

**A SERIES ON SOVEREIGNTY IN THE 21<sup>ST</sup> CENTURY  
ORGANISED BY THE INSTITUTE FOR COMPARATIVE AND  
INTERNATIONAL LAW AT THE UNIVERSITY OF MELBOURNE,  
AUSTRALIA**

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Wednesday 19 March 2003**

**“ANOTHER SPIN ON THE MERRY-GO-ROUND”**

In 1963 one commentator described the sovereignty of parliament as a “merry-go-round.”<sup>1</sup> I had a spin of my own on it in 1970. I should have known better than to attempt such giddiness again. What is more, the pace of the contraption has accelerated. Life was simpler in 1970. Subject to the odd manner and formalism, Dicey ruled. Rights talk was vaguely impolite.<sup>2</sup> Rules of recognition and quests for grundnorms were of interest mainly in relation to South Africa and Rhodesia. They seemed safely far away. In New Zealand, unburdened with federalism, we felt like inheritors of the Diceyan dream. The only cloud on the horizon was the question whether Parliamentary sovereignty was an impediment to the adoption of an entrenched bill of rights. Could parliament bind itself? My conclusion then (grounded in legal positivism, concern for democratic legitimacy, and suspicion of judicial self-aggrandisement) was that Parliament could not be so bound.

More than 30 years on, post *Factortame*<sup>3</sup> and post the constitutional reforms in the United Kingdom, Australia, and New Zealand of the 1980s and 1990s, parliamentary sovereignty seems diminished. Senior judges in the United Kingdom and New Zealand have questioned the idea of a parliament with unlimited power.<sup>4</sup> In the United Kingdom, as in New Zealand, legislative statements of rights provide registers against which legislative as well as executive action may be assessed by the courts.<sup>5</sup> In Australia, judges have drawn wide implied constitutional principles from the constitution to protect

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<sup>1</sup> J. Mitchell “Sovereignty of Parliament – Yet Again” (1963) 79 *Law Quarterly Review* 196.

<sup>2</sup> In New Zealand, freedom of speech had recently been put in its place by the Court of Appeal by being balanced against the right of Members of Parliament to entertain visitors without the embarrassment of protestors chained to the pillars of Parliament (*Melser v Police* [1987] NZLR 437).

<sup>3</sup> *R v Secretary of State for Transport; ex parte Factortame Ltd (No. 2)* [1991] AC 603.

<sup>4</sup> Lord Woolf of Barnes “Le Droit public – English style” [1995] *Public Law* 57; Sir John Laws “Law and Democracy” [1995] *Public Law* 72; Sir Robin Cooke “Fundamentals” [1988] *New Zealand Law Journal* 158.

<sup>5</sup> In the United Kingdom by explicit power to make declarations of incompatibility; in New Zealand through judicial acceptance of a similar responsibility in appropriate cases (see *Moonen v Film and Literature Review Board* [2000] 2 NZLR 9).

representative democracy and equality.<sup>6</sup> In the meantime, international agencies such as WTO are making laws for us. The citizens of New Zealand, Australia, and the United Kingdom now have access to international forums for vindication of human rights not properly protected by the domestic legal system. Debates about our constitutional arrangements have become the favoured playing field for the perennial soccer match described by Tony Honoré between positivists and natural lawyers.<sup>7</sup> Here is much sound and fury. (The positivists seem ahead at the moment on a law review count.) And the organisers of this series of lectures have indicated that they would be grateful for something more than a rehearsal of well-worn arguments. Are there any that are not threadbare?

In 1963 Mitchell described the concept of an unlimited parliament as the product merely of “a conjunction of influence at one time”. He was of the view that the authorities upon which the concept was based on re-examination did not appear to “go as far as was at one time thought”. The re-examination of the concept of unlimited sovereignty necessarily re-opened what was described as “the problem of judicial review”. Not surprisingly no concluded answer was able to be given to the problems identified “in view of the lack of modern authority and of the shifts in opinion”. Mitchell was phelgmatic:<sup>8</sup>

Essentially the accepted doctrines have grown up as beliefs based rather more on assertion than proof. From time to time it may not be foolish to ask if beliefs are really justified.

So here we go again.

Is it fanciful to have the impression that questions of sovereignty exert a particular fascination for us in Australia and New Zealand? The constitutional order in the United Kingdom has been transformed in our lifetimes with very little fuss. By comparison, we seem unaccountably anxious. Is our agitation because our independence has been only recently perfected and sovereignty seems all the more precious for that? Is it because the constitutional arrangements of our jurisdictions have been incompletely explored? Or is it because both of us have indigenous people to accommodate within the constitutional framework?

Maitland was of the view that the constitution of a country could be discerned only for a particular time and only through its general law.<sup>9</sup> In similar vein, Bagehot,<sup>10</sup> in the preface to the second edition, writes of

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<sup>6</sup> *Nationwide News Pty Limited v Wills* (1992) 177 CLR 1; *Leeth v Commonwealth* (1992) 174 CLR 455 at 480 per Deane and Toohey JJ, dissenting.

<sup>7</sup> Tony Honoré “The necessary connection between Law and Morality” (2002) 22 *Oxford Journal of Legal Studies* 489.

<sup>8</sup> Mitchell, above at n 1, 223.

<sup>9</sup> W. Maitland *The Constitutional Law of England* (1963) 538.

<sup>10</sup> *The English Constitution* 1867 (Oxford).

[t]he great difficulty in the way of a writer who attempts to sketch a living Constitution – a Constitution that is in actual work and power. The difficulty is that the object is in constant change.

We have preferred to see our constitution in terms of a political theory we have believed to express an eternal truth. If the theories of parliamentary supremacy on which our constitutions have seemed to be securely founded are not compelled by fundamental legal principle or logic, then we need to work harder to find our constitutional fundamentals. We should start with our own history. It is not self-evident that the political accommodation reached in England after the struggles between King and Parliament of the 17<sup>th</sup> century, is a sufficient explanation of the constitutions of Australia and New Zealand in the 21<sup>st</sup> century.

So I do not want to start with *Dr Bonham's case*<sup>11</sup> (which is in any event said by Baker rightly to be seen “more as a last stand than as a statement of orthodox doctrine”).<sup>12</sup> Nor do I think it worthwhile to review the slight later case-law on the topic.<sup>13</sup> I am happy to start with the assumption that the case-law, at least in my jurisdiction, does not support judicial review of the substance of legislation.

I want rather to talk about where our constitutions are today and say something about the way they might be going. I will suggest that a fixation with parliamentary sovereignty and the relative democratic merits of parliament and the courts to the exclusion of a wider perspective is impoverishing our constitutional thinking. I want to avoid the labels of supremacy and activism and protestations of democratic legitimacy. I want to suggest that our own political institutions and community expectations have moved on from a monolithic and obsolete view of the fundamentals of law as a quest for the power that trumps. And I want to suggest that it is time we too moved on to consider our constitutional arrangements without distorting them through the lens of command.

I offer these thoughts as an outsider. Our jurisdictions are very different in form. You have a written constitution and judicial power to strike down legislation inconsistent with it. Our constitution is largely unwritten and, since emancipation from the Westminster Parliament, we have never exercised judicial review of legislation. Our constitutional views now operate under a

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<sup>11</sup> (1610) 8 Co Rep 1136; 77 GR 646.

<sup>12</sup> Certainly, this was Lord Elsmere's view soon after: it was more fitting “that Acts of parliament should be corrected by the same pen that drew them than to be dashed in pieces by the opinion of a few judges”. (See L. Knafla *Law and Politics in Jacobean England: The Traits of Lord Chancellor Ellesmere* (1997) 306-309. Coke himself apparently changed his mind.

<sup>13</sup> See the survey by Karen Grau in “Parliamentary Sovereignty: New Zealand – New Millenium” (2002) 33 *Victoria University of Wellington Law Review* 354 and by Kirby P in *Building Construction Employees and Building Labourers Federation of New South Wales v Minister of Industrial Relations* (1986) 7 NSWLR 372.

bill of rights,<sup>14</sup> a register that links us to a wider world view and its jurisprudence. You do not have such a statement, and our legal systems may be diverging because of the difference. What I have to say is inevitably shaped by New Zealand's recent experience with a bill of rights, and must to that extent be a comparative view. I do not attempt to suggest how these experiences relate to domestic controversies in Australia. On both sides of the Tasman we have reason to reconsider aspects of sovereignty.

## Sovereignty

The term "sovereignty" as used of parliamentary sovereignty is a legal concept to describe powers of lawmaking which are unrestricted by any legal limit. Dicey described it in these words:<sup>15</sup>

The principle of parliamentary sovereignty means neither more nor less than this, namely, that parliament thus defined has, under the English constitution the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of parliament.

Although the theory has been criticised as "an academic formulation which does not fit the law of England,"<sup>16</sup> the supremacy of parliament in this sense has gripped.<sup>17</sup>

Is it perhaps a trap that so much constitutional writing in our shared history is based on what Latham described as the "tacit jurisprudence", derived from Austin, of the theory of law as the command of a "Sovereign"?<sup>18</sup> Has it meant that we have been deflected from identification of the basics of our constitutions by competing visions of which organ of government should have the last word? Have we failed to keep firmly in mind that the constitutional role of supervision for legality does not make the court a rival for legislative power?

Ferdinand Mount suggests we have been misled by a principle pushed to its limits:<sup>19</sup>

Indeed, the first principle is that no principle should be over-stressed or pushed to its limits. It is precisely the Royal

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<sup>14</sup> New Zealand Bill of Rights Act 1990.

<sup>15</sup> A.V. Dicey *Introduction to the Study of the Law of Constitution* (10<sup>th</sup> ed., 1959; 1<sup>st</sup> ed., 1885) 39-40.

<sup>16</sup> Ivor Jennings *The Law and the Constitution* (5<sup>th</sup> ed., 1959) 318.

<sup>17</sup> *Lee v Bude and Torrington Junction Railway Co* (1871) LR 6 CP 576 at 582 per Willes J; *British Railways Board v Pickin* [1974] AC 765 at 768; *Building Construction Employees and Building Labourers Federation of New South Wales v Minister of Industrial Relations* per Kirby J.

<sup>18</sup> R.T.E Latham *The Law and the Constitution* (1949; reprinted 1970).

<sup>19</sup> Ferdinand Mount *The British Constitution Now* (1992) 81.

absolutism of the Renaissance which, renewed and transformed into parliamentary absolutism, has destroyed our capacity for constitutional thought by asking over and over again the same question, who ultimately has the sovereign power? And insisting on an answer.

We must first understand that “parliamentary supremacy is neither the beginning nor the end of our constitutional history”.

As Latham pointed out in a passage that has become classic, wherever the formal source of law is anyone “but a single actual person”,<sup>20</sup>

the designation of him must include the statement of rules for the ascertainment of his will, and these rules, since their observance is a condition of the validity of his legislation, are rules of law logically prior to him.

Latham preferred to analyse the constitution in terms of Kelsen’s normative order. He was content to deal with the language of “sovereignty” as “approximately true” for countries with unitary constitutions. But he thought the better view to be that “even the theoretic possibility of sovereignty as a *grundnorm* is questionable”.

Latham was clear that the Austinian theory “manifestly breaks down when applied to a constitution where either there is a partition of powers between different authorities or fundamental guarantees are entrenched behind a procedure of amendment more difficult than the process of ordinary legislation”. While a partition of powers sets up a *grundnorm* which is “purely formal”, Latham recognised that, where there are constitutional guarantees, the *grundnorm* is substantial as well as formal: “it determines not only the validity but also some of the content of the rules of law below”.<sup>21</sup>

The rules of law which make up the *grundnorm* are the “sum of the principles which command the ultimate allegiance of the courts”. As such, they may remain indeterminate and may shift over time. They are however rules of law and ultimately must be capable of recognition and application by the courts.

This description is one I find compelling. It applies equally to the organising principles of constitutions which are written, partly written, or unwritten. It acknowledges that constitutions live and develop. It does not promote competitions for supremacy between courts and legislatures. It recognises that they have separate functions under the law. It requires identification of the ultimate legal rules.

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<sup>20</sup> Latham, above at n 18, 523.

<sup>21</sup> Ibid., 522-525.

Those who feel unable to shed the “law as command” approach in favour of an ultimate static norm, are driven to move sovereignty to the electorate.<sup>22</sup> That seems to me to confuse legal sovereignty with political sovereignty but in any event it does not serve to remove the problem of identification and ascertainment of will.

It may be simplistic to look for any ultimate rule of allegiance, as Hart and Wade in development of Dicey think required by the doctrine of parliamentary sovereignty. Sir Neil MacCormick<sup>23</sup> suggests rather that a constitution is a collection of rules which “interact and cross-refer”. The court’s obligation is to the “constitution as a whole.” The legal order permits constitutional change. Constitutions live. No written text can capture “the constitution as a whole”. The experience of your own High Court, the Canadian Supreme Court and the Indian Supreme Court has been that even in states with written constitutions it is necessary to look to implied constitutional principles to make the statements work.<sup>24</sup>

It needs to be acknowledged that, as Latham and Craig have both pointed out,<sup>25</sup> any identification of the constitution in terms of the principles of democracy, separation of powers or basis for judicial review is manifestly substantive.

Since we patriated our constitution, in New Zealand we have not had to confront even formal constraints on legislative power. Much less have we confronted any substantive constraints which might be implied from democratic principle or fundamental rights.<sup>26</sup> They may never arise for determination, as Latham foresaw. Clearly there are risks if the courts stray from the view of the society they serve. But ultimately if an unavoidable question about the preconditions of valid law-making by the legislature comes before the court for determination, it is difficult to see that it could be evaded. They are rules of law which it is the responsibility of the courts to identify and uphold. Lord Cooke of Thorndon has described<sup>27</sup>

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<sup>22</sup> E.W. Thomas “The Relationship of Parliament and the Courts: A tentative thought or two for the new millennium” (2000) 31 *Victoria University of Wellington Law Review* 5. There is high authority for this approach: *Australian Capital Television v The Commonwealth* (1992) 66 ALJ 695 at 703; (1992) 177 CLR 106 per Mason CJ; *Kirmani v Captain Cook Cruises* (1985) 159 CLR 351 at 442 per Deane J.

<sup>23</sup> Sir Neil MacCormick *Questioning Sovereignty: Law, state and nation in the European Commonwealth* (1999) 79-95.

<sup>24</sup> *Reference re Cession of Quebec* (1998) 161 DLR (4<sup>th</sup>) 385 suggested four “fundamental and organising principles” of the Canadian Constitutional: federalism; democracy; constitutionalism and the rule of law; and respect for minorities (at paragraph 32); *Australian Capital Television Pty Limited v The Commonwealth*.

<sup>25</sup> Paul Craig “Constitutional Foundations: The Rule of Law and Supremacy” [2003] *Public Law* 92.

<sup>26</sup> Note, however, the use of entrenchment to protect certain fundamental provisions in the Electoral Act 1993 (see s268 of that Act and also Standing Order 261 of the Standing Orders of the New Zealand House of Representatives 1993).

<sup>27</sup> Sir Robin Cooke “The Struggle for Supremacy in Administrative Law” in Michael Taggart (ed.) *Judicial Review of Administrative Action in the 1980s* (1986) 10.

the practical truth.....inherent in our system of checks and balances that every Act of Parliament, even one touching the jurisdiction of the courts themselves, is ultimately subject to interpretation by the superior courts of general jurisdiction.

The result of abandoning what Mount calls the “more grandiose definitions of parliamentary sovereignty” may not be to assert judicial supremacy to determine what law is good. It may give rise to a more modest principle of legislative primacy under which the legislation of Parliament prevails over the decisions of the courts or of subordinate lawmakers unless contrary to the constitutional rules upon which law-making validity depends.

### **The currents of the times: internationalism, pluralism, federalism, separation of functions**

Sir Kenneth Keith has pointed out that Dicey’s theory of the omnipotence of The Queen in parliament must be heavily qualified when the law of the United Kingdom is seen in its wider international context.<sup>28</sup> Even when Dicey wrote, there were many matters of importance upon which the United Kingdom Parliament could not be effective through the operation of national law alone. Whether or not national courts would enforce it, national law was subject even then to international law constraints. That inter-dependence has been vastly accelerated over the last 100 years.

There have been pressures for both devolution and transfer of important aspects of national sovereignty. Privatisation of former public power has raised issues about its control.<sup>29</sup> Paul Kennedy refers to major changes in the power of the state which “call into question the usefulness of the nation state itself”.<sup>30</sup>

The key autonomous actor in political and international affairs for the past few centuries appears not just to be losing its control and integrity, but to be the *wrong sort* of unit to handle the newer circumstances. For some problems, it is too large to operate effectively; for others, it is too small. In consequence, there are pressures for a “relocation of authority” both upward and downward, creating structures that might respond better to today’s and tomorrow’s forces for change.

These are the stresses that have led both to devolution in the United Kingdom and accession to the Treaty of Rome. Both actions were inconsistent with Dicey’s vision of sovereignty. He had no time for federalism, which he considered “a very peculiar sentiment”. He was a

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<sup>28</sup> Sir Kenneth Keith “The impact of international law on New Zealand law” (1998) 6 *Waikato Law Review* 1 at 8.

<sup>29</sup> Lord Justice Sedley *Freedom, Law & Justice* (The Hamlyn Lecture for 1999); R. Goode *Commercial Law in the Next Millennium* (The Hamlyn Lecture for 1999).

<sup>30</sup> P. Kennedy *Preparing for the twenty-first century* (1993) 131.

determined fighter against home rule for Ireland, which he regarded as a greater evil than independence because of its inconsistency with sovereignty. Dicey set his face against any plurality within the state (although such plurality, through distribution of power between King, Church and feudal magnates had been part of the law of England until Tudor times). Ferdinand Mount<sup>31</sup> reminds us:

Even the sketchiest consideration of the transition from the Plantagenets to the Tudors can scarcely avoid noticing the change from plural or shared sovereignty to monolithic or absolute sovereignty. The disappearance of the notion that the King's power was subject to God's power, and the extinction, demotion or bypassing of the Church's court, represented enormous alterations to ways of thinking no less than to the administration of justice and the structure of politics.

The principle of subsidiarity applied by Europe, as Justice Sandra Day O'Connor identifies, shares common tactical roots with federalism and devolution:<sup>32</sup>

The federalist structure of the United States constitution was designed in part to gain the States acceptance of a stronger central government by assuring meaningful residual state sovereignty. Devolution in the United Kingdom is often considered a measure to ensure the continuity of the union by allowing greater self-government within the limits of union. Likewise, "subsidiarity".....represents an accommodation designed to ensure acceptance of the European union among national governments and the citizens of each state by preventing an over-centralisation of power at the EU level. Just as with devolution the European Union in theory diminishes UK sovereignty in only that measure which parliament chooses but also like devolution the reality may not be so cut and dried.

Justice O'Connor suggests however that:

The intricacies of modern society, perhaps now more than ever, also demand local decision-making that is flexible, responsive, and personal. As salutary as national and supernational bodies can be, we must not let their potential obscure the simple truth that government often governs best when it governs close to the people.

Sir Neil MacCormick has suggested that the abandonment of the notion of parliamentary sovereignty may "release us from the conceptual fetters of juridical foundationalism, our inherited belief that sovereignty alone

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<sup>31</sup> Mount, above at n 19.

<sup>32</sup> Justice Sandra Day O'Connor "Altered States: federalism and devolution at the "real turn" of the millenium" [2001] *Cambridge Law Journal* 493.



underpins law and liberty” and may make possible legal and political communities which recognise themselves as “communities of principle”.<sup>33</sup>

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<sup>33</sup> Sir Neil MacCormick “Beyond the Sovereign State” (1993) 56 *Modern Law Review* 1.

## Parliamentary sovereignty in New Zealand

In New Zealand, the term “sovereignty” resonates with the language of the Treaty of Waitangi. By that Treaty, Maori ceded to Queen Victoria:<sup>34</sup>

All the rights and powers of sovereignty which the said Confederation or individual chiefs respectively exercise or possess, or may be supposed to exercise or possess over the respective territories as the sole sovereigns thereof.

That was the English version. By the Maori version (signed by the overwhelming majority of those who adhered to the Treaty), Maori relinquished not their mana (a term used in the 1835 Declaration of Independence to describe “sovereignty”) but the “kawanatanga of their lands” to the Queen. This kawanatanga was a transliteration of Governor and was known to Maori from the model of Pontius Pilate in the Bible.

In 1861 the retired first Chief Justice of New Zealand, William Martin, argued that “Governorship” was to be seen and defined by reference to its object. The preamble to the Treaty of Waitangi (after reciting the Queen’s anxiety to protect “the just rights and property” of Maori and her wish to “secure to them the enjoyment of Peace and Good Order”) recorded that the Queen was “desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws alike to the native population and to Her subjects”. Martin suggested that the powers ceded to the Queen by the chiefs were only those necessary for the establishment of settled government and law. “In return they retained ‘what they understood full well – the “tino rangatiratanga” (full chiefship), in respect of all their lands’”.<sup>35</sup>

On this argument, the sovereignty obtained by the British Crown was a sovereignty qualified by the Treaty. It has not been treated as so qualified as a matter of domestic law. But the elements of our unwritten constitution have never been fully explored to date.<sup>36</sup> We have assumed the application of the doctrine of parliamentary sovereignty in New Zealand. Why, is not clear. It is not a necessary feature of the possession of territorial sovereignty as the limitations based by written constitutions on the powers of representative assemblies in many commonwealth countries makes clear. The doctrine is a “distinctively English principle which has no counterpart in Scottish constitutional law.”<sup>37</sup>

The orthodoxy is that the Treaty of Waitangi is not part of the domestic law of New Zealand, except in so far as it has been incorporated by legislation,<sup>38</sup>

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<sup>34</sup> The Treaty of Waitangi (1840) is reprinted in the First Schedule to the Treaty of Waitangi Act 1975.

<sup>35</sup> (1890) NZPP G1.

<sup>36</sup> *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301.

<sup>37</sup> *MacCormick v Lord Advocate* [1953] SC 396 at 411 per Lord Cooper.

<sup>38</sup> *Hoani Te Heu Heu Tukino v Aotea District Maori Land Board* [1941] AC 308.

but throughout our history there have been references in the statute to the Treaty. The Second Article of the Treaty was recited in part in the Long Title to the 1862 Native Land Act. It has frequently been acknowledged that the whole of the law relating to Maori land derives from the Treaty. Its influence on other legislation has been more erratic. But at least since the 1980s references to the Treaty have been quite common in legislation, particularly those dealing with the management of natural resources.

There was a quite determined effort by the New Zealand judiciary from the 1870s to assert that the consequence of British sovereignty over New Zealand was to vest all property in land in the Crown. On this view, the obligation to protect Maori properties undertaken in Article 2 of the Treaty was a moral obligation only. No property could be recognised by the court unless it had been the subject of Crown grant. That view departed from early New Zealand authority which had applied Chief Justice Marshall's statement of the recognition of proprietary rights established by native custom in *Johnson v M'Intosh*.<sup>39</sup> *R v Symonds*<sup>40</sup> was our early *Mabo*.<sup>41</sup> We were not bedevilled by concepts of *terra nullius* in New Zealand because it was acknowledged from the outset that the whole surface of the land was held by the natives according to their customs at the time of acquisition of sovereignty. The Privy Council however firmly rejected the revisionist approach of the local judges in *Nireaha Tamaki v Baker*<sup>42</sup> and subsequent cases, saying it was "rather late in the day" for it to be argued in a New Zealand court that there was "no customary law of the Maoris of which the courts of law can take cognisance."<sup>43</sup>

The Native Land Courts were unashamedly a mechanism not for recognising native custom but for converting proprietary interests according to such custom into Crown grant lands. Such Crown grants extinguished any customary interests, including those overlapping interests not able to be approximated to fee simple title. The extent to which customary proprietary interests not equivalent to full ownership of land still exists is largely unexplored. Because any such interests have been overlooked for so long, they are likely to be difficult to resurrect against the patchwork of regulatory controls and conferment of private interests which have occurred in the interim.

The question whether the sovereignty of the New Zealand Parliament is limited by our history is therefore a topic of more than academic interest. Maori claims are currently being managed through a political process of settlements. They may avoid the need for such questions to be explored through the courts. In the political process the government has been assisted by reports of the Waitangi Tribunal, a body set up in 1975 to advise the Crown on claims of Treaty breach and on the "practical application" of the

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<sup>39</sup> 8 Wheat 543 (1823) (USSC).

<sup>40</sup> (1847) NZPCC 387.

<sup>41</sup> *Mabo v State of Queensland (No. 2)* (1992) 175 CLR 1.

<sup>42</sup> (1901) NZPCC 371.

<sup>43</sup> *Nireaha Tamaki v Baker* at 557.

Treaty. As part of its function the Tribunal is specifically empowered to enquire into whether primary legislation is in breach of the principles of the Treaty.

In addition, on referral by the House of Representatives, the Waitangi Tribunal can advise whether any proposed Bill is contrary to the principles of the Treaty. I am not sure whether this provision has ever been used. In the *Muriwhenua* claim hearing, two dramatic interim reports by the Waitangi Tribunal were critical in securing passage of s9 of the State Owned Enterprises Act (upon which much litigation was later hung) and as a platform for the injunction against creation of fishing quota (which led directly to the substantial Maori fisheries settlements).<sup>44</sup> The function of the Tribunal is recommendatory only (except in respect of a jurisdiction to order the return of Crown land subject to a forestry settlement). That leaves orthodoxy in place.

In *Te Runanga o Wharekauri Rekohu Inc v Attorney-General*<sup>45</sup> representatives of tribes opposed to a comprehensive settlement for Maori fishing claims applied to the High Court to stop the implementation by legislation of the settlement. The legislation was to extinguish all Maori fishing interests arising under the Treaty or by custom. The Court of Appeal confirmed as an established rule of practice “non-interference by the courts in parliamentary proceedings”.<sup>46</sup> That rule of practice prevented the court from prohibiting the introduction of a Bill into Parliament. The judgment of the Court, delivered by Cooke P held (applying the decision of Kirby P in *Eastgate v Rozzoli*)<sup>47</sup> that:<sup>48</sup>

The proper time for challenging an act of a representative legislature, if there are any relevant limitations, is after the enactment.

The principle of non-interference with the introduction of a Bill was expressed to be the corollary of the implied right to freedom of expression in relation to public and political affairs in a system of representative government which found favour in the High Court decisions of *Nationwide News Pty Limited v Wills*<sup>49</sup> and *Australian Capital Television Pty v Commonwealth (No2)*.<sup>50</sup> The same right was said to be reflected in the Bill of Rights 1688 (UK). The Court considered it “impossible to suppose that a Minister may be judicially prevented from presenting to a representative assembly a measure for consideration”.<sup>51</sup> Closely allied to that conclusion was the further view that

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<sup>44</sup> Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 2, 1988).

<sup>45</sup> [1993] 2 NZLR 301.

<sup>46</sup> *Te Runanga o Wharekauri Rekohu* at 307.

<sup>47</sup> [1990] 20 NSWLR 188.

<sup>48</sup> *Te Runanga o Wharekauri Rekohu* at 308.

<sup>49</sup> (1992) 108 ALR 681.

<sup>50</sup> (1992) 177 CLR 106; (1992) 108 ALR 577.

<sup>51</sup> *Te Runanga o Wharekauri Rekohu* at 308.

the courts could not compel a Minister to present a measure to a representative assembly for consideration.<sup>52</sup>

Surely in a democracy it would be quite wrong and almost inconceivable for the courts to attempt to dictate, by declaration or a willingness to award damages or any other form of relief, what should be placed before parliament. Parliament of New Zealand consists of the sovereign in right of New Zealand and the House of Representatives (Constitution Act 1986, s14). The twofold nature of parliament is commonly overlooked when the institution is mentioned as if it consisted of the House only, but that point does not alter the outcome of the case now before this court. The point that does matter, in our opinion, is that public policy requires that the representative chamber of parliament should be free to determine what it will or will not allow to permit to be put before it. Correspondingly Ministers of the Crown must remain free to determine, according to their view of the public interest, what they will invite the House for consider.

For these reasons the Court found that the deed which purported to require the introduction of legislation was of no legal effect. The proceedings (which spring off the deed and the question whether it bound the Maori applicants for relief) were accordingly held to be “misconceived”.

The Court went on to note that the deed did not purport to repeal the Treaty of Waitangi:<sup>53</sup>

Clause 1.3 says as much, virtually expressed. Moreover a nation cannot cast adrift from its own foundations. The treaty stands. Parliament is free, if it sees fit to repeal, s88(2) of the Fisheries Act and to make other legislative changes envisaged in the deed. Parliament was free to do so before the deed and remains free to do so afterwards. Whatever constitutional or fiduciary significance the treaty may have of its own force, or as a result of past or present statutory recognition, could only remain. The Honourable Minister of Justice has recorded that he was advised that the deed has the support of a representative and authoritative cross-section of Maori opinion. That advice must have a significant bearing on constitutional and fiduciary issues. It cannot foreclose them; the court would fail in our duty to all citizens, including both Maori and Pakeha, if we were to rule otherwise.

The Court was not concerned with political questions for political judgment.<sup>54</sup> No issue under the New Zealand Bill of Rights Act was said to “arise now”.

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<sup>52</sup> *Te Runanga o Wharekauri Rekohu* at 308.

<sup>53</sup> *Te Runanga o Wharekauri Rekohu* at 308-309.

Significantly, the Court did not foreclose the possibility of further litigation, simply noting that there would be little point in bringing the matter again before the courts “until at least some years of experience have been gained, and perhaps not even then.”

This is as close as it gets in New Zealand. Substantial deference to the legislature by the courts. A consciousness of the separate roles of each. And delphic remarks about constitutional foundations, the place in them of the Treaty of Waitangi, and the court’s ultimate obligation to say what the legal foundation of the constitution is.

In this last indication that the nature of parliamentary sovereignty is common law, the New Zealand Court of Appeal’s approach is supported by the views of Sir Owen Dixon. In his important essay “The Law and the Constitution”,<sup>55</sup> delivered in Melbourne in March 1935, he considered it to be “not the least of the achievements of the common law that it endowed the parliament which was evolved under it with an unrestricted power of altering the law”.

In another essay, “The Common Law as an Ultimate Constitutional Foundation,”<sup>56</sup> Sir Owen Dixon made the point that even in a unitary system of government (such as New Zealand possesses) “the rules of the common law operate in a way that is perhaps subtle and ill-defined, but is yet effective, to impose conditions upon the actual exercise of legislative power”.

It is or was always commonly thought that in a unitary system the legislature is free of the trammels of the law. No doubt that is because the supremacy of the Parliament at Westminster over the law has been contrasted for so long with the case of federal legislatures, whose powers are limited by law. . . . [But] Restrictions upon legislative powers are not inconsistent with a unitary form of government..... Limitations upon the powers of colonial legislatures always existed, unimportant as the limitations often were. The Colonial Laws Validity Act 1865, though freeing colonial legislatures from some restraints and conferring upon them constituent powers, did not place the legislatures in the same position as the Parliament at Westminster.

It has appeared to me that not a little of the difficulty that was felt about the decision of the courts here and of the Privy Council in *Trethowan’s Case* and twenty years later about the decision of the courts in South Africa in *Harris v Minister of the Interior*, was due to the failure to understand that the principle of parliamentary supremacy was a doctrine of the common law

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<sup>54</sup> The United Nations Human Rights Committee considered and rejected a complaint about the fisheries settlement legislation lodged in 1992 (see Apirana Mahuika Communication No. 547/1993, views adopted 27 October 2000, 70<sup>th</sup> session).

<sup>55</sup> “The Law and the Constitution” reprinted in *Jesting Pilate* (2<sup>nd</sup> ed., 1997) 38.

<sup>56</sup> Also reprinted in *Jesting Pilate* at 203.

as to the Parliament at Westminster and not otherwise a necessary part of the conception of a unitary system of government. There was no inherent reason for supposing that in virtue of the Colonial Laws Validity Act 1865, the same supremacy over the law should be conferred on a colonial legislature as the Parliament at Westminster possessed at common law. Nor, as I think, was there any warrant for making the preliminary assumption which seems to have been made at first in South Africa that in a Dominion Constitution combined with the Statute of Westminster, a unitary system of government in a sovereign state must involve such a parliamentary supremacy over the law. It is as well to recall that it was not until after the Revolution Settlement that the complete supremacy of the Parliament of Great Britain over the law was acknowledged. The development of the doctrine into its most absolute form may be traced and in that development may be seen the influence not only of the changes in political thought but also of more abstract conceptions of sovereignty. That, however, is not a ground for relinquishing the view that when all is said and done the principle is one of constitutional law. It is part of the constitutional law of the United Kingdom and is to be ascribed to the common law.

Whether there are limits to the lawmaking power of the New Zealand Parliament has not been authoritatively determined. The question is one in which the historical foundation of our nation may perhaps seem more important than theories crafted to fit a snapshot of the history of another country. What is required is an “explicit analysis of constitutional principle”<sup>57</sup> rather than the identification of a “sovereign” or a search for a single “rule of recognition”.

The emphasis on sovereignty in the Diceyan sense of an indivisible power may also have inhibited the development in New Zealand of more flexible systems of political organisation. Have we been shackled by the “conceptual fetters of juridical foundationalism” which, in Sir Neil MacCormick’s words, have made us believe that “an indivisible sovereignty alone underpins law and liberty”?<sup>58</sup>

It is sometimes forgotten that the law as brought to New Zealand in 1840 was extended to the country only in stages. Even in areas of settlement, accommodation was made for Maori attitudes. For example, the abhorrence of Maori to imprisonment led to modifications in the law as it applied to Maori relating to bail and imprisonment for property offences. In the early days of Crown colony government the aim was to persuade Maori of the benefits of English legal processes and law. Custom was not to be interfered with

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<sup>57</sup> As T.S.R. Allan recognises in “Parliamentary sovereignty: law, politics and revolution” (1997) 113 *Law Quarterly Review* 443 at 448.

<sup>58</sup> See above.

unless “repugnant to the laws of humanity”.<sup>59</sup> Warfare and cannibalism were not tolerated, but slavery was not suppressed for some years. It was brought to an end more by Christian teaching and the substantial changes to Maori society which followed settlement rather than by effort of the legal system.

When a New Zealand constitution conferring limited powers upon a representative assembly was proposed, it was on the basis that districts could be set aside in which Maori could live under their customs. Repugnancy to the laws of England would be tolerated. Only customs repugnant to the “laws of humanity” would be suppressed in such districts. Provision for such districts was made in the 1846 Constitution Act and in the 1852 Constitution Act which served as our basic constitutional document (unbelievably) until 1986. The ability to proclaim districts in which Maori custom would apply was one of the sections reserved for amendment by the United Kingdom parliament until the Statute of Westminster. It was not repealed until 1986.<sup>60</sup> It remained on the statute books as an item of curiosity. Most of us had forgotten entirely the aspiration for self-government and the offer of legal plurality it originally contained.

Events moved on. Calls for plurality of one sort or another remain. As MacCormick has shown and as the devolutions in Scotland and Wales demonstrate, such empowerment is a widespread human aspiration, not to be summarily dismissed out of hand unless we maintain a rigid approach to parliamentary sovereignty.

### **The impact of domestic human rights legislation**

Seven years ago Lord Cooke of Thorndon expressed the view that:<sup>61</sup>

The world is moving.....towards an international law of human rights.

The world is shrinking. Most countries of the common law world now require judges to apply constitutional or statutory statements of rights. Their background are the international covenants, particularly the International Covenant on Civil and Political Rights. For those countries which have ratified it, the Optional Protocol to that Covenant permits direct scrutiny by the Human Rights Committee. The decisions of our courts on human rights are not final.<sup>62</sup>

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<sup>59</sup> Letter of Instruction to Hobson (1839).

<sup>60</sup> Indeed, it was developed in the Maori Councils Act 1900 (the preamble to which refers to “reiterated applications” by Maori for local self-government). Similar aspirations are partially addressed in the Maori Community Development Act 1962.

<sup>61</sup> *R v Barlow* (1992) 14 CRNZ 9.

<sup>62</sup> Pursuant to paragraph 4 of article 5 of the Optional Protocol to the International Covenant on Civil and Political Rights it is possible to lodge a complaint with the United Nations Human Rights Committee. For example, in 1998, a complaint was lodged concerning same-sex marriages (see *Juliet Joslin* (CCPR/75/D/902/1999, 8-26 July 2002)), which the Court of Appeal held were not permitted by the Marriage



The salutary experience of the English courts with the European Court of Human Rights was a potent factor in the adoption of the Human Rights Act 1998 (UK). As Professor Leslie Zines pointed out, the bypassing of the national courts (which were unable to provide remedies) undermined them.<sup>63</sup> The patriation of human rights was important for the standing of the administration of justice in the United Kingdom.

The New Zealand Bill of Rights Act 1990 affirms “New Zealand’s commitment to the International Covenant on Civil and Political Rights”.<sup>64</sup> It has therefore explicitly “internationalised” our rights jurisprudence as well as investing it with greater moral content.<sup>65</sup> We gain considerable help from the international and parallel domestic case-law. Learning from each other has been an important part of the common law method throughout our history. Now, international human rights standards “march with the common law”.<sup>66</sup> The process has, I suggest, revitalised the common law.<sup>67</sup>

Although the New Zealand Bill of Rights Act, like the Human Rights Act 1998 (UK) is an ordinary statute which yields to other statutes, it is clear from its international and common law roots (and indeed from its legislative history, its subject matter, and its evocative title) that the Act was designed to operate within a sphere that may broadly be termed “constitutional”. Both the Bill of Rights Act in New Zealand and the Human Rights Act in the United Kingdom apply to acts by the judicial branches of the government as well as the executive branch. Significantly it also applies to “acts done.....by the legislative.....branch of the government of New Zealand”. It should be noted in passing that the legislation therefore recognises a tripartite government, following a separation of the institutions of government adopted in the New Zealand Constitution Act 1986.

The obligation imposed upon the judiciary seems to require common law to be developed in conformity with the New Zealand Bill of Rights Act.<sup>68</sup> Similar views of the UK Act have been expressed by Lord Irvine of Lairg.<sup>69</sup>

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Act 1955 (see *Quilter v Attorney-General* [1998] 1 NZLR 523). It was rejected by the UNHRC on the basis that paragraph 2 of article 23 of the ICCPR defined the right to marriage using the term “men and women”, rather than “every human being”, “everyone” or “all persons” as appear elsewhere in the Covenant. Therefore states are obliged to provide only for the union of man and woman. The Committee found that refusing to provide for same-sex marriages did not violate the Covenant right to marriage.

<sup>63</sup> L. Zines *Constitutional Change in the Commonwealth* (1991) 50.

<sup>64</sup> New Zealand Bill of Rights Act 1990, Long Title.

<sup>65</sup> P. Joseph *Constitutional and Administrative Law in New Zealand* (2<sup>nd</sup> ed., 2001) 170.

<sup>66</sup> See *R v Secretary of State for the Home Department ex parte McQuillan* [1995] 4 All ER 400 at 422 per Sedley J.

<sup>67</sup> Mount, above at n 19, points out that the same process of revitalisation can be seen in earlier centuries by the incorporation of other great charters.

<sup>68</sup> The point has not yet risen directly for determination in New Zealand, although it was assumed to be the case by Hardie Boys J in *Simpson v Attorney-General (Baigent’s case)* [1994] 3 NZLR 667 at 702 and by me in *Lange v Atkinson* [1997] 2

There are specific provisions in the Bill of Rights Act and in legislative and executive procedures to assist the democratic process. The Attorney-General under s7 must inform parliament of any inconsistency (a more positive equivalent is provided by s4 of the Human Rights Act (UK)). Guidelines<sup>70</sup> produced by the Legislative Advisory Committee require legislation to comply with fundamental common law principles.

In New Zealand the Court of Appeal has indicated that on an appropriate occasion it might declare that a statutory limitation upon rights cannot be demonstrably justified in a free and democratic society and is in breach of the Bill of Rights Act.<sup>71</sup> If that is so, it will appropriate a power specifically conferred upon the English courts as a significant remedy under the Human Rights Act.

This approach has been criticised.<sup>72</sup> But the role assumed in 2000 by the Court of Appeal in relation to the Bill of Rights Act to make declarations of inconsistency was in 2001 explicitly conferred upon the Human Rights Review Tribunal for discrimination in breach of s19 of the New Zealand Bill of Rights Act.<sup>73</sup> Parliament seemingly has approved. Should we not see this as an example of the dialogue between courts and legislature which has been a feature of Canadian Charter jurisprudence? And why is it not properly to be seen as helpful? The rule of law, as Lord Steyn has argued, itself serves a democratic ideal.<sup>74</sup> The elaboration of reasons for judgment fulfils an important democratic function in itself. As Mount has commented, it “informs the conversation of politics with a sense of dispersed responsibility.”

Of course some caution is appropriate in human rights litigation. Carol Harlow has raised the dangers of “campaigning litigation” which may result in “colonisation of the legal by the political process” and, echoing T.R. Allan, “a corruption of the legal process.”<sup>75</sup> Lord Hoffman has warned that it is important for the courts to show restraint in consideration of the limits which human rights impose upon democratic institutions. Particular care is needed

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NZLR 22. See also Sir Robin Cooke “A Sketch From the Blue Train” [1994] *New Zealand Law Journal* 10 at 11.

<sup>69</sup> See address to Third Clifford Chance Conference, (28 November 1997).

<sup>70</sup> See <http://www.justice.govt.nz/lac/index.html>. Also see paragraphs 5.35 and 5.36 of the Cabinet Manual (available at: <http://www.dpmc.govt.nz/cabinet/manual/5.html>), which requires Ministers to confirm that a draft Bill complies with, inter alia, the principles of the Treaty of Waitangi and New Zealand’s international obligations.

<sup>71</sup> *Moonen v Film and Literature Board of Review*.

<sup>72</sup> J. Allan “Moonen and McSense” [2002] *New Zealand Law Journal* 142.

<sup>73</sup> Section 92J of the Human Rights Act 1993, as amended in 2001, permits the Tribunal to grant a declaration that an enactment is inconsistent with the right to freedom from discrimination affirmed by s19 of the New Zealand Bill of Rights Act 1990.

<sup>74</sup> Lord Steyn “Democracy through Law” (Inaugural Lord Cooke of Thorndon Lecture, Victoria University of Wellington, 18 September 2002).

<sup>75</sup> C. Harlow “Public Law and Popular Justice” (2002) 65 *Modern Law Review* 1 at 2 and 13.

where an outcome is likely to impact upon public expenditure. Judges must recognise that they are “not appointed to set the world to rights.”<sup>76</sup>

I agree that judges cannot expect to set the world to rights. That is not the common law method we apply. Although judges make law, there is a world of difference between judicial determination of an actual controversy within the skeleton of principle and precedent which is the discipline of the common law and legislation, which is the function of parliament.<sup>77</sup> On the other hand, the judiciary today has the comfort of an international register provided by comparable jurisdictions. And in the end, this is a function legislatively confirmed under our Bill of Rights Act. And why not? The role of the courts is after all to uphold legality in actual cases. The courts are themselves subject to the rule of law and accordingly cannot usurp powers lawfully exercised by other agencies, including parliament. They operate at the boundaries. But their responsibility to ensure that power is exercised only according to law is one they cannot constitutionally shrug.<sup>78</sup>

Co-operation with Parliament in protection of human rights through dialogue is one thing; disallowance of legislation by the court is quite another. That power is specifically withheld under the New Zealand Bill of Rights Act. In March 1995 the United Nations Committee on Human Rights expressed regret that the New Zealand Bill of Rights Act “has no higher status than ordinary legislation and does not repeal earlier inconsistent legislation”. It recommended that the Act be revised “to give the courts power as soon as possible to strike down or decline to give effect to legislation on the ground of inconsistency with covenant rights and freedoms as affirmed in the Bill of Rights”.<sup>79</sup> Australia too has been criticised for the absence of a constitutional Bill of Rights and the lacunae in the protection of Covenant rights in the Australian legal system. The Australian legal system is said to be deficient in providing effective remedies to persons whose rights under the Covenant have been violated.<sup>80</sup> It remains to be seen where this international lobbying will go.

Whether the suggestion of the United Nations Human Rights Committee that the courts be given power to strike down legislation would enhance the protection of human rights is not self-evident.<sup>81</sup> The policy of leaving protection as a co-operative enterprise between parliament and the courts may be as effective. The requirement in s6 of our Bill of Rights Act that legislation is to be interpreted where possible to give effect to the rights

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<sup>76</sup> Lord Hoffman “Separation of Powers” (The Comber Lecture, 2000).

<sup>77</sup> See Sir Gerald Brennan in *Dietrich v R* (1992) 109 ALR 385 at 403 quoting himself in *Mabo v Queensland* (1992) 107 ALR 1 at 18.

<sup>78</sup> *Brown v Stott (Procurator fiscal, Dunfermline)* [2001] 2 WLR 817.

<sup>79</sup> Reproduced in *Human Rights In New Zealand* (Ministry of Foreign Affairs and Trade Information Bulletin No.55, 1995).

<sup>80</sup> *United Nations Human Rights Committee Report on Australia* (consideration at CCRR HRC 69<sup>th</sup> Session, 1858<sup>th</sup> meeting, 27 July 2000 [CCPR/C/SR.1858]).

<sup>81</sup> It is arguable that the Human Rights Committee went too far: the obligation under the Covenant is an obligation of result and not an obligation of method or content.

contained in the legislation is a powerful tool. It is more consistent with our traditions. Janet McLean of the University of Auckland has noted that “the systems [in the United States and New Zealand] seem to be operating in much the same way”.<sup>82</sup>

I do not think it matters greatly for the protection of human rights whether we operate under constitutional instruments which fetter legislative action or common law which must yield to unambiguous legislation. Equally, if we move to a Bill of Rights enforceable against legislation, I do not think the sky will fall, although I acknowledge there are risks (to judicial method, legitimacy, and independence) if such review supervises for values not constitutional in the sense of being essential to law-making validity.

Power to review legislation is accepted in Westminster-derived legal systems where a “higher order” law (whether by written constitution or Act of the Imperial parliament) imposes restrictions on legislative competence or process.<sup>83</sup> Even in New Zealand, we had examples of colonial legislation being held to be invalid by local courts.<sup>84</sup> Our higher courts have exercised judicial review of legislation in the past. Today, under the Declaratory Judgments Act 1908, application may still be made to the High Court for a declaratory order as to the “construction or validity” of a statute. Whether such process survives the declaration of “full power to make laws” in the New Zealand Constitution Act 1986 is unclear.

In *Shaw v Commissioner of Inland Revenue*,<sup>85</sup> the Court dismissed an application for declaration that part of the income tax 1976 was invalid as contrary to Magna Carta. The Court did acknowledge a responsibility to ensure that statutes are properly enacted:<sup>86</sup>

In other words the court may determine whether parliament itself has followed the laws that govern the manner in which legislation is created. Parliament is subject to law just like every other person and body in New Zealand; it is bound by statutory requirements.

It declined in the case before it to consider other limits to the legislative authority of parliament.

*Shaw’s* case indicates a willingness to supervise legislative process. On Latham’s view that the rules as to valid legislation are rules of law, that

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<sup>82</sup> See J. McLean “Legislative Invalidity, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act” [2001] *New Zealand Law Review* 421.

<sup>83</sup> *Bribery Commissioner v Ranasinghe* [1965] AC 172; *Attorney-General for New South Wales v Trethowan* [1932] AC 526.

<sup>84</sup> *R v Lander* [1919] NZLR 305.

<sup>85</sup> [1999] 3 NZLR 154.

<sup>86</sup> *Shaw* at 157.

approach must be correct. As Chief Justice Marshall in 1803 so famously observed, it is the “province and duty [of the courts] to say what the law is.”<sup>87</sup>

Paul Craig<sup>88</sup> suggests Dicey worked upon a “broader constitutional map” than has been recognised by his adherents. He recognised that principled justification had to be found for the omnipotence of parliament. In the living constitution today it remains to be seen whether we will come to recognise rights-based limits on legislative competence which go beyond the narrower rules of formal validity and perhaps those which protect democratic process. If human rights protection is an aspect of the rule of law, as the preamble to the International Covenant on Civil and Political Rights states it is, then it is possible we will come to recognise substantive limitations upon the competence of Parliament to make laws in breach of the human rights our countries are obliged by international commitments to observe.<sup>89</sup>

It may be that only some substantive rights will come to be seen as constitutional legal constraints on legislation. We have already moved some distance towards greater judicial responsibility in relation to the rights which underpin democratic process.<sup>90</sup> It may be that access to the courts also falls into the basket of fundamental rights.<sup>91</sup> Such ranking of rights could leave wider principles, such as equality, outside any rule of law limiting legislative choice.<sup>92</sup> These are deep philosophical waters, much agitated today<sup>93</sup> but it would be foolish to think that they can never settle under the oil of developing international practice and domestic experience. It is, for example, now widely accepted that the international commitments preclude the reintroduction of the death penalty in countries which have acceded to the International Covenant on Civil and Political Rights. But the point that should perhaps be made is that in fact we seem to have crossed the line between a vision of the rule of law that is purely formal and one that is substantive at least in part. The decisions are still controversial and it is possible there will

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<sup>87</sup> *Marbury v Madison* (1803) 1 Cranch. 137; see also *Bank Hamizrachi v Migdal* 49 (1995) (4) PD 221 cited in A. Harel “The rule of law and judicial review: Reflections on the Israeli constitutional revolution” in D. Dyzenhaus (ed.) *Recrafting the rule of law* (1999) 143 at 146.

<sup>88</sup> “Sovereignty of the United Kingdom Parliament After *Factortame*” (1991) 11 *Yearbook of English Law* 221 at 238.

<sup>89</sup> In New Zealand, such result may be pre-empted by s4 of the New Zealand Bill of Rights Act although its application will be subject to the interpretation of the prohibition on judicial review “by reason only that the provision is inconsistent with any provision of this Bill of Rights.” Breach of a condition of legislation which is part of the “whole constitution” might be outside the direction that the statute is to be applied notwithstanding breach of the Act.

<sup>90</sup> *Australian Capital Television v The Commonwealth*; *Dixon v Attorney-General of British Columbia* (1989) 59 DLR (4<sup>th</sup>) 247; John Hart Ely *Democracy and Distrust: A Theory of Judicial Review* (1980).

<sup>91</sup> *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

<sup>92</sup> Cf. Deane and Toohey JJ (dissenting in *Leech*).

<sup>93</sup> For example: J. Waldron “A Right-based Critique of Constitutional Rights” (1993) 13 *Oxford Journal of Legal Studies* 13; R. Dworkin *Taking Rights Seriously* (1977); T.R.S. Allan “The Rule of Law as the Rule of Reason: Consent and Constitutionalism” (1999) 115 *Law Quarterly Review* 221; R. Craig “Constitutional Foundations, the Rule of Law and Supremacy [2003] *Public Law* 92.

be a swing back to a more formal view of law in which parliamentary supremacy over law is reasserted. But I think it more likely that the world has moved on.

Substantive review of legislation may never be confronted. Our Parliament has committed to human rights through international commitments, domestic legislation, and through checks to ensure compliance through its processes. If it does slip up, the ability to declare incompatibility is only one of a range of lower impact options available to a court confronted with an apparent conflict between human rights and legislation. There are many examples now in both New Zealand and United Kingdom of closer scrutiny of executive action and stricter interpretation of legislative provisions which clash with fundamental rights.<sup>94</sup> That approach is specifically mandated by both the Human Rights Act (UK) and the New Zealand Bill of Rights Act in making the protection of human rights a judicial responsibility and in requiring the judiciary to interpret legislation wherever possible consistently with the rights recognised.

Close scrutiny of legislation has implications for implied repeal. The doctrine rests on slender authority.<sup>95</sup> It is already under strain. It may be questioned to what extent it can survive modern legislative and judicial identification of statutes as “constitutional” and the international obligations which support that ranking. That is the view taken by Laws LJ in *Thoburn v Sunderland City Council*.<sup>96</sup> It is implicit in *Factortame (No. 1)*.<sup>97</sup> At paragraph 62 of *Thoburn* Laws LJ expressed the view that the common law has now come to recognise that there are rights which should properly be classified as constitutional or fundamental. From this he identified a “further insight”.<sup>98</sup>

We should recognise a hierarchy of Acts of parliament: as it were “ordinary” statutes and “constitutional” statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which: (a) conditions the legal relationship between citizen and state in some general, over-arching manner; or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. (a) and (b) are of necessity closely related: it is difficult to think of an instance of (a) that is not also an instance of (b). The special status of constitutional statutes follows the special status of constitutional rights. Examples are *Magna Carta 1297* (25 EDW 1), the Bill of Rights 1689 (1 Will and Mary Sess 2C2), the Union with Scotland Act 1706 (6 Anne C11), the Reform Acts which distributed and enlarged the franchise

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<sup>94</sup> *R v Secretary of State for Home Department (ex parte Simms)* [2002] 2 AC 115; *R v Pounamu* [2000] 2 NZLR 695, *R v Pora* [2001] 2 NZLR 37; *Anisminic Ltd v Foreign Compensation Commission*.

<sup>95</sup> N.W. Barber and A.L. Young “The rise of prospective Henry VIII clauses and their implications for sovereignty” [2003] *Public Law* 112.

<sup>96</sup> [2002] EWHC 195 at paragraph 60.

<sup>97</sup> [1990] 2 AC 85.

<sup>98</sup> *Thoburn* at paragraph 62.

(representation of the Peoples' Act 1832 (2 and 3 Will 4 C45), 1867 (30 and 31 Vict. C102) and 1884 (48 and 49 Vict. C3)). The Human Rights Act 1998, the Scotland Act 1998 and the Government of Wales Act 1998. The 1972 Act clearly belongs in this family. It incorporated the whole *corpus* of substantive community rights and obligations, and gave over-riding domestic effect to the judicial and administrative machinery of community law. It may be there has never been a statute having such profound effects on so many dimensions of our daily lives, the 1972 Act is, by force of the common law, a constitutional statute.

Such approaches to legislative construction do not formally limit of the power to legislate on any subject without risk of invalidation by the courts. That maintains the traditional orthodoxy. This is the common law in operation in which statutory interpretation has never been a mechanistic literalist endeavour. It permits the context of constitutional values to be taken into account, as Craig suggests.<sup>99</sup>

Janet McLean has persuasively argued that there is no illegitimacy in judicial measurement of legislative and executive measures against human rights standards:<sup>100</sup>

What is developing is an elaborate system of deference depending on the right at risk.....not all rights will be treated the same and some rights, such as that to be free from unreasonable search and seizure, contain their own modifiers.....over time, one would hope that a more explicit methodology would develop – adopting some version of proportionality doctrine, *Wednesbury* doctrine or a domestic version of the margin of appreciation doctrine. Such an approach has the potential to combine a sensitivity to democratic judgments, as well as providing a means by which to make quite forceful normative statements in a proper case. The existence of doctrines by which courts pay deference to legislative judgments does not depend on whether there is a striking down power. Equally, however, the normative force of a court's judgments will diminish the more contestable the "reasonableness" component, and according to the susceptibility of an issue to a legal analysis.

The view we have favoured in New Zealand is that a Bill of Rights does not entail a choice between parliament and the courts or elected politicians and non-elected judges. It is directed "at the law making process as a whole."<sup>101</sup> The purpose is good government. As Sir Kenneth Keith puts it:

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<sup>99</sup> Craig, above at n 25.

<sup>100</sup> McLean, above at n 78, 442-448.

<sup>101</sup> Sir Kenneth Keith "The New Zealand Bill of Rights Experience: Lessons for Australia" (Bill of Rights Conference, 21 June 2002).

The enterprise of protecting rights should generally be seen as a co-operative rather than a divisive one.

In New Zealand at least, claims of judicial supremacism seem rather odd. The obligation to develop common law in conformity with principles of human rights has been legislatively confirmed. The obligation to supervise for legality arises through the function of the courts in our systems, recognised by our statutes. Of course the judges have to be careful to stick to judicial method. Of course they cannot invest the law with their own personal value judgments. Of course they must look to precedent and follow the common law discipline of reasoning by analogy and against identified principles. They must be careful not to impose costs which it is for the legislature to weigh. All of these cautionary precepts apply to the entire range of judicial function. The possibility of illegitimate judicial reasoning does not make judicial insistence on legality in the observance of the constitution illegitimate.

Great deference is due to parliament as the primary institution through which democratic government is delivered. It is constrained by law only in the fundamental constitutional preconditions of valid law-making. What those constitutional restrictions are is not settled and can be expected to shift over time. The formal elements of law-making are legal preconditions for the reasons explained by Latham. It may be that restrictions to protect the essential democratic process are now widely accepted as constitutional limits on parliamentary competence. There will be much less acceptance of broader substantive limitations based on human rights. But it would be foolish to reject the possibility of further development here for reasons of dogma. The world is changing.

Meanwhile, we can expect stricter interpretation of the powers conferred by legislation and closer scrutiny of executive action (both under legislation and what remains of the prerogative) against human rights standards. Where human rights and constitutional values (such as participation in the democratic process) are engaged, assumptions of legislative intent and deference to executive discretion may no longer be as potent. Such an approach too has implications for the doctrine of parliamentary sovereignty. It may mean that Parliament will need to confront human rights implications directly and be clear in its expression where legislation impacts upon rights. Acceptance of implied repeal may be a technique of construction the common law will not retain where human rights are affected. And when Parliament legislates to confer powers upon the executive which may erode human rights, it can expect scrutiny of the exercise of those powers not in a deferential *Wednesbury* manner but in a manner which is commensurate with the legislative and international recognition of rights as constitutional in a broad sense.

I should end where I started out 30 years ago with the question whether Parliament can bind itself. As Sir Owen Dixon said, this is the old theological



riddle.<sup>102</sup> Shall I attempt an answer? It would be that Parliament is not limited by earlier legislation. But it is bound by the constitution which may partly be expressed in earlier legislation. The constitution evolves. Saying what it is in a case where the content of the constitution directly arises is ultimately for the courts. That is because the conditions of valid law-making are law. Parliament is supreme as legislator. But it legislates under the law of the constitution.

Where does this leave Dicey? Spinning still perhaps. Does it mean Parliament is not sovereign? Yes. But it never was. Where does it leave the rest of us? Pretty much where we have always been. But freed from a theory that does not fit, we are better able to confront directly the difficult issues thrown up at the edges of law. We can consider them on the basis of reason and principle, through the processes of democracy and under the security of law.

Tolstoy, referring to the new worlds revolutions in dogma can open up, invoked Copernicus:

Just as in astronomy it was necessary to renounce the consciousness of an unreal immobility and to recognise an unfelt motion, it is similarly necessary to renounce a freedom that does not exist and to recognise a dependence of which we are not conscious.

It is time to release some energy. Parliamentary sovereignty is an inadequate theory of our constitutions. An untrammelled freedom of Parliament does not exist. We need to develop a better consciousness of the dependence of our societies upon the law of the constitution - and a feel for constitutional movement, in renunciation of an immobility which is unreal. We should get off the merry-go-round.

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<sup>102</sup> If parliament is sovereign, it can bind itself hand and foot. If it can bind itself hand and foot, it is not sovereign. If it cannot bind itself hand and foot, then there are things parliament cannot do, and parliament is not sovereign.