

**THE JAPANISATION OF AMERICAN LAW?  
SUBSTANTIVE SIMILARITIES, COMPARED TO FORMAL ANGLO-NEW ZEALAND LAW**

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Some have recently proclaimed a thoroughgoing "Americanisation of Japanese Law", as economic liberalisation, political fragmentation, and the growth of legal services markets accelerated in Japan from the mid-1990s. In product liability, corporate governance and other fields, Japan's "law in books" has indeed been moving towards more of "the American Way". Yet the changes are subject to the vagaries of all law reform, they often draw on European Union (EU) or other models, and they are certainly less pronounced when it comes to Japan's "law in action".<sup>a</sup> Nonetheless, in a peculiar sense not appreciated by recent commentators, the Japan legal system has long shared much with its counterpart in the US. Both are much more open to what Atiyah and Summers famously outlined as "substantive reasoning" – "moral, economic, political, institutional or other consideration[s]" – and they have developed legal institutions to support that vision of law.<sup>b</sup> American commentators have trouble appreciating this commonality, since of course not everything is the same in Japan.

However, this Paper demonstrates that the more important contrast lies between both these legal systems, on the one hand, and the still distinctly more "formal reasoning" oriented legal systems in England and for example New Zealand, on the other. The dichotomy also remains in many dimensions of contract law and practice in all four countries. On the other hand, each pair differs somewhat in being more or less formal in various areas of contract law.<sup>c</sup> In addition, what Atiyah and Summers term "second-order reasoning" – the underlying values and other considerations that these systems draw on to feed through their more substantive reasoning frameworks – probably differ even further. The spread of market forces – in economics, politics and

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\* "Like attracts like" (Japanese proverb).

<sup>a</sup> Compare R D Kelemen & E C Sibbitt "The Americanization of Japanese Law" (2002) 23 *University of Pennsylvania Journal of International Economic Law* 269 with eg L Nottage *Product Safety and Liability Law in Japan: From Minamata to Mad Cows* (London, RoutledgeCurzon, 2004).

<sup>b</sup> P S Atiyah and R S Summers *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press, Oxford, 1987) 2.

<sup>c</sup> See eg L Nottage "Form and Substance in US, English, New Zealand and Japanese Law: A Framework for Better Comparisons of Developments in the Law of Unfair Contracts" (1996) 26 *Victoria University of Wellington Law Review* 247 (Japanese law somewhat more formal than US law) and L Nottage "Economic Dislocation and Contract Renegotiation in New Zealand and Japan: A Preliminary Empirical Study" (1997c) 27 *Victoria University of Wellington Law Review* 59 (more substantive); and generally L Nottage "Tracing Trajectories of Contract Law Theory: Form in Anglo-NZ Law, Substance in Japan and the US" (Sydney Law School Research Paper, 2007b, forthcoming).

other social spheres – does seem to be transforming Japan’s value system, and this is highlighted by some Western commentators as driving the “Americanisation” of certain areas of Japanese law. Yet ideology dies hard and, probably more importantly, supporting socio-legal institutions (or communities) continually redefine and reassert themselves.<sup>d</sup> Thus, even comparing Japan with the US belies straightforward convergence. Adding countries in the English law tradition to the picture highlights further persistent divergence, despite the admittedly powerful globalisation of law and socio-economic relations.

## I Revisiting Atiyah and Summers’ “Form-Substance” Framework

Atiyah and Summers developed their “form-substance” dichotomy primarily to argue that legal reasoning and legal institutions were consistently more formal in England compared to the US. Their study attracted generally favourable reviews, with John Bell suggesting for instance that it would become:<sup>1</sup>

required reading for anyone who studies both English and American law and ... a classic of legal scholarship. Never before have two scholars of such eminence in their own jurisdictions sat down to write together a work which analyses the nature of their legal systems in such depth and with such care. Of course, two people will inevitably be selective ...

Atiyah and Summers themselves concluded by suggesting that more research should be undertaken with respect to their theses, acknowledging that “no pair of scholars can hope to be fully conversant with the whole of one system of law, let alone two”.<sup>2</sup> They invited scholars to identify and evaluate any further counter-examples in each of their two legal systems; to explore possible further dimensions in legal reasoning and institutional structure, and the ways in which they relate with each other; and to develop specific hypotheses to test from a social scientific perspective, rather than the broader-brush qualitative approach adopted in their work.<sup>3</sup> Researchers writing in diverse fields, from a range of methodological standpoints, have risen to these challenges to varying degrees. Many have been inspired to explore differing orientations in areas of English and US law which Atiyah and Summers alluded to in much less detail, or not at all.<sup>4</sup> Others have considered more recent developments in

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<sup>d</sup> L Nottage “Nothing New in the (North) East? The Rhetoric and Reality of Corporate Governance in Japan” (2006) 01-1 *CLPE Research Paper* <http://ssrn.com/abstract=885367>; L Nottage “Translating Tanase: Challenging Paradigms of Japanese Law and Society” (2006) *Sydney Law School Research Papers* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=921932](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=921932).

<sup>1</sup> J Bell “Book Review” (1993) 22 *Anglo-Am L Rev* 126, 126.

<sup>2</sup> P Atiyah and R Summers *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press, Oxford, 1987) 428.

<sup>3</sup> Above n 2, 429.

<sup>4</sup> See for example K N Hylton “Fee-Shifting and the Predictability of Law” (1995) 71 *Chi-Kent L Rev* 427; C Conrad “Scapegoating the Jury” (1997) 7 *Cornell J L & Pub Pol’y* 7; R J Krotoszynski “Autonomy, Community, and the Traditions of Liberty: The Contrast of British and American Privacy Law” (1990) *Duke L J* 1398; R J Krotoszynski “*Brind & Rust v Sullivan*: Free Speech and the Limits of a Written Constitution” (1994) 22 *Fla St U L Rev* 1; D Partlett “From Victorian Opera to Rock and Rap: Inducement to Breach of Contract in the Music Industry” (1992) 66 *Tul L Rev* 771; D Partlett “Legal Hot Zones” (1996) 56 *La L Rev* 781; D F Partlett “Tort Liability and the American Way: Reflections on Liability for Emotional Distress” (1997) 45 *AJCL* 171; G R Shreve “Symmetries of Access in Civil

areas which they examined quite closely.<sup>5</sup> In the inaugural Clarendon Law Lectures delivered at Oxford University in 1995, Judge Richard Posner attempted to develop and test empirically several hypotheses contrasting English and US legal systems.<sup>6</sup> More generally, in the forty-ninth series of Hamlyn Lectures delivered in late 1997, Roy Goode drew on the “trail-blazing work” by Atiyah and Summers to reiterate that, to this day, “the emphasis in English law is very much on formal reasoning and in American law on substantive reasoning”.<sup>7</sup> These studies overwhelmingly support their claims of significant and entrenched differences in legal reasoning and institutional structure. Part II of this Paper argues that such differences remain prominent in contemporary English and US law generally, and help to uncover and explain differences in three major areas of contract law discussed in my other published work.

Another question, however, is whether these two legal systems may be converging. David Partlett, in his favourable review essay, suggests that Atiyah and Summers nonetheless may have underestimated a growing cross-fertilisation of English law from Commonwealth jurisdictions as well as the US.<sup>8</sup> A few years later, in a lecture in Sydney in 1992, Atiyah himself suggested that the growing significance of EU law may be:<sup>9</sup>

leading English law down a number of paths which plainly point to an increase in unpredictability in law, and a decrease in legal formality. In some ways these changes may suggest a greater convergence between the English and American traditions.

Yet Atiyah and Summers seem to have been right in implying that such convergence becomes more problematic in the light of the interlocking and often internally consistent aspects of the respective legal systems:<sup>10</sup>

a legal system consists of so many interlocking parts – including not only the substantive law, but also the conventions and customs governing the personnel of the law – that changes in one part

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Rights Litigation” (1990) 66 *Indiana L J* 1; W S Jordan “Legislative History and Statutory Interpretation: The Relevance of English Practice” (1994) 29 *U San Fran L Rev* 1; K Teeven “A History of Legislative Reform of the Common Law of Contract” (1994?) 26 *U Tol L Rev* 35; S Dow “The Doctrine of *Price v Neal* in English and American Contract Law” (1998) 6 *Tul J Int’l & Comp L* 113; M Cloud “Pragmatism, Positivism, and Principles in Fourth Amendment Theory” (1993) 41 *UCLA L Rev* 199; M Cloud “The Fourth Amendment During the *Lochner* Era: Privacy, Property, and Liberty in Constitutional Theory” (1996) 48 *Stan L Rev* 555; D T Coenen “Priorities in Accounts: The Crazy Quilt of Current Law and a Proposal for Reform” (1992) 45 *Vand L Rev* 1061; C R Sunstein “Problems with Rules” (1995) 83 *Calif L Rev* 953; A Phang “Positivism and the English Law of Contract” (1992) 55 *MLR* 102.

<sup>5</sup> See for example P D Carrington “Butterfly Effects: The Possibilities of Law Teaching in a Democracy” (1992) *Duke L J* 741; M Schwarzschild “Class, National Character, and the Bar Reforms in Britain: Will There Always Be An England?” (1994) 9 *Conn J Int’l L* 185; J Friesen “When Common Law Courts Interpret Civil Codes” (1996) 15 *Wis Int’l L J* 1. See also below in Part II of this Paper.

<sup>6</sup> R Posner *Law and Legal Theory in England and America* (Clarendon Press, Oxford, 1996). Ironically, for a foremost proponent of the economic analysis of law, he was led to various speculations as to broader differences in “national legal culture”.

<sup>7</sup> R Goode *Commercial Law in the Next Millennium* (Sweet & Maxwell, London, 1998) 25.

<sup>8</sup> D Partlett “The Common Law as Cricket” (1990) 43 *Vand L Rev* 1401.

<sup>9</sup> P S Atiyah “Justice and Predictability in the Common Law” (1992) 15 *UNSWLJ* 448, 461. See generally also B Markesinis (ed) *The Gradual Convergence: Foreign Ideas, Foreign Influences and European Law on the Eve of the 21st Century* (Clarendon Press, Oxford, 1993).

<sup>10</sup> Above n 2, 431.

must be expected to have rippling ramifications elsewhere. But it will often take time for the other parts of the legal system to realign themselves with changes of this character.

This paper, combined with some related publications, demonstrate the enduring significance of some key differences in legal reasoning and legal institutions – broadly defined – in England and the US. That conclusion should not be too surprising in the light of general legal theory suggesting the coherence of legal systems,<sup>11</sup> or its relative autonomy vis à vis other social sub-systems.<sup>12</sup> Theories of relative autonomy do not necessarily foreclose the possibility of change. Yet they highlight the problematic nature of legal evolution even amidst globalisation of economic, political and social relations. This helps explain the gradual transformations described in this paper.<sup>13</sup>

The coherence of legal systems, however, is another point on which Atiyah and Summers invited broader comparative research. Indeed, they remarked:<sup>14</sup>

Japan (as well as various other nations) has borrowed large segments of its legal system (including whole codes) from foreign countries. Compared with England and America, is there, in these borrowing countries, a relative lack of *fit* (or a significantly lower level of fit) between the degree of formality of legal reasoning, and other pieces that go into the mosaic?

This paper concludes that contemporary Japanese law also exhibits a strong degree of coherence, similar to that in the US. Despite some counter-tendencies, the same holds for New Zealand law, except that its orientation remains instead quite resolutely formal along the dimensions suggested by Atiyah and Summers, following the English law tradition.<sup>15</sup>

The latter conclusion finds broad support from a paper prepared for a major conference hosted by New Zealand's Legal Research Foundation in 2001. Justice Fisher drew heavily on the work of Atiyah and Summers to bring out contrasts still between legal institutions and patterns in legal reasoning (especially judicial reasoning) in New Zealand and the US.<sup>16</sup> His Honour argued that until two or three decades ago, New

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<sup>11</sup> See for example R Dworkin *Law's Empire* (Fontana, London, 1986).

<sup>12</sup> See eg G Teubner *Law as an Autopoietic System* (Oxford, UK; Cambridge, USA, Blackwell, 1993).

<sup>13</sup> Compare for example K Keith "Governance, Sovereignty and Globalisation" (1998) NZACL Yearbook 3: 1997 477; Nottage, above n d.

<sup>14</sup> Above n 2, 430 (original emphasis).

<sup>15</sup> This paper thus provides an analytical framework to deal with a crucial issue left open by (then Justice) E W Thomas "Fairness and Certainty in Adjudication: Formalism vs Substantivism" (1999) 9 Otago L Rev 459, 487 ("I can give no guidance why formalism persists both within the legal profession and the judiciary [in New Zealand] ...").

It also answers affirmatively the question put by J Steyn "Does Legal Formalism Hold Sway in England?" (1996) 49 CLP 43. Lord Steyn believes that "in the last twenty-five years there has been a *gradual* shift away from using *exclusively* formalist techniques", and that "in a modern liberal democracy the shift *should generally* be away from formalism" (Steyn, cited in this footnote, at pages 46-47, emphasis added). He generously concedes that his article cannot "prove these assertions. A *magnum opus* by an academic lawyer would be necessary to do justice to the topic (at pages 47-48). The present author does not pretend to provide a magnum opus definitely settling this question, but argues that a rigorous and broad-based comparative approach shows the difficulties involved in trying to move away from formal reasoning patterns and supporting institutions. For further discussion of the variant of "formalism" discussed by Lord Steyn, see below Part II.C (especially "interpretive formality").

<sup>16</sup> R Fisher "New Zealand Legal Method: Influences and Consequences" in R Bigwood (ed)

Zealand law was characterised by the following features:

- reception of English law and institutions, resulting in the pragmatism shared by many other common law jurisdictions;
- reliance on English sources of law, but heightened prominence given to local judgments;
- less time pressure on judges compared to the US;
- “case specific reasoning” (attention to facts and dicta of individual precedents, rather than unifying principles and general propositions which are the starting point for legal analysis in the US);
- formalism (notably in deferring to precedent and preferring literal meanings in statutory interpretation);
- judicial restraint; and
- political neutrality.

However, Justice Fisher argued that forces for change have come from:

- growing resort to New Zealand courts (although only superior courts are mentioned<sup>17</sup>), due for instance to the population becoming more diverse, and Parliament referring more controversial questions to Courts or enacting more broadly worded legislation;
- less influence from England, as it becomes increasingly linked with continental Europe and New Zealand looks further afield, assisted by New Zealand academics who also increasingly look beyond black-letter law, and especially as domestic legislation has burgeoned; and
- improved access to legal source material.

Nonetheless, significant differences to the US remained among all defining features of the legal method perceived as having emerged in New Zealand:

- international eclecticism;
- “case specific reasoning”;
- respect for legislative intent and precedent;
- “passive formalism” (“passive” because focusing still on considerations motivating the original legislator or judge, “formalist” in focusing on legal pedigree and mode of articulation);
- “creative formalism” (resolving new issues “by doctrinalism, extrapolation from literalist constructions, and drawing on factual analogies from non-binding precedents”);
- rudimentary policy analysis (especially among younger practitioners, and noticeable in New Zealand legal textbooks);
- sustained political neutrality; and

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*Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, 2001).

<sup>17</sup> Compare L Nottage and C Wollschlaeger “What Do Courts Do?” [1996] NZLJ 369 (adding data for District Courts and population growth to show that overall civil litigation rates have been quite stable since the 1970s, in contrast to many industrialised countries).

- retention of a right of appeal to a court in another country (the Judicial Committee of the Privy Council).

This paper covers many of these points to reinforce the general conclusion that New Zealand's legal system as a whole has not moved sharply towards US-style substantive reasoning and supporting institutions. However, it builds more carefully on the various dimensions proposed by Atiyah and Summers, to bring out further contrasts and to provide a basis for the analysis of contract law in other published work. It also goes further than Justice Fisher's analysis, which contrasts the US and some shifts in New Zealand and only notes in passing some transformations for instance in England, by comparing four legal systems. Such a comparison does complicate the analysis, perhaps explaining why even comparing three legal systems has not yet been attempted systematically by others.<sup>18</sup> Nonetheless, examining various dimensions of legal reasoning and legal institutions generally, in the rest of this Paper, suggests a spectrum along the lines set out in Figure 2 below (at the end of Part III). Comparing three areas of contract law suggests a similar array. The precise positioning of English law vis à vis New Zealand law on the one hand, and US and Japanese law on the other, remains debatable. Yet clear differences emerge between the two pairs of legal systems, revealing considerable coherence in orientation both at the level of the general legal system, and in a broad area of law such as contract law. That serves to counter some persistent stereotypes and over-generalisations about certain alleged peculiarities of Japanese law. It also demonstrates that the analytical framework developed by Atiyah and Summers retains broader importance for comparative legal studies.<sup>19</sup>

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<sup>18</sup> This is despite another invitation by Atiyah, in his 1992 lecture. He remarked that Australian law may lie "somewhere between" English and US law (above n 9, 454); and also that Australian law may be moving in similar directions to English law under the influence of EEC law – but leaving "others to explore that possibility" (above n 9, 461). Another reason why no-one seems to have taken up that further challenge is the enormous difficulty in one researcher getting a good enough feel for three legal systems – let alone four – to be able to compare them convincingly (compare Bell, above n 1). Perhaps this explains why subsequent broader comparative research projects directed by Summers have involved large teams of researchers: see especially D N MacCormick and R S Summers (eds) *Interpreting Statutes: A Comparative Study* (Dartmouth, Aldershot, 1993); D N MacCormick and R S Summers *Interpreting Precedents: A Comparative Study* (Dartmouth, Aldershot, 1997). This approach, however, has involved the sacrifice of focus and analytical rigour. As a result, some criticise too ready over-generalisations from the comparative reports, useful though these are in themselves: see for example M Adam "The Rhetoric of Precedent and Comparative Legal Research" (1999) 62 MLR 464.

<sup>19</sup> See also B Grossfeld *Kernfragen der Rechtsvergleichung [Key Issues in Comparative Law]* (Mohr, Tübingen, 1996) 6. Compare K Zweigert and H Kötz (Weir, Tony trans) *Introduction to Comparative Law* (3 ed, Clarendon Press, Oxford, 1998) 73. Conceding that drawing distinctions among legal systems will depend on one's aims, they state: "Thus for [Atiyah and Summers] the character of a legal system depends very much on whether 'form' or 'substance' predominates in its judicial reasoning, its interpretation of statutes or its court procedures. After analysing and comparing the case-law, the legislative techniques, the role of judge and advocate, and the nature of legal training in England and the United States, they conclude that the two legal systems are really very different, so different indeed that many a reader will think that English law, with its tendency towards more formal argument, is closer to the continental legal systems than to that of the United States ...". Nonetheless, in Part II of their work comparing specific legal doctrines (especially in contract law), Zweigert and Kötz often run together "Anglo-American law" or at least describe differences without linking them to broader differences within the two legal systems.

## II Form and Substance in Legal Reasoning and Legal Institutions

Atiyah and Summers argue that analytically it is possible and useful to distinguish between two types of reasons. A “substantive reason is a moral, economic, political, institutional or other consideration”, whereas:<sup>20</sup>

a formal reason is a legally authoritative reason on which judges and others are empowered or required to base an action or decision, and such a reason usually excludes from consideration, overrides, or at least diminishes the weight of, any countervailing substantive reason arising at the point of decision or action. For example, it is a formal reason for making a decision that *there is a valid legal rule that*, in the given circumstances, D ought to pay damages to P. Unlike a substantive reason, a formal reason necessarily presupposes a valid law or other valid legal phenomenon, such as a contract or a verdict. Indeed, the very existence of this law or other legal phenomenon, as interpreted, is a formal reason or generates a formal reason for deciding an issue. Thus, authoritativeness is an essential attribute of a formal reason. A formal reason is also ordinarily in some degree mandatory, that is, it normally prevails over any contrary substantive reasons in the application of the law.

This highlights immediately two aspects of formal reasoning: “authoritative formality” (discussed below, Part II.A) and “mandatory formality” (Part II.C). Atiyah and Summers refine these further along with two other dimensions of legal reasoning: “content formality” (Part II.B) and “interpretive formality” (Part II.C). They also argue that English law, and its supporting institutional framework (court system, legislative process, legal profession, and so on), prefer or foster more formal reasoning compared to US law. Atiyah and Summers add that US law generates more “truth formality” and “enforcement formality” (Part II.D), two varieties of formality which reinforce a more formal orientation overall, even if not types of formal reasoning in themselves. Their further definitions of these two varieties of formality, along with the four dimensions of legal reasoning just mentioned, are developed and explored below in conjunction with the institutional framework in New Zealand and Japanese law as well.

### II.A Authoritative Formality: Constitutions, Legislation, Courts, and Lawyers

Authoritative formality always arises, Atiyah and Summers suggest, because “rules or other phenomena (such as contracts or verdicts) which generate reasons must be recognised as legally authoritative”.<sup>21</sup> This type of formality in legal reasoning varies along two sub-dimensions. First, it may involve low or high “validity formality”, depending on whether legal standards by which the validity of legal phenomena is determined are “content-oriented” (inviting inquiry into substance) as opposed to “source-oriented” (requiring inquiry into the mode of origin to determine validity). One example given of a source-oriented standard, generating high validity formality and hence more authoritative formality and more formal reasoning generally, is a standard which says simply that “a duly enacted statute is law”.<sup>22</sup> English and New Zealand law, which retain quite strict doctrines of parliamentary sovereignty, can be seen as

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<sup>20</sup> Atiyah and Summers, above n 2, 2 (original emphasis).

<sup>21</sup> Above n 2, 12.

<sup>22</sup> Above n 2, 12.

favouring this type of formal approach.<sup>23</sup> US law, and to a lesser extent Japanese law, undermine such a strict doctrine by allowing judicial review based on codified constitutions with the status of supreme law, containing very broadly phrased “content-oriented” standards of validity (for example, freedom of expression).<sup>24</sup> The resultant authority and central constitutional role of the US courts stands in stark contrast to the position of courts in England and New Zealand.<sup>25</sup> A related distinctive feature of US law is the centrality of its constitutional documents, which Roger Cotterell believes have reinforced direct “popular sovereignty”, and shielded the latter from the dominance of parliamentary sovereignty which became so prevalent in England.<sup>26</sup>

<sup>23</sup> Above n 2, 46-47. For New Zealand, see generally M McDowell and D Webb *The New Zealand Legal System* (Butterworths, Wellington, 1995) 113-117; K Upston-Hooper “Slaying the Leviathan: Critical Jurisprudence and the Treaty of Waitangi” (1998) 28 VUWLR 683; R Boast “Customary Law and Legal Anthropology” in R Boast, A Erueti, D McPhail and N Smith (eds) *Maori Land Law* (Butterworths, Wellington, 1999) 1.

<sup>24</sup> Atiyah and Summers, above n 2, 75-76. Compare L W Beer “Freedom of Expression: The Continuing Revolution” in P Luney and K Takahashi (eds) *Japanese Constitutional Law* (Tokyo UP, Tokyo, 1993) 220; R Krotoszynski “The Chrysanthemum, the Sword, and the First Amendment: Disentangling Culture, Community, and Freedom of Expression” (1998) *Wisconsin Law Review* 905. Some provisions are more tightly drafted in Japan’s 1946 Constitution. A good example is art 31, with narrower scope than the due process clauses in US law. Seemingly this was because progressives in the Occupation forces did not want the newly created Supreme Court to strike down legislation on the basis of breach of substantive due process, in the way the US Supreme Court did for some New Deal legislation. See Y Okudaira “Forty Years of the Constitution and its Various Influences: Japanese, American, and European” in P Luney and K Takahashi (eds) *Japanese Constitutional Law* (Tokyo UP, Tokyo, 1993) 1, 13-16. On the drafting of the Constitution, see generally K Inoue *Macarthur’s Japanese Constitution: A Linguistic and Cultural Study of its Making* (U Chicago Press, Chicago, 1991); C Kades “The American Role in Revising Japan’s Imperial Constitution” (1989) 104 *Pol Sci Q* 215

<sup>25</sup> For a critique rare among US commentators, see M Tushnet *Taking the Constitution Away From the Courts* (Princeton UP, Princeton, 1999). Jeremy Waldron (*Law and Disagreement*, Oxford UP, New York, 1999) also advocates according more priority to the legislature. However, in a review essay suggesting that Waldron goes too far in restraining judicial review, Richard Posner (now Chief Judge of the US Court of Appeals for the Seventh Circuit), begins by noting:

Jeremy Waldron, law professor and political philosopher, is a New Zealander educated there and in England, and, although he has lived and worked in [the US] for many years, he brings to the study of American constitutional theory the valuable perspective of an outsider.

R Posner “Review of Jeremy Waldron, *Law and Disagreement*” (2000) 100 *Columbia L Rev* 582, 582. A recent illustration of the still dominant and largely accepted role of the courts in the US constitutional system is *Bush v Gore*: compare F Goodman “Preface” (2001) 574 *Annals of The American Academy of Political and Social Science* 9, 13-16; R Posner “Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation” [2000] *Sup Ct Rev* 1.

<sup>26</sup> R Cotterell “The Symbolism of Constitutions: Some Anglo-American Constitutions” in I Loveland *A Special Relationship? American Influences on Public Law in the UK* (Clarendon Press, Oxford, 1995) 25, 39 (original emphasis):

A fundamental difference between the British and American contexts ... is that in the former no doctrine of popular sovereignty – no image of “the people” as an active law-making collectivity – was available to become attached to the contents of a specific *document* as fundamental constitutional law and become an enduring reference point in constitutional thought. Thus, the common law tradition subsumed specific enactments within itself as exemplifications of common law principle while validating the processes of parliamentary legislation.

A second sub-dimension of authoritative formality is “rank formality”. This will be higher if formal reasons are assigned a clear rank depending on strict rules of priority.<sup>27</sup> In the present author’s view, this depends in turn partly on how many different sources exist, since this calls for more complicated rules of priority. Partly, it should depend on the nature of those rules, which may be themselves more or less formal along all the dimensions and sub-dimensions of formal reasoning identified by Atiyah and Summers. As they point out, US law contains the following plethora of sources of law, stemming in part from constitutional vetting of legislation and further complicated by a federal structure, namely:<sup>28</sup>

- The federal Constitution;
- Federal legislation;
- Federal administrative rules and regulations;
- Treaties duly entered into by the President and ratified by the US Senate;
- Federal judicial decisions;
- State constitutions;
- State legislation;
- State administrative rules and regulations; and
- State judicial decisions

Further complications are how “self-executing” treaties,<sup>29</sup> and customary international law,<sup>30</sup> fit into this normative structure of US law. “Conflict of law” rules to resolve such problems, as well as US rules of private international law determining whether foreign law should be applied, also exhibit remarkably low rank formality.<sup>31</sup> Rank formality is further undermined by a more flexible approach to stare decisis, due in part to the complex structure of federal and multiple state courts.<sup>32</sup> Conflicting decisions or differing approaches invite courts to examine other US jurisdictions’ judgments for the quality of their reasoning (also adding to content-oriented authoritative formality), even though not strictly bound (the more source-oriented approach, following from a stricter doctrine of stare decisis).<sup>33</sup> At least some courts, moreover, appear quite open to

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<sup>27</sup> Atiyah and Summers, above n 2, 43.

<sup>28</sup> Above n 2, 55.

<sup>29</sup> K Baghdadi “Apples and Oranges - The Supremacy Clause and the Determination of Self-Executing Treaties” (1997) 20 *Hastings Int’l & Comp L Rev* 701; C M Vasquez “The Four Doctrines of Self-Executing Treaties” (1995) 43 *AJCL* 695.

<sup>30</sup> G Kelly “Does Customary International Law Supersede a Federal Statute?” (1999) 37 *Colum J Tran L* 507.

<sup>31</sup> Atiyah and Summers, above n 2, 56-69. Compare also for example F Juenger “Two European Conflicts Conventions” (1998) 28 *VUWLR* 527, 530-531, 536.

<sup>32</sup> Atiyah and Summers, above n 2, 128-130. See also H Jacob “Courts and Politics in the United States” in H Jacob and others (eds) *Courts, Law and Politics in Comparative Perspective* (Yale UP, New Haven/London, 1996) 16, 21-23, 28-29, 65-66.

<sup>33</sup> See for example below, Paper Two, Part II.C. See also generally J Hardisty “The Effect of Future Orientation on the American Reformulation of English Judicial Method” (1979) 30 *Hastings LJ* 523, 532 (less bound by precedent). For a radical proposal, by American standards, see for example M Paulsen “Abrogating Stare Decisis by Statute: Can Congress Remove the Precedential Effect of *Roe* and *Casey*?” (2000) 109 *Yale LJ* 1535.

drawing from jurisdictions overseas.<sup>34</sup> This tendency may have been boosted by the influx of immigrant academics, especially from Germany before and during World War II, reinforcing also the influence of academic commentators in US law generally.<sup>35</sup>

In Japan, article 94 of the Constitution included a new power: “local governments may ... enact ordinances within the limits of the law”. The Local Government Law further specified this grant of authority, and added the police power to local functions. These grants are generous relative to many other unitary states, although distinctly less so than in the US and other federal systems. Central government has also tended to guard its authority jealously, challenging (in and especially out of court) disliked local government policies as not “within the limits of the law”. Nonetheless, local governments have been active in areas such as pollution control.<sup>36</sup> A major practical limit to decentralising authority has been the increasing dependence of prefectures on central government budget funding.<sup>37</sup> However, legislation passed on 8 July 1999 reconfigured relations between central and local government.<sup>38</sup> While it is too early to ascertain long-term implications, already there are signs of local authorities trying to wrest more control of finances away from the central government,<sup>39</sup> potentially reinforcing their powers as laid out in legislation.

In sharp contrast to the US, the Japanese court system is unitary and highly centralised. This should heighten rank formality, but it has been complicated or reduced in many other respects. Although perhaps to a declining extent, Japanese courts draw quite extensively – but rarely expressly – on legal principles and sometimes even findings from foreign jurisdictions.<sup>40</sup> This may follow from the continued influence of

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<sup>34</sup> Especially New Yorks courts (H von Freyhold “Cross-Border Legal Interactions in New York Courts” in V Gessner (ed) *Foreign Courts: Civil Litigation in Foreign Legal Cultures* (Dartmouth, Aldershot et al, 1996) 43. See also below Paper Two Part II.C.1. But see S Miner “Reception of Foreign Law in the US Federal Courts” (1995) 43 *AJCL* 581; P M McFadden “Provincialism in United States Courts” (1995) 81 *Cornell L Rev* 4.

<sup>35</sup> See for example M Reimann “A Career in Itself: The German Professoriate as a Model for America Legal Academia” in M Reimann (ed) *The Reception of Continental Ideas in the Common Law World* (Duncker & Humblot, Berlin, 1993) 166. See also generally W P LaPiana *Logic and Experience: The Origin of Modern American Legal Education* (Oxford UP, New York, 1994).

<sup>36</sup> S R Reed *Japanese Prefectures and Policy-Making* (U Pittsburgh Press, Pittsburgh, 1987), 24-5, 63-87; S Kawashima “A Survey of Environmental Law and Policy in Japan” (1995) 20 *North Carolina J of Int L and Commercial Regulation* 231, 259-261.

<sup>37</sup> K E Calder *Crisis and Compensation: Public Policy and Political Stability in Japan* (Princeton U P, 1987) 274-311. See generally F Horie “Intergovernmental Relations in Japan: Historical and Legal Patterns of Power Distribution Between Central and Local Governments” in J Jun and D Wright (eds) *Globalization and Decentralization: Institutional Contexts, Policy Issues, and Intergovernmental Relations in Japan and the United States* (Georgetown UP, Washington DC, 1996) 48; M Muramatsu *Local Power in the Japanese State* (U California Press, Berkeley et al, 1997); Y Sugimoto *An Introduction to Japanese Society* (Cambridge UP, Cambridge, 1997) 208-210.

<sup>38</sup> Compare for example “Editorial: Rethink Organisational Framework”, *The Daily Yomiuri*, Tokyo, 12 June 1999 (available through LEXIS in the ALLASI library).

<sup>39</sup> L Nottage “Tax Policy in Japan for the 21st Century: Decentralisation and Digitalisation” (September 2000) 44 *CCH Asiawatch Newsletter* 6.

<sup>40</sup> Z Kitagawa *Rezeption und Fortildung des Europaischen Zivilrechts in Japan [Reception and Development of European Civil Law in Japan]* (Alfred Metzner Verlag, Frankfurt, 1970); E Hoshino (J O Haley trans) “The Contemporary Contract” (1972) 5 *L in Japan* 1.

legal academics.<sup>41</sup> Many maintain a strong interest in comparative law dating back to the Meiji era.<sup>42</sup> More importantly, following the civil law tradition, Japanese judges are not bound by *stare decisis*,<sup>43</sup> although a centrally directed and bureaucratic career judiciary along with crowded dockets create pressure towards uniformity. Rank formality is also complicated by the way in which the supremacy of constitutional review has emerged. The Supreme Court's power to undertake judicial review of legislation enacted by the Diet, under the Constitution, was confirmed in 1948. It took until 1952 to establish the power of lower courts to rule on claims of unconstitutionality.<sup>44</sup> Subsequently, courts have been quite reluctant to extend judicial review principles to administrative proceedings, although this may now be changing. Even today, the Supreme Court in particular tries to decide cases narrowly. It often restricts even a finding of unconstitutionality to particular facts, or bases its decision more on statutory interpretation than a discussion of broad constitutional principles.<sup>45</sup> Of course, some have pointed out that even the US Supreme Court tends narrowly to decide constitutional issues, "one case at a time".<sup>46</sup> The Japanese Supreme Court does remain comparatively reticent in finding enacted legislation to be unconstitutional. Even when it does reach such a conclusion, it does not always provide an effective remedy, in part because its power is limited to referring the matter back to the legislature for attention.<sup>47</sup> Overall, however, Japanese law is left with more possible sources for authoritative norms, vying for priority in quite an opaque fashion. This can be seen in the question of incorporation of international law norms into domestic law,<sup>48</sup> most

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<sup>41</sup> T Isomura "Nihonho no Tenkai (4) - Gakusetsu no Hatashita Yakuwari [Developments in Japanese Law (4): The Role Played by Academic Theory]" in T Hironaka and E Hoshino (eds) *Minpoten no Hyakunen (I) [One Hundred Years of the Civil Code (I)]* (Yuhikaku, Tokyo, 1998) 505.

<sup>42</sup> Y Noda "Comparative Jurisprudence in Japan: Its Past and Present" (1975) 8 L in Japan 1; (1976) 9 L in Japan 4.

<sup>43</sup> J O Haley *The Spirit of Japanese Law* (U Georgia Press, Athens/London, 1998) 92-97, 114-22. See also generally J Merryman, D Clark and J O Haley *The Civil Law Tradition: Europe, Latin America and East Asia* (Michie, Charlottesville (Va), 1994).

<sup>44</sup> Respectively, 8 July 1948, Supreme Court (4 Keishu 801); 8 October 1952, Supreme Court.

<sup>45</sup> Okudaira, above n 24, 16-23.

<sup>46</sup> C Sunstein *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard UP, Cambridge (Mass), 1999). This may be an accelerating trend: see A Hellman "The Shrunken Docket of the Rehnquist Court" [1996] Sup Court Rev 403. Pressure in this direction also may be very strong in highest courts with powers of constitutional review. See for example D Beatty "Constitutional Rights: Japan and Canada" (1993) 41 AJCL 535; D Beatty "Law and Politics" (1996) 44 AJCL 131.

<sup>47</sup> As Okudaira points out (above n 24, 19-20), the malapportionment cases – finding elections unconstitutional but not voiding them – had additional statutory complications. Compare W Bailey "Reducing Malapportionment in Japan's Electoral Districts: The Supreme Court Must Act" (1997) 6 Pac Rim L & Pol'y J 167.

<sup>48</sup> S Ago "The ILO's Supervision and Japan" (1995) J Ann Int'l L 3; Y Iwasawa "Implementation of International Trade Agreements in Japan" in M Hilf and U Petersmann (eds) *National Constitutions and International Economic Law* (Kluwer, Boston, 1991) 299; H K Park "*Japan v Kim Sun-Ki*" (1998) 92 AJIL 301.

See also K Watanabe "*Joyaku no Teiketsu to Kokunaiho Seibi - Iwayuru Joshi Sabetsu Haishi Joyaku Hijunji no Giron o Tegakari to shite* [Adjusting Domestic Law and Concluding Treaties: The Debate on Ratifying the So-Called Convention Abolishing Discrimination Against Women]" in M Nakamura and H Maeda (eds) *Rippokatei no Kenkyu - Rippo ni okeru Seifu no Yakuwari [Studies in Legislative Process: The Roles of the Government in Enacting Laws]* (Shinzansha, Tokyo, 1997) 132; K Port "The Japanese International Law "Revolution": International Human Rights Law and its Impact in

notably recently in a District Court decision recognising the northern Ainu minority as an indigenous people.<sup>49</sup> In consequence, rank formality is generally quite low in Japan.

Rank formality is further complicated by the phenomenon of “administrative guidance”, involving actions by public officials to persuade a private entity to voluntarily cooperate in a purpose they see as desirable.<sup>50</sup> It became hotly discussed first within Japan in the 1960s and especially the 1970s, after the Ministry of International Trade and Industry (MITI) took informal measures to deal with Oil Shock disruptions to petroleum markets. Criticisms mounted especially from outside Japan in the 1980s and early 1990s, in response to trade friction and calls for greater transparency in Japanese markets and public administration.<sup>51</sup> The Administrative Procedure Law 1993 may formalise and restrict administrative guidance, for instance by

Japan” (1991) 28 *Stan J Int'l L* 139.

<sup>49</sup> T Sonohara “Towards a Genuine Redress for an Unjust Past: The Nibutani Dam Case” (1997) 4 *E Law: Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v4n2/sonoha42.html>>; M Levin “Essential Commodities and Racial Justice: Using Constitutional Protection of Japan’s Indigenous People to Inform Understandings of the United States and Japan” (2001) 33 *NYU J Int'l L & Pol* 419. On the Ainu, see generally T Kitakamae “Ainu Concepts of Social Order and the Law of Japan” (1987) 2 *Law and Anthropology* 239; R Siddle “Ainu: Japan’s Indigenous People” in M Weiner (ed) *Japan’s Minorities: The Illusion of Homogeneity* (Routledge, London, 1998) 17; Sugimoto, above n 27, 184-189 (also stressing, contrary to received wisdom, that Japan has a comparative high proportion of ethnic minorities).

The Emperor was a further and very important source of legal authority under the Meiji Constitution, and some revival of this in some form is not totally inconceivable. That, however, would require an exceptionally bold interpretation of Art 1 of the present Constitution, under which the Emperor is a symbol of Japan, the state and the unity of the Japanese people. In practice, moreover, the impetus for such a move seems highly improbable. Even the well-publicised spectacles around the time of Hirohito’s last days in 1989 seem to have been the result of canny calculations by business and political interests, at a particular juncture. See O Watanabe “The Sociology of *Jishuku* and *Kicho*: The Death of the Showa Tenno as a Reflection of the Structure of Contemporary Japanese Society” (1989) 1 *Japan Forum* 275. Similarly, Crown prerogative powers in the UK are now very limited. See Atiyah and Summers above n 2, 54; C Vincenzi *Crown Powers, Subjects and Citizens* (Pinter, London/Washington, 1994) 1-34. The same appears to hold in New Zealand, even after the complication of changing the electoral system to proportional representation (compare G Palmer and M Palmer *Bridled Power: New Zealand Government under MMP* (Oxford UP, Auckland, 1997) 43-48; A Quentin-Baxter “Implications for the Governor-General” in A Simpson (ed) *The Constitutional Implications of MMP* (VUW School of Political Science and International Relations, Wellington, 1998) 96), due the careful restraint exercised by the incumbent Governor-General (M Hardie-Boys “Continuity and Change: The 1996 Election and the Role of the Governor-General” in A Simpson (ed) *The Constitutional Implications of MMP* (VUW School of Political Science and International Relations, Wellington, 1998) 78).

<sup>50</sup> T Nakagawa “Administrative Guidance: A Tentative Model of How Japanese Lawyers Understand It” (1998) 32 *Kobe University L Rev* 1. See generally M Young “Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan” (1984) 84 *Colum L Rev* 924.

<sup>51</sup> M Young “Structural Adjustment of Mature Industries in Japan: Legal Institutions, Industry Associations and Bargaining” in S Wilks and M Wright (eds) *The Promotion and Regulation of Industry in Japan* (Macmillan, Hampshire/London, 1991) 135; F Upham “Privatizing Regulation: The Implementation of the Large-Scale Retail Stores Law” in G Allinson and Y Sone (eds) *Political Dynamics in Contemporary Japan* (Cornell UP, Ithaca, 1993) 264; compare H Otake “Revising the Interpretation of the Japanese Economy: Political Intervention and Market Competition in the Distribution System” in M Muramatsu and F Naschold (eds) *State and Administration in Japan and Germany* (de Gruyter, Berlin, 1997) 305.

allowing regulatees to request it to be made in writing. Yet it is still unclear how much such provisions are being invoked, and what changes have directly ensued in practice.<sup>52</sup> The enactment in 1999 of official information legislation seems likely to prove much more significant in controlling bureaucratic discretion.<sup>53</sup>

Japanese courts have played quite an active role in setting normative confines within which administrative guidance is permissible, but those confines depend on the context. The courts have been stricter with respect to an agency's requests for cooperation with its extra-statutory standards (for example, in waste disposal).<sup>54</sup> But they have been more lenient towards an agency intervening in private conflicts (for example, among developers and local residents, by delaying issuance of a permit). Intervention is permitted, thus promoting negotiations, until regulatees make it clear that they will not negotiate any longer or until the underlying dispute has been resolved.<sup>55</sup> Courts also have been lenient when the agency acts to deal with unexpected emergencies (as with MITI after the Oil Shock).<sup>56</sup> All three categories involve extra-statutory purposes, not part of "statutory programmes".<sup>57</sup> The more lenient attitude of the courts at least in the latter two categories therefore lessens rank formality in Japan, by expanding the possibility for justifiable autonomous executive action. Authoritative formality also is lessened by delimiting the scope of justified conduct only in broad, more content-oriented terms.<sup>58</sup> However, instances of "jawboning" by bureaucrats in similar situations can be found in the US as well.<sup>59</sup> Moreover, in other

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<sup>52</sup> K Duck "Now that the Fog has Lifted: The Impact of Japan's Administrative Procedures Law on the Regulation of Industry and Market Governance" (1996) 19 *Fordham Int'l LJ* 1686. Generally on the Law, see also L Koedderitzsch "Japan's New Administrative Procedure Law" (1991) 21 *L in Japan* 105.

<sup>53</sup> See generally "*Tsukaikonasu Chikara o Yashinai* [Fostering the Strength to Make It Work]" *Asahi Shimbun*, Tokyo, 8 May 1999, 5; N Kadomatsu "The New Administrative Information Disclosure Law in Japan" (1999) 8 *Zeitschrift für Japanisches Recht* 34. The Law has only been in effect since 1 April 2001.

<sup>54</sup> Nakagawa, above n 92, 10. J M Ramseyer "Rethinking Administrative Guidance" in M Aoki and G Saxonhouse (eds) *Finance, Governance and Competition in Japan* (Oxford UP, London, 1999) 199 points out that these instances of more active court control involve local governments, not central government. He also argues that this supports his longstanding contention (above n 24) that the post-War Japanese judiciary has followed the preferences of the ruling LDP.

<sup>55</sup> Nakagawa, above n 50, 11-12. The leading case a Supreme Court judgment of 16 July 1985 (*Nakatani [Nakaya] v Tokyo-To*, partially translated in Y Yanagida and others *Law and Investment in Japan: Cases and Materials* (Harvard UP, Cambridge (Mass), 1994), 133-136).

<sup>56</sup> Above n 50, 13-14. See also J Ramseyer "The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan" (1985) *Yale LJ* 605; T Mito "Business-Government Relations in Japan: MITI and the Petroleum Industry During the High Economic Growth Era" (1998) 9 *Research Bulletin of the International Student Center (Kyushu University)* 147.

<sup>57</sup> Nakagawa, above n 50.

<sup>58</sup> Interestingly, Nakagawa (above n 50, 6) characterises as "substantive informality" these three types of administrative guidance. See also T Nakagawa "Administrative Informality in Japan" (2000) 52 *Admin L Rev* 175.

<sup>59</sup> Indeed, in *Eastern Airline Inc v McDonnell Douglas Corp* (1976) 532 F2d 957 (5th Cir), the US Court of Appeals held that compliance with the government's "jawboning" was sufficient to excuse McDonnell Douglas from its contractual obligation to supply jetliners to Eastern. Similar promotion of deferral to informal government pressure may also have underpinned the decision in the same Circuit a decade later. In *Nissho Iwai Ltd v Occidental Crude Sales Inc* 729 F 2d 1530 (5th Cir 1984), the appellant (a Japanese corporation, no less!) successfully claimed that Occidental should not be excused from its

contexts in Japan, administrative guidance can be seen as involving informal implementation, but in pursuit of statutory policy goals or programmes rather than extra-statutory purposes. This is less disruptive of rank formality. Overall, then, the Japanese legal system should not be seen as radically more substantive in its reasoning in this respect.

Unlike US and Japanese law, English and New Zealand law still recognise more limited sources of law and draw much clearer rules of priority among them. Atiyah and Summers suggest that English law really just involves two sources: legislation (with primary legislation trumping secondary legislation) and case law.<sup>60</sup> They did note the rapid expansion of judicial review in England since the 1970s, a trend which has been maintained.<sup>61</sup> Their point about judicial review's not really undermining the authority of the legislature, however, is still well taken. After all, finding secondary legislation to be ultra vires means finding it to be beyond powers granted by Parliament in the enabling statute, which reinforces Parliament's sovereignty.<sup>62</sup> Striking down regulations more directly, for unreasonableness, has

obligation to supply oil because the latter had not negotiated enough with the Libyan government, which ended up interrupting oil flow. Granted, some empirical studies have noted more consensual informal relations between private parties and regulators in Japan (see for example J L Badaracco *Loading the Dice: A Five Country Study of Vinyl Chloride Regulation* (Harvard Business School Press, Boston, 1985), K Aoki and J W Cioffi "Same Wine in Different Bottles: A Case Study of Waste Management Regulation in the United States and Japan" (1997) Paper presented at the Annual Meeting of the Law and Society Association, Aspen, 30 May 1999), compared to the "adversarial legalism" said to be rampant in the US (R Kagan "Should Europe Worry about Adversarial Legalism?" (1998) 17 OJLS 165; but see J Rees "Development of Communitarian Regulation in the Chemical Industry" (1997) 19 L & Pol'y 477; J O Haley "Mission to Manage: The US Forest Service as a 'Japanese' Bureaucracy" in K Hayashi (ed) *The US-Japanese Economic Relationship: Can It Be Improved?* (Simon Schuster, New York, 1989) 196). More empirical studies, in various areas, should be conducted in those countries, as well as the UK where informal relations also seem more prevalent (J Braithwaite and V Braithwaite "The Politics of Legalism: Rules versus Standards in Nursing-Home Regulation" (1995) 4 Soc & Leg Stud 307). The point here is simply that instances of bureaucratic informalism and "administrative guidance" can be found in the US, sometimes even validated by the courts, as well as in Japan. This therefore complicates rank formality in both jurisdictions. (It may also reflect and reinforce the development of neo-proceduralist or reflexive rationality in modern law: see below Paper Five Part II.B.1 and II.B.3.)

<sup>60</sup> A very recent illustration is the Court of Appeal's about-face in *Awwad v Gerarhty & Co (a firm)* [2000] 1 All ER 608 (noted by N Andrews [2000] CLJ 265). This makes it clear that English common law will not permit contingency fees beyond those permitted by statute law development over the 1990s. More generally, however, there are recent suggestions that the English constitution may increasingly engage with a growing variety of less rigidly ranked normative sources. See for example N W Barber "Sovereignty Re-examined: The Courts, Parliament, and Statutes" (2000) 20 OJLS 131; and N Walker "Beyond the Unitary Conception of the United Kingdom Conception?" [2000] Public L 384.

<sup>61</sup> Atiyah and Summers, above n 2, 46-47, 55; H Kritzer "Courts, Justice and Politics in England" in H Jacob and others (eds) *Courts, Law and Politics in Comparative Perspective* (Yale UP, New Haven/London, 1996) 81, 157 (citing three studies by Maurice Sunkin).

<sup>62</sup> This is so even for cases such as *R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants* [1996] 4 All ER 385 (CA). There the Court of Appeal struck down regulations issued under the Social Security (Contributions and Benefits) Act 1992, denying benefits to those who sought asylum after entering the UK (rather than on entry), as inconsistent with rights under the Asylum and Immigrations Appeals Act 1993. Parliament's sovereignty remains the focus, although the case demonstrates perhaps more daring by courts in determining what was intended. Note also that even this result led to Parliament restoring the disallowed regulations in the Asylum and Immigration Act 1998. See also for example M Elliott "The Ultra Vires Doctrine in a Constitutional Setting: Still the

remained rare.<sup>63</sup> Superior courts in England have been particularly reluctant to go beyond the enforcement of legitimate procedural expectations, to protect legitimate expectations of substantive benefit, after engaging in a wide-ranging balancing of public authorities' objectives and reasoning as opposed to the reasonableness of the applicant's expectations.<sup>64</sup> The broader US notion of substantive due process has not emerged, having been subsumed in doctrines of the rule of law, Parliamentary sovereignty and the concept of jurisdiction. This also is related to English courts having developed due process doctrines incrementally out of the Common Law, with no constitutional codification.<sup>65</sup> In other areas of law with potentially broader political implications, appellate courts in England also appear to remain very deferential towards Parliament.<sup>66</sup>

Another possible complication, noted by Atiyah and Summers but only briefly, was the potential for EU law to become a major new source of law in England. That possibility has become more real since they wrote,<sup>67</sup> but limits remain apparent. English courts do appear increasingly willing to refer questions on EU law to the European Court of Justice. Yet average referrals remain low compared to other major EU member states.<sup>68</sup> Further, referrals remain a roundabout means of promoting EU

Central Principle of Administrative Law" (1999) 58 CLJ 129. But see some contrary views brought together in C Forsyth (ed) *Judicial Review and the Constitution* (Hart, Oxford, 2000); and A Halpin "The Theoretical Controversy Concerning Judicial Review" (2001) 64 MLR 500.

<sup>63</sup> See A Carroll *Constitutional and Administrative Law* (Financial Times, London, 1998) 276.

<sup>64</sup> But see M Roberts "Public Law Representations and Substantive Legitimate Expectations" (2001) 64 MLR 112 (noting differences among recent case law from the Court of Appeal, made up of different judges); R Best "Legitimate Expectation of Substantive Benefit" [2000] NZLJ 307 (noting that *R v North and East Devon Health Authority, ex p Coughlan* [2000] 2 WLR 622 (CA) may signal a move towards the latter approach, with implications for New Zealand law). There are parallels with the focus of Anglo-New Zealand courts on procedural impropriety, rather than substantive unfairness (as in the US and especially Japan), in contract law: see Nottage 1996, above n c).

<sup>65</sup> D Galligan *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon Press, Oxford, 1996) 187-192. The open-ended standards set out in the Administrative Procedures Act, enacted in the US in 1946, parallel those in its main constitutional documents. See T Hayes "Judicial Review and Codification" 20 *Legal Stud* 517, 522-524 (contrasting Australia's more tightly drafted Administrative Decisions (Judicial Review Act 1977); and below Part II.D.

<sup>66</sup> See generally R J Martineau *Appellate Justice in England and the US: A Comparative Analysis* (William S Hein, Buffalo (NY), 1990). See for example *C (A Minor) v DPP; sub nom Curry v DPP* [1995] 2 WLR 383 (HL, upholding old rule restricting children's criminal liability); *Fitzpatrick v Sterling Housing Association Ltd* (The Independent, 29 July 1997) (CA, refusing to extend tenancy law rights to those in stable same-sex relationships). Compare *Airedale NHS v Bland* [1993] AC 789 (HL, upholding the right to end the life of a vegetative accident victim). Posner (above n 6, 111) cites this case as evidence that "English judges are flexing their muscles to a degree unprecedented since before World War I". In that case, though, the Court had no option but to make a decision one way or the other, while several Law Lords stressed that in general important social and moral issues should be settled in and by Parliament (C Elliott and F Quinn *English Legal System* (2 ed, Addison Wesley Longman, Harlow, 1998), 16). But see Kritzer, above n 61, 156 (arguing that "English courts are increasingly willing to tell the government officials, at both national and local levels, that their action is wrong").

<sup>67</sup> Atiyah and Summers, above n 2, 54. See also Atiyah, above n 9; Kritzer, above n 61, 166-173. For a comparison of EU with New Zealand constitutional law, see generally C Callahan "Constitutionalisation of Treaties by the Courts: The Treaty of Waitangi and the Treaty of Rome Compared" (1999) 18 NZULR 334.

<sup>68</sup> See for example *R v International Stock Exchange ex parte Else* [1993] QB 534 (CA, per Bingham MR). Some notable recent cases, however, have not made referrals: M Horspool "Statutory

law. “Direct effect” of rights under EU treaties, regulations, and even Directives, has become more important following the *Factortame* litigation. Mostly, however, this has been subsumed within the doctrine of parliamentary sovereignty.<sup>69</sup> To be sure, in certain areas such as sex discrimination, EU law has had a major impact in practice.<sup>70</sup> A further normative influence has come from the European Convention on Human Rights. Yet this too has only come indirectly, until very recently. Its express incorporation now into domestic English law, through the Human Rights Act 1998, may expand this influence. However, the process of incorporation itself can be seen as a reinforcing of parliamentary sovereignty. The restricted form of incorporation, notably in terms of courts’ powers to strike down contrary legislation,<sup>71</sup> also suggests a reluctance to

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Interpretation of European Community Law by English Courts” in M Freeman (ed) *Legislation and the Courts* (Dartmouth, Aldershot, 1997) 95, 109-11. Kritzer (above n 61, 168) indicated that annual referrals were low compared with France and Germany. A more recent data set confirms that over 1958-1998 UK courts made fewer annual referrals (only 10.13) than Germany (31.67), France (16.18), Italy (13.59), the Netherlands (12.35), and Belgium (12.26). However, the UK’s referral rate has grown consistently since the 1980s, reaching an average of 18.7 over 1992-7, compared to 49.5 for Germany, 30.7 for Italy, 17.2 for Belgium, and 15.8 for France. See A S Sweet & T L Brunell “The European Court, National Judges and Legal Integration” (2000) 6 *European LJ* 117, 120 (Figure 2 and Table 1; the data set is available through <<http://www.iue.it/RSC/>>). Compare C Lenz & G Grill “The Preliminary Ruling and the United Kingdom” (1996) 19 *Fordham Int’l LJ* 844.

<sup>69</sup> See for example D Nicol “The Legal Constitution: United Kingdom Parliament and European Court of Justice” (1999) 5/1 *J Legis Studies* 135; C Boch *EC Law in the UK* (Pearson Education Ltd, Harlow, 2000) 27-36; Carroll, above n 63, 88:

the attitude of English judges to the relationship between English statute and European Community law remains founded on an interpretation of Parliament’s will as expressed in the EEC Act 1972, s 2(4). Hence, in construing legislation in accordance with Community law and, in the event of conflict, giving primacy to the same, judges claim to be doing no more than was intended and authorised by the sovereign body. That is much different than (and falls short of) recognising Community law as part of a superior constitutional and legal order to which the legislative sovereignty of the United Kingdom has been sublimated for so long as the Community remains in being. According to this English view of things, therefore, it remains possible for Parliament to reassert its sovereign power, even in relation to directly effective Community law, providing its intention to do so is clear and unequivocal.

But compare for example P P Craig “Sovereignty of the United Kingdom Parliament After *Factortame*” (1991) 11 *Yearbook of European Law* 221.

<sup>70</sup> See for example *R v Secretary of State for Employment ex parte Equal Opportunities Commission* [1995] 1 AC 1; C E Epp *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (U Chicago Press, Chicago, 1998) 139-140, 149-153. Compare also Sweet & Brunell, above n 68, 126 (noting an above average referral rate to the European Court of Justice from the UK for this category of case).

<sup>71</sup> See K D Ewing “The Human Rights Act and Parliamentary Democracy” (1999) 62 *MLR* 79. Murray Hunt contends that the important role granted to Parliament in the Act implies a communitarian rather than liberal scheme of rights protection; but is concerned that entrenched deference to parliamentary sovereignty will reinforce formal reasoning of English courts when asked to interpret the Act. See M Hunt “The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession” (1999) *J L & Soc’y* 86, 90-94. Note also that s 2(1) of the Act only requires English courts interpreting Convention rights to take the decisions of the European Court of Justice into account, rather than requiring them to apply it. See C McCrudden “A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights” (2000) 20 *OJLS* 499, 503-504. See also J Limbach “The Concept of the Supremacy of the Constitution” (2001) 64 *MLR* 1, 6-7. Compare N Walker “Setting English Judges to Rights” (1999) 19 *OJLS* 133; B Markesinis (ed) *The Impact of the Human Rights Bill*

recognise fully a new source of law (potentially reducing rank formality), as well as hesitation with regard to the Convention's very source-oriented standards of validity (further potentially diminishing authoritative formality). This forms an undercurrent to the pressing but unresolved issue of the possible "horizontal effect" of the Human Rights Act, making Convention rights directly enforceable against private parties, as well as public authorities.<sup>72</sup> A related issue is the evolving approach of English courts and commentators with respect to important norms of international law.<sup>73</sup>

It is too soon to gauge precisely the effects of incorporation of the Convention,<sup>74</sup> or other constitutional reforms that were initiated by the Blair government soon into its first term of office.<sup>75</sup> Devolution of more law-making power to Scotland and Wales appears relatively limited.<sup>76</sup> Unlike Japan and especially the US, where local authorities have powers unless specifically excluded, the Scotland Act 1998 grants powers only for specified areas of law-making, thus excluding all others. It also expressly recognises the Westminster Parliament's right to override legislation passed by the Scottish Parliament even in those areas.<sup>77</sup> In contrast to recent developments in Japan, moreover, the process of devolution in England has involved central government retaining very strict control over finances.<sup>78</sup> Accordingly, a high level of authoritative formality will probably be maintained in England. Nonetheless, its recent "rolling programme of devolution" has finally released political forces which may eventually propel English law towards more substantive reasoning.<sup>79</sup> Further complicating

on *English Law* (Oxford UP, London, 1998).

<sup>72</sup> See for example N Bamforth "The True 'Horizontal Effect' of the Human Rights Act 1998" (2001) 117 LQR 34.

<sup>73</sup> See generally R Gardiner "Interpretation in the English Courts Since *Fothergill v Monarch Airlines* (1980)" (1995) 44 ICLQ 620; R Gardiner "Treaties and Treaty Materials: Role, Relevance, and Accessibility" (1997) 46 ICLQ 643. See also *Fisher v Minister of Public Safety and Immigration (No 2)* [2000] 1 AC 434 (PC, upholding *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 (HL), refusing to give direct effect to a treaty not incorporated into domestic law), followed in *Higgs v Minister of National Security* [2000] 2 AC 228 (PC). But see now *Lewis v Attorney-General of Jamaica* [2000] 3 WLR 1785 (PC, allowing unincorporated treaty norms to be considered in determining natural justice). This most recent twist in the saga of the rights of death-row prisoners in American island states is roundly applauded by E W Thomas "A Critical Examination of the Doctrine of Precedent" in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001).

<sup>74</sup> One commentator suggests that the Act simply cements into place a trend for English courts to refer to the Convention anyway, and is pessimistic about its likely future impact because of additional issues regarding standing, levels of damages awarded, and so on. See L Clements "The Human Rights Act – A New Equity or a New Opiate: Reinventing Justice or Repacking State Control?" (1999) J L & Soc'y 72.

<sup>75</sup> See generally R Brazier "New Labour, New Constitution?" (1998) 49 NILQ 1; V Bogdanor "Labour and the Constitution - Part 1: The Record" in B Brivati and T Bale (eds) *New Labour in Power: Precedents and Prospects* (Routledge, London, 1997) 111.

<sup>76</sup> See generally R Brazier "The Scotland Bill as Constitutional Legislation" (1998) 19 Stat L Rev 12; J McFadden "The Scottish Parliament: Provisions for Dispute Resolution" (1998) Jurid Rev 221.

<sup>77</sup> See for example P Craig and M Walters "The Courts, Devolution and Judicial Review" (1998) Pub L 272.

<sup>78</sup> Compare Nottage, above n 29, with R Hazell & R Cornes "Financing Devolution: The Centre Retains Control" in R Hazell (ed) *Constitutional Futures: A History of the Next Ten Years* (Oxford UP, Oxford, 1999) 196.

<sup>79</sup> Compare R Hazell & B O'Leary "A Rolling Programme of Devolution: Slippery Slope or

authoritative formality, “devolution statutes” like the Scotland Act appoint the Judicial Committee of the Privy Council – not the House of Lords – as the final court of appeal for overturning legislation enacted by the devolved legislatures which is incompatible with the European Convention on Human Rights. In the cases decided since October 2000, moreover, two Scots Law Lords have sat on the Committee.<sup>80</sup>

On the other hand, despite remarkable growth in legislative activity over the 20th century, development of English law through the courts remains very important. They have been adept in preserving the core of the Common Law as judge-made law.<sup>81</sup> This heightens the importance of questions such as how English judges interpret prior case law, how they view and apply doctrines of precedent, and how this may complicate patterns of normative authority. Of particular interest is the degree to which they may draw on content-oriented standards of validity, such as broad principles upon which the Common Law is supposedly based, which could undermine rank formality by creating a new source of formal validity. Despite some judges advocating and applying such an approach, overall the English courts appear to maintain a strong commitment to authoritative formality, at least compared to the US.

Thus, although the Court of Appeal technically is not bound by its own precedents, in practice it departs from them very rarely. The same applies to the House of Lords, despite its Practice Statement of 1966.<sup>82</sup> Some have suggested that the Statement, allowing the House to depart from its own precedents, was prompted by the attraction of reasoning developed by courts in other Commonwealth jurisdictions. The House of Lords’ shift back to more limited scope for recognising tort liability for pure economic loss, in the early 1990s, likewise may have been encouraged by the approach of the High Court of Australia.<sup>83</sup> However, few other examples of the “centrifugal force”<sup>84</sup> of Commonwealth jurisprudence on English courts spring to mind. Similarly,

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Safeguard of the Union?” in R Hazell (ed) *Constitutional Futures: A History of the Next Ten Years* (Oxford UP, Oxford, 1999) 21.

<sup>80</sup> A O’Neill “Judicial Politics and the Judicial Committee: The Devolution Jurisprudence of the Privy Council” (2001) 64 MLR 603, 606.

<sup>81</sup> S Hedley “How Has the Common Law Survived the 20th Century?” (2000) 50 Northern Ireland LQ 283.

<sup>82</sup> R Youngs *English, French and German Comparative Law* (Cavendish, London, 1998) 55. Thomas J (above n 73) notes that since 1966, the House has overruled its own decisions in only eight cases, and declined to do so in twelve. Atiyah and Summers observe that between 1966 and 1980, the US Supreme Court overruled 55 of its own decisions, to which figure should be added overruling by state supreme courts: Atiyah and Summers, above n 2, 139.

<sup>83</sup> M Smith “The Use and Abuse of Foreseeability: Some Observations on Judicial Law Making in the Common Law System” in H Leser and T Isomura (eds) *Wege zum Japanischen Rechts - FS Kitagawa* (Berlin, 1992) 523.

<sup>84</sup> J Beatson “Has the Common Law a Future?” (1997) 56 CLJ 291, 292. See also Partlett, above n 8. Compare for example the unwillingness of English courts to develop the doctrine of unconscionable bargains to control contractual unfairness (below Paper Three Part II.B.1), despite its retention in almost all Commonwealth jurisdictions (including New Zealand, at least in theory: see below Part II.C.1 of this Paper).

although some judges are more interested in comparative law generally,<sup>85</sup> so far this has had little effect on results reached in particular cases.<sup>86</sup>

The Practice Statement of 1966 was also influenced by Lord Denning's plea in 1959 for the House to take responsibility for developing the law and dispensing justice. Lord Reid later made efforts to address this concern, notably in a work published in 1972.<sup>87</sup> Noting statements of Lord Lowry recently, however, Neil MacCormick and others have concluded that "British judges remain cautious and reluctant shamelessly to assume the law makers' mantle".<sup>88</sup> Thus, since the 1960s there does appear to have been a gradual movement away from according authority to precedents on the ("natural law" or "law-as-custom") theory that they are evidence of the law to be uncovered by judges of practical wisdom and legal learning, or the (positivist) theory that judges can make law "interstitially" where legislation or precedents cannot be found. Rather, "the modern stress ... is on law as grounded in principles partly emergent from practice and custom, partly constructed out of moral or ideological elements that bring together practice and contemporary values in a coherent order ...".<sup>89</sup> Nonetheless, after considering institutional considerations like those just mentioned, MacCormick and others conclude that:<sup>90</sup>

If we are all – up to a point – realists about precedent, there remains a variety of reasons to do with tradition, stability, predictability and deference to parliamentary authority that are probably sufficient to preserve the relative rigidity and formality within the common law world of the British model of precedent.

New Zealand law, statutory and judge-made, also remains formal along most of these dimensions. This is apparent, first, in the even more attenuated form in which a Bill of Rights was eventually enacted: the New Zealand Bill of Rights Act 1990. Initially, courts did interpret the legislation quite broadly, putting at risk traditional

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<sup>85</sup> Lord Goff "The Future of the Common Law" (1997) 46 ICLQ 745; T Bingham "There is a World Elsewhere: The Changing Perspectives of English Law" (1992) 41 ICLQ 513; J Steyn "The Role of Good Faith and Fair Dealing in Contract Law: A Hair Shirt Philosophy?" [1991] Denning LJ 131.

<sup>86</sup> Compare for example the judgments of Bingham LJ in *Interfoto Library Ltd v Stiletto Ltd* [1989] QB 433 (below Paper Three Part III.B.1) and especially *The Super Servant Two* (below Paper Four Part II.A); and Steyn J in *Star Steamship Society v Beogradaska Plovidra* [1988] 2 Lloyd's LR 583 (*The Junior K*). See also for example the approach preferred by the House of Lords in *White v Jones* [1995] 1 All ER 691. But see B Markesinis "Five Days in the House of Lords: Some Comparative Reflections on *White v Jones*" (1995) 3 Tort LJ 169.

<sup>87</sup> See, respectively, Lord Denning *From Precedent to Precedent* (Clarendon Press, Oxford, 1959); Lord Reid "The Judge as Law Maker" (1972) 12 J Soc Public Teachers of Law 22. Lord Steyn also singles out these two developments as critical; but notes that although Lord Reid made it clear "that in a situation of choice a judge may be guided by common sense, legal principles, his sense of justice, and ... policy factors [, that] position was perfectly consistent with Lord Reid's unswerving loyalty to the supremacy of Parliament": see J Steyn, above n 15, 48.

<sup>88</sup> Z Bankowski, D N MacCormick & G Marshall "Precedent in the United Kingdom" in D N MacCormick and R S Summers *Interpreting Precedents: A Comparative Study* (Dartmouth, Aldershot, 1997) 315, 352 (also citing *C (a Minor) v DPP*, The Times, 17 March 1995, where Lord Lowry suggested caution where Parliament had not legislated on the point, where social policy was in dispute, fundamental legal doctrines were involved, or finality and certainty could not be guaranteed by judicial change). Lord Steyn (above n 15) expressly adopts Lord Reid's devotion to Parliamentary sovereignty.

<sup>89</sup> Bankowski and others, above n 88, 330, 352.

<sup>90</sup> Above n 88, 332; ,

doctrines of parliamentary sovereignty.<sup>91</sup> Since the mid-1990s, however, they appear to be taking a distinctly more restrictive approach.<sup>92</sup> Secondly, judicial review in administrative law has grown, as in England; but remains bounded by similar principles.<sup>93</sup> Thirdly, New Zealand courts, like their English counterparts, have been reluctant to develop case law by analogy to developments in statute law more generally.<sup>94</sup> Fourthly, without the likes of EU Law, creating at least partial breaches in

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<sup>91</sup> M Principe “The Demise of Parliamentary Sovereignty? Canadian and American Influences Upon the New Zealand Judiciary’s Interpretation of the Bill of Rights Act 1990” (1993) *Loyola LA Int’l & Comp LJ* 167.

<sup>92</sup> H Schwartz “The Short and Happy Life and Tragic Death of the New Zealand Bill of Rights Act” (1998) *NZ L Rev* 233. Compare also A Butler “The Bill of Rights Debate” (1997) 16 *OJLS* 323; A Butler “Strengthening the Bill of Rights” (2000) 31 *VUWLR* 129; A Butler “Judicial Indications of Inconsistency – A New Weapon in the Bill of Rights Armoury?” [2000] 1 *NZ L Rev* 58; A Butler “Declaration of incompatibility or interpretation consistent with human rights in New Zealand” [2001] *Public L* 28. James Farmer has also raised doubts recently about the Court of Appeal’s ongoing commitment to a vital role in the public law arena more generally, noting the Privy Council’s overruling of the Court in *Mercury Energy Ltd v ECNZ* [1994] 2 *NZLR* 385 (judicial review of a state-owned enterprise); *Treaty Tribes Coalition v Urban Maori Authorities* [1997] 1 *NZLR* 513 and *Phipps v Royal Australasian College of Surgeons* [2000] 2 *NZLR* 513 (both cases involving natural justice). He also notes that the Court of Appeal is reluctant to draw on US case law. See J Farmer “The New Zealand Court of Appeal: Maintaining Quality After the Privy Council” in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001); and compare I Loveland “Introduction: Should We Take Lessons from America?” in 1, 16-23 (contrasting the extensive use of US law in the highest courts in Canada, India and Australia, with signs of faltering interest in US law on the part of English superior courts).

<sup>93</sup> P Joseph “Delegated Legislation in New Zealand” (1997) 18 *Stat L Rev* 85. Thomas J’s recent suggestions that the grounds for judicial review should be broadened are not generally supported: H Hancock “*Waitakere* Unreasonableness” [1998] *NZLJ* 187. Compare also J Hodder “‘Irrationality’: A Synonym Too Far?” in New Zealand Law Society (eds) *Public Law: Update on Administrative Law and Judicial Review* (NZ Law Society, Wellington, 1998) 29.

<sup>94</sup> Opponents of analogical use of statutes include P S Atiyah “Common Law and Statute Law” (1985) 48 *MLR* 1; and T Allan *Law, Liberty and Justice* (Clarendon, Oxford, 1993). However, in the Chatham Lecture delivered on 30 October 1998, a senior Law Lord suggested that in English courts “regard should be paid to the policy inherent in any relevantly analogous statute”: T Bingham *The Business of Judging: Selected Essays and Speeches* (Oxford UP, Oxford, 2000) 387. More recently, a former Law Commissioner notes examples in which English courts nonetheless have used statutes directly, such as *Photo Production Ltd v Securicor Transport Ltd* [1980] *AC* 827 (encouraged to uphold an exemption clause after the Unfair Contract Terms Act 1977 was enacted to cover other situations) and *Wong Mee Wan v Kwan Kin Travel Service* [1996] 1 *WLR* 38 (PC, considering regulations to decide what terms were reasonable to imply into a package holiday contract). He argues that such developments should be encouraged, in view for instance of the increasing legislation derived from the EU and changes in methods of interpreting statutes. However, concerns include Sir Guenter Treitel’s suggestion that new legislation on contracts for the benefit of third parties should have no indirect impact on common law cases outside its scope. See J Beatson “The Role of Statute in Common Law Doctrine” (2001) 117 *LQR* 247, 253, 255, 267-269.

In *South Pacific Manufacturing Co Ltd v NZ Security Consultants and Investigators Ltd* [1992] 2 *NZLR* 282, 297-298, Cooke P approved the approach in *Photo Production*. One scholar in New Zealand has since urged the analogical use of statutes: G Gunasekara “Judicial Reasoning by Analogy with Statutes: A Heresy or a New Avenue for the Development of the Common Law?” (1993) *NZLJ* 446; G Gunasekara “Judicial Reasoning by Analogy with Statutes: Now an Accepted Technique in New Zealand?” (1998) 19 *Stat LR* 177. Powerful opponents, however, include Jim Evans and Peter Watts (see the analysis in the latter’s “The Judge as Casual Law-Maker” in R Bigwood (ed) *Legal Method in New*

the tower of parliamentary sovereignty in England, New Zealand courts face even greater difficulties in bringing into consideration norms of international law which are not specifically incorporated into domestic legislation.<sup>95</sup> Indeed, in *Boscawen Properties Ltd v Governor-General*,<sup>96</sup> the Court of Appeal upheld regulations setting tariffs on used cars from Japan which were in breach of GATT, despite section 9(2)(2) of the Tariff Act 1988 requiring tariffs to be set in conformity with New Zealand's international obligations. The Court held that the regulations were later validated by Parliament by means of the blanket Subordinate Legislation (Confirmation and Validation) Act 1991). A further reflection of the difficulty in allowing international law norms their own "voice", not heard only through the mediation of Parliament, is the lack of progress in the Law Commission's recommendation to change the incorporation process for treaties by institutionalising broad-based consultation prior to ratification.<sup>97</sup>

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*Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001), citing a forthcoming book paper by Evans).

Analogical use of statutes is more acceptable in jurisdictions which draw on civil law methodology, such as France (D Harris and D Tallon (eds) *Contract Law Today: Anglo-French Comparisons* (Clarendon Press, Oxford, 1989) 189-190), German and (perhaps to a lesser extent) Japan: G Rahn *Rechtsdenken und Rechtsauffassung in Japan [Legal Thought and Conceptions of Law in Japan]* (CH Beck, Munich, 1990) 417-425. See also below Paper Two Part II.D; Paper Three Part IV.A.

<sup>95</sup> In his writings as an academic, Law Commissioner, and (extra-judicially) as a Justice of the Court of Appeal, Sir Kenneth Keith has tended to advocate an expansive approach. See for example K Keith "The Application of Human Rights Law in New Zealand" (1997) 32 *Texas Int'l LJ* 401; K Keith "The Impact of International Law on New Zealand Law" (1998) 6 *Waikato L Rev* 1; K Keith "Roles of the Courts in New Zealand in Giving Effect to International Human Rights - With Some History" (1999) 29 *VUWLR* 27. However, in a very recent work ("Sources of Law, Especially in Statutory Interpretation, with Suggestions About Distinctiveness" in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001), while responding convincingly to criticisms that the Court of Appeal has been activist in referring to international instruments to interpret statutes (namely, J Allan "Statutory Interpretation and the Courts" (1999) 18 *NZULR* 439), Sir Kenneth is decidedly circumspect as to how Courts should approach international texts not yet incorporated into national law. In a contribution to the same volume (J Evans "Questioning the Dogmas of Realism" in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001; also forthcoming in [2001] *NZ L Rev*), Sir Kenneth's judgment in *Sellers v Maritime Safety Inspector* [1999] 2 *NZLR* 44 is roundly criticised for applying a presumption that statutes are not intended to contravene international law, when the legislation appeared to contain no ambiguity. A former Law Commissioner also criticises this judgment as another instance of "judicial supremacism": D F Dugdale "Framing Statutes in an Age of Judicial Supremacism" (2000) 9 *Otago L Rev* 600, 606. Conversely, several commentators indicate some disappointment with impediments to, or a reluctance of, New Zealand Courts to apply international law norms more actively. Compare for example A Butler and P Butler "The Judicial Use of International Human Rights Law in New Zealand" (1999) 29 *VUWLR* 173; M Poole "The Use and Abuse of International Instruments" in New Zealand Law Society (ed) *Public Law: Update on Administrative Law and Judicial Review* (NZ Law Society, Wellington, 1998) 13; M Poole "International Instruments in Administrative Decisions: Mainstreaming International Law" (1999) 30 *VUWLR* 91. For subsequent illustrations of reticence on the part of the Court of Appeal, see for example *Mendelsohn v A-G* [1999] 2 *NZLR* 268; and *R v Pora* [2001] 2 *NZLR* 37. Thanks to Tony Shaw for identifying these cases.

<sup>96</sup> Unreported (1 December 1994) Court of Appeal, CA 9/94, Richardson, Casey & McKay JJ.

<sup>97</sup> Compare NZ Law Commission *The Treaty-Making Making Process: Reform and the Role of Parliament* (Report No 45, Wellington, 1997) with M Poole "The Globalisation of New Zealand Law" in NZ Law Society (ed) *Public Law: Update on Administrative Law and Judicial Review* (NZ Law Society, Wellington, 1998) 1. The recommendation that treaties be tabled in Parliament has been followed, by

On the other hand, Cheryl Saunders has speculated that deference to Parliament may be significantly greater in England, compared to Australia and New Zealand, where the institution accordingly has been threatened. Reforms over the last decade or so have aimed to bolster the roles and influence of Parliament in New Zealand.<sup>98</sup> Although this move is aimed in part at restoring greater independence vis à vis the executive, thus complicating authoritative formality, it then simplifies it by insisting on Parliament's sovereignty. Even the much fanfares change in electoral law, to a multi-member proportional (MMP) system,<sup>99</sup> can be appraised in this light.

At various stages in his judicial career, Lord Cooke has hinted that there may be some fundamental rights which New Zealand courts will uphold even if Parliament purports to take them away.<sup>100</sup> However, these remain obiter dicta, not developed systematically by other New Zealand judges. Lord Cooke's views have attracted some sympathy among senior members of the judiciary in England, notably Lord Woolf, but they have been "treated appropriately dismissively" – in the words of a former Law Commissioner in New Zealand recently – by the present Vice-Chancellor.<sup>101</sup> Lord Cooke's views also underpin his opinion that making New Zealand a republic would mean a constitutional revolution; but that is not shared by leading constitutional scholars either.<sup>102</sup> More generally, deference to the legislature still follows strongly in New Zealand, probably all the more so given its unicameral system (making it easier for Parliament to intervene).<sup>103</sup> The entrenchment of parliamentary supremacy is also

contrast, but there had been an early precedent for that: see K Keith "The New Zealand Treaty Practice: The Executive and the Legislature" (1963) 1 NZULR 273.

<sup>98</sup> C Saunders "Thinking About Parliament" in A Simpson (ed) *The Constitutional Implications of MMP* (VUW School of Political Science and International Relations, Wellington, 1998) 27, 29, 31. On the reforms, see generally G Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992). A recent indication of Sir Geoffrey Palmer's longstanding concern about proliferation of sources of normative authority is his criticism of the growing prominence of "rules" in addition to statutes and regulation. He argues that New Zealand does not need "three levels of law-making rather than two". But if a case can be made to the contrary, he says, one proposal is to require agreement of the full Cabinet before such rules are made. This is consistent with his earlier preference for reinforcing parliamentary supremacy because Cabinet is accountable to Parliament. Perhaps reflecting the fact that he is no longer in Parliament, however, he also mentions an alternative approach: "following American developments, ... restrict [rules] to measures which can be successfully negotiated to a consensus by the agency and those affected by the proposed rule" (G Palmer "Deficiencies in New Zealand Delegated Legislation" (1999) 30 VUWLR 1, 35). In light of the overall formal orientation of New Zealand law, it seems very unlikely that it will move rapidly towards the US approach (on which see more generally J Freeman "Collaborative Governance in the Administrative State" (1997) 45 UCLA L Rev 1).

<sup>99</sup> Compare generally K Asaka "Electoral Reform in Japan: A Comparative Constitutional Perspective" (1997) 27 VUWLR 25; C Rudd and T Ishikawa *Electoral Reform in New Zealand and Japan: A Shared Experience?* (Massey University New Zealand Centre for Japanese Studies, 1994).

<sup>100</sup> See the cases cited in R Cooke "Fundamentals" [1988] NZLJ 158; and generally M Kirby "The Struggle for Simplicity: Lord Cooke and Fundamental Rights" (1998) 24 Commonwealth L Bull 496.

<sup>101</sup> Dugdale, above n 95, 607, citing Lord Irving "Judges and Decision-Makers: The Theory and Practice of *Wednesday Review*" [1996] Public L 59, 75-78, critical of Lord Woolf "Droit Public – English Style" [1995] Public L 57, 68-69..

<sup>102</sup> A Stockley "Parliament, Crown and Treaty: Inextricably Linked?" (1997) 17 NZULR 19, 18. Compare for example F M Brookfield "Republican New Zealand: Legal Aspects and Consequences" (1995) 310 NZ L Rev 310.

<sup>103</sup> Compare generally R Cooter and T Ginsburg "Comparative Judicial Discretion: An Empirical Test of Economic Models" (1996) 16 Int'l Rev of Law and Economics 295. For examples of deference in

apparent in a seemingly growing trend for the government to promptly enact statutes circumscribing court judgments of which it disapproves.<sup>104</sup>

More challenging to the normative hierarchy of New Zealand law has been the increasing prominence of norms contained in the Treaty of Waitangi.<sup>105</sup> These have widened the scope of constitutional discourse in New Zealand.<sup>106</sup> Yet there are deep historical continuities in the current resurgence of interest in the Treaty, as in the way the debate has been framed by legislative granting of rights.<sup>107</sup> Parliamentary sovereignty has been reaffirmed in this process, with bolder statements of principle proposed by some judges being ignored or put quietly to rest.<sup>108</sup> Normative closure is further promoted by insisting that (a) legislative settlements involve *iwi* (tribes), even though traditionally it seems that smaller units controlled resources;<sup>109</sup> (b) settlements be final;<sup>110</sup> and (c) recognition of Maori customary law be limited.<sup>111</sup>

In theory, New Zealand's legal system could generate lower rank formality through having the possibility of three appeals, unlike Japan and England which generally recognise only two.<sup>112</sup> A further complication affecting rank formality was,

New Zealand, see for example *Whiting v Diver Plumbing & Heating Ltd* [1992] 1 NZLR 560, per Tipping J (gently implying that the Contracts Enforcement Act 1956 should be amended); I McKay "Interpreting Statutes – A Judge's View" (2000) Otago L Rev 743 (evinced a strict approach); N When "Desperate Remedies and the West Coast Sawmillers" (2001) 19 NZULR 351, 366 (discussing cases where the requirement of consultation was narrowly construed, and a "takings" clause was not implied into the Bill of Rights Act 1990). But see S Baldwin "New Zealand's National Legal Identity" (1989) 4 Cant L Rev 173, 175 (suggesting that the lack of an Upper House may have encouraged judges like Lord Cooke to attempt to counterbalance Parliamentary power).

<sup>104</sup> One prominent holding overruled in recent years is *Daniels v Thompson* [1998] 3 NZLR 22 (where a majority of the Court of Appeal decided that claims for exemplary damages could not be brought against someone who had been subject to prior criminal proceedings, whether or not those proceedings resulted in a guilty verdict, because of the prohibition against "double jeopardy").

<sup>105</sup> See for example R Cooke "The Challenge of Treaty of Waitangi Jurisprudence" (1994) 2 Waikato L Rev <<http://www.liinz.org.nz/liinz/other/wlr/1994/Article1-Cooke.html>>.

<sup>106</sup> P G McHugh "Sovereignty This Century: Maori and the Common Law Constitution" Proceedings of the Australasian Law Teachers Association conference, Wellington, July 4-7 1999, Vol 2; P G McHugh "Constitutional Voices" (1996) 26 VUWLR 499. See also J G A Pocock "Law, Sovereignty and History in a Divided Culture: The Case of New Zealand and the Treaty of Waitangi" (1998) 43 McGill LJ 481.

<sup>107</sup> See for example P Spiller, J Finn and R Boast *A New Zealand Legal History* (Brookers, Wellington, 1995) 172-173; R Boast "Maori Fisheries 1986-1998: A Reflection" (1999) 30 VUWLR 111.

<sup>108</sup> See for example Callahan, above n 67; R Boast "Maori Land and the Treaty of Waitangi" in R Boast, A Erueti, D McPhail and N Smith (eds) *Maori Land Law* (Butterworths, Wellington, 1999) 269, 272-274. Consistent with this is the call for more incorporation of Maori voice in law-making: M Wilson "The Reconfiguration of New Zealand's Constitution: The Transformation of Tino Rangatiratanga into Political Reality" (1997) 5 Waikato L Rev 17, 24-25. For a vigorous call for less interference by New Zealand courts in Treaty matters, see D Round "Judicial Activism and the Treaty: The Pendulum Returns" (2000) 9 Otago L Rev 653.

<sup>109</sup> Boast, above n 107, 112-113.

<sup>110</sup> See K Minogue *Waitangi: Morality and Reality* (NZ Business Roundtable, Wellington, 1998); A Mikaere "Settlement of Treaty Claims: Full and Final, or Fatally Flawed?" (1997) 17 NZULR 425.

<sup>111</sup> See for example R Boast "New Zealand Common Law and Customary Law" in R Boast, A Erueti, D McPhail and N Smith (eds) *Maori Land Law* (Butterworths, Wellington, 1999) 12, 18. See also R Boast "F O V Acheson and Maori Customary Law" (1999) 30 VUWLR 661.

<sup>112</sup> See generally Yanagida and others, above n 55, 41-47. Japan differs in that the first (*koso*) appeal was available not only from a district court in first instance; but also from a summary court (*kan'i*

for many years, a noticeable difference in approach between the highest appellate court, the Judicial Committee of the Privy Council (dominated by more conservative Law Lords), and the Court of Appeal under Cooke P.<sup>113</sup> This confused the normative hierarchy in New Zealand law. Proposals to abolish appeals to the Privy Council, especially since the mid-1990s,<sup>114</sup> therefore can be seen as a rather radical attempt to restore clearer rank formality. However, tensions regarding appeals to the Privy Council were diffused somewhat when the Privy Council made some careful decisions appointing New Zealand judges to hear some of its cases, and deferred to purportedly well-established Court of Appeal jurisprudence and/or “local circumstances”.<sup>115</sup>

Different complications emerged from the early 1990s. The Law Lords became less conservative, and indeed they were occasionally joined until 2001 by Lord Cooke, created a life peer in the House of Lords upon his retirement from the Court of Appeal. Conversely, there is evidence of growing conservatism in the Court of Appeal under Richardson P in the latter half of the 1990s. James Farmer has recently raised concerns that pressures for efficient case processing due to an increasing work load appear to have led the Court (a) to adopt a “minimalist approach” to particular cases, neglecting opportunities for embarking on broader inquiries and settling contested legal principles; (b) discouraging multiple judgments; and (c) downplaying the importance of oral argument on legal principle. He also criticises the Court of Appeal’s unwillingness to grapple with contemporary economic theory in competition law cases, compared even to the Privy Council, and argues generally that New Zealand Courts (except possibly the Court of Appeal under Cooke P) have traditionally been followers rather than leaders.<sup>116</sup>

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*saibansho*, with some parallels with New Zealand’s Disputes Tribunals: Y Wada “*Osutoraria/Nyujirando no Funso Shinpansho* [Disputes Tribunals in Australia and New Zealand]” (1998) 1 Uebu Jyanaru <<http://hosha.law.kyoto-u.ac.jp/default.htm>>. The summary court has jurisdiction over claims of up to Yen 900,000 (about NZ\$15,000), except now if *shogaku tetsutsuki* are elected for claims of up to Yen 300,000 (Code of Civil Procedure (“New CCP”, Law No 109, 1996, art 368). A further instance of the entrenchment of formal reasoning in New Zealand may be the recent calls for more “legal” expertise among Dispute Tribunals referees: compare J McDermott and J Skinner “New Zealand’s Disputes Tribunals: Growth of a ‘People’s Court’ Under Threat” (1999) Proceedings of the Australasian Law Teachers Association conference, Wellington, 4-7 July 1999, Vol 2. In addition, greater rank formality is injected into the New Zealand court system by appellate courts being more ready to accept first instance findings of fact, compared to the US and even England or Australia recently. See G Hammond “Comparative Perspectives: A Commentary” in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001), citing *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190.

<sup>113</sup> On the shifts in Law Lord conservatism, see for example Epp, above n 70, 127-131 (through to the early 1990s); and J Hodder “International Crimes and Immunities” (1998) 21/3 TCL 1 (the late 1990s).

<sup>114</sup> See for example New Zealand Business Roundtable *Appeals to the Privy Council* (New Zealand Business Roundtable, Wellington, 1995).

<sup>115</sup> Notably, for instance, in *Invercargill City Council v Hamlin* [1996] 1 NZLR 513, reaffirming the expansive liability of local authorities for pure economic loss (compare Smith, above n 83). For a strong critique of deference to New Zealand case law and circumstances perceived as distinctive, see P Watts, above n 94. Compare generally K Glover “Severing the Ties that Bind? The Development of a Distinctive New Zealand Jurisprudence” (2000) 8 Waikato L Rev 25; P Spiller “Special Leave to Appeal” (1998) NZLJ 3; M Richardson “The Privy Council and New Zealand” (1997) 46 ICLQ 908.

<sup>116</sup> J Farmer, above n 92. As an example of “minimalism”, he cites *Attorney-General v E* [2000] 3 NZLR 257, and the dissenting judgment by Thomas J (arguing that the case should not be disposed of simply by overturning Fisher J’s finding on legitimate expectations, but should consider wider issues

Richardson P has recently confirmed the growing work load of the Court of Appeal in recent decades, lower proportions of lengthy judgments, and lower proportions of multiple or dissenting judgments (with, moreover, fewer citations recently to decisions of the Australian High Court decisions, apparently due to its tendency for judges to issue judgments adopting differing approaches). His Honour does note that references to law reform material and legal periodicals have risen significantly since 1960.<sup>117</sup> However, from an empirical analysis of the 377 most recent reported decisions of the Court of Appeal as of December 2000, Russell Smyth observes that the Court cites proportionately fewer law review articles per case than either the High Court of Australia or the US Supreme Court, suggesting a Court which is less innovative, policy-oriented or activist.<sup>118</sup> This tension, now between a seemingly more conservative Court of Appeal and the Judicial Committee of the Privy Council (made up predominantly by Law Lords) heading in a less conservative direction, is an important factor behind renewed proposals to abolish appeals to the Privy Council. If only because of New Zealand's new Labour government, most commentators assume that abolition will now occur, focusing attention on what likely appellate structure will arise in its stead.<sup>119</sup> The end result, however, will certainly be a greater degree of rank formality in

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concerning the exercise of discretion by an immigration officer). On the Privy Council's greater willingness to engage with US antitrust and economic principles, Farmer cites *Clear Communications Ltd v Telecom Corporation of NZ Ltd* [1997] 1 NZLR 513.

<sup>117</sup> I Richardson "Trends in Judgment Writing in the New Zealand Court of Appeal" in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001). Table 1 of this contribution records, for instance, that the Court rendered only 78 decisions in 1960; 246, in 1980; 396, in 1990; and around 460 in 1997 and 2000. Figure 4 thereof shows that, as a percentage of the total number of decisions cited in any one year, the number of Australian decisions rose from four percent in 1960 to twelve percent in 1990, before declining to five percent in 2000. It should be added that even in the period from 1945 to 1962, New Zealand courts referred to Australian precedents to a "surprising extent": D Mathieson "Australian Precedents in New Zealand Courts" (1963) 1 NZULR 77, 77. The recent downturn therefore suggests an increasingly parochial Court of Appeal, further reducing rank formality in New Zealand's legal system. Compare also the much higher rate of dissenting judgments in appellate courts in the US compared to England, discussed by Atiyah and Summers, above n 2, 283-289. Multiple decisions are also very common in the US (see for example A Hochschild "The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective" (2000) 4 Wash U J L & Pol'y 261), whereas Sir Ivor Richardson indicates that this increasingly prominent feature of case law from the High Court of Australia is one reason for declining references to it in New Zealand's Court of Appeal.

<sup>118</sup> R Smyth "Judicial Robes or Academic Gowns? Citation to Secondary Authority and Legal Method in the New Zealand Court of Appeal" in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001). See also R Smyth "Judicial Citations – An Empirical Study of Citation Practice in the New Zealand Court of Appeal" (2000) 31 VUWLR 847. It could be objected that law review articles are not cited for other reasons, such as counsel not drawing them to the Court's attention. However, counsel will be disinclined to cite law review articles if they perceive the Court as less willing to draw on such writings, which are often prescriptive or policy-oriented. Thanks to Tony Angelo for raising this point.

<sup>119</sup> See for example Farmer, above n 92. His paper responds to the Attorney-General's Discussion Paper, "Reshaping New Zealand's Appeal Structure" (Wellington, December 2000, available at <<http://www.executive.govt.nz/minister/wilson/privy-council/index.html>>). The New Zealand Law Society journal quoted most newspaper editorial writers as agreeing with the paper's proposal to end links: Note, "NZ's Appeal Structure" (2001) 554 Lawtalk 24. However, confidence in the Privy Council may have been revived recently after it reversed the Court of Appeal's decision to order lawyers to

New Zealand's court hierarchy compared to that which has prevailed for the last two decades.

Just focusing on the existence and wording of constitutional structures or instruments, and the emergence of more or less "activist" judges or courts, is unlikely to explain adequately all the important dimensions in a legal system's overall orientation towards formal versus substantive reasoning. This point emerges from Epp's comparative analysis of the "rights revolution" in the US since the 1960s, and some more limited trends in the same direction in the UK more recently. Generally, more attention to basic human rights should inject more "content-oriented" standards of validity into those legal systems.<sup>120</sup> Epp convincingly shows the importance of changes over this period in the "support structures" for mobilising at least some important rights, such as those involving sex discrimination. These structures include the changing nature of the legal profession, expanding availability to certain types of contingency fees, access to legal aid, and so on.<sup>121</sup>

Similarly, in comparing England and the US, Atiyah and Summers bring into the picture many aspects of the broader institutional framework. They suggest, for instance, that comparative deference to legislative solutions, and to superior courts or binding precedents, are related to differences in England and the US in how legislation is enacted, and how the judiciary and the legal profession more generally are organised. Specifically, they argue that the English reliance on enacting legislation is justified by the comparative ease in which this can be achieved in practice, due for instance to the considerable fusion of the executive with the legislature and the very limited powers of the House of Lords, unlike the US where both the Senate and the President remain distinct, each with extended veto powers.<sup>122</sup> Deference to statutory provisions, as a primary source of authority in legal reasoning in England, is also more readily justified because of the high quality of drafting stemming from a single parliamentary office.

A greater willingness to defer to previous decisions of the same court or to higher courts, they argue, is further reinforced by the traditionally homogeneous nature of the legal profession, particularly the Bar supplying most of the judiciary.<sup>123</sup> The 1990s did bring accelerating growth in the number of lawyers in England; more diversification in their makeup; and reforms permitting solicitors to obtain rights of audience in superior courts. However, empirical studies show that very few solicitors actually have obtained and use those new rights.<sup>124</sup> There was also considerable opposition to proposals to grant rights of audience in superior courts mainly to

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contribute personally to the costs of the litigant against whom they were acting: see *Harley v McDonald* [2001] 2 WLR 1749 (PC), and an earlier note by D Webb "*Harley Costs: A Note of Caution*" [2000] NZLJ 453.

<sup>120</sup> Compare also Fisher, above n 16.

<sup>121</sup> Epp, above n 70, 44-70, 140-155.

<sup>122</sup> A radical recent proposal, for a constitutional law scholar in the US, involves abandoning the presidential system in favour of the Westminster system. See B Ackerman "The New Separation of Powers" (2000) 113 Harv L Rev 634. The institutional upheaval that would be required is obvious from his comparative analysis.

<sup>123</sup> Atiyah and Summers, above n 2, 298-305, 329-335, 347-368. See also Kritzer, above n 61, 86-92; R Abel *The Legal Profession in England and Wales* (Basil Blackwell, Oxford, 1989).

<sup>124</sup> M Zander "Rights of Audience in the Higher Courts in England and Wales since the 1990 Act: What Has Happened?" (1997) 4 Int'l J Legal Profession 167.

government lawyers.<sup>125</sup> The tradition of drawing judges primarily from the Bar is likely to continue despite the House of Lords limiting the immunity of barristers from suits for professional negligence.<sup>126</sup> The Bar, especially the senior counsel who still provide the overwhelming proportion of influential judges, remains a strongly male and white institution.<sup>127</sup> Hence it is unlikely that the English judiciary will rapidly lose its present homogeneous character.<sup>128</sup> Until it becomes more diversified, a more adventurous approach – resulting for instance in less authoritative formality – probably cannot be expected.<sup>129</sup> By contrast, the legal profession in the US is much more heterogeneous.<sup>130</sup> This has carried over into its judiciary, with further diversity arising from judges often being elected by popular elections, and considerable lateral career moves (in and out of political life, for instance).<sup>131</sup>

Examination of “support structures” for asserting civil rights through the courts, and of legal institutions more generally, is also crucial in positioning New Zealand. Empirical scholarship on the legal profession is sparse, but one study in the early 1980s brought out patterns of social stratification closer to those in England than in the US.<sup>132</sup> The subsequent growth of large law firms, and the increasing numbers of persons being admitted as lawyers, also parallels developments in England.<sup>133</sup> Yet it seems likely that

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<sup>125</sup> See for example J Steyn “The Role of the Bar, Judge and the Jury: Winds of Change” (1999) Pub L 51.

<sup>126</sup> D Webb “Dismantling Advocates’ Immunity” [2000] NZLJ 327. Restricting immunity may undermine barristers’ willingness to fulfil the duty they owe to the Court, which Atiyah and Summers (above n 2, 367) and Posner (above n 6, 21-30) mention as a link towards a more unified Bar and judiciary than in the US. However, it is too early to be sure, and it seems that other links have been more important, especially similar socio-economic backgrounds and institutions such as the Inns of Court. Compare Bingham, above n 94, 355-362; J Flood “Barristers” (August 2001 manuscript for a forthcoming comparative study of lawyers, edited by Albert Kritzer). Thanks to John Flood for providing the latter manuscript.

<sup>127</sup> Out of just over 10,000 barristers in practice at the end of 2000, only 26 percent are female; 9 percent, non-Caucasian; and 3 percent, women of colour. Of the approximately 1000 Queen’s Counsel, only 82 are women and 25 come from ethnic minorities. See Flood, above n 126.

<sup>128</sup> On the latter, see C Elliott and F Quinn *English Legal System* (2 ed, Addison Wesley Longman, Harlow, 1998) 97-98.

<sup>129</sup> Sir Guenter Treitel has suggested that English judges have become less assertive as the franchise has expanded, since with every advance of democracy the non-representative nature of the judiciary became more conspicuous (quoted in Posner, above n 6, 34). Of interest in this respect, then, is some growing interest in reforming the process by which English judges are appointed: see Elliott and Quinn, above n 128, 92, 97-98. This also became a topic of debate in New Zealand from the mid-1990s (see for example R Kerr “Judging the Judiciary” [1998] NZLJ 329). However, no significant changes have resulted (see L Nottage “New Zealand Law through the Internet: The Commonwealth Law Tradition and Socio-Legal Experimentation” (1999) 6 E Law: Murdoch U Electronic Journal of Law <<http://www.murdoch.edu.au/elaw/issues/v6n1/nottage61.html>>).

<sup>130</sup> R M Abel *American Lawyers* (Oxford UP, New York, 1989).

<sup>131</sup> Atiyah and Summers, above n 2, 130-132; H Jacob “Courts and Politics in the United States” in H Jacob and others (eds) *Courts, Law and Politics in Comparative Perspective* (Yale UP, New Haven (Conn), 1996) 16, 66-69.

<sup>132</sup> G Murray “New Zealand Lawyers: From Colonial GPs to the Servants of Capital” in R Abel and P Lewis (eds) *Lawyers in Society: The Common Law World* (Berkeley, U California Press, 1989).

<sup>133</sup> For another rare socio-legal study, by a New Zealander who spent most of his career in the US (and now teaches business management at Auckland University), see M J Powell “Business Management and the Professions: The Changing Nature of the Legal Profession” in J Deeks and N Perry (eds)

large law firms in New Zealand remain closer in organisational beliefs and expectations to those still prevalent among large law firms in England, compared to those in the US.<sup>134</sup> Further, despite New Zealand's long tradition of lawyers being able to qualify and work as both barristers and solicitors,<sup>135</sup> functional specialisation has emerged and judges are still drawn overwhelmingly from those working as barristers sole. Social class has probably been less important in the New Zealand Bar compared to England,<sup>136</sup> resulting in a less homogenous judiciary. However, New Zealand does have some notable "legal dynasties", which have generated leading practitioners dominating long periods of its modern history.<sup>137</sup> Unfortunately, there is an acute dearth of empirical data in New Zealand on these points.<sup>138</sup> Nonetheless, the impression remains of a much more homogenous legal profession and judiciary in both New Zealand and England, at least compared to the US.<sup>139</sup>

At first sight, Japan seems closer to the English law tradition than to US law, for the executive is fused with the legislature.<sup>140</sup> Indeed, this link has been cemented by one political party (the LDP) retaining power in both Houses of the Diet for most of the period since 1950. That has also reduced the potential for the upper house to exercise

*Controlling Interests: Business, the State and Society* (Auckland, U Auckland Press, 1991). See also generally D Brock, M Powell & C R Hinings (eds) *Restructuring the Professional Organization: Accounting, Health Care and Law* (Routledge, London, 1999).

<sup>134</sup> One recent study shows how a large English firm adheres much more to the traditional professional partnership than a US firm of comparable stature: J Flood "Professionals Organizing Professionals: Comparing the Logic of United States and United Kingdom Law Practice" in D Brock, M Powell & C R Hinings (eds) *Restructuring the Professional Organization: Accounting, Health Care and Law* (Routledge, London, 1999) 154. Compare M Galanter "Law Abounding: Legalisation Around the North Atlantic" (1992) 55 MLR 1.

<sup>135</sup> Spiller and others, above n 107, 236-237. Functional specialisation, and the retention in New Zealand of English traditions such as barristers being appointed Queen's Counsel, have been questioned as possibly contrary to anti-competition law: A Bollard and P Scott "Competition and the Legal Profession" [1996] NZLJ 275. True to that tradition, the Law Society promptly retorted that such features should be retained because the New Zealand legal profession serves wider public interests: Note "Competition Policy Should Not Override Public Interest: Forbes" (1996) 454 Lawtalk 5. It may become more difficult to maintain this attitude if more empirical research is undertaken showing the increasingly competitive nature of the New Zealand legal profession (see Powell, above n 133; M Fay and J Bell, "Lawyers' Attitudes To Competition and Advertising" [1996] NZLJ 462). Yet retention of the Queen's Counsel system seems more likely in view of the resilience of traditional patterns within the legal profession, and the lack of socio-legal studies in New Zealand legal academia (see below Part II.C).

<sup>136</sup> Compare Flood, above n 126. In England, the High Court still does not appear to have any non-Caucasian judge, and higher courts still do not have any women judges. By contrast, in recent years a Maori has been appointed to New Zealand's High Court (Justice Durie), and a woman has been appointed Chief Justice (Chief Justice Elias).

<sup>137</sup> See for example P Spiller *The Chapman Legal Family* (Victoria UP, Wellington, 1992). As Thomas J has observed recently: "By and large, [New Zealand judges] are perceived as a conservative, middle to upper class, frequently second or third generational privileged elite": E W Thomas "The Conscience of the Law" (2000) 6 Waikato L Rev 3, 3.

<sup>138</sup> Compare for example P Spiller "Realism in the Court of Appeal: The Value of the Oral Tradition" (1998) 2 Ybk of NZ Jurisprudence 34.

<sup>139</sup> See also Fisher, above n 16.

<sup>140</sup> See generally K Takahashi "Contemporary Democracy in a Parliamentary System" in P Luney and K Takahashi (eds) *Japanese Constitutional Law* (Tokyo UP, Tokyo, 1993) 87.

some veto powers.<sup>141</sup> All this might suggest that Japan, like England and New Zealand, can readily enact legislation, thus encouraging a more formal rather than more substantive orientation in its legal system generally. In fact, until deregulation gained momentum over the 1990s, enactment of legislation – even that which might seem to clearly favour the LDP – seem less frequent and certainly slower in post-War Japan than one would expect given the dominance of one political party. Partly this stemmed from the ability of opposition parties and other interest groups to invoke arguments based on the Constitution, and otherwise mobilise the legal system for political or policy-making purposes.<sup>142</sup>

That is so even if (as just mentioned) the courts are reluctant to strike down as unconstitutional legislation once enacted. Some have gone on to suggest that in politically charged cases Japanese judges tend to decide in favour of the central government and LDP policy preferences. Ramseyer and Rasmussen find some statistical evidence that those judges who do not, end up with worse career paths.<sup>143</sup> Deciding in favour of the status quo in constitutional cases, however, is a feature shared by many final appellate courts,<sup>144</sup> and possibly some intermediate ones. Their thesis also seems inconsistent with little, if any, evidence that LDP cabinets have directly appointed “party hacks” or known LDP sympathisers to the Supreme Court.<sup>145</sup> It also begs the question of what cases can be defined as “politically charged”. The thesis would become more convincing if similar career disadvantages could be shown for judges who took activist, anti-LDP approaches in post-War litigation involving employee dismissals, industrial pollution, or product liability.<sup>146</sup> In any event, Ramseyer and Rasmussen find

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<sup>141</sup> Under art 59 of the Constitution, even if the House of Representatives approves a Bill (even by a simple majority), the House of Counsellors can reject it, in which case the House of Representatives can get it enacted directly but only by approving it by a two-thirds majority. Although admittedly limited, this veto power is a potentially very real one. Accordingly it is odd that Cooter and Ginsburg (above n 103) fail to recognise it at all in their comparative study of judicial (in)dependence. A different question is whether recognising it would affect the statistically significant correlations identified by the regression analysis. If not, it shows the lack of robustness of such analysis.

<sup>142</sup> On the former, see for instance the promulgation of legislative amendments in line with “new” Guidelines on US-Japanese Security agreed between the Japanese and US governments over three years ago: see for example T Yamauchi “*Shin-Gaidorain Kanrenho to Kenpojo no Mondaiten* [Constitutional Difficulties with the Legislation Relating to the New Guidelines]” (1999) 1160 *Juristo* 36. On the latter, compare generally E Feldman *The Rituals of Rights in Japan: Law, Society and Health Policy* (Cambridge UP, Cambridge, 2000).

Another development, also tending to complicate authoritative formality, is the steady increase in the numbers of members’ Bills – both submitted *and* enacted – over the last few years: see “Lawmakers Try to Make Laws: Young Guns Drop Money Game, Fight Bureaucratic Control” *JapanTimes*, Tokyo, 23 March 1999, 1. Compare also Atiyah and Summers, above n 2, 302-303; and S G Palmer “The Evolution of a Legal System: A Dialogue” (Paper presented to the Australasian Law Teachers Association conference, Wellington, 4-7 July 1999) (highlighting a rise in Members’ Bills since the introduction of MMP, yet conceding that very few are enacted as such).

<sup>143</sup> J M Ramseyer and E Rasmussen “Why Are Japanese Judges So Conservative in Politically Charged Cases?” (1999) Paper Presented at the Annual Meeting of the Law and Society Association, Chicago, 27-30 May 1999. See also J M Ramseyer “The Puzzling (In)dependence of the Courts: A Comparative Approach” (1996) 23 *J Leg Stud* 721; J M Ramseyer and E Rasmussen “Judicial Independence in a Civil Law Regime: The Evidence from Japan” (1997) 13 *J of L, Econ & Org* 259.

<sup>144</sup> See for example Beatty, above n 46.

<sup>145</sup> Compare Haley, above n 43, 109-114, 118-122.

<sup>146</sup> See, respectively, D H Foote “Judicial Creation of Norms in Japanese Labor Law: Activism in

no significant correlations in Commercial Code cases, which they take to support their thesis in that these are not “politically charged”.<sup>147</sup> That qualification is particularly important for the purposes of this research, because it implies that contract case law development also cannot be expected to exhibit systematic bias, even on a highly jaundiced view of possible politicisation of the judiciary in Japan in the public law arena.

Rather than political conservatism, moreover, a narrow focus on efficient case processing appears a more significant explanation.<sup>148</sup> That focus is reinforced by the bureaucratic organisation of the Japanese judiciary; comparatively limited funding for the courts and fewer judges;<sup>149</sup> and perhaps a tendency towards conceptual reasoning found in some jurisdictions in the civil law tradition.<sup>150</sup> Those factors threaten to constrict the scope for substantive reasoning. Specifically, they should encourage the often noted emergence of de facto observance of other courts’ precedents, despite the theory that Japanese judges are not strictly bound by a doctrine of stare decisis.<sup>151</sup> As Haley observes: “As career government officials, they do not enjoy the same autonomy nor the overtly policy-making role of common-law judges” (by which he probably has in mind US judges, not those in the English law tradition). Yet he quickly continues: “The constraints of a centrally organised bureaucracy should not be overstated. Judges in Japan do enjoy considerable individual as well as collective autonomy. The balance between constraint and freedom is quite delicate”.<sup>152</sup> Such autonomy, combined with other factors such as the judges’ extensive powers to ascertain and review facts, helps explain instances of both private and public law cases (especially among District Courts) reaching seemingly contradictory results.<sup>153</sup> While this opens another path to substantive reasoning in Japan’s legal system, it means that law is not swallowed up by politics in the manner suggested by Ramseyer.

Formal tendencies in Japanese law are further reinforced by the nature of the legal profession. Qualified practising attorneys (*bengoshi*) only get appointed as judges very occasionally.<sup>154</sup> That reduces the sense, still prevalent among New Zealand and

the Service of - Stability?” (1996) 43 UCLA L Rev 635; Upham, above n 51; L Nottage “The Still-birth and Re-birth of Product Liability in Japan” in D Nelken and J Feest (eds) *Adaptation of Legal Cultures* (Hart, Oxford, 2001) 147.

<sup>147</sup> Ramseyer and Rasmussen, above n 143. It could also be objected that commercial law issues do have political ramifications, although these appear more prominently when enactment or amendment of legislation is discussed (below Paper Three Part IV) than when judges decide cases.

<sup>148</sup> See M Abe “The Internal Control of a Bureaucratic Judiciary: The Case of Japan” (1995) 23 Int’l J of the Sociology of Law 303.

<sup>149</sup> Nijuissei Seisaku Kenkyujo (ed) *Minji Shiho no Kasseika ni Mukete [Towards the Revitalisation of Civil Justice]* (Nijuissei Seisaku Kenkyujo, Tokyo, 1998).

<sup>150</sup> Haley, above n 43, 47-48. See also L Nottage “Contract Law, Theory and Practice in Japan: Plus ça Change, Plus c’est la Même Chôse?” in V Taylor (ed) *Asian Laws Through Australian Eyes* (Law Book Company, Sydney, 1997) 316.

<sup>151</sup> Above n 43.

<sup>152</sup> Haley, above n 43, 92, 93. See also J O Haley “Judicial Independence in Japan Revisited” (1995) 25 L in Japan 1.

<sup>153</sup> Respectively, see for example L Nottage, above n 146; and D O’Brien with Y Ogoshi *To Dream of Dreams* (U Hawaii Press, Honolulu, 1996).

<sup>154</sup> Haley, above n 43, 50-58.

especially English barristers, of being an “officer of the Court”.<sup>155</sup> *Bengoshi* also desire and highly value independence and the freedom from control of others.<sup>156</sup> Yet they do share important bonds with the Japanese judiciary due to a variety of factors: often shared educational backgrounds (most coming from leading law faculties); a period of shared training (at government expense) before qualifying either as an attorney or a judge; their limited numbers; and the protracted “trial by colloquy” characteristic of civil procedure in the civil law tradition, encouraging cooperation between advocates and judges.<sup>157</sup> *Bengoshi* also share a coherent sense of ethical responsibilities, which judges can also draw on if necessary. Arguably, this sense follows from having a smaller Bar, and in turn it helps underpin the broadly phrased provisions of the Code of Attorney Ethics in Japan.<sup>158</sup> This may change, along with many other recent reforms, especially the doubling of the numbers who pass the bar examination every year, over the 1990s, and a concomitant shortening in the government-funded training period.<sup>159</sup> In sum, closer examination of broader institutional realities in Japan does suggest a more formal orientation than in the US. Nonetheless, in key features making up authoritative formality, the two legal systems have very much in common, and both contrast with English and New Zealand law.

## II.B Content Formality: Determining Rules by Fiat, and Under- or Over-Inclusiveness

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<sup>155</sup> That sense even leads Posner (above n 6, 21-30) to include English barristers as “judicial adjuncts”, so as to recalculate a ratio of “lawyers” to “judges” which is much lower than that for the US (even adding law clerks to its “judges”) – and instead closer to that in Continental European jurisdictions. While an interesting attempt at a functional comparison, this seems to go too far. Anyway, any such sense is being undermined in New Zealand due to for example the rise of large law firms, who see their loyalties as overwhelmingly to their clients – or even their own firms. See for example T Molloy *Thirty Pieces of Silver* (Howling at the Moon Productions, Auckland, 1998) 312-322, 397-398 (on the tax schemes promoted by Russell McVeigh); D Shale “Shake the Tree” [2000] NZLJ 139 (on the decision of Kensington Swan to form an alliance with the legal services branch of a “big five” global accountancy firm, KPMG Legal, after his firm “several years ago had decided that a legal firm was just like any other commercial business”).

<sup>156</sup> Haley, above n 43, 53-54.

<sup>157</sup> See generally J Davis *Dispute Resolution in Japan* (Kluwer, Dordrecht, 1996) 252-257. The term “trial by colloquy” is taken from C Buehring-Uhle *Arbitration and Mediation in International Business* (Kluwer, The Hague/et al, 1996) 25 (citing Fischer-Zernin & Junker, “Arbitration and Mediation: Synthesis or Antithesis?” (1988) 5 J Int’l Arb 21, 29-30). See also generally S Kiefel “Civil Procedure: Some Comparisons” (1999) 18 Australian Bar Rev 173.

<sup>158</sup> S A Leonard “Attorney Ethics and the Size of the Japanese Bar” (Jan-Mar 1992) Japan Quarterly 86.

<sup>159</sup> Compare T Nishimura “The Code of Ethics Applicable to *Bengoshi*” (Paper presented to the Temple University CLE Seminar, Tokyo, 1 December 1998, and available at <<http://www.tuj.ac.jp/law/benethics.html>>); with R Hamano “Japanese Lawyers in Transition” (1998) 49 Rikkyo Hogaku 325; L Nottage “Cyberspace and the Future of Law, Legal Education, and Practice in Japan” (1998) 5 Web Journal of Current Legal Issues <<http://webjcli.ncl.ac.uk/1998/issue5/nottage5.html>> (forthcoming in revised form in G Greenleaf & M Ibusuki (eds) *Transnational Cyberspace Law*, Hart, Oxford, 2001).

Atiyah and Summers argue that a second dimension to formal reasoning lies in content formality, related to acceptance of arbitrariness.<sup>160</sup> This dimension too is determined by two factors or sub-dimensions. The first is the extent to which the rule or other legal phenomenon is shaped by fiat, rather than particular reasons of substance. An example given of high content formality in this respect is the rule of the road that people should drive on the left (in England, also New Zealand, and even Japan<sup>161</sup>) as opposed to the right (the US, of course). The second factor involved, they argue, is the extent to which a rule is under-inclusive or over-inclusive in relation to its objectives. For instance:<sup>162</sup>

Requirements of form, such as a rule requiring a will to be signed by two witnesses, are often significantly over-inclusive (they invalidate wills even where there is ample evidence from other sources that the will does represent the testator's true desires) and to that extent have higher content formality.

This example deserves further exploration, as emblematic of an important sub-dimension of legal reasoning generally.<sup>163</sup> Compared to US law, English law traditionally has maintained stricter rules as to formal requirements in will-making.<sup>164</sup> So has New Zealand, despite a recent proposal to adopt a more substantive approach.<sup>165</sup> Japanese law lies somewhere in between. The Civil Code allows for three formalities.<sup>166</sup> The most formal is the “notarised will”, where the testator dictates the terms of the will to a notary public (*koshonin*), in the presence of two witnesses. Secondly, there is the “secret will”. The testator must sign the will, stamp it as well as the envelope it is placed in, and deliver the latter to a notary public in the presence of two witnesses, declaring it to be a will along with his or her name and address. The least formal is a type of “holographic will”, where the testator must write out by his or her own hand (*jihitsu*) the will's provisions, the date, his or her name, and then stamp it. In the latter category, moreover, Japanese courts have interpreted broadly the requirements of dating and of including the testator's name.<sup>167</sup> In 1994, the Supreme Court even accepted as valid a

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<sup>160</sup> Atiyah and Summers, above n 2, 13-14.

<sup>161</sup> R McGregor *Japan Swings: Politics, Culture and Sex in the New Japan* (Yenbooks, Tokyo, 1996) 42 argues that this rule was transplanted from England. That may have been so, for English automobiles were popular in Meiji Japan. It has been suggested, however, that the rule of “keeping left” was to allow mostly right-handed *samurai* to draw their longswords quickly. This entire topic cannot be pursued further here.

<sup>162</sup> Atiyah and Summers, above n 2, 13.

<sup>163</sup> The sub-dimension is also examined in relation to one aspect of the law of contract formation: Nottage 2007d.

<sup>164</sup> See J H Langbein “Substantial Compliance with the Wills Act” (1975) 88 Harv L Rev 489; R Miller “Substantial Compliance and the Execution of Wills” (1987) 36 ICLQ 559.

<sup>165</sup> NZ Law Commission *Succession Law: A Succession (Wills) Act* (Report No 41, Wellington, 1997) (proposing for example a dispensing power, allowing Courts to enforce will despite formal irregularities if there is proof of the testator's intentions). These reform proposals have had a long gestation period (compare for example R Tobin “The Wills Act Formalities: A Need for Reform” (1991) NZLJ 191), and their attempt to move New Zealand towards more substantive reasoning may encounter considerable difficulties. See below Paper Two Parts II.B and III.

<sup>166</sup> Respectively, arts 969, 970, and 968.

<sup>167</sup> Respectively, see for example the judgment of 2 July 1916, Great Court of Cassation (21 Minroku 1176: sufficient if the name identifies the testator adequately); and the judgment of 31 May 1979, Supreme Court (33 Minshu 4-445: sufficient if a mistaken date can be readily corrected from other

carbon paper copy of the will.<sup>168</sup> Generally Japanese courts undertake a broad-based inquiry to determine whether the will represents the true intentions of the party, remedying procedural irregularities provided substantial equality among heirs is respected or the dispositions are reasonable.<sup>169</sup>

Atiyah and Summers also point out that statutory rules, whose verbal form tends to be more fixed than rules established by judge-made pronouncements, are often more over- or under-inclusive. Moreover, “statutory rules tend to have more arbitrary content, at least in the sense that there will be many more or less arbitrary provisions as to time, place and amount in statutes dealing (for instance) with taxation or social security”.<sup>170</sup> This, they argue, bears on their primary thesis:<sup>171</sup>

the same rules of the common law tend to have less content formality in American than in England; statute law tends to be more precisely drafted in England, and to that extent has more of the arbitrary and thus higher content formality than in America; and statute law is itself a more important form of law in England than in America.

Reinforced again by some features of its legal infrastructure, especially a specialist Office of Parliamentary Counsel proud of its prowess in legislative drafting,<sup>172</sup> New Zealand law follows more the approach of English law.<sup>173</sup> Japanese law, especially in practice, appears to bear more affinity with US law. In particular, commentators have often pointed to the broad wording in Japanese legislation which is eventually enacted. Such wording often appears to stem in part from the comparatively wide-ranging process of bargaining and compromise among political actors and interest groups, as well as among the variety of executive agencies which compete in producing opinions and draft legislation.<sup>174</sup> The Cabinet’s Legislative Drafting Office often only becomes involved in finalising a Bill at the last moment.<sup>175</sup>

provisions or circumstances).

<sup>168</sup> 19 October 1994, Supreme Court (1477 Hanji 52). Prior to this judgment, most (but not all) scholars and courts had interpreted art 968 as not permitting the recording of the will’s provisions by mechanical means, such as typewriters or word processors: see T Kuki “*Tsujo no Hoshiki* [Normal Formalities]” in Z Nakagawa and E Kato (eds) *Shinpan Chushaku Minpo* [Civil Law Commentary - Revised Edition] Vol 28 (Yuhikaku, Tokyo, 1993) 82-83. However, the Tokyo Family Court (20 April 1973, 25/10 Kagetsu 114) had previously upheld a typewritten will. This recent Supreme Court judgment may augur further relaxation of the “handwriting” requirement too, or perhaps legislative amendment.

<sup>169</sup> See generally T Matsumoto “*Yuigon no Hoshiki* [Formalities for Wills]” (1995) 11 *Kazoku Shakai* to Ho 53.

<sup>170</sup> Atiyah and Summers, above n 2, 14.

<sup>171</sup> Above n 2, 14.

<sup>172</sup> See for example N J Jamieson “Getting Down to the Act - Further Memoirs of an Antipodean Lawmaker” (1994) 15 *Stat L Rev* 192.

<sup>173</sup> See for example J Prebble “The Interpretation Provisions of the New Zealand Income Act 1994” (1999) 30 *VUWLR* 49, 62 (contrasting US law).

<sup>174</sup> A good example of this, leading to a broadly worded statute, is Japan’s Product Liability Law (No 85, 1994): see Nottage, above n 146.

<sup>175</sup> See generally H Hiramatsu “*Seifu ni okeru Naikaku Hoseikyoku no Yakuwari* [The Role of the Cabinet’s Legislative Drafting Office in the Government]” in M Nakamura and H Maeda (eds) *Rippokatei no Kenkyu - Rippo ni okeru Seifu no Yakuwari* [Studies in Legislative Process: The Roles of the Government in Enacting Laws] (Shinzansha, Tokyo, 1997) 282; K Watanabe “*Joyaku no Teiketsu to Kokunaiho Seibi - Iwayuru Joshi Sabestsu Haishi Joyaku Hijunji no Giron o Tegakari to shite* [Adjusting Domestic Law and Concluding Treaties: The Debate on Ratifying the So-Called Convention Abolishing

This aspect might be linked to what Atiyah and Summers propose briefly and cryptically as “rule of law” formality, in that less precise legislative provision (or no provision at all) can run against values involved in “prospective general rules, clarity, certainty, predictability, equality before the law, and provision of a fair opportunity to obey”.<sup>176</sup> Critiques of Japanese law from English commentators are understandable on this ground, particularly the scope it opens for administrative guidance by executive agencies operating under or implementing generally worded legislation, with consequent broad discretion and lack of certainty.<sup>177</sup> Similar critiques from US commentators are more surprising, given the lower content formality – and possibly even rule of law formality – found in their own legal system.<sup>178</sup>

### II.C Mandatory and Interpretive Formality: “Hard and Fast Rules”

A third dimension of formal reasoning proposed by Atiyah and Summers is mandatory formality, involving the overriding (or excluding from consideration, or diminishing the weight of) at least *some* contrary substantive reasons. This too involves primarily two aspects. One is “prima facie mandatory formality”, which is higher if the legal rule is stated in explicit, unqualified terms. An example given is a rule prohibiting the driving of vehicles in a park, as opposed to prohibiting “unreasonably noisy” ones.<sup>179</sup> A second aspect is the ultimate degree of mandatory formality which arises after defences and collateral doctrines have been taken into account. Many types of defences and doctrines are possible, allowing for more substantive reasoning. That also follows if a rule involves lower “interpretive formality”, adopting a less formal interpretive method which shapes the resulting formal reason.<sup>180</sup>

An interpretation is highly formal if it merely focuses on the literal meaning of words, or on the narrow confines of normative conduct or other phenomena to be interpreted. Interpretation may be less formal and more substantive in one of two ways. Interpretation may be substantive to the extent that the interpreter searches for and gives effect to the underlying purposes and rationales which are implicit in the text or which can be ascertained from other sources (such as legislative history). Sometimes no such purposes or rationales can be identified, but interpretation can still be substantive to the extent that the decision-maker then relies on substantive reasons drawn from other non-legal sources - for example, where a judge draws on his own background political morality, or on a public morality which he attributes to the legislature or to the public.

Atiyah and Summers argue that legislation, compared to case law rules, encourages more formal reasoning along these dimensions as well as others (especially

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Discrimination Against Women]” in M Nakamura and H Maeda (eds) *Rippokatei no Kenkyu - Rippo ni okeru Seifu no Yakuwari [Studies in Legislative Process: The Roles of the Government in Enacting Laws]* (Shinzansha, Tokyo, 1997) 132; M Seki “The Drafting Process for Cabinet Bills” (1986) L in Japan 168.

<sup>176</sup> Atiyah and Summers, above n 2, 415. Compare below Paper Five Part II.A.

<sup>177</sup> M Dean “Administrative Guidance in Japanese Law: A Threat to the Rule of Law” (1991) JBL 398.

<sup>178</sup> A fairer appraisal has been provided recently by F Upham “Ideology, Experience, and the Rule of Law in Developing Societies”, paper presented at the University of Michigan conference, “Change Continuity, and Context: Japanese Law in the Twenty-First Century”, Ann Arbor, 6-7 April 2001.

<sup>179</sup> Compare Atiyah and Summers, above n 2, 16-17.

<sup>180</sup> Above n 2, 15.

content formality).<sup>181</sup> They then suggest that England generally relies far more on statute than on case law, and thus has a much more formal system. Supporting this conclusion with quantitative data is acknowledged to be difficult, because for instance “there are no settled criteria by which to individuate a statutory scheme as embodying one statute rather than two or more”.<sup>182</sup> However, Atiyah and Summers point to the vague formulations found in US constitutional and other public law statutes, making these areas of law more like those developed through (often less formal) case law; and evidence of a long tradition of legislative rather than judicial reform in English private law.<sup>183</sup> New Zealand clearly follows the English pattern in these respects, and the overall degree of formal reasoning in New Zealand will have been boosted by its propensity to promulgate very large amounts of primary and secondary legislation despite so-called “deregulation” since the mid-1980s.<sup>184</sup> Despite a similar tendency as Japan has restructured its economy and polity over the 1990s, legislation generally appears less tightly drafted.

Atiyah and Summers identify some structural differences consistent with English law adopting a more formal approach, along this dimension, compared to the US. Literal interpretation of statutes, for instance, runs in parallel with a more careful drafting and enactment process. They also point to a traditional reluctance to investigate legislative history in interpreting statutes.<sup>185</sup> That tendency still can be detected in commentary in England following *Pepper v Hart*.<sup>186</sup> However, Sir Kenneth Keith notes

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<sup>181</sup> Above n 2, 96-98. But see below Paper Three Parts III.A and IV.A (suggesting that legislative process, especially in the US, may become so heavily politicised that formality is comparatively diminished even when statutes are enacted).

<sup>182</sup> Above n 2, 98-99. Compare R Cooter & T Ginsburg, above n 103

<sup>183</sup> Above n 2, 100, 140-1 (reforms through statute in England, in contrast to many parts of the US, include implied warranties of habitability in residential leases, bad faith discharge of employees, abolition of the common law contributory negligence rule, liability of occupiers, control of exemption clauses under the Unfair Contract Terms Act 1977, modification of effects from changed circumstances through the Law Reform (Frustrated Contract) Act 1943). To this should be added now the Contracts (Rights of Third Parties) Act 1999 (Beatson, above n 94, 267-269). New Zealand has also adopted legislation to deal with these problems, instead of leaving them primarily to the courts. One distinctive further legislative intervention is the Law Reform (Testamentary Promises) Act 1949: see S Nield, “‘If You Look After Me, I Will Leave You My Estate’: The Enforcement of Testamentary Promises in England and New Zealand” (2000) 20 *Legal Studies* 85, 87-88.

<sup>184</sup> The proclivity to legislate appears very deep-rooted. Compare for example G Palmer *Unbridled Power? An Interpretation of New Zealand’s Constitution and Government* (Oxford UP, Wellington, 1979) and G Palmer “The New Zealand Legislative Machine” (1987) 17 *VUWLR* 285; with G Palmer and M Palmer *Bridled Power: New Zealand Government Under MMP* (Oxford UP, Auckland, 1997) and Nottage, above n 159. Statute law’s encouragement of formal reasoning of various types helps explain why New Zealand contract law remains so wedded to classical or neoclassical models. This is so despite the enactment of various “Contract Statutes” especially from 1969 through to 1982 (Nottage 2007b Part IV.C).

<sup>185</sup> Above n 2, 100-112.

<sup>186</sup> [1993] AC 593. See generally S D Girvin “Hansard and the Interpretation of Statutes” (1993) 22 *Anglo-Am L Rev* 475. Critical commentary includes F Bennion “How They Got It All Wrong in *Pepper v Hart*” (1995) *British Tax Review* 325; R Zimmerman “Statuta Sunt Stricte Interpretanda?” (1997) 56 *CLJ* 315, 318-20; and M Freeman “Positivism and Statutory Interpretation: An Essay in the Retrieval of Democracy” in S Guest (ed) *Positivism Today* (Dartmouth, Aldershot, 1996) 6. *Three Rivers Direct Council v Bank of England (No 2)* [1996] 2 All ER 363 appears to go further than *Pepper v Hart*, by permitting reference to Hansard even when the statute appeared unambiguous on its face. That

a recent decision of the House of Lords in which Lord Cooke did find Hansard useful, and contends that New Zealand “Courts and Parliament have not formulated strict prerequisites for the use of [such] material, in terms for instance of ambiguity or absurdity”.<sup>187</sup> However, strong criticism of the use of legislative history is found also in New Zealand,<sup>188</sup> despite a rigid rule excluding access to extrinsic evidence having been undermined prior to *Pepper v Hart*.

Consistently with a more substantive orientation overall, Japanese courts and commentators always have looked closely at legislative history. Following the approach in most civil law jurisdictions, slowly and sporadically trickling into English law mainly through EU law,<sup>189</sup> Japanese law has long maintained a purposive or teleological approach to statutory interpretation.<sup>190</sup> Courts in the US also adopt a broader approach, although in recent years some Supreme Court Justices (notably Antonio Scalia) have advocated “originalist” interpretations of the US Constitution.<sup>191</sup> That may indicate a

holding may have followed, however, from the statute having been enacted to fulfil obligations arising from a EU Directive. See generally Horspool, above n 68. Recently, Lord Steyn has observed that in his experience *Pepper v Hart* arguments “have never produced anything significant”; and that, although they occasionally might produce something useful, this happens so rarely and at such cost that “the pragmatic case against the decision ... is strong”: “Interpretation: Legal Texts and their Landscape” in B S Markesinis (ed) *The Clifford Chance Millennium Lectures: The Coming Together of the Common Law and the Civil Law* (Hart, Oxford, 2000) 88. See also J Steyn “*Pepper v Hart*: A Re-examination” (2001) 21 OJLS 59.

<sup>187</sup> Keith, above n 95 (“Sources of Law”), citing *R v Environmental Secretary ex parte Spath Holme Ltd* [2001] 2 WLR 15, 44 (per Lord Cooke).

<sup>188</sup> For example J Evans “Controlling the Use of Parliamentary History” (1998) 18 NZULR 1; Evans, above n 95; N Jamieson “Legislation Through the Millennial Looking Glass” (2000) 9 Otago LR 713, 719. Compare also I McKay, above n 103, 755 (observing that “the New Zealand Courts have not adopted as liberal an approach as that which found favour in *Pepper v Hart*, although even the House of Lords will only do so when the words are ambiguous”, and that his Honour and other Justices of the Court of Appeal “have tried to discourage the excessive citation of [Parliamentary] materials”).

<sup>189</sup> Horspool, above n 68; and *Three Rivers*, above n 186.

<sup>190</sup> See for example T Isomura “*Hokaiishaku Hoho no Shomondai* [Issues in Legal Interpretation]” in T Isomura (ed) *Gendai Hogaku Kogi [Lectures on Contemporary Law]* (Yuhikaku, Tokyo, 1978) 85, 88. The Japanese approach is apparently even broader than that preferred in German, for instance; but the “pendulum may be swinging back”: Rahn, above n 94, 426.

<sup>191</sup> A large-scale comparative study of statutory interpretation, conducted over the 1980s, noted instances of a broader approach in the US compared to England. These included less logical-conceptual argumentation, constructing implications from general legal concepts; more appeals to substantive reasons of policy influential in an general area of law; and more appeals to independent substantive reasons (morality, policy ideas, etc). See R Summers & M Taruffo “Interpretation and Comparative Analysis” in D N MacCormick and R S Summers (eds) *Interpreting Statutes: A Comparative Study* (Dartmouth, Aldershot, 1993) 461, 472-473.

On indications of subsequent retrenchment, see for example Sunstein, above n 46, 209-243. Some commentators have also noted lower courts adopting a narrower approach: see for example J P Nehf “Textualism in the Lower Courts: Lessons from Judges Interpreting Consumer Legislation” (1994) 26 Rutgers LJ 1. Others recently have criticised excessive use of legislative history in interpreting US statutes, proposing reforms along recent English lines: see for example Jordan, above n 4. See also generally J J Brudney “Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?” (1994) 93 Mich L Rev 1.

Nonetheless, consistently with the approach of Atiyah and Summers, it has also been stressed that adopting more formal *reasoning*, for instance for statutory interpretation, will depend on and have repercussions on other *institutions*. In a manner representative of US legal scholarship, this is seen

move to increased interpretive formality, as well as more source-oriented standards of validity and hence greater authoritative formality.

Atiyah and Summers also compare the differing attitudes in England and the US, beyond the statutory context, regarding the tension between literal meaning and underlying substantive purposes or morality. Of particular interest, in view of the recent debate in New Zealand,<sup>192</sup> is the role of judges. Emphasising the different institutional environment, Atiyah and Summers argue that Anglo-American differences in “constitutional positions, political influence, case selection procedures, and reliance on arguments from the bar tend to make the English judiciary much more cautious in exercising their law-making function”.<sup>193</sup> Related differences involve law clerks, dissent rates, federalism, and homogeneity of the bar and the judiciary.<sup>194</sup> Lord Denning is the exception proving the rule, in their view, that English judges have maintained a stricter attitude towards precedents of higher courts and been more unwilling to boldly and extensively explore underlying policy considerations drawn from a range of sources.<sup>195</sup> Atiyah and Summers conclude:<sup>196</sup>

Of course, within the parameters of the English judicial tradition, levels of activism vary with the individual judges (as no doubt they do in America) and also with the times. Robert Stevens, for instance, has argued with a great deal of supporting evidence that the English law lords saw themselves as having a more policy, if not downright political, function in the late nineteenth and early twentieth centuries, that the period 1940-1955 was a period of extreme abdication from policy, a period of high formalism, while in the years between 1956 and 1976 a move back towards a more policy-oriented approach can be discerned. Others may wish to qualify this picture in various ways, or may find the dating of these periods open to question. But for present purposes, it is enough to say that these movements in the direction of a substantive approach in

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predominantly as problem for empirical inquiry. See C Sunstein “Must Formalism Be Defended Empirically?” (1999) 66 U Chi L Rev 636; A Vermeule “Interpretation, Empiricism and the Closure Problem” (1999) 66 U Chi L Rev 698.

<sup>192</sup> Above n 129; R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001).

<sup>193</sup> Atiyah and Summers, above n 2, 268-269, 269-281. Another institutional factor related to judicial processes and roles is the degree to which judgments may be cited in court. In *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192, the House of Lords attempted to restrict citation of unreported judgments from electronic media: compare Bankowski and others, above n 88, 321. More generally, pursuant to para 8 of the Chief Justice’s Practice Note regarding “Citation of Authorities” issued on 9 April 2001, [2001] 1 WLR 1001, advocates may cite only one authority per proposition of law unless reasons are given for citing more. Further, para 9.2 requires that any advocate citing an authority from another jurisdiction must (i) comply with para 8; “(ii) indicate in respect of each authority what that authority adds that is not to be found in authority in this jurisdiction; or, if there is said to be justification for adding to domestic authority, what that justification is; and (iii) certify that there is no authority in this jurisdiction that precludes the acceptance by the court of the proposition that the foreign authority is said to establish”.

<sup>194</sup> Above n 2, 281-297, 349-350, 356-357. Recent statistics confirm that dissents in the House of Lords remain much lower than in the US (8.9 percent over 1955-1965 and 9.3 percent over 1966-1999, compared to 60.72 percent in the Supreme Court over 1930-1989). See J Alder “Dissents in Courts of Last Resort: Tragic Choices?” (2000) 20 OJLS 221, 238 (n 87). He also notes less tradition of “relentless dissent”; and adds that dissents in the House of Lords are more restrained than in the Supreme Court, where the style is not infrequently acrimonious.

<sup>195</sup> Above n 2, 290-291.

<sup>196</sup> Above n 2, 349 (citing R Stevens *Law and Politics* (U North Carolina Press, Chapel Hill, 1978).

the House of Lords are minimal in comparison with the degree of policy orientation displayed by more adventurous American judges. With rare exceptions, English appellate judges for at least the past century have been professional lawyers whose main loyalty has been to the profession and to the law as a non-political institution, as they thought it to be.

This conclusion helps explain the emergence of a more conservative House of Lords over the 1980s and early 1990s, and puts in perspective a widely perceived counter-tendency (towards greater liberalism) from the mid-1990s.<sup>197</sup> Such shifts have prompted publication recently of an empirical study demonstrating the scope of discretion which actually exists in the House of Lords. Judgments are shown to vary systematically depending on the Law Lord in question; and strict interpretations of precedent or legislation arguably give way to general preferences for recognisable interests, such as commercial or state interests in negligence claims and the civil service in welfare entitlement claims.<sup>198</sup>

Such criticisms further undermine a narrow declaratory view of law, according to which judges have no role in creating law. Lord Bingham, senior Law Lord, argues that this view is gainsaid anyway because “[i]n England, the last quarter century has seen fundamental Judge-made changes in the law” in many fields.<sup>199</sup> On the other hand, he rejects the opposite “Denning” school of thought which “not only acknowledges a lawmaking role for the Judges, but glories in that role and asserts a right to pursue it wherever established law impedes the doing of justice in an individual case”.<sup>200</sup> Lord Bingham believes that the majority of English judges now acknowledges “that Judges do make law, and [regard] this as an entirely proper judicial function, provided it is exercised within certain limits”, such as whether (a) citizens have ordered their affairs based on an earlier understanding of the law; (b) amendment would require comprehensive legislation; (c) the issue is the subject of legislative activity; (d) it involves an area distant from judicial experience; and (e) it involves a current social policy with no consensus in the community.<sup>201</sup> He suggests that such judges are activists, in “keeping pace with change in the consensus”; but not creatives, in “the use of the law to generate change in the consensus”, as defined by Lord Devlin two decades ago.<sup>202</sup> This view is consistent with a gradual shift since the 1960s regarding judicial views towards the authority of precedent, perceived by some of Lord Bingham’s contemporaries. However, the latter note that in England.<sup>203</sup>

in the absence of a single documentary constitution ... the two main documentary sources of legal argumentation are statutes ... and precedents. Even arguments from principles or from policy

<sup>197</sup> Above n 113.

<sup>198</sup> D Robertson *Judicial Discretion in the House of Lords* (Clarendon Press, Oxford, 1998).

<sup>199</sup> Bingham, above n 94, 29, lists – in addition to “the creative, if somewhat erratic approach of the English Courts to questions of negligence where the victim has suffered economic loss” – the law relating to public interest immunity; sovereign immunity; forum non conveniens; restitution; tax avoidance schemes; pre-emptive interlocutory remedies; the currency in which judgment may be given; and, pre-eminently, judicial review. But see for example on judgment currency, Atiyah and Summers, above n 2, 140 (US-style anticipatory overruling was not permitted, in *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443).

<sup>200</sup> Bingham, above n 94, 28, 32-33.

<sup>201</sup> Bingham, above n 94, 27, 31-32.

<sup>202</sup> Bingham, above n 94, 33.

<sup>203</sup> Bankowski and others, above n 88, 324.

normally seek to ground statements of either in some previous dicta of judges, or to anchor principle or policy in some relevant statute.

Similarly, while identifying and advocating a move towards more substantive reasoning, Lord Steyn highlights a range of impediments arising still from the working environment of English judges (even in the House of Lords). These include case load pressures, lack of law clerks to help prepare judgments, counsel concentrating on precedent and conceptual arguments, no Brandeis briefs, and dependence on arguments presented by counsel.<sup>204</sup>

By contrast, Atiyah and Summers indicate that US appellate court judges are less afraid of adopting a “creativist” approach, partly reflecting the above-mentioned differences in court structures and processes.<sup>205</sup> In leading or forging social consensus, moreover, US courts have been open to techniques such as the Brandeis brief and scholarly research to draw on an array of material going beyond principles permeating law books, or even a sense of justice derived from personal experiences of the judges – anyway more varied in the US.<sup>206</sup> Such techniques are also important when US judges behave as activists in Lord Bingham’s sense, which they do readily for instance in discarding old precedents, by seeking out changes in political or socio-economic circumstances to update the law.<sup>207</sup> This distinctly more expansive scope of inquiry and generally more progressive attitude is reflected in, and is reinforced by, the influential legal theory propounded by Ronald Dworkin:<sup>208</sup>

a view of ‘integrity’ in which propositions of law are true if they follow from the principles of justice, fairness and procedural due process that provide the best constructive interpretation of the community’s legal practice, an approach that requires judges to draw on their own convictions about justice and fairness.

These distinctions are consistent with the patterns uncovered by Roger Cotterrell in a pathbreaking empirical study published in 1990 comparing references to “community” and related ideas in judgments from 1979 in the US Supreme Court, as opposed to higher English courts. The latter referred to the *interests* of the community, and often specific sub-communities; but there were very few references to shared community *values* as an independent source of authority. By contrast, in the US.<sup>209</sup>

<sup>204</sup> Steyn, above n 15, 54-55.

<sup>205</sup> Atiyah and Summers, above n 2, 275. An excellent example of a “creativist” judge, at least over much of his career, is Chief Judge Richard Posner. Compare for example Posner, above n 6; above n 25.

<sup>206</sup> Atiyah and Summers, above n 2, 267-297.

<sup>207</sup> Bankowski and others, above n 88, 374-375, 392.

<sup>208</sup> Atiyah and Summers, above n 2, 264. Avery Katz adopts a position largely consistent with Dworkin’s assertion of the potential for coherent moral reasoning to be uncovered, and applied by judges. It can be argued, however, that such views of law bear deeper similarities with that propounded by “classical formalists”, namely a system which is complete (right answers are available in every case), formal (in the sense of being able to derive these from logical working out of the system), conceptually ordered (deriving rules from a few fundamental principles), and socially acceptable (by generating normative allegiance). See R Pildes “Forms of Formalism” (1999) 66 U Chi L Rev 607, 608-611.

<sup>209</sup> R Cotterrell “Law’s Image of Community and Imperium” (1990) 10 Studies in Law, Politics and Society 3, 14 (original emphasis).

The community if portrayed as *active*. It thinks, acts, feels and can suffer injury much like an individual ..., has a conscience, and has its views and values represented through judge and jury. Its impact on law is portrayed as direct. Ambiguity as to the extent of community fits conveniently the diversity of legal jurisdictions within a federal system. But, however extensive or inclusive the community, it is consistently seen as the source of moral authority of law, or the constituency to which law must be responsible, or the locus of values to which law must relate.

Cotterrell contrasts this with the enduring attraction in England of a positivist notion of *imperium*, or top-down rule of law founded on parliamentary sovereignty.

Arguably, moreover, the expanded scope in the US for investigating community norms should allow not only for broader based “activist” judging (limited to reflecting those norms in case law) but also more “creativist” judges (reorganizing them to promote a particular moral vision). Such differences may be particularly noticeable in public law, where courts in both England and the US appear to have been more ready to diverge from precedent to consider substantive considerations. But contrasts should also emerge in private law given the links to broader patterns of legal reasoning and institutions described above.<sup>210</sup>

There have been decidedly fewer publications by Japanese judges about their role, and even fewer empirical studies on their attitudes. However, academic commentary points to a strong and perhaps growing willingness to update Japanese law, especially the Codes enacted in the late 19th century, to reflect socio-economic realities. This reflects a strong influence from legal realism in the US, as well as the latter’s German antecedents (below Part Two Introduction Part II). The tendency may have been strongest in Japanese private law.<sup>211</sup> One aspect of this is a strong sense of providing justice for the individual parties to the case.<sup>212</sup> Pursuing this line may even allow for “creativist” judging, leading society towards new ideals. On the whole, however, Japanese judges appear to focus on providing “acceptable” results given current community expectations. Hence they tend towards what Lord Bingham terms “activism”, albeit with distinctly less of the deference to Parliament and other restraints still prevalent in England.<sup>213</sup>

There are also instances of formal reasoning by Japanese judges even in the private law arena.<sup>214</sup> More generally, Japanese judges have increasingly interpreted

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<sup>210</sup> Bankowski and others, above n 88, 350; R Summers “Precedent in the United States” in D N MacCormick and R S Summers *Interpreting Precedents: A Comparative Study* (Dartmouth, Aldershot, 1997) 355, 371. Compare Steyn, above n 15, 52, suggesting a less substantive approach by English judges particularly in contract law, as opposed to public law.

<sup>211</sup> See generally Rahn, above n 94; Nottage 2007b. Judges earlier in the century were less adept in updating private law, due to a propensity to import foreign legal theories (mainly from Germany) despite inconsistencies with Japan’s legislation: see Z Kitagawa *Rezeption und Fortildung des Europäischen Zivilrechts in Japan [Reception and Development of European Civil Law in Japan]* (Alfred Metzner Verlag, Frankfurt, 1970). Compare Ramseyer and Rasmussen, above n 143.

<sup>212</sup> Indeed, some criticise a tendency for Japanese courts to carry this from private law into competition law, undermining more economic analyses of relevant markets: see S Kozuka “Competition Law, Deregulation, and Juridification” in T Ginsburg, L Nottage & H Sono (eds) *The Multiple Worlds of Japanese Law: Disjunctions and Conjunctions* (University of Victoria Centre for Asia-Pacific Initiatives, Victoria BC, 2001) 101.

<sup>213</sup> Compare Bingham, above n 94; Bankowski and others, above n 88.

<sup>214</sup> See for example V Taylor “Continuing Transactions and Persistent Myths: Contracts in Contemporary Japan” (1993) 19 Melbourne University L Rev 352.

legislative provisions in favour of a “theory of presupposed ultimate facts” (*yoken jijitsu ron*) to distribute the burden of proof, promoting what Ichiro Kitamura has termed “precision justice” in civil proceedings.<sup>215</sup> Allowing and requiring more attention to factual findings, and promoting efficient case processing, this has not been directed primarily at substantive reinterpretations of the law. Institutionally, moreover, the ability to engage in more creativist judging is hampered by the lack of a system for amicus or Brandeis briefs, although this may be partly offset by an expert witness system rooted in continental European law. Boundaries between disciplines in legal education and scholarship can also impede promotion of social scientific research, and its incorporation into civil law theory-building and adjudication.<sup>216</sup>

Nonetheless, a more substantive orientation is underscored by institutional starting points, such as the lack of doctrine of *stare decisis*; the strong tradition of legal sociology in Japan; and legal realist or other jurisprudential theories which have found a broad audience, including among judges.<sup>217</sup> This orientation may be less extreme than in the US, but there are important commonalities.

Thus, judge-made law both in the US and Japan appears more actively to seek out and engage underlying substantive purposes or morality. This contrasts not only with the situation in England, but also New Zealand. Despite some early and contemporary tendencies towards a more creative approach, most appellate court judges in New Zealand nowadays appear to follow what Lord Bingham defines as the majority view in England.<sup>218</sup> Consequently, any thesis of a uniquely New Zealand legal method or identity, based on distinctly more substantive based reasoning, appears to go too far.<sup>219</sup>

Some influential judges in the new colony were quite reformist, seeing New Zealand as providing an opportunity to improve on English law. One aspect of this involved simplifying rules and procedures of English law. Partly this stemmed from the need to accommodate the indigenous Maori population, vastly outnumbering the new settlers. However, the latter became disgruntled with these concessions, inhibiting the development of extensive cultural and legal pluralism until its revival two or three decades ago.<sup>220</sup> A more enduring legacy appears to have been “the search for

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<sup>215</sup> I Kitamura “The Judiciary in Contemporary Society: Japan” (1993) *Case Western J Int’l L* 263, 270.

<sup>216</sup> L Nottage “Contract Law, Theory and Practice in Japan” in V Taylor (ed) *Asian Laws Through Australian Eyes* (Law Book Company, Sydney, 1997) 316. But see now for example T Uchida *Keiyaku no Jidai: Nihon Shakai to Keiyakuho [The Contract Era: Japanese Society and Law]* (Iwanami Shoten, Tokyo, 2000) 280-302. See also generally H Sono “The Multiple Worlds of *Nihon-ho*” in T Ginsburg, L Nottage & H Sono (eds) *The Multiple Worlds of Japanese Law: Disjunctions and Conjunctions* (University of Victoria Centre for Asia-Pacific Initiatives, Victoria BC, 2001) 47.

<sup>217</sup> Above n 211.

<sup>218</sup> Bingham, above n 94, 28 (citing *Burt v Governor-General of New Zealand* [1992] 3 NZLR 672, 683, in which the Court of Appeal stated: “While accepting that it is inevitably the duty of the Court to extend the scope of common law review if justice so requires, we are not satisfied that in this field justice does so require, at any rate at present”).

<sup>219</sup> See also R Sutton & R Bigwood “Taking Stock: Legal Method in New Zealand Today (and for the Future?)” in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001).

<sup>220</sup> J Bassett “The New Zealand Legal System: Early Historical Influences” in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001).

simplicity” in developing New Zealand law,<sup>221</sup> together with feelings of distinctiveness and reformist zeal.

Richard Sutton speculates that the urge towards making the law more accessible, but also more acceptable, “to ordinary people who have no particular interest in abstract theory or historical subtleties” may relate to peculiar features of New Zealanders or differences in legal practice.<sup>222</sup> However, he focuses on law reform initiatives in the 1960s as generating a new attitude towards legal change, including among the judiciary. Sutton notes that many of the members of the various part-time Law Reform Committees established in 1966 later became Court of Appeal judges, and that:<sup>223</sup>

quite a lot of the law reform committees’ work consisted of clearing away the legal debris of past centuries. The idea was to allow the Court freedom to develop new and more acceptable rules over a period of time.

The most visible examples were some of the “Contract Statutes” enacted in the 1970s, which not only simplified the law on illegality, mistakes and remedies, but also conferred broad discretions for judicial relief.<sup>224</sup>

Nonetheless, the willingness of New Zealand judges to take this cue in developing the law should be seen in the light of the gradual transformations in England described above. Consistently with the evolving views of influential judges and the House of Lords’ Practice Statement of 1966, an amendment that year also allowed the Judicial Committee of the Privy Council to render one dissenting opinion as well as a collective majority opinion.<sup>225</sup> Partly the result of longstanding pressure from Australia, this change may have encouraged New Zealand judges to take a more active (or even creative) role in developing their own law. Over this important period through to the early 1980s, moreover, those involved in the part-time Committees benefited from shared backgrounds in a still relatively small legal community, consultation almost exclusively within the legal profession and related bodies, and a focus on relatively discrete areas of law. These factors no doubt encouraged a common understanding about what rules needed attention, and possibly about what overarching factors were relevant to any newly conferred legislative discretions.<sup>226</sup>

By the early 1980s, however, criticisms of the work of the Committees had arisen primarily as a result of entrusting them broader and more politically charged topics, compounded by limited public consultation and funding. The New Zealand Law

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<sup>221</sup> Compare generally P Rishworth (ed) *Struggle for Simplicity: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997); and A Tipping “A View From the Trenches: A Commentary on the Essays by Thomas J and Professor Watts” in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001), defining good judgment writing in New Zealand under the rubric “SOB”: simplicity, openness, and brevity).

<sup>222</sup> R Sutton “Lord Cooke and the Academy: A View from the Law Schools” in P Rishworth (ed) *Struggle for Simplicity: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 13, 16.

<sup>223</sup> Above n 222, 18.

<sup>224</sup> See for example D W McLauchlan “Contract and Commercial Law Reform in New Zealand” (1984) 11 NZULR 36, 39-46. Compare Nottage 2007b Part IV.

<sup>225</sup> Compare Alder, above n 194, 235-237.

<sup>226</sup> Compare Sutton, above n 222, 17. See also G Hammond “The Part-Time Law Reform Committees: An Overview” (1988) 13 NZULR 135, 148 (asking however how influential their work was “outside what might be termed the senior circles of the profession”); Nottage 2007b Part II.

Commission was set up in 1985, sending a clear message to the Courts: it “would handle large-scale law reform, and matters which had a high political sensitivity, or required skills and techniques beyond the normal abilities of Judges”.<sup>227</sup> This must have had an ambivalent effect on the judiciary overall. Traditionalists, of which New Zealand had had its share even after World War II,<sup>228</sup> or new members of the judiciary, would have felt more justified in deferring to statute-based law reform. But those following some transformations in judicial thinking in England, especially after the experience of participating in New Zealand’s part-time Reform Committees, would have found it difficult to abandon their new philosophy or perspective on the judges’ role in developing the law.

Such a tension does appear to have some antecedents, as indeed there were precursors for legislation allowing broad scope for discretionary relief by Courts. An example of the latter is legislation on testamentary promises enacted and amended in the 1940s.<sup>229</sup> By 1969, albeit perhaps influenced by the early deliberations of the Law Reform Committees, a prominent judge had criticised a tendency “on the part of some modern law reformers to conclude that it is unnecessary to state a general rule, and that a statute may provide best in the interests of justice if, without stating any general principle, it leaves the matter of relief entirely to the discretion of the court”.<sup>230</sup> From the 1980s, moreover, growing concern was expressed about the potential uncertainty of the Contract Statutes.

On the other hand, a decade after New Zealand’s Court of Appeal finally decided in 1971 that it would no longer automatically follow decisions of the House of Lords, Sir Robin Cooke (as he then was) began with New Zealand’s testamentary promises legislation to expose an “exploded hypothesis: the ideal that the common law should be the same throughout the Commonwealth”.<sup>231</sup> Further examples of alleged divergences in New Zealand focused on criminal law, tort law, and equity in personal relationships. In 1987, Sir Robin added to these areas some distinctive developments mainly in administrative law, employment law, real and personal property law, and contract law

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<sup>227</sup> Above n 222, 19. An interesting parallel development is the increasing “politicisation” of the American Law Institute (ALI), one of the major law reform bodies in the US: compare R Hyland “Perspectives on Private Law Codification in America in the 21st Century” (Paper presented at the Civil Code Centennial Conference, “Legislation in the 21st Century and Private Law”, Tokyo, 12 November). However, the ALI is private rather than governmental, which already lessens authoritative formality compared to the likes of the New Zealand Law Commission. It has also always been a large institution, even before attempts to boost its membership and promote further consultation in order to enhance legitimacy, and politicisation of the ALI over recent decades has been intense. The ALI’s role in promoting substantive reasoning, in various guises, is therefore much more significant than that of the Commission and other bodies involved in law reform in New Zealand.

<sup>228</sup> For example, as conceded even by the sympathetic biographer of a prominent judge in New Zealand this century, “he was a judicial conservative with a liberal personal philosophy”: J Finn “Sir Kenneth Gresson: A Study in Judicial Decision-Making” (1997) 6 *Cant L Rev* 481, 486.

<sup>229</sup> Nield, above n 183. A recent reform proposal would extend relief not only to those promised benefits under a will, but also to situations in which the deceased has “unjustly benefited”: New Zealand Law Commission *Succession Law: A Succession (Adjustment) Act* (Report No 39, Wellington, 1997). However, the proposal has not been implemented, perhaps due to concern about further erosion of bright-line rules.

<sup>230</sup> A Turner “Changing the Law” (1969) 3 *NZULR* 404.

<sup>231</sup> R Cooke “Divergences – England, Australia and New Zealand” [1983] *NZLJ* 297, 299.

(especially the new statutes).<sup>232</sup> All these developments were said to constitute a distinct national legal identity, although an underlying theme – abandoning “the pretence of legal formalism” in favour of “conscious value judgments” and policy considerations – was only briefly sketched.<sup>233</sup> Two years later, again in reviewing developments in public law, employment law, and constructive trusts, Sir Robin added that New Zealand judges more openly acknowledge that instead of deciding new points primarily by deduction, “the search is rather for the solution that seems fair and just after balancing all the relevant considerations”.<sup>234</sup> However, remarkable optimism was shown concerning the ability to agree on what constitutes fairness, an optimism buttressed by the sense that New Zealand’s democratic and egalitarian society retains a largely common set of values with fairness ranked highly.<sup>235</sup> These presuppositions have not been explored, and the key appears to be the uncovering of policy considerations (such as fairness) by analysing lines of judicial authority.<sup>236</sup>

A similar approach is revealed in a lecture in 1990 proclaiming “the reasonable expectations of the parties” as a touchstone for civil obligations.<sup>237</sup> Nonetheless, Sir Robin has indicated that differences can be drawn between commercial and consumer contracts, and has not advocated overturning core established principles in company law.<sup>238</sup> His main contribution to reforming contract law in the 1990s is an attempt to simplify the law on remoteness of damages, by substituting the test laid down in an early English precedent for a list of policy considerations and other relevant factors, building on views he expressed in 1978.<sup>239</sup> However, the old test appears to have prevailed in later cases, and Sir Robin’s general approach has drawn considerable concern.<sup>240</sup>

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<sup>232</sup> R Cooke “The New Zealand National Legal Identity” (1987) 3 Cant L Rev 171, 172-180. A few paragraphs were also devoted to environmental law, intellectual property law, evidence, and statutory interpretation.

<sup>233</sup> Above n 232, 171.

<sup>234</sup> R Cooke “Fairness” (1989) 19 VUWLR 421, 422; Baldwin, above n 103, 179.

<sup>235</sup> Cooke, above n 234, 422-423.

<sup>236</sup> Compare Cooke, above n 232, 171; and generally Lord Cooke *Turning Points in the Common Law* (Clarendon Press, Oxford, 1997). See also Sutton, above n 222, 20.

<sup>237</sup> R Cooke “Dynamics of the Common Law” in *Proceedings of the Ninth Commonwealth Law Conference* (Auckland, 1990) 1, 4. See also R Cooke “Introduction” (1995) 9 JCL 3, 6 (“In contract as in other fields, the reasonable expectations of persons in the shoes of the respective parties may be seen as a governing concept permeating the common law”).

<sup>238</sup> J Farmer “Lord Cooke and Judicial Decision-making: A Perspective from the Commercial Bar” in P Rishworth (ed) *Struggle for Simplicity: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 53, 63, 65.

<sup>239</sup> Compare *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39, attempting to break the spell of *Hadley v Baxendale* (1854) 9 Exch 341, with R Cooke “Remoteness of Damage and Judicial Discretion” (1978) 37 CLJ 289.

<sup>240</sup> Compare *BNZ v NZ Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA); *JB Caldwell Ltd v Logan House Retirement Home Ltd* [1999] 2 NZLR 99 (HC). For a critique mainly that the factors listed in *McElroy* do not support Sir Robin’s conclusion in that case, see R Ahdar “Remoteness, ‘Ritual Incantation’ and the Future of *Hadley v Baxendale*: Reflections from New Zealand” (1994) 7 JCL 53. Although not directed specifically to Lord Cooke, Peter Watts also relates the factor-listing approach to “reductionism” – collapsing principles into one overarching principle – and concludes: “The ‘trust me, this is not the same thing as palm tree justice’ sentiment that sometimes also comes with reductionism does not inspire confidence. It rather provokes irritation”. See P Watts “The Role of Conscience: A

On the other hand, a renewed governmental interest in public law since the inauguration of the New Zealand Law Commission, notably enactment of the Bill of Rights Act 1990, did not deter Sir Robin from developing his vision of rights over the first half of 1990s.<sup>241</sup> Further, in 1995 he remarked:<sup>242</sup>

As a general aim, although not of course as an absolute rule, Parliamentary legislation should be seen as desirable only when judges fail to amend or develop it in performance of their rightful responsibility. The work of Law Commissions is valuable to courts as well as legislatures.

Contemporaneously, Thomas J provided a rare attempt to relate similar themes to broader discussions in legal philosophy.<sup>243</sup> It drew an immediate and remarkably acrimonious rebuke by Don Dugdale, a well-known practitioner and later a Law Commissioner.<sup>244</sup> A recent restatement by Thomas J insists that fairness, part of a broader sense of justice, “is immanent within the community”.<sup>245</sup> This has drawn an even more powerful charge of “moral realism”.<sup>246</sup> Such an approach hampers attempts to engage social scientific methods to determine what values really are deeply held by communities (or indeed sub-communities), as attempted for example in Australia in the wake of similar appeals to community values by prominent judges in the late 1980s and early 1990s.<sup>247</sup> Instead, Thomas J recently reiterated the need to identify “the moral sentiment which is universal to all branches of the law”, but still emphasises case law and academic commentary.<sup>248</sup> Further, although Thomas J seems to have become more circumspect about the role that courts should accord to Parliament,<sup>249</sup> his views were recently criticised by Dugdale as “judicial supremacism”.<sup>250</sup> In September 2001, Thomas J retired from the Court of Appeal.

Commentary on Bigwood *Conscience and the Liberal Conception of Contract* (2000) 6 NZBLQ 64, 65.

<sup>241</sup> See generally A Adams “Competing conceptions of the Constitution: the New Zealand Bill of Rights Act 1990 and the Cooke Court of Appeal” [1996] NZ L Rev 368.

<sup>242</sup> Cooke “Introduction”, above n 237, 7.

<sup>243</sup> E W Thomas “A Return to Principle in Legal Reasoning and an Acclamation of Judicial Autonomy” (1993) VUWLR Monograph 5.

<sup>244</sup> D F Dugdale “A Polite Response to Mr Justice Thomas” (1993) 23 VUWLR 125.

<sup>245</sup> Thomas, above n 16, 470. His Honour also goes on to suggest, like Sir Robin Cooke (above n 234, 422), that what is fair can readily be determined once concrete facts are presented.

<sup>246</sup> J Allen “The Invisible Hand in Justice Thomas’ Philosophy of Law” [1999] NZ L Rev 213, 218-220; this is not disputed in E W Thomas “The ‘Invisible Hand’ Prompts a Response” [1999] NZ L Rev 227.

<sup>247</sup> Compare J Braithwaite “Community Values and Australian Jurisprudence” (1995) 17 Syd L Rev 351.

<sup>248</sup> E W Thomas “The Conscience of the Law” (2000) 8 Waikato L Rev 1, 21.

<sup>249</sup> Compare E W Thomas “Parliamentary Supremacy and the Judicial Function” (1999) 112 LQR 177; E W Thomas “The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium” (2000) 31 VUWLR 5; and especially “Judging in the Twenty-First Century” [2000] NZLJ 228, 231 (illustrating his position with *NZ Maori Council v A-G* [1987] 1 NZLR 641, yet noting that the statute in question had provided a reference to the Treaty of Waitangi, and that the Court as a third party was suited to resolving the dispute – this appears more significant than the fact that the Treaty was “a fundamental constitutional document”). More circumspection would be consistent with Thomas J’ longstanding insistence that the major constraint on judges is “the felt presence of all the factors which make up the discipline which binds the judiciary” (Thomas, above n 243, 56), if the Court of Appeal has become more conservative since the departure of Lord Cooke.

<sup>250</sup> D Dugdale, above n 95. See also D Round, above n 108.

The philosophies or attitudes of judges in New Zealand, as elsewhere, have always differed significantly.<sup>251</sup> Partly this depends on personal background, and Peter Spiller has contrasted Thomas J with his decidedly more conservative contemporary McKay J. The latter came from a family of lawyers and commercial law practice, whereas the former came from a non-legal family and followed a more varied career. This also formed a contrast between Richmond J and Woodhouse J in an earlier period, and “the kinds of differences evident in the 1970s between the judgments of Richmond P and Woodhouse J were to be repeated in the 1990s when McKay and Thomas JJ sat alongside each other on the bench”.<sup>252</sup> Unfortunately, comprehensive empirical studies of the influences on judges remain sparse in New Zealand, compared to the US, Japan and even England.<sup>253</sup> Nonetheless, it appears that the philosophy of Lord Cooke developed by Thomas J came under increasing pressure in the latter half of the 1990s.<sup>254</sup> The latter also found himself frequently in dissent with his colleagues on the Court of Appeal, and indeed he appeared to take pride in this dissentient role.<sup>255</sup> Yet there were few examples in which Thomas J’s views have definitively resulted in new substantive developments in New Zealand private law.<sup>256</sup> There are parallels with a possible retrenchment recently from arguably more striking transformations in Australian law and judicial reasoning from the 1970s through to the mid-1990s.<sup>257</sup> Overall, New Zealand’s Court of Appeal now appears decidedly more willing to defer to Parliament, and possibly its instrumentalities such as the Law Commission.<sup>258</sup>

It should also be stressed that even Lord Cooke and Thomas J limited their substantive reasoning to principles inherent in the legal system, narrowly defined. They may have gone beyond what Fisher J perceives as New Zealand’s mainstream “creative formalism”, judging based on “doctrinalism, extrapolation from literalist constructions,

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<sup>251</sup> See for example P Spiller “Judges at Work: The New Zealand Court of Appeal (1958-1976)” (1993) 1 Waikato L Rev 73; Turner, above n 230; Finn, above n 228. Compare also for example Robertson, above n 198; and the seemingly incommensurable views expressed by various Law Lords, not always consistently, in recent judgments, described by Alder, above n 198.

<sup>252</sup> P Spiller “Realism in the Court of Appeal: The Value of the Oral Tradition”(1998) 2 Yearbook of New Zealand Jurisprudence 34, 36-37. See also McKay, above n 103.

<sup>253</sup> Compare for example F Schauer “Incentives, Reputation, and the Inglorious Determinants of Judicial Behaviour” (2000) 68 U Cinn L Rev 615; Ramseyer and Rasmussen, above n 143; Robertson, above n 198; J Griffiths, *The Politics of the Judiciary* (5 ed Fontana, London, 1997).

<sup>254</sup> See for example J Smillie “Certainty and Civil Obligation” (2000) 9 Otago L Rev 633, 635-636. Compare also J Hodder “Certainty, the Law and the Southern Perspective” (2000) 23/19 TCL 1; Evans, above n 195; Watts, above n 94.

<sup>255</sup> See Smyth, above n 118, Table 10 (noting that Thomas J dissented in 19 of 155 judgments over 1995-2000). This appears particularly true of recent contract law cases. See for example *Electricity Corporation of NZ v Fletcher Challenge Energy Ltd* (10 October 2001) Court of Appeal, CA 132/00, Richardson P, Thomas, Keith, Blanchard and McGrath JJ. Generally, Thomas J seems to see himself as a modern-day Lord Denning for New Zealand: compare E W Thomas “Lord Denning: 1899-1999” [1999] NZLJ 92.

<sup>256</sup> A rare exception may be Thomas J’s views, in *Dreux v A-G* (1996) 6 TCLR 617 (CA), on admissibility of subsequent conduct when construing contracts. Compare Nottage 2007b Part IV.E.

<sup>257</sup> Compare P Finn “Australia Compared” in R Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, forthcoming 2001); Sutton & Bigwood, above n 219; J Edelman “Judicial Discretion in Australia” (2000) 19 Aust Bar Rev 285.

<sup>258</sup> See for example *R v Hines* [1997] 3 NZLR 529.

and drawing factual analogies from non-binding precedents”.<sup>259</sup> Yet Thomas J would likely have agreed with recent remarks by Lord Cooke showing clearly that he is not a “creativist” judge, in the sense mentioned by Lord Bingham and not uncommon in the US.<sup>260</sup>

Roscoe Pound, the American jurist, was one who spoke of the judicial function as social engineering. That is a description carrying suggestions (perhaps unintended) which I would respectfully reject. It is not the role of the Judge to mould society. Other forces lie at the root of social change. In that regard, as in most others, the Judge has at best an identifying and balancing function.

Rather, therefore, both Lord Cooke and Thomas J appear to be attracted into a middle category mentioned by Fisher J recently, consisting of judges who “resort to first principles drawn from an overview of the common law but without regard to consequences”.<sup>261</sup>

Likewise, Hammond J has argued that most influential judges in New Zealand nowadays decide cases – especially the easier ones – by uncovering principles from precedents and applying them deductively, switching in hard cases to an anti-theoretical “pragmatism” wherein “knowledge is socially constructed: the truth is what a community believes at a particular time”. This differs, he suggests, from seeking “a putative consensus as an objective basis for judicial policy-making”, one grounded either in empirical investigations or contemporary philosophy.<sup>262</sup> It is submitted that the latter and “creative substantivism” distinguish US and Japanese judicial reasoning, based on high interpretive formality and thus reinforcing substantive reasoning generally, underscored by key institutional differences. The New Zealand judiciary may have moved towards more substantive reasoning; but there are counter-tendencies recently, similar movements earlier (and again recently) in England, and – most importantly – a significant contrast remains with both the US and Japan.<sup>263</sup>

The nature of judicial reasoning is a central aspect of legal reasoning in complex contemporary democracies, but it is difficult to pin down without closer examination of how judges decide cases in particular areas of law. More generally, however, Atiyah and Summers suggest that contrasting degrees of mandatory and interpretive formality add up to distinct patterns of usage and conceptions of rules. They argue that US law adopts more flexible rules, and interprets rules more readily in the light of substantive reasons, whereas English law prefers and sticks to more “hard and fast rules”.<sup>264</sup> The philosophies articulated by Lord Cooke and Thomas J move towards the US (and Japanese) end of the spectrum, but they need to be placed in the context just described. Similarly, despite enacting some legislation with broadly worded provisions after World

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<sup>259</sup> These categories, but not the relationships they may have to Lord Cooke and Thomas J, are defined by Fisher, above n 16.

<sup>260</sup> Lord Cooke “The Judge in an Evolving Society” (1998) 28 VUWLR 467, 468. Compare Thomas, above n 243; Bingham, above n 94.

<sup>261</sup> Fisher, above n 16.

<sup>262</sup> Hammond, above n 112.

<sup>263</sup> See also Sutton and Bigwood, above n 219, ending with a contrast between “pragmatic realism” and the US tradition centred on strong constitutionalism and rights jurisprudence, the possibility of a return to orthodoxy in New Zealand, and so on.

<sup>264</sup> Atiyah and Summers, above n 2, 71.

War II,<sup>265</sup> New Zealand's statute book appears to remain much closer to England in terms of hard and fast rules, compared to the US and Japan.

For instance, Atiyah and Summers' distinction helps explain the much stricter approach maintained by English compared to US courts in respect of "equity clauses", which parties add to allow arbitrators to decide contractual disputes without being strictly bound by legal rules.<sup>266</sup> Likewise, a recent empirical study of attitudes towards broad principles characterising the new *lex mercatoria* demonstrated a significantly greater perception of greater risk, and fewer benefits in invoking it, among English compared to other respondents from around the world (comprised mainly of arbitrators, in-house counsel, lawyers, and academics). As a subset, US respondents did not demonstrate significant aversion to such broad principles.<sup>267</sup>

More generally, Sir Roy Goode recently has contrasted the conceptual approach maintained in English commercial law concerning personal property, and that preferred in the US.<sup>268</sup>

In many ways American lawyers are the most creative in the world in adapting their commercial law to changing commercial needs. We only have to look at Article 9 of the Uniform Commercial Code for its integrated approach to the treatment of security interests and its jettisoning of outmoded distinctions between one security form and another, and, more recently, at the latest revision of Article 8 dealing with interests in securities, to see the power of the creative thought devoted to ensuring the continued relevance of commercial law to changing business needs. The great strength of leading American commercial lawyers lies in their perception of commercial law as essentially a tool for providing sensible solutions to practical problems.

The difficulties and delays that New Zealand has experienced in enacting the Personal Property Security Act 1999, drawing on the UCC and Canadian progeny, indicate the enduring attraction of formal reasoning patterns.<sup>269</sup> The new legislation may help move

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<sup>265</sup> Above n 185.

<sup>266</sup> H Yu "Amiable Composition – A Learning Curve" (2000) *J Int'l Arb* 79, 89-98. The author notes that despite some English judges relaxing their stance over the 1980s, only the enactment of s 46(1)(b) of the Arbitration Act 1996 has – impliedly – made it clear that such clauses should be respected. Similar recognition is accorded now by art 28(3) of Schedule 1 of New Zealand's Arbitration Act 1996. Until this legislative intervention, New Zealand courts would have followed the more restrictive English law approach to equity clauses.

<sup>267</sup> K Berger and others "The CENTRAL Enquiry on the Use of Transnational Law in International Contract Law and Arbitration – Background, Procedure and Selected Results" in K Berger (ed) *The Practice of Transnational Law* (Kluwer, The Hague, 2001) 91; L Nottage "Practical and Theoretical Implications of the *Lex Mercatoria* for the Asia-Pacific Region: CENTRAL's Empirical Study on the Use of Transnational Law" (2000) 4 *Vindabona J Int'l Comm L & Arb* 132.

<sup>268</sup> Goode, above n 7, 26. For more detailed contrasts, see Goode, above n 7, 62-64, 67-68, and 78-79.

<sup>269</sup> Compare R Buckley "*Commercial Law in the Next Millenium – A Review of the Hamlyn Lectures Delivered by Professor Roy Goode*" (2000) 12 *Bond L Rev* 115, 116:

... I had thought that the resistance in Australia to adopting the approach taken by Uniform Commercial Code Article 9 to personal property securities was simply the product of inertia and narrow-mindedness. With the benefit of this volume, I see our resistance as the result of a fundamentally different way of understanding how law works.

The rest of the book review makes it clear that the reviewer sees Australian law as still strongly attracted to formal reasoning, stressed by Goode in distinguishing contemporary English from US commercial law. On the background to New Zealand's Act, see R Dugan "PPSA – The Price of Certainty" [2000] *NZLJ*

New Zealand law towards a more substantive approach. However, the starting point will again have been prompted by statute, which by its nature tends to promote more formal reasoning than judge-made law. A key factor will therefore be whether the new statutory regime is seen to have a coherent underlying philosophy, promoting at least some aspects of substantive reasoning, to be used to interpret the new rules it lays down.<sup>270</sup>

Atiyah and Summers relate a preference for hard and fast rules, as opposed to flexible rules interpreted more readily in light of substantive reasons, to differing traditions in legal philosophy. In particular, they contrast the heavy infusion of natural law and more recently legal realism (or “legal instrumentalism”) in the US, as opposed to the strong tradition of legal positivism in England even today.<sup>271</sup> They also contend that these different orientations are reflected in legal education in the two jurisdictions.<sup>272</sup> Already during the 1920s and early 1930s, the development of legal realism in the US led to curricular and intellectual innovation in leading law schools. Professors at Columbia Law School criticised the narrow case law method developed at Harvard by Langdell, for instance, and advocated reforms:<sup>273</sup>

... premised on the necessity of relating the teaching of legal principles to factual situations the students were likely to encounter in the course or practice. They turned to social science disciplines to supply context for and means of comprehension of those situations.

The realist tradition firmly established socio-legal studies in all top US law schools in the decades after World War II. Other law schools remained more black-letter in orientation; but policy-based arguments are common even there, and the top law schools still tend to set the ideal for legal scholarship and education.<sup>274</sup>

After a considerable time lag, a similar connection appears to have been significant in England, albeit less obviously. Some of the key figures in developing socio-legal studies in English law faculties from the 1970s, such as William Twining,

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241. For longstanding pressures to abandon form for substance in this field, see McLauchlan, above n 224, 48-58.

<sup>270</sup> Similar issues arise regarding New Zealand’s Contract Statutes (Nottage 2007b Part IV.C) and the Consumer Guarantees Act 1993 (Nottage 1996 above n c Part IV.C). Compare also generally Nottage 2007b Part I, contrasting the philosophy underpinning the Uniform Commercial Code in the US.

<sup>271</sup> Above n 2, 240-266; R Summers *Instrumentalism and American Legal Theory* (Cornell UP, Ithaca, 1982). See also Posner, above n 6, 2-37; M Horwitz “Why is Anglo-American Jurisprudence Unhistorical?” (1997) 17 OJLS 551. But see M Lobban “Was There a Nineteenth Century ‘English School of Jurisprudence?’” (1998) 16 J Leg History 34; W Nelson “The Integrity of the Judiciary in Twentieth-Century New York” (1998) 30 Rutgers L Rev 1.

<sup>272</sup> Above n 2, 384-407. See also Carrington, above n 5.

<sup>273</sup> C Tomlins “Framing the Field of Law’s Disciplinary Encounters: A Historical Narrative” (2000) 34 L & Soc’y Rev 911, 920. See also Nottage 2007b Part I.

<sup>274</sup> The distinction between “leading” and “mainstream” US law schools is emphasised in L Nottage, T Ginsburg & H Sono, “The Worlds, Vicissitudes and Futures of Japan’s Law” in T Ginsburg, L Nottage & H Sono (eds) *The Multiple Worlds of Japanese Law: Disjunctions and Conjunctions* (University of Victoria Centre for Asia-Pacific Initiatives, Victoria BC, 2001) 1. For a critique by a prominent US judge that legal scholarship and education in the US, generally, has gone too far away from practice-oriented concerns in favour of policy-based argumentation, see for example H Edwards “The Growing Disjunction Between Legal Education and the Legal Profession” (1993) 91 Mich L Rev 34.

were intensely interested in legal realism.<sup>275</sup> Also important in promoting socio-legal theory was the critical legal studies movement, with deep roots in the US legal realist tradition.<sup>276</sup>

However, an overlapping but sometimes distinct influence was Marxism, which Anthony Ogus has criticised recently as having divorced England's "first wave" of legal interdisciplinary studies (from around 1972 to 1984) from more empirically based and policy-oriented studies. He argues that the latter have become much more prevalent since the mid-1980s, and that this "second wave" has significantly penetrated the mainstream of legal discourse in England. Important factors have been funding through the Economic and Social Research Council, the growing importance of the Research Assessment Exercise in English universities, and funding from more government departments (notably the Lord Chancellor's Department since 1996).<sup>277</sup> Twining concurs regarding the growing impact of social science not only on contemporary legal education, but also on policy-making. However, he mentions concerns about the use made of empirical studies by reformers.<sup>278</sup> Further, even recent major policy initiatives, such as those by Lord Woolf relating to large-scale civil justice reform, were erected on rather shaky empirical and theoretical foundations.<sup>279</sup> The more methodical law reform of the Law Commission remains very black-letter law driven. It undertakes or promotes little empirical research,<sup>280</sup> is reluctant to explore even the economic ramifications of particular doctrines or reform proposals,<sup>281</sup> and its reform proposals seem to have become increasingly narrow in focus.<sup>282</sup> More generally, much more research in England appears to be driven by "the pull of the policy audience", criticised in the US for ultimately favouring narrower conceptions of rules in socio-economic contexts.<sup>283</sup>

Nonetheless, socio-legal studies and a keen interest in jurisprudential enquiry are now a prominent feature of English legal education and, increasingly, its legal

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<sup>275</sup> See W Twining *Karl Llewellyn and the Realist Movement* (U Oklahoma Press, Norman, 1973); W Twining *Blackstone's Tower: The English Law School* (Sweet & Maxwell, London, 1994).

<sup>276</sup> T Ginsburg "In Defence of Japanese Law" in T Ginsburg, L Nottage & H Sono (eds) *The Multiple Worlds of Japanese Law: Disjunctions and Conjunctions* (University of Victoria Centre for Asia-Pacific Initiatives, Victoria BC, 2001) 29.

<sup>277</sup> A Ogus "Interdisciplinary Approaches to Law: Utility and Disutility" (2000) 50 *N Ireland LQ* 421, 429-430.

<sup>278</sup> W Twining "Remembering 1972: The Oxford Centre in the Context of Developments in Higher Education and the Discipline of Law" (1995) 22 *J L & Soc'y* 35, 42 (for example in the Royal Commission on Criminal Justice, and studies of the Bar vocational course).

<sup>279</sup> Important theoretical and empirical issues are raised by many contributions in A Zuckerman and R Cranston (eds) *Reform of Civil Procedure: Essays on 'Access to Justice'* (Clarendon Press, Oxford, 1995). However, they appeared late in the reform process. All the more so, in the case of the detailed empirical study only recently published by H Genn: *Paths to Justice: What People Think and Do About Going To Law* (Hart, Oxford, 1999).

<sup>280</sup> See for example R Lewis "Contracts between Businessmen: Reform of the Law of Firm Offers and an Empirical Study of Tendering Practices in the Building Industry" (1982) 9 *Brit J L & Soc'y* 153.

<sup>281</sup> A I Ogus "Economics and Law Reform: Thirty Years of Law Commission Endeavour" (1995) 111 *LQR* 407.

<sup>282</sup> As shown by the demise of ambitious projects such as Harvey MacGregor's proposed codification of contract law: see generally F Reynolds "Codification, Law Reform, and Judicial Development" (1995) 9 *JCL* 200.

<sup>283</sup> A Sarat and S Silbey "The Pull of the Policy Audience" (1988) 14 *Law & Pol'y* 765.

system as a whole. Ogus and others emphasise the continued importance of the Oxford Centre for Socio-Legal Studies, since its founding in 1972.<sup>284</sup> The first issue of the *British Journal of Law in Society* (now renamed the *Journal of Law and Society*) was published in 1974. The proportion of articles devoted to socio-legal studies and jurisprudence, appearing in major English law journals, appears to have grown steadily since the 1980s.<sup>285</sup> In parallel, the Socio-Legal Studies Association established in 1990 has been extremely active in promoting conferences, workshops and networking among teachers and students, and its membership has increased dramatically.<sup>286</sup> Socio-legal studies have also been bolstered by rapid expansion of exchanges of students among English and European law faculties, such as the SOCRATES scheme, which has also broadened the scope of enquiry in comparative legal research.<sup>287</sup> Nonetheless, these developments appear less pervasive and are certainly more recent than in the US, at least in the education provided by the latter's leading law schools.<sup>288</sup>

By these measures, New Zealand does not appear to have shifted as far as England towards US-style legal theory and education, especially over the last two decades, despite early movements in that direction. A century ago, notable New Zealand jurist John Salmond made some important breaks with Austinian legal positivism, arguing for instance for recognition of the law-making role of courts along the lines of the behaviouralist critique by Oliver Wendell Holmes, which had a major impact on the development of legal realism in the US.<sup>289</sup> Yet Salmond only met Holmes in 1921, and Salmond's death a few years later prevented the emergence of a more realist approach in his judicial reasoning and academic writing.<sup>290</sup> Even today, articles dedicated to general legal theory are comparatively rarely found in New Zealand law journals, even the main university ones. While attention to "the law in action" began to characterise some academic writing from the 1970s, sustained empirical studies are still quite rare.<sup>291</sup>

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<sup>284</sup> See generally the special issue of the *Journal of Law and Society* (Vol 22 No 1, 1995), "Socio-legal Studies in Context: The Oxford Centre Past and Present" (D J Gilligan, ed).

<sup>285</sup> Compare generally Twining, above n 278; Ogus, above n 277. See also for example the *Modern Law Review*, especially over the 1990s, and the *Oxford Journal of Legal Studies*. A comprehensive empirical confirmation, compared to other jurisdictions, cannot be attempted in this Paper.

<sup>286</sup> Ogus (above n 277, 427) observes that membership was over 500 in 1996. This compares to 1636 full-time law teachers in England and Wales over 1991-2 (882 in universities, 754 in polytechnics: Twining, above n 278, 38).

<sup>287</sup> Compare J Bell "*Royaume-Uni* [United Kingdom]" [4-1999] *Rev int droit comp* 1024, 1028.

<sup>288</sup> Compare for example the vigorous debates in comparative studies taking place in the US: G Berman "The Discipline of Comparative Law in the United States" [1999-4] *RIDC* 1040, 1044-1047. But see P Legrand "Against a European Civil Code" (1997) 60 *MLR* 44; G Teubner "Legal Irritants: Good Faith in British Law and How Unifying Law Ends Up in New Divergences" (1998) 61 *MLR* 11.

<sup>289</sup> A Frame *Salmond: Southern Jurist* (Victoria UP, Wellington, 1995) 58.

<sup>290</sup> Frame, above n 289, 210, 218-241, 236 n 85 (citing Denning's critical review of *Principles of the Law of Contracts*, published posthumously with Winfield as co-author).

<sup>291</sup> For instance, in the *New Zealand Universities Law Review* (which like the *Modern Law Review* in England attracts contributions from scholars from many universities), the first article extensively analysing a leading jurisprudential theory appears to be F Brookfield "Kelsen, the Constitution and the Treaty" (1992) 15 *NZULR* 163. A pathbreaking pioneering social-legal study was A Frame & P Harris "Formal Rules and Informal Practices: A Study of the New Zealand Rent Appeal Boards" (1977) 7 *NZULR* 213. However, further writing drawing on disciplines other than law seems to have centred on competition law and policy. See for example R Ahdar "Regulating Mergers upon Socio-Political Grounds in New Zealand" (1986) 12 *NZULR* 49.

New Zealand still has no journal dedicated to the advancement of socio-legal inquiry, despite the proliferation of specialist law journals particularly over the 1990s. Nor does it have any academic association, or even informal grouping of researchers, committed to promoting socio-legal studies.<sup>292</sup> Universities generally have been starved of funding over the 1990s, and there is very little outside funding available for socio-legal research, especially research not directly related to immediate policy concerns.<sup>293</sup> Even allowing for New Zealand's much smaller population base, these developments stand in sharp contrast to the situation in England over recent decades.<sup>294</sup>

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More generally, the most sustained jurisprudential writing since the 1980s appears to be a monograph by Thomas J published through the Victoria University of Wellington Law Review: Thomas, above n 243. On the other hand, work in legal (and social) history appears to have grown, particularly in relation to Maori issues. See for example R Boast "F O V Acheson and Maori Customary Law" (1999) 30 VUWLR 661. A few articles incorporating original empirical research have also been published in recent years: see for example Nottage 1997 above n c; L Nottage "Planning and Renegotiating Long-Term Contracts in New Zealand and Japan: An Interim Report on an Empirical Research Project" (1997) NZ L Rev 482; Smyth, above n 118. Finally, under the editorship of Bernard Robertson, a former academic from England, the *New Zealand Law Journal* began in the mid-1990s to publish a number of empirical studies or articles raising empirical questions. However, these have been shorter pieces directed primarily at pressing policy issues. See for example Fay and Bell, above n 135; Nottage & Wollschlaeger, above n 17; Dugan, above n 269; G Hannis "Credit Law Reform" [2001] NZLJ 121. As mentioned above, a more comprehensive comparison with developments in law journal writing in other jurisdictions would be helpful; but it represents a major undertaking, beyond the scope of this Paper.

<sup>292</sup> The New Zealand Society for Legal and Social Philosophy Inc does not focus on *social science* and its interaction with law. The New Zealand Association for Comparative Law, the first nation-wide body for those interested in comparative legal studies, was only formed in 1995: see A H Angelo "Some Reflections on Comparative Law in New Zealand" [4-1999] Rev int droit comp 1013, 1014. It has a distinguished but small membership. Its yearbooks so far have made valuable contributions to the corpus of writings in comparative legal studies in New Zealand. However, they have not included any programmatic statements on comparative law methodology, nor sustained analyses of the links between law and social science or jurisprudence. One limited exception is a short commentary, incorporating the outlines of a theory developed at length elsewhere, reproduced very recently as L Nottage "Comment on *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*" (2001) 32 VUWLR 842 (also available at <<http://www.upf.pf/recherche/RJP7.htm>>). The only major work contributing to comparative law methodology, published in New Zealand over recent decades, emerges from a study by a Japanese law professor: I Kitamura (A Angelo trans) "Problems of the Translation of Law in Japan" (1993) VUWLR Monograph 7. Otherwise, promotion of socio-legal studies comes only indirectly and mainly through the Australian and New Zealand Society of Criminology (<<http://www.law.ecel.uwa.edu.au/anzsoc/>>).

<sup>293</sup> L Nottage "Nyujiirando no Hogaku Kyoiku ni okeru Hoshiteki na Kaikakushugi [Conservative Reformism in New Zealand's Legal Education]" (2000) 6 Shihokaikaku Zasshi 61. The Legal Research Foundation (<<http://legalresearch.auckland.ac.nz/>>) has a limited budget, mainly devoted to publications and the occasional conference. The New Zealand Law Foundation (<<http://www.lawfoundation.org.nz/grants/index.html>>) provides grants mainly for practical projects. For "research and/or publication with a legal focus", it provided grants over under NZ\$100,000 per annum on average over 1992-1999, with many for publications as opposed to research, and most research projects revealing the strong pull of the policy audience.

<sup>294</sup> New Zealand also has no equivalent of the Australian Sociology of Law Association, the Australian Research Council (a very large funder of socio-legal studies), and journals dedicated to socio-legal studies such as *Law in Context* and the *Alternative Law Journal*. Compare also generally J Goldring "Law" in Academy of the Social Sciences in Australia (ed) *Challenges for the Social Sciences in Australia* Vol 2 (Canberra, 1998).

Some have perceived a growing influence of US law and legal institutions, citing for instance some early attempts at Victoria University to teach tort law in relation to social history.<sup>295</sup> By the 1980s, however, instruction in this field had become more black-letter again.<sup>296</sup> Waikato Law School has attempted to teach “law in context” since its establishment in the early 1990s.<sup>297</sup> Little original empirical research has emerged from this initiative, however,<sup>298</sup> and its overall impact on the way law is taught in other New Zealand law schools appears to have remained limited. Consistent with the view that New Zealand’s legal education system remains very black-letter law oriented, and indeed may have become more so over the 1990s, is Fisher J’s experience that younger practitioners in New Zealand nowadays are *less* likely than their senior colleagues to advance policy arguments in court.<sup>299</sup>

Reflecting and reinforcing these trends, important law reform and policy decisions in New Zealand are still made largely in an empirical vacuum.<sup>300</sup> The Law Commission still does not have a trained economist or social scientist as a Commissioner.<sup>301</sup> Nor has it commissioned any large empirical studies for its many reports, relying at most on public consultation.<sup>302</sup> In recent years, the Commission has focused increasingly on narrow law reform issues.<sup>303</sup> All these factors reinforce a

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<sup>295</sup> K Keith “The Impact of American Ideas on New Zealand’s Educational Policy, Practice, and Theory: The Case of Law” (1985) 18 VUWLR 327.

<sup>296</sup> The present author shares the experience related by his contemporary, G McLay “Towards A Legal History of New Zealand” (1999) 30 VUWLR 333, 338-339.

<sup>297</sup> P Haremann “Law in Context: Taking Context Seriously” (1995) 3 Waikato L Rev 137; N Seuffert and others “Developing and Teaching An Introduction to Law in Context: Surrogacy and Baby M” (1993) 1 Waikato L Rev 27.

<sup>298</sup> A notable exception is the work of Peter Spiller, originally from South Africa. See for example P Spiller *The Disputes Tribunals of New Zealand* (Brookers, Wellington, 1997); P Spiller, above n 251, n 252.

<sup>299</sup> Above n 16.

<sup>300</sup> See for example Nottage & Wollschlaeger, above n 17 (not cited by Fisher, above n 16, when discussing allegedly greater litigiousness and the policy issue of appellate court structure reform); Dugan, above n 269 (noting the lack of assessment as to the direct and indirect costs involved in enacting the Personal Property Security Act 1999).

<sup>301</sup> One external review of New Zealand’s Law Commission – in fact conducted by Sir Geoffrey Palmer, primarily responsible for establishing it in 1985 when he was Minister of Justice – included a recommendation that there be a more balanced make-up, “with one Commissioner and researchers to come from a discipline other than the law” (noted in (2000) 23/25 TCL 10). However, both of the full-time Law Commissioners appointed soon thereafter for five-year terms were judges. One part-time Commissioner newly appointed for three years was a Queen’s Counsel. The other new part-time Commissioner was Ngatata Love, a former Dean of Business Studies at Massey University, but it appears the primary attraction of engaging him was as a specialist in Maori issues.

<sup>302</sup> Sutton and Bigwood, above n 219 (noting criticism of New Zealand Law Commission *Insolvency Law Reform: Promoting Trust and Confidence*, Study Paper No 11, Wellington, 2001).

<sup>303</sup> See for example New Zealand Law Commission *Aspects of Damages: The Award of Interest on Money Claims* (Report No 28, Wellington, 1994); New Zealand Law Commission *Repeal of the Contracts Enforcement Act 1956: A Discussion Paper* (Preliminary Paper No 30, Wellington, 1997); D F Dugdale “Law Commission Papers” [2000] NZLJ 90. A further illustration of a more conservative approach by the Commission in the late 1990s is that studies on access to legal services for women were published not as Preliminary Papers, but in a new category of Study Papers. To be sure, the Commission continues to produce some more wide-ranging studies, but the recommendations tend to be straightforward. One example is that electronic transactions can be readily regulated by traditional doctrines of contract

black-letter law tradition in New Zealand, probably even more powerful than in England today, and certainly in strong contrast to the US.<sup>304</sup>

By contrast, Japan had early encounters with legal realism not only through the US before World War II, but also through parallel European developments. This found its way into both jurisprudential critiques of legal positivism and empirical research by leading private law scholars, such as Suehiro and Kawashima.<sup>305</sup> The trend accelerated after World War II, with legal sociology and jurisprudential inquiry enjoying a boom among researchers and law schools since the late 1980s.<sup>306</sup> It is not unusual to find private law scholarship addressing at a sophisticated theoretical level the relationship between social practices, legal norms, and political philosophy.<sup>307</sup> That is so even though some of this may not be as thoroughly substantive in approach as in the US, and (as indeed there) the bulk of private law scholarship in Japan remains largely exegetical.<sup>308</sup>

## II.D Enforcement Formality and Truth Formality: Two Varieties of Formality

Having set out these four main dimensions of legal reasoning and some of their sub-dimensions, and later tying these into some institutional features of the legal systems considered, Atiyah and Summers delve more deeply into the latter. They suggest that England also prefers two “varieties” of formality, being “general features of the style or vision of a legal system”.<sup>309</sup>

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formation: see *Electronic Commerce Part One: A Guide for the Legal and Business Community* (NZLC R50, Wellington, 1999) 20-21. Compare for example T Uchida “*Saibakukan to Keiyaku* [Cyberspace and Contract]” (1998) 312 UP 1; Nottage, above n 159.

The recent work of the English Law Commission also remains rather narrowly focused, part of a tendency towards “legislative microsurgery” (Beatson, above n 94, 252). But New Zealand certainly has not followed the bold and innovative approach taken by the Law Commission of Canada (<<http://www.lcc.gc.ca/en/>>), which now draws heavily on empirical and outside studies to make creative thematic connections across multiple areas of law. Compare generally R MacDonald “Recommissioning Law Reform” (1997) 35 Alberta L Rev 831.

<sup>304</sup> New Zealand scholars who have developed an interest in how the law operates in practice have tended to move overseas and make their careers there. A well-known example is Donald Harris, central in developing socio-legal studies at Oxford and in the UK generally. Perhaps less well known is Terence Halliday, until recently based at the American Bar Foundation in Chicago: see for example T C Halliday *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment* (U of Chicago Press, Chicago, 1987). One possible exception in New Zealand is the work of a few criminologists, such as the empirical study into juries directed in the late 1990s by Professor Warren Young (then of Victoria University Law Faculty). That research comes very late indeed, however, compared to the many studies on juries which have been conducted in the US. A second possible exception is some growing interest in “law and economics” (see for example NZ Law Society (ed) *Economics and the Law* (New Zealand Law Society, Wellington, 1996)). But this has remained rudimentary and devoid of attempts at empirical testing (compare D Campbell “On What is Valuable in Law and Economics” (1996) 8 Otago L Rev 489; J Smillie “Formalism, Fairness and Efficiency: Civil Adjudication in New Zealand” (1996) NZ L Rev 254). See also generally G Crespi “Comparing United States and New Zealand Legal Education: Are US Law Schools Too Good?” (1997) 30 Vand J Trans L 31.

<sup>305</sup> See Nottage 2007b Part II.

<sup>306</sup> F Upham “What’s Happening in Japan, Sociolegal-wise” (1989) 23 L & Soc Rev 879.

<sup>307</sup> See for example Uchida, above n 216; Nottage 2007b Part II.

<sup>308</sup> Nottage, above n 150; Sono, above n 216.

<sup>309</sup> Atiyah and Summers, above n 2, 17-18.

First, “enforcement formality” is defined as the degree to which legal rules and other norms are actually translated into practice, with more formal legal systems striving to ensure a higher degree of obedience to and enforcement of the law. Atiyah and Summers contrast here the relative speed and efficiency of English as opposed to American court practice. They tie this to the “English rule” of awarding lawyers’ costs to the winning party, the ability to award pre-judgment interest in damages claims, more scope for summary judgment proceedings, and so on. Enforcement of judgments is also enhanced by fewer exceptions to assets on which the creditor can levy execution, a unitary jurisdiction rather than a federal system, and so on.<sup>310</sup> Access to justice also has also been heightened due to much greater availability of legal aid, despite some retrenchment in the 1990s.<sup>311</sup>

A corollary of higher enforcement formality should be greater concern when access to the courts becomes problematic. This would help explain the remarkably radical proposals for civil justice reform contained in the Woolf Report,<sup>312</sup> and the limited opposition they drew. The aims of drastically improving “expedition” and “economy” of court processes were almost unanimously accepted. A few stressed the need to value more highly “expertise” and “equality” as well.<sup>313</sup> A vigorous but rather lonely critic was Michael Zander.<sup>314</sup> His main objection was that little attempt was made to weigh costs and benefits, and he maintains that evidence after the first wave of reforms were implemented in 1999 has been mixed.<sup>315</sup> Ironically, some early

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<sup>310</sup> Above n 2, 185-215.

<sup>311</sup> In 1994, for instance, legal aid (net of receipts) amounted to 590 million pounds or US\$900 million. This was more than twice that dispensed by the federal agency in the US, where there is also almost no non-federal public civil legal aid. See Posner, above n 6, 77-78. On the changes to streamline legal aid in England, see for example T Gorierly “The Government’s Legal Aid Reforms” in A Zuckerman and R Cranston (eds) *Reform of Civil Procedure: Essays on ‘Access to Justice’* (Clarendon Press, Oxford, 1995) 346; M Zander “The Government’s Plans on Legal Aid and Conditional Fees” (1998) 61 MLR 538.

<sup>312</sup> For a concise overview, see Lord Woolf “Civil Justice in the United Kingdom” (1997) 45 AJCL 709.

<sup>313</sup> J Lightman “Civil Litigation in the 21st Century” (1998) 17 CJQ 373.

<sup>314</sup> M Zander “The Woolf Report: Forward or Backwards for the New Lord Chancellor?” (1997) 16 Civil JQ 208. A response can be found in Lord Woolf “Medics, Lawyers and the Courts” (1997) 16 Civil JQ 302.

<sup>315</sup> M Zander *The State of Justice* (Sweet & Maxwell, London, 2000) 48-49. These include criticisms from England’s largest personal injury firm about judicial case management being a disaster, generating higher costs and front-loading of work. Another objections was the reform effort’s focus on “the very top of the pyramid” of disputes. By contrast, the head of the Civil Justice Division in the Lord Chancellor’s Department suggests recently that cases are settling earlier, as issues are identified earlier; judges are taking seriously their expanded roles in case management; and solicitors are developing a more collaborative attitude, with more using ADR. He also notes work on extending the Woolf regime to all specialist civil jurisdictions, including the Commercial Court; and developing reforms especially for housing claims, representative actions, group litigation, and judicial review. Gladwell also mentions a major review of issues in enforcing judgments, remarking that “for far too long we believed that parties went to court for a judgment. Of course, what they actually go to court for is their money, and, as too many people learn the hard way, it doesn’t necessarily follow that having a judgment in your favour means you’ll get your money”: Gladwell (2000) 19 CLJ 16. This latter point goes some way to meet Zander’s concerns about a holistic approach; but it differs in the underlying premise, consistent with a preference for high “enforcement formality”, that ready access to the civil justice system is the ideal for citizens.

scepticism about the Woolf reforms had come from commentators in the US.<sup>316</sup> Earlier amendments to civil procedure rules there were less ambitious, or have been rolled back significantly.<sup>317</sup> Bearing in mind the greater increases in civil litigation and at least a more general *perception* of a “litigation crisis”,<sup>318</sup> this too suggests less concern with enforcement formality than in the UK.

Until recently, New Zealand had similar rules to England in facilitating access to the courts and enforcing judgments once rendered.<sup>319</sup> Occasional commentators saw little need for radical reforms along the lines of the Woolf Report proposals, arguing that New Zealand courts already had developed effective case management techniques.<sup>320</sup> This does not appear to have been mere complacency, primarily on the part of judges, which might indicate less concern with adequate enforcement of legal norms and thus lower enforcement formality. Nor should we interpret in that way the lethargic response to proposals to allow more contingency fees in New Zealand, a noticeable trend in England (and Australia) over the 1990s.<sup>321</sup> Rather, despite a few

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<sup>316</sup> S Flanders “Case Management: Failure in America? Success in England and Wales?” (1998) 17 Civil JQ 308.

<sup>317</sup> See for example R Marcus “Deja Vu All Over Again? An American Reaction to the Woolf Report” in A Zuckerman and R Cranston (eds) *Reform of Civil Procedure: Essays on ‘Access to Justice’* (Clarendon Press, Oxford, 1995) 219.

<sup>318</sup> Posner, above n 6, 111 (noting strong increase in civil case filings in the UK, albeit not as much as in US federal courts, since 1960). But compare Jacob, above n 150, 48-50; M Galanter “Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society” (1983) 31 UCLA L Rev 4.

<sup>319</sup> See C Pidgeon “Civil Procedure: District Courts” in Sir Robin Cooke (gen ed) *The Laws of New Zealand* Vol 5 (Butterworths, Wellington, 1993) paras 36-37, 112-125, 320-329, 380, 428-450; C Pidgeon “Civil Procedure: High Court” in Sir Robin Cooke (gen ed) *The Laws of New Zealand* Vol 5 (Butterworths, Wellington, 1995) paras 21-22, 111-124, 392-401, 463-508, 519-520.

<sup>320</sup> See for example J Hansen “Case Management in New Zealand Courts” (1998) 8 Otago L Rev 319; I Richardson “The Evolution of a Legal System: A Dialogue” (Paper presented at the Australasian Law Teachers Association conference, Wellington, 4-7 July 1999). From 1 January 2000, a Practice Note on Civil Case Management in the High Court came into effect, extending pilot schemes established in late 1997 in the High Court Registries in Auckland, Napier and Christchurch. Cases are now assigned by High Court Registrars to three or four tracks, and the rules generally aim to identify early the issues in dispute and encourage settlement by negotiation or ADR; early planning of proceedings, clarifying likely time and costs involved; reduce delays and expenses in interlocutory applications, through limited in depth conferences; and achieve a final hearing on a firm date within a reasonable time after commencement. Despite moving clearly in the direction of the Woolf reforms in England, these developments have attracted little detailed analysis. However, raising similar concerns to Zander (above n 215) without citing his work, Farmer (above n 92) has argued recently that more case management in New Zealand civil proceedings has instead lead to *greater* costs and delays.

<sup>321</sup> A few suggestions for change were made only in the latter half of the 1990s: see for example S Zindel “The Case for Contingency Fees” (1996) NZLJ 295; K Tokeley “Taking a Chance: A Proposal for Contingency Fees” (1998) 28 VUWLR 13. Finally, in May 2001, the New Zealand Law Commission has released a report recommending modest change, namely permitting remuneration dependent on outcome if (a) such remuneration is normal (already approved in *Sieveright v Ward & Ors* [1935] NZLR 43), or (b) it involves “a normal fee plus an amount (‘a success uplift’) to compensate the lawyer for the risk of not being paid at all and for the disadvantages of not having received payment on account”: see New Zealand Law Commission *Subsidising Litigation* (Report No 72, Wellington, 2001) 23. The Commission adds that a “success uplift cannot be expressed as a proportion of an amount recovered”, which is permitted (and common) in the US. It also does not specifically recommend any other limitation on the success uplift, an important issue in other Anglo-Commonwealth jurisdictions: currently set at 100% of the normal fee in

complaints by practitioners and judges about delays in certain courts, New Zealand has been quite exceptional among industrialised economies in not experiencing steady increases in civil litigation rates since the early 1970s.<sup>322</sup> The reasons for this are not totally clear; but the comparatively stable civil litigation rate suggests that New Zealand's more measured moves towards greater case management may be consistent with retaining quite high enforcement formality even compared to England. It also helps explain the comparatively modest legal aid budget, despite its rise from NZ\$2 million to \$100 million over the last 20 years. Even that increase has prompted enactment of the Legal Services Act 2000, taking away responsibilities for legal aid from district sub-committees (which had involved practitioners in approving aid applications).<sup>323</sup>

Japan remains closer to the US. Both exhibit distinctly lower enforcement formality, although access to courts may have been even more problematic in Japan than in the US. One obstacle has been limited funding from the government and only slowly increasing numbers of judges, despite some reform proposals beginning in 1998 from a LDP policy-making body.<sup>324</sup> Another problem is lawyers' fees. The "American rule" is generally followed, although the winning party can claim its lawyers' fees from the losing party in some tort actions, and there are also now some discussions about possible reforms.<sup>325</sup> This may exacerbate delays, and certainly can be a barrier to claims by a (non-tort) plaintiff of limited means. Another impediment is the prohibition on pure contingency fees. *Bengoshi* must charge a minimum up-front retainer fee set by Bar Association rules (although this was often honoured somewhat in the breach, perhaps underlying revisions in 1995 which reduced that component and boosted the fees which had to be charged upon success in court).<sup>326</sup> Limited entry into the profession also means that high fees can be charged, although some competition from various "lawyer-substitutes" may dampen this somewhat,<sup>327</sup> and in transnational matters *bengoshi* do not seem much more expensive than lawyers in other major

England, for instance, and at 25 percent in Victoria. Compare Zander, above n 215; R White & R Atkinson "Personal Injury Litigation, Conditional Fees and After-the-Event Insurance" (2000) 19 CJQ 118, 119-121; Andrews, above n 60.

<sup>322</sup> Nottage and Wollschlaeger, above n 17, 272 ("Figure 3" therein). But see Fisher, above 16 (not including District Court data).

<sup>323</sup> P Pepperell "Legal Services: Who Is Being Served?" (2000) 23/36 TCL 1. Compare Posner, above n 6, 120 (legal aid in the UK was already about NZ\$2 billion by 1994); New Zealand Law Commission, above n 221, 14 ("eligibility for legal aid is currently set so low (so low as even to exclude some social welfare beneficiaries) that those who are neither rich nor very poor are in practice denied access to legal services").

<sup>324</sup> Nottage, "Cyberspace", above n 159. Japanese judges also do not have legally qualified clerks to assist in research and preparation of judgments, although District Court judges are assigned to assist Supreme Court justices with their enormous caseload. Compare generally P Jamieson "Of Judges, Judgments and Judicial Assistants" (1998) 17 Civil JQ 395.

<sup>325</sup> See for example K Sugii "*Bengoshi Hiyo no Haisosha Futan no Mondaiten* [Problems with the Principle that the Losing Party Bears Lawyers' Costs]" (1997) 1112 Juristo 41.

<sup>326</sup> See D F Henderson "The Role of Lawyers in Japan" in H Baum (ed) *Japan: Economic Success and Legal System* (de Gruyter, Berlin/New York, 1997) 27.

<sup>327</sup> See also J M Ramseyer "Lawyers, Foreign Lawyers, and Lawyer Substitutes: The Market for Regulation in Japan" (1986) 27 Harv J Int'l L 500; R Miller "Apples vs Persimmons: Let's Stop Drawing Inappropriate Comparisons between the Legal Profession in Japan and the United States" (1987) VUWLR 201.

jurisdictions.<sup>328</sup> Legal aid is notoriously limited.<sup>329</sup> Parties who persevere with court proceedings then meet the slow pace of “trial by colloquy”.<sup>330</sup> Reforms to the Code of Civil Procedure, in effect from 1 January 1998, were designed to speed up the process.<sup>331</sup> Compared to the Woolf proposals, however, these were rather narrow – driven primarily by the judiciary (in particular) trying to further improve efficiency without having to push for more funding for the courts, which might risk sending the wrong political signals. Similar tendencies remain apparent in a second round of Code reforms in effect from 2004.<sup>332</sup> On the other hand, delays may be offset by the regular award of pre-judgment interest in civil matters,<sup>333</sup> and by effective and often used summary debt collection actions (*tokusoku*) in Summary Courts.<sup>334</sup> But this is little consolation in light of the other difficulties just mentioned. Finally, despite amendments to legislation on execution of judgments, Japan still has several problems with the system under which its bailiffs seize debtor assets.<sup>335</sup> Although statutory exceptions to the assets available for judgment execution are very limited, bringing Japanese law closer to English and New Zealand law, the limited markets for auctioned (second-hand) goods and high internal transport costs mean that in practice Japan probably lies closer to the US.

Many of these “institutional barriers” to litigation have long been criticised by US commentators, although perhaps overly so.<sup>336</sup> Such critiques seem rather ironic

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<sup>328</sup> See T Kitagawa and L Nottage “Globalization of Japanese Corporations and the Development of Corporate Legal Departments: Problems and Prospects” (Paper presented at the conference on “The Emergence of an Indigenous Legal Profession in the Pacific Basin” at Harvard Law School, 11-14 December, 1998).

<sup>329</sup> In 1992, for instance, it amounted to Yen 207 million (about NZ\$3 million). Only 7.8% was government funded; most came from *bengoshi*. See (Zaidan Hojin) Horitsu Fujo Kyokai Kanagawa-ken Shibu (ed) *Nyujirando no Horitsu Fujo Seido: Shisatsu Hokokusho [New Zealand’s Legal Aid System: Inquiry Report]* (Horitsu Fujo Kyokai Kanagawa-ken Shibu, Yokohama, 1995) 39-40.

<sup>330</sup> Buehring-Uhle, above n 157.

<sup>331</sup> Law No 109, 1996 (“New CCP”). See generally Y Taniguchi “The 1996 Code of Civil Procedure of Japan: A Procedure for the Coming Century?” (1997) 45 AJCL 767.

<sup>332</sup> See Y Wada “Merging Formality and Informality in Dispute Resolution” (1997) 27 VUWLR 45, 53; Abe, above n 148; L Nottage “Civil Procedure Reforms in Japan: The Latest Round” (2005) 22 *Ritsumeikan Law Review* 81.

<sup>333</sup> Indeed, given the very low interest rate environment in Japan for the last few years (almost zero for deposits), awards at 5% for civil matters (Civil Code (Law No 89, 1897) art 404) or 6% for commercial matters (Commercial Code (Law No 48, 1900) may increase the pressure on a party, realising that it has a poor case, to settle or drop the case quickly. That pressure grows because Civil Code art 405 allows compounding of such interest after one year. This goes even further than English or New Zealand law (compare the still unimplemented proposal to allow more extensive compounding, recommended in New Zealand Law Commission *Aspects of Damages: The Award of Interest on Money Claims* (Report No 28, Wellington, 1994).

<sup>334</sup> New CCP arts 392-396; M Kondo “Reform of Civil Litigation: Some Thoughts From Japan” (1997) 19 *Liverpool L Rev* 89, 105-106. For trends over the last century, see C Wollschlaeger “Historical Trends of Civil Litigation in Japan, Arizona, Sweden and Germany: Japanese Legal Culture in the Light of Judicial Statistics” in H Baum (ed) *Japan: Economic Success and Legal System* (de Gruyter, Berlin/New York, 1997) 89.

<sup>335</sup> Davis, above n 157, 335-345; F G Bennett “Civil Execution in Japan: The Legal Economics of Perfect Honesty” (1999) 177 *J of Law and Politics* (Nagoya University) 1.

<sup>336</sup> Famously, J Haley “The Myth of the Reluctant Litigant” (1978) 4 *J Japan Studies* 359. J M Ramseyer and M Nakazoto *Japanese Law: An Economic Approach* (U Chicago Press, Chicago, 1998)

from an English law perspective, which shows up significant problems with access to justice in the US. Further, greater enforcement formality is likely to result in Japan from the final report of the Judicial Reform Deliberative Council (*shiho kaikaku shingikai* or “Reform Council”), delivered to the Prime Minister on 12 June 2001. It included wide-ranging proposals to expand access to civil justice, such as:<sup>337</sup>

- further boosting numbers of *bengoshi* and allowing for more “lawyer-substitutes”;
- related creation of new postgraduate “Law School” programs;
- introducing a partial “loser-pays” (or “English”) rule for attorney fees;
- reducing court filing fees;
- reducing by half the time needed for civil litigation;
- improving processes for enforcing judgments;
- more specialist procedures, including extending a new one-day procedure to larger claims;
- proposals for group litigation; and
- more deployment of information technology and ADR.

However, many key recommendations represent compromises or leave important points to be resolved, and prompt implementation of all these measures will no doubt prove difficult. Civil litigation rates in Japan have already increased over the 1990s, particularly in areas with more *bengoshi*, but much of this is *tokusoku* debt enforcement related to economic slowdown.<sup>337a</sup> Although Japanese law may still exhibit less enforcement formality than US law, both exhibit noticeably less again compared to English and New Zealand law.

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140-141) point out that delays in reaching judgment in contested cases in Japanese District Courts in 1994 are similar to those experienced in Second Circuit District Courts, and not much greater than in District Courts for all Circuits that year. However they acknowledge that it depends on what courts are compared. (One should add that the types of suits, and the rates and timing of settlements for instance, should be compared as well.) They also fault Haley for downplaying Japanese courts’ ability to impose monetary penalties for not complying with injunctions, and overlooking contempt powers (Ramseyer and Nakazoto, 147-150). However, those powers appear much less extensive than in Anglo-New Zealand law, at least. Compare also Y Watanabe, S Miyazawa, S Kisa, S Yoshino and T Sato *Tekisutobukko Gendai Shiho [Textbook on the Contemporary Judicial System]* (2 ed, Nihon Hyoronsha, Tokyo, 1994) 150-151; Davis, above n 157.

On the other hand, Haley (above n 43, 30) himself recently has argued that enforcement at least of competition law in Japan may not be as weak as some have suggested. See also J O Haley “Error, Irony, and Convergence: A Comparative Study of the Origins and Development of Competition Policy in Postwar Germany and Japan” in B Grossfeld and others (eds) *Festschrift fuer Wolfgang Fikentcher zum 70 Geburtstag* (JCB Mohr, Tuebingen, 1998) 876.

<sup>337</sup> L Nottage “Japan’s Impending Reforms of the Administration of Justice: Far From Final” (2001) 48 *CCH Asiawatch* 5; L Nottage “Japan’s New Arbitration Law: Domestication Reinforcing Internationalisation?” (2004) 7 *International Arbitration Law Review* 54; Nottage above n 332; L Nottage “Build Postgraduate Law Schools in Kyoto, and Will They Come - Sooner and Later?” (2005) 7 *Australian Journal of Asian Law*.

<sup>337a</sup> Compare T Ginsburg & G Hoetker “The Unreluctant Litigant? An Empirical Analysis of Japan’s Turn to Litigation” (2006) 35 *Journal of Legal Studies* 31 with T Tanase “Soshoriyo to Kindaika Kasetsu [Litigation Use and the Modernisation Hypothesis]” in *Minjisoshoho Riron No Aratana Kochiku [New Constructions in Civil Procedure Law Theory]* (Tokyo, Yuhikaku, 2001).

As a second “variety” of formality differing between US and English law, Atiyah and Summers define “truth formality” as the degree to which a legal system identifies “true facts” to which legal rules and other legal phenomena are related.<sup>338</sup> They suggest that all legal systems strive to recognise this to a degree, to implement rules of law embodying underlying substantive social policies for instance, and to allow (even in formally oriented systems) judges encountering concrete social realities to bring the law up to date. They argue, though, that overall the trial process in English law exhibits more truth formality.<sup>339</sup> Two points they make relating to the legal profession, and five relating more to civil procedure per se, can be readily extended to New Zealand. At first glance, many of these also seem to apply to Japan, suggesting higher truth formality and thus a tension with its overall more substantive orientation. Closer consideration of the institutional and other realities of Japanese trial process, however, brings Japan closer to the US at least in some of those respects as well.

One factor perceived by Atiyah and Summers as contributing to greater truth formality in English law lies again in the nature of the legal profession.<sup>340</sup>

Most members of the English bar are of high quality, and most have to acquire extensive courtroom practice, if they are to remain in the profession at all. Although today some would say that there is a greater number of less competent barristers in England than there has ever been before, few of these less competent barristers would ever be entrusted with important litigation.

Despite the further changes to the English legal profession, mentioned above,<sup>341</sup> the contrast with the rather motley lot of trial lawyers in the US remains. A similar contrast can be made for New Zealand, where functional specialisation in litigation has emerged. So too for Japan, where a still restricted cohort of *bengoshi* specialise primarily in court work.<sup>342</sup> Yet greater time pressures on them due to their limited numbers, exacerbated by delays in crowded courts, must be considered too. In practice, then, truth formality seems less likely to be fostered than in England or even New Zealand. It will be further diminished following the Reform Council’s proposal to boost *bengoshi* numbers, one key initiative that has been quite promptly phased in.<sup>343</sup>

Secondly, Atiyah and Summers argue that rules of practice and professional ethics greatly restrict the contacts English barristers may have with witnesses prior to trial. New Zealand does not have such strict rules; but it would not countenance the degree of “coaching” permitted in the US, encouraging witnesses or clients to fabricate or embellish facts.<sup>344</sup> In Japan there are only limited restrictions, and some “coaching” is common in practice.<sup>345</sup>

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<sup>338</sup> Atiyah and Summers, above n 2, 18.

<sup>339</sup> Above n 2, 157-169.

<sup>340</sup> Above n 2, 162.

<sup>341</sup> For example Zander, above n 124; Flood, above n 126.

<sup>342</sup> Hamano, above n 159.

<sup>343</sup> Nottage, above n 237.

<sup>344</sup> Atiyah and Summers, above n 2, 163-164. Compare D Webb *Ethics, Professional Responsibility and the Lawyer* (Butterworths, Wellington, 2000).

<sup>345</sup> The only real limit is Art 54 of Japan’s Code of Ethics for Practising Attorneys (2 March 1990, available in authoritative translation at <<http://www.nichibenren.or.jp/english/1att.htm>>). This states that a *bengoshi* “shall not entice a witness into committing perjury or making a false statement, nor ... submit false evidence”. Yet this appears to be interpreted narrowly, in light of Japan’s adoption of the adversary

Thirdly, Atiyah and Summers stress that the finder of fact in England is mostly a judge with extensive trial experience, rather than the jury empanelled on a one-off basis even for much civil – including contract – litigation in the US.<sup>346</sup> More recent proposals to abolish or reform the nature of jury trials in remaining fields of civil litigation in England, such as complex fraud cases, and in criminal trials in New Zealand, therefore may be driven by a greater concern for truth formality, although many of the arguments favouring reform focus on cost efficiencies.<sup>347</sup> Conversely, the long campaign that has recently led to the revival of jury trials in Japan,<sup>348</sup> remarkable for a jurisdiction which has drawn heavily on the civil law tradition,<sup>349</sup> can be seen as another emergent substantive element in Japanese law. At present, trained career judges do still make the findings of fact in Japan. Nonetheless, greater time pressures regarding hearings may mean that less truth formality emerges than in English and New Zealand trial processes. Further, the Council's recent report includes proposals to introduce "lay assessors" to assist judges in Japanese proceedings, although the respective numbers and roles have yet to be defined.<sup>350</sup>

The practical problem of time pressure on Japanese courts also impacts on the other considerations suggested by Atiyah and Summers in their comparative analysis. They argue that truth formality is also enhanced in England by comparatively few restrictions on admissibility of evidence, such as strict rules on hearsay, which are maintained in the US primarily because of the constitutional rights to jury trials.<sup>351</sup> New Zealand too has relaxed hearsay and other rules, especially in civil litigation.<sup>352</sup> But the scope of admissibility of evidence is broadest in Japan, at least in theory, for it follows a civil law approach in allowing "free evaluation of evidence".<sup>353</sup>

Fifthly, Atiyah and Summers argue that an English judge can interject questions and so on, unlike the jury in the US. This is relative, specifically in

principle: see for example Nihon Bengoshi Rengokai (ed) *Chushaku Bengoshi Rinri [Commentary on Attorney Ethics]* (2 ed, Yuhikaku, Tokyo, 1996) 198-201. The practical effect of this proscription is further diminished because there is no reported judgment holding a witness guilty of perjury, under art 169 of the Penal Code (Law No 45, 1908), in a civil matter. Thanks are due to Shiro Kawashima for pointing this out.

<sup>346</sup> Atiyah and Summers, above n 2, 164-165.

<sup>347</sup> For example F Page "What is Fraud?" (1997) 147 NLJ 321. See also A M Pritchard "A Reform for Jury Trial" (1998) 148 NLJ 475.

<sup>348</sup> R Lempert "A Jury for Japan?" (1992) 40 AJCL 37; M Dean "Trial by Jury: A Force for Change in Japan" (1995) 44 ICLQ 379; K Anderson & M Nolan "Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (Saiban-in Seido) from Domestic Historical and International Psychological Perspectives" (2004) 37 *Vanderbilt Journal of Transnational Law* 935.

<sup>349</sup> Compare M Dubber "The German Jury and the Metaphysical *Volk*: From Romantic Idealism to Nazi Ideology" (1995) 43 AJCL 227.

<sup>350</sup> Nottage, above n 237.

<sup>351</sup> Atiyah and Summers, above n 2, 165, 169-175. Compare N Demleitner "More than 'Just' Evidence" (1999) AJCL 516 (conflating American with English law).

<sup>352</sup> M Casey *Garrow & Casey's Principles of the Law of Evidence* (8 ed, Butterworths, Wellington, 1996) 43-46, 61-68; A Tompkins "Hearsay" in A Tompkins and J Gallen (eds) *Evidentiary Issues* (Wellington, New Zealand Law Society, 1996). See for example *Juken Nissho Ltd v Northland Regional Council* (15 May 2000, unreported, Court of Appeal, CA 68/00, Richardson P, Gault and Thomas JJ).

<sup>353</sup> K Shindo *Shin Minji Soshoho [New Law of Civil Procedure]* (Kobundo, Tokyo, 1998) 475-479. Compare generally M Damaska "Free Proof and Its Detractors" (1995) 43 AJCL 343.

comparison with the jury trial in the US, for most judges in England – and New Zealand – use this power quite sparingly in civil trials. Nonetheless, in this respect too, Japanese trial process seems to involve more truth formality: again following a civil tradition, the judge has a right (indeed, sometimes a duty) of “clarification” (*shakumeiken*). The latter has been used particularly in pro se litigation, thus helping to uncover the relevant facts even when there is an imbalance in sophistication among the parties to the case. This trait of Japanese civil procedure developed out of criticism of judges’ reluctance to clarify matters in the 1950s and early 1960s, itself a reaction to perceived excesses prior to World War II.<sup>354</sup> A well-known judge has written that more use of *shakumeiken* may be expected as a result of the CCP reforms.<sup>355</sup> Clearly this will depend in part on whether those reforms succeed in relieving pressure on congested court dockets, to allow judges more leeway to exercise this clarifying power. It is also unclear how *shakumeiken* will be affected by more *bengoshi* and greater availability of expert witnesses, recommended more recently by the Reform Council.

The qualification regarding court congestion also can be directed against a sixth point suggested by Atiyah and Summers as promoting more truth formality: appellate courts’ powers to review lower courts’ findings of fact as well as conclusions of law. They stress the restricted scope for this in the US as opposed to England, where courts are assisted by full written transcripts of the oral hearings.<sup>356</sup> In Japan, as in England or New Zealand, the first appeal can be of both fact and law. There also have been very few restrictions placed on admissibility of new legal arguments upon appeal.<sup>357</sup> In practice, however, the potential for careful appellate review of the evidence has been diminished because a verbatim transcript is not always kept. Partly this was due to limited numbers of court stenographers (*sokikan*). Following the CCP reforms, no new stenographers were to be appointed. Tape recordings have become valid evidence for review upon appeal,<sup>358</sup> however, which may increase the scope for careful fact-finding at appellate levels.

To that end, seventhly, Atiyah and Summers emphasise that “an English judge is expected to give reasons for his findings of fact where the facts have been seriously controverted”.<sup>359</sup> This expectation has grown in recent years. It has been undermined somewhat in New Zealand, but one judge has suggested (extra-judicially) that the tide is about to turn.<sup>360</sup> A related tendency is for English courts to set out the facts of the case in more detail, compared to US courts.<sup>361</sup> New Zealand courts remain similar to the former, while Japanese courts are closer to the latter, although perhaps even more succinct (especially in older judgments). Certainly it is uncommon for a Japanese

<sup>354</sup> T Hattori and D Henderson *Civil Procedure in Japan* (Transnational Juris Publications, Dobbs Ferry (NY), 1985 looseleaf) §7.02[10][d].

<sup>355</sup> J Nara “*Shinminjisoshoho to Shakumeiken o meguru Jakkan no Mondai* [Some Issues in the “Right to Clarify” Under the New Code of Civil Procedure]” (1997) 1613 *Hanrei Jiho* 3 (Part 1); 1614 *Hanrei Jiho* 3 (Part 2).

<sup>356</sup> Atiyah and Summers, above n 2, 165.

<sup>357</sup> Hattori and Henderson, above n 254, §8.02[1], [3].

<sup>358</sup> Shindo, above n 253, 765.

<sup>359</sup> Atiyah and Summers, above n 2, 165.

<sup>360</sup> Hammond, above n 112 (contrasting *Glannery v Halifax Estate Agencies Ltd* [2000] 1 All ER 373 with *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190).

<sup>361</sup> See also generally J L Goutal “Characteristics of Judicial Style in France, Britain and the USA” (1976) 24 *AJCL* 43.

judgment to state why someone's evidence is not preferred, especially when this turns on credibility of witnesses. This may be less necessary, however, due to the burden of proof in civil matters being set higher than the balance of probabilities standard in most common law jurisdictions.<sup>362</sup>

A further point mentioned briefly by Atiyah and Summers, in discussing truth formality, may provide a good test of comparative formality overall. They think that:<sup>363</sup>

a more formal system is likely to be more effective in inducing voluntary out-of-court settlements of disputes. All legal systems, whether more or less formal, must rely heavily on encouraging such settlements because their court systems will otherwise be in danger of being overwhelmed with trial work. But such settlements are less likely to be made where the alternative of authoritative coercive resolution in court is not itself highly truth oriented. Certainly, parties who have little or no confidence in the truth-finding capacities of the courts could not so easily be persuaded to settle their claims (or defences) on the basis of the facts as they actually are. Some settlements would doubtless still be made, but they would tend to reflect bargaining power to a much greater degree ...

They go on to contrast the highly predictable nature of English rules in relation to personal injury claims, and seemingly high settlement rates, compared to the US.<sup>364</sup>

Richard Posner has pursued these notions, attempting to develop further hypotheses and to test them empirically. He pointed out that the relatively smaller legal system in the UK, in terms of per capita lawyers and cases filed or tried, may be explained by greater legal certainty.<sup>365</sup> Overall, certainty was said to be implied by longer average age of Court of Appeal citations to other courts, compared to US Federal Courts of Appeals' citations to other courts, both overall and in important sub-categories such as "tort and contract" cases. Further evidence offered included the lower rate of appeals in English courts, which Posner suggested might be even lower if England had a "loser-pays" rule (an additional incentive to appeal).<sup>366</sup> He acknowledged that aggregate comparisons must be taken with a grain of salt, however, and therefore considered evidence of more certainty in specific areas.

One measure of certainty of contracts was given as an independent agency's ranking of the business risk of non-enforceability of contracts. In fact, both the UK and the US obtained 3.5 on a scale of 0 to 4 (with Switzerland getting the highest at 3.6, while "Japan, Singapore and the Western European countries are also in the 3's").<sup>367</sup> That seems to go against Posner's hypothesis; but the question seems ambiguous anyway – it might be interpreted by respondents as asking how likely contracting parties are likely to breach their obligations, rather than how effectively contract claims can be pursued through the courts. Clearer questions were posed by Simon Deakin and others

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<sup>362</sup> Hattori and Henderson, above n 254, §7.05[13]]b].

<sup>363</sup> Atiyah and Summers, above n 2, 159.

<sup>364</sup> Above n 2, 175-176. This has been further expanded by the House of Lords approving the use of actuarial evidence in *Wells v Wells* [1998] 1 WLR 319. See generally D Kemp (assisted by P Mantle) *Damages for Personal Injury and Death* (7 ed, Sweet & Maxwell, London, 1999).

<sup>365</sup> Above n 6, 80-84. A second possibility, to which he devotes much less attention perhaps because difficult to measure, is that English law (perhaps like Japanese law: see Henderson, above n 244) may provide for fewer justiciable rights compared to US law. A third is the continued prohibition of pure US-style contingency fees.

<sup>366</sup> Above n 6, 84-89.

<sup>367</sup> Above n 6, 94-95.

in their later survey research; but unfortunately the latter only compared British, German and Italian firms.<sup>368</sup>

Secondly, like Atiyah and Summers, Posner considered accident cases. He pointed to the quality of judges, lack of jury involvement, and the loser-pays rule (through discounting the filing of weak cases or interposing of weak defences in strong cases) as reducing the probability of legal error. He noted also the much lower rate of personal injury litigation in the UK, which could be seen as consistent with greater certainty of legal outcome. Yet Posner appeared more impressed by the possibility that UK accident victims do not sue because damages are comparatively low and because there are effective alternative means to compensation (for example national health cover).<sup>369</sup>

By abolishing almost all claims relating to personal injury by accident since 1974,<sup>370</sup> New Zealand cannot be compared on this point. But Ramseyer and Nakazato have showed empirically that accident victims in Japan claim and obtain out of court very close to what the courts would award. They tie these patterns to the highly predictable rules that have developed in this area, compared precisely to the US.<sup>371</sup> As they point out, high predictability can overcome even high costs of litigation, in encouraging bargaining “in the shadow of the law”.<sup>372</sup> The high predictability and settlement rates observed in this area of Japanese law, however, appear striking only relative to the US. English rules and processes may be even more predictable, although that is probably putting the case too strongly.<sup>373</sup> Just as importantly, commentators have faulted Ramseyer and Nakazato for focusing on an exceptional area in Japanese law.<sup>374</sup>

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<sup>368</sup> S Deakin, C Lane and F Wilkinson “Contract Law, Trust Relations, and Incentives for Co-Operation: A Comparative Study” in S Deakin and J Michie (eds) *Contracts, Cooperation and Competition* (Oxford UP, Oxford, 1997) 105, 125-127. British firms had a higher likelihood of “legal action against a customer or supplier committing a breach of contract” compared to German firms, but lower likelihood compared to Italian ones. British firms also thought “the outcome of legal action” was not as clear, compared to their German counterparts; but clearer compared to Italian firms.

<sup>369</sup> Posner, above n 6, 96-101. See also P S Atiyah “Tort Law and the Alternatives: Some Anglo-American Comparisons” (1987) *Duke LJ* 1002; compare B Markesinis “Litigation Mania in England, Germany and the USA: Are We So Very Different?” (1990) 49 *CLJ* 232. Later in his Clarendon Lectures, Posner (above n 6, 106-111) speculates that more deference to elites or authority in the UK constitutes a difference in “legal culture” compared to the US. Similarly, Kritzer (above n 61, 146-52) notes much certainty in quantum issues, but potential uncertainty with regard to liability given more restricted pre-trial discovery; and he focuses on alternative mechanisms (including also criminalisation) which he ties expressly to such cultural differences. Compare generally H Genn *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Clarendon, Oxford, 1987).

<sup>370</sup> See generally I Campbell *Compensation for Personal Injury in New Zealand: Its Rise and Fall* (Auckland UP, Auckland, 1996).

<sup>371</sup> J M Ramseyer and M Nakazato “The Rational Litigant: Settlement Amounts and Verdict Rates in Japan” (1989) 17 *J of Legal Studies* 262.

<sup>372</sup> This phrase is from the seminal article by R H Mnookin and L Kornhauser “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88 *Yale LJ* 950, also cited by Atiyah and Summers (above n 2, 159 n 5). See also J M Ramseyer “Reluctant Litigant Revisited: Rationality and Disputes in Japan” (1988) *J Japan Stud* 111. Of course, even perfect predictability will not lead to settlement if litigation costs are greater than the plaintiff’s expected value of litigated outcome, because no rational litigant would then sue.

<sup>373</sup> Complaints about problems in pursuing personal injury claims were one impetus given for the proposals which emerged in the Woolf Report: see Woolf, above n 212.

<sup>374</sup> Compare for example D H Foote “Resolution of Traffic Accident Disputes and Judicial

Although predictability of outcome may be a factor in explaining litigation and settlement patterns in other areas of Japanese law, such as product liability, the data is far from conclusive.<sup>375</sup> In comparison, English and New Zealand seem decidedly more predictable in their contract law, as detailed in my other published work. Insurance and alternative dispute resolution mechanisms are also much less pervasive, so problems in obtaining and enforcing judgments become much more important. Thus, Japanese law may indeed be more predictable than US law, but both seem distinctly less so than English or New Zealand law. This suggests that the latter exhibit more truth formality.

### III Conclusions

The foregoing analysis has been necessarily wide-ranging and selective. In itself, and even in conjunction with my more focused published inquiries, it cannot claim to be definitive. Nonetheless, the evidence mustered in this Paper appears to confirm the usefulness of Atiyah and Summers' analytical framework (above Part I).

One general attraction of their approach is that it invites consideration not just of the "law in books", but also the "law in action", which is essential for sound comparative law.<sup>376</sup> Studying legal reasoning can often lead to focusing on the former; but the discussions above were able to readily bring in the latter, including the legal profession and court structure (Part II.A), legislative process (Parts II.B), judicial reasoning, and legal education (Part II.C). Atiyah and Summers' two varieties of formality, discussed above (Part II.D), further invited a focus on the law in action by readily allowing incorporation of more findings from social scientific research. This is also true of other published work proposing another variety of formality, "didactic formality" – the tendency of the law in books in England and New Zealand to lead the law in action, rather than vice versa as in Japan and the US.<sup>377</sup>

Secondly, considerable coherence of legal systems emerges in New Zealand and Japanese law, not just US and English law. At first glance, Japanese law does appear to exhibit a surprisingly high degree of truth formality; but this tendency becomes less pronounced when some realities of Japanese judicial process are considered. Those realities, in turn, are related to low enforcement formality. Japan also reveals a more substantive approach consistently along all the dimensions of formal

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Activism in Japan" (1995) 25 *Law in Japan* 19 (charting the active role of Japanese courts in the 1960s in developing these more predictable rules, on both liability and damages, in response to rapid increases in traffic accidents in the 1950s); T Tanase "The Management of Automobile Disputes: Automobile Accident Compensation in Japan" (1990) 24 *L & Soc Rev* 651 (stressing also the importance of insurance schemes, out of court dispute resolution forums, and information about all these mechanisms facilitating settlements). See also K Hamada "Explaining the Low Litigation Rate in Japan" in M Aoki & G Saxonhouse (eds) *Finance, Governance, and Competitiveness in Japan* (Oxford UP, Oxford, 2000) 179, 180 (generally criticising Ramseyer's frequent "extreme overgeneralisation").

<sup>375</sup> See for example L Nottage "The Present and Future of Product Liability Dispute Resolution in Japan" (2000) 27 *Wm Mitchell L Rev* 215; L Nottage "New Concerns and Challenges for Product Safety in Japan" (2000) 11/8 *Aust PL Reporter* 100.

<sup>376</sup> See generally R Pound *Introduction to the Philosophy of Law* (rev ed, Yale UP, New Haven, 1955); and L Nottage "Convergence, Divergence, and the Middle Way in Unifying or Harmonising Private Law" (2004) 1 *Annual of German and European Law* 166.

<sup>377</sup> Nottage 2007c.

reasoning described above.

Thirdly, this Paper has shown how Atiyah and Summers' framework can be extended to compare jurisdictions other than England and the US, such as New Zealand and Japan. Admittedly, it remains difficult to say whether Japanese law is more or less substantive than US law in terms of each of these parameters. Overall, it probably is and will remain less so – that is, somewhat more formal – than US law. Japan's unitary and centralised constitutional system promotes more source-oriented standards of validity and greater rank formality, amounting to more authoritative formality. On the other hand, content formality may be less than in the US, although empirical research is particularly needed on this point. Mandatory and interpretive formality appears somewhat greater, although Japanese law also prefers substantive reasoning to "hard and fast rules". This is reflected in judicial reasoning patterns, and in the influence of disciplines other than law in legal education and scholarship (especially in leading institutions), although substantive reasoning tendencies are probably less than among US counterparts. Enforcement formality is probably lower than in the US, but recent empirical comparisons indicate that this may be less so than perceived still by many US commentators, and the recent proposals to reform civil justice in Japan should significantly raise enforcement formality. They may also promote more truth formality; but some proposals (such as a new system for lay assessors and a possibly more diverse legal profession) may encourage more substantive tendencies, and current realities generate less truth formality than one would expect. As this summary indicates, however, the picture is complicated by existing or likely changes in Japan's legal system. There are also indications that US law has similarly moved towards greater formality over the last decade or so. Nonetheless, it is clear that the overall orientation of both legal systems remains highly substantive. It is also probable that the distance between the two is much less than the distance between this pair of legal systems on the one hand, and English and New Zealand law on the other.

The latter pair maintains a distinctly more formal orientation. This overall conclusion retains its force, despite similar difficulties in "summing up" relative positions along multiple parameters, and especially the complications stemming from patterns of change over recent decades. On the one hand, New Zealand law developed less authoritative formality from the 1970s through to the early 1990s, as more attention was placed on human rights and biculturalism, perhaps supported by a somewhat more diverse legal profession than in England. This trend was also related to broader innovations in judicial reasoning, promoting less interpretive and mandatory formality, and a movement away from "hard and fast rules". Legislative interventions over this period reinforced a reduction in content formality. Enforcement and truth formality also were probably somewhat less than in England. However, there appears to be a distinct movement back towards more formal reasoning, especially in authoritative, content and mandatory formality, over the 1990s. This tendency is reinforced by pressures on New Zealand's legislature and appellate courts, an enduring black-letter law tradition in legal education, and other institutional factors.

By contrast, England appears to have overcome a formalist reaction to earlier innovations in judicial reasoning, now moving back towards greater interpretive formality and generally towards a more substantive orientation. Particularly significant are the growing influence of EU law, devolution and constitutional reform, and more gradual transformations in the legal profession and the civil justice system. Nonetheless,

the shift is slow and not always consistent. Most importantly for this Paper's inquiry into "convergence" theory, it cannot be said that England has now drawn closer to the US than to the legal systems it spawned centuries ago, notably New Zealand. Instead, the distance between the contemporary English and New Zealand legal systems is very probably closer than the distance between them, on the one hand, and both US and Japanese law on the other. Diagrammatically, therefore, the four jurisdictions can be positioned approximately as in the top line of Figure 2 below.

To obtain a clearer picture, one strategy might be to extend the comparative compass to include more legal systems, especially those sharing common roots with Japan and the US (such as Germany),<sup>378</sup> or with England and New Zealand (such as Australia). A more manageable alternative is to examine in much greater detail some of the points mentioned by Atiyah and Summers, or those developed in Part II of this Paper. My other published work links some of the discussion so far to the development of contract law theory generally, or tightens the focus onto two dimensions of legal reasoning in three main areas of contract law, some narrower than others. The results are shown to be largely consistent with the conclusions just mentioned, based on a comparison of the four legal systems more generally, and therefore reinforce those conclusions.

This quite persistent dichotomy between substantive reasoning based legal systems in both Japan and the US, and more formal reasoning based systems in England and New Zealand, generates important implications for debates in comparative law. On the one hand, it helps systemically counter occasional assertions, still, that Japanese law is unique or radically different from US law. On the other, it cautions against more recent over-generalisations proclaiming the Americanisation of Japanese law – or equally, following this analysis, the "Japanisation of American law". Both are certainly more substantive reasoning based. But the legal institutions underpinning that orientation are not always the same, which helps explain why specific doctrines are not always the same either. Further, in some (perhaps most) respects Japanese law prefers more formal approaches than the US, whereas in others (especially perhaps enforcement formality) it is less so.

In addition, the "second-order reasons" or values underpinning the overall system and framing the content of the substantive considerations more readily flowing through into the law, in both Japan and the US, are not necessarily the same. For example, "good faith" is accepted as a general principle of contract law in both countries and their judicial systems find ways to support application of that principle – unlike England and New Zealand. Yet Japanese law may still provide more communitarian underpinnings and content to good faith than US law, which tends to favour "economistic" rationales based on methodological individualism.<sup>379</sup> Second-order reasons preferred in the US probably bear more similarities with those preferred in England in New Zealand, but those countries' more formal legal structures

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<sup>378</sup> See briefly for example L Nottage "Contract Law and Practice in Japan: An Antipodean Perspective" in H Baum (ed) *Japan: Economic Success and Legal System* (de Gruyter, Berlin, 1997) 197, 211-212.

<sup>379</sup> See generally Nottage 1996 above n c. Compare the work of Ramseyer, assuming – heroically – that *homo economicus* is identical in both the US and Japan: C Freedman & L Nottage "The Chicago School of Economics and (Japanese) Law: Resisting the Invasions of Stigler and Ramseyer" 2006-3 *Centre for Japanese Economic Studies: Research Papers* [www.econ.mq.edu.au/cjes/research/research\\_papers#2006](http://www.econ.mq.edu.au/cjes/research/research_papers#2006).

make it harder for them to influence reasoning and doctrines.

Thus, as well as lessons in “re-orienting” understandings of Japanese law, extending the framework initially proposed by Atiyah and Summers offers broader lessons for comparative law methodology, and ongoing debates about the nature and extent of the globalisation of law and socio-economic relations. Strong “convergence” theory is challenged first by differences in first-order reasoning and related institutions even among substantive reasoning based systems, secondly by potentially even more varied second-order reasonings, and finally by systems which remain quite coherently and resolutely wedded to more formal legal reasoning.

