in full view of the Cenotaph and Anzac day dawn war-memorial service.[209] She argued that her act was an expression of opinion protected by the freedom of expression clause in BORA,[210]

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[204] *West Virginia State Board of Education v. Barnette* above n 202, at 646 – 647.

[205] As opposed to a market equilibrium, or indeed a new equilibrium as the case may be.

[206] *West Virginia State Board of Education v. Barnette* above n 202, at 670 – 671.

[207] John Aneurin Grey Griffith *The Politics of the Judiciary* (1st ed, FontanaCollins, London, 1977).

[208] *Valerie Morse v The Police* above n 28.

[209] At [1].

[210] At [1], per Bill of Rights Act 1990, s 14: "Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form."

and was convicted in the District Court of 'offensive and disorderly behavior'.[211] Her appeals to the High Court and Court of Appeal were dismissed.[212] The Chief Justice chose to grant the appeal finding the charge and subsequent convictions based on "an erroneous understanding of what constitutes offensive behavior".[213] Tipping J referred to BORA only in passing.[214] He found that "…those affected are required, for the purpose of the necessary assessment, to be appropriately tolerant of the rights of others" but that whether the defendants conduct was offensive "in law" was a "contextual decision".[215] Only McGrath J found the behavior clearly offensive in terms of the charge, but "expressive conduct, which is protected by the right to freedom of expression".[216] He considered whether the limitation was justified per s 5 BORA and found that the charge was not warranted.[217] Dr. Farmer, QC, who often appears before the Court, concludes that "The Supreme Court's judgment in *Morse* must raise real questions of the ability of appellate judges who are far removed from the day-to-day world of ordinary New Zealanders to interpret and apply statutes that are said to embody New Zealand values" as "Anzac Day is part of the fabric of this Nation".[218]

[50] This was not a judgment, similar to that as expressed by the Court of Appeal[219] - *'Bill of Rights Freedom of Expression versus Disorderly Conduct Flag Burning'* - but of contextual analysis of the charge "objectively assessed".[220] The result from a constitutional/rights perspective, however, was that Ms. Morse had the charges against her dismissed. "There is a view that the Supreme Court should focus on the great social issues of the day",[221] and the Court must have viewed *Morse* as such as it was only one of two criminal cases between 2004 and 2013 which resulted in judgments from each member of the bench.[222] The citizen-majority do not always appreciate the protection of rights and the

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[211] Summary Offences Act 1981, s 4(1)(a).

[212] *Valerie Morse v The Police* above n 28, at [2]. Technically Elias CJ found that the lower courts had made an error of law, however the distinction between labeling this case as an appeal error of law and hearing the facts *de novo* is vague when considering the extended discussion of facts in the judgment.

[213] At [59] per Blanchard J summarising Elias CJ's judgment.

[214] At [71] per Tipping J.

[215] At [72].

[216] At [104] per McGrath J.

[217] At [117], Arnold J did the same at [124].

[218] Jim Farmer "A Barrister's Perspective" in Mary-Rose Russell and Matthew Barber (ed) *The Supreme Court of New Zealand: 2004-2013* (Thomson Reuters, Wellington, 2015) 61 at 88.

[219] *The Queen v Valerie Morse* [2009] NZCA 623.

[220] *Valerie Morse v Police* above n 28, at [7] per Elias CJ; Above n 219..

[221] Farmer "A Barrister's Perspective" above n 218 at 83.

[222] Prasad, Biggs and Robertson "Criminal Law" above n 122, at 348.

judgment has been described as "caustic"[223] for allowing the *Morse* expression. Reminiscent of Frankfurter J's *Barnette* dissent, Thomas J, a retired member of the Supreme Court bench, writing extra judicially under judicial alias as High Court Justice Athena J[224] said it was a case;[225]

> …in which an impoverished amoral concept of "public order" is judicially ordained; a law in which the right to freedom of expression trumps – or tramples upon – other rights… to which individuals and minorities may be exposed to uncivil, and even odious, ethic, sexist, homophobic, anti-Christian, anti-Semitic, and anti-Islamic taunts providing no public disorder results… a law which demeans dignity… a law in which the mores or standards of society are set without regard to the reasonable expectations of citizens in a free and democratic society… [T]hat is beyond the pale in a civil and civilized society.

Evans and Fern, perhaps in defense of the Supreme Court's conscious decision not to adjudicate *Morse* on rights grounds as one of the great social issues of the day argue that the Court is in its "capital building years, and, "in futures, it is conceivable that political conflict…and the institutionalisation of judicial power may combine in ways that make for a more assertive Supreme Court".[226] NZ and UK courts do not typically display the linguistic candor of Athena J[227] even though her Honour came down on the opposing side of the rights divide. Perhaps one-day dissents of the ilk of Frankfurter and Athena/Thomas J, or rights asserting decisions as in *Obergefull* or the majority in *Barnette* who protected freedom of speech/expression would issued from the bench once the NZ court becomes more assertive.

[51] The *Morse* decision was popularized as "Ruling makes flag burning legal, says expert". The expert, Bill Hodge of Auckland University was quoted as saying "You can now burn the New Zealand flag any time, anywhere you like".[228] With respect, that would be the case if the court had held that the protection of freedom of expression[229] reigned supreme, as the US SC did in *Barnette,* but it did not. The Court held that the "case was distorted by failure to identify the meaning of the provision [of the

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[223] Farmer "A Barrister's Perspective" above n 218 at 87.

[224] The name 'Athena J' no doubt chosen as a homage to a feminine judicial embodiment of judicial wisdom.

[225] EW Thomas "*Bonkers and Ors v The Police:* Judgment of Athena J in the High Court" (2011) 19 Waikato Law Review 94 at 112.

[226] Evans and Fern "From Applications to Appeals: A Political Science Perspective on the New Zealand Supreme Court's Dockets" above n 31, at 58.

[227] Joseph "Parliament, the Courts, and the Collaborative Enterprise" above n 6, at 340.

[228] Clio Francis "Ruling makes flag burning legal, says expert" *Stuff.co.nz* (7 May 2011) <http://www.stuff.co.nz/dominion-post/news/4973904/Ruling-makes-flag-burning-legal-says-expert>.

[229] Bill of Rights Act 1990, s 14.

Summary Offences Act] in issue" and it was not "…confident on the evidence that a conviction could properly have been entered [as the behavior was not] assessed as objectively disorderly".[230] In no way has flag burning made legal, on the contrary as long as it is objectively disorderly or provocative (for example had Ms. Morse been situated on the Cenotaph not across the road at the Law School) it is still illegal in black-letter law.[231] However the regulatory effect, *sotto voce*,[232] is that the Police (as a branch of the executive) will now no longer charge a citizen with an offence for burning the flag, and the pragmatic results of *Barnette* contrasted with *Valerie Morse* are the same. Both courts issued clear directions to the executive branches, but with different regulatory dialogue.

L Privacy Rights and Regulation outside BORA

[52] The judiciary also regulates rights in *lis' Citizen v Citizen,* which have writ large aggregate affect on society as a whole. Courts no longer 'find and declare the law' and there is wide recognition of the judicial function of law making,[233] the common law is not a library yet to be catalogued by the judiciary. With that comes recognition that the judicial decision is therefore dependent on both the inclination of the judge and the traditions of the society. Due to the system of precedent the outcomes of disputes are shaped by previous disputes, and thus the role of the court in the society is influenced by the nature of previous disputes, *stare decisis*, brought before them.[234] An expansion of the judicial role in society, especially with regards disputes of rights and public policy, plays an important regulatory function and therefore the judiciary's role cannot be underestimated.

[53] Sir Geoffrey Palmer, himself as Attorney-General recommending over forty-eight judicial appointments, stated;[235]

> It is clear that as the chief expositors, applicators and significant developers of the laws, the Judges must be regarded as important. They are important because the law is important…they make the legal rules in a not inconsiderable number of instances which will be applied to future conduct.

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[230] *Valerie Morse v The Police* above n 28, at [58] per Elias CJ.

[231] Under s 4(1)(a) of the Summary Offences Act 1981.

[232] 'Soft voice'. The result was that the Court sent a direction to the Executive Branch, the Police, in *sotto voce,* without changing the underlying illegality of the offence.

[233] Shimon Shetreet "Judging in Society: The Changing Role of Courts" in Shimon Shetreet (ed) *The Role of Courts in Society* (Kluwer Academic Publishers, The Netherlands, 1988) 467 at 467.

[234] At 468.

[235] Geoffrey Palmer, "Judicial Selection and Accountability: Can the New Zealand System Survive?" in FM Brookfield, BD Gray, RB McClintock and Lord Cooke (ed) *Courts and Policy* (Thomson Brookers, Wellington, NZ, 1997) 11 at 11.

I go further than Sir Geoffrey, the judiciary as a class often make the legal rules, either primary or secondary,[236] they interpret them and they apply them to the fact patterns before them and give directions either via precedent or obiter for future applicability. They can create tests or develop new areas of law to further regulate conduct. This is evidenced in the area of privacy law, firstly by *Hosking v Runting*[237] where the Court of Appeal accepted that there was a common law tort of privacy in NZ. No tort existed before, and the court created the two-part test of the reasonable expectation of privacy and the publicity of facts highly objectionable to the reasonable person.[238] The Courts overall regulation of social conduct was subject to the defense of legitimate public concern/interest emanating from the right of freedom of expression.[239] Subsequently Whata J in the High Court faced with a similar yet distinct situation where there was no publicity of objectionable content held that the NZ common law should recognise a tort of intrusion into seclusion and created both the tort and test for it.[240] Before *Hosking* or *C v Holland*[241] NZ law did not know of ether civil actions nor had suitable remedies available to victims/plaintiffs harmed. The legal answers, substantive rights for wrongs committed, were judicial creations, wholly legitimate responses to social conduct unbecoming in NZ society. Creatures of common law permitted and informed by the NZ constitution, in so far as such creatures could be created and the creature, privacy, was recognised as a right. Therefore what matters is, in doing so, by not just effecting remedies (as it the accepted norm) but by creating rights, is where do judicial officers see themselves within the constitutional framework? An answer postulated by J.A.G Griffith is that;[242]

> It is the creative function of judges that makes their job important and makes worthwhile some assessment of the way they behave, especially in political cases. It must be remembered that in most cases for most of the time the function of the judge…is to ascertain the facts. But when question of law do arise, their determination may be of the greatest importance because of the effect that will have on subsequent cases…

[54] Should *C v Holland* not have appeared on Whata J's civil list that day then the regulation of our social conduct may be very different – in that

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[236] Rules about rules and therefore procedural in nature, or rules themselves. Secondary rules can be as important as primary rules, for example the rules of evidence; See also Carol Harlow and Richard Rawlings *Law and Administration* (2nd ed, Butterworths, London, 1997) at 205; Kenneth Davies *Discretionary Justice: A preliminary Inquiry* (5th ed, University of Illinois Press, Illinois, 1976) at 215.

[237] *Hosking v Runting & Others* above n 134.

[238] At [45]-[49] and [108]-[116].

[239] At [117], and [129]-[130].

[240] *C v Holland* above n 134, at [94].

[241] Above.

[242] Griffith *The Politics of the Judiciary* above n 207, at 17.

specific sphere it may still be unregulated. For if the Judge who heard the case had not seen it as his judicial function to regulate good social morays and conduct in an area where parliament would not[243] then neither the tort would exist but a wrong[244] would go forth without a remedy: an important declaration that admonishing said conduct would be missed. Moreover the 'manner' that the judiciary respects and responds to civil/social disagreement, as Waldron identifies, the process theory, is an equally important judicial function,[245] as indeed is judicial regulation of society and social conduct between citizens. The judicial regulatory mechanism is not just limited to constitutional matters and rights adjudication between citizen and state but extends into the commercial sphere.

[243] By creating a civil regime for breach of privacy, this did not occur in part until the Harmful Digital Communications Act 2015.

[244] The 'wrong' in *C v Holland* as explained in the judgment was that Mr. Holland had hidden a camera in the ceiling cavity above the shower and recorded Ms. C showering and then watched theses videos for his own gratification. Ms. C was horrified when an acquaintance discovered the videos on Mr. Holland's laptop.

[245] Waldron "Forward" above n 102, at vii; Waldron *Law and Disagreement* above n 188, at 191.

IV Illustration: The Early Political Judge through Commerce

> Every practicing barrister knows before which judges he would prefer not to appear in a political case…This however is to say little more than that, as we have already remarked, judges are human with human prejudices. And that some are more human than others…But if that were all we would expect to find a wide spectrum of judicial opinion about political cases. Instead, we find a remarkable consistency of approach in these cases concentrated in a fairly narrow part of the spectrum of political opinion. It spreads from that part of the center which is shared by right-wing Labour, Liberal and 'progressive' Conservative opinion.[246]
>
> J.A.G Griffith *The Politics of the Judiciary* (1977)

[55] In this example the Judiciary are vested with wide scope to act as Parliament's political regulators. They regulate specifically in a commercial private rights arena, having an effect wider than the singular *lis* in the particular *inter se* dispute. They are rights regulators in a non-constitutional *lis*.

[56] In 1956, the Restrictive Practices Court was established in the UK.[247] Its function was an early precursor to anti-competitive practices tribunals and it was to provide "…for the registration and judicial investigation of certain restrictive trading agreements, and for the prohibition of such agreements when found contrary to the public interest"[248]. Comprising of a mixed bench of High Court judiciary and lay businessmen, it's scope was much wider than later competition regulation under NZ's Part 2 of the Commerce Act 1986, and indeed is its current UK iteration. The court could void restrictive competitive agreements between businessmen on the criterion that "…a restriction is deemed to be contrary to the public interest unless the court is satisfied that it is reasonably necessary or that its removal would be more harmful to the public than its retention."[249]

[57] Griffith identifies a decidedly 'political' case in the courts tenure, in *Re Yarn Spinners Agreement,*[250] only the second case ever heard by this court and one of its most political. Precursors to the Act contained no

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[246] Griffith *The Politics of the Judiciary* above n 207, at 31.

[247] Restrictive Practices Act 1956 (UK).

[248] Preamble.

[249] Griffith *The Politics of the Judiciary* above n 207, at 40.

[250] *In Re Yarn Spinners' Agreement (No. 1)* (1959) LR 1 RP 118; [1959] 1 All ER 299 (RTCP); [1959] 1 WLR 154.

concrete definition of what was or was not in the public interest[251] and yet this nebulous void was of little concern to the House of Commons. In the Commons many of the debates focused on the establishment of the "special court of law" to adjudicate on the validity of restrictive agreements i.e. were they within the public interest and thus permissible.[252] The Conservative Government found it desirable that decisions concerning public interests aspects of trade were left to the judiciary, whereas the Labour opposition contended that such issues were non-justiciable and ought to be decided by the Minister (which ironically would have been a Tory Minister).[253] A compromise was made and the preamble to the Act provides vesting a special court with investigatory powers comprising a mixed bench of judges and laymen.[254]

[58] Every practice that came before the court labored under a rebuttable presumption that it was contrary to the public interest. Section 20(1) provided the declaratory power of the court to hold any restriction (business agreement) as "…contrary to the public interest" and further void those restrictions.[255] Whist the Act listed several circumstances availing the business to argue that their practices were in the public interest, the court's wide discretion could outweigh any potential justification due to two specific clauses. Firstly, the restriction must not be unreasonable and must be balanced against the detriment it inflicted on the public at large (not the benefit to the business or the industry) or third parties to the agreement.[256] Secondly existed the "famous tailpiece" of the legislation, s 21.[257]

[59] Once the businessman has argued that his practice comes within one of the seven availing circumstances[258] the tailpiece of the legislation comes into operation. For the court to find in favor of the business it must be "…satisfied…that the restriction is not unreasonable having regard to the balance between those circumstances [the seven availing] and *any*

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[251] Laurens H Rhinelander "The British Restrictive Trade Practices Act" (1960) 46 Va Law Rev 1 at 6.

[252] (1956) 549 GBPD HC 1932.

[253] Above; (1956) 551 GBPD HC 448; (1956) 198 GBPD HL 928-29; (1956) 951 GBPD HC 2018, 2023; (1956) 551 GBPD HC 431-32; (1956) 198 GBPD HL 24-25, 75.

[254] Restrictive Trade Practices Act 1956 (UK), s 2 - 5. Although at the time the extent to which the laymen held sway can be doubted. To emphasise the success of this model lay business men and women in NZ can also sit alongside High Court judges on certain brought under the Commerce Act 1986 per s 78. They did so in *Wellington International Airport & ors v Commerce Commission* [2013] NZHC 3289 which at the time was NZ's longest judgment at [1949] paragraphs. It concerned part 4 of the Commerce Act and the case was heard before Clifford J and lay members Mr. R Davey and Mr. R Shogren.

[255] Restrictive Trade Practices Act 1956 (UK), s 20(3).

[256] Section 21(1)(a)-(g).

[257] Rhinelander "The British Restrictive Trade Practices Act" above n 251, at 30.

[258] In s 21(1) the seven are; "public safety", "public benefit", small businessman (four and five), "unemployment", "export", "ancillary restrictions".

detriment to the public or to persons not party to the agreement…resulting or likely to result from the operation of the restriction".[259] I emphasise this to highlight that in essence decisions as to whether a trade practice was 'restrictive' had some consideration as to the affect on the market and yet judicial discretion outweighs this via a broad 'tailpiece' of "any detriment to the public".

[60] In *Re Yarn Spinners Agreement* it was found that the price of yarn was higher than it would have been on the free-market.[260] To avail this was the considerable localised unemployment that would result from ending the scheme,[261] approximately 100,000 people in eleven areas.[262] Notable of the courts political statements is the following finding;[263]

> We are satisfied that the industry can and ought to be made smaller and more compact…We cannot see why price invasion [from imports] is a bad thing or something which ought to be prevented; it is only one form of normal trade competition…Competition in quality is no doubt a benefit, but the removal of the restrictions would not prevent it. [Regarding unemployment]…But we are clear that once we have reached a conclusion of fact, it is our duty to disregard the consequences of our findings.

[61] That the use of judges to make "…political and economic decisions was widely criticised in 1956"[264] is hardly surprising. That eight years later the same court's jurisdiction was extended by the Resale Prices Act 1964 (UK)[265] is even less surprising as the decisions that the court made (essentially trade liberalising in *Re Yarn Spinners*) should they have been made by the Minister would have been deeply unpopular in the electorate but necessary for the economy overall. The Lord Chancellor, Lord Gardiner, that year referred to the Court and noted "…the increasing practice in the last ten years of employing Her Majesty's Judges to perform tasks other than their ordinary tasks" and then added "I am not quite clear whether Her Majesty's Judges have any special qualifications to determine what are really socio-economic question, but they have done well".[266] It is a trend that the judiciary has continued to excel at not just in areas of commerce, and do not shy away from.

[62] Griffith points to doubts regarding the infringement of judicial purity, the foray into the political arena, trade agreements, and concludes that the Restrictive Practices Court may have provided some precedent in

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[259] Section 21(1) (final clause).

[260] *In Re Yarn Spinners' Agreement (No. 1)* above n 250.

[261] Rhinelander "The British Restrictive Trade Practices Act" above n 251, at 48.

[262] Griffith *The Politics of the Judiciary* above n 207, at 41.

[263] *In Re Yarn Spinners' Agreement (No. 1)* above n 250, Judgement of Mr Justice Devlin at 41.

[264] At 41.

[265] As above.

[266] (1964) 258 GBPD HL 835, 836.

judicial involvement in the field of industrial relations.[267] More so than providing precedent it is an example of judicial expansion in not only the regulating trade conduct (as opposed to contractual terms), which is not a traditional judicial function, but also Parliament expecting of them to preform 'other than their ordinary tasks' more generally i.e. public policy regulation. In 1956 there exists a clear devolution of regulation from the House to the Court via the term 'public benefit'. This phrase in a judicial setting is not unusual and indeed in the area of tort law and the duty of care it is bread and butter,[268] but it is the context of its operation which is noteworthy.[269] Who better than to decide a politically unpalatable decision than a judge who is only disparately constitutionally responsive to the democratic will? But why is a judge deciding if free trade is for *pro bono public*? Is the judge any better qualified to do so than the politician? If the judge is just as qualified, than as Griffith argues, they must also be political actors in adjudicating economic questions of 'public benefit' and in carrying out this regulatory function.

The authority for the judges on the Restrictive Practices Court to make decisions came from Parliament, a devolution, and yet without that legislative grant it is hard to found the power on any constitutional ground. Trade, in the *Re Yarn Spinners* example, is the realm of the executive. One academic noted in 1960 that this separate court was a "unique experiment"[270] in a discrete area of law. In 1956 it was considered responsible for a 'special court' to be established, for fear that a normal Court of Queens Bench would be 'tainted' were it to make economic decisions in the public interest. Now, however, the separation requirement does not exist; all courts are equally suited to regulate in what was once considered demarcated special areas.[271]. The Lord Chancellor noted at the final reading of the bill that it was "…an example of the dynamic use of the law" and "…one which provides for those affected the best machinery for arriving at the truth and reaching justice which the world has so far devised".[272] The conceptualisation of

[267] Griffith *The Politics of the Judiciary* above n 207, at 41.

[268] Hazel Mclean "Negligent Regulatory Authorities and the Duty of Care" (1988) 8 Oxf J Leg Stud 442.

[269] Louis Blom-Cooper QC, Brice Dickson and Gavin Drewry *The Judicial House of Lords* (Oxford University Press, Oxford, 2009) at 216: Commenting on Lord Reid's famed refute in *Home Office v Dorset Yacht Co Ltd* [1970] UKHL 2 to the suggestion as raised in *Williams v. State of New York* 127 NE 2d 545 (1955), 550 at [15], of the "stoutness of heart among New York Prison authorities" said "...But my experience leads me to believe that Her Majesty's servants are made of sterner stuff" and found in favor of a duty of care.

[270] Rhinelander "The British Restrictive Trade Practices Act" above n 251, at 56.

[271] Even with regards patents where there exists a specialised tribunal adjudicated by a Commissioner, a specific right of appeal exists to a non-specialised High Court: Patents Act 2013, s 214. Litigation at first instance can be conducted before the Intellectual Property Office of New Zealand at significant costs savings (but does not have to be), Patents Act 2013, Part 4; See also s 92 'Opposition to grant of patent' where a hearing is held in font of a Commissioner but an appeal is before the High Court. Unlike in the UK, in NZ there is no specific High Court list for patent appeals – they go on the general commercial list.

[272] (1956) 199 GBPD HL 350.

truth and justice has also changed; what is 'truth' was once factual, now it is court policy making, regulating social conduct.[273] Courts in a dispute between the Crown, acting on behalf of the aggregate public, and private businessman (the restrictive practice) now decide the correct/just public interest of that agreement. The courts are apparently the best machinery for doing so, even though such question is political in nature. *Audi alteram partem,*[274] where the other side is now the public at large and the judicial decision is no longer one just of the fact of record and correct law but regulatory due to its "… capacity for standard-setting… [And the] capacity for behavior-modification to change the state of the system".[275] Therefore the regulatory mechanism extends far beyond rights adjudication in the constitutional arena, and in commerce, the operation of the mechanism as in *lis'* constitutional, is political in nature.

[273] *Valerie Morse v The Police* above n 28: where the Supreme Court decided that the behavior – burning the flag on ANZAC day, was socially acceptable, as it did not meet threshold of the charge of 'offensive behavior'.

[274] A fundamental principle of natural justice; 'listen to the other side', or 'let the other side be heard'.

[275] Hood et al *The Government of Risk* above n 90, at 23.

V Illustration: Judicial Review as Juridical Political Regulation

> *"The Orthodox View"*
> Standard public law texts do not usually admit the relationship between law and political science… the majority do their utmost to separate law from its political context. The dominant view has been that law is not a branch of political science, a view accepted by lawyers and political scientists alike.[276]
>
> Harlow and Rawlings *Law and Administration* (1997)

[63] An exposition of a new judicial regulatory mechanism focusing on rights and regulating constitutional norms would be lacking if it did not end without touching on Judicial Review. Judicial review is the ultimate form of judicial regulation over public functionaries. The core rational of Judicial Review in the twenty-first-century is summarized as "the reasonable and political judge upholding the rule of law".[277] Professor Waldron comments that the establishment of the NZ Supreme Court "has not lead to anything remotely like a judicial revolution"[278] and that "it has not approached [Rights/BORA matters] in the excess of activist enthusiasm that some politicians expected."[279] This is not to say that in the aforementioned regulatory exposition society should "underestimate the importance of straightforward business-as-usual affirmations of the rule of law by our courts, even when that does not involve the pyrotechnics of judicial review".[280] Lord Cooke has highlighted "the historical fact that what is now called judicial review long preceded democracy[/parliament]…"[281] Judicial Review, or regulating the rule of law, was a political exercise long before there were elected politicians. Judicial review is not just political but is regulatory in nature. Now as such review commonly focuses on judges reviewing actions of the executive branch, or public functionaries carrying out the policies of politicians, it is no longer controversial to reject the orthodox view and label judicial review a political exercise, even if traditional notions of an apolitical judicial function would find this recognition "unpalatable".[282]

[64] Detached separation between political and judicial spheres, to the English orthodoxy, was originally considered to buttress rule of law

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[276] Harlow and Rawlings *Law and Administration* above n 236, at 1.

[277] Timothy Andrew Orville Endicott *Administrative Law* (2nd ed, Oxford University Press, Oxford, 2011) at 66.

[278] Waldron "Forward" above n 102, at vii.

[279] Above at xi.

[280] Above at xi.

[281] Lord Cooke "The Road Ahead for the Common Law" above n 75, at 275.

[282] As above.

arguments, as "legal ideas were invisible in the elaboration of political argument".[283] This gave the former purity and legitimacy. Regulatory scholars Hancher and Moran concluded in the late 1980's that "In the UK especially, law has not been viewed as the great interpreter of politics".[284] Hansard was not to be cited in Court even on matters of Parliaments intent, and this position only changed in the early 1990's.[285] This illogical separation between legal and political spheres was idealistic, false and flawed as the 'spheres' where never distinct. This purist 'separation' of politics and law led to the above conclusions of regulatory scholars Hancher and Moran, Wade criticises the purists;[286]

> But if the price of preserving the purity of constitutional law is that one must ignore the political pros and cons of what are, after all our most essential laws, then I would say that the price is too high and the lack of realism is excessive. This is the world in which political scientists and economists have to live in any case

With respect to the Hancher and Moran the view that law was not, and should not be, an interpreter of politics, in their regulatory field has lead to a lack of development of a judicial regulatory theory sitting outside of the discrete grounds of judicial review. Judicial Review is inherently a political exercise, regulatory in nature and room exists for a judicial regulatory mechanism, as argued in this paper, to develop along rights and constitutional grounds separate from judicial review. Judicial review as a form of regulation emphasises the reasonableness of the administrators' action,[287] whereas the judicial regulatory mechanism looks to the wider constitutional and rights implications of judicial adjudication – especially in cases which are not judicial review cases such as *Taylor* or *Valerie Morse.*

[65] It is a classical liberal ideal that judges are to act as arbiters between citizens and the state,[288] and this administrative law principle flows though to the regulatory mechanism. Throughout this paper I have used the example of a *lis* of distinction of which might be a *lis* between *Citizen v State*. Examples provided were *Taylor* and *Valerie Morse.* Neither were judicial review cases, however both were rights/constitutional and had the flavor of the judiciary checking legislative/executive power against rule of law principles. Griffith radically called into question the idea of apolitical legal behavior as "…the idea of apolitical law is itself

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[283] As above, citing Sir Cecil Car *Concerning English Administrative Law* (Oxford University Press, Oxford, 1941) at 10-11.

[284] Hancher and Moran "Organizing regulatory space" above n 43, at 65.

[285] *Pepper v Hart* [1993] AC 593 (HL) at 638-639, 644-649.

[286] Sir William Wade *Hamlyn Lectures Thirty-Second Series: Constitutional Fundamentals* (Stevens & Sons, Lincoln's Inn, 1989) at 2.

[287] In any sense or use of the word political; of or relating to the affairs of people, the government, country.

[288] Harlow and Rawlings *Law and Administration* above n 236, at 3.

political"[289] yet there is a seemingly inherent conflict with judges acting simultaneously as purely neutral 'legal' arbiters and as political actors in both judicial review and by extension in judicial regulation in further fields. Intrinsic in the rule of law is the separation between judicial and political powers,[290] and ascribing to the judiciary political powers in regulation is an apparent conflict. Yet by comparison, in tort law political statements can subsist under the guise of 'policy' arguments. This questions the term 'politics', and perhaps with regards judicial regulation we should think of the word *de novo*. Indeed even in a *lis* outside of the constitutional realm, scope can be found for legitimate judicial policy making - in the form of regulations;[291]

> Law plays an important role in shaping political behavior in liberal democracies, but it is often assigned an especially significant role with respect judicial behavior.

[66] Lord Denning, MR, in a case concerning the duty of care in a tort lacking any precedent decided, with "refreshing candor"[292] that, "In the end", "it will be found to be a question of policy, which we, as judges, have to decide".[293] Therefore is the rule of law in administrative law incorrectly associated with the idea of a politically neutral judiciary and is it all the more important that when the judiciary regulates conduct we consider it as such? The answer is yes as "the price is too high and the lack of realism is excessive" by not recognising the key political-regulatory function of judiciary.[294] The high price is akin to having blinkers on at a crossroads. Thomas J recognised this, concluding that a shift in approach is both needed and expected by the community; [295]

> The permanence of those principles and the enduring nature of the values underlying them are in danger of being obscured if the shift in judicial approach is not anchored in the changing needs or expectations of the community.

Judicial regulation, its development and its recognition, is commensurate with the new judicial résumé, society expects and calls for "Independent and active judges",[296] and in turn judges fulfill the role. The 18th century guise of judges simply declaring law, as opposed to making it, is

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[289] Griffith *The Politics of the Judiciary* above n 207; Harlow and Rawlings *Law and Administration* above n 236, at 3.

[290] At 3; Michael Oakeshott *Rationalism in Politics and Other Essays* (Oxford-Blackwell, Oxford 1962) at 41.

[291] Evans and Fern "From Applications to Appeals: A Political Science Perspective on the New Zealand Supreme Court's Dockets" above n 31, at 35.

[292] Wade *Hamlyn Lectures Thirty-Second Series: Constitutional Fundamentals* above n 286, at 79.

[293] *Dutton v Bognor Regis U.D.C* [1972] 1 QB 373 at 391.

[294] Wade *Hamlyn Lectures Thirty-Second Series: Constitutional Fundamentals* above n 286, at 78.

[295] *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA); See also Matthew Smith *The New Zealand Judicial Review Handbook* (Thomson Reuters, Wellington, NZ, 2011) at 7.

[296] At 378.

premised on the judiciary being politically neutral.[297] It is a premise which the judiciary do not ascribe to, and nor does society expect them to.

[67] A jurisprudential scholar postulated from high theory that "The courts are the capitals of law's empire, and judges are its princes".[298] This creates an image not unlike judicial review, and the classical English viewpoint, even expanded to judicial regulation, that "[the rule of law is] somehow neutral and impartial, 'above' both ruler and party politics"[299] withers away. And "Today no apology is needed for talking openly about judicial policy"[300] with regards both judicial review, a traditional form of judicial regulation on conduct, and the new judicial regulatory theory as described in this paper. Common law courts, like other classical regulators, regulate directly and the judiciary regulates specifically in the rights and constitutional arena wider than the *lis* in particular *inter se* disputes. An exposition of Judges as regulators would not be possible without recognition of the burgeoning taxonomy of administrative law, or a realisation of the political judiciary.

[297] Harlow and Rawlings *Law and Administration* above n 236, at 3; See also H Laski *A Grammar of Politics* (5th ed, HarperCollins, NY, 1967) chp 10 note 1.

[298] Dworkin *Laws Empire* above n 132, at 407.

[299] Harlow and Rawlings *Law and Administration* above n 236, at 3

[300] Wade *Hamlyn Lectures Thirty-Second Series: Constitutional Fundamentals* above n 286, at 78.

VI Concluding remarks: Judicial Regulation part of New Zealand's Constitutional Norms

[68] If the NZ constitution is a "…reflection of our national culture"[301] then by circular definition our national culture is informed by our judicial regulatory mechanism. As our national culture evolves then so to is our 'open-textured' constitution amended. Intrinsic in the judicial regulatory mechanism is that courts exercise substantial regulatory power, effecting society, far in excess of the *lis*. The regulatory mechanism is the protection of aggregate fundamental rights through legal actions. This regulatory mechanism can only be recognised with an understanding of the inherent political nature of the judicial regulatory enterprise.

[69] National culture is influenced by its people, its regulation and vice versa. Matthew Palmer suggests that there are ten people, influential constitutional actors, who interpret and greatly influence NZ's Constitution.[302] He is not alone in expressing such a viewpoint. Ten years earlier in a predictably titled essay, *The Suggested Revolution Against the Crown,* Cooke P identified one reason why England would see a King William V on the throne;[303]

> …that not for any juristic reason but simply because, as a writer in *The Times,* Nigella Lawson, put it: "Suspicion rather than hope is the national characteristic. Most people think that turning Britain into a republic will never turn the British into republicans."

The Nigella Lawson he referred to was, in 1995, not known yet for her culinary prowess but as a *Sunday Times* writer and the daughter of Lord Nigel Lawson, the Tory Chancellor under Thatcher. Cooke P gives great weight the young Ms. Lawson's constitutional insights and to the sway her opinion had over the English public. Matthew Palmer is correct that there are indeed key constitutional actors in NZ, he is specific in identifying ten, and yet of those who regulate our national culture – the norms and constitutional actors in the wider sense, there are many more.

[70] There is a dilemma inherent in the NZ constitution which the regulatory mechanism goes some way to solving. "Whether there are limits to the lawmaking power of the New Zealand Parliament has not [yet] been authoritatively determined", [304] and throughout this paper I have

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[301] Joseph "Preface" in Philip A Joseph (ed) *Essays on the Constitution* (Brooker's, Wellington, 1995).

[302] Matthew SR Palmer "What is New Zealand's Constitution and Who Interprets it? Constitutional Realism and the Importance of Public Office-holders" (2006) 17 Public Law Review 133 at 2.

[303] Sir Robin Cooke "The Suggested Revolution Against the Crown" in Philip A Joseph (ed) *Essays on the Constitution* (Brooker's, Wellington, 1995) at 28: citing The Times, 10 January 1995.

[304] Elias CJ "Sovereignty in the 21st century: Another Spin on the Merry-Go-round" above n 126, at 15; as presented by The Rt. Hon Dame Sian Elias "Another Spin on the Merry-Go-Round" (A Series on

described parliament as 'ostensibly sovereign' in constitutional and rights matters. It is a popular legal truism in the USA that "we are under a Constitution, but the Constitution is what the judges say it is"[305] due to the documentary fundamentalism intrinsic the judiciaries interpretative role of the US Constitution. That is also a realisation even more applicable to the NZ legal landscape then most NZ lawyers would admit, as, regarding judicial regulation of constitutional norms, "the systems [In the US and in NZ] seem to be operating in much the same way".[306] The NZ exists in constitutional dilemma is apparent in the views of the NZ Chief Justice, "In New Zealand at least, claims of judicial supremacisism seem rather odd"[307] but that by and large "Parliamentary sovereignty is an inadequate theory of our constitution[...]". This does not mean that when adjudicating constitutional questions the NZ judiciary could not be activist – but this must be measured against the "somewhat indeterminate nature of the constitutional enterprise in New Zealand".[308] I suggest that the judicial regulatory mechanism is a better viewpoint.

[71] Professor Joseph has argued that Parliamentary Sovereignty is an inadequate explanation of the relationship between Courts and the Executive/Legislature within NZ's Westminster democracy.[309] The Constitution is not a power play between political and judicial forces, the reality is that the Courts accept Parliament's power to effect legal change through legislation and Parliament accepts the judicial power to adapt its legislation to the fact patters of the *lis*.[310] This is, as Lord Woolf held, cognisant with the "wider constitutional principle of mutuality of respect between two constitutional sovereignties".[311] In particular Joseph finds that the traditional model of parliamentary sovereignty can be reconciled with the expanded judicial functions under modern human rights instruments, such as BORA. Parliament has given the courts the responsibility to vindicate the rule of law and to protect citizens from unjustified interference. Thus the exercise of power sharing shows the

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Sovereignty in the 21st Century Organised by the Institute for Comparative and International Law at the University of Melbourne Australia 19th March, 2003).

[305] Charles Even Hughes Speech before the Chamber of Commerce, Elmira, New York (3 May 1907) published in *Addresses and Papers of Charles Evans Hughes, Governor of New York, 1906–1908* (G.P. Putnam's Sons, 1908) (reprint, Kessinger Publishing, Montana, 2007) at 139.

[306] McLean "Legislative invalidation, human rights protection and s 4 of the New Zealand Bill of Rights Act" above n 178.

[307] At 24.

[308] Rt Hon Sir Geoffrey Palmer "Comparative Constitutional Law at Iowa: The New Zealand Constitution and the Power of Courts" (2006) 15 Transnatl Law Contemp Probl 551 at 552.

[309] Joseph "Parliament, the Courts, and the Collaborative Enterprise" above n 6, at 321.

[310] At 333.

[311] *Hamilton v Al Fayed* [1999] 3 All ER 317 at 320.

different branches engaging in a "collaborative enterprise". [312] A recognition of the collaborative enterprise is necessary for judicial regulatory mechanism's theoretical development insofar as it is not viewed as illegitimate judicial supremacisism.

[72] The NZ constitution, unwritten, evolving, falls to the judicial branch, the judicial mechanism, to be regulated, this is "the courts contribution".[313] It is a difficult question as to the courts legitimate exercise of judicial discretion and regulating outside the *lis* and *inter se* disputes. The judicial mechanism is in part wide variegated standard setting existing both inside and outside the *lis*. It operates within the exchange of a 'rights' market, where courts fulfill their role as the neutral adjudicator branch of government, but manifestly informed by constitutional norms. Standard setting is key in both regulatory function and regulatory definition.[314] The mechanism, and thus the common law courts as regulators, under the NZ model of an unwritten constitution is an exercise in the discretionary judicial function "allow[ing] a distinction to be made between more or less preferred states of the system", what the system, the state or society is, and an extempore ability to "change the state of the system" by behavior modification, either incrementally or writ large.[315] In not every case, will a judicial decision, be judicial regulation. Many cases together can act as incremental movement towards the setting of new standard, whereas others – most clearly those in the BORA or constitutional realm will be explicit.

[73] The limits of common-law courts as regulators are defined by the courts capacity for behavior modification, to change the state of the system. Common law courts, like other classical regulators, regulate directly. The judiciary regulates specifically in the rights and constitutional arena wider than the *lis* in particular *inter se* disputes.

[74] This paper is by no means an attempt to observe that Parliament and the Executive, do not regulate, that is a fortiori, or that regulation is the exclusive realm of the judiciary. It seeks to expose and address a new typology of judicial regulation through the mechanism, of the courts. Whilst this authors' concept of a judicial regulatory mechanism may seem limitless, it is restricted in the limits, which exist, in the legal system for which the mechanism operates. In NZ Parliament is supreme up to a

[312] Joseph "Parliament, the Courts, and the Collaborative Enterprise" above n 6, at 332

[313] Barak "Constitutional Law Without a Constitution: The Role of the Judiciary" above n 1, at 449.

[314] Hood et al *The Government of Risk* above n 90, at 23.

[315] As above.

point, the Courts and Judiciary often question this.[316] Our Sovereign in right - her heirs and successors[317] via a Governor-General have prerogative and reserve powers, and citizens have fundamental rights existing both in statute[318] and pre-existing in common law inherited from the Laws of England.[319] The relationship between the Crown and Maori is governed by the principles of the Treaty of Waitangi.[320] These are but a small selection of NZ's "open textured"[321] constitutional norms. Joseph is convincing that there exists collaboration between the two branches (Government/Judiciary) which "transcends the language of *Leviathan* – of sovereignty, supremacy and subordination".[322] It is mostly for the judiciary to manage the domain of rights as a regulatory exercise, "the legislative role of the Courts is interstitial…[Courts] effect just and efficient legislative outcomes in ways that reconcile the institutional values of the legal system".[323] This is not to say Parliament does not play a large role and might fundamentally alter the texture or indeed remove in entirety any one or all of them, including abrogating parts of the common law. Should Parliament do this, or NZ move down the road of republicanism, there would be such a fundamental change in the NZ system that indeed judicial regulation would be limited, but only because the underlying fundamental norm of the system has changed.[324] A new system of law in NZ would take its place;[325] a new constitutional makeup and a cognisant new judicial regulatory mechanism would develop.[326] The regulatory role of courts in NZ is part of the security of NZ's constitutional balance.

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316 *Taylor v New Zealand Poultry Board* above n 114; Elias CJ "Sovereignty in the 21st century: Another Spin on the Merry-Go-round" above n 126, at note 52.

317 Oaths and Declarations Act 1957, s 17: Members of Parliament must take the s 17 Oath of Allegiance under Standing Orders 12(e), and may withdraw if they do not take the oath (13(1)). The Oath reads " I, ..., swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Her heirs and successors, according to law. So help me God."

318 The Bill of Rights Act 1990.

319 Section 28: these pre-existing common law rights whilst almost all inherited from the Laws of England, does not remove the possibility that NZ may have developed distinct common law rights of its own between 1840 and 1990.

320 As interpreted by the principles in the *Lands Case* above n 60.

321 Haneghan "The changes to final appeals in New Zealand since the creation of the New Zealand Supreme Court" above n 50.

322 Joseph "Parliament, the Courts, and the Collaborative Enterprise" above n 6, at 345,

323 At 345.

324 Hans Kelsen *General Theory of Law and State* (Harvard University Press, Cambridge MA, 1945) at 115.

325 FM Brookfield *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 1999) at 18, 26.

326 Dennis Lloyd, Baron Lloyd of Hampstead and Michael DA Freeman, *Lloyd's Introduction to Jurisprudence* (Stevens, London, 1985) at 407.

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