

## When there becomes here: the domestic application of foreign law

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The propriety or otherwise of citing foreign judgments can incite very strong reactions. In 2005, at a conference convened by the Judeo-Christian Council for Constitutional Restoration, constitutional lawyer Edwin Vieira said that Justice Kennedy's judgment in *Lawrence v Texas*<sup>2</sup> invalidating a state law against homosexual relations "upholds Marxist, Leninist, satanic principles borrowed from foreign law".<sup>3</sup>

As Justice Gageler's paper<sup>4</sup> shows, the citation of foreign jurisprudence in the Australian context is more mundane and orthodox. The same is true in New Zealand.<sup>5</sup> In this paper I will comment, from a New Zealand perspective on the following themes discussed in Justice Gageler's paper<sup>6</sup>:

- (a) Authority reigns;
- (b) Common law without borders;
- (c) The ubiquitous statute; and
- (d) Domesticated foreign law.

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<sup>2</sup> *Lawrence v Texas* 539 US 558 (2002). In dissent, the late Justice Scalia dubbed the reliance by the majority on foreign law as dangerous because the Court should not "impose foreign moods, fads, or fashions on Americans": at 598, citing the concurring judgment of Justice Clarence Thomas in *Foster v Florida*, 537 US 990 (2002) at 990. He added that the majority's opinion was "the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda".

<sup>3</sup> Cited in David J Seipp "Our Law, Their Law, History and the Citation of Foreign Law" (2006) 86 B U L Rev 1417 at 1419.

<sup>4</sup> Stephen Gageler, "Statutory Interpretation and the Use of Overseas Jurisprudence" (speech given to the Banking and Financial Services Law Association Conference, Queenstown, 29 August 2016).

<sup>5</sup> See, for example, Brian Flanagan "Judicial Globalisation and Perceptions of Disagreement: Two Surveys" [2012] NZ L Rev 443 at 447-448; Jeremy Finn "New Zealand Lawyers and "Overseas" Precedent 1874-1973 – Lessons from the Otago District Law Society Library" (2007) 11 Otago LR 469; James Allan et al, "The Citation of Overseas Authority in Rights Litigation in New Zealand: How Much Bark? How Much Bite?" (2007) Otago LR 11 433; Claudia Geiringer "International Law through the Lens of *Zaoui*: Where is New Zealand at?" (2006) 17 PLR 300; Russell Smyth, "Judicial Citations; An Empirical Study of Citation Practice in the New Zealand Court of Appeal" [2000] VUWLR 441; Russell Smyth "Judicial Robes or Academic Gowns? Citation of Secondary Authority and Legal Method in the New Zealand Court of Appeal" in Rick Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, 2001) at 101 [*Legal Method*]; Sir Ivor Richardson "Trends in Judgment Writing in the New Zealand Court of Appeal" in *Legal Method* at 261.

<sup>6</sup> I have taken the liberty of isolating and naming what I see as Justice Gageler's main themes.

## *Authority reigns*

The opening section of Justice Gageler’s paper is directed to the issue of the use of authority generally, whether foreign or domestic. His first point is that legal formalism in Australia has led to a tendency to take comfort in the citation of authority, even where none is needed and even where the authority cited is not of high authority.<sup>7</sup> Justice Gageler then turns to history, tracing the early use of authority to discern legal principles to the development of the common law doctrine of binding authority from the first half of the nineteenth century.<sup>8</sup> This in turn has led to the distinction between binding and persuasive authority.

In its modern manifestation in New Zealand, the doctrine of precedent<sup>9</sup> means that courts lower in the hierarchy are bound by the ratio of decisions in courts higher in the hierarchy.<sup>10</sup> Courts at the same level are not so bound, although for reasons of judicial comity and stability in the law, judges may well follow earlier decisions of other judges.<sup>11</sup> Further, although the intermediate court of appeal in New Zealand<sup>12</sup> normally sees itself as bound by its own decisions, in rare circumstances it will be open to overruling an earlier decision.<sup>13</sup> It

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<sup>7</sup> For example, Justice Gageler gives the example of the High Court of Australia citing the Supreme Court of Illinois for the meaning of “humbug”: see Stephen Gageler, above n 4, at 2, citing *Sali v SPC Ltd* (1993) 116 ALR 625 at n 9.

<sup>8</sup> For a New Zealand view, see Michael Lobban “Mapping the Common Law: Some Lessons from History” [2014] NZ L Rev 21.

<sup>9</sup> At least in the modern manifestation of the doctrine tracing back to the last quarter of the eighteenth century, as explained by Justice Gageler: Stephen Gageler, above n 4, at 3.

<sup>10</sup> See Daniel Laster “Unreported Judgments and Principles of Precedent In New Zealand” (1988) 6 Otago LR 563 at 567–568; and also E W Thomas “A Critical Examination of the Doctrine of Precedent” in *Legal Method*, above n 5, at 141.

<sup>11</sup> For an example of an early discussion on this, see A G Davis “Judicial Precedent in New Zealand: Judgments of Courts of First Instance” (1954) 30 NZLJ 305; and more recently Daniel Laster, above n 10, at 566–567.

<sup>12</sup> This is slightly more complicated in Australia by way of their federal system. However, as Justice Gageler points out, the High Court of Australia in *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 held that an intermediate appellate court, whether State or federal, should not depart from an existing interpretation of uniform national legislation by another intermediate appellate court unless convinced that the interpretation is plainly wrong: at 492.

<sup>13</sup> This applies even after the advent of the New Zealand Supreme Court. In *R v Chilton* [2006] 2 NZLR 341 (CA), the Court of Appeal set out the circumstances in which it might revisit earlier decisions, including the length of time for which the earlier decision has stood, the nature of the issue, and changing social conditions: at [83]–[91]. The Court did note that the approach to departing from its earlier decisions will be cautious because of the need for certainty and stability in the law: at [83]. The Court of Appeal is of course bound by the Supreme Court and will still hold itself as bound by decisions of the Privy Council (at least in decisions in New Zealand cases) unless and until such decisions are overturned by the Supreme Court: at [111].

is likely that the New Zealand Supreme Court would be similarly cautious in overruling its previous decisions.<sup>14</sup>

It is important to remember that it is only the ratio of a decision that is binding. Even where decisions are not binding, however, the common law method, which entails working by analogy and incrementally,<sup>15</sup> will by necessity rely on authority, without needing to descend into the empty formalism Justice Gageler describes. The role of persuasive authority is to elucidate the legal principles and to provide for consistency, predictability and fairness (including that like cases are treated alike) in the law. These are also the principles underlying the notion of binding authority.<sup>16</sup>

In many cases, however, it will not be the law that is in contention but the facts, although sometimes, even when the facts are ascertained, the issue of how the law should apply to those facts will remain. And sometimes the law itself will be uncertain or it will be uncertain which rule applies in the particular factual circumstances.

In final courts, where leave (and persistent litigants) are required, cases will usually come into the last category, sometimes into the middle category and almost never into the first category.<sup>17</sup> In New Zealand in essence cases must be of general and public importance to

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<sup>14</sup> The Supreme Court has overruled a Privy Council decision: see *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149, where the majority preferred the view of the Court of Appeal as regards exemplary damages over that of the Privy Council (per Blanchard, Tipping, McGrath and Wilson JJ, Elias CJ dissenting). In that case, Tipping J, in his separate judgment, said that it was logical that a decision of the Privy Council should be regarded for precedent purposes in the same way as a previous decision of the Supreme Court and that it “would not be appropriate for this Court to regard itself as absolutely bound by its own decisions.” However, any departure from such decisions would only occur in compelling circumstances: at [104]. See also the comments of Elias CJ at [32], Blanchard J at [51] and McGrath J at [210] and the commentary of Thomas Joseph, “Precedent in the Supreme Court” [2011] NZLJ 9.

<sup>15</sup> For more on this, see John Farrar “Reasoning by analogy in the law” (paper presented to the “Judicial Reasoning: Art or Science?” (Conference for the National Judicial College of Australia, ANU College of Law and Australian Academy of Forensic Sciences, Canberra, 8–9 February 2009). See also Lord Goff “The Future of the Common Law” (1997) 46 ICLQ 745 at 753; and Cross and Harris *Precedent in English Law* (4th ed, Clarendon Press, Oxford, 1981) at 186–206.

<sup>16</sup> Justice Gageler comments on persuasive and binding authority: Stephen Gageler, above n 4 at 6, 9–10 and 13. See also Theodore Bennet “The Rule of Precedent” in Laurence Goldstein (ed) *Precedent in Law* (Clarendon Press, Oxford, 1987) at 89; and Richard Bronaugh “Persuasive Precedent” in Laurence Goldstein (ed) *Precedent in Law* (Clarendon Press, Oxford, 1987) at 217.

<sup>17</sup> New Zealand is, however, probably more open to overturning facts on appeal than in other jurisdictions: see, for example, *Austin, Nichols & Co v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

reach the Supreme Court and cases just involving facts are unlikely to meet this threshold.<sup>18</sup> But all of the cases which reach the final courts have also passed through the lower courts and so the issue of how to deal with the last two categories of cases will have to have been faced by those courts too. It is in these cases that persuasive authority will play a major role.

A final court has the luxury of being last. The law is what the court pronounces it to be and, subject to the controversial issue of prospective overruling, always was the law.<sup>19</sup> It will remain the law until that court or Parliament through legislation takes a different view. As Justice Jackson once said, however, of the United States Supreme Court, we are “not final because we are infallible, but we are infallible only because we are final.”<sup>20</sup> In my view, this makes it even more important that final courts are meticulous in their reasoning and research processes, including their reliance on authority.<sup>21</sup>

A final court must be mindful of the constitutional strictures referred to by Justice Gageler.<sup>22</sup> These are particularly acute where there is a written constitution but the New Zealand Supreme Court has to respect what can be loosely termed constitutional principles, some enshrined in legislation.<sup>23</sup> For example all New Zealand courts are bound by the

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<sup>18</sup> The criteria for leave to appeal to the Supreme Court are currently set out in s 13 of the Supreme Court Act 2003. Included are cases where a substantial miscarriage of justice may have occurred. That ground is of relatively limited application in civil cases, however: see *Junior Farms Ltd v Hampton Securities Ltd (in liquidation)* [2006] NZSC 60 at [4]–[5].

<sup>19</sup> For more on this, see for example W Freidland “Prospective and retrospective judicial law making” (1974) 29 MLR 593; PJ Mishkin “The Supreme Court 1964 Term” (1966) 79 Harv L Rev 56; and Lord Devlin’s comments in *The Judge* (Oxford University Press, 1979) at 12 where he considered prospective overrulings to be “the Rubicon that divides the judicial and legislative powers”. For commentary supporting the use of prospective overruling, see for example Jesse Wall “Prospective overruling – it’s about time” (2009) 12(1) Otago LR 131. The issue was left open by the Supreme Court in *Y (SC 40/2013) v R* [2014] NZSC 34, [2014] 1 NZLR 724 at [28]. See also the discussion of Tipping J in his judgment in *Chamberlains v Lai* [2006] NZSC 70, [2007] 2 NZLR at [130]–[148].

<sup>20</sup> *Brown v Allen* (1953) 344 US 443 at 540.

<sup>21</sup> See the comments of Karl Llewellyn in *The Bramble Bush* (Oxford University Press, New York, 2008) at 176, where he said that it is the role of appellate courts to “consciously awaken” to their duties of certainty and predictability and that every opinion must be “directed forward, it must make sense and give guidance for tomorrow for the *type of situation* in hand”.

<sup>22</sup> Stephen Gageler, above n 4, at 8–11.

<sup>23</sup> There is no definitive list of constitutional legislation in New Zealand. Professor Philip Joseph identifies constitutionally significant statutes as the Legislature Act 1908, the Constitution Act 1986, the New Zealand Bill of Rights Act 1990, the Electoral Act 1993 and the Parliamentary Privilege Act 2014, among others: Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 28–29.

New Zealand Bill of Rights Act 1990 (Bill of Rights).<sup>24</sup> The Supreme Court Act 2003 also makes it clear that the existence of the Supreme Court does not affect New Zealand's commitment to the rule of law and the sovereignty of Parliament.<sup>25</sup>

Final courts generally must also be cognisant of the limits of the judicial role and judicial competencies.<sup>26</sup> They are still constrained by the common law method of reasoning by analogy. As Lord Bingham said “the law scores its runs in singles: no boundaries, let alone sixes.”<sup>27</sup> Final courts are also ultimately responsible for ensuring coherence and stability in the law. This may mean that, if a principle is longstanding and people have ordered their affairs in line with that principle, then a final court should hesitate before coming to a different view, even if the authorities to date have been from courts lower in the hierarchy.<sup>28</sup>

Another important limit of the judicial role is that judges hear one case at a time. There is not a major tradition of interveners in New Zealand at least<sup>29</sup> and so the courts are largely confined to the way the parties have framed the case<sup>30</sup> and, when they are considering the law, it is in light of the particular circumstances of the case.<sup>31</sup> This means that the courts are

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<sup>24</sup> New Zealand Bill of Rights Act 1990, s 3(a) provides that the Bill of Rights applies to acts done by judicial branches of the government of New Zealand. See also *R v Pora* [2001] 2 NZLR 37 (CA) at [166] per Thomas J, and the dissenting judgment of Elias CJ in *Attorney-General v Chapman* [2011] NZSC 110, [2012] NZLR 462 at [8]–[14] (Anderson J agreeing). The majority (McGrath, William Young and Gault JJ) did not hold that the Bill of Rights did not apply to the judiciary but differed in their views of the consequences of any breach: at [205]–[206] per McGrath and William Young JJ, and at [213] per Gault J.

<sup>25</sup> Supreme Court Act 2003, s (3)2. The Judicature Modernisation Bill is to replace the Supreme Court Act and this provision was not originally included in the Judicature Modernisation Bill 2013 (178-2) when it passed its second reading on the 18 February 2015. A supplementary order paper has proposed adding this provision to the Bill: Supplementary Order Paper (62) Judicature Modernisation Bill (178-2).

<sup>26</sup> For a debate on this point, see B V Harris “Final Appellate Courts Overruling Their Own “Wrong” Precedents: The Ongoing Search for Principle” (2002) 118 LQR 408; and Jack Hodder “Departure from “Wrong” Precedents by Final Appellate Courts: Disagreeing with Professor Harris” [2003] NZLR 161.

<sup>27</sup> Lord Bingham “The Way We Live Now: Human Rights in the New Millennium” (1999) 1 Web JCLI.

<sup>28</sup> This was touched upon by Lord Neuberger at this conference in 2014: see Lord Neuberger “The Remedial Constructive Trust” (speech given at the Banking and Financial Services Law Association Conference, Queenstown, 10 August 2014) at [27]–[28].

<sup>29</sup> This also seems to have been the case in Australia: see *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319. However it appears that there may have been a shift in recent years: see, for example George Williams “The amicus curiae and intervener in the High Court of Australia: a comparative analysis” (2000) 28 Fed L Rev 365 and Justice Susan Kenny “Interveners and amici curiae in the High Court” [1997] FedJSchol 1; and Angel Aleksov “Intervention in constitutional cases” (2012) 86 ALJ 555.

<sup>30</sup> Subject to natural justice and fairness issues, the courts may go outside the arguments they have heard and certainly will do their own research, but it is sometimes not possible to consider a legal argument if a different way of framing the issues may have required different evidence in the courts below.

<sup>31</sup> This is so even where there is a tradition of interveners. See also Michael Kirby “Judicial Activism” (1997) 23 Commw L Bull 1224 at 1232. For more on the merits of so-called ‘judicial minimalism’ and its impact on the development of the law, see Cass Sunstein *One Case at a Time: judicial minimalism on the Supreme Court* (Harvard University Press, Cambridge, 1999).

not the best place for the consideration of wide scale reform. That is usually best left to a Law Commission and ultimately to Parliament.<sup>32</sup>

I thought I would finish this section by a list of the things that irritate me about the citing of authorities, both in court decisions and counsel's submissions, while recognising that I may well have been guilty of many of these myself:

- (a) Not analysing what the ratio of a decision is. At its most basic, this is found in the reasons of the majority but it is astonishing how often the reasons of only one of multiple judgments are cited and in some cases the reasons cited are even from a dissent. I accept courts and especially final courts can, even where there are multiple judgments, do more to facilitate the task of discerning a ratio but this does not excuse the above practices.<sup>33</sup>
- (b) Not identifying whether comments are obiter. Of course, even obiter comments can be highly persuasive authority, particularly when they are from courts higher in the hierarchy. When pointing to such comments, however, it is vital to ensure that all relevant comments are referred to (especially if conflicting) or, if that is the case, to make it clear that only one of the judges commented on that particular point.
- (c) Providing long dissertations on the evolution of the law when the law is now settled. This is particularly the case when long quotations from now obsolete judgments are included. Even if the law is still unsettled long dissertations on history are only necessary where that historical analysis is needed to clear up current uncertainties. Otherwise long historical dissertations might show impressive diligence but are redundant. Save it for the law review article.
- (d) Quoting large passages from judgments. Most people skip quotes and the fundamental point made can be lost. First discern and outline succinctly the

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<sup>32</sup> See also Peter Blanchard "Judging and Law Reform" (speech given at Auckland University, 5 March 2011); and Lord Neuberger, above n 28, at [27].

<sup>33</sup> The New Zealand Supreme Court is not immune from such criticism: see, for example, Jessica Palmer and Andrew Geddis "What was that thing you said? The NZ Supreme Court's vexing *Vector Gas* Decision" (2012) 31 U Queensland LJ 287.

principle to be taken from the case, followed by the case citation and, if you must, a pithy quotation. But in most cases a summary of principle will do.

- (e) Citing multiple judgments for the same proposition rather than the most authoritative and, worse still, quoting large portions from those multiple judgments.

### *Common law without borders*

In his paper Justice Gageler has traced the move to a common law of Australia, separate from the English common law. He outlines the role of the Privy Council in the early days as the guardian of the common law against colonial upstarts with the 1879 pronouncement that the interpretation of English law should be as nearly as possible the same in all parts of the Empire where English law prevails.<sup>34</sup> Justice Gageler dates Australia's freedom from the shackles of the England common law as only really happening once appeals to the Privy Council were abolished.<sup>35</sup> This occurred by stages, appeals to the Privy Council ending finally in March 1986.<sup>36</sup> Justice Gageler does note that, despite the abolition of Privy Council appeals, decisions of the English Court of Appeal and the House of Lords continued to be what he calls presumptively persuasive for some time.<sup>37</sup>

The first point to note is that the common law in New Zealand was from inception distinct from that of England because of the existence of Maori customary law. English common law recognised customary law provided it met certain criteria. The custom must have been reasonable, observed as of right, immemorial and could not be contrary to an Act of Parliament.<sup>38</sup> This was adopted in relation to Maori customary law in *Public Trustee v Loasby*.<sup>39</sup> The Court of Appeal suggested a more modern approach to recognising Maori customary law when dealing with burial custom in *Takamore v Clarke* by trying “to integrate [customary law] into the common law where possible rather than relying on the strict rules of

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<sup>34</sup> *Trimble v Hill* (1879) 5 App Cas 342 at 344-345.

<sup>35</sup> Stephen Gageler, above n 4, at 8.

<sup>36</sup> At 8.

<sup>37</sup> At 10.

<sup>38</sup> This criteria is a summary of those points from Sir John Salmond *Jurisprudence* (7th ed, Sweet and Maxwell, London, 1924) at 207–220. The foundation for this is *The Case of Tanistry* (1608) Dav Ir 28 at 32. See also *Wolstatnton Ltd v Newcastle-under-Lyme Corporation* [1940] AC 860 (HL) at 876.

<sup>39</sup> *Public Trustee v Loasby* [1908] 27 NZLR 801 (SC).

colonial times”.<sup>40</sup> On appeal, the Supreme Court did not explicitly deal with this suggestion but in substance accepted that Maori custom was part of New Zealand law.<sup>41</sup>

In New Zealand it is fair to say that the cases involving Maori customary law have mostly arisen in the context of customary title.<sup>42</sup> The Treaty of Waitangi is also of great importance to New Zealand and there has been a clear shift from the days it was regarded as a “simple nullity”<sup>43</sup> to what is now likely a requirement to interpret statutes consistently with the Treaty where possible and the general weaving of the Treaty into our jurisprudence.<sup>44</sup>

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<sup>40</sup> *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [254] per Glazebrook and Wild JJ. This was reinforced by the need to develop the common law so far as reasonably possibly consistently with the Treaty of Waitangi and the collective nature of indigenous people as recognised by the United Nations Declaration on the Rights of Indigenous people and other international human rights covenants to which New Zealand is a party: at [254]. A modern approach to the common law and burial custom would be to consider the custom a relevant cultural consideration to be taken into account by an executor or executrix in determining the method and place of burial. Such consideration would require the facilitation of a culturally appropriate discussion and negotiation among members of the whānau to reach a consensus: at [255].

<sup>41</sup> *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94] per Elias CJ and at [164] per Tipping, McGrath and Blanchard JJ. William Young J did not comment on this. For more, see Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law (The Harkness Henry Lecture, University of Waikato, 7 November 2013); Annis Somerville “Tikanga in the Family Court – the gorilla in the room” (2016) 8 NZFLJ 157; Natalie Coates “The Recognition of Tikanga in the Common Law of New Zealand” [2015] NZ L Rev 1; Rebecca Walsh “*Takamore v Clarke*: A Missed Opportunity to Recognise Tikanga Maori?” (2013) 19 Auckland U L Rev 246; and Laura Lincoln “*Takamore v Clarke*: An Appropriate Approach to the Recognition of Maori Custom in New Zealand Law?” (2013) 44 VUWLR 141.

<sup>42</sup> One of the most prominent of those cases in modern times was *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA), otherwise known as the foreshore and seabed case. See also *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA). Customary title has also drawn judicial attention in Australia, as evidenced by *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1. Other areas of law have paid heed to Maori customary law, such as fishery rights: see *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC); and *Te Rūnanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA).

<sup>43</sup> As it was described by Prendergast CJ in *Wi Parata v Bishop of Wellington* (1877) 2 NZ Jur (NS) 72 at 78.

<sup>44</sup> See, for example, *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA). In this case, Cooke P said that s 9 of the State Owned Enterprises Act 1986, which provides that nothing in the Act permits the Crown to act in a manner that is inconsistent with the principles of the Treaty, has “the impact of a constitutional guarantee”: at 658. See also *New Zealand Maori Council v Attorney-General* [2013] NZSC 6 [2013] 3 NZLR 31 at [52]–[59]. This concept is reflected in other legislation: see, for example, Hazardous Substances and New Organisms Act 1996, s 8; Resource Management Act 1993, s 8; and the Crown Minerals Act 1991, s 4. With regard to the cases making use of the Treaty without direct incorporation, see *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC); *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC); *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA); and *Baldick v Jackson* (1910) 30 NZLR 343 at 344–345. See also Geoffrey Palmer “The Treaty of Waitangi - Where to from here?” (2007) 11 Otago LR (2007) 381; PG McHugh “What difference a Treaty makes – the pathway of aboriginal rights jurisprudence in New Zealand public law” (2004) 15 PLR 87; and Kenneth Keith “The Treaty of Waitangi in the Courts” (1990) 14 NZULR 37.



The second point is that the development of a distinctly New Zealand common law started earlier than the relatively recent setting up of the New Zealand Supreme Court in 2004.<sup>45</sup> Indeed, concern about the Privy Council's lack of understanding of local conditions had been expressed in the first decade of the twentieth century,<sup>46</sup> although these concerns died down after the First World War. After the Second World War, the focus shifted to the setting up of a permanent Court of Appeal in New Zealand which was achieved in 1957.<sup>47</sup> During this period, the value of the ties to the United Kingdom were emphasised and there was a reluctance to recognise New Zealand as having a distinct international personality.<sup>48</sup>

There was, however, an interesting debate in the New Zealand Law Journal in the mid 1950s. The issue was whether, where there are conflicting decisions of the Privy Council and the House of Lords, the New Zealand courts should follow the House of Lords. Professor AG Davis answered that question resoundingly in favour of the House of Lords as the highest tribunal having authority to lay down a principle of English law, provided the House of Lords had expressly stated in what respects the Privy Council has erred.<sup>49</sup> In a portent of things to come, one R B Cooke (later Lord Cooke) suggested that there might be, as he put it, an "alternative to unquestioning compliance." Great weight should be attached

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<sup>45</sup> The Supreme Court was established by the Supreme Court Act 2003 which came into force 1 January 2004, and was empowered to hear appeals from 1 July 2004: s 2 and s 55. No appeals to the Privy Council could be brought in respect of any decisions made by a New Zealand court after 31 December 2003: s 42. This is subject to certain transitional provisions: s 50.

<sup>46</sup> See the discussion in Kenneth Keith "The Unity of the Common Law and the Ending of Appeals to the Privy Council" (2005) 54 ICLQ 197 at 202–203. Sir Kenneth draws attention to *Wallis v Solicitor-General, Protests of Bench and Bar* [1903] NZPCC 730. In this case, a special adjourned sitting was held in the Court of Appeal on Saturday, April 25, 1903. Chief Justice Stout indicated that he had something to say regarding the recent decision of the Privy Council in *Wallis v Solicitor-General* [1903] NZPC 1, [1903] AC 173. The Chief Justice said a "direct attack" had been made "upon the probity of the Appeal Court of New Zealand". The Chief Justice said in response that the statements of fact and law in the judgment of the Privy Council were made without a knowledge of New Zealand legislation and further that this was not the only judgment of the Privy Council that was "pronounced under a misapprehension or an ignorance of our local laws." The Chief Justice concluded "The matter is really a serious one. A great Imperial judicial tribunal sitting in the capital of the Empire, dispensing justice even to the meanest of British subjects in the uttermost parts of the earth, is a great and noble ideal. But if that tribunal is not acquainted with the laws it is called upon to interpret or administer, it may unconsciously become the worker of injustice. And if such should unfortunately happen, that Imperial spirit that is the true bond of union amongst His Majesty's subjects must be weakened. At present we in New Zealand are, so far as the Privy Council is concerned, in an unfortunate position. It has shown that it knows not our statutes, or our conveyancing terms, or our history."

<sup>47</sup> See Kenneth Keith, above n 46, at 204–205.

<sup>48</sup> At 204–205.

<sup>49</sup> A G Davis "Judicial Precedent in New Zealand" [1955] NZLJ 42 at 45. In reaching this view, Professor Davis relied on Lord Dunedin's statement in *Robins v National Trust Co Ltd* [1927] AC 515 (HL) at 519, quoted with approval by Myers CJ in *Gooch v NZ Financial Times (No 2)* [1933] NZLR 257 (CA). Professor Davis also relied on Latham CJ's comments in the High Court of Australia in *Piro v W Forster and Co Ltd* (1943) 68 CLR 313 at 320, and also the words of Finlay J *In re Rayner* [1948] NZLR 455 (CA) at 508.

to decisions of the House of Lords and “to the importance of uniformity but in exceptional cases these considerations may be subordinated to the overriding desirability of achieving a more just result”. He saw a policy of “general compliance” as prudent but considered there to be no justification for “utter submission.”<sup>50</sup>

As in Australia, it was in the 1980’s that departure from the unquestioning adoption of English law really began and this was at least accepted by the Privy Council in a retreat from the position it had taken in 1879. A prime example of this is the case of *Invercargill City Council v Hamlin*.<sup>51</sup> In that case, the Court of Appeal chose to uphold a line of New Zealand cases that had admittedly originated from a House of Lords case<sup>52</sup> but one which the House of Lords had subsequently rejected. Separation from England was viewed by Cooke P (later Lord Cooke) as an inevitable result of Commonwealth jurisdictions going down their own paths without taking English decisions as the “invariable starting point.”<sup>53</sup> Even the arguably more cautious Justice Richardson, while noting the great respect afforded to House of Lords decisions, accepted that ultimately the New Zealand courts had to “follow the course which in our judgment best meets the needs of this society.”<sup>54</sup> The Privy Council recognised this when it held that the Court of Appeal was entitled to depart from English case law on the ground that the conditions in New Zealand are different.<sup>55</sup>

It is not just social conditions that differ of course. As discussed in the next section, another

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<sup>50</sup> R B Cooke “The Supreme Court of the British Commonwealth?” [1956] NZLJ 233 at 235. See also E K Braybrooke “The Authority of the House of Lords” [1956] NZLJ 347 agreeing with Cooke.

<sup>51</sup> *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC). There were other cases which made similar points both before and after *Hamlin*, as pointed out by Kenneth Keith, above n 46, at 206–209. See, for example *Reid v Reid* [1982] 1 NZLR 147 (PC); *Treaty Tribes Coalition v Urban Maori Authorities* [1997] 1 NZLR 513 (PC); and *Lange v Atkinson* [2000] 1 NZLR 257 (PC).

<sup>52</sup> *Anns v Merton London Borough Council* [1978] AC 728 (HL).

<sup>53</sup> *Invercargill City Council v Hamlin* [1994] 1 NZLR 513 (CA) at 523 per Cooke P.

<sup>54</sup> At 527.

<sup>55</sup> At 519–520. The duty of care imposed on local authorities for defective buildings has recently been extended further by the Supreme Court: see *Body Corporate No 207624 v North Shore City Council (Spencer on Byron)* [2012] NZSC 83, [2013] 2 NZLR 297. For more on *Hamlin*, see Robyn Martin “Diverging Common Law – *Invercargill* goes to the Privy Council” (1997) 60 Mod Law Rev 94; and P W Young “A home-grown common law” (1996) 70 ALJ 341. There are opposing views on both this and the appropriateness of taking ‘local conditions’ into account: see, for example Professor Peter Watts “The Judge as a Casual Lawmaker” in *Legal Method*, above n 5, at 175.

difference is the prevalence of legislation in New Zealand overriding the common law.<sup>56</sup> A more recent reason for departing from English law has been the increasing influence from Europe (subject to change with Brexit).<sup>57</sup>

Finally on this topic, and despite the development of a distinctly New Zealand common law, our courts, like their Australian counterparts, can still have a tendency to provide English cases as authority for a proposition, without explicitly noting that they are not bound by the decision and not always citing any New Zealand decisions that may also have adopted that view of the law. It seems to me that this practice is both understandable and legitimate, as long as the judge has turned his or her mind to whether the New Zealand common law should depart from the English position. It recognises the common heritage of the common law. As recently said by Lord Neuberger, although it is inevitable that inconsistencies in the common law will develop between different jurisdictions, it is nonetheless highly desirable for jurisdictions to learn from each and at least to “lean in favour of harmonising” the development of the common law.<sup>58</sup>

### *The ubiquitous statute*

Justice Gageler’s next theme is the replacement in the last quarter of the twentieth century of large parts of the common law by legislation. Statutes have also modified the methodology of the common law, particularly in statutory interpretation. He points to the introduction in 1981 of a statutory requirement for courts to adopt a purposive approach to statutory

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<sup>56</sup> For example our criminal law has long been largely codified since the Criminal Code Act 1893, unlike in England and Wales where much of the criminal law remains governed by the common law. The New Zealand legislation was based on a code prepared by the English jurist Sir James Fitzjames Stephen, who had drafted the Criminal Code (Indictable offences) Bill in 1878 intended for England. The bill was discharged in England before it could be enacted. For more, see Stephen White “The Making of the New Zealand Criminal Code of 1893: A Sketch” (1986) 16 VUWL Rev 353; and *R v Lunt* [2004] 1 NZLR 498 (CA) at [17]–[20].

<sup>57</sup> This was one of the reasons given for setting up the New Zealand Supreme Court: see Margaret Wilson “Establishing a Supreme Court in New Zealand” in Andrew Stockley and Andrew Littlewood (eds) *The New Zealand Supreme Court: The First Ten Years* (LexisNexis, Wellington, 2015) at 1; Richard Cornes “Appealing to history: the New Zealand Supreme Court debate” (2004) 24 Legal Stud 210 at 2; and Noel Cox “The abolition or retention of the Privy Council as the final court of appeal for New Zealand: conflict between national identity and legal pragmatism” [2002] NZ L Rev 220. See also the speech by the Hon Margaret Wilson, at the time Attorney-General, given at the Supreme Court Bill’s first reading (NZPD 605) 2786–2787.

<sup>58</sup> *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45 at [45]. In this decision, however, the United Kingdom did not adopt the remedial constructive trust even though it is established in Canada and has been upheld in Australia and New Zealand.

interpretation,<sup>59</sup> supplemented in 1984 by a new provision that expressly permits courts to consider extrinsic material in ascertaining the meaning of statutes.<sup>60</sup>

Taking the last point first, New Zealand has long had legislation mandating a purposive approach to statutory interpretation.<sup>61</sup> However, it would be fair to say that this was usually honoured more in the breach until the 1980s when the purposive approach to legislation became the norm.<sup>62</sup>

Against this background it is unsurprising that the current Interpretation Act 1999 provides that the meaning of an enactment must be ascertained from its text and in the light of its purpose.<sup>63</sup> The use of context is not expressly dealt with.<sup>64</sup> The inclusion of the word context was considered and recommended by the Law Commission in its 1990 review of the Acts Interpretation Act 1924.<sup>65</sup> The Commission was of the view that the general context of language and society was “inevitably part of the process of finding meaning”.<sup>66</sup> The Commission did not define context, but suggested that context could include the rest of the enactment, the area of law from which the legislation arises and the wider social and political context out of which the legislation arises,<sup>67</sup> along with other elements of law such as the principles of judicial review<sup>68</sup> or New Zealand’s “extensive network of treaty obligations”.<sup>69</sup>

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<sup>59</sup> Acts Interpretation Act 1901 (Cth), s 15A.

<sup>60</sup> Acts Interpretation Act 1901 (Cth), s 15AB.

<sup>61</sup> This can be traced back to a 1851 Interpretation Ordinance which provided “The language of every ordinance shall be construed according to its plain import, and where it is doubtful, according to the purpose thereof.” A purposive approach has been repeated in every interpretation statute since 1888, including the Acts Interpretation Act 1908, s 6(i); the Acts Interpretation Act 1924, s 5(j); and the current Interpretation Act, s 5(1): see Kenneth Keith, above n 46, at 200; George Tanner QC and Ross Carter “The Old Girl Still Looks Good to Me: Purposive Interpretation of New Zealand Legislation” (4th Australasian Drafting Conference, Sydney, 3-5 August 2005) at 2; and Cathy Nijman “Ascertaining the Meaning of Legislation – A Question of Context” (2007) 38 VUWLR 629 at 630.

<sup>62</sup> See further DAS Ward “Trends in the Interpretation of Statutes” (1957) 2 VUWLR 155 at 160 and 168–171. See also my discussion of this trend in Susan Glazebrook “Statutory Interpretation and Tax Avoidance” (Paper prepared for the “Tax Avoidance in the 21<sup>st</sup> Century” Conference, Melbourne, 17 May 2013) at 2 and “Do they say what they mean and mean what they say?” (2015) 14 Otago LR 61 at 67.

<sup>63</sup> Interpretation Act 1999, s 5(1).

<sup>64</sup> However it should be noted that s 6 provides that an enactment applies to circumstances as they arise. This ambulatory provision allows some movement with changing conditions.

<sup>65</sup> The original provision recommended by the Law Commission in their Draft Interpretation Act, s 9 was “The meaning of an enactment is to be ascertained from its text in the light of its purpose and in its context”: Law Commission *A New Interpretation Act: To Avoid “Prolivity and Tautology”* (NZLC R17, 1990).

<sup>66</sup> At [68].

<sup>67</sup> At [71].

<sup>68</sup> At [72].

<sup>69</sup> At [71].

By the time the Bill was reported back by the Select Committee, the reference to context had been removed.<sup>70</sup> The explanatory note explained the omission on the basis of the impreciseness of the term and the concern that its inclusion “may widen the courts’ current approach to interpretation”<sup>71</sup> and lead to a more liberal approach to statutory interpretation that would depart from the words of the statute and therefore the purpose of Parliament.<sup>72</sup> Despite the removal of context from the statute as enacted, the courts regularly look at the legislative scheme, Parliamentary history and wider context behind the legislation, including Law Commission reports.<sup>73</sup>

Before leaving the topic of statutory interpretation, it is important to stress that the purposive approach to statutory interpretation still requires a concentration on the text and the meaning of the text as s 5(1) of the Interpretation Act makes clear. This has two consequences. The first is that statutory interpretation is just that – it cannot extend to rewriting a statute.<sup>74</sup> The second is that it is the text that was passed by Parliament and it is this text that is published as the law. In my view, this means that the words must be considered from the perspective of what they would convey to a reasonable, informed member of the class to which the legislation is addressed (which will usually be the public at large).<sup>75</sup>

New Zealand has also seen what Justice Gageler calls “the relentless march of the statute” replacing or modifying large areas of the common law. This process has been imaginatively described as a “sword stabbing into the body of the common law to excise and rectify certain unwanted case-law developments.”<sup>76</sup> One example in New Zealand of this process was in contract law, the reform of which began in 1969 and ended in 1982. Within the space of

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<sup>70</sup> Interpretation Bill 1998 (90-2), cl 5(1).

<sup>71</sup> Interpretation Bill 1998 (90-2) (explanatory note) at ii. The exclusion was evidently strenuously opposed by the New Zealand Law Society.

<sup>72</sup> At iii. For more, see Cathy Nijman, above n 61.

<sup>73</sup> See, for example *Worldwide NZ LLC v NZ Venue and Event Management Ltd* [2014] NZSC 108, [2015] 1 NZLR 1; and *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767 (SC) at [22]. For more see also Cathy Nijman, above n 61; Kenneth Keith *Interpreting Treaties, Statutes and Contracts* (OP No 19, New Zealand Centre for Public Law, 2009) at 36; and Ross Carter (ed) *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at ch 9.

<sup>74</sup> Charles Fried “Scholars and Judges: Reason and Power” 23(1999) Harv J L & Pub Pol’y 807 at 811. See also Susan Glazebrook “Statutory interpretation, tax avoidance and the Supreme Court: reconciling the specific and the general” (paper prepared for the New Zealand Institution of Chartered Accountants 2013 Tax Conference, Auckland, 7–9 November 2013) at 31.

<sup>75</sup> See also Susan Glazebrook “Do they say what they mean and mean what they say?”, above n 62, at 68–72.

<sup>76</sup> Andreas Rahmatian “Codification of Private Law in Scotland: Observations by a Civil Lawyer” (2004) 8(1) Edin L R 28 at 52.

these 13 years, four statutes<sup>77</sup> were enacted which largely replaced the general common law applicable to contracts.<sup>78</sup>

Even in the context of codification, the common law can remain relevant. Obviously it survives where there is only partial codification and in some cases, in order for the code to make sense, it must be read in the light of its common law history. Further, the rules relating to precedent still apply. The courts lower in the hierarchy are still bound by decisions of the courts above, whether in common law or in statutory interpretation.<sup>79</sup>

### *Domesticated foreign law*

Justice Gageler's last theme returns to the title of his paper: the use of foreign authority in the interpretation of domestic statutes. Here he points to the twin influences of globalisation and technology.<sup>80</sup>

Justice Gageler identifies one impact of globalisation as being a change from legislation that was the product of local innovation or borrowed (with necessary adaptation) from the United Kingdom to legislation that more and more has its roots in international agreements or its inspiration drawn from jurisdictions other than the United Kingdom.<sup>81</sup> In terms of technology, Justice Gageler points to the increased accessibility of foreign legal sources and the vast amount of contextual material that can accompany it. He makes the very valid point that, from a cost/benefit point of view, "there can be such a thing as too much information."<sup>82</sup>

Justice Gageler then turns to the question of why decisions of foreign courts should be considered in a domestic context at all.<sup>83</sup> In terms of statute law, he says that in some cases to do so will give effect to the purposes of a statute where the statute is designed to give

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<sup>77</sup> These being the Illegal Contracts Act 1970, the Contractual Mistakes Act 1977, the Contractual Remedies Act 1979 and the Contracts (Privity) Act 1982.

<sup>78</sup> For discussion as to whether some or all of these statutes do constitute a code, see for example D W McLauchlan "Contract and Commercial Law Reform in New Zealand" (1984) 11 NZULR 36; D F Dugdale "A Code is a Code is a Code" (2002) 8 NZBLQ 129; D W McLauchlan "The Contractual Mistakes 'Code': A Polite Response to Mr Dugdale" (2002) 8 NZBLQ 132; B Coote "The Contractual Mistakes Act as a Code: Some Further Thoughts" (2002) 8 NZBLQ 223.

<sup>79</sup> For more on this, see my earlier paper "Do they say what they mean and mean what they say?", above n 62, at 72–77.

<sup>80</sup> Stephen Gageler, above n 4, at 11.

<sup>81</sup> At 12.

<sup>82</sup> At 13.

<sup>83</sup> At 14.

domestic effect to principles expounded by foreign courts. In some cases too the purpose of a statute might be promoted by adopting a construction in harmony with the construction of similar legislation in other countries. This applies in particular where a statute implements an international agreement.<sup>84</sup>

In other cases, the justification for taking into account decisions of foreign courts relates to the common law methodology itself and why, in terms of that methodology, regard is had to authority generally: including considerations of fairness, equality before the law, efficiency (not reinventing the wheel), coherence, stability and predictability of the law. The strength of those justifications, and therefore the desirability of taking account of foreign jurisprudence, will, however, vary from case to case.<sup>85</sup>

I agree with all of Justice Gageler's points, which are equally applicable in a New Zealand context. In this commentary, I thought it might be helpful to elaborate on the last point he makes about different justifications for using foreign jurisprudence by discussing in more detail the different situations where foreign jurisprudence might play a role domestically.<sup>86</sup> Before I do that, it is worth providing some qualification to the picture my opening paragraph may have given as to the use of foreign jurisprudence in the United States.

The controversy there regarding the use of foreign law relates mostly to constitutional interpretation. The late Justice Scalia once categorically stated that he does not use foreign law in the interpretation of the United States Constitution. In his view, using foreign law to determine the content of constitutional law as a way of making sure America is "on the right track" presupposes that America has the same moral and legal framework of the world, which in his view, it does not.<sup>87</sup> Even with regard to constitutional interpretation, this

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<sup>84</sup> At 14–15.

<sup>85</sup> At 15–16.

<sup>86</sup> See, for example, Elaine Mak "Why Do Dutch and UK Judges Cite Foreign Law?" (2011) 86 Cambridge LJ 420 at 443 for a study of judges and their use of international materials. For more on this point, see my earlier paper "Cross-pollination or contamination: global influences on New Zealand law" (2015) 21 *Canta LR* 60 at 68–69 (publication forthcoming), at 77–78.

<sup>87</sup> N Dorsen "The relevance of foreign legal materials in U.S. constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer" (2005) 3 *IJCL* 519 at 521. Professor Seipp, above n 3, at 1418, in fact says this is not the case and that Justice Scalia has mentioned foreign law in constitutional matters or joined judgments that have done so, citing *McIntyre v Ohio Elections Commission* 514 US 334 (1995) at 381–382 (Scalia J dissenting); *Locke v Davey* 540 US 712 (2004) at 734 (Scalia J dissenting), and joining Chief Justice Rehnquist in *Washington v Glucksberg* 521 US 702 (1997) at 734.

view has been criticised by many constitutional scholars as both ahistorical and wrong.<sup>88</sup>

Be that as it may, context is key. Justice Scalia has said that, when interpreting a treaty or legislation which incorporates a treaty, federal courts should give “considerable respect” to how a treaty has been interpreted elsewhere, to avoid frustrating the object of the treaty “to establish a single, agreed-upon regime.”<sup>89</sup> In such a case, the interpretation given by foreign courts can constitute “evidence of the original shared understanding of the contracting parties” and it is reasonable to impute an intention to interpret the treaty consistently.<sup>90</sup> Justice Scalia has also cited foreign law in other areas of law beyond treaty interpretation, including in commercial law cases.<sup>91</sup>

So now to move to a discussion of when foreign jurisprudence may be used in different contexts in New Zealand.<sup>92</sup>

#### *Direct application of foreign law*

Foreign law can be directly applicable in some cases. For example a contract may provide that it (or part of it) is to be governed by foreign law. In such a case the content of the applicable foreign law is treated as a question of fact requiring evidential proof.<sup>93</sup>

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<sup>88</sup> See, for example Roger Alford “Four Mistakes in the Debate on ‘Outsourcing Authority’” (2006) 69 *Alb L Rev* 653; Sarah Cleveland “Our International Constitution” (2006) 31 *Yale J Int’l L* 1; Harlan Grant Cohen “Supremacy and Diplomacy: The International Law of the U.S. Supreme Court” (2006) 24 *Berk J Intl L* 273; Paul Finkelman “Foreign Law and American Constitutional Interpretation: A Long and Venerable Tradition” (2007) 63 *NYU Ann Surv Am L* 29; and Seipp, above n 3. There are others who agree with Justice Scalia, however. See, for example Robert J Delahuntly and John Yoo “Against Foreign Law” (2005-2006) 29 *Harv J L & Pub Pol’y* 291.

<sup>89</sup> Justice Antonin Scalia “Foreign Legal Authority in the Federal Courts” (2004) 98 *Am Socy Intl L Proc* 305 at 305.

<sup>90</sup> *Olympic Airways v Husain* 540 US 644 (2004) at 660 (dissenting).

<sup>91</sup> See, for example, his dissent in *Hartford Fire Insurance Co v California* 509 US 764 (1992) and also *JP Morgan Chase Bank v Traffic Stream (BVI) Infrastructure Ltd* 536 US 88 (2002) at 91.

<sup>92</sup> For more on the role of national courts and foreign law in general, see also Anthea Roberts “Comparative international law? The role of national courts in creating and enforcing international law” (2011) *Intl & Comp Law* 57, at 59–61.

<sup>93</sup> Evidence Act 2006, s 144. For other instances of direct application of foreign law, see Lord Mance “Foreign and Comparative Law in the Courts” (2001) 36 *Tex Intl L J* 415 at 415–417.



## *Customary International Law*

Customary international law is automatically a part of domestic common law as long as it is not inconsistent with an act of Parliament or with a prior judicial decision of final authority.<sup>94</sup>

Customary international law arises out of the combination of state practice and a belief by states that the practice is an international legal obligation (*opinio juris sive necessitates*).<sup>95</sup>

This definition in itself means that, where customary international law is in issue, recourse to decisions of foreign courts may be relevant: to whether the custom actually exists as well as to its content.<sup>96</sup>

## *Treaties and Conventions*

In New Zealand international treaties are not formally part of domestic law until incorporated through legislation.<sup>97</sup> There is no uniform method of incorporation. Sometimes the treaty itself is appended to the legislation and sometimes the treaty obligations are incorporated into the body of the legislation, often with some modification of the wording.<sup>98</sup>

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<sup>94</sup> See James Crawford *Brownlie's Principles of Public International Law* (8th ed, Oxford University Press, Oxford, 2012) at 67. This so called doctrine of "incorporation" was explicitly stated by Lord Denning MR in *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529 (CA) at 554 where he said, "[s]eeing that the rules of international law have changed – and do change – and that the courts have given effect to the changes without any Act of Parliament, it follows ... inexorably that the rules of international law, as existing from time to time, do form part of English law." For a New Zealand perspective, see Paul Hunt and Margaret Bedggood "The International Law Dimension of Human Rights in New Zealand" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms* (Brookers, Wellington, 1995) at 57–58; Kenneth Keith, "The Impact of International Law on New Zealand Law" (1998) 6 *Waikato L R* 1 at 22; and see also Doug Tennent *Immigration and Refugee Law* (2nd ed, LexisNexis, Wellington, 2014) at 29.

<sup>95</sup> See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 at [207]. See also Treasa Dunworth "The Rising Tide of Customary International Law: Will New Zealand Sink or Swim?" (2004) 15 *PLR* 36 at 36. More on this can be found in my earlier paper "Cross-pollination or contamination: global influences on New Zealand law", above n 86, at 69.

<sup>96</sup> See, for example, Andre Da Rocha Ferreira, Cristieli Carvalho, Fernanda Graeff Machry, and Pedro Barreto Vianna Rigon "Formation and Evidence of Customary International Law" *UFRGS Model United Nations Journal* 1 (2013) 182. This article gives a good summary of how the International Court of Justice uses caselaw as a subsidiary means of establishing customary international law.

<sup>97</sup> For more on this, see my earlier paper "Cross-pollination or contamination: global influences on New Zealand law", above n 86, at 61–64.

<sup>98</sup> Methods of implementing treaties include giving direct effect to the text of the treaty by way of a provision establishing that the treaty provisions "have the force of law" in New Zealand; statutes that use some of the wording of the treaty incorporated into the body of the statute or indicating in some other way its treaty origins; statutes which incorporate the substance of the treaty without any obvious reference to the treaty; and primary legislation authorising subordinate legislation to give effect to the treaty: Law Commission *The Treaty Making Process: Reform and the Role of Parliament* (RP45 1997) at [125]–[126]. The Law Commission recommended in this report that "so far as practicable" the implementation of treaties or other international instruments should give direct effect to the texts by using the original wording of the treaties

The Vienna Convention on the Law of Treaties 1969 (the Vienna Convention) was ratified by New Zealand in April 1970. This Convention requires that a treaty be interpreted in good faith in accordance with the ordinary meaning of its terms as seen in their context and in light of the treaty's object and purpose. Subsequent interpretation of the treaty in practice which indicates what parties intended the text to mean must also be considered.<sup>99</sup> Supplementary materials such as travaux préparatoires may be considered in order to confirm the meaning of a treaty provision or to determine the meaning if it is ambiguous.<sup>100</sup> It can be seen that these principles are relatively similar to what is required under our Interpretation Act.<sup>101</sup>

It has been noted that the Vienna Convention does not explicitly require consistency of interpretation across the different signatories. Thus some argue that the duty of a court is to interpret provisions of treaties consistently with the interpretation principles in the Vienna Convention, even if that means that the court's view differs from that taken in other jurisdictions.<sup>102</sup> Others argue that, as treaties record common obligations, courts should try for consistency of interpretation if possible.<sup>103</sup> This means having regard to the caselaw of other jurisdictions.

One of the issues, however, with treaties, and particularly multilateral ones, is that the drafting can reflect compromises to satisfy competing interests and concerns and this can lead to unclear or ambiguous wording. Indeed, it has been said that a treaty is a "disagreement reduced to writing".<sup>104</sup> It has also been said that, as products of international consensus, treaties are not drafted with the same precision as domestic legislation and that this is particularly so in the case of multilateral treaties.<sup>105</sup> These factors, coupled with the fact that

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and if not possible, by indicating the treaty or international origins: at [195]. For discussion on the impact of the method of incorporation on the interpretation of treaties, see Keith, above n 94, at 18–19 and 23–31.  
<sup>99</sup> Vienna Convention on the Law of Treaties 1969, art 31. This practice must be consistent and common to, or accepted by, all parties: see Anthony Aust *Modern Treaty Law and Practice* (3rd ed, Cambridge University Press, Cambridge, 2013) at 215.

<sup>100</sup> Vienna Convention on the Law of Treaties 1969, art 32.

<sup>101</sup> See the comments in *Attorney-General v Zaoui* [2005] 1 NZLR 690 (CA) at [129].

<sup>102</sup> Roberts, above n 92, at 84.

<sup>103</sup> A desire for consistency of interpretation has long been articulated – see for example *Stag Line Ltd v Foscolo, Mango and Co Ltd* (1932) AC 328 at 350 (HL). See also the more recent comments in *R v Secretary of State for the Home Department, ex parte Adnan* [2001] 2 AC 477 (HL) at 617 per Lord Steyn. Some treaties require in their terms consistency of interpretation, such as the United Nations Convention on International Sale of Goods, art 7(1). New Zealand ratified this convention and passed the Sale of Goods (United Nations Convention) Act 1994 which incorporated the Convention as a schedule.

<sup>104</sup> P Allott, 'The Concept of International Law' (1999) 10 *European J Intl L* 31 at 43.

<sup>105</sup> Shaheed Fatima *Using International Law in Domestic Courts* (Hart Publishing, Oregon, 2005) at 97–98.

treaties will fall to be determined by different domestic institutions around the world, mean that the idea of uniform interpretation, however desirable, may not be achievable.<sup>106</sup>

### *Unincorporated treaties*

Even if ratified treaties have not been incorporated by legislation, this does not mean they are irrelevant in the domestic context. There is a presumption in New Zealand that Parliament intends to legislate consistently with international obligations meaning that, to the extent that the words allow, legislation will be interpreted accordingly.<sup>107</sup> It has also become clear in recent years that, if there is a broad based discretion given to the executive, then this discretion must be exercised consistently with international obligations.<sup>108</sup> Courts adjudicating on such cases may well need to consider foreign court decisions.

International obligations are also necessarily part of the values, norms and principles to be taken into account when developing the common law.<sup>109</sup> One example of this can be found in the decision in *Hosking v Runting*, where the majority<sup>110</sup> recognised a tort of privacy in

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<sup>106</sup> Roberts, above n 92, at 74.

<sup>107</sup> On the traditional view, a prima facie ambiguity was required to trigger the presumption. Thus the New Zealand Court of Appeal originally held that an open-ended administrative discretionary power could not be confined by implied limits derived from international law: see *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA) at 229 per Richardson J. See also at 225–226 per Cooke J and Somers J at 232. This is no longer the case: see, for example, *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA); and also Philip A Joseph “Exploratory Questions in Administrative Law” (2012) 25 NZULR 73 at 99–100. For a comparison between New Zealand and Australia on this point, see Dan Meagher “The Common Law Presumption of Consistency with International Law: Some Observations from Australia (and Comparisons with New Zealand)” [2012] NZLR 465. For more on this, see my earlier paper “Cross-pollination or contamination: global influences on New Zealand law”, above n 86, at 63–64; and also “Do they say what they mean and mean what they say?”, above n 62, at 81–84.

<sup>108</sup> The courts have read open-ended administrative discretionary powers as being subject to the limits of international law: see for example *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA); *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289. *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104; and *Helu v Immigration and Protection Tribunal* [2015] NZSC 28 at [144]. See also my earlier paper “Cross-pollination or contamination: global influences on New Zealand law”, above n 86, at 64–67.

<sup>109</sup> See Treasa Dunworth “Law Made Elsewhere: The Legacy of Sir Ken Keith” in Claudia Geiringer and Dean R Knight (eds) *Seeing the World Whole – Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) 126 at 133 where she argues that international law operates as influential authority and its influence will depend on factors such as the value of the international principle and its need for influence domestically, or the way in which a particular rule fits within the domestic system. See also Mayo Moran “Influential Authority and the Estoppel-Like Effect of International Law” in Hilary Charlesworth and others (eds) *The Fluid State: International Law and National Legal Systems* (2005) 156; Alice Osman “Demanding attention: The roles of unincorporated international instruments in judicial reasoning” (2014) 12(2) NZJPIIL 345 at 349–356; and Janet McLean in “Divergent Legal Conceptions of the State: Implications for Global Administrative Law” (2004) 68 Law & Contemp Probs 167 at 177–178.

<sup>110</sup> Gault, Blanchard and Tipping JJ (Anderson P and Keith J dissenting). There were four judgments.

New Zealand.<sup>111</sup> In their judgment in that case Gault P and Blanchard J said that there is increasing recognition that the common law should develop consistently with international treaties to which New Zealand is a party.<sup>112</sup> They went on to say that this is an international trend.<sup>113</sup> They referred to case law on breach of confidence and privacy in the United Kingdom,<sup>114</sup> Australia,<sup>115</sup> Canada<sup>116</sup> and the United States<sup>117</sup> in coming to their conclusion on the existence of the tort.<sup>118</sup> The other judges also referred to foreign law on the topic.<sup>119</sup> The fact that the right to privacy recognised in the International Covenant on Civil and Political Rights<sup>120</sup> was not recognised in our Bill of Rights did not prevent the common law from being developed to protect particular aspects of privacy.<sup>121</sup>

### *Model Laws*

An obvious area where international consistency of interpretation is important is where domestic legislation enacts model laws. Many model laws come from the United Nations Commission on International Trade Law (UNCITRAL) whose business is legal harmonisation and modernisation.<sup>122</sup> Other sources of model law include The Hague Convention and the Rome Institution for Unification of Private Law (UNIDROIT). In order to increase the likelihood of uniformity and certainty, states may be invited to make as few

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<sup>111</sup> *Hosking v Runting* [2005] 1 NZLR 1 (CA).

<sup>112</sup> At [3]–[6].

<sup>113</sup> At [6]. See also Osman, above n 109, at 354. For an Australian example, see *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 288 where Mason CJ and Deane J recognised that “[t]he provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law.”

<sup>114</sup> At [23]–[53].

<sup>115</sup> At [54]–[59].

<sup>116</sup> At [60]–[65].

<sup>117</sup> At [66]–[77].

<sup>118</sup> At [117]–[148]. Key cases for this development included *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199; *Campbell v MGN Ltd* [2003] 1 All ER 224 (CA); *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 SC (HL); *Douglas v Hello! Ltd* [2001] QB 967 (CA); *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 SC (HL) and *Kapellas v Kofman* 1 Cal 3d 20 (1969).

<sup>119</sup> See, for example, Keith J at [182], [194] and [200]–[201]; Tipping J at [240]–[242]; and Anderson P at [269].

<sup>120</sup> International Covenant on Civil and Political Rights, art 17. New Zealand ratified this on 28 December 1978.

<sup>121</sup> *Hosking v Runting*, above n 111, at [114]. A similar comment was made by Tipping J at [226].

<sup>122</sup> Gerard McCormack, “Comi and Comity in UK and US Insolvency Law” 128 (2012) LQR 140 at 140.

changes as possible when incorporating such model laws.<sup>123</sup> However, model laws usually provide greater flexibility for modification for those who adopt them.<sup>124</sup>

One example is the Model Law on Cross-Border Insolvency, adopted by UNICITRAL on 30 May 1997. New Zealand implemented the Model Law through the Insolvency (Cross-Border) Act 2006 (the Act) in its first schedule. However it has been adapted to fit the New Zealand legal context.<sup>125</sup> Despite the modifications, the Act explicitly imports the Model Law requirement that regard is to be had to the Act's international origin and the need to promote uniformity in its application and the observance of good faith.<sup>126</sup> Additionally, the Act provides that reference may be made to the Model Law on Cross-Border Insolvency and any document that relates to the Model Law that originates from UNICITRAL.<sup>127</sup>

New Zealand has also adopted much of the model law on Electronic Commerce in the Electronic Transactions Act 2002.<sup>128</sup> Section 6 of the Act provides that, in interpreting the Act, regard may be had to the Model Law and any international document that relates to it. This at least implicitly recognises the desirability of international consistency in interpretation and therefore the relevance of foreign jurisprudence.

UNICITRAL has taken steps to increase the accessibility of jurisprudence and made the task of achieving consistency much easier by setting the information system, CLOUT (Case Law on UNICITRAL Texts). The system is intended to cover caselaw on current and future UNICITRAL texts. States appoint national correspondents to monitor and collect court decisions and prepare abstracts of those considered relevant in one of the official languages of the United Nations, which are then translated into all six languages<sup>129</sup> and published online

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<sup>123</sup> G Shapira, "UNICITRAL and its work – Harmonisation and Unification of International Trade Law" NZLJ [1992] 309 at 310.

<sup>124</sup> Law Commission *International Trade Conventions* (SP5, 2000) at [15].

<sup>125</sup> Introduction to Insolvency (Cross-Border) Act 2006, *Insolvency Law* (Thomson Reuters, online ed) at CBIntro.04(1).

<sup>126</sup> Insolvency (Cross-Border) Act 2006, sch 1, art 8.

<sup>127</sup> Insolvency (Cross-Border) Act 2006, s 5.

<sup>128</sup> Introduction to E-Commerce Law, *Gault on Commercial Law* (Thomson Reuters, online ed) at 5A.6.01.

<sup>129</sup> Arabic, Chinese, English, French, Russian and Spanish.

when a sufficient number of abstracts have been received.<sup>130</sup> The Hague Convention on Private International Law has a similar collation of case law that is accessible online.<sup>131</sup>

It is worth adding some thoughts on how international consistency can be achieved, both in terms of model laws and treaty interpretation. The first point is that there cannot be a requirement for all subsequent courts to follow the authority that is “first off the blocks”. Indeed, international consensus may only arise over time and after debate through conflicting decisions. Once that consensus has arisen, it seems to me proper, in terms of the judicial oath, for a court, in order to achieve the object of establishing a uniform regime, to defer to the views of other states if their interpretation is “within the ballpark” of a reasonable interpretation.<sup>132</sup>

### *Statutes from abroad*

As Justice Gagelar has noted, foreign law can be the source of inspiration for domestic statutes. For example our Personal Property Securities Act 1999 (PPSA) is based on a Canadian model. This model was in turn based somewhat on American legislation.<sup>133</sup> The relevance of Canadian cases in New Zealand PPSA cases has been highlighted.<sup>134</sup> However, ultimately any decision must turn on the New Zealand legislation which is not completely identical to Canada.<sup>135</sup>

I note also that Australia enacted the Personal Property Securities Act 2009, which has both similarities and differences to the New Zealand PPSA.<sup>136</sup> The Australian legislation has been referred to by New Zealand courts when faced with questions of interpretation.<sup>137</sup>

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<sup>130</sup> United Nations Commission on International Trade Law *Case Law on UNICITRAL Texts User Guide A/CN.9/SER.C/GUIDE/1/Rev.2*. These abstracts are supported by digests sorted by article for the Convention of the Sale of Goods and the Model Law on International Commercial Arbitration. Other resources also exist which collect cases under the Convention of the Sale of Goods, such as the Pace University website <<http://www.cisg.law.pace.edu>>. See also Luke Nottage “Who’s Afraid of the Vienna Sales Convention (CISG)? A New Zealander’s View from Australia and Japan” (2005) 36 VUWLR 85.

<sup>131</sup> INCADAT, accessible at <[www.incadat.com](http://www.incadat.com)>

<sup>132</sup> As Justice Scalia said when referring to Treaty interpretation in his interview with N Dorsen: above n 87, at 521. See also Justice Scalia, above n 89, at 305.

<sup>133</sup> Based on the Uniform Commercial Code, art 9.

<sup>134</sup> For example, see *Service Foods Manawatu Ltd (in rec and in liq) v NZ Associated Refrigerated Food Distributors Ltd* (2006) 9 NZCLC 263,979 (HC) at [3].

<sup>135</sup> See *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629 (CA) at [16] per Robertson and Baragwanath JJ.

<sup>136</sup> For more on this, see Michael Arthur “The Australian PPSA” [2010] NZLJ 393.

Another example can be seen in *Worldwide NZ LLC v NZ Venue and Event Management Ltd*.<sup>138</sup> In this case the Supreme Court considered the meaning of “debt” within s 87(1) of the Judicature Act 1908 which deals with the imposition of interest on debts and damages after judgment. The Court acknowledged the legislative history of the provision,<sup>139</sup> including that the current provision was the result of an adoption of a United Kingdom statute,<sup>140</sup> which was made clear during speeches in the New Zealand House of Representatives.<sup>141</sup> Given this legislative history, the Court was of the view that caselaw from the United Kingdom on the provision was “highly relevant”<sup>142</sup> and it also considered Australian caselaw on a similar provision.<sup>143</sup>

### *Bills of Rights*

Another area where international jurisprudence is of major significance is in the interpretation of human rights legislation.<sup>144</sup> This is understandable given the universal nature of human rights.<sup>145</sup> A 2011 study on judges of the Supreme Court found that all judges characterised themselves as regular users of law of other national jurisdictions in their judgments on rights. The study concluded that New Zealand judges displayed a relatively greater receptiveness to transnational materials than in other jurisdictions.<sup>146</sup>

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<sup>137</sup> See *Rabobank New Zealand Ltd v McAnulty* [2011] 3 NZLR 192 (CA) at [42]–[44]; and also *Stiassny v Commissioner of Inland Revenue* [2012] NZSC 106 at [57].

<sup>138</sup> *Worldwide NZ LLC v NZ Venue and Event Management Ltd*, above n 73.

<sup>139</sup> At [17]–[22].

<sup>140</sup> Law Reform (Miscellaneous Provisions) Act 1934.

<sup>141</sup> (29 July 1952) 279 NZPD 584.

<sup>142</sup> *Worldwide NZ LLC v NZ Venue and Event Management Ltd*, above n73, at [25]. The Court also discussed in detail some of the United Kingdom cases: at [25]–[31].

<sup>143</sup> At [32].

<sup>144</sup> The two most important pieces of human rights legislation in New Zealand being the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

<sup>145</sup> As evidenced by the Universal Declaration of Human Rights, which New Zealand ratified in 1948.

<sup>146</sup> Brian Flanagan, above n 5, at 447–448. This was in comparison to judges surveyed from the British House of Lords, the Caribbean Court of Justice, the High Court of Australia, the Constitutional Court of South Africa, the Supreme Court of Ireland, the Supreme Court of India, the Supreme Court of Israel and the Supreme Court of Canada. It is common for foreign decisions and human rights legislation to be considered in interpreting our Bill of Rights. See, for example, the decision of Richardson P, Blanchard and Tipping JJ (Gault, McGrath and Anderson JJ concurring in separate judgments, Elias CJ dissenting) in *R v Shaheed* [2002] 2 NZLR 377 (CA), where in interpreting the Bill of Rights Act, the position of the United States, Ireland, Canada, Trinidad and Tobago and England and Wales was considered: at [71]–[111]. See also the Supreme Court decision in *R v Condon* [2007] 1 NZLR 300 (SC) where the Court considered European, United Kingdom, Irish, United States, Canadian, Australian and New Zealand law in determining the scope of the right to legal counsel: at [36]–[66].

### *Foreign authority generally*

Outside of the above areas, the use of foreign precedent as persuasive authority will depend on the issue. Where the issue is a question governed by the common law and where there is no binding domestic authority, the most assistance is likely to come from other common law jurisdictions, although how matters have been treated outside of the common law world could certainly contribute to the development of the common law.<sup>147</sup> Where the issue may be of more global significance (and that will cover many commercial issues), then authority from a wider variety of jurisdictions would be of relevance.

More generally, it can often be helpful, particularly when grappling with hard cases with a dearth of local authority, to understand how similar issues have been dealt with elsewhere. This is so even if the court ultimately comes to the view that the overseas jurisprudence is inapplicable to the domestic social, legal or commercial circumstances or is in error. By considering contrary views, courts can test and strengthen their own conclusions. Such an approach is the essence of an adversarial legal system.<sup>148</sup> Further, as Justice Susan Kiefel has said, the process of comparison between jurisdictions can be used to “understand why the approaches of other jurisdictions are the way they are, and to use that understanding to form a more holistic view of one’s own law and the direction that it should take.”<sup>149</sup>

This is not to suggest that there are no issues in relying on foreign jurisprudence. The cases will have arisen against a different legal and cultural background which may not be fully

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<sup>147</sup> Indeed, some believe that judicial dialogue between civil law and common law countries should be increased: see, for example Marinella Marmo “Cross-fertilisation between civil law countries and common law countries: The importance of judicial dialogue in criminal proceedings” (2006) 16 JJA 106. For more on this point, see Casalav Pejovic “Civil Law and Common Law: Two Different Paths Leading to the Same Goal” (2001) 32 VUWL Rev 817. For an Australian account see Susan Kiefel “Comparative Analysis in Judicial Decision-Making: The Australian Perspective” (2011) 75 *Rabels Z* 354, where she notes the use of civil law materials in some areas of law such as cases dealing with unsuccessful sterilisation and the limited use of such materials in other areas of law such as restitution, intellectual property and administrative law: at 389–359

<sup>148</sup> For more on this, see my earlier paper “Cross-pollination or contamination: global influences on New Zealand law”, above n 86, at 77–78. Exposure to the perceived errors of other courts can be just as beneficial as consideration of correct law by way of “the clearer perception and livelier impression of truth, produced by its collusion with error”: John Stewart Mill *On Liberty* (Longman, Roberts & Green, 1869) at 31.

<sup>149</sup> Susan Kiefel, above n 147. Kiefel is of the view that this level of understanding is critical to a final court such as the High Court of Australia which is faced “on a daily basis, with novel and complex legal problems that invite consideration of the conceptual framework and underlying purpose of the law”: at 365–366.



understood.<sup>150</sup> There may be language difficulties. Further, different judicial training and so-called “underlying cognitive grids”<sup>151</sup> that shape decision-making in one country may not be easily transferred to another. The sheer volume of foreign material available can lead also to “cherry picking”, where judges refer only to foreign material which supports the decision they have in mind and do not discuss or consider foreign materials that point to another conclusion.<sup>152</sup> There is also the issue of cost/benefit referred to by Justice Gageler.

### *Final Thoughts*

In the modern world, isolationism is neither desirable nor possible and this also applies to law. That the courts look outward to other jurisdictions when deciding cases should therefore not be controversial. However, domestic courts must also make sure that they are cognisant of areas where the unique heritage, culture, social conditions and legal traditions of the jurisdiction might suggest a different path from the rest of the world.

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<sup>150</sup> See, for example, *R v Wichman* [2014] NZSC 80 where it was noted by two of the judges in dissent that any possible divergence with Canada and Australia with regards to unfairly obtained evidence required consideration of the different legislative context: at [232] and [240] per Elias CJ and at [517] per Glazebrook J.

<sup>151</sup> Roberts, above n 92, at 74; and V Curran, ‘Remembering Law in the Internationalizing World’ (2005) 34 *Hofstra L Rev* 93, at 97.

<sup>152</sup> Justice Scalia has made this accusation in relation to the use of foreign jurisprudence by his colleagues, saying that the tendency to “invoke alien law when it agrees with one’s own thinking and ignore it otherwise” is “not reasoned decision-making, but sophistry” *Roper v Simmons* 543 US 551 (2005) at 627 (dissenting).