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CONTENTS

Robin Cooke Lecture 2003

Something Old, Something New: Constitutional Stirrings and the Supreme Court <i>Dame Sian Elias</i>	121
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Articles

Aboriginal Title in New Zealand: A Retrospect and Prospect <i>P G McHugh</i>	139
Indigenous Autonomy and Justice in North America <i>Mark Bennett</i>	203

Comment

Healing the Past or Harming the Future? Large Natural Groupings and the Waitangi Settlement Process <i>Malcolm Birdling</i>	259
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Articles

The Emperor's Old Clothes: Lack of Transparency in the Courts-Martial Board of Review <i>Gordon P Hook</i>	285
Ministers' Personal Appointees: Part Politician, Part Bureaucrat <i>Lucy Hare</i>	315

SOMETHING OLD, SOMETHING NEW: CONSTITUTIONAL STIRRINGS AND THE SUPREME COURT

*Dame Sian Elias**

This is the edited text of the Robin Cooke Lecture 2003, delivered at the Victoria University of Wellington Law School on 11 December 2003.

In 1904 Sir Robert Stout, then Chief Justice of New Zealand, described the continuation of appeals to the Privy Council as "an anomaly in our Constitution".¹ We lived with greater anomalies until the passing of the Constitution Act 1986, but the Privy Council has proved to be the hardest of all institutional relics of colony.

In 1904 we shared the "anomaly" of Privy Council appeals with Australia. Indeed, Stout's paper proposed that the newly created High Court of Australia be the final court of appeal for that country – and that it be located in the capital.² (Australia took another 80 years to implement both proposals.) Earlier, the fate of appeals to the Privy Council had been one of the last obstacles to approval in London of the federal Constitution. A last-minute compromise, for which Sir Samuel Griffith was blamed,³ preserved appeals to the Privy Council except in matters of dispute in the Federation. The compromise in Australia limped on until the 1980s. In New Zealand, we have taken another 20 years to think about the matter.

Such caution has been a characteristic of our handling of constitutional matters. At New Zealand insistence, the Statute of Westminster 1931 provided that it would not have

* Chief Justice of New Zealand.

1 Sir Robert Stout "Appellate Tribunals for the Colonies" (1904) 2 Commonwealth LR 3, 4.

2 Stout, above n 1, 10.

3 At his swearing-in as Chief Justice on 6 October 1903, Sir Samuel Griffith felt it necessary to respond to the criticisms made of his appointment in the Federal Parliament: Hon Murray Gleeson, Chief Justice of Australia "The Centenary of the High Court: Lessons from History" (13th AIJA Oration, Australian Institute of Judicial Administration, Melbourne, 3 October 2003) 1.

effect in New Zealand until adopted by statute.⁴ Our existing constitutional arrangements under the Constitution Act 1852 were expressed to be "thoroughly satisfactory" in the parliamentary debates. Speakers were generally anxious that we should not be seen to show "ingratitude towards England" by adopting the freedom offered. Anxiety to preserve appeals to the Privy Council was also expressed.⁵

It took 15 years for us to adopt the Statute of Westminster.⁶ Until then, 15 entrenched sections of the 1852 Constitution Act could be amended only by the United Kingdom Parliament. One such amendment, proposed during the Depression, would have sought a reduction in the salary of the judges.⁷ In an unaccountable burst of enthusiasm for the principles of judicial independence, the proposal was dropped. It was not until 1986 that we got around to replacing the 1852 Act.

What this carelessness about our constitutional arrangements has meant is that when we do come to consider reforms touching upon those arrangements, we are not generally well prepared. The debate which preceded the enactment of the Supreme Court Act 2003 may be thought to provide some illustrations,⁸ but the traditional reticence may be changing. The Act itself is groundbreaking in making explicit reference to principles of the constitution.⁹ Whether this signals the start of a greater willingness to engage in constitutional discourse remains to be seen.

Lord Cooke is a relatively late convert to the creation of a local final appellate court. Since 1987 he has been convinced that the time had come to move on:¹⁰

In short, New Zealand is now an independent member state of the Commonwealth, a separate realm of the Queen. It is inconsistent with that nationhood to submit our legal issues to the adjudication of those, whoever they may be, who happen at any one time and in any particular case to comprise a majority of Judges of another country, appointed and sitting far off in that

4 Statute of Westminster 1931 (UK), s 10.

5 Hon David Buddo (23 July 1931) 228 NZPD 642; compare Rev C L Carr (21 July 1931) 228 NZPD 580.

6 Statute of Westminster Adoption Act 1947.

7 See Sir David Smith "Bench and Bar 1928-1950" in Robin Cooke (ed) *Portrait of a Profession* (Reed, Wellington, 1969) 90, 98-103.

8 See Rt Hon Dame Sian Elias "Transition, Stability and the New Zealand Legal System" (F W Guest Memorial Lecture 2003) (2004) 10 Otago LR 475, 476-477.

9 See the Supreme Court Act 2003, s 3(2): "Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament."

10 Lord Cooke of Thorndon "Final Appeal Courts: Some Comparisons" (New Zealand Centre for Public Law occasional paper no 7, Wellington, 2001) 18.

country and primarily versed in the laws of that country. Most New Zealand law has become markedly different from English law—the major statute law almost entirely so, the common law so to a significant extent.

What Lord Cooke has recently described as the "diminishing Englishness of the common law"¹¹ is the result of a number of factors. One of them has been the developing confidence in local traditions and experiences in other jurisdictions in which the common law has taken root. The common law has never been a seamless whole. When it has travelled it has adapted to local circumstances, to meet the needs of different communities. The need to accommodate the customs and laws of the existing inhabitants of territories acquired by the British Crown made variation inevitable. As local legislatures made laws to meet the aspirations of local communities, the common law moved with the legislation. Even where there was no statutory prod, different solutions to common legal problems were sometimes adopted as a matter of intellectual preference.

Lord Bingham, in discussing the future of the common law, has identified the "diminished role" of the Judicial Committee of the Privy Council as having given freedom to the courts of Australia, Canada, and India to develop principles of their own.¹² Without that same freedom, New Zealand divergence from English law has depended more upon differences in local conditions, particularly led by statutes, than on differences in legal reasoning. The Privy Council has been more encouraging of diversity at some times than at others. In *Australian Consolidated Press Ltd v Uren*, a Board which included Sir Alfred North acknowledged the ability of Australian courts to go their own way when reasonable differences of view on matters of policy were open.¹³

The issue that faced the High Court in the present case was whether the law as it had been settled in Australia should be changed. Had the law developed by processes of faulty reasoning or had it been founded upon misconceptions it would have been necessary to change it. Such was not the case. In the result in a sphere of the law where its policy calls for decision and where its policy in a particular country is fashioned so largely by judicial opinion it became a question for the High Court to decide whether the decision in *Rookes v Barnard* [[1964] AC 1129 (HL)] compelled a change in what was a well settled judicial approach in the law of libel in Australia. Their Lordships are not prepared to say that the High Court were wrong in being unconvinced that a changed approach in Australia was desirable.

11 Robin Cooke "The Road Ahead for the Common Law" (2004) 53 ICLQ 273, 273.

12 Tom Bingham *The Business of Judging* (Oxford University Press, Oxford, 2000) 387.

13 *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590, 644 (PC).

In a blow for greater diversity, the young Cooke, writing in the *New Zealand Law Journal*, argued against "unquestioning compliance" with English case law.¹⁴ He argued that the New Zealand Court of Appeal should examine academic criticisms of English authorities, and the views of other great Commonwealth or American judges, in deciding which course to take.

In practice, the freedom to go our own way has been limited. There are some notable exceptions,¹⁵ but in many other cases interesting developments have been arrested.¹⁶ But times change. Some of the New Zealand cases may yet be seen to be prophetic of changes in English law.

Lord Cooke's own contribution to the development of a distinctive New Zealand law is immense. We need not be quite as partisan as one Australian commentator, who claimed that Sir Owen Dixon was "arguably the greatest judge that the common law system has produced",¹⁷ but Lord Cooke's own contribution to the New Zealand legal tradition, and to the wider common law tradition of which it is part, is at least as great.

It is worth reflecting on some of the elements of the New Zealand legal tradition. I wonder whether any country started out with higher expectations of law than ours. An inducement to Maori to enter into the Treaty of Waitangi was the promise of law. That is clear from the debates at Waitangi¹⁸ and earlier petitions for British protection. Lord Glenelg, the Colonial Secretary, explained the decision to make New Zealand a colony in terms of the need to establish legal order and to avoid the repetition in New Zealand of "the calamities by which the aborigines of America and African colonies have been afflicted".¹⁹

14 R B Cooke "The Supreme Tribunal of the British Commonwealth?" (1956) 32 NZLJ 233, 235.

15 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC); *Lange v Atkinson* [2000] 1 NZLR 257 (PC).

16 *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1990] 3 NZLR 513 (PC); *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700 (PC); *Downsview Nominees Ltd v First City Corporation Ltd* [1993] 1 NZLR 513 (PC); *O'Connor v Hart* [1985] 1 NZLR 159 (PC); *Aotearoa International Ltd v Scancarriers A/S* [1985] 1 NZLR 513 (PC).

17 Hon Mr Justice Michael McHugh "The Law-making Function of the Judicial Process—Part II" (1988) 62 ALJ 116, 127.

18 W Colenso *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (Government Printer, Wellington, 1890) 27.

19 Lord Glenelg to Lord Durham (29 December 1837) *Great Britain Parliamentary Papers* NZ 1 1840 (582) VI, App 8, 148–149.

The establishment of a legal system and the provision of laws appropriate to local conditions had to await the arrival of the first Chief Justice. In the meantime the temporary expedient was adopted of applying "the Laws of New South Wales so far as they can be made applicable".²⁰ That was resented greatly by the local residents, who thought they gave a "penal taint" to the new colony.²¹ Their opposition was an early expression of distinctiveness.

When William Martin, the first Chief Justice, and William Swainson, the second Attorney-General, arrived together on the *Tyne* in 1841, they assisted with the drafting of Ordinances for the government of the new colony. The instructions received by Governor Hobson had advised them to look to the laws of other countries which had adapted English law while "retaining the spirit of English law", but discouraged "servile adherence to them as precedent, except as far as the similarity of circumstances may allow".²²

The licence offered was taken. The first Ordinances were received with some astonishment in London. They were radical measures by the standard of the day. Some, too radical, were disallowed.

The Supreme Court of New Zealand, established in 1841, had jurisdiction in common law and equity right from the outset,²³ anticipating the English restructuring by decades. Property and Conveyancing Ordinances greatly simplified the English law, and the Land Claims Ordinance 1841 established that the domain lands of the Crown were "subject ... to the rightful and necessary occupation and use thereof" by the aboriginal inhabitants.²⁴ What that means, we are still working through. The rules of the Supreme Court were breathtakingly streamlined by the standards of the day. Proceedings could be started by oral complaint to a Registrar.²⁵ The judge was required "to elicit the point in issue, by examination of the parties or their Solicitors".²⁶

Our early judges, both Martin and Chapman, were also adventurous in their sources. Chapman was an admirer of Justice Story of the United States Supreme Court. The Full

20 New South Wales Laws Extension Ordinance 4 Vict 1, long title. See A H McLintock *Crown Colony Government in New Zealand* (Government Printer, Wellington, 1958) 132.

21 McLintock, above n 20, 132–133.

22 Lord John Russell to William Hobson (9 December 1840) *Great Britain Parliamentary Papers* NZ 3 1841 (311) XVII 24, 25.

23 Supreme Court Ordinance 1841 5 Vict 1, cls 2, 3.

24 Land Claims Ordinance 1841 4 Vict 2, cl 2.

25 Supreme Court Rules Ordinance 1844 8 Vict 1, r 12.

26 Supreme Court Rules Ordinance 1844 8 Vict 1, r 28.

Court decision in *R v Symonds*²⁷ draws not only on Blackstone but also on Chancellor Kent's commentaries and the United States Supreme Court decision in *Cherokee Nation v State of Georgia*.²⁸ When the Privy Council eventually came to consider *R v Symonds* in the course of *Nireaha Tamaki v Baker*, Lord Davey sniffed a little at the use of American case law, saying:²⁹

The judgments of Marshall, CJ, are entitled to the greatest respect although not binding on a British Court. The decisions referred to, however, being given under different circumstances do not appear to assist their Lordships in this case. But some of the judgments contain *dicta* not unfavourable to the appellant's case.

Our first Court of Appeal was the Governor and the Executive Council.³⁰ The 1846 Ordinance establishing the Court gave it power to grant leave to appeal to the Privy Council where the amount in issue exceeded £500 or the Court of Appeal had overruled the Supreme Court.³¹ No appeals to London were in fact taken to the Court of Appeal during the period of Crown colony government. Only one appeal to the Privy Council is reported for that period;³² it led to the judgment of the Full Court of Martin CJ and Chapman J being overturned.

In enactment of our own statutes and in case law we have swung between periods of local adaptation or invention and periods of slavish imitation, characterised by Jim Cameron as "legal cringe".³³ Pioneering legislation and innovative judicial responses to local conditions gave way in the period after World War I to a more wooden approach which lasted until the 1960s. By 1965 a reforming Minister of Justice, Ralph Hanan, had identified a fundamental cause of the inadequacy of law reform at the time to be the view that "important changes in the common law should not normally be made except in accordance with changes that have taken place in England". That, he said, was "not good enough".³⁴ After the early adventurism of Chapman and Martin, Cameron's verdict on

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

28 *Cherokee Nation v State of Georgia* (1831) 30 US (5 Pet) 1. See for example *R v Symonds*, above n 27, 388, 390 Chapman J.

29 *Nireaha Tamaki v Baker* (1901) NZPCC 371, 384–385 (PC).

30 Supreme Court Amendment Ordinance 1846 10 Vict 3, cl 3.

31 Supreme Court Amendment Ordinance 1846 10 Vict 3, cl 8.

32 *R v Clarke* (1851) NZPCC 516 (PC).

33 B J Cameron "Legal Change over Fifty Years" (1987) 3 Cant LR 198, 198.

34 J R Hanan *The Law in a Changing Society: A Policy and Programme for Law Reform* (Department of Justice, Wellington, 1965) 20.

New Zealand case law is that it demonstrated "essentially derivative thinking and a narrow application of precedent" for much of the 20th century.³⁵

With the formation of the separate Court of Appeal in 1957, slavish adherence to English precedents passed. *Corbett v Social Security Commission*³⁶ was the beginning of a new confidence which led Lord Cooke to his 1987 verdict that "New Zealand law, both that made by our parliament and that made by our judges, has now evolved into a truly distinctive body of principles and practices, reflecting a truly distinctive outlook".³⁷

In 1995, however, Chief Justice Sir Thomas Eichelbaum sounded a note of caution about the extent to which the New Zealand courts may have felt constrained by the right of appeal to the Privy Council:³⁸

In fairness, the effect of the restraint imposed by the mere presence of the right of appeal to the Privy Council should not be underestimated. In the absence of fairly obvious differentiating local circumstances, the likelihood must be considerable that their Lordships sitting at Downing St will apply the law with which they are comfortable when at the House of Lords. Any New Zealand judgment which consciously departs from "English law" does so at the risk of reversal. Thus it surprises not that the number of instances where New Zealand Judges have deliberately courted that risk is relatively small.

The suggestion that the development of New Zealand common law may have been inhibited in the past by appeals to the Privy Council is impossible to prove. The question whether the abolition of appeals to London will result in accelerating divergence is one of the important questions hanging over the creation of the new Supreme Court.

The experience in Australia and Canada does suggest that some conformity may be lost over time, but the common law heritage, as I have elsewhere suggested,³⁹ pulls together. More often than not, when decisions in novel cases have to be measured against the principles identified in comparable jurisdictions, we will agree. So too the increasing internationalisation of much of our law pulls us together. Where there are differences

35 Cameron, above n 33, 210.

36 *Corbett v Social Security Commission* [1962] NZLR 878 (CA).

37 Sir Robin Cooke "The New Zealand National Legal Identity" (1987) 3 Cant LR 171, 182; see also *Invercargill City Council v Hamlin*, above n 15.

38 Thomas Eichelbaum "Brooding Inhibition—Or Guiding Hand? Reflections on the Privy Council Appeal" in Philip A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 112, 127–128.

39 Dame Sian Elias "The Usages of Society and the Fashions of the Times: W[h]ither the Common Law?" (Address to the 13th Commonwealth Law Conference, Melbourne, 15 April 2003) 19.

between us, it will usually be because there are reasons to go different ways. Those expressions of difference are themselves critical to the continued vitality of the common law. I do not think it was simply for reasons of politeness that the Privy Council acknowledged in *Invercargill City Council v Hamlin* that a strength of the common law is the ability of the courts of different jurisdictions to "learn from each other".⁴⁰

On the question of divergence, there are forces at work other than the loss of appeals to London. The increasing integration of the legal systems of Europe and the power of international movements in human rights and commercial law have diminished the centrality of the House of Lords. As Lord Cooke has said in a recent paper, "a new Supreme Court of the United Kingdom will be one national supreme court among many".⁴¹ Indeed, he goes on to point out that it will not even be supreme if the European Court of Justice emerges as the final court for the Union. It may be that through the process of "learning from each other" the common law of our different jurisdictions will be enriched by the European insights increasingly important in the decisions of the English courts. If so, it will be because, in the contest of ideas, they persuade on their own merits.

I do not expect that the setting up of the Supreme Court will unsettle our law. Those who are worried about the prospect do not, I think, understand how conservative judicial method must be. I do not even think that the Supreme Court will have immediate and dramatic impact. Still less can it expect to be immediately or consistently popular. It is worth remembering the experience in Australia and the United States.

Chief Justice Gleeson in the celebrations to mark the centenary of the High Court of Australia in October 2003 reminds us that there never was a "golden age when members of the Court basked in universal admiration".⁴² The circumstances of the Court's creation and the initial appointments to it were highly controversial. There were fears that the judges would not have enough to do. It was suggested that the Court should come together as needed and could be made up of the Chief Justices of the States. The first five members of the Court were all men who had been prominent politicians. Chief Justice Gleeson notes that "[f]rom the very beginning, decisions of the Court that have frustrated political objectives, have resulted in noisy criticism, resentment of the Court's power and independence, and threats to limit that independence".⁴³

40 See *Invercargill City Council v Hamlin*, above n 15, 520.

41 Cooke "The Road Ahead for the Common Law", above n 11, 274.

42 Gleeson, above n 3, 3.

43 Gleeson, above n 3, 9.

Chief Justice Gleeson rather philosophically suggests that such a reaction is only what is to be expected in a "robust democracy".⁴⁴ In New Zealand we too will have to develop similar stoicism.

The Constitution of the United States was consciously created as supreme law, creating and limiting government, because of the history of dispute with the Parliament at Westminster. Even with this background of insistence on legality, however, the United States Supreme Court languished for its first 10 years. In its first term the only work it had to do was to admit attorneys to the Bar. It heard no cases for two years, and delivered no substantive decisions for a further year. It had difficulty attracting and keeping members.⁴⁵ In 1801, when Chief Justice Marshall was appointed, the Court is said to have "existed on the fringe of American awareness. Its prestige was slight, and it was more ignored than respected".⁴⁶

When the United States Government moved from Philadelphia to Washington, the Court was simply overlooked. No provision was made for it until the Senate consented to allow it to use one of the committee rooms in the basement. At one stage it was reduced to holding sittings in a tavern. These beginnings are some comfort to the judges appointed to the New Zealand Supreme Court, now that the details of our temporary and permanent accommodation are being revealed to us.

It seems to me that we can expect over time to gain three principal benefits from the establishment of the Supreme Court. The first is the extension of the benefit of second tier appeal to all cases which merit it, with gains for the consistency and coherence of our law. The second benefit is the local knowledge to place the difficult questions the Court will be asked to consider in context. The third benefit is better understanding of the place of law and the legal system within our community.

First, access. The benefit of a second tier appeal has to date been secured for only a very small number of cases. I have expressed the view before that a lack of accessibility to the law has been the real cost of our not having had a final court of appeal in New Zealand.⁴⁷ That inaccessibility has not simply been due to the expense of appeals. Where a mixed system of appeals as of right and appeals by leave is maintained, appeals taken as a matter

⁴⁴ Gleeson, above n 3, 9.

⁴⁵ Leonard W Levy *Seasoned Judgements: The American Constitution, Rights, and History* (Transaction, New Brunswick, 1997) 321–322.

⁴⁶ Levy, above n 45, 379.

⁴⁷ Elias "Transition, Stability and the New Zealand Legal System", above n 8, 482.

of right leave little room for appeals which require leave. It is no accident that so few appeals from New Zealand on criminal matters have been granted special leave.

The experience in Australia may well be a pointer to the future in New Zealand. Since 1984, when special leave to appeal became a requirement for all appeals to the High Court, criminal appeals have constituted a much greater proportion of the work of the High Court. Justices Kirby and Heydon have both attributed the change to the abolition of appeals as of right.⁴⁸ The change has affected the tone of the national legal system. As Justice Kirby has identified,⁴⁹ it is in criminal cases that the rule of law is truly tested. The accessibility of a court at the apex of the hierarchy in such matters provides an important institutional guarantee and the ability to respond to local conditions. In Australia, questions of fair trial are considered by the High Court on the basis of a distinctively Australian perspective.⁵⁰

Whilst English and local legal history are undoubtedly of much interest, they do not, in our view, dictate the emerging law on the subject of this judgment as it now applies in Australia.

I have singled out the criminal law, but, in truth, there are many areas of law of vital importance to the lives of New Zealanders where a second tier appeal has not been available. That is damaging to the integrity of the legal system. The role of an apex court is to maintain the coherence of the legal system as a whole. As Aharon Barak, Chief Justice of Israel, has identified, it is important that a legal system have a court with a sense of the scope and reach of the whole law.⁵¹

The development of a specific common-law doctrine radiates into the entire legal system. The interpretation of a single statute affects the interpretation of all statutes. A legal system is not a confederation of laws. Legal rules and principles together constitute a system of law whose different parts are tightly linked.

A divergence of final responsibility for the legal system, such as we have in effect had to date, means that the coherence and overview which is the benefit of a final court with responsibility for maintaining legality in the entire legal system is lost.

48 Hon Justice Michael Kirby "Why has the High Court Become More Involved in Criminal Appeals?" (2002) 23 Aust Bar Rev 4; J D Heydon "Evidence Law" in Tony Blackshield, Michael Coper, and George Williams (eds) *The Oxford Companion to the High Court of Australia* (Oxford University Press, Melbourne, 2001) 254–256.

49 Kirby, above n 48, 19.

50 *Azzopardi v The Queen* [2001] 205 CLR 50, 65 Gaudron, Gummow, Kirby, and Hayne JJ.

51 Aharon Barak "A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116 Harv L Rev 16, 25–26.

The second benefit we can hope to obtain from patriating our final court is the knowledge of local conditions which is essential if a legal system is to be responsive to the community it serves. Others take a different view on this. Some see detachment or remoteness as a more important quality than local knowledge. There are those who believe that local conditions can be adequately communicated by counsel. I am not convinced. When as counsel in the *Maori Broadcasting* case⁵² I was asked by the presiding Law Lord "Do they still live on reservations?", I was able of course to answer the immediate question and put right the rolled-up misconception—but I felt a sense of helplessness about describing a whole world. Similarly, when sitting on a conveyancing case in the Judicial Committee discussing the standard of care to be expected of a provincial legal practitioner in New Zealand, I felt keenly the gulf in understanding of the sophistication and subtlety reasonably to be expected.

The third change we may expect over time to flow from the establishment of the Supreme Court is better understanding in the community of the role of courts. Our present system has been bewilderingly obscure. It was instructive to watch from the sidelines the celebration of the centenary of the High Court of Australia. The Court is a visible symbol of the place of impartial administration of justice in the Australian constitution. It demonstrates how government under law is assured by courts which are independent. Chief Justice Gleeson, in reflecting on the place occupied by the High Court, has suggested that the Australian community understands that in a contest between citizen and government, the High Court holds the scales of justice evenly.⁵³

The High Court of Australia is visible and accessible, as our final court has never been. Its decisions may be criticised from time to time. There is reason to believe that the public is aware of what is at stake, and that the institutional safeguard of the Court is appreciated and understood in a way that cannot be taken for granted in our own system. Similar pride in the institutions, if not in particular outcomes, can be seen in Canada and the United States.

Why does public understanding of the role of the courts matter? An aspect of the rule of law is accessibility to courts which are independent and impartial. Courts are vulnerable, particularly when obliged to address controversial matters. They cannot avoid such matters when they are brought for decision in properly constituted litigation. Characterisation of judges as "activist" for fulfilling their judicial obligations is misconceived, and dangerous to the institutions.

52 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC).

53 Gleeson, above n 3, 25.

The independence of the judiciary is not an immediately appealing quality to many people. It exists not as protection for judges but to ensure impartiality. It provides the assurance referred to by Chief Justice Gleeson that the scales of justice are held evenly, no matter how powerful the interests and no matter how loud the clamour for one side. The independence of the judiciary exists to ensure that the individual judge, when judging, is subject only to the law.

The New Zealand Constitution Act 1986 makes separate provision for the legislative, executive, and judicial branches of government. Although our legal system requires the independence of the judiciary from other sources of state power, that independence is, in reality, fragile. Judges have security of tenure and salary but are dependent on the executive for administrative support and in the setting of the fees which litigants must pay to have access to the courts.

International statements of basic principles for judicial independence adopted by both the United Nations General Assembly and the Commonwealth recognise judicial independence as having an institutional dimension.⁵⁴ The Supreme Court of Canada has held that administrative independence in the organisation of judicial work and the support necessary to achieve it are aspects of judicial independence.⁵⁵ Chief Justice Barak of Israel has expressed the view that it is inconsistent with judicial independence for the administration of the judiciary to be through a department of government.⁵⁶ In the United States, Canada, and Australia, judges are given considerable operational autonomy.

In their joint response to the United Kingdom Government's consultation paper proposing the setting up of a Supreme Court, the Law Lords argued that the new Court should enjoy "corporate independence".⁵⁷

[The Court] must have its own budget, settled in a manner which protects the court from political pressure. It must have its own Registrar, answerable to the court, its own staff and its own IT facilities. The independence of the judges requires not only that they be free of

54 See for example the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (19 August 1995); Universal Declaration on the Independence of Justice (Montreal, 10 June 1983) UN Doc E/CN.4/Sub.2/1985/18/Add.6, annex IV; Basic Principles on the Independence of the Judiciary (1985) UN Doc A/CONF.121/22/Rev.1; Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government (2003).

55 See *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3, 81 para 118 Lamer CJC, L'Heureux-Dubé, Sopinka, Gonthier, Cory, and Iacobucci JJ.

56 Barak, above n 51, 54.

57 The Law Lords' Response to the Government's Consultation Paper on Constitutional Reform: A Supreme Court for the United Kingdom (CP 11/03, July 2003) 2 para 4.

extraneous pressure but also that the court be institutionally free of administrative pressure. In Australia, a one-line budget is agreed annually between the High Court's chief executive officer and the attorney-general, and a similar arrangement would be appropriate here.

It is arguable that in New Zealand we are now getting out of step with countries with which we identify closely. Since 1995 we have attempted a middle way, with the courts administered by a separate Department for Courts. In matters of direct judicial support (including support for organisation of judicial work) we have operated in a loose partnership with the Department. The halfway house has now been changed in a reorganisation of the justice sector. The Department for Courts has been reabsorbed back into the Ministry of Justice.

It may be that when the reorganisation is completed, some mechanism can be devised to maintain judicial independence in matters of judicial administration and immediate judicial support. Questions of security of communication between judges and maintenance of confidentiality need urgently to be resolved.

There is no incentive on the executive to address concerns like these. In 1939, Parliament was vigilant to protect the principle of judicial independence even from a probably unexceptionable proposal to let the judiciary share in the general belt-tightening at a time of depression. Today there seems little public awareness of the current issues which impact upon the principle – and little understanding that an independent judiciary is essential to maintenance of the rule of law.⁵⁸ If the invisibility of our final appeal court has been part of that problem, the establishment of the Supreme Court may assist in raising awareness of what is at stake in our constitutional arrangements.

The Supreme Court Act itself raises awareness of aspects of our constitution. It acknowledges constitutional fundamentals by its explicit reference to the doctrines of the rule of law and the sovereignty of Parliament. Section 3(2) does not impose any direct responsibility on the Court. It is formal legislative confirmation of what is described as "New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament". This provision captures a duality identified by Dicey in his hugely influential *Introduction to the Study of the Law of the Constitution*.⁵⁹ This duality, as Sir Kenneth Keith has remarked, has inbuilt tension.⁶⁰

58 Antonio Lamer "The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change" (1996) 45 UNBLJ 3, 7–8.

59 A V Dicey *Introduction to the Study of the Law of the Constitution* (1 ed, MacMillan, London, 1885; 10 ed, MacMillan, London, 1959).

60 K J Keith "Sovereignty at the Beginning of the 21st Century: Fundamental or Outmoded?" (2004) 63 CLJ 581.

Both the rule of law and parliamentary sovereignty are principles of the constitution. The inclusion of reference to them in the Supreme Court Act is at first sight startling. The 1986 Constitution Act avoids such sweeping doctrine and simply provides that the New Zealand Parliament "continues to have full power to make law" for New Zealand.⁶¹ It is possible that in the use of these terms we are seeing the beginning of an attempt to address and capture in writing the elements of our constitution.

In *X Ltd v Morgan-Grampian (Publishers) Ltd*, Lord Bridge declared that "[t]he maintenance of the rule of law is in every way as important in a free society as the democratic franchise".⁶² Implicit in the rule of law is the existence of independent judicial authority. The separate authority of the judiciary exists, as Justice Brandeis, dissenting in *Myers v United States*, explained,⁶³ to prevent the exercise of arbitrary power. There is some measure of truth in the view that the phrase "rule of law" has a moral force which may not aid proper analysis.⁶⁴ As Harden and Lewis have said, the common law has sometimes been invoked "as some kind of universal redeemer. It became to arbitrariness and partisan government what the Christian cross affects to be to vampires. This, needless to say, was to claim too much."⁶⁵

Parliamentary supremacy over the judiciary, as Lord Templeman identified in *In re M*,⁶⁶ is exercisable only through legislation. Determination of all questions of law is the function of the courts.

Dicey defined the sovereignty of Parliament in terms of unfettered lawmaking power. Whether Parliament can be totally unrestricted in the way it makes law is, as Sir Owen Dixon recognised, "the old theological riddle".⁶⁷ The idea has been criticised as "an academic formulation which does not fit the law of England".⁶⁸ Its application even to unitary parliaments which have evolved from limited colonial legislatures is not self-

61 Constitution Act 1986, s 15(1).

62 *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1, 48 (HL).

63 See Justice Brandeis's dissent in *Myers v United States* (1926) 272 US 52, 240-295.

64 See Paul Craig "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] PL 467.

65 Ian Harden and Norman Lewis *The Noble Lie: The British Constitution and the Rule of Law* (Hutchinson, London, 1986) ch 2 "The rule of law: a chequered history" 37.

66 *In re M* [1994] 1 AC 377, 395 (HL).

67 Sir Owen Dixon "The Common Law as an Ultimate Constitutional Foundation" in *Jesting Pilate* (Hein, Melbourne, 1997) 207.

68 Sir Ivor Jennings *The Law and the Constitution* (5 ed, University of London Press, London, 1959) 167.

evident, as both Sir Owen Dixon, who exalted legalism, and Sir Kenneth Keith, who does not, have noted.⁶⁹

Dicey's theory struggles to accommodate the devolution of power. That can be seen in self-government in its application to matters of internal administration for the American colonies, where what Sir William Holdsworth described as a "pedantic use of the theory of the sovereignty of Parliament"⁷⁰ fuelled revolution. It can be seen in the example of Home Rule for Ireland (to which Dicey was implacably opposed) and in the transfer of full authority to the former colonies. Within the United Kingdom, too, Diceyan sovereignty would find preposterous the Scottish view that the provisions of the Act of Union are fundamental and unalterable for all time.⁷¹

Sir William Wade has explained seismic movements such as these in terms of revolution, acquiesced in by the courts. That is how he accounts for the decision in the second *Factortame* case.⁷² The revolutionary explanation allows theoretical consistency, if a rather jerky progression of constitutional history. I was once attracted to it, but I have come to believe that, in truth, it is the theory that does not fit.

Now is not the time for a lengthy discourse upon parliamentary sovereignty or the rule of law, or, what is more important, the relationship between the two. They are topics I have explored earlier.⁷³ What is perhaps worth noting for present purposes is that while both the sovereignty of Parliament and the rule of law are aspects of our unwritten constitution, the case law dealing with them is comparatively slender and the concepts undeveloped.

In its absolutist form, parliamentary sovereignty collides uncomfortably with modern movements for internationalism, federalism, devolution, and the principle of subsidiarity.⁷⁴ It also collides with the developing common law of what Lord Steyn has

69 See Dixon, above n 67, 203; Keith, above n 60, 584–585.

70 W Holdsworth *A History of English Law* (ed A L Goodheart and H G Hanbury, Methuen, London, 1956) vol 10, 531; vol 11, 119–126.

71 *MacCormick v Lord Advocate* [1953] SC 396, 411 Lord Cooper.

72 *R v Secretary of State for Transport, ex parte Factortame (No 2)* [1991] 1 AC 603 (HL); Sir William Wade and Christopher Forsyth *Administrative Law* (8 ed, Oxford University Press, Oxford, 2000) 27–29.

73 Rt Hon Dame Sian Elias "Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round" (2003) 14 PLR 148.

74 See for example Sandra Day O'Connor "Altered States: Federalism and Devolution at the 'Real' Turn of the Millennium" (2001) 60 CLJ 493; Paul Kennedy *Preparing for the Twenty-First Century* (Random House, New York, 1993) 131.

described as "renaissance constitutionalism".⁷⁵ Rights adjudication is increasingly conducted by a method of constitutionalism which is explicitly grounded in the rule of law. Jeffrey Jowell has suggested that in such litigation the courts essentially ask two questions: Is there a breach of a fundamental democratic right? If there is, is the decision necessary in the interests of a legitimate countervailing democratic value? This is review of the "constitutional co-ordinates of the decision".⁷⁶

What is unclear is the impact of this movement on parliamentary sovereignty. If law is indeed to rule, then Parliament must at least observe the prior rules of formal validity for lawmaking. Whether those rules go further than formal requirements has not been authoritatively decided. There are, however, indications of a developing view, long foretold by Lord Cooke, that Parliament is constrained by rules fundamental to the democratic process, by an inability to exclude the courts from supervising the exercise of government power for legality, and, more controversially, by human rights. If so, we no longer have a vision of the rule of law that is purely formal.

In *The Liberation of English Public Law*, the final essay in the 1997 Hamlyn Lectures, Lord Cooke confronted "constitutional bedrock".⁷⁷ Since questions of law "are always ultimately for the courts",⁷⁸

the total abolition of an independent judiciary is unthinkable; its existence is the basic rock of the constitution. An Act wholly replacing the independent judiciary by congeries of administrative tribunals with members holding office at the pleasure of the government of the day can scarcely be imagined; and I believe that the courts would not uphold it.

Lord Cooke has returned to this theme in his recent Commonwealth lecture.⁷⁹ He points out that the number of decisions in which judges have held that legislative or administrative intent must prevail is "untold and huge". There is, however, a "bottom line" of minority rights which cannot lawfully be crossed. "The legislative and judicial functions are complementary; the supremacism of either has no place."

It would be wrong to end without acknowledging the aspirations for justice and its delivery which have prompted the creation of the Supreme Court.

75 Lord Steyn "The New Legal Landscape" [2000] 6 EHRLR 549, 552.

76 Jeffrey Jowell "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] PL 671, 681.

77 Rt Hon Lord Cooke of Thorndon *Turning Points of the Common Law* (Sweet and Maxwell, London, 1997) 78.

78 Cooke *Turning Points of the Common Law*, above n 77, 79.

79 Cooke "The Road Ahead for the Common Law", above n 11, 278.

Sir Robert Stout in 1904, in advocating the abolition of appeals to the Privy Council, spoke of "[t]he psychological effect of dependence on some external power for the performance of our highest duties as citizens of these new nations".⁸⁰ The same chilling effect was described by Sir Thomas Eichelbaum in 1995.⁸¹

In 2004, the year the Supreme Court will be established, we will be 50 years from Beaglehole's essay *The New Zealand Scholar*.⁸² In a time of developing national consciousness, Beaglehole quoted Robin Hyde's cry that "we are hungry for the words that shall show us these islands and ourselves; that shall give us a home in thought".⁸³ Beaglehole makes the point that there is a lag between political independence and independence of thought for all colonial peoples.⁸⁴ It was a process described more than 100 years before Beaglehole by Ralph Waldo Emerson, in expressing an intellectual Declaration of Independence to the students of Harvard: "We will walk on our own feet; we will work with our own hands; we will speak our own minds".⁸⁵

The process of transition may be lengthy. It does not come about at once or in all things at the same time. In 1954 Beaglehole was tentative. He spoke of a "gathering conviction" that we had in New Zealand "something interesting;" "not ... a harvest, but at least it is a seed bed". He "ventured to hope".⁸⁶ Today, prodded by the historians, poets, and writers discussed by Beaglehole, the seed bed he discerned has flourished. Those of my generation do not doubt that in art, in literature, in politics, we have a home in thought at home. That is not to suggest that we have cut adrift from our wider heritage. We have built upon it.

I do not suggest that a home in thought for New Zealand law is provided by the creation of an institution. It is the work of many generations. We are the inheritors of their hopes and their expectations of us. Our home in thought has been built with the help of judges who have served in New Zealand since William Martin arrived on the *Tyne* in 1841. No one has contributed more than Lord Cooke of Thorndon. It is a privilege to say so in a lecture dedicated to his honour.

80 Stout, above n 1, 13.

81 See Eichelbaum, above n 38.

82 J C Beaglehole *The New Zealand Scholar* (Margaret Condliffe Memorial Lecture, Canterbury University College, 21 April 1954), reprinted in Peter Munz (ed) *The Feel of Truth: Essays in New Zealand and Pacific History* (Reed, Wellington, 1969) 237.

83 Beaglehole, above n 82, 244.

84 Beaglehole, above n 82, 239-240.

85 Ralph Waldo Emerson "The American Scholar" (Address to the Phi Beta Kappa Society, Harvard University, 31 August 1837).

86 Beaglehole, above n 82, 248.

SOMETHING OLD, SOMETHING NEW: CONSTITUTIONAL STIRRINGS AND THE SUPREME COURT

*Dame Sian Elias**

This is the edited text of the Robin Cooke Lecture 2003, delivered at the Victoria University of Wellington Law School on 11 December 2003.

In 1904 Sir Robert Stout, then Chief Justice of New Zealand, described the continuation of appeals to the Privy Council as "an anomaly in our Constitution".¹ We lived with greater anomalies until the passing of the Constitution Act 1986, but the Privy Council has proved to be the hardest of all institutional relics of colony.

In 1904 we shared the "anomaly" of Privy Council appeals with Australia. Indeed, Stout's paper proposed that the newly created High Court of Australia be the final court of appeal for that country – and that it be located in the capital.² (Australia took another 80 years to implement both proposals.) Earlier, the fate of appeals to the Privy Council had been one of the last obstacles to approval in London of the federal Constitution. A last-minute compromise, for which Sir Samuel Griffith was blamed,³ preserved appeals to the Privy Council except in matters of dispute in the Federation. The compromise in Australia limped on until the 1980s. In New Zealand, we have taken another 20 years to think about the matter.

Such caution has been a characteristic of our handling of constitutional matters. At New Zealand insistence, the Statute of Westminster 1931 provided that it would not have

* Chief Justice of New Zealand.

1 Sir Robert Stout "Appellate Tribunals for the Colonies" (1904) 2 Commonwealth LR 3, 4.

2 Stout, above n 1, 10.

3 At his swearing-in as Chief Justice on 6 October 1903, Sir Samuel Griffith felt it necessary to respond to the criticisms made of his appointment in the Federal Parliament: Hon Murray Gleeson, Chief Justice of Australia "The Centenary of the High Court: Lessons from History" (13th AIJA Oration, Australian Institute of Judicial Administration, Melbourne, 3 October 2003) 1.

effect in New Zealand until adopted by statute.⁴ Our existing constitutional arrangements under the Constitution Act 1852 were expressed to be "thoroughly satisfactory" in the parliamentary debates. Speakers were generally anxious that we should not be seen to show "ingratitude towards England" by adopting the freedom offered. Anxiety to preserve appeals to the Privy Council was also expressed.⁵

It took 15 years for us to adopt the Statute of Westminster.⁶ Until then, 15 entrenched sections of the 1852 Constitution Act could be amended only by the United Kingdom Parliament. One such amendment, proposed during the Depression, would have sought a reduction in the salary of the judges.⁷ In an unaccountable burst of enthusiasm for the principles of judicial independence, the proposal was dropped. It was not until 1986 that we got around to replacing the 1852 Act.

What this carelessness about our constitutional arrangements has meant is that when we do come to consider reforms touching upon those arrangements, we are not generally well prepared. The debate which preceded the enactment of the Supreme Court Act 2003 may be thought to provide some illustrations,⁸ but the traditional reticence may be changing. The Act itself is groundbreaking in making explicit reference to principles of the constitution.⁹ Whether this signals the start of a greater willingness to engage in constitutional discourse remains to be seen.

Lord Cooke is a relatively late convert to the creation of a local final appellate court. Since 1987 he has been convinced that the time had come to move on:¹⁰

In short, New Zealand is now an independent member state of the Commonwealth, a separate realm of the Queen. It is inconsistent with that nationhood to submit our legal issues to the adjudication of those, whoever they may be, who happen at any one time and in any particular case to comprise a majority of Judges of another country, appointed and sitting far off in that

4 Statute of Westminster 1931 (UK), s 10.

5 Hon David Buddo (23 July 1931) 228 NZPD 642; compare Rev C L Carr (21 July 1931) 228 NZPD 580.

6 Statute of Westminster Adoption Act 1947.

7 See Sir David Smith "Bench and Bar 1928-1950" in Robin Cooke (ed) *Portrait of a Profession* (Reed, Wellington, 1969) 90, 98-103.

8 See Rt Hon Dame Sian Elias "Transition, Stability and the New Zealand Legal System" (F W Guest Memorial Lecture 2003) (2004) 10 Otago LR 475, 476-477.

9 See the Supreme Court Act 2003, s 3(2): "Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament."

10 Lord Cooke of Thorndon "Final Appeal Courts: Some Comparisons" (New Zealand Centre for Public Law occasional paper no 7, Wellington, 2001) 18.

country and primarily versed in the laws of that country. Most New Zealand law has become markedly different from English law—the major statute law almost entirely so, the common law so to a significant extent.

What Lord Cooke has recently described as the "diminishing Englishness of the common law"¹¹ is the result of a number of factors. One of them has been the developing confidence in local traditions and experiences in other jurisdictions in which the common law has taken root. The common law has never been a seamless whole. When it has travelled it has adapted to local circumstances, to meet the needs of different communities. The need to accommodate the customs and laws of the existing inhabitants of territories acquired by the British Crown made variation inevitable. As local legislatures made laws to meet the aspirations of local communities, the common law moved with the legislation. Even where there was no statutory prod, different solutions to common legal problems were sometimes adopted as a matter of intellectual preference.

Lord Bingham, in discussing the future of the common law, has identified the "diminished role" of the Judicial Committee of the Privy Council as having given freedom to the courts of Australia, Canada, and India to develop principles of their own.¹² Without that same freedom, New Zealand divergence from English law has depended more upon differences in local conditions, particularly led by statutes, than on differences in legal reasoning. The Privy Council has been more encouraging of diversity at some times than at others. In *Australian Consolidated Press Ltd v Uren*, a Board which included Sir Alfred North acknowledged the ability of Australian courts to go their own way when reasonable differences of view on matters of policy were open.¹³

The issue that faced the High Court in the present case was whether the law as it had been settled in Australia should be changed. Had the law developed by processes of faulty reasoning or had it been founded upon misconceptions it would have been necessary to change it. Such was not the case. In the result in a sphere of the law where its policy calls for decision and where its policy in a particular country is fashioned so largely by judicial opinion it became a question for the High Court to decide whether the decision in *Rookes v Barnard* [[1964] AC 1129 (HL)] compelled a change in what was a well settled judicial approach in the law of libel in Australia. Their Lordships are not prepared to say that the High Court were wrong in being unconvinced that a changed approach in Australia was desirable.

11 Robin Cooke "The Road Ahead for the Common Law" (2004) 53 ICLQ 273, 273.

12 Tom Bingham *The Business of Judging* (Oxford University Press, Oxford, 2000) 387.

13 *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590, 644 (PC).

In a blow for greater diversity, the young Cooke, writing in the *New Zealand Law Journal*, argued against "unquestioning compliance" with English case law.¹⁴ He argued that the New Zealand Court of Appeal should examine academic criticisms of English authorities, and the views of other great Commonwealth or American judges, in deciding which course to take.

In practice, the freedom to go our own way has been limited. There are some notable exceptions,¹⁵ but in many other cases interesting developments have been arrested.¹⁶ But times change. Some of the New Zealand cases may yet be seen to be prophetic of changes in English law.

Lord Cooke's own contribution to the development of a distinctive New Zealand law is immense. We need not be quite as partisan as one Australian commentator, who claimed that Sir Owen Dixon was "arguably the greatest judge that the common law system has produced",¹⁷ but Lord Cooke's own contribution to the New Zealand legal tradition, and to the wider common law tradition of which it is part, is at least as great.

It is worth reflecting on some of the elements of the New Zealand legal tradition. I wonder whether any country started out with higher expectations of law than ours. An inducement to Maori to enter into the Treaty of Waitangi was the promise of law. That is clear from the debates at Waitangi¹⁸ and earlier petitions for British protection. Lord Glenelg, the Colonial Secretary, explained the decision to make New Zealand a colony in terms of the need to establish legal order and to avoid the repetition in New Zealand of "the calamities by which the aborigines of America and African colonies have been afflicted".¹⁹

14 R B Cooke "The Supreme Tribunal of the British Commonwealth?" (1956) 32 NZLJ 233, 235.

15 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC); *Lange v Atkinson* [2000] 1 NZLR 257 (PC).

16 *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1990] 3 NZLR 513 (PC); *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700 (PC); *Downsview Nominees Ltd v First City Corporation Ltd* [1993] 1 NZLR 513 (PC); *O'Connor v Hart* [1985] 1 NZLR 159 (PC); *Aotearoa International Ltd v Scancarriers A/S* [1985] 1 NZLR 513 (PC).

17 Hon Mr Justice Michael McHugh "The Law-making Function of the Judicial Process—Part II" (1988) 62 ALJ 116, 127.

18 W Colenso *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (Government Printer, Wellington, 1890) 27.

19 Lord Glenelg to Lord Durham (29 December 1837) *Great Britain Parliamentary Papers* NZ 1 1840 (582) VI, App 8, 148–149.

The establishment of a legal system and the provision of laws appropriate to local conditions had to await the arrival of the first Chief Justice. In the meantime the temporary expedient was adopted of applying "the Laws of New South Wales so far as they can be made applicable".²⁰ That was resented greatly by the local residents, who thought they gave a "penal taint" to the new colony.²¹ Their opposition was an early expression of distinctiveness.

When William Martin, the first Chief Justice, and William Swainson, the second Attorney-General, arrived together on the *Tyne* in 1841, they assisted with the drafting of Ordinances for the government of the new colony. The instructions received by Governor Hobson had advised them to look to the laws of other countries which had adapted English law while "retaining the spirit of English law", but discouraged "servile adherence to them as precedent, except as far as the similarity of circumstances may allow".²²

The licence offered was taken. The first Ordinances were received with some astonishment in London. They were radical measures by the standard of the day. Some, too radical, were disallowed.

The Supreme Court of New Zealand, established in 1841, had jurisdiction in common law and equity right from the outset,²³ anticipating the English restructuring by decades. Property and Conveyancing Ordinances greatly simplified the English law, and the Land Claims Ordinance 1841 established that the domain lands of the Crown were "subject ... to the rightful and necessary occupation and use thereof" by the aboriginal inhabitants.²⁴ What that means, we are still working through. The rules of the Supreme Court were breathtakingly streamlined by the standards of the day. Proceedings could be started by oral complaint to a Registrar.²⁵ The judge was required "to elicit the point in issue, by examination of the parties or their Solicitors".²⁶

Our early judges, both Martin and Chapman, were also adventurous in their sources. Chapman was an admirer of Justice Story of the United States Supreme Court. The Full

20 New South Wales Laws Extension Ordinance 4 Vict 1, long title. See A H McLintock *Crown Colony Government in New Zealand* (Government Printer, Wellington, 1958) 132.

21 McLintock, above n 20, 132–133.

22 Lord John Russell to William Hobson (9 December 1840) *Great Britain Parliamentary Papers* NZ 3 1841 (311) XVII 24, 25.

23 Supreme Court Ordinance 1841 5 Vict 1, cls 2, 3.

24 Land Claims Ordinance 1841 4 Vict 2, cl 2.

25 Supreme Court Rules Ordinance 1844 8 Vict 1, r 12.

26 Supreme Court Rules Ordinance 1844 8 Vict 1, r 28.

Court decision in *R v Symonds*²⁷ draws not only on Blackstone but also on Chancellor Kent's commentaries and the United States Supreme Court decision in *Cherokee Nation v State of Georgia*.²⁸ When the Privy Council eventually came to consider *R v Symonds* in the course of *Nireaha Tamaki v Baker*, Lord Davey sniffed a little at the use of American case law, saying:²⁹

The judgments of Marshall, CJ, are entitled to the greatest respect although not binding on a British Court. The decisions referred to, however, being given under different circumstances do not appear to assist their Lordships in this case. But some of the judgments contain *dicta* not unfavourable to the appellant's case.

Our first Court of Appeal was the Governor and the Executive Council.³⁰ The 1846 Ordinance establishing the Court gave it power to grant leave to appeal to the Privy Council where the amount in issue exceeded £500 or the Court of Appeal had overruled the Supreme Court.³¹ No appeals to London were in fact taken to the Court of Appeal during the period of Crown colony government. Only one appeal to the Privy Council is reported for that period;³² it led to the judgment of the Full Court of Martin CJ and Chapman J being overturned.

In enactment of our own statutes and in case law we have swung between periods of local adaptation or invention and periods of slavish imitation, characterised by Jim Cameron as "legal cringe".³³ Pioneering legislation and innovative judicial responses to local conditions gave way in the period after World War I to a more wooden approach which lasted until the 1960s. By 1965 a reforming Minister of Justice, Ralph Hanan, had identified a fundamental cause of the inadequacy of law reform at the time to be the view that "important changes in the common law should not normally be made except in accordance with changes that have taken place in England". That, he said, was "not good enough".³⁴ After the early adventurism of Chapman and Martin, Cameron's verdict on

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

28 *Cherokee Nation v State of Georgia* (1831) 30 US (5 Pet) 1. See for example *R v Symonds*, above n 27, 388, 390 Chapman J.

29 *Nireaha Tamaki v Baker* (1901) NZPCC 371, 384–385 (PC).

30 Supreme Court Amendment Ordinance 1846 10 Vict 3, cl 3.

31 Supreme Court Amendment Ordinance 1846 10 Vict 3, cl 8.

32 *R v Clarke* (1851) NZPCC 516 (PC).

33 B J Cameron "Legal Change over Fifty Years" (1987) 3 Cant LR 198, 198.

34 J R Hanan *The Law in a Changing Society: A Policy and Programme for Law Reform* (Department of Justice, Wellington, 1965) 20.

New Zealand case law is that it demonstrated "essentially derivative thinking and a narrow application of precedent" for much of the 20th century.³⁵

With the formation of the separate Court of Appeal in 1957, slavish adherence to English precedents passed. *Corbett v Social Security Commission*³⁶ was the beginning of a new confidence which led Lord Cooke to his 1987 verdict that "New Zealand law, both that made by our parliament and that made by our judges, has now evolved into a truly distinctive body of principles and practices, reflecting a truly distinctive outlook".³⁷

In 1995, however, Chief Justice Sir Thomas Eichelbaum sounded a note of caution about the extent to which the New Zealand courts may have felt constrained by the right of appeal to the Privy Council:³⁸

In fairness, the effect of the restraint imposed by the mere presence of the right of appeal to the Privy Council should not be underestimated. In the absence of fairly obvious differentiating local circumstances, the likelihood must be considerable that their Lordships sitting at Downing St will apply the law with which they are comfortable when at the House of Lords. Any New Zealand judgment which consciously departs from "English law" does so at the risk of reversal. Thus it surprises not that the number of instances where New Zealand Judges have deliberately courted that risk is relatively small.

The suggestion that the development of New Zealand common law may have been inhibited in the past by appeals to the Privy Council is impossible to prove. The question whether the abolition of appeals to London will result in accelerating divergence is one of the important questions hanging over the creation of the new Supreme Court.

The experience in Australia and Canada does suggest that some conformity may be lost over time, but the common law heritage, as I have elsewhere suggested,³⁹ pulls together. More often than not, when decisions in novel cases have to be measured against the principles identified in comparable jurisdictions, we will agree. So too the increasing internationalisation of much of our law pulls us together. Where there are differences

35 Cameron, above n 33, 210.

36 *Corbett v Social Security Commission* [1962] NZLR 878 (CA).

37 Sir Robin Cooke "The New Zealand National Legal Identity" (1987) 3 Cant LR 171, 182; see also *Invercargill City Council v Hamlin*, above n 15.

38 Thomas Eichelbaum "Brooding Inhibition—Or Guiding Hand? Reflections on the Privy Council Appeal" in Philip A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 112, 127–128.

39 Dame Sian Elias "The Usages of Society and the Fashions of the Times: W[h]ither the Common Law?" (Address to the 13th Commonwealth Law Conference, Melbourne, 15 April 2003) 19.

between us, it will usually be because there are reasons to go different ways. Those expressions of difference are themselves critical to the continued vitality of the common law. I do not think it was simply for reasons of politeness that the Privy Council acknowledged in *Invercargill City Council v Hamlin* that a strength of the common law is the ability of the courts of different jurisdictions to "learn from each other".⁴⁰

On the question of divergence, there are forces at work other than the loss of appeals to London. The increasing integration of the legal systems of Europe and the power of international movements in human rights and commercial law have diminished the centrality of the House of Lords. As Lord Cooke has said in a recent paper, "a new Supreme Court of the United Kingdom will be one national supreme court among many".⁴¹ Indeed, he goes on to point out that it will not even be supreme if the European Court of Justice emerges as the final court for the Union. It may be that through the process of "learning from each other" the common law of our different jurisdictions will be enriched by the European insights increasingly important in the decisions of the English courts. If so, it will be because, in the contest of ideas, they persuade on their own merits.

I do not expect that the setting up of the Supreme Court will unsettle our law. Those who are worried about the prospect do not, I think, understand how conservative judicial method must be. I do not even think that the Supreme Court will have immediate and dramatic impact. Still less can it expect to be immediately or consistently popular. It is worth remembering the experience in Australia and the United States.

Chief Justice Gleeson in the celebrations to mark the centenary of the High Court of Australia in October 2003 reminds us that there never was a "golden age when members of the Court basked in universal admiration".⁴² The circumstances of the Court's creation and the initial appointments to it were highly controversial. There were fears that the judges would not have enough to do. It was suggested that the Court should come together as needed and could be made up of the Chief Justices of the States. The first five members of the Court were all men who had been prominent politicians. Chief Justice Gleeson notes that "[f]rom the very beginning, decisions of the Court that have frustrated political objectives, have resulted in noisy criticism, resentment of the Court's power and independence, and threats to limit that independence".⁴³

40 See *Invercargill City Council v Hamlin*, above n 15, 520.

41 Cooke "The Road Ahead for the Common Law", above n 11, 274.

42 Gleeson, above n 3, 3.

43 Gleeson, above n 3, 9.

Chief Justice Gleeson rather philosophically suggests that such a reaction is only what is to be expected in a "robust democracy".⁴⁴ In New Zealand we too will have to develop similar stoicism.

The Constitution of the United States was consciously created as supreme law, creating and limiting government, because of the history of dispute with the Parliament at Westminster. Even with this background of insistence on legality, however, the United States Supreme Court languished for its first 10 years. In its first term the only work it had to do was to admit attorneys to the Bar. It heard no cases for two years, and delivered no substantive decisions for a further year. It had difficulty attracting and keeping members.⁴⁵ In 1801, when Chief Justice Marshall was appointed, the Court is said to have "existed on the fringe of American awareness. Its prestige was slight, and it was more ignored than respected".⁴⁶

When the United States Government moved from Philadelphia to Washington, the Court was simply overlooked. No provision was made for it until the Senate consented to allow it to use one of the committee rooms in the basement. At one stage it was reduced to holding sittings in a tavern. These beginnings are some comfort to the judges appointed to the New Zealand Supreme Court, now that the details of our temporary and permanent accommodation are being revealed to us.

It seems to me that we can expect over time to gain three principal benefits from the establishment of the Supreme Court. The first is the extension of the benefit of second tier appeal to all cases which merit it, with gains for the consistency and coherence of our law. The second benefit is the local knowledge to place the difficult questions the Court will be asked to consider in context. The third benefit is better understanding of the place of law and the legal system within our community.

First, access. The benefit of a second tier appeal has to date been secured for only a very small number of cases. I have expressed the view before that a lack of accessibility to the law has been the real cost of our not having had a final court of appeal in New Zealand.⁴⁷ That inaccessibility has not simply been due to the expense of appeals. Where a mixed system of appeals as of right and appeals by leave is maintained, appeals taken as a matter

⁴⁴ Gleeson, above n 3, 9.

⁴⁵ Leonard W Levy *Seasoned Judgements: The American Constitution, Rights, and History* (Transaction, New Brunswick, 1997) 321–322.

⁴⁶ Levy, above n 45, 379.

⁴⁷ Elias "Transition, Stability and the New Zealand Legal System", above n 8, 482.

of right leave little room for appeals which require leave. It is no accident that so few appeals from New Zealand on criminal matters have been granted special leave.

The experience in Australia may well be a pointer to the future in New Zealand. Since 1984, when special leave to appeal became a requirement for all appeals to the High Court, criminal appeals have constituted a much greater proportion of the work of the High Court. Justices Kirby and Heydon have both attributed the change to the abolition of appeals as of right.⁴⁸ The change has affected the tone of the national legal system. As Justice Kirby has identified,⁴⁹ it is in criminal cases that the rule of law is truly tested. The accessibility of a court at the apex of the hierarchy in such matters provides an important institutional guarantee and the ability to respond to local conditions. In Australia, questions of fair trial are considered by the High Court on the basis of a distinctively Australian perspective.⁵⁰

Whilst English and local legal history are undoubtedly of much interest, they do not, in our view, dictate the emerging law on the subject of this judgment as it now applies in Australia.

I have singled out the criminal law, but, in truth, there are many areas of law of vital importance to the lives of New Zealanders where a second tier appeal has not been available. That is damaging to the integrity of the legal system. The role of an apex court is to maintain the coherence of the legal system as a whole. As Aharon Barak, Chief Justice of Israel, has identified, it is important that a legal system have a court with a sense of the scope and reach of the whole law.⁵¹

The development of a specific common-law doctrine radiates into the entire legal system. The interpretation of a single statute affects the interpretation of all statutes. A legal system is not a confederation of laws. Legal rules and principles together constitute a system of law whose different parts are tightly linked.

A divergence of final responsibility for the legal system, such as we have in effect had to date, means that the coherence and overview which is the benefit of a final court with responsibility for maintaining legality in the entire legal system is lost.

48 Hon Justice Michael Kirby "Why has the High Court Become More Involved in Criminal Appeals?" (2002) 23 Aust Bar Rev 4; J D Heydon "Evidence Law" in Tony Blackshield, Michael Coper, and George Williams (eds) *The Oxford Companion to the High Court of Australia* (Oxford University Press, Melbourne, 2001) 254–256.

49 Kirby, above n 48, 19.

50 *Azzopardi v The Queen* [2001] 205 CLR 50, 65 Gaudron, Gummow, Kirby, and Hayne JJ.

51 Aharon Barak "A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116 Harv L Rev 16, 25–26.

The second benefit we can hope to obtain from patriating our final court is the knowledge of local conditions which is essential if a legal system is to be responsive to the community it serves. Others take a different view on this. Some see detachment or remoteness as a more important quality than local knowledge. There are those who believe that local conditions can be adequately communicated by counsel. I am not convinced. When as counsel in the *Maori Broadcasting* case⁵² I was asked by the presiding Law Lord "Do they still live on reservations?", I was able of course to answer the immediate question and put right the rolled-up misconception—but I felt a sense of helplessness about describing a whole world. Similarly, when sitting on a conveyancing case in the Judicial Committee discussing the standard of care to be expected of a provincial legal practitioner in New Zealand, I felt keenly the gulf in understanding of the sophistication and subtlety reasonably to be expected.

The third change we may expect over time to flow from the establishment of the Supreme Court is better understanding in the community of the role of courts. Our present system has been bewilderingly obscure. It was instructive to watch from the sidelines the celebration of the centenary of the High Court of Australia. The Court is a visible symbol of the place of impartial administration of justice in the Australian constitution. It demonstrates how government under law is assured by courts which are independent. Chief Justice Gleeson, in reflecting on the place occupied by the High Court, has suggested that the Australian community understands that in a contest between citizen and government, the High Court holds the scales of justice evenly.⁵³

The High Court of Australia is visible and accessible, as our final court has never been. Its decisions may be criticised from time to time. There is reason to believe that the public is aware of what is at stake, and that the institutional safeguard of the Court is appreciated and understood in a way that cannot be taken for granted in our own system. Similar pride in the institutions, if not in particular outcomes, can be seen in Canada and the United States.

Why does public understanding of the role of the courts matter? An aspect of the rule of law is accessibility to courts which are independent and impartial. Courts are vulnerable, particularly when obliged to address controversial matters. They cannot avoid such matters when they are brought for decision in properly constituted litigation. Characterisation of judges as "activist" for fulfilling their judicial obligations is misconceived, and dangerous to the institutions.

52 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC).

53 Gleeson, above n 3, 25.

The independence of the judiciary is not an immediately appealing quality to many people. It exists not as protection for judges but to ensure impartiality. It provides the assurance referred to by Chief Justice Gleeson that the scales of justice are held evenly, no matter how powerful the interests and no matter how loud the clamour for one side. The independence of the judiciary exists to ensure that the individual judge, when judging, is subject only to the law.

The New Zealand Constitution Act 1986 makes separate provision for the legislative, executive, and judicial branches of government. Although our legal system requires the independence of the judiciary from other sources of state power, that independence is, in reality, fragile. Judges have security of tenure and salary but are dependent on the executive for administrative support and in the setting of the fees which litigants must pay to have access to the courts.

International statements of basic principles for judicial independence adopted by both the United Nations General Assembly and the Commonwealth recognise judicial independence as having an institutional dimension.⁵⁴ The Supreme Court of Canada has held that administrative independence in the organisation of judicial work and the support necessary to achieve it are aspects of judicial independence.⁵⁵ Chief Justice Barak of Israel has expressed the view that it is inconsistent with judicial independence for the administration of the judiciary to be through a department of government.⁵⁶ In the United States, Canada, and Australia, judges are given considerable operational autonomy.

In their joint response to the United Kingdom Government's consultation paper proposing the setting up of a Supreme Court, the Law Lords argued that the new Court should enjoy "corporate independence".⁵⁷

[The Court] must have its own budget, settled in a manner which protects the court from political pressure. It must have its own Registrar, answerable to the court, its own staff and its own IT facilities. The independence of the judges requires not only that they be free of

54 See for example the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (19 August 1995); Universal Declaration on the Independence of Justice (Montreal, 10 June 1983) UN Doc E/CN.4/Sub.2/1985/18/Add.6, annex IV; Basic Principles on the Independence of the Judiciary (1985) UN Doc A/CONF.121/22/Rev.1; Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government (2003).

55 See *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3, 81 para 118 Lamer CJC, L'Heureux-Dubé, Sopinka, Gonthier, Cory, and Iacobucci JJ.

56 Barak, above n 51, 54.

57 The Law Lords' Response to the Government's Consultation Paper on Constitutional Reform: A Supreme Court for the United Kingdom (CP 11/03, July 2003) 2 para 4.

extraneous pressure but also that the court be institutionally free of administrative pressure. In Australia, a one-line budget is agreed annually between the High Court's chief executive officer and the attorney-general, and a similar arrangement would be appropriate here.

It is arguable that in New Zealand we are now getting out of step with countries with which we identify closely. Since 1995 we have attempted a middle way, with the courts administered by a separate Department for Courts. In matters of direct judicial support (including support for organisation of judicial work) we have operated in a loose partnership with the Department. The halfway house has now been changed in a reorganisation of the justice sector. The Department for Courts has been reabsorbed back into the Ministry of Justice.

It may be that when the reorganisation is completed, some mechanism can be devised to maintain judicial independence in matters of judicial administration and immediate judicial support. Questions of security of communication between judges and maintenance of confidentiality need urgently to be resolved.

There is no incentive on the executive to address concerns like these. In 1939, Parliament was vigilant to protect the principle of judicial independence even from a probably unexceptionable proposal to let the judiciary share in the general belt-tightening at a time of depression. Today there seems little public awareness of the current issues which impact upon the principle – and little understanding that an independent judiciary is essential to maintenance of the rule of law.⁵⁸ If the invisibility of our final appeal court has been part of that problem, the establishment of the Supreme Court may assist in raising awareness of what is at stake in our constitutional arrangements.

The Supreme Court Act itself raises awareness of aspects of our constitution. It acknowledges constitutional fundamentals by its explicit reference to the doctrines of the rule of law and the sovereignty of Parliament. Section 3(2) does not impose any direct responsibility on the Court. It is formal legislative confirmation of what is described as "New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament". This provision captures a duality identified by Dicey in his hugely influential *Introduction to the Study of the Law of the Constitution*.⁵⁹ This duality, as Sir Kenneth Keith has remarked, has inbuilt tension.⁶⁰

58 Antonio Lamer "The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change" (1996) 45 UNBLJ 3, 7–8.

59 A V Dicey *Introduction to the Study of the Law of the Constitution* (1 ed, MacMillan, London, 1885; 10 ed, MacMillan, London, 1959).

60 K J Keith "Sovereignty at the Beginning of the 21st Century: Fundamental or Outmoded?" (2004) 63 CLJ 581.

Both the rule of law and parliamentary sovereignty are principles of the constitution. The inclusion of reference to them in the Supreme Court Act is at first sight startling. The 1986 Constitution Act avoids such sweeping doctrine and simply provides that the New Zealand Parliament "continues to have full power to make law" for New Zealand.⁶¹ It is possible that in the use of these terms we are seeing the beginning of an attempt to address and capture in writing the elements of our constitution.

In *X Ltd v Morgan-Grampian (Publishers) Ltd*, Lord Bridge declared that "[t]he maintenance of the rule of law is in every way as important in a free society as the democratic franchise".⁶² Implicit in the rule of law is the existence of independent judicial authority. The separate authority of the judiciary exists, as Justice Brandeis, dissenting in *Myers v United States*, explained,⁶³ to prevent the exercise of arbitrary power. There is some measure of truth in the view that the phrase "rule of law" has a moral force which may not aid proper analysis.⁶⁴ As Harden and Lewis have said, the common law has sometimes been invoked "as some kind of universal redeemer. It became to arbitrariness and partisan government what the Christian cross affects to be to vampires. This, needless to say, was to claim too much."⁶⁵

Parliamentary supremacy over the judiciary, as Lord Templeman identified in *In re M*,⁶⁶ is exercisable only through legislation. Determination of all questions of law is the function of the courts.

Dicey defined the sovereignty of Parliament in terms of unfettered lawmaking power. Whether Parliament can be totally unrestricted in the way it makes law is, as Sir Owen Dixon recognised, "the old theological riddle".⁶⁷ The idea has been criticised as "an academic formulation which does not fit the law of England".⁶⁸ Its application even to unitary parliaments which have evolved from limited colonial legislatures is not self-

61 Constitution Act 1986, s 15(1).

62 *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1, 48 (HL).

63 See Justice Brandeis's dissent in *Myers v United States* (1926) 272 US 52, 240-295.

64 See Paul Craig "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] PL 467.

65 Ian Harden and Norman Lewis *The Noble Lie: The British Constitution and the Rule of Law* (Hutchinson, London, 1986) ch 2 "The rule of law: a chequered history" 37.

66 *In re M* [1994] 1 AC 377, 395 (HL).

67 Sir Owen Dixon "The Common Law as an Ultimate Constitutional Foundation" in *Jesting Pilate* (Hein, Melbourne, 1997) 207.

68 Sir Ivor Jennings *The Law and the Constitution* (5 ed, University of London Press, London, 1959) 167.

evident, as both Sir Owen Dixon, who exalted legalism, and Sir Kenneth Keith, who does not, have noted.⁶⁹

Dicey's theory struggles to accommodate the devolution of power. That can be seen in self-government in its application to matters of internal administration for the American colonies, where what Sir William Holdsworth described as a "pedantic use of the theory of the sovereignty of Parliament"⁷⁰ fuelled revolution. It can be seen in the example of Home Rule for Ireland (to which Dicey was implacably opposed) and in the transfer of full authority to the former colonies. Within the United Kingdom, too, Diceyan sovereignty would find preposterous the Scottish view that the provisions of the Act of Union are fundamental and unalterable for all time.⁷¹

Sir William Wade has explained seismic movements such as these in terms of revolution, acquiesced in by the courts. That is how he accounts for the decision in the second *Factortame* case.⁷² The revolutionary explanation allows theoretical consistency, if a rather jerky progression of constitutional history. I was once attracted to it, but I have come to believe that, in truth, it is the theory that does not fit.

Now is not the time for a lengthy discourse upon parliamentary sovereignty or the rule of law, or, what is more important, the relationship between the two. They are topics I have explored earlier.⁷³ What is perhaps worth noting for present purposes is that while both the sovereignty of Parliament and the rule of law are aspects of our unwritten constitution, the case law dealing with them is comparatively slender and the concepts undeveloped.

In its absolutist form, parliamentary sovereignty collides uncomfortably with modern movements for internationalism, federalism, devolution, and the principle of subsidiarity.⁷⁴ It also collides with the developing common law of what Lord Steyn has

69 See Dixon, above n 67, 203; Keith, above n 60, 584–585.

70 W Holdsworth *A History of English Law* (ed A L Goodheart and H G Hanbury, Methuen, London, 1956) vol 10, 531; vol 11, 119–126.

71 *MacCormick v Lord Advocate* [1953] SC 396, 411 Lord Cooper.

72 *R v Secretary of State for Transport, ex parte Factortame (No 2)* [1991] 1 AC 603 (HL); Sir William Wade and Christopher Forsyth *Administrative Law* (8 ed, Oxford University Press, Oxford, 2000) 27–29.

73 Rt Hon Dame Sian Elias "Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round" (2003) 14 PLR 148.

74 See for example Sandra Day O'Connor "Altered States: Federalism and Devolution at the 'Real' Turn of the Millennium" (2001) 60 CLJ 493; Paul Kennedy *Preparing for the Twenty-First Century* (Random House, New York, 1993) 131.

described as "renaissance constitutionalism".⁷⁵ Rights adjudication is increasingly conducted by a method of constitutionalism which is explicitly grounded in the rule of law. Jeffrey Jowell has suggested that in such litigation the courts essentially ask two questions: Is there a breach of a fundamental democratic right? If there is, is the decision necessary in the interests of a legitimate countervailing democratic value? This is review of the "constitutional co-ordinates of the decision".⁷⁶

What is unclear is the impact of this movement on parliamentary sovereignty. If law is indeed to rule, then Parliament must at least observe the prior rules of formal validity for lawmaking. Whether those rules go further than formal requirements has not been authoritatively decided. There are, however, indications of a developing view, long foretold by Lord Cooke, that Parliament is constrained by rules fundamental to the democratic process, by an inability to exclude the courts from supervising the exercise of government power for legality, and, more controversially, by human rights. If so, we no longer have a vision of the rule of law that is purely formal.

In *The Liberation of English Public Law*, the final essay in the 1997 Hamlyn Lectures, Lord Cooke confronted "constitutional bedrock".⁷⁷ Since questions of law "are always ultimately for the courts",⁷⁸

the total abolition of an independent judiciary is unthinkable; its existence is the basic rock of the constitution. An Act wholly replacing the independent judiciary by congeries of administrative tribunals with members holding office at the pleasure of the government of the day can scarcely be imagined; and I believe that the courts would not uphold it.

Lord Cooke has returned to this theme in his recent Commonwealth lecture.⁷⁹ He points out that the number of decisions in which judges have held that legislative or administrative intent must prevail is "untold and huge". There is, however, a "bottom line" of minority rights which cannot lawfully be crossed. "The legislative and judicial functions are complementary; the supremacism of either has no place."

It would be wrong to end without acknowledging the aspirations for justice and its delivery which have prompted the creation of the Supreme Court.

75 Lord Steyn "The New Legal Landscape" [2000] 6 EHRLR 549, 552.

76 Jeffrey Jowell "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] PL 671, 681.

77 Rt Hon Lord Cooke of Thorndon *Turning Points of the Common Law* (Sweet and Maxwell, London, 1997) 78.

78 Cooke *Turning Points of the Common Law*, above n 77, 79.

79 Cooke "The Road Ahead for the Common Law", above n 11, 278.

Sir Robert Stout in 1904, in advocating the abolition of appeals to the Privy Council, spoke of "[t]he psychological effect of dependence on some external power for the performance of our highest duties as citizens of these new nations".⁸⁰ The same chilling effect was described by Sir Thomas Eichelbaum in 1995.⁸¹

In 2004, the year the Supreme Court will be established, we will be 50 years from Beaglehole's essay *The New Zealand Scholar*.⁸² In a time of developing national consciousness, Beaglehole quoted Robin Hyde's cry that "we are hungry for the words that shall show us these islands and ourselves; that shall give us a home in thought".⁸³ Beaglehole makes the point that there is a lag between political independence and independence of thought for all colonial peoples.⁸⁴ It was a process described more than 100 years before Beaglehole by Ralph Waldo Emerson, in expressing an intellectual Declaration of Independence to the students of Harvard: "We will walk on our own feet; we will work with our own hands; we will speak our own minds".⁸⁵

The process of transition may be lengthy. It does not come about at once or in all things at the same time. In 1954 Beaglehole was tentative. He spoke of a "gathering conviction" that we had in New Zealand "something interesting;" "not ... a harvest, but at least it is a seed bed". He "ventured to hope".⁸⁶ Today, prodded by the historians, poets, and writers discussed by Beaglehole, the seed bed he discerned has flourished. Those of my generation do not doubt that in art, in literature, in politics, we have a home in thought at home. That is not to suggest that we have cut adrift from our wider heritage. We have built upon it.

I do not suggest that a home in thought for New Zealand law is provided by the creation of an institution. It is the work of many generations. We are the inheritors of their hopes and their expectations of us. Our home in thought has been built with the help of judges who have served in New Zealand since William Martin arrived on the *Tyne* in 1841. No one has contributed more than Lord Cooke of Thorndon. It is a privilege to say so in a lecture dedicated to his honour.

80 Stout, above n 1, 13.

81 See Eichelbaum, above n 38.

82 J C Beaglehole *The New Zealand Scholar* (Margaret Condliffe Memorial Lecture, Canterbury University College, 21 April 1954), reprinted in Peter Munz (ed) *The Feel of Truth: Essays in New Zealand and Pacific History* (Reed, Wellington, 1969) 237.

83 Beaglehole, above n 82, 244.

84 Beaglehole, above n 82, 239-240.

85 Ralph Waldo Emerson "The American Scholar" (Address to the Phi Beta Kappa Society, Harvard University, 31 August 1837).

86 Beaglehole, above n 82, 248.

SOMETHING OLD, SOMETHING NEW: CONSTITUTIONAL STIRRINGS AND THE SUPREME COURT

*Dame Sian Elias**

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In 1904 Sir Robert Stout, then Chief Justice of New Zealand, described the continuation of appeals to the Privy Council as "an anomaly in our Constitution".¹ We lived with greater anomalies until the passing of the Constitution Act 1986, but the Privy Council has proved to be the hardest of all institutional relics of colony.

In 1904 we shared the "anomaly" of Privy Council appeals with Australia. Indeed, Stout's paper proposed that the newly created High Court of Australia be the final court of appeal for that country – and that it be located in the capital.² (Australia took another 80 years to implement both proposals.) Earlier, the fate of appeals to the Privy Council had been one of the last obstacles to approval in London of the federal Constitution. A last-minute compromise, for which Sir Samuel Griffith was blamed,³ preserved appeals to the Privy Council except in matters of dispute in the Federation. The compromise in Australia limped on until the 1980s. In New Zealand, we have taken another 20 years to think about the matter.

Such caution has been a characteristic of our handling of constitutional matters. At New Zealand insistence, the Statute of Westminster 1931 provided that it would not have

* Chief Justice of New Zealand.

1 Sir Robert Stout "Appellate Tribunals for the Colonies" (1904) 2 Commonwealth LR 3, 4.

2 Stout, above n 1, 10.

3 At his swearing-in as Chief Justice on 6 October 1903, Sir Samuel Griffith felt it necessary to respond to the criticisms made of his appointment in the Federal Parliament: Hon Murray Gleeson, Chief Justice of Australia "The Centenary of the High Court: Lessons from History" (13th AIJA Oration, Australian Institute of Judicial Administration, Melbourne, 3 October 2003) 1.

effect in New Zealand until adopted by statute.⁴ Our existing constitutional arrangements under the Constitution Act 1852 were expressed to be "thoroughly satisfactory" in the parliamentary debates. Speakers were generally anxious that we should not be seen to show "ingratitude towards England" by adopting the freedom offered. Anxiety to preserve appeals to the Privy Council was also expressed.⁵

It took 15 years for us to adopt the Statute of Westminster.⁶ Until then, 15 entrenched sections of the 1852 Constitution Act could be amended only by the United Kingdom Parliament. One such amendment, proposed during the Depression, would have sought a reduction in the salary of the judges.⁷ In an unaccountable burst of enthusiasm for the principles of judicial independence, the proposal was dropped. It was not until 1986 that we got around to replacing the 1852 Act.

What this carelessness about our constitutional arrangements has meant is that when we do come to consider reforms touching upon those arrangements, we are not generally well prepared. The debate which preceded the enactment of the Supreme Court Act 2003 may be thought to provide some illustrations,⁸ but the traditional reticence may be changing. The Act itself is groundbreaking in making explicit reference to principles of the constitution.⁹ Whether this signals the start of a greater willingness to engage in constitutional discourse remains to be seen.

Lord Cooke is a relatively late convert to the creation of a local final appellate court. Since 1987 he has been convinced that the time had come to move on:¹⁰

In short, New Zealand is now an independent member state of the Commonwealth, a separate realm of the Queen. It is inconsistent with that nationhood to submit our legal issues to the adjudication of those, whoever they may be, who happen at any one time and in any particular case to comprise a majority of Judges of another country, appointed and sitting far off in that

4 Statute of Westminster 1931 (UK), s 10.

5 Hon David Buddo (23 July 1931) 228 NZPD 642; compare Rev C L Carr (21 July 1931) 228 NZPD 580.

6 Statute of Westminster Adoption Act 1947.

7 See Sir David Smith "Bench and Bar 1928-1950" in Robin Cooke (ed) *Portrait of a Profession* (Reed, Wellington, 1969) 90, 98-103.

8 See Rt Hon Dame Sian Elias "Transition, Stability and the New Zealand Legal System" (F W Guest Memorial Lecture 2003) (2004) 10 Otago LR 475, 476-477.

9 See the Supreme Court Act 2003, s 3(2): "Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament."

10 Lord Cooke of Thorndon "Final Appeal Courts: Some Comparisons" (New Zealand Centre for Public Law occasional paper no 7, Wellington, 2001) 18.

country and primarily versed in the laws of that country. Most New Zealand law has become markedly different from English law—the major statute law almost entirely so, the common law so to a significant extent.

What Lord Cooke has recently described as the "diminishing Englishness of the common law"¹¹ is the result of a number of factors. One of them has been the developing confidence in local traditions and experiences in other jurisdictions in which the common law has taken root. The common law has never been a seamless whole. When it has travelled it has adapted to local circumstances, to meet the needs of different communities. The need to accommodate the customs and laws of the existing inhabitants of territories acquired by the British Crown made variation inevitable. As local legislatures made laws to meet the aspirations of local communities, the common law moved with the legislation. Even where there was no statutory prod, different solutions to common legal problems were sometimes adopted as a matter of intellectual preference.

Lord Bingham, in discussing the future of the common law, has identified the "diminished role" of the Judicial Committee of the Privy Council as having given freedom to the courts of Australia, Canada, and India to develop principles of their own.¹² Without that same freedom, New Zealand divergence from English law has depended more upon differences in local conditions, particularly led by statutes, than on differences in legal reasoning. The Privy Council has been more encouraging of diversity at some times than at others. In *Australian Consolidated Press Ltd v Uren*, a Board which included Sir Alfred North acknowledged the ability of Australian courts to go their own way when reasonable differences of view on matters of policy were open.¹³

The issue that faced the High Court in the present case was whether the law as it had been settled in Australia should be changed. Had the law developed by processes of faulty reasoning or had it been founded upon misconceptions it would have been necessary to change it. Such was not the case. In the result in a sphere of the law where its policy calls for decision and where its policy in a particular country is fashioned so largely by judicial opinion it became a question for the High Court to decide whether the decision in *Rookes v Barnard* [[1964] AC 1129 (HL)] compelled a change in what was a well settled judicial approach in the law of libel in Australia. Their Lordships are not prepared to say that the High Court were wrong in being unconvinced that a changed approach in Australia was desirable.

11 Robin Cooke "The Road Ahead for the Common Law" (2004) 53 ICLQ 273, 273.

12 Tom Bingham *The Business of Judging* (Oxford University Press, Oxford, 2000) 387.

13 *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590, 644 (PC).

In a blow for greater diversity, the young Cooke, writing in the *New Zealand Law Journal*, argued against "unquestioning compliance" with English case law.¹⁴ He argued that the New Zealand Court of Appeal should examine academic criticisms of English authorities, and the views of other great Commonwealth or American judges, in deciding which course to take.

In practice, the freedom to go our own way has been limited. There are some notable exceptions,¹⁵ but in many other cases interesting developments have been arrested.¹⁶ But times change. Some of the New Zealand cases may yet be seen to be prophetic of changes in English law.

Lord Cooke's own contribution to the development of a distinctive New Zealand law is immense. We need not be quite as partisan as one Australian commentator, who claimed that Sir Owen Dixon was "arguably the greatest judge that the common law system has produced",¹⁷ but Lord Cooke's own contribution to the New Zealand legal tradition, and to the wider common law tradition of which it is part, is at least as great.

It is worth reflecting on some of the elements of the New Zealand legal tradition. I wonder whether any country started out with higher expectations of law than ours. An inducement to Maori to enter into the Treaty of Waitangi was the promise of law. That is clear from the debates at Waitangi¹⁸ and earlier petitions for British protection. Lord Glenelg, the Colonial Secretary, explained the decision to make New Zealand a colony in terms of the need to establish legal order and to avoid the repetition in New Zealand of "the calamities by which the aborigines of America and African colonies have been afflicted".¹⁹

14 R B Cooke "The Supreme Tribunal of the British Commonwealth?" (1956) 32 NZLJ 233, 235.

15 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC); *Lange v Atkinson* [2000] 1 NZLR 257 (PC).

16 *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1990] 3 NZLR 513 (PC); *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700 (PC); *Downsview Nominees Ltd v First City Corporation Ltd* [1993] 1 NZLR 513 (PC); *O'Connor v Hart* [1985] 1 NZLR 159 (PC); *Aotearoa International Ltd v Scancarriers A/S* [1985] 1 NZLR 513 (PC).

17 Hon Mr Justice Michael McHugh "The Law-making Function of the Judicial Process—Part II" (1988) 62 ALJ 116, 127.

18 W Colenso *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (Government Printer, Wellington, 1890) 27.

19 Lord Glenelg to Lord Durham (29 December 1837) *Great Britain Parliamentary Papers* NZ 1 1840 (582) VI, App 8, 148–149.

The establishment of a legal system and the provision of laws appropriate to local conditions had to await the arrival of the first Chief Justice. In the meantime the temporary expedient was adopted of applying "the Laws of New South Wales so far as they can be made applicable".²⁰ That was resented greatly by the local residents, who thought they gave a "penal taint" to the new colony.²¹ Their opposition was an early expression of distinctiveness.

When William Martin, the first Chief Justice, and William Swainson, the second Attorney-General, arrived together on the *Tyne* in 1841, they assisted with the drafting of Ordinances for the government of the new colony. The instructions received by Governor Hobson had advised them to look to the laws of other countries which had adapted English law while "retaining the spirit of English law", but discouraged "servile adherence to them as precedent, except as far as the similarity of circumstances may allow".²²

The licence offered was taken. The first Ordinances were received with some astonishment in London. They were radical measures by the standard of the day. Some, too radical, were disallowed.

The Supreme Court of New Zealand, established in 1841, had jurisdiction in common law and equity right from the outset,²³ anticipating the English restructuring by decades. Property and Conveyancing Ordinances greatly simplified the English law, and the Land Claims Ordinance 1841 established that the domain lands of the Crown were "subject ... to the rightful and necessary occupation and use thereof" by the aboriginal inhabitants.²⁴ What that means, we are still working through. The rules of the Supreme Court were breathtakingly streamlined by the standards of the day. Proceedings could be started by oral complaint to a Registrar.²⁵ The judge was required "to elicit the point in issue, by examination of the parties or their Solicitors".²⁶

Our early judges, both Martin and Chapman, were also adventurous in their sources. Chapman was an admirer of Justice Story of the United States Supreme Court. The Full

20 New South Wales Laws Extension Ordinance 4 Vict 1, long title. See A H McLintock *Crown Colony Government in New Zealand* (Government Printer, Wellington, 1958) 132.

21 McLintock, above n 20, 132–133.

22 Lord John Russell to William Hobson (9 December 1840) *Great Britain Parliamentary Papers* NZ 3 1841 (311) XVII 24, 25.

23 Supreme Court Ordinance 1841 5 Vict 1, cls 2, 3.

24 Land Claims Ordinance 1841 4 Vict 2, cl 2.

25 Supreme Court Rules Ordinance 1844 8 Vict 1, r 12.

26 Supreme Court Rules Ordinance 1844 8 Vict 1, r 28.

Court decision in *R v Symonds*²⁷ draws not only on Blackstone but also on Chancellor Kent's commentaries and the United States Supreme Court decision in *Cherokee Nation v State of Georgia*.²⁸ When the Privy Council eventually came to consider *R v Symonds* in the course of *Nireaha Tamaki v Baker*, Lord Davey sniffed a little at the use of American case law, saying:²⁹

The judgments of Marshall, CJ, are entitled to the greatest respect although not binding on a British Court. The decisions referred to, however, being given under different circumstances do not appear to assist their Lordships in this case. But some of the judgments contain *dicta* not unfavourable to the appellant's case.

Our first Court of Appeal was the Governor and the Executive Council.³⁰ The 1846 Ordinance establishing the Court gave it power to grant leave to appeal to the Privy Council where the amount in issue exceeded £500 or the Court of Appeal had overruled the Supreme Court.³¹ No appeals to London were in fact taken to the Court of Appeal during the period of Crown colony government. Only one appeal to the Privy Council is reported for that period;³² it led to the judgment of the Full Court of Martin CJ and Chapman J being overturned.

In enactment of our own statutes and in case law we have swung between periods of local adaptation or invention and periods of slavish imitation, characterised by Jim Cameron as "legal cringe".³³ Pioneering legislation and innovative judicial responses to local conditions gave way in the period after World War I to a more wooden approach which lasted until the 1960s. By 1965 a reforming Minister of Justice, Ralph Hanan, had identified a fundamental cause of the inadequacy of law reform at the time to be the view that "important changes in the common law should not normally be made except in accordance with changes that have taken place in England". That, he said, was "not good enough".³⁴ After the early adventurism of Chapman and Martin, Cameron's verdict on

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

28 *Cherokee Nation v State of Georgia* (1831) 30 US (5 Pet) 1. See for example *R v Symonds*, above n 27, 388, 390 Chapman J.

29 *Nireaha Tamaki v Baker* (1901) NZPCC 371, 384–385 (PC).

30 Supreme Court Amendment Ordinance 1846 10 Vict 3, cl 3.

31 Supreme Court Amendment Ordinance 1846 10 Vict 3, cl 8.

32 *R v Clarke* (1851) NZPCC 516 (PC).

33 B J Cameron "Legal Change over Fifty Years" (1987) 3 Cant LR 198, 198.

34 J R Hanan *The Law in a Changing Society: A Policy and Programme for Law Reform* (Department of Justice, Wellington, 1965) 20.

New Zealand case law is that it demonstrated "essentially derivative thinking and a narrow application of precedent" for much of the 20th century.³⁵

With the formation of the separate Court of Appeal in 1957, slavish adherence to English precedents passed. *Corbett v Social Security Commission*³⁶ was the beginning of a new confidence which led Lord Cooke to his 1987 verdict that "New Zealand law, both that made by our parliament and that made by our judges, has now evolved into a truly distinctive body of principles and practices, reflecting a truly distinctive outlook".³⁷

In 1995, however, Chief Justice Sir Thomas Eichelbaum sounded a note of caution about the extent to which the New Zealand courts may have felt constrained by the right of appeal to the Privy Council:³⁸

In fairness, the effect of the restraint imposed by the mere presence of the right of appeal to the Privy Council should not be underestimated. In the absence of fairly obvious differentiating local circumstances, the likelihood must be considerable that their Lordships sitting at Downing St will apply the law with which they are comfortable when at the House of Lords. Any New Zealand judgment which consciously departs from "English law" does so at the risk of reversal. Thus it surprises not that the number of instances where New Zealand Judges have deliberately courted that risk is relatively small.

The suggestion that the development of New Zealand common law may have been inhibited in the past by appeals to the Privy Council is impossible to prove. The question whether the abolition of appeals to London will result in accelerating divergence is one of the important questions hanging over the creation of the new Supreme Court.

The experience in Australia and Canada does suggest that some conformity may be lost over time, but the common law heritage, as I have elsewhere suggested,³⁹ pulls together. More often than not, when decisions in novel cases have to be measured against the principles identified in comparable jurisdictions, we will agree. So too the increasing internationalisation of much of our law pulls us together. Where there are differences

³⁵ Cameron, above n 33, 210.

³⁶ *Corbett v Social Security Commission* [1962] NZLR 878 (CA).

³⁷ Sir Robin Cooke "The New Zealand National Legal Identity" (1987) 3 Cant LR 171, 182; see also *Invercargill City Council v Hamlin*, above n 15.

³⁸ Thomas Eichelbaum "Brooding Inhibition—Or Guiding Hand? Reflections on the Privy Council Appeal" in Philip A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 112, 127–128.

³⁹ Dame Sian Elias "The Usages of Society and the Fashions of the Times: W[h]ither the Common Law?" (Address to the 13th Commonwealth Law Conference, Melbourne, 15 April 2003) 19.

between us, it will usually be because there are reasons to go different ways. Those expressions of difference are themselves critical to the continued vitality of the common law. I do not think it was simply for reasons of politeness that the Privy Council acknowledged in *Invercargill City Council v Hamlin* that a strength of the common law is the ability of the courts of different jurisdictions to "learn from each other".⁴⁰

On the question of divergence, there are forces at work other than the loss of appeals to London. The increasing integration of the legal systems of Europe and the power of international movements in human rights and commercial law have diminished the centrality of the House of Lords. As Lord Cooke has said in a recent paper, "a new Supreme Court of the United Kingdom will be one national supreme court among many".⁴¹ Indeed, he goes on to point out that it will not even be supreme if the European Court of Justice emerges as the final court for the Union. It may be that through the process of "learning from each other" the common law of our different jurisdictions will be enriched by the European insights increasingly important in the decisions of the English courts. If so, it will be because, in the contest of ideas, they persuade on their own merits.

I do not expect that the setting up of the Supreme Court will unsettle our law. Those who are worried about the prospect do not, I think, understand how conservative judicial method must be. I do not even think that the Supreme Court will have immediate and dramatic impact. Still less can it expect to be immediately or consistently popular. It is worth remembering the experience in Australia and the United States.

Chief Justice Gleeson in the celebrations to mark the centenary of the High Court of Australia in October 2003 reminds us that there never was a "golden age when members of the Court basked in universal admiration".⁴² The circumstances of the Court's creation and the initial appointments to it were highly controversial. There were fears that the judges would not have enough to do. It was suggested that the Court should come together as needed and could be made up of the Chief Justices of the States. The first five members of the Court were all men who had been prominent politicians. Chief Justice Gleeson notes that "[f]rom the very beginning, decisions of the Court that have frustrated political objectives, have resulted in noisy criticism, resentment of the Court's power and independence, and threats to limit that independence".⁴³

40 See *Invercargill City Council v Hamlin*, above n 15, 520.

41 Cooke "The Road Ahead for the Common Law", above n 11, 274.

42 Gleeson, above n 3, 3.

43 Gleeson, above n 3, 9.

Chief Justice Gleeson rather philosophically suggests that such a reaction is only what is to be expected in a "robust democracy".⁴⁴ In New Zealand we too will have to develop similar stoicism.

The Constitution of the United States was consciously created as supreme law, creating and limiting government, because of the history of dispute with the Parliament at Westminster. Even with this background of insistence on legality, however, the United States Supreme Court languished for its first 10 years. In its first term the only work it had to do was to admit attorneys to the Bar. It heard no cases for two years, and delivered no substantive decisions for a further year. It had difficulty attracting and keeping members.⁴⁵ In 1801, when Chief Justice Marshall was appointed, the Court is said to have "existed on the fringe of American awareness. Its prestige was slight, and it was more ignored than respected".⁴⁶

When the United States Government moved from Philadelphia to Washington, the Court was simply overlooked. No provision was made for it until the Senate consented to allow it to use one of the committee rooms in the basement. At one stage it was reduced to holding sittings in a tavern. These beginnings are some comfort to the judges appointed to the New Zealand Supreme Court, now that the details of our temporary and permanent accommodation are being revealed to us.

It seems to me that we can expect over time to gain three principal benefits from the establishment of the Supreme Court. The first is the extension of the benefit of second tier appeal to all cases which merit it, with gains for the consistency and coherence of our law. The second benefit is the local knowledge to place the difficult questions the Court will be asked to consider in context. The third benefit is better understanding of the place of law and the legal system within our community.

First, access. The benefit of a second tier appeal has to date been secured for only a very small number of cases. I have expressed the view before that a lack of accessibility to the law has been the real cost of our not having had a final court of appeal in New Zealand.⁴⁷ That inaccessibility has not simply been due to the expense of appeals. Where a mixed system of appeals as of right and appeals by leave is maintained, appeals taken as a matter

44 Gleeson, above n 3, 9.

45 Leonard W Levy *Seasoned Judgements: The American Constitution, Rights, and History* (Transaction, New Brunswick, 1997) 321–322.

46 Levy, above n 45, 379.

47 Elias "Transition, Stability and the New Zealand Legal System", above n 8, 482.

of right leave little room for appeals which require leave. It is no accident that so few appeals from New Zealand on criminal matters have been granted special leave.

The experience in Australia may well be a pointer to the future in New Zealand. Since 1984, when special leave to appeal became a requirement for all appeals to the High Court, criminal appeals have constituted a much greater proportion of the work of the High Court. Justices Kirby and Heydon have both attributed the change to the abolition of appeals as of right.⁴⁸ The change has affected the tone of the national legal system. As Justice Kirby has identified,⁴⁹ it is in criminal cases that the rule of law is truly tested. The accessibility of a court at the apex of the hierarchy in such matters provides an important institutional guarantee and the ability to respond to local conditions. In Australia, questions of fair trial are considered by the High Court on the basis of a distinctively Australian perspective.⁵⁰

Whilst English and local legal history are undoubtedly of much interest, they do not, in our view, dictate the emerging law on the subject of this judgment as it now applies in Australia.

I have singled out the criminal law, but, in truth, there are many areas of law of vital importance to the lives of New Zealanders where a second tier appeal has not been available. That is damaging to the integrity of the legal system. The role of an apex court is to maintain the coherence of the legal system as a whole. As Aharon Barak, Chief Justice of Israel, has identified, it is important that a legal system have a court with a sense of the scope and reach of the whole law.⁵¹

The development of a specific common-law doctrine radiates into the entire legal system. The interpretation of a single statute affects the interpretation of all statutes. A legal system is not a confederation of laws. Legal rules and principles together constitute a system of law whose different parts are tightly linked.

A divergence of final responsibility for the legal system, such as we have in effect had to date, means that the coherence and overview which is the benefit of a final court with responsibility for maintaining legality in the entire legal system is lost.

48 Hon Justice Michael Kirby "Why has the High Court Become More Involved in Criminal Appeals?" (2002) 23 Aust Bar Rev 4; J D Heydon "Evidence Law" in Tony Blackshield, Michael Coper, and George Williams (eds) *The Oxford Companion to the High Court of Australia* (Oxford University Press, Melbourne, 2001) 254–256.

49 Kirby, above n 48, 19.

50 *Azzopardi v The Queen* [2001] 205 CLR 50, 65 Gaudron, Gummow, Kirby, and Hayne JJ.

51 Aharon Barak "A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116 Harv L Rev 16, 25–26.

The second benefit we can hope to obtain from patriating our final court is the knowledge of local conditions which is essential if a legal system is to be responsive to the community it serves. Others take a different view on this. Some see detachment or remoteness as a more important quality than local knowledge. There are those who believe that local conditions can be adequately communicated by counsel. I am not convinced. When as counsel in the *Maori Broadcasting* case⁵² I was asked by the presiding Law Lord "Do they still live on reservations?", I was able of course to answer the immediate question and put right the rolled-up misconception—but I felt a sense of helplessness about describing a whole world. Similarly, when sitting on a conveyancing case in the Judicial Committee discussing the standard of care to be expected of a provincial legal practitioner in New Zealand, I felt keenly the gulf in understanding of the sophistication and subtlety reasonably to be expected.

The third change we may expect over time to flow from the establishment of the Supreme Court is better understanding in the community of the role of courts. Our present system has been bewilderingly obscure. It was instructive to watch from the sidelines the celebration of the centenary of the High Court of Australia. The Court is a visible symbol of the place of impartial administration of justice in the Australian constitution. It demonstrates how government under law is assured by courts which are independent. Chief Justice Gleeson, in reflecting on the place occupied by the High Court, has suggested that the Australian community understands that in a contest between citizen and government, the High Court holds the scales of justice evenly.⁵³

The High Court of Australia is visible and accessible, as our final court has never been. Its decisions may be criticised from time to time. There is reason to believe that the public is aware of what is at stake, and that the institutional safeguard of the Court is appreciated and understood in a way that cannot be taken for granted in our own system. Similar pride in the institutions, if not in particular outcomes, can be seen in Canada and the United States.

Why does public understanding of the role of the courts matter? An aspect of the rule of law is accessibility to courts which are independent and impartial. Courts are vulnerable, particularly when obliged to address controversial matters. They cannot avoid such matters when they are brought for decision in properly constituted litigation. Characterisation of judges as "activist" for fulfilling their judicial obligations is misconceived, and dangerous to the institutions.

52 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC).

53 Gleeson, above n 3, 25.

The independence of the judiciary is not an immediately appealing quality to many people. It exists not as protection for judges but to ensure impartiality. It provides the assurance referred to by Chief Justice Gleeson that the scales of justice are held evenly, no matter how powerful the interests and no matter how loud the clamour for one side. The independence of the judiciary exists to ensure that the individual judge, when judging, is subject only to the law.

The New Zealand Constitution Act 1986 makes separate provision for the legislative, executive, and judicial branches of government. Although our legal system requires the independence of the judiciary from other sources of state power, that independence is, in reality, fragile. Judges have security of tenure and salary but are dependent on the executive for administrative support and in the setting of the fees which litigants must pay to have access to the courts.

International statements of basic principles for judicial independence adopted by both the United Nations General Assembly and the Commonwealth recognise judicial independence as having an institutional dimension.⁵⁴ The Supreme Court of Canada has held that administrative independence in the organisation of judicial work and the support necessary to achieve it are aspects of judicial independence.⁵⁵ Chief Justice Barak of Israel has expressed the view that it is inconsistent with judicial independence for the administration of the judiciary to be through a department of government.⁵⁶ In the United States, Canada, and Australia, judges are given considerable operational autonomy.

In their joint response to the United Kingdom Government's consultation paper proposing the setting up of a Supreme Court, the Law Lords argued that the new Court should enjoy "corporate independence".⁵⁷

[The Court] must have its own budget, settled in a manner which protects the court from political pressure. It must have its own Registrar, answerable to the court, its own staff and its own IT facilities. The independence of the judges requires not only that they be free of

54 See for example the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (19 August 1995); Universal Declaration on the Independence of Justice (Montreal, 10 June 1983) UN Doc E/CN.4/Sub.2/1985/18/Add.6, annex IV; Basic Principles on the Independence of the Judiciary (1985) UN Doc A/CONF.121/22/Rev.1; Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government (2003).

55 See *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3, 81 para 118 Lamer CJC, L'Heureux-Dubé, Sopinka, Gonthier, Cory, and Iacobucci JJ.

56 Barak, above n 51, 54.

57 The Law Lords' Response to the Government's Consultation Paper on Constitutional Reform: A Supreme Court for the United Kingdom (CP 11/03, July 2003) 2 para 4.

extraneous pressure but also that the court be institutionally free of administrative pressure. In Australia, a one-line budget is agreed annually between the High Court's chief executive officer and the attorney-general, and a similar arrangement would be appropriate here.

It is arguable that in New Zealand we are now getting out of step with countries with which we identify closely. Since 1995 we have attempted a middle way, with the courts administered by a separate Department for Courts. In matters of direct judicial support (including support for organisation of judicial work) we have operated in a loose partnership with the Department. The halfway house has now been changed in a reorganisation of the justice sector. The Department for Courts has been reabsorbed back into the Ministry of Justice.

It may be that when the reorganisation is completed, some mechanism can be devised to maintain judicial independence in matters of judicial administration and immediate judicial support. Questions of security of communication between judges and maintenance of confidentiality need urgently to be resolved.

There is no incentive on the executive to address concerns like these. In 1939, Parliament was vigilant to protect the principle of judicial independence even from a probably unexceptionable proposal to let the judiciary share in the general belt-tightening at a time of depression. Today there seems little public awareness of the current issues which impact upon the principle – and little understanding that an independent judiciary is essential to maintenance of the rule of law.⁵⁸ If the invisibility of our final appeal court has been part of that problem, the establishment of the Supreme Court may assist in raising awareness of what is at stake in our constitutional arrangements.

The Supreme Court Act itself raises awareness of aspects of our constitution. It acknowledges constitutional fundamentals by its explicit reference to the doctrines of the rule of law and the sovereignty of Parliament. Section 3(2) does not impose any direct responsibility on the Court. It is formal legislative confirmation of what is described as "New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament". This provision captures a duality identified by Dicey in his hugely influential *Introduction to the Study of the Law of the Constitution*.⁵⁹ This duality, as Sir Kenneth Keith has remarked, has inbuilt tension.⁶⁰

58 Antonio Lamer "The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change" (1996) 45 UNBLJ 3, 7–8.

59 A V Dicey *Introduction to the Study of the Law of the Constitution* (1 ed, MacMillan, London, 1885; 10 ed, MacMillan, London, 1959).

60 K J Keith "Sovereignty at the Beginning of the 21st Century: Fundamental or Outmoded?" (2004) 63 CLJ 581.

Both the rule of law and parliamentary sovereignty are principles of the constitution. The inclusion of reference to them in the Supreme Court Act is at first sight startling. The 1986 Constitution Act avoids such sweeping doctrine and simply provides that the New Zealand Parliament "continues to have full power to make law" for New Zealand.⁶¹ It is possible that in the use of these terms we are seeing the beginning of an attempt to address and capture in writing the elements of our constitution.

In *X Ltd v Morgan-Grampian (Publishers) Ltd*, Lord Bridge declared that "[t]he maintenance of the rule of law is in every way as important in a free society as the democratic franchise".⁶² Implicit in the rule of law is the existence of independent judicial authority. The separate authority of the judiciary exists, as Justice Brandeis, dissenting in *Myers v United States*, explained,⁶³ to prevent the exercise of arbitrary power. There is some measure of truth in the view that the phrase "rule of law" has a moral force which may not aid proper analysis.⁶⁴ As Harden and Lewis have said, the common law has sometimes been invoked "as some kind of universal redeemer. It became to arbitrariness and partisan government what the Christian cross affects to be to vampires. This, needless to say, was to claim too much."⁶⁵

Parliamentary supremacy over the judiciary, as Lord Templeman identified in *In re M*,⁶⁶ is exercisable only through legislation. Determination of all questions of law is the function of the courts.

Dicey defined the sovereignty of Parliament in terms of unfettered lawmaking power. Whether Parliament can be totally unrestricted in the way it makes law is, as Sir Owen Dixon recognised, "the old theological riddle".⁶⁷ The idea has been criticised as "an academic formulation which does not fit the law of England".⁶⁸ Its application even to unitary parliaments which have evolved from limited colonial legislatures is not self-

61 Constitution Act 1986, s 15(1).

62 *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1, 48 (HL).

63 See Justice Brandeis's dissent in *Myers v United States* (1926) 272 US 52, 240-295.

64 See Paul Craig "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] PL 467.

65 Ian Harden and Norman Lewis *The Noble Lie: The British Constitution and the Rule of Law* (Hutchinson, London, 1986) ch 2 "The rule of law: a chequered history" 37.

66 *In re M* [1994] 1 AC 377, 395 (HL).

67 Sir Owen Dixon "The Common Law as an Ultimate Constitutional Foundation" in *Jesting Pilate* (Hein, Melbourne, 1997) 207.

68 Sir Ivor Jennings *The Law and the Constitution* (5 ed, University of London Press, London, 1959) 167.

evident, as both Sir Owen Dixon, who exalted legalism, and Sir Kenneth Keith, who does not, have noted.⁶⁹

Dicey's theory struggles to accommodate the devolution of power. That can be seen in self-government in its application to matters of internal administration for the American colonies, where what Sir William Holdsworth described as a "pedantic use of the theory of the sovereignty of Parliament"⁷⁰ fuelled revolution. It can be seen in the example of Home Rule for Ireland (to which Dicey was implacably opposed) and in the transfer of full authority to the former colonies. Within the United Kingdom, too, Diceyan sovereignty would find preposterous the Scottish view that the provisions of the Act of Union are fundamental and unalterable for all time.⁷¹

Sir William Wade has explained seismic movements such as these in terms of revolution, acquiesced in by the courts. That is how he accounts for the decision in the second *Factortame* case.⁷² The revolutionary explanation allows theoretical consistency, if a rather jerky progression of constitutional history. I was once attracted to it, but I have come to believe that, in truth, it is the theory that does not fit.

Now is not the time for a lengthy discourse upon parliamentary sovereignty or the rule of law, or, what is more important, the relationship between the two. They are topics I have explored earlier.⁷³ What is perhaps worth noting for present purposes is that while both the sovereignty of Parliament and the rule of law are aspects of our unwritten constitution, the case law dealing with them is comparatively slender and the concepts undeveloped.

In its absolutist form, parliamentary sovereignty collides uncomfortably with modern movements for internationalism, federalism, devolution, and the principle of subsidiarity.⁷⁴ It also collides with the developing common law of what Lord Steyn has

69 See Dixon, above n 67, 203; Keith, above n 60, 584–585.

70 W Holdsworth *A History of English Law* (ed A L Goodheart and H G Hanbury, Methuen, London, 1956) vol 10, 531; vol 11, 119–126.

71 *MacCormick v Lord Advocate* [1953] SC 396, 411 Lord Cooper.

72 *R v Secretary of State for Transport, ex parte Factortame (No 2)* [1991] 1 AC 603 (HL); Sir William Wade and Christopher Forsyth *Administrative Law* (8 ed, Oxford University Press, Oxford, 2000) 27–29.

73 Rt Hon Dame Sian Elias "Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round" (2003) 14 PLR 148.

74 See for example Sandra Day O'Connor "Altered States: Federalism and Devolution at the 'Real' Turn of the Millennium" (2001) 60 CLJ 493; Paul Kennedy *Preparing for the Twenty-First Century* (Random House, New York, 1993) 131.

described as "renaissance constitutionalism".⁷⁵ Rights adjudication is increasingly conducted by a method of constitutionalism which is explicitly grounded in the rule of law. Jeffrey Jowell has suggested that in such litigation the courts essentially ask two questions: Is there a breach of a fundamental democratic right? If there is, is the decision necessary in the interests of a legitimate countervailing democratic value? This is review of the "constitutional co-ordinates of the decision".⁷⁶

What is unclear is the impact of this movement on parliamentary sovereignty. If law is indeed to rule, then Parliament must at least observe the prior rules of formal validity for lawmaking. Whether those rules go further than formal requirements has not been authoritatively decided. There are, however, indications of a developing view, long foretold by Lord Cooke, that Parliament is constrained by rules fundamental to the democratic process, by an inability to exclude the courts from supervising the exercise of government power for legality, and, more controversially, by human rights. If so, we no longer have a vision of the rule of law that is purely formal.

In *The Liberation of English Public Law*, the final essay in the 1997 Hamlyn Lectures, Lord Cooke confronted "constitutional bedrock".⁷⁷ Since questions of law "are always ultimately for the courts",⁷⁸

the total abolition of an independent judiciary is unthinkable; its existence is the basic rock of the constitution. An Act wholly replacing the independent judiciary by congeries of administrative tribunals with members holding office at the pleasure of the government of the day can scarcely be imagined; and I believe that the courts would not uphold it.

Lord Cooke has returned to this theme in his recent Commonwealth lecture.⁷⁹ He points out that the number of decisions in which judges have held that legislative or administrative intent must prevail is "untold and huge". There is, however, a "bottom line" of minority rights which cannot lawfully be crossed. "The legislative and judicial functions are complementary; the supremacism of either has no place."

It would be wrong to end without acknowledging the aspirations for justice and its delivery which have prompted the creation of the Supreme Court.

75 Lord Steyn "The New Legal Landscape" [2000] 6 EHRLR 549, 552.

76 Jeffrey Jowell "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] PL 671, 681.

77 Rt Hon Lord Cooke of Thorndon *Turning Points of the Common Law* (Sweet and Maxwell, London, 1997) 78.

78 Cooke *Turning Points of the Common Law*, above n 77, 79.

79 Cooke "The Road Ahead for the Common Law", above n 11, 278.

Sir Robert Stout in 1904, in advocating the abolition of appeals to the Privy Council, spoke of "[t]he psychological effect of dependence on some external power for the performance of our highest duties as citizens of these new nations".⁸⁰ The same chilling effect was described by Sir Thomas Eichelbaum in 1995.⁸¹

In 2004, the year the Supreme Court will be established, we will be 50 years from Beaglehole's essay *The New Zealand Scholar*.⁸² In a time of developing national consciousness, Beaglehole quoted Robin Hyde's cry that "we are hungry for the words that shall show us these islands and ourselves; that shall give us a home in thought".⁸³ Beaglehole makes the point that there is a lag between political independence and independence of thought for all colonial peoples.⁸⁴ It was a process described more than 100 years before Beaglehole by Ralph Waldo Emerson, in expressing an intellectual Declaration of Independence to the students of Harvard: "We will walk on our own feet; we will work with our own hands; we will speak our own minds".⁸⁵

The process of transition may be lengthy. It does not come about at once or in all things at the same time. In 1954 Beaglehole was tentative. He spoke of a "gathering conviction" that we had in New Zealand "something interesting;" "not ... a harvest, but at least it is a seed bed". He "ventured to hope".⁸⁶ Today, prodded by the historians, poets, and writers discussed by Beaglehole, the seed bed he discerned has flourished. Those of my generation do not doubt that in art, in literature, in politics, we have a home in thought at home. That is not to suggest that we have cut adrift from our wider heritage. We have built upon it.

I do not suggest that a home in thought for New Zealand law is provided by the creation of an institution. It is the work of many generations. We are the inheritors of their hopes and their expectations of us. Our home in thought has been built with the help of judges who have served in New Zealand since William Martin arrived on the *Tyne* in 1841. No one has contributed more than Lord Cooke of Thorndon. It is a privilege to say so in a lecture dedicated to his honour.

80 Stout, above n 1, 13.

81 See Eichelbaum, above n 38.

82 J C Beaglehole *The New Zealand Scholar* (Margaret Condliffe Memorial Lecture, Canterbury University College, 21 April 1954), reprinted in Peter Munz (ed) *The Feel of Truth: Essays in New Zealand and Pacific History* (Reed, Wellington, 1969) 237.

83 Beaglehole, above n 82, 244.

84 Beaglehole, above n 82, 239-240.

85 Ralph Waldo Emerson "The American Scholar" (Address to the Phi Beta Kappa Society, Harvard University, 31 August 1837).

86 Beaglehole, above n 82, 248.

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CONTENTS

Robin Cooke Lecture 2003

Something Old, Something New: Constitutional Stirrings and the Supreme Court <i>Dame Sian Elias</i>	121
--	-----

Articles

Aboriginal Title in New Zealand: A Retrospect and Prospect <i>P G McHugh</i>	139
Indigenous Autonomy and Justice in North America <i>Mark Bennett</i>	203

Comment

Healing the Past or Harming the Future? Large Natural Groupings and the Waitangi Settlement Process <i>Malcolm Birdling</i>	259
---	-----

Articles

The Emperor's Old Clothes: Lack of Transparency in the Courts-Martial Board of Review <i>Gordon P Hook</i>	285
Ministers' Personal Appointees: Part Politician, Part Bureaucrat <i>Lucy Hare</i>	315

SOMETHING OLD, SOMETHING NEW: CONSTITUTIONAL STIRRINGS AND THE SUPREME COURT

*Dame Sian Elias**

This is the edited text of the Robin Cooke Lecture 2003, delivered at the Victoria University of Wellington Law School on 11 December 2003.

In 1904 Sir Robert Stout, then Chief Justice of New Zealand, described the continuation of appeals to the Privy Council as "an anomaly in our Constitution".¹ We lived with greater anomalies until the passing of the Constitution Act 1986, but the Privy Council has proved to be the hardest of all institutional relics of colony.

In 1904 we shared the "anomaly" of Privy Council appeals with Australia. Indeed, Stout's paper proposed that the newly created High Court of Australia be the final court of appeal for that country – and that it be located in the capital.² (Australia took another 80 years to implement both proposals.) Earlier, the fate of appeals to the Privy Council had been one of the last obstacles to approval in London of the federal Constitution. A last-minute compromise, for which Sir Samuel Griffith was blamed,³ preserved appeals to the Privy Council except in matters of dispute in the Federation. The compromise in Australia limped on until the 1980s. In New Zealand, we have taken another 20 years to think about the matter.

Such caution has been a characteristic of our handling of constitutional matters. At New Zealand insistence, the Statute of Westminster 1931 provided that it would not have

* Chief Justice of New Zealand.

1 Sir Robert Stout "Appellate Tribunals for the Colonies" (1904) 2 Commonwealth LR 3, 4.

2 Stout, above n 1, 10.

3 At his swearing-in as Chief Justice on 6 October 1903, Sir Samuel Griffith felt it necessary to respond to the criticisms made of his appointment in the Federal Parliament: Hon Murray Gleeson, Chief Justice of Australia "The Centenary of the High Court: Lessons from History" (13th AIJA Oration, Australian Institute of Judicial Administration, Melbourne, 3 October 2003) 1.

effect in New Zealand until adopted by statute.⁴ Our existing constitutional arrangements under the Constitution Act 1852 were expressed to be "thoroughly satisfactory" in the parliamentary debates. Speakers were generally anxious that we should not be seen to show "ingratitude towards England" by adopting the freedom offered. Anxiety to preserve appeals to the Privy Council was also expressed.⁵

It took 15 years for us to adopt the Statute of Westminster.⁶ Until then, 15 entrenched sections of the 1852 Constitution Act could be amended only by the United Kingdom Parliament. One such amendment, proposed during the Depression, would have sought a reduction in the salary of the judges.⁷ In an unaccountable burst of enthusiasm for the principles of judicial independence, the proposal was dropped. It was not until 1986 that we got around to replacing the 1852 Act.

What this carelessness about our constitutional arrangements has meant is that when we do come to consider reforms touching upon those arrangements, we are not generally well prepared. The debate which preceded the enactment of the Supreme Court Act 2003 may be thought to provide some illustrations,⁸ but the traditional reticence may be changing. The Act itself is groundbreaking in making explicit reference to principles of the constitution.⁹ Whether this signals the start of a greater willingness to engage in constitutional discourse remains to be seen.

Lord Cooke is a relatively late convert to the creation of a local final appellate court. Since 1987 he has been convinced that the time had come to move on:¹⁰

In short, New Zealand is now an independent member state of the Commonwealth, a separate realm of the Queen. It is inconsistent with that nationhood to submit our legal issues to the adjudication of those, whoever they may be, who happen at any one time and in any particular case to comprise a majority of Judges of another country, appointed and sitting far off in that

4 Statute of Westminster 1931 (UK), s 10.

5 Hon David Buddo (23 July 1931) 228 NZPD 642; compare Rev C L Carr (21 July 1931) 228 NZPD 580.

6 Statute of Westminster Adoption Act 1947.

7 See Sir David Smith "Bench and Bar 1928-1950" in Robin Cooke (ed) *Portrait of a Profession* (Reed, Wellington, 1969) 90, 98-103.

8 See Rt Hon Dame Sian Elias "Transition, Stability and the New Zealand Legal System" (F W Guest Memorial Lecture 2003) (2004) 10 Otago LR 475, 476-477.

9 See the Supreme Court Act 2003, s 3(2): "Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament."

10 Lord Cooke of Thorndon "Final Appeal Courts: Some Comparisons" (New Zealand Centre for Public Law occasional paper no 7, Wellington, 2001) 18.

country and primarily versed in the laws of that country. Most New Zealand law has become markedly different from English law—the major statute law almost entirely so, the common law so to a significant extent.

What Lord Cooke has recently described as the "diminishing Englishness of the common law"¹¹ is the result of a number of factors. One of them has been the developing confidence in local traditions and experiences in other jurisdictions in which the common law has taken root. The common law has never been a seamless whole. When it has travelled it has adapted to local circumstances, to meet the needs of different communities. The need to accommodate the customs and laws of the existing inhabitants of territories acquired by the British Crown made variation inevitable. As local legislatures made laws to meet the aspirations of local communities, the common law moved with the legislation. Even where there was no statutory prod, different solutions to common legal problems were sometimes adopted as a matter of intellectual preference.

Lord Bingham, in discussing the future of the common law, has identified the "diminished role" of the Judicial Committee of the Privy Council as having given freedom to the courts of Australia, Canada, and India to develop principles of their own.¹² Without that same freedom, New Zealand divergence from English law has depended more upon differences in local conditions, particularly led by statutes, than on differences in legal reasoning. The Privy Council has been more encouraging of diversity at some times than at others. In *Australian Consolidated Press Ltd v Uren*, a Board which included Sir Alfred North acknowledged the ability of Australian courts to go their own way when reasonable differences of view on matters of policy were open.¹³

The issue that faced the High Court in the present case was whether the law as it had been settled in Australia should be changed. Had the law developed by processes of faulty reasoning or had it been founded upon misconceptions it would have been necessary to change it. Such was not the case. In the result in a sphere of the law where its policy calls for decision and where its policy in a particular country is fashioned so largely by judicial opinion it became a question for the High Court to decide whether the decision in *Rookes v Barnard* [[1964] AC 1129 (HL)] compelled a change in what was a well settled judicial approach in the law of libel in Australia. Their Lordships are not prepared to say that the High Court were wrong in being unconvinced that a changed approach in Australia was desirable.

11 Robin Cooke "The Road Ahead for the Common Law" (2004) 53 ICLQ 273, 273.

12 Tom Bingham *The Business of Judging* (Oxford University Press, Oxford, 2000) 387.

13 *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590, 644 (PC).

In a blow for greater diversity, the young Cooke, writing in the *New Zealand Law Journal*, argued against "unquestioning compliance" with English case law.¹⁴ He argued that the New Zealand Court of Appeal should examine academic criticisms of English authorities, and the views of other great Commonwealth or American judges, in deciding which course to take.

In practice, the freedom to go our own way has been limited. There are some notable exceptions,¹⁵ but in many other cases interesting developments have been arrested.¹⁶ But times change. Some of the New Zealand cases may yet be seen to be prophetic of changes in English law.

Lord Cooke's own contribution to the development of a distinctive New Zealand law is immense. We need not be quite as partisan as one Australian commentator, who claimed that Sir Owen Dixon was "arguably the greatest judge that the common law system has produced",¹⁷ but Lord Cooke's own contribution to the New Zealand legal tradition, and to the wider common law tradition of which it is part, is at least as great.

It is worth reflecting on some of the elements of the New Zealand legal tradition. I wonder whether any country started out with higher expectations of law than ours. An inducement to Maori to enter into the Treaty of Waitangi was the promise of law. That is clear from the debates at Waitangi¹⁸ and earlier petitions for British protection. Lord Glenelg, the Colonial Secretary, explained the decision to make New Zealand a colony in terms of the need to establish legal order and to avoid the repetition in New Zealand of "the calamities by which the aborigines of America and African colonies have been afflicted".¹⁹

14 R B Cooke "The Supreme Tribunal of the British Commonwealth?" (1956) 32 NZLJ 233, 235.

15 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC); *Lange v Atkinson* [2000] 1 NZLR 257 (PC).

16 *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1990] 3 NZLR 513 (PC); *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700 (PC); *Downsview Nominees Ltd v First City Corporation Ltd* [1993] 1 NZLR 513 (PC); *O'Connor v Hart* [1985] 1 NZLR 159 (PC); *Aotearoa International Ltd v Scancarriers A/S* [1985] 1 NZLR 513 (PC).

17 Hon Mr Justice Michael McHugh "The Law-making Function of the Judicial Process—Part II" (1988) 62 ALJ 116, 127.

18 W Colenso *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (Government Printer, Wellington, 1890) 27.

19 Lord Glenelg to Lord Durham (29 December 1837) *Great Britain Parliamentary Papers* NZ 1 1840 (582) VI, App 8, 148–149.

The establishment of a legal system and the provision of laws appropriate to local conditions had to await the arrival of the first Chief Justice. In the meantime the temporary expedient was adopted of applying "the Laws of New South Wales so far as they can be made applicable".²⁰ That was resented greatly by the local residents, who thought they gave a "penal taint" to the new colony.²¹ Their opposition was an early expression of distinctiveness.

When William Martin, the first Chief Justice, and William Swainson, the second Attorney-General, arrived together on the *Tyne* in 1841, they assisted with the drafting of Ordinances for the government of the new colony. The instructions received by Governor Hobson had advised them to look to the laws of other countries which had adapted English law while "retaining the spirit of English law", but discouraged "servile adherence to them as precedent, except as far as the similarity of circumstances may allow".²²

The licence offered was taken. The first Ordinances were received with some astonishment in London. They were radical measures by the standard of the day. Some, too radical, were disallowed.

The Supreme Court of New Zealand, established in 1841, had jurisdiction in common law and equity right from the outset,²³ anticipating the English restructuring by decades. Property and Conveyancing Ordinances greatly simplified the English law, and the Land Claims Ordinance 1841 established that the domain lands of the Crown were "subject ... to the rightful and necessary occupation and use thereof" by the aboriginal inhabitants.²⁴ What that means, we are still working through. The rules of the Supreme Court were breathtakingly streamlined by the standards of the day. Proceedings could be started by oral complaint to a Registrar.²⁵ The judge was required "to elicit the point in issue, by examination of the parties or their Solicitors".²⁶

Our early judges, both Martin and Chapman, were also adventurous in their sources. Chapman was an admirer of Justice Story of the United States Supreme Court. The Full

20 New South Wales Laws Extension Ordinance 4 Vict 1, long title. See A H McLintock *Crown Colony Government in New Zealand* (Government Printer, Wellington, 1958) 132.

21 McLintock, above n 20, 132–133.

22 Lord John Russell to William Hobson (9 December 1840) *Great Britain Parliamentary Papers* NZ 3 1841 (311) XVII 24, 25.

23 Supreme Court Ordinance 1841 5 Vict 1, cls 2, 3.

24 Land Claims Ordinance 1841 4 Vict 2, cl 2.

25 Supreme Court Rules Ordinance 1844 8 Vict 1, r 12.

26 Supreme Court Rules Ordinance 1844 8 Vict 1, r 28.

Court decision in *R v Symonds*²⁷ draws not only on Blackstone but also on Chancellor Kent's commentaries and the United States Supreme Court decision in *Cherokee Nation v State of Georgia*.²⁸ When the Privy Council eventually came to consider *R v Symonds* in the course of *Nireaha Tamaki v Baker*, Lord Davey sniffed a little at the use of American case law, saying:²⁹

The judgments of Marshall, CJ, are entitled to the greatest respect although not binding on a British Court. The decisions referred to, however, being given under different circumstances do not appear to assist their Lordships in this case. But some of the judgments contain *dicta* not unfavourable to the appellant's case.

Our first Court of Appeal was the Governor and the Executive Council.³⁰ The 1846 Ordinance establishing the Court gave it power to grant leave to appeal to the Privy Council where the amount in issue exceeded £500 or the Court of Appeal had overruled the Supreme Court.³¹ No appeals to London were in fact taken to the Court of Appeal during the period of Crown colony government. Only one appeal to the Privy Council is reported for that period;³² it led to the judgment of the Full Court of Martin CJ and Chapman J being overturned.

In enactment of our own statutes and in case law we have swung between periods of local adaptation or invention and periods of slavish imitation, characterised by Jim Cameron as "legal cringe".³³ Pioneering legislation and innovative judicial responses to local conditions gave way in the period after World War I to a more wooden approach which lasted until the 1960s. By 1965 a reforming Minister of Justice, Ralph Hanan, had identified a fundamental cause of the inadequacy of law reform at the time to be the view that "important changes in the common law should not normally be made except in accordance with changes that have taken place in England". That, he said, was "not good enough".³⁴ After the early adventurism of Chapman and Martin, Cameron's verdict on

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

28 *Cherokee Nation v State of Georgia* (1831) 30 US (5 Pet) 1. See for example *R v Symonds*, above n 27, 388, 390 Chapman J.

29 *Nireaha Tamaki v Baker* (1901) NZPCC 371, 384–385 (PC).

30 Supreme Court Amendment Ordinance 1846 10 Vict 3, cl 3.

31 Supreme Court Amendment Ordinance 1846 10 Vict 3, cl 8.

32 *R v Clarke* (1851) NZPCC 516 (PC).

33 B J Cameron "Legal Change over Fifty Years" (1987) 3 Cant LR 198, 198.

34 J R Hanan *The Law in a Changing Society: A Policy and Programme for Law Reform* (Department of Justice, Wellington, 1965) 20.

New Zealand case law is that it demonstrated "essentially derivative thinking and a narrow application of precedent" for much of the 20th century.³⁵

With the formation of the separate Court of Appeal in 1957, slavish adherence to English precedents passed. *Corbett v Social Security Commission*³⁶ was the beginning of a new confidence which led Lord Cooke to his 1987 verdict that "New Zealand law, both that made by our parliament and that made by our judges, has now evolved into a truly distinctive body of principles and practices, reflecting a truly distinctive outlook".³⁷

In 1995, however, Chief Justice Sir Thomas Eichelbaum sounded a note of caution about the extent to which the New Zealand courts may have felt constrained by the right of appeal to the Privy Council:³⁸

In fairness, the effect of the restraint imposed by the mere presence of the right of appeal to the Privy Council should not be underestimated. In the absence of fairly obvious differentiating local circumstances, the likelihood must be considerable that their Lordships sitting at Downing St will apply the law with which they are comfortable when at the House of Lords. Any New Zealand judgment which consciously departs from "English law" does so at the risk of reversal. Thus it surprises not that the number of instances where New Zealand Judges have deliberately courted that risk is relatively small.

The suggestion that the development of New Zealand common law may have been inhibited in the past by appeals to the Privy Council is impossible to prove. The question whether the abolition of appeals to London will result in accelerating divergence is one of the important questions hanging over the creation of the new Supreme Court.

The experience in Australia and Canada does suggest that some conformity may be lost over time, but the common law heritage, as I have elsewhere suggested,³⁹ pulls together. More often than not, when decisions in novel cases have to be measured against the principles identified in comparable jurisdictions, we will agree. So too the increasing internationalisation of much of our law pulls us together. Where there are differences

³⁵ Cameron, above n 33, 210.

³⁶ *Corbett v Social Security Commission* [1962] NZLR 878 (CA).

³⁷ Sir Robin Cooke "The New Zealand National Legal Identity" (1987) 3 Cant LR 171, 182; see also *Invercargill City Council v Hamlin*, above n 15.

³⁸ Thomas Eichelbaum "Brooding Inhibition—Or Guiding Hand? Reflections on the Privy Council Appeal" in Philip A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 112, 127–128.

³⁹ Dame Sian Elias "The Usages of Society and the Fashions of the Times: W[h]ither the Common Law?" (Address to the 13th Commonwealth Law Conference, Melbourne, 15 April 2003) 19.

between us, it will usually be because there are reasons to go different ways. Those expressions of difference are themselves critical to the continued vitality of the common law. I do not think it was simply for reasons of politeness that the Privy Council acknowledged in *Invercargill City Council v Hamlin* that a strength of the common law is the ability of the courts of different jurisdictions to "learn from each other".⁴⁰

On the question of divergence, there are forces at work other than the loss of appeals to London. The increasing integration of the legal systems of Europe and the power of international movements in human rights and commercial law have diminished the centrality of the House of Lords. As Lord Cooke has said in a recent paper, "a new Supreme Court of the United Kingdom will be one national supreme court among many".⁴¹ Indeed, he goes on to point out that it will not even be supreme if the European Court of Justice emerges as the final court for the Union. It may be that through the process of "learning from each other" the common law of our different jurisdictions will be enriched by the European insights increasingly important in the decisions of the English courts. If so, it will be because, in the contest of ideas, they persuade on their own merits.

I do not expect that the setting up of the Supreme Court will unsettle our law. Those who are worried about the prospect do not, I think, understand how conservative judicial method must be. I do not even think that the Supreme Court will have immediate and dramatic impact. Still less can it expect to be immediately or consistently popular. It is worth remembering the experience in Australia and the United States.

Chief Justice Gleeson in the celebrations to mark the centenary of the High Court of Australia in October 2003 reminds us that there never was a "golden age when members of the Court basked in universal admiration".⁴² The circumstances of the Court's creation and the initial appointments to it were highly controversial. There were fears that the judges would not have enough to do. It was suggested that the Court should come together as needed and could be made up of the Chief Justices of the States. The first five members of the Court were all men who had been prominent politicians. Chief Justice Gleeson notes that "[f]rom the very beginning, decisions of the Court that have frustrated political objectives, have resulted in noisy criticism, resentment of the Court's power and independence, and threats to limit that independence".⁴³

40 See *Invercargill City Council v Hamlin*, above n 15, 520.

41 Cooke "The Road Ahead for the Common Law", above n 11, 274.

42 Gleeson, above n 3, 3.

43 Gleeson, above n 3, 9.

Chief Justice Gleeson rather philosophically suggests that such a reaction is only what is to be expected in a "robust democracy".⁴⁴ In New Zealand we too will have to develop similar stoicism.

The Constitution of the United States was consciously created as supreme law, creating and limiting government, because of the history of dispute with the Parliament at Westminster. Even with this background of insistence on legality, however, the United States Supreme Court languished for its first 10 years. In its first term the only work it had to do was to admit attorneys to the Bar. It heard no cases for two years, and delivered no substantive decisions for a further year. It had difficulty attracting and keeping members.⁴⁵ In 1801, when Chief Justice Marshall was appointed, the Court is said to have "existed on the fringe of American awareness. Its prestige was slight, and it was more ignored than respected".⁴⁶

When the United States Government moved from Philadelphia to Washington, the Court was simply overlooked. No provision was made for it until the Senate consented to allow it to use one of the committee rooms in the basement. At one stage it was reduced to holding sittings in a tavern. These beginnings are some comfort to the judges appointed to the New Zealand Supreme Court, now that the details of our temporary and permanent accommodation are being revealed to us.

It seems to me that we can expect over time to gain three principal benefits from the establishment of the Supreme Court. The first is the extension of the benefit of second tier appeal to all cases which merit it, with gains for the consistency and coherence of our law. The second benefit is the local knowledge to place the difficult questions the Court will be asked to consider in context. The third benefit is better understanding of the place of law and the legal system within our community.

First, access. The benefit of a second tier appeal has to date been secured for only a very small number of cases. I have expressed the view before that a lack of accessibility to the law has been the real cost of our not having had a final court of appeal in New Zealand.⁴⁷ That inaccessibility has not simply been due to the expense of appeals. Where a mixed system of appeals as of right and appeals by leave is maintained, appeals taken as a matter

⁴⁴ Gleeson, above n 3, 9.

⁴⁵ Leonard W Levy *Seasoned Judgements: The American Constitution, Rights, and History* (Transaction, New Brunswick, 1997) 321–322.

⁴⁶ Levy, above n 45, 379.

⁴⁷ Elias "Transition, Stability and the New Zealand Legal System", above n 8, 482.

of right leave little room for appeals which require leave. It is no accident that so few appeals from New Zealand on criminal matters have been granted special leave.

The experience in Australia may well be a pointer to the future in New Zealand. Since 1984, when special leave to appeal became a requirement for all appeals to the High Court, criminal appeals have constituted a much greater proportion of the work of the High Court. Justices Kirby and Heydon have both attributed the change to the abolition of appeals as of right.⁴⁸ The change has affected the tone of the national legal system. As Justice Kirby has identified,⁴⁹ it is in criminal cases that the rule of law is truly tested. The accessibility of a court at the apex of the hierarchy in such matters provides an important institutional guarantee and the ability to respond to local conditions. In Australia, questions of fair trial are considered by the High Court on the basis of a distinctively Australian perspective.⁵⁰

Whilst English and local legal history are undoubtedly of much interest, they do not, in our view, dictate the emerging law on the subject of this judgment as it now applies in Australia.

I have singled out the criminal law, but, in truth, there are many areas of law of vital importance to the lives of New Zealanders where a second tier appeal has not been available. That is damaging to the integrity of the legal system. The role of an apex court is to maintain the coherence of the legal system as a whole. As Aharon Barak, Chief Justice of Israel, has identified, it is important that a legal system have a court with a sense of the scope and reach of the whole law.⁵¹

The development of a specific common-law doctrine radiates into the entire legal system. The interpretation of a single statute affects the interpretation of all statutes. A legal system is not a confederation of laws. Legal rules and principles together constitute a system of law whose different parts are tightly linked.

A divergence of final responsibility for the legal system, such as we have in effect had to date, means that the coherence and overview which is the benefit of a final court with responsibility for maintaining legality in the entire legal system is lost.

48 Hon Justice Michael Kirby "Why has the High Court Become More Involved in Criminal Appeals?" (2002) 23 Aust Bar Rev 4; J D Heydon "Evidence Law" in Tony Blackshield, Michael Coper, and George Williams (eds) *The Oxford Companion to the High Court of Australia* (Oxford University Press, Melbourne, 2001) 254–256.

49 Kirby, above n 48, 19.

50 *Azzopardi v The Queen* [2001] 205 CLR 50, 65 Gaudron, Gummow, Kirby, and Hayne JJ.

51 Aharon Barak "A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116 Harv L Rev 16, 25–26.

The second benefit we can hope to obtain from patriating our final court is the knowledge of local conditions which is essential if a legal system is to be responsive to the community it serves. Others take a different view on this. Some see detachment or remoteness as a more important quality than local knowledge. There are those who believe that local conditions can be adequately communicated by counsel. I am not convinced. When as counsel in the *Maori Broadcasting* case⁵² I was asked by the presiding Law Lord "Do they still live on reservations?", I was able of course to answer the immediate question and put right the rolled-up misconception—but I felt a sense of helplessness about describing a whole world. Similarly, when sitting on a conveyancing case in the Judicial Committee discussing the standard of care to be expected of a provincial legal practitioner in New Zealand, I felt keenly the gulf in understanding of the sophistication and subtlety reasonably to be expected.

The third change we may expect over time to flow from the establishment of the Supreme Court is better understanding in the community of the role of courts. Our present system has been bewilderingly obscure. It was instructive to watch from the sidelines the celebration of the centenary of the High Court of Australia. The Court is a visible symbol of the place of impartial administration of justice in the Australian constitution. It demonstrates how government under law is assured by courts which are independent. Chief Justice Gleeson, in reflecting on the place occupied by the High Court, has suggested that the Australian community understands that in a contest between citizen and government, the High Court holds the scales of justice evenly.⁵³

The High Court of Australia is visible and accessible, as our final court has never been. Its decisions may be criticised from time to time. There is reason to believe that the public is aware of what is at stake, and that the institutional safeguard of the Court is appreciated and understood in a way that cannot be taken for granted in our own system. Similar pride in the institutions, if not in particular outcomes, can be seen in Canada and the United States.

Why does public understanding of the role of the courts matter? An aspect of the rule of law is accessibility to courts which are independent and impartial. Courts are vulnerable, particularly when obliged to address controversial matters. They cannot avoid such matters when they are brought for decision in properly constituted litigation. Characterisation of judges as "activist" for fulfilling their judicial obligations is misconceived, and dangerous to the institutions.

52 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC).

53 Gleeson, above n 3, 25.

The independence of the judiciary is not an immediately appealing quality to many people. It exists not as protection for judges but to ensure impartiality. It provides the assurance referred to by Chief Justice Gleeson that the scales of justice are held evenly, no matter how powerful the interests and no matter how loud the clamour for one side. The independence of the judiciary exists to ensure that the individual judge, when judging, is subject only to the law.

The New Zealand Constitution Act 1986 makes separate provision for the legislative, executive, and judicial branches of government. Although our legal system requires the independence of the judiciary from other sources of state power, that independence is, in reality, fragile. Judges have security of tenure and salary but are dependent on the executive for administrative support and in the setting of the fees which litigants must pay to have access to the courts.

International statements of basic principles for judicial independence adopted by both the United Nations General Assembly and the Commonwealth recognise judicial independence as having an institutional dimension.⁵⁴ The Supreme Court of Canada has held that administrative independence in the organisation of judicial work and the support necessary to achieve it are aspects of judicial independence.⁵⁵ Chief Justice Barak of Israel has expressed the view that it is inconsistent with judicial independence for the administration of the judiciary to be through a department of government.⁵⁶ In the United States, Canada, and Australia, judges are given considerable operational autonomy.

In their joint response to the United Kingdom Government's consultation paper proposing the setting up of a Supreme Court, the Law Lords argued that the new Court should enjoy "corporate independence".⁵⁷

[The Court] must have its own budget, settled in a manner which protects the court from political pressure. It must have its own Registrar, answerable to the court, its own staff and its own IT facilities. The independence of the judges requires not only that they be free of

54 See for example the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (19 August 1995); Universal Declaration on the Independence of Justice (Montreal, 10 June 1983) UN Doc E/CN.4/Sub.2/1985/18/Add.6, annex IV; Basic Principles on the Independence of the Judiciary (1985) UN Doc A/CONF.121/22/Rev.1; Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government (2003).

55 See *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3, 81 para 118 Lamer CJC, L'Heureux-Dubé, Sopinka, Gonthier, Cory, and Iacobucci JJ.

56 Barak, above n 51, 54.

57 The Law Lords' Response to the Government's Consultation Paper on Constitutional Reform: A Supreme Court for the United Kingdom (CP 11/03, July 2003) 2 para 4.

extraneous pressure but also that the court be institutionally free of administrative pressure. In Australia, a one-line budget is agreed annually between the High Court's chief executive officer and the attorney-general, and a similar arrangement would be appropriate here.

It is arguable that in New Zealand we are now getting out of step with countries with which we identify closely. Since 1995 we have attempted a middle way, with the courts administered by a separate Department for Courts. In matters of direct judicial support (including support for organisation of judicial work) we have operated in a loose partnership with the Department. The halfway house has now been changed in a reorganisation of the justice sector. The Department for Courts has been reabsorbed back into the Ministry of Justice.

It may be that when the reorganisation is completed, some mechanism can be devised to maintain judicial independence in matters of judicial administration and immediate judicial support. Questions of security of communication between judges and maintenance of confidentiality need urgently to be resolved.

There is no incentive on the executive to address concerns like these. In 1939, Parliament was vigilant to protect the principle of judicial independence even from a probably unexceptionable proposal to let the judiciary share in the general belt-tightening at a time of depression. Today there seems little public awareness of the current issues which impact upon the principle – and little understanding that an independent judiciary is essential to maintenance of the rule of law.⁵⁸ If the invisibility of our final appeal court has been part of that problem, the establishment of the Supreme Court may assist in raising awareness of what is at stake in our constitutional arrangements.

The Supreme Court Act itself raises awareness of aspects of our constitution. It acknowledges constitutional fundamentals by its explicit reference to the doctrines of the rule of law and the sovereignty of Parliament. Section 3(2) does not impose any direct responsibility on the Court. It is formal legislative confirmation of what is described as "New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament". This provision captures a duality identified by Dicey in his hugely influential *Introduction to the Study of the Law of the Constitution*.⁵⁹ This duality, as Sir Kenneth Keith has remarked, has inbuilt tension.⁶⁰

58 Antonio Lamer "The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change" (1996) 45 UNBLJ 3, 7–8.

59 A V Dicey *Introduction to the Study of the Law of the Constitution* (1 ed, MacMillan, London, 1885; 10 ed, MacMillan, London, 1959).

60 K J Keith "Sovereignty at the Beginning of the 21st Century: Fundamental or Outmoded?" (2004) 63 CLJ 581.

Both the rule of law and parliamentary sovereignty are principles of the constitution. The inclusion of reference to them in the Supreme Court Act is at first sight startling. The 1986 Constitution Act avoids such sweeping doctrine and simply provides that the New Zealand Parliament "continues to have full power to make law" for New Zealand.⁶¹ It is possible that in the use of these terms we are seeing the beginning of an attempt to address and capture in writing the elements of our constitution.

In *X Ltd v Morgan-Grampian (Publishers) Ltd*, Lord Bridge declared that "[t]he maintenance of the rule of law is in every way as important in a free society as the democratic franchise".⁶² Implicit in the rule of law is the existence of independent judicial authority. The separate authority of the judiciary exists, as Justice Brandeis, dissenting in *Myers v United States*, explained,⁶³ to prevent the exercise of arbitrary power. There is some measure of truth in the view that the phrase "rule of law" has a moral force which may not aid proper analysis.⁶⁴ As Harden and Lewis have said, the common law has sometimes been invoked "as some kind of universal redeemer. It became to arbitrariness and partisan government what the Christian cross affects to be to vampires. This, needless to say, was to claim too much."⁶⁵

Parliamentary supremacy over the judiciary, as Lord Templeman identified in *In re M*,⁶⁶ is exercisable only through legislation. Determination of all questions of law is the function of the courts.

Dicey defined the sovereignty of Parliament in terms of unfettered lawmaking power. Whether Parliament can be totally unrestricted in the way it makes law is, as Sir Owen Dixon recognised, "the old theological riddle".⁶⁷ The idea has been criticised as "an academic formulation which does not fit the law of England".⁶⁸ Its application even to unitary parliaments which have evolved from limited colonial legislatures is not self-

61 Constitution Act 1986, s 15(1).

62 *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1, 48 (HL).

63 See Justice Brandeis's dissent in *Myers v United States* (1926) 272 US 52, 240-295.

64 See Paul Craig "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] PL 467.

65 Ian Harden and Norman Lewis *The Noble Lie: The British Constitution and the Rule of Law* (Hutchinson, London, 1986) ch 2 "The rule of law: a chequered history" 37.

66 *In re M* [1994] 1 AC 377, 395 (HL).

67 Sir Owen Dixon "The Common Law as an Ultimate Constitutional Foundation" in *Jesting Pilate* (Hein, Melbourne, 1997) 207.

68 Sir Ivor Jennings *The Law and the Constitution* (5 ed, University of London Press, London, 1959) 167.

evident, as both Sir Owen Dixon, who exalted legalism, and Sir Kenneth Keith, who does not, have noted.⁶⁹

Dicey's theory struggles to accommodate the devolution of power. That can be seen in self-government in its application to matters of internal administration for the American colonies, where what Sir William Holdsworth described as a "pedantic use of the theory of the sovereignty of Parliament"⁷⁰ fuelled revolution. It can be seen in the example of Home Rule for Ireland (to which Dicey was implacably opposed) and in the transfer of full authority to the former colonies. Within the United Kingdom, too, Diceyan sovereignty would find preposterous the Scottish view that the provisions of the Act of Union are fundamental and unalterable for all time.⁷¹

Sir William Wade has explained seismic movements such as these in terms of revolution, acquiesced in by the courts. That is how he accounts for the decision in the second *Factortame* case.⁷² The revolutionary explanation allows theoretical consistency, if a rather jerky progression of constitutional history. I was once attracted to it, but I have come to believe that, in truth, it is the theory that does not fit.

Now is not the time for a lengthy discourse upon parliamentary sovereignty or the rule of law, or, what is more important, the relationship between the two. They are topics I have explored earlier.⁷³ What is perhaps worth noting for present purposes is that while both the sovereignty of Parliament and the rule of law are aspects of our unwritten constitution, the case law dealing with them is comparatively slender and the concepts undeveloped.

In its absolutist form, parliamentary sovereignty collides uncomfortably with modern movements for internationalism, federalism, devolution, and the principle of subsidiarity.⁷⁴ It also collides with the developing common law of what Lord Steyn has

69 See Dixon, above n 67, 203; Keith, above n 60, 584–585.

70 W Holdsworth *A History of English Law* (ed A L Goodheart and H G Hanbury, Methuen, London, 1956) vol 10, 531; vol 11, 119–126.

71 *MacCormick v Lord Advocate* [1953] SC 396, 411 Lord Cooper.

72 *R v Secretary of State for Transport, ex parte Factortame (No 2)* [1991] 1 AC 603 (HL); Sir William Wade and Christopher Forsyth *Administrative Law* (8 ed, Oxford University Press, Oxford, 2000) 27–29.

73 Rt Hon Dame Sian Elias "Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round" (2003) 14 PLR 148.

74 See for example Sandra Day O'Connor "Altered States: Federalism and Devolution at the 'Real' Turn of the Millennium" (2001) 60 CLJ 493; Paul Kennedy *Preparing for the Twenty-First Century* (Random House, New York, 1993) 131.

described as "renaissance constitutionalism".⁷⁵ Rights adjudication is increasingly conducted by a method of constitutionalism which is explicitly grounded in the rule of law. Jeffrey Jowell has suggested that in such litigation the courts essentially ask two questions: Is there a breach of a fundamental democratic right? If there is, is the decision necessary in the interests of a legitimate countervailing democratic value? This is review of the "constitutional co-ordinates of the decision".⁷⁶

What is unclear is the impact of this movement on parliamentary sovereignty. If law is indeed to rule, then Parliament must at least observe the prior rules of formal validity for lawmaking. Whether those rules go further than formal requirements has not been authoritatively decided. There are, however, indications of a developing view, long foretold by Lord Cooke, that Parliament is constrained by rules fundamental to the democratic process, by an inability to exclude the courts from supervising the exercise of government power for legality, and, more controversially, by human rights. If so, we no longer have a vision of the rule of law that is purely formal.

In *The Liberation of English Public Law*, the final essay in the 1997 Hamlyn Lectures, Lord Cooke confronted "constitutional bedrock".⁷⁷ Since questions of law "are always ultimately for the courts",⁷⁸

the total abolition of an independent judiciary is unthinkable; its existence is the basic rock of the constitution. An Act wholly replacing the independent judiciary by congeries of administrative tribunals with members holding office at the pleasure of the government of the day can scarcely be imagined; and I believe that the courts would not uphold it.

Lord Cooke has returned to this theme in his recent Commonwealth lecture.⁷⁹ He points out that the number of decisions in which judges have held that legislative or administrative intent must prevail is "untold and huge". There is, however, a "bottom line" of minority rights which cannot lawfully be crossed. "The legislative and judicial functions are complementary; the supremacism of either has no place."

It would be wrong to end without acknowledging the aspirations for justice and its delivery which have prompted the creation of the Supreme Court.

75 Lord Steyn "The New Legal Landscape" [2000] 6 EHRLR 549, 552.

76 Jeffrey Jowell "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] PL 671, 681.

77 Rt Hon Lord Cooke of Thorndon *Turning Points of the Common Law* (Sweet and Maxwell, London, 1997) 78.

78 Cooke *Turning Points of the Common Law*, above n 77, 79.

79 Cooke "The Road Ahead for the Common Law", above n 11, 278.

Sir Robert Stout in 1904, in advocating the abolition of appeals to the Privy Council, spoke of "[t]he psychological effect of dependence on some external power for the performance of our highest duties as citizens of these new nations".⁸⁰ The same chilling effect was described by Sir Thomas Eichelbaum in 1995.⁸¹

In 2004, the year the Supreme Court will be established, we will be 50 years from Beaglehole's essay *The New Zealand Scholar*.⁸² In a time of developing national consciousness, Beaglehole quoted Robin Hyde's cry that "we are hungry for the words that shall show us these islands and ourselves; that shall give us a home in thought".⁸³ Beaglehole makes the point that there is a lag between political independence and independence of thought for all colonial peoples.⁸⁴ It was a process described more than 100 years before Beaglehole by Ralph Waldo Emerson, in expressing an intellectual Declaration of Independence to the students of Harvard: "We will walk on our own feet; we will work with our own hands; we will speak our own minds".⁸⁵

The process of transition may be lengthy. It does not come about at once or in all things at the same time. In 1954 Beaglehole was tentative. He spoke of a "gathering conviction" that we had in New Zealand "something interesting;" "not ... a harvest, but at least it is a seed bed". He "ventured to hope".⁸⁶ Today, prodded by the historians, poets, and writers discussed by Beaglehole, the seed bed he discerned has flourished. Those of my generation do not doubt that in art, in literature, in politics, we have a home in thought at home. That is not to suggest that we have cut adrift from our wider heritage. We have built upon it.

I do not suggest that a home in thought for New Zealand law is provided by the creation of an institution. It is the work of many generations. We are the inheritors of their hopes and their expectations of us. Our home in thought has been built with the help of judges who have served in New Zealand since William Martin arrived on the *Tyne* in 1841. No one has contributed more than Lord Cooke of Thorndon. It is a privilege to say so in a lecture dedicated to his honour.

80 Stout, above n 1, 13.

81 See Eichelbaum, above n 38.

82 J C Beaglehole *The New Zealand Scholar* (Margaret Condliffe Memorial Lecture, Canterbury University College, 21 April 1954), reprinted in Peter Munz (ed) *The Feel of Truth: Essays in New Zealand and Pacific History* (Reed, Wellington, 1969) 237.

83 Beaglehole, above n 82, 244.

84 Beaglehole, above n 82, 239-240.

85 Ralph Waldo Emerson "The American Scholar" (Address to the Phi Beta Kappa Society, Harvard University, 31 August 1837).

86 Beaglehole, above n 82, 248.

SOMETHING OLD, SOMETHING NEW: CONSTITUTIONAL STIRRINGS AND THE SUPREME COURT

*Dame Sian Elias**

This is the edited text of the Robin Cooke Lecture 2003, delivered at the Victoria University of Wellington Law School on 11 December 2003.

In 1904 Sir Robert Stout, then Chief Justice of New Zealand, described the continuation of appeals to the Privy Council as "an anomaly in our Constitution".¹ We lived with greater anomalies until the passing of the Constitution Act 1986, but the Privy Council has proved to be the hardest of all institutional relics of colony.

In 1904 we shared the "anomaly" of Privy Council appeals with Australia. Indeed, Stout's paper proposed that the newly created High Court of Australia be the final court of appeal for that country – and that it be located in the capital.² (Australia took another 80 years to implement both proposals.) Earlier, the fate of appeals to the Privy Council had been one of the last obstacles to approval in London of the federal Constitution. A last-minute compromise, for which Sir Samuel Griffith was blamed,³ preserved appeals to the Privy Council except in matters of dispute in the Federation. The compromise in Australia limped on until the 1980s. In New Zealand, we have taken another 20 years to think about the matter.

Such caution has been a characteristic of our handling of constitutional matters. At New Zealand insistence, the Statute of Westminster 1931 provided that it would not have

* Chief Justice of New Zealand.

1 Sir Robert Stout "Appellate Tribunals for the Colonies" (1904) 2 Commonwealth LR 3, 4.

2 Stout, above n 1, 10.

3 At his swearing-in as Chief Justice on 6 October 1903, Sir Samuel Griffith felt it necessary to respond to the criticisms made of his appointment in the Federal Parliament: Hon Murray Gleeson, Chief Justice of Australia "The Centenary of the High Court: Lessons from History" (13th AIJA Oration, Australian Institute of Judicial Administration, Melbourne, 3 October 2003) 1.

effect in New Zealand until adopted by statute.⁴ Our existing constitutional arrangements under the Constitution Act 1852 were expressed to be "thoroughly satisfactory" in the parliamentary debates. Speakers were generally anxious that we should not be seen to show "ingratitude towards England" by adopting the freedom offered. Anxiety to preserve appeals to the Privy Council was also expressed.⁵

It took 15 years for us to adopt the Statute of Westminster.⁶ Until then, 15 entrenched sections of the 1852 Constitution Act could be amended only by the United Kingdom Parliament. One such amendment, proposed during the Depression, would have sought a reduction in the salary of the judges.⁷ In an unaccountable burst of enthusiasm for the principles of judicial independence, the proposal was dropped. It was not until 1986 that we got around to replacing the 1852 Act.

What this carelessness about our constitutional arrangements has meant is that when we do come to consider reforms touching upon those arrangements, we are not generally well prepared. The debate which preceded the enactment of the Supreme Court Act 2003 may be thought to provide some illustrations,⁸ but the traditional reticence may be changing. The Act itself is groundbreaking in making explicit reference to principles of the constitution.⁹ Whether this signals the start of a greater willingness to engage in constitutional discourse remains to be seen.

Lord Cooke is a relatively late convert to the creation of a local final appellate court. Since 1987 he has been convinced that the time had come to move on.¹⁰

In short, New Zealand is now an independent member state of the Commonwealth, a separate realm of the Queen. It is inconsistent with that nationhood to submit our legal issues to the adjudication of those, whoever they may be, who happen at any one time and in any particular case to comprise a majority of Judges of another country, appointed and sitting far off in that

4 Statute of Westminster 1931 (UK), s 10.

5 Hon David Buddo (23 July 1931) 228 NZPD 642; compare Rev C L Carr (21 July 1931) 228 NZPD 580.

6 Statute of Westminster Adoption Act 1947.

7 See Sir David Smith "Bench and Bar 1928-1950" in Robin Cooke (ed) *Portrait of a Profession* (Reed, Wellington, 1969) 90, 98-103.

8 See Rt Hon Dame Sian Elias "Transition, Stability and the New Zealand Legal System" (F W Guest Memorial Lecture 2003) (2004) 10 Otago LR 475, 476-477.

9 See the Supreme Court Act 2003, s 3(2): "Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament."

10 Lord Cooke of Thorndon "Final Appeal Courts: Some Comparisons" (New Zealand Centre for Public Law occasional paper no 7, Wellington, 2001) 18.

country and primarily versed in the laws of that country. Most New Zealand law has become markedly different from English law—the major statute law almost entirely so, the common law so to a significant extent.

What Lord Cooke has recently described as the "diminishing Englishness of the common law"¹¹ is the result of a number of factors. One of them has been the developing confidence in local traditions and experiences in other jurisdictions in which the common law has taken root. The common law has never been a seamless whole. When it has travelled it has adapted to local circumstances, to meet the needs of different communities. The need to accommodate the customs and laws of the existing inhabitants of territories acquired by the British Crown made variation inevitable. As local legislatures made laws to meet the aspirations of local communities, the common law moved with the legislation. Even where there was no statutory prod, different solutions to common legal problems were sometimes adopted as a matter of intellectual preference.

Lord Bingham, in discussing the future of the common law, has identified the "diminished role" of the Judicial Committee of the Privy Council as having given freedom to the courts of Australia, Canada, and India to develop principles of their own.¹² Without that same freedom, New Zealand divergence from English law has depended more upon differences in local conditions, particularly led by statutes, than on differences in legal reasoning. The Privy Council has been more encouraging of diversity at some times than at others. In *Australian Consolidated Press Ltd v Uren*, a Board which included Sir Alfred North acknowledged the ability of Australian courts to go their own way when reasonable differences of view on matters of policy were open.¹³

The issue that faced the High Court in the present case was whether the law as it had been settled in Australia should be changed. Had the law developed by processes of faulty reasoning or had it been founded upon misconceptions it would have been necessary to change it. Such was not the case. In the result in a sphere of the law where its policy calls for decision and where its policy in a particular country is fashioned so largely by judicial opinion it became a question for the High Court to decide whether the decision in *Rookes v Barnard* [[1964] AC 1129 (HL)] compelled a change in what was a well settled judicial approach in the law of libel in Australia. Their Lordships are not prepared to say that the High Court were wrong in being unconvinced that a changed approach in Australia was desirable.

11 Robin Cooke "The Road Ahead for the Common Law" (2004) 53 ICLQ 273, 273.

12 Tom Bingham *The Business of Judging* (Oxford University Press, Oxford, 2000) 387.

13 *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590, 644 (PC).

In a blow for greater diversity, the young Cooke, writing in the *New Zealand Law Journal*, argued against "unquestioning compliance" with English case law.¹⁴ He argued that the New Zealand Court of Appeal should examine academic criticisms of English authorities, and the views of other great Commonwealth or American judges, in deciding which course to take.

In practice, the freedom to go our own way has been limited. There are some notable exceptions,¹⁵ but in many other cases interesting developments have been arrested.¹⁶ But times change. Some of the New Zealand cases may yet be seen to be prophetic of changes in English law.

Lord Cooke's own contribution to the development of a distinctive New Zealand law is immense. We need not be quite as partisan as one Australian commentator, who claimed that Sir Owen Dixon was "arguably the greatest judge that the common law system has produced",¹⁷ but Lord Cooke's own contribution to the New Zealand legal tradition, and to the wider common law tradition of which it is part, is at least as great.

It is worth reflecting on some of the elements of the New Zealand legal tradition. I wonder whether any country started out with higher expectations of law than ours. An inducement to Maori to enter into the Treaty of Waitangi was the promise of law. That is clear from the debates at Waitangi¹⁸ and earlier petitions for British protection. Lord Glenelg, the Colonial Secretary, explained the decision to make New Zealand a colony in terms of the need to establish legal order and to avoid the repetition in New Zealand of "the calamities by which the aborigines of America and African colonies have been afflicted".¹⁹

14 R B Cooke "The Supreme Tribunal of the British Commonwealth?" (1956) 32 NZLJ 233, 235.

15 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC); *Lange v Atkinson* [2000] 1 NZLR 257 (PC).

16 *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1990] 3 NZLR 513 (PC); *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700 (PC); *Downsview Nominees Ltd v First City Corporation Ltd* [1993] 1 NZLR 513 (PC); *O'Connor v Hart* [1985] 1 NZLR 159 (PC); *Aotearoa International Ltd v Scancarriers A/S* [1985] 1 NZLR 513 (PC).

17 Hon Mr Justice Michael McHugh "The Law-making Function of the Judicial Process—Part II" (1988) 62 ALJ 116, 127.

18 W Colenso *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (Government Printer, Wellington, 1890) 27.

19 Lord Glenelg to Lord Durham (29 December 1837) *Great Britain Parliamentary Papers* NZ 1 1840 (582) VI, App 8, 148–149.

The establishment of a legal system and the provision of laws appropriate to local conditions had to await the arrival of the first Chief Justice. In the meantime the temporary expedient was adopted of applying "the Laws of New South Wales so far as they can be made applicable".²⁰ That was resented greatly by the local residents, who thought they gave a "penal taint" to the new colony.²¹ Their opposition was an early expression of distinctiveness.

When William Martin, the first Chief Justice, and William Swainson, the second Attorney-General, arrived together on the *Tyne* in 1841, they assisted with the drafting of Ordinances for the government of the new colony. The instructions received by Governor Hobson had advised them to look to the laws of other countries which had adapted English law while "retaining the spirit of English law", but discouraged "servile adherence to them as precedent, except as far as the similarity of circumstances may allow".²²

The licence offered was taken. The first Ordinances were received with some astonishment in London. They were radical measures by the standard of the day. Some, too radical, were disallowed.

The Supreme Court of New Zealand, established in 1841, had jurisdiction in common law and equity right from the outset,²³ anticipating the English restructuring by decades. Property and Conveyancing Ordinances greatly simplified the English law, and the Land Claims Ordinance 1841 established that the domain lands of the Crown were "subject ... to the rightful and necessary occupation and use thereof" by the aboriginal inhabitants.²⁴ What that means, we are still working through. The rules of the Supreme Court were breathtakingly streamlined by the standards of the day. Proceedings could be started by oral complaint to a Registrar.²⁵ The judge was required "to elicit the point in issue, by examination of the parties or their Solicitors".²⁶

Our early judges, both Martin and Chapman, were also adventurous in their sources. Chapman was an admirer of Justice Story of the United States Supreme Court. The Full

20 New South Wales Laws Extension Ordinance 4 Vict 1, long title. See A H McLintock *Crown Colony Government in New Zealand* (Government Printer, Wellington, 1958) 132.

21 McLintock, above n 20, 132–133.

22 Lord John Russell to William Hobson (9 December 1840) *Great Britain Parliamentary Papers* NZ 3 1841 (311) XVII 24, 25.

23 Supreme Court Ordinance 1841 5 Vict 1, cls 2, 3.

24 Land Claims Ordinance 1841 4 Vict 2, cl 2.

25 Supreme Court Rules Ordinance 1844 8 Vict 1, r 12.

26 Supreme Court Rules Ordinance 1844 8 Vict 1, r 28.

Court decision in *R v Symonds*²⁷ draws not only on Blackstone but also on Chancellor Kent's commentaries and the United States Supreme Court decision in *Cherokee Nation v State of Georgia*.²⁸ When the Privy Council eventually came to consider *R v Symonds* in the course of *Nireaha Tamaki v Baker*, Lord Davey sniffed a little at the use of American case law, saying:²⁹

The judgments of Marshall, CJ, are entitled to the greatest respect although not binding on a British Court. The decisions referred to, however, being given under different circumstances do not appear to assist their Lordships in this case. But some of the judgments contain *dicta* not unfavourable to the appellant's case.

Our first Court of Appeal was the Governor and the Executive Council.³⁰ The 1846 Ordinance establishing the Court gave it power to grant leave to appeal to the Privy Council where the amount in issue exceeded £500 or the Court of Appeal had overruled the Supreme Court.³¹ No appeals to London were in fact taken to the Court of Appeal during the period of Crown colony government. Only one appeal to the Privy Council is reported for that period;³² it led to the judgment of the Full Court of Martin CJ and Chapman J being overturned.

In enactment of our own statutes and in case law we have swung between periods of local adaptation or invention and periods of slavish imitation, characterised by Jim Cameron as "legal cringe".³³ Pioneering legislation and innovative judicial responses to local conditions gave way in the period after World War I to a more wooden approach which lasted until the 1960s. By 1965 a reforming Minister of Justice, Ralph Hanan, had identified a fundamental cause of the inadequacy of law reform at the time to be the view that "important changes in the common law should not normally be made except in accordance with changes that have taken place in England". That, he said, was "not good enough".³⁴ After the early adventurism of Chapman and Martin, Cameron's verdict on

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

28 *Cherokee Nation v State of Georgia* (1831) 30 US (5 Pet) 1. See for example *R v Symonds*, above n 27, 388, 390 Chapman J.

29 *Nireaha Tamaki v Baker* (1901) NZPCC 371, 384–385 (PC).

30 Supreme Court Amendment Ordinance 1846 10 Vict 3, cl 3.

31 Supreme Court Amendment Ordinance 1846 10 Vict 3, cl 8.

32 *R v Clarke* (1851) NZPCC 516 (PC).

33 B J Cameron "Legal Change over Fifty Years" (1987) 3 Cant LR 198, 198.

34 J R Hanan *The Law in a Changing Society: A Policy and Programme for Law Reform* (Department of Justice, Wellington, 1965) 20.

New Zealand case law is that it demonstrated "essentially derivative thinking and a narrow application of precedent" for much of the 20th century.³⁵

With the formation of the separate Court of Appeal in 1957, slavish adherence to English precedents passed. *Corbett v Social Security Commission*³⁶ was the beginning of a new confidence which led Lord Cooke to his 1987 verdict that "New Zealand law, both that made by our parliament and that made by our judges, has now evolved into a truly distinctive body of principles and practices, reflecting a truly distinctive outlook".³⁷

In 1995, however, Chief Justice Sir Thomas Eichelbaum sounded a note of caution about the extent to which the New Zealand courts may have felt constrained by the right of appeal to the Privy Council:³⁸

In fairness, the effect of the restraint imposed by the mere presence of the right of appeal to the Privy Council should not be underestimated. In the absence of fairly obvious differentiating local circumstances, the likelihood must be considerable that their Lordships sitting at Downing St will apply the law with which they are comfortable when at the House of Lords. Any New Zealand judgment which consciously departs from "English law" does so at the risk of reversal. Thus it surprises not that the number of instances where New Zealand Judges have deliberately courted that risk is relatively small.

The suggestion that the development of New Zealand common law may have been inhibited in the past by appeals to the Privy Council is impossible to prove. The question whether the abolition of appeals to London will result in accelerating divergence is one of the important questions hanging over the creation of the new Supreme Court.

The experience in Australia and Canada does suggest that some conformity may be lost over time, but the common law heritage, as I have elsewhere suggested,³⁹ pulls together. More often than not, when decisions in novel cases have to be measured against the principles identified in comparable jurisdictions, we will agree. So too the increasing internationalisation of much of our law pulls us together. Where there are differences

³⁵ Cameron, above n 33, 210.

³⁶ *Corbett v Social Security Commission* [1962] NZLR 878 (CA).

³⁷ Sir Robin Cooke "The New Zealand National Legal Identity" (1987) 3 Cant LR 171, 182; see also *Invercargill City Council v Hamlin*, above n 15.

³⁸ Thomas Eichelbaum "Brooding Inhibition—Or Guiding Hand? Reflections on the Privy Council Appeal" in Philip A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 112, 127–128.

³⁹ Dame Sian Elias "The Usages of Society and the Fashions of the Times: W[h]ither the Common Law?" (Address to the 13th Commonwealth Law Conference, Melbourne, 15 April 2003) 19.

between us, it will usually be because there are reasons to go different ways. Those expressions of difference are themselves critical to the continued vitality of the common law. I do not think it was simply for reasons of politeness that the Privy Council acknowledged in *Invercargill City Council v Hamlin* that a strength of the common law is the ability of the courts of different jurisdictions to "learn from each other".⁴⁰

On the question of divergence, there are forces at work other than the loss of appeals to London. The increasing integration of the legal systems of Europe and the power of international movements in human rights and commercial law have diminished the centrality of the House of Lords. As Lord Cooke has said in a recent paper, "a new Supreme Court of the United Kingdom will be one national supreme court among many".⁴¹ Indeed, he goes on to point out that it will not even be supreme if the European Court of Justice emerges as the final court for the Union. It may be that through the process of "learning from each other" the common law of our different jurisdictions will be enriched by the European insights increasingly important in the decisions of the English courts. If so, it will be because, in the contest of ideas, they persuade on their own merits.

I do not expect that the setting up of the Supreme Court will unsettle our law. Those who are worried about the prospect do not, I think, understand how conservative judicial method must be. I do not even think that the Supreme Court will have immediate and dramatic impact. Still less can it expect to be immediately or consistently popular. It is worth remembering the experience in Australia and the United States.

Chief Justice Gleeson in the celebrations to mark the centenary of the High Court of Australia in October 2003 reminds us that there never was a "golden age when members of the Court basked in universal admiration".⁴² The circumstances of the Court's creation and the initial appointments to it were highly controversial. There were fears that the judges would not have enough to do. It was suggested that the Court should come together as needed and could be made up of the Chief Justices of the States. The first five members of the Court were all men who had been prominent politicians. Chief Justice Gleeson notes that "[f]rom the very beginning, decisions of the Court that have frustrated political objectives, have resulted in noisy criticism, resentment of the Court's power and independence, and threats to limit that independence".⁴³

40 See *Invercargill City Council v Hamlin*, above n 15, 520.

41 Cooke "The Road Ahead for the Common Law", above n 11, 274.

42 Gleeson, above n 3, 3.

43 Gleeson, above n 3, 9.

Chief Justice Gleeson rather philosophically suggests that such a reaction is only what is to be expected in a "robust democracy".⁴⁴ In New Zealand we too will have to develop similar stoicism.

The Constitution of the United States was consciously created as supreme law, creating and limiting government, because of the history of dispute with the Parliament at Westminster. Even with this background of insistence on legality, however, the United States Supreme Court languished for its first 10 years. In its first term the only work it had to do was to admit attorneys to the Bar. It heard no cases for two years, and delivered no substantive decisions for a further year. It had difficulty attracting and keeping members.⁴⁵ In 1801, when Chief Justice Marshall was appointed, the Court is said to have "existed on the fringe of American awareness. Its prestige was slight, and it was more ignored than respected".⁴⁶

When the United States Government moved from Philadelphia to Washington, the Court was simply overlooked. No provision was made for it until the Senate consented to allow it to use one of the committee rooms in the basement. At one stage it was reduced to holding sittings in a tavern. These beginnings are some comfort to the judges appointed to the New Zealand Supreme Court, now that the details of our temporary and permanent accommodation are being revealed to us.

It seems to me that we can expect over time to gain three principal benefits from the establishment of the Supreme Court. The first is the extension of the benefit of second tier appeal to all cases which merit it, with gains for the consistency and coherence of our law. The second benefit is the local knowledge to place the difficult questions the Court will be asked to consider in context. The third benefit is better understanding of the place of law and the legal system within our community.

First, access. The benefit of a second tier appeal has to date been secured for only a very small number of cases. I have expressed the view before that a lack of accessibility to the law has been the real cost of our not having had a final court of appeal in New Zealand.⁴⁷ That inaccessibility has not simply been due to the expense of appeals. Where a mixed system of appeals as of right and appeals by leave is maintained, appeals taken as a matter

⁴⁴ Gleeson, above n 3, 9.

⁴⁵ Leonard W Levy *Seasoned Judgements: The American Constitution, Rights, and History* (Transaction, New Brunswick, 1997) 321–322.

⁴⁶ Levy, above n 45, 379.

⁴⁷ Elias "Transition, Stability and the New Zealand Legal System", above n 8, 482.

of right leave little room for appeals which require leave. It is no accident that so few appeals from New Zealand on criminal matters have been granted special leave.

The experience in Australia may well be a pointer to the future in New Zealand. Since 1984, when special leave to appeal became a requirement for all appeals to the High Court, criminal appeals have constituted a much greater proportion of the work of the High Court. Justices Kirby and Heydon have both attributed the change to the abolition of appeals as of right.⁴⁸ The change has affected the tone of the national legal system. As Justice Kirby has identified,⁴⁹ it is in criminal cases that the rule of law is truly tested. The accessibility of a court at the apex of the hierarchy in such matters provides an important institutional guarantee and the ability to respond to local conditions. In Australia, questions of fair trial are considered by the High Court on the basis of a distinctively Australian perspective.⁵⁰

Whilst English and local legal history are undoubtedly of much interest, they do not, in our view, dictate the emerging law on the subject of this judgment as it now applies in Australia.

I have singled out the criminal law, but, in truth, there are many areas of law of vital importance to the lives of New Zealanders where a second tier appeal has not been available. That is damaging to the integrity of the legal system. The role of an apex court is to maintain the coherence of the legal system as a whole. As Aharon Barak, Chief Justice of Israel, has identified, it is important that a legal system have a court with a sense of the scope and reach of the whole law.⁵¹

The development of a specific common-law doctrine radiates into the entire legal system. The interpretation of a single statute affects the interpretation of all statutes. A legal system is not a confederation of laws. Legal rules and principles together constitute a system of law whose different parts are tightly linked.

A divergence of final responsibility for the legal system, such as we have in effect had to date, means that the coherence and overview which is the benefit of a final court with responsibility for maintaining legality in the entire legal system is lost.

48 Hon Justice Michael Kirby "Why has the High Court Become More Involved in Criminal Appeals?" (2002) 23 Aust Bar Rev 4; J D Heydon "Evidence Law" in Tony Blackshield, Michael Coper, and George Williams (eds) *The Oxford Companion to the High Court of Australia* (Oxford University Press, Melbourne, 2001) 254–256.

49 Kirby, above n 48, 19.

50 *Azzopardi v The Queen* [2001] 205 CLR 50, 65 Gaudron, Gummow, Kirby, and Hayne JJ.

51 Aharon Barak "A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116 Harv L Rev 16, 25–26.

The second benefit we can hope to obtain from patriating our final court is the knowledge of local conditions which is essential if a legal system is to be responsive to the community it serves. Others take a different view on this. Some see detachment or remoteness as a more important quality than local knowledge. There are those who believe that local conditions can be adequately communicated by counsel. I am not convinced. When as counsel in the *Maori Broadcasting* case⁵² I was asked by the presiding Law Lord "Do they still live on reservations?", I was able of course to answer the immediate question and put right the rolled-up misconception—but I felt a sense of helplessness about describing a whole world. Similarly, when sitting on a conveyancing case in the Judicial Committee discussing the standard of care to be expected of a provincial legal practitioner in New Zealand, I felt keenly the gulf in understanding of the sophistication and subtlety reasonably to be expected.

The third change we may expect over time to flow from the establishment of the Supreme Court is better understanding in the community of the role of courts. Our present system has been bewilderingly obscure. It was instructive to watch from the sidelines the celebration of the centenary of the High Court of Australia. The Court is a visible symbol of the place of impartial administration of justice in the Australian constitution. It demonstrates how government under law is assured by courts which are independent. Chief Justice Gleeson, in reflecting on the place occupied by the High Court, has suggested that the Australian community understands that in a contest between citizen and government, the High Court holds the scales of justice evenly.⁵³

The High Court of Australia is visible and accessible, as our final court has never been. Its decisions may be criticised from time to time. There is reason to believe that the public is aware of what is at stake, and that the institutional safeguard of the Court is appreciated and understood in a way that cannot be taken for granted in our own system. Similar pride in the institutions, if not in particular outcomes, can be seen in Canada and the United States.

Why does public understanding of the role of the courts matter? An aspect of the rule of law is accessibility to courts which are independent and impartial. Courts are vulnerable, particularly when obliged to address controversial matters. They cannot avoid such matters when they are brought for decision in properly constituted litigation. Characterisation of judges as "activist" for fulfilling their judicial obligations is misconceived, and dangerous to the institutions.

52 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC).

53 Gleeson, above n 3, 25.

The independence of the judiciary is not an immediately appealing quality to many people. It exists not as protection for judges but to ensure impartiality. It provides the assurance referred to by Chief Justice Gleeson that the scales of justice are held evenly, no matter how powerful the interests and no matter how loud the clamour for one side. The independence of the judiciary exists to ensure that the individual judge, when judging, is subject only to the law.

The New Zealand Constitution Act 1986 makes separate provision for the legislative, executive, and judicial branches of government. Although our legal system requires the independence of the judiciary from other sources of state power, that independence is, in reality, fragile. Judges have security of tenure and salary but are dependent on the executive for administrative support and in the setting of the fees which litigants must pay to have access to the courts.

International statements of basic principles for judicial independence adopted by both the United Nations General Assembly and the Commonwealth recognise judicial independence as having an institutional dimension.⁵⁴ The Supreme Court of Canada has held that administrative independence in the organisation of judicial work and the support necessary to achieve it are aspects of judicial independence.⁵⁵ Chief Justice Barak of Israel has expressed the view that it is inconsistent with judicial independence for the administration of the judiciary to be through a department of government.⁵⁶ In the United States, Canada, and Australia, judges are given considerable operational autonomy.

In their joint response to the United Kingdom Government's consultation paper proposing the setting up of a Supreme Court, the Law Lords argued that the new Court should enjoy "corporate independence".⁵⁷

[The Court] must have its own budget, settled in a manner which protects the court from political pressure. It must have its own Registrar, answerable to the court, its own staff and its own IT facilities. The independence of the judges requires not only that they be free of

54 See for example the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (19 August 1995); Universal Declaration on the Independence of Justice (Montreal, 10 June 1983) UN Doc E/CN.4/Sub.2/1985/18/Add.6, annex IV; Basic Principles on the Independence of the Judiciary (1985) UN Doc A/CONF.121/22/Rev.1; Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government (2003).

55 See *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3, 81 para 118 Lamer CJC, L'Heureux-Dubé, Sopinka, Gonthier, Cory, and Iacobucci JJ.

56 Barak, above n 51, 54.

57 The Law Lords' Response to the Government's Consultation Paper on Constitutional Reform: A Supreme Court for the United Kingdom (CP 11/03, July 2003) 2 para 4.

extraneous pressure but also that the court be institutionally free of administrative pressure. In Australia, a one-line budget is agreed annually between the High Court's chief executive officer and the attorney-general, and a similar arrangement would be appropriate here.

It is arguable that in New Zealand we are now getting out of step with countries with which we identify closely. Since 1995 we have attempted a middle way, with the courts administered by a separate Department for Courts. In matters of direct judicial support (including support for organisation of judicial work) we have operated in a loose partnership with the Department. The halfway house has now been changed in a reorganisation of the justice sector. The Department for Courts has been reabsorbed back into the Ministry of Justice.

It may be that when the reorganisation is completed, some mechanism can be devised to maintain judicial independence in matters of judicial administration and immediate judicial support. Questions of security of communication between judges and maintenance of confidentiality need urgently to be resolved.

There is no incentive on the executive to address concerns like these. In 1939, Parliament was vigilant to protect the principle of judicial independence even from a probably unexceptionable proposal to let the judiciary share in the general belt-tightening at a time of depression. Today there seems little public awareness of the current issues which impact upon the principle – and little understanding that an independent judiciary is essential to maintenance of the rule of law.⁵⁸ If the invisibility of our final appeal court has been part of that problem, the establishment of the Supreme Court may assist in raising awareness of what is at stake in our constitutional arrangements.

The Supreme Court Act itself raises awareness of aspects of our constitution. It acknowledges constitutional fundamentals by its explicit reference to the doctrines of the rule of law and the sovereignty of Parliament. Section 3(2) does not impose any direct responsibility on the Court. It is formal legislative confirmation of what is described as "New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament". This provision captures a duality identified by Dicey in his hugely influential *Introduction to the Study of the Law of the Constitution*.⁵⁹ This duality, as Sir Kenneth Keith has remarked, has inbuilt tension.⁶⁰

58 Antonio Lamer "The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change" (1996) 45 UNBLJ 3, 7–8.

59 A V Dicey *Introduction to the Study of the Law of the Constitution* (1 ed, MacMillan, London, 1885; 10 ed, MacMillan, London, 1959).

60 K J Keith "Sovereignty at the Beginning of the 21st Century: Fundamental or Outmoded?" (2004) 63 CLJ 581.

Both the rule of law and parliamentary sovereignty are principles of the constitution. The inclusion of reference to them in the Supreme Court Act is at first sight startling. The 1986 Constitution Act avoids such sweeping doctrine and simply provides that the New Zealand Parliament "continues to have full power to make law" for New Zealand.⁶¹ It is possible that in the use of these terms we are seeing the beginning of an attempt to address and capture in writing the elements of our constitution.

In *X Ltd v Morgan-Grampian (Publishers) Ltd*, Lord Bridge declared that "[t]he maintenance of the rule of law is in every way as important in a free society as the democratic franchise".⁶² Implicit in the rule of law is the existence of independent judicial authority. The separate authority of the judiciary exists, as Justice Brandeis, dissenting in *Myers v United States*, explained,⁶³ to prevent the exercise of arbitrary power. There is some measure of truth in the view that the phrase "rule of law" has a moral force which may not aid proper analysis.⁶⁴ As Harden and Lewis have said, the common law has sometimes been invoked "as some kind of universal redeemer. It became to arbitrariness and partisan government what the Christian cross affects to be to vampires. This, needless to say, was to claim too much."⁶⁵

Parliamentary supremacy over the judiciary, as Lord Templeman identified in *In re M*,⁶⁶ is exercisable only through legislation. Determination of all questions of law is the function of the courts.

Dicey defined the sovereignty of Parliament in terms of unfettered lawmaking power. Whether Parliament can be totally unrestricted in the way it makes law is, as Sir Owen Dixon recognised, "the old theological riddle".⁶⁷ The idea has been criticised as "an academic formulation which does not fit the law of England".⁶⁸ Its application even to unitary parliaments which have evolved from limited colonial legislatures is not self-

61 Constitution Act 1986, s 15(1).

62 *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1, 48 (HL).

63 See Justice Brandeis's dissent in *Myers v United States* (1926) 272 US 52, 240-295.

64 See Paul Craig "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] PL 467.

65 Ian Harden and Norman Lewis *The Noble Lie: The British Constitution and the Rule of Law* (Hutchinson, London, 1986) ch 2 "The rule of law: a chequered history" 37.

66 *In re M* [1994] 1 AC 377, 395 (HL).

67 Sir Owen Dixon "The Common Law as an Ultimate Constitutional Foundation" in *Jesting Pilate* (Hein, Melbourne, 1997) 207.

68 Sir Ivor Jennings *The Law and the Constitution* (5 ed, University of London Press, London, 1959) 167.

evident, as both Sir Owen Dixon, who exalted legalism, and Sir Kenneth Keith, who does not, have noted.⁶⁹

Dicey's theory struggles to accommodate the devolution of power. That can be seen in self-government in its application to matters of internal administration for the American colonies, where what Sir William Holdsworth described as a "pedantic use of the theory of the sovereignty of Parliament"⁷⁰ fuelled revolution. It can be seen in the example of Home Rule for Ireland (to which Dicey was implacably opposed) and in the transfer of full authority to the former colonies. Within the United Kingdom, too, Diceyan sovereignty would find preposterous the Scottish view that the provisions of the Act of Union are fundamental and unalterable for all time.⁷¹

Sir William Wade has explained seismic movements such as these in terms of revolution, acquiesced in by the courts. That is how he accounts for the decision in the second *Factortame* case.⁷² The revolutionary explanation allows theoretical consistency, if a rather jerky progression of constitutional history. I was once attracted to it, but I have come to believe that, in truth, it is the theory that does not fit.

Now is not the time for a lengthy discourse upon parliamentary sovereignty or the rule of law, or, what is more important, the relationship between the two. They are topics I have explored earlier.⁷³ What is perhaps worth noting for present purposes is that while both the sovereignty of Parliament and the rule of law are aspects of our unwritten constitution, the case law dealing with them is comparatively slender and the concepts undeveloped.

In its absolutist form, parliamentary sovereignty collides uncomfortably with modern movements for internationalism, federalism, devolution, and the principle of subsidiarity.⁷⁴ It also collides with the developing common law of what Lord Steyn has

69 See Dixon, above n 67, 203; Keith, above n 60, 584–585.

70 W Holdsworth *A History of English Law* (ed A L Goodheart and H G Hanbury, Methuen, London, 1956) vol 10, 531; vol 11, 119–126.

71 *MacCormick v Lord Advocate* [1953] SC 396, 411 Lord Cooper.

72 *R v Secretary of State for Transport, ex parte Factortame (No 2)* [1991] 1 AC 603 (HL); Sir William Wade and Christopher Forsyth *Administrative Law* (8 ed, Oxford University Press, Oxford, 2000) 27–29.

73 Rt Hon Dame Sian Elias "Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round" (2003) 14 PLR 148.

74 See for example Sandra Day O'Connor "Altered States: Federalism and Devolution at the 'Real' Turn of the Millennium" (2001) 60 CLJ 493; Paul Kennedy *Preparing for the Twenty-First Century* (Random House, New York, 1993) 131.

described as "renaissance constitutionalism".⁷⁵ Rights adjudication is increasingly conducted by a method of constitutionalism which is explicitly grounded in the rule of law. Jeffrey Jowell has suggested that in such litigation the courts essentially ask two questions: Is there a breach of a fundamental democratic right? If there is, is the decision necessary in the interests of a legitimate countervailing democratic value? This is review of the "constitutional co-ordinates of the decision".⁷⁶

What is unclear is the impact of this movement on parliamentary sovereignty. If law is indeed to rule, then Parliament must at least observe the prior rules of formal validity for lawmaking. Whether those rules go further than formal requirements has not been authoritatively decided. There are, however, indications of a developing view, long foretold by Lord Cooke, that Parliament is constrained by rules fundamental to the democratic process, by an inability to exclude the courts from supervising the exercise of government power for legality, and, more controversially, by human rights. If so, we no longer have a vision of the rule of law that is purely formal.

In *The Liberation of English Public Law*, the final essay in the 1997 Hamlyn Lectures, Lord Cooke confronted "constitutional bedrock".⁷⁷ Since questions of law "are always ultimately for the courts",⁷⁸

the total abolition of an independent judiciary is unthinkable; its existence is the basic rock of the constitution. An Act wholly replacing the independent judiciary by congeries of administrative tribunals with members holding office at the pleasure of the government of the day can scarcely be imagined; and I believe that the courts would not uphold it.

Lord Cooke has returned to this theme in his recent Commonwealth lecture.⁷⁹ He points out that the number of decisions in which judges have held that legislative or administrative intent must prevail is "untold and huge". There is, however, a "bottom line" of minority rights which cannot lawfully be crossed. "The legislative and judicial functions are complementary; the supremacism of either has no place."

It would be wrong to end without acknowledging the aspirations for justice and its delivery which have prompted the creation of the Supreme Court.

75 Lord Steyn "The New Legal Landscape" [2000] 6 EHRLR 549, 552.

76 Jeffrey Jowell "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] PL 671, 681.

77 Rt Hon Lord Cooke of Thorndon *Turning Points of the Common Law* (Sweet and Maxwell, London, 1997) 78.

78 Cooke *Turning Points of the Common Law*, above n 77, 79.

79 Cooke "The Road Ahead for the Common Law", above n 11, 278.

Sir Robert Stout in 1904, in advocating the abolition of appeals to the Privy Council, spoke of "[t]he psychological effect of dependence on some external power for the performance of our highest duties as citizens of these new nations".⁸⁰ The same chilling effect was described by Sir Thomas Eichelbaum in 1995.⁸¹

In 2004, the year the Supreme Court will be established, we will be 50 years from Beaglehole's essay *The New Zealand Scholar*.⁸² In a time of developing national consciousness, Beaglehole quoted Robin Hyde's cry that "we are hungry for the words that shall show us these islands and ourselves; that shall give us a home in thought".⁸³ Beaglehole makes the point that there is a lag between political independence and independence of thought for all colonial peoples.⁸⁴ It was a process described more than 100 years before Beaglehole by Ralph Waldo Emerson, in expressing an intellectual Declaration of Independence to the students of Harvard: "We will walk on our own feet; we will work with our own hands; we will speak our own minds".⁸⁵

The process of transition may be lengthy. It does not come about at once or in all things at the same time. In 1954 Beaglehole was tentative. He spoke of a "gathering conviction" that we had in New Zealand "something interesting;" "not ... a harvest, but at least it is a seed bed". He "ventured to hope".⁸⁶ Today, prodded by the historians, poets, and writers discussed by Beaglehole, the seed bed he discerned has flourished. Those of my generation do not doubt that in art, in literature, in politics, we have a home in thought at home. That is not to suggest that we have cut adrift from our wider heritage. We have built upon it.

I do not suggest that a home in thought for New Zealand law is provided by the creation of an institution. It is the work of many generations. We are the inheritors of their hopes and their expectations of us. Our home in thought has been built with the help of judges who have served in New Zealand since William Martin arrived on the *Tyne* in 1841. No one has contributed more than Lord Cooke of Thorndon. It is a privilege to say so in a lecture dedicated to his honour.

80 Stout, above n 1, 13.

81 See Eichelbaum, above n 38.

82 J C Beaglehole *The New Zealand Scholar* (Margaret Condliffe Memorial Lecture, Canterbury University College, 21 April 1954), reprinted in Peter Munz (ed) *The Feel of Truth: Essays in New Zealand and Pacific History* (Reed, Wellington, 1969) 237.

83 Beaglehole, above n 82, 244.

84 Beaglehole, above n 82, 239-240.

85 Ralph Waldo Emerson "The American Scholar" (Address to the Phi Beta Kappa Society, Harvard University, 31 August 1837).

86 Beaglehole, above n 82, 248.

