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THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Hon Dr Michael Cullen
Jeffrey Goldsworthy
Lord Cooke of Thorndon
Terence Arnold QC

Andrew Geddis
Claudia Geiringer
Neill Atkinson
Grant Morris

Janet L Hiebert

VICTORIA UNIVERSITY OF WELLINGTON
Te Whare Wānanga o te Ūpoko o te Ika a Māui



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PARLIAMENT AND THE COURTS: ARM WRESTLE OR HANDSHAKE?

*Terence Arnold QC**

The appropriate relationship between Parliament and the courts has been much debated in New Zealand recently. In particular, it has been claimed that some New Zealand judges have adopted an "activist" stance which improperly challenges the sovereignty of Parliament. By reference to various statutory contexts this paper argues that much criticism of judicial activism is misconceived as it criticises the courts for performing tasks which Parliament has required them, by legislation, to perform. However, the fact that Parliament has asked the courts to consider contentious issues of social and economic policy in various contexts may have encouraged the courts to adopt a view of the judicial function which challenges traditional concepts of parliamentary sovereignty.

The question of the proper relationship between Parliament and the courts has been much debated in New Zealand recently. The proposal to abolish the right of appeal to the Privy Council and establish a final court of appeal in New Zealand aroused in some a concern that repatriating our final court would encourage "judicial activism" or "judicial supremacism", commonly described as an inappropriate usurpation by the courts of decision-making on matters properly left to Parliament and its democratically elected members. This resulted in section 3(2) of the Supreme Court Act 2003 which provides: "Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament."¹

* Solicitor-General of New Zealand. This paper is a development of a paper I delivered at a seminar held by the Institute for the Study of Competition and Regulation in 2003. I acknowledge the helpful assistance of Tania Warburton, Associate Crown Counsel.

1 This provision was inserted following the Select Committee's consideration of the Supreme Court Bill 2002 to meet a concern that the establishment of the new Supreme Court might be interpreted as a signal to the courts to adopt a more activist role. See Justice and Electoral Committee "Report on the Supreme Court Bill 2002 (16-2)" (16 September 2003) 22-24. Arguably, the provision contains an inbuilt tension between the concepts of the rule of law and the sovereignty of Parliament: see K J Keith "Sovereignty at the Beginning of the 21st Century: Fundamental or Outmoded?" (2004) 63 CLJ 581, 584-585.

Then came the decision of the Court of Appeal in *Attorney-General v Ngati Apa*.² There was a strong reaction to this on various grounds. For present purposes, there are two particularly interesting features of the case. The first is the Court's refusal to follow its earlier decision in *In re The Ninety-Mile Beach*,³ a decision which had been acted upon by policy-makers over the years. The second is the Chief Justice's statement concerning legislative intention:⁴

I query whether the question of jurisdiction is properly addressed by first asking whether Parliament can have intended to permit recognition of or to create property in the seabed under the 1993 Act. The Maori lands legislation has never been constitutive of customary property. If the Maori Land Court does not have jurisdiction, the ascertainment of any property interests will have to be undertaken by the High Court (which may refer questions of tikanga for the opinion of the Maori Land Court). That does not seem a sensible or intended result.

Finally, the Chief Justice gave a speech in Australia in which she challenged conventional thinking about parliamentary sovereignty,⁵ emphasising the role of human rights jurisprudence, both national and international, in developing the scope and role of the rule of law. Where human rights and constitutional values were concerned, the Chief Justice saw little potency in assumptions of legislative intent or in deference to executive discretion. This provoked a sharp response from the Deputy Prime Minister who asserted a traditional view of parliamentary sovereignty, arguing that the lack of a democratic mandate meant that judges should not engage in activities that would politicise their role.⁶

Given my current role, this is territory where I need to tread carefully. What I propose to do is to develop, albeit briefly, two points.

Successive New Zealand governments have been responsible for promoting legislation which effectively requires the courts to be judicially active, or at least to see themselves as being involved in a collaborative enterprise with Parliament in developing over-arching principles capable of being applied in individual cases. In some areas, Parliament has conferred on the courts wide discretions, enabling intervention and the crafting of relief

2 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

3 *In re the Ninety-Mile Beach* [1963] NZLR 461 (CA).

4 *Attorney-General v Ngati Apa*, above n 2, para 56 Elias CJ.

5 Rt Hon Dame Sian Elias "Sovereignty in the 21st Century: Another spin on the merry-go-round" (2003) 14 PLR 148.

6 Hon M Cullen, Deputy Prime Minister, speech on the 150th anniversary sitting of Parliament (Wellington, 24 May 2004); see Hon M Cullen "Parliamentary Sovereignty and the Courts" [2004] NZLJ 243.

appropriate to particular cases. In other instances, Parliament has required courts to consider broad areas of economic or social policy. As a consequence, much criticism of inappropriate judicial activism is misguided because it is directed at judicial decision-making which the courts have been required by legislation to undertake.

There have, however, within a relatively short time frame been profound changes in the way in which judges view and describe their role. Those changes, if carried through, will result in a different conception of the relationship between Parliament and the courts than has existed over the last 100 years.

* * *

I started my working life as a legal academic with a particular interest in criminal law. As New Zealand was one of the common law jurisdictions which enacted Sir James Fitzjames Stephen's Criminal Code, I became interested in the 19th century debates about codification, out of which the Stephen Code emerged along with a competing criminal code drafted by R S Wright, then a barrister and later a judge.⁷ These followed the earlier efforts of the Criminal Law Commissioners.⁸ Codifications emerged in other areas of law over this period, for example, Wills Acts, Sale of Goods Acts, Bills of Exchange Acts and Partnership Acts, which were enacted in various common law jurisdictions in the late 19th and early 20th centuries. One of the issues that interested me about the Stephen Code was what role it contemplated for judges in the development of the law.

Holdsworth has described Jeremy Bentham as the father of the idea of codification in the common law world.⁹ Bentham was deeply committed to codification as a result of his profound dislike of the common law, which he considered to be "corrupt, unknowable, incomplete, and arbitrary".¹⁰ Bentham was driven by a desire to achieve certainty and simplicity, which he thought was possible only if the interference of lawyers could be minimised. While he saw a need for judges, he did not believe that they should operate in the common law tradition but rather in a largely administrative capacity, applying clear law to particular facts.

7 See Martin L Friedland "Codification in the Commonwealth: Earlier Efforts" (1990) 2 Criminal Law Forum 145, also published in (1992) Commonwealth Law Bulletin 1172; S White "The Making of the New Zealand Criminal Code Act of 1893: A Sketch" (1986) 16 VUWLR 353.

8 Rupert Cross "The Reports of the Criminal Law Commissioners (1833-1849) and the Abortive Bills of 1853" in P R Glazebrook (ed) *Reshaping the Criminal Law* (Stevens, London, 1978) 5.

9 W S Holdsworth *A History of English Law* (vol XVI, Methuen, London, 1964) 316.

10 Philip Schofield "Jeremy Bentham: Legislator of the World" (1998) 51 Current Legal Prob 115, 122.

While his own attempts at codification in various parts of the world proved unsuccessful, at least if judged in terms of the number of governments which he was able to persuade to undertake codification, Bentham's work did inspire enthusiasm among others. From the early part of the 19th century there were sustained efforts to codify parts of the common law.

Neither Wright's Criminal Code nor Stephen's Criminal Code was enacted in England. But the Stephen Code was enacted in numerous Commonwealth jurisdictions, including Canada, New Zealand and various Australian States. Like other codifiers, Stephen had to consider to what extent he should leave scope for judicial development of the law and the exercise of discretion by judges. Stephen was not critical of the common law method in the way that Bentham was, seeing the development of the criminal law to that point as the result of a collaboration between Parliament and the courts. He wrote:¹¹

The extreme completeness and minuteness of the English criminal law is all the more remarkable because it was in its origin, and on some particular points still is, singularly vague. Its present condition arises from the fact that it was put together slowly and bit by bit by parliament on the one hand and the judges of the superior courts on the other.

It thus represents, like the other branches of the law of England, the result of the labours of the most powerful legislature and the most authoritative body of judges known to history. In no other country in the world has a single legislature exercised without dispute and without rival the power of legislating over a compact and yet extensive nation for anything approaching to so long a period as the parliament of England. In no other country has a small number of judges exercised over a country anything like so extensive and compact the undisputed power of interpreting written and declaring unwritten law, in a manner generally recognised as of conclusive authority.

Any code which was not founded upon and did not recognise these characteristics of the law of England would give up one of its most valuable characteristics.

In the result, Stephen's Criminal Code, while drafted as a genuine code in many respects, did leave some room for continued operation of the common law and considerable scope for judicial development of the law. For example, section 21(1) of the Criminal Code Act 1893 provided:

All rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to any charge, shall remain in force and be

11 James Fitzjames Stephen *A History of the Criminal Law of England* (vol 3, Macmillan, London, 1883) 355.

applicable to any defence to a charge under this Act, except in so far as they are thereby altered or are inconsistent therewith.

The definitions of offences in the Criminal Code frequently made no mention of the necessary mental element. Hence, it was left to the courts to develop the relevant general principles and to apply them to particular offences.¹² Inevitably, the Code left room for the exercise of discretion by judges in other contexts also. This was noted when the Criminal Code Bill was being debated in the Legislative Council of the New Zealand Parliament in 1893. Mr Kelly said in the course of the debate:¹³

And then, with regard to the Judges, I should like to see their discretionary powers limited. Judges are but men. Of course they are experts in law, but they are men with passions like ourselves: indeed, the fact that a man is a Judge does not necessarily imply that he possesses a large amount of common-sense at times.

Having been exposed to all this as a young academic, it seemed obvious to me that the law in a country like New Zealand was the result of what could sensibly be described as a partnership between Parliament and the courts, the input of each varying with the particular context. In this sense there was, to use Philip Joseph's term, a "collaborative enterprise" between Parliament and the courts.¹⁴ I was, therefore, a little startled when I once appeared before a Select Committee and made an observation along these lines to be told rather sternly by a Member that Parliament did not see itself as being involved in any form of partnership or collaborative enterprise with the judiciary; rather, Parliament made the law, and the judges simply applied it ("did what they were told").

Although I conceived of Parliament and the courts working together in important respects, I accepted without question the conventional view that ultimately Parliament could, if it wished, always have the final word through its power to legislate. What I did not appreciate then was that that principle would be doubted, as it now is. Over the last 40 or 50 years there has been an increased willingness on the part of the courts to scrutinise and control the actions of the executive through judicial review. We are now seeing a similar process underway in respect of the legislature, with, oddly enough, the legislature's (possibly unintentional) encouragement.

12 The Crimes Bill 1989, introduced into Parliament by Sir Geoffrey Palmer, contained a General Part defining various types of mental element for the first time: see Simon France "The Mental Element" in Neil Cameron and Simon France (eds) *Essays on Criminal Law in New Zealand: Towards Reform?* (VUWLR and Victoria University Press, Wellington, 1990) 43. It was not enacted.

13 (4 July 1893) 79 NZPD 182.

14 See Philip A Joseph "The Demise of Ultra Vires - Judicial Review in the New Zealand Courts" [2001] PL 354.

Against this background, I turn to the first of the points which I propose to develop, namely the way in which Parliament has required the courts to become judicially active.

I WHAT PARLIAMENT HAS REQUIRED OF THE JUDGES

Professor Burrows identifies two distinct styles of legislative drafting.¹⁵ Statutes, he writes, may contain:

- Statements of general principle, which give considerable scope for discretionary judgment on the part of those applying the law. Such statements require the courts to develop second order principles or rules over time to assist in the application of the general principle. (I will refer to this style of drafting as "open" drafting.)
- Detailed drafting, which limits the range of discretionary judgments by providing detailed rules to be followed by those applying the law. (I will refer to this as "closed" drafting.)

Professor Burrows argues that open drafting is suitable for statutes which deal with matters involving infinitely variable fact situations (he gives the example of legislation dealing with the custody of children). Closed drafting is, he argues, necessary in relation to criminal law, taxation and commercial statutes, where accessibility, predictability and certainty are critical values.

In New Zealand much of the criticism of what has been described as judicial activism has come from the business community. Judicial activism, it has been claimed, undermines the accessibility of the law, and its predictability and certainty in terms of outcome. Accessibility and certainty are seen to be critical for commercial dealings, particularly where there is an international component. Against this background, it is perhaps surprising that the New Zealand Parliament passed a series of Acts from the late 1960s through to the mid-1980s which replaced or supplemented the common law of contract in important respects and gave judges broad discretions designed to enable them to achieve "individualised" justice or fair outcomes in individual cases. To enable this outcome, Parliament utilised open drafting.

Examples of these statutes are the Minors' Contracts Act 1969 (which replaced the previous amalgam of statute and common law with a code dealing with the position of minors in contract), the Illegal Contracts Act 1970 (which sought to mitigate the harsh effects of the common law in relation to illegal contracts), the Contractual Mistakes Act 1977 (which empowered the courts to grant a greater range of relief than had been possible under the common law where contracts were entered into under mistake), the Contractual Remedies Act 1979 (which deals with pre-contractual misrepresentations and, subject to

¹⁵ J F Burrows *Statute Law in New Zealand* (3 ed, LexisNexis, Wellington, 2003) 85–89.

the individual contract, gives the courts discretion to grant a range of remedies in misrepresentation cases) and the Contracts (Privity) Act 1982 (which allows a person who is not a party to a contract to sue on the contract in certain circumstances). These statutes tend to be short and superficially straightforward. Typically, they give the courts a broad discretion to grant such relief as they consider fair or just in the circumstances of the individual case. There is even a power to vary contractual obligations in some instances.

To this list must be added the Fair Trading Act 1986, and in particular section 9. This provision creates a broad liability for misrepresentation, enabling claimants to bypass the limitations of the law relating to misrepresentation in contract and tort. Where there is a breach of this provision, the courts, again, have a wide discretion to grant relief, including the power to vary contractual obligations.¹⁶ And, unlike the position under the Contractual Remedies Act, there is no capacity to contract out of the Fair Trading Act.¹⁷ Plainly, section 9 is remarkable in its scope.

Finally, it should not be forgotten that the courts have power under the Commerce Act 1986 to vary contracts where there is a contravention of the Act.¹⁸ The most striking example of the exercise of this power is found in a case concerning the ownership and control of the Kapuni gas field.¹⁹ I return to this case below.

The extent of the discretions conferred on the courts by the contract statutes led one English academic to say in 1982 that if they were introduced into the law of England they would "assuredly drive the world's merchants and their disputes away from the City of London".²⁰ In the course of a survey of the New Zealand contract legislation, Professor Reynolds said of the Contractual Remedies Act 1979:²¹

It must however lead to a different way of handling contract disputes in New Zealand. The facilitation of commercial operations is not the only function of the law of contract, but it is one, and no function should be overlooked. It will be important to know how the Act, together with the Contractual Mistakes Act, is perceived by commercial persons as operating in New Zealand. One problem worth noting is that of the conflict of laws ... I would think that a

16 Commerce Act 1986, s 43(2)(b).

17 *Picture Perfect Ltd v Camera House Ltd* [1996] 1 NZLR 310, 317 (HC) Barker J.

18 Commerce Act 1986, s 89(2).

19 *Shell (Petroleum Mining) Co Ltd v Kapuni Gas Contracts Ltd* (1997) 7 TCLR 463 (HC) Barker J and Mr Blunt.

20 L S Sealy, Book Review of Frances Dawson *The Contractual Remedies Act 1979* [1982] CLJ 189.

21 F M B Reynolds "Contract: Codification, Legislation and Judicial Development" (1995) 9 JCL 11, 24-25.

foreign trader, at any rate one from a common law jurisdiction who was well-informed on New Zealand law, would be cautious of accepting New Zealand law for an international contract. Such a choice would mean that a dispute could probably only be resolved in New Zealand, a result which may well be acceptable in some cases, but may not be always.

It is not clear whether the contract statutes have in fact produced the uncertainty that some commentators fear. The Law Commission carried out a review of the statutes in the late 1980s and early 1990s, concluding that:²²

[N]ot only have the statutes by and large achieved their purpose, but also ... any fears which might have been entertained for "sanctity of contract" because discretions were conferred on the courts have proved to have little if any foundation.

By contrast, Professor Coote, who was a member of the committee which was responsible for the development of the legislation, recently expressed the view that the statutes have, as interpreted and applied, posed a significant threat to security of contract, contrary to his expectation both at the time and subsequently.²³ He commented that he was surprised at how quickly familiarity with the pre-existing body of common law was lost,²⁴ an important point to which I return.

Finally, Professor Sutton has observed that the contract statutes:²⁵

... are not an enduring code, so much as a liberating device. In the modern environment, such reforms may well be thought unworthy of legislative time. Courts are much more willing than they were in the 1960s and 1970s to look at established doctrine with a critical eye.

Given the impact that Professor Sealy ascribed to the contract statutes in his 1982 comment, it is perhaps surprising to think that, today, judges might have achieved similar results of their own accord.

In summary, the effect of the contract statutes was a liberalising one. The statutes were intended to enable the courts to move away from some of the harshness and consequent judicial manipulation associated with the common law rules to enable them to consider directly the merits of individual cases and to resolve them accordingly. In some instances the statutes provided guidelines for the court in the exercise of their discretion, but in others the courts were left to develop the relevant principles themselves.

22 New Zealand Law Commission *Contract Statutes Review* (NZLC R25, Wellington, 1993) para 4.

23 B Coote "Security of Contract and the New Zealand Contract Statutes" (2000) 6 NZBLQ 114.

24 Coote, above n 23, 117.

25 Richard Sutton "Commentary on 'Codification, Law Reform and Judicial Development'" (1996) 9 JCL 200, 201.

Accordingly, to the extent that there is uncertainty in the areas governed by the contract statutes, the responsibility must surely be that of Parliament rather than the courts. Given the level of overseas investment in New Zealand, there is obviously a question as to whether any uncertainty that was created did have a significant impact on commercial dealings.²⁶

The contract statutes do at least place the courts in familiar territory. They operate at a micro level, in the sense that they focus the courts' attention on the need to achieve just outcomes in particular cases. Other statutes require the courts to consider general policy issues at a macro level. Here the courts are taken into unfamiliar territory. The types of broad social policy questions which the courts may be asked to consider under various pieces of legislation today are likely to be contentious. This has been demonstrated in New Zealand in several contexts, perhaps most notably in relation to generally-worded Treaty clauses. The interpretation and application of the New Zealand Bill of Rights Act 1990, particularly following the coming into force of the Human Rights Amendment Act 2001, is another obvious example.

But I will begin with a less obvious example, namely the Commerce Act 1986. That Act was the cornerstone of the Fourth Labour Government's policy for deregulation of the New Zealand economy. The philosophy underlying the Act was that competition could be relied upon to create an efficient economy: where competition could not operate, price control was available. The principal focus was on general, rather than industry-specific, regulation.

The Act was modelled on the Australian Trade Practices Act 1974, although it was less detailed and prescriptive than the Australian Act. The underlying concepts were derived from American and European competition law. Like the human rights legislation, then, the themes were international.

The role of the Commerce Commission under the Act is: in respect of restrictive trade practices, that of an investigator and prosecutor; in respect of mergers, acquisitions, clearances and authorisations, that of an investigator and adjudicator; and, in respect of price control, that of ministerial advisor or, if price control is imposed, administrator. The courts are required to play a critical role under the Act, determining cases in which breaches of the trade practices provisions are alleged by the Commission or by private parties and hearing appeals from decisions of the Commission in relation to mergers and acquisitions, and clearances and authorisations.

26 There are other examples of legislation in the commercial area which conferred or confer broad discretions on the courts. Examples include the Contracts Employment Act 1991, the Companies Act 1993 and the Securities Markets Act 1988.

Within the Commerce Act, there are examples of both closed and open drafting. Some sections (for example, section 30) contain detailed definitions which provide the courts with a reasonably precise framework for analysis. But the critical sections, section 27 (prohibition on provisions in contracts, arrangements or understandings that have the purpose or effect of substantially lessening competition in a market), section 36 (prohibition on misuse of market power) and section 47 (prohibition on mergers or acquisitions that would substantially lessen competition in a market) are open-ended. In effect they state underlying principles, leaving important work to be undertaken by the courts in giving meaning to, and applying, the underlying principles. In order to give those principles meaning, the courts must understand the economic concepts on which the Act is based: for example, markets, the nature and effect of market power, the way in which competition produces efficient outcomes and the nature and role of barriers to entry. Once understood, these concepts need to be applied to the facts of particular cases.

This is no easy task, particularly because while there is considerable agreement among economists at a theoretical level concerning the core concepts of industrial organisation economics, their practical application in a real world context (which is what the Commerce Act 1986 requires) is not well understood and is, therefore, controversial. The problems of application are made more acute by the fact that the New Zealand economy is a small one²⁷ and underwent a difficult process of deregulation, and corporatisation and privatisation of state enterprises, from the mid-1980s. Applying competition principles to industries in transition from highly regulated to lightly regulated is difficult and complex.²⁸

Against this background, we should not be surprised that some economists consider the courts, and indeed their fellow economists, have misunderstood or misapplied important economic concepts underlying the Commerce Act 1986, with negative public policy implications.²⁹

Not only is the task which Parliament has set for the courts an inherently difficult one given the concepts involved, but the results of particular decisions can have significant consequences for the New Zealand economy. Among the cases with which the courts have

27 See Terence Arnold, David Boles de Boer and Lewis Evans "The Structure of New Zealand Industry: Its Implications for Competition Law" in Mark Berry and Lewis Evans (eds) *Competition Law at the Turn of the Century: A New Zealand Perspective* (Victoria University Press, Wellington, 2003) 24.

28 See, for example, the discussion in *Power New Zealand Ltd v Mercury Energy Ltd* [1996] 1 NZLR 686, 695-696 (HC) Barker J and Mr Brunt.

29 See Chris Pleatsikas and David Teece "Economic Fallacies Encountered in the Law of Anti-Trust: Illustrations from Australia and New Zealand" (2001) 9 TPLJ 73.

had to grapple under the Commerce Act 1986 are cases dealing with terms of access to important elements of New Zealand's infrastructure (airports,³⁰ ports³¹ and telecommunications networks³²), cases dealing with access to important natural resources (gas reserves³³ and radio frequencies³⁴) and cases dealing with significant acquisitions.³⁵ Obviously, decisions in such cases may have important, long-term implications for the economy.

Account must also be taken in this context of the range of relief that a court may grant under the Commerce Act 1986. Most notable in this context is the relief granted by the High Court in the *Kapuni* case.³⁶ There was a dispute between the producers of the Kapuni gas field (Shell and Todd) and the buyer of the output of the field under a long term supply contract (Natural Gas Corporation, originally a Crown-owned company but at the time publicly owned, Fletcher Challenge holding approximately one third of its shares). The supply contract had been entered into well before the Commerce Act 1986 came into force and was critical to the sellers' decision to produce the field. The Court found that the contract breached section 27 of the Act. By way of remedy, the Court ordered, under section 89, that the contract be varied so that only half of the remaining gas went to the Natural Gas Corporation. Shell and Todd were free to sell the balance to others, although they gave an undertaking that they would sell only for the purposes of electricity generation. Here, then, is a significant interference in commercial relations undertaken by the Court under a clear statutory power. In other words, this was the type of remedy that Parliament had anticipated in enacting the legislation.

While courts in other jurisdictions have similar powers, it is fair to say that the small size of the New Zealand economy, and the restructuring it has undergone, magnify the risk of error.

30 *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647 (HC).

31 *Union Shipping NZ Ltd v Port Nelson Ltd* [1990] 2 NZLR 662 (HC); *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 (CA).

32 *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 (PC).

33 *Shell (Petroleum Mining) Co Ltd v Kapuni Gas Contracts Ltd*, above n 19.

34 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429 (CA).

35 *Power New Zealand Ltd v Mercury Energy Ltd and Commerce Commission* [1997] 2 NZLR 669 (CA); *Air New Zealand v Commerce Commission* (17 September 2004) HC CIV 2003 404 006590, Rodney Hansen J and KM Vautier.

36 *Shell (Petroleum Mining) Co Ltd v Kapuni Gas Contracts Ltd*, above n 19.

Turning now to Treaty clauses, their history is well known and I will not dwell on it. Briefly, in *Te Heuheu Tukino v Aotea District Maori Land Board*,³⁷ the Privy Council held that the Treaty of Waitangi could not be enforced in the courts except insofar as it had been incorporated into municipal law. Following the 1985 amendments to the Treaty of Waitangi Act 1975, Parliament incorporated general Treaty clauses into several statutes. Sections 9 and 27 of the State-Owned Enterprises Act 1986, both introduced to the Bill as it was going through Parliament, are examples. Section 9 said: "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi." Section 27 (as then in force) set out provisions to apply where land subject to a claim by Maori to the Waitangi Tribunal under the Treaty of Waitangi Act 1975 was to be transferred to a state-owned enterprise.

In the famous *New Zealand Maori Council (Lands)* case,³⁸ the Maori applicants sought to prevent the transfer of land to new state-owned enterprises, alleging that the Crown would be in breach of section 9 if the transfers went ahead. The Court of Appeal had to determine the effect of section 9 and the meaning of the principles of the Treaty to which it referred. The effect to be given to section 9 depended in part on the relationship between sections 9 and 27.

The Crown advanced arguments which, in the Court's view, would have resulted in section 9 being a provision with little or no content. Accordingly, the Court rejected these arguments. Rather, the Court developed an approach to the section which, in its view, gave the section real meaning. Cooke P said, towards the end of his judgment:³⁹

The effect of our present decision, built on the Treaty of Waitangi Act and the State-Owned Enterprises Act, is that in relation to land now held by the Crown it should never again be possible to put aside a Maori grievance in that way. The Crown now has to work out a system to safeguard Maori claims regarding land covered by the 1986 Act before any land can be transferred to a State enterprise. The Maori Council can come back to the Court if not satisfied with the proposed system. In the meantime no outright transfers can be made.

In short the present decision together with the two Acts means that there will now be an effective legal remedy by which grievous wrongs suffered by one of the Treaty partners in breach of the principles of the Treaty can be righted. I have called this a success for the Maoris; but let what opened the way enabling the Court to reach this decision not be overlooked. Two crucial steps were taken by Parliament in enacting the Treaty of Waitangi Act and in insisting

37 *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC).

38 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

39 *New Zealand Maori Council v Attorney-General*, above n 38, 668 Cooke P (emphasis added).

on the principles of the Treaty in the State-Owned Enterprises Act. *If the judiciary has been able to play a role to some extent creative, that is because the legislature has given the opportunity.*

There is, of course, a legitimate question as to whether the courts should have been asked to attempt so difficult and contentious a task as identifying and articulating the principles of the Treaty. But Parliament did ask the courts to perform that role and the courts cannot fairly be criticised for doing as Parliament required. The fact that they did so in this and other cases is not a sign of improper judicial activism.

A similar position exists in relation to the human rights legislation, in particular the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. Again, the territory is familiar and I will not dwell on it. By virtue of the 2001 amendment to the Human Rights Act 1993, all government activity is subject to the non-discrimination standard contained in section 19 of the New Zealand Bill of Rights Act 1990. Section 19 prohibits discrimination on specified grounds. Such discrimination is not unlawful if it is demonstrably justifiable in a free and democratic society, nor is it unlawful in the context of affirmative action programmes.

The Human Rights Act 1993 permits complaints of unlawful discrimination to be made in respect of legislation, regulations, government policies, government programmes and against individual decisions. The relief that may be granted depends upon what is challenged, the most important limit being that a court is not permitted to strike down any legislation that it finds to be unlawfully discriminatory. The most that it can do is to make a declaration of inconsistency. While in this context Parliament retains the ultimate word, it is clear from the processes that Parliament has put in place that a declaration of inconsistency is intended to be a powerful remedy.

The human rights legislation creates tensions between competing principles. These will, as the cases have already demonstrated, cause difficulty for the courts and for public acceptance of the courts' role under the legislation. In particular:

- The New Zealand Bill of Rights Act 1990 sets out a range of rights in absolute terms, but then recognises that they may be subject to "such reasonable limits as can be demonstrably justified in a free and democratic society".⁴⁰ The courts will be called upon to adjudicate whether limits on rights in particular situations can be so justified. They are developing various tools to assist in the weighing process, in particular proportionality analysis and principles of judicial restraint or deference. But the proper balance will frequently be contentious.

40 New Zealand Bill of Rights Act 1990, s 5.

- While recognising that Parliament remains supreme in the sense that it can legislate in a way that is inconsistent with the New Zealand Bill of Rights Act 1990,⁴¹ the Act also requires that where a rights consistent meaning can be given to an enactment, that meaning is to be preferred (section 6). As experience is demonstrating, the reconciliation of these two principles is not easy.

The implications of subjecting government action to the discrimination standard will be obvious. Governments are constantly making decisions about the allocation of scarce resources. In making those allocation decisions governments must make choices, which may result in different groups within society being treated differently. In that sense, governing is all about discriminating. It is likely that some of the bases on which allocation choices are made will fall within the prescribed categories of discrimination. In those circumstances, those who feel disadvantaged by allocation decisions may seek to challenge them. If so, the government will be required to justify its choices. There has been fierce debate about whether this is a role that the courts should be asked to perform, with some arguing that it will lead to the politicisation of the judicial process or the constitutionalisation of political issues. But the fact is that the courts have been asked to perform it, and perform it they must.

The Commerce Act 1986, generally-worded Treaty clauses and the human rights legislation require the courts to consider and resolve important issues of social and economic policy. They draw the courts into difficult and contentious areas. Given the concerns that legislators and others express about the supremacy of Parliament and the role of non-elected judges, it is legitimate to ask why it is that Parliament has asked the courts to engage in these activities.

My point thus far has been that in any debate about judicial activism and the proper relationship between the courts and Parliament, regard must be had to the tasks that Parliament has required the courts to perform. Too often, the debate in New Zealand has overlooked the elementary point that Parliament has, in significant areas of social and economic policy, given wide powers to the courts in relation to the development of principles and their application to particular cases.

However, it is fair to say that the courts themselves have undergone a profound rethinking or rearticulation of their role and their relationship with Parliament over the past decade or so. I now turn to that.

41 New Zealand Bill of Rights Act 1990, s 4.

II CHANGING JUDICIAL ATTITUDES TO THE ROLE OF THE COURTS

Perhaps influenced by the fact that Parliament has, by means of legislative measures such as those noted above, shown confidence in the capacity of the judiciary to consider contentious issues of social and economic policy in the context of deciding particular cases, judges themselves have begun to articulate a stronger role for the courts as a countervailing force to Parliament.⁴² Just as they have shown an increasing willingness over the last 50 years to scrutinise the conduct of the executive, the courts are, I believe, showing an increasing willingness to challenge the concept of parliamentary sovereignty, at least in the form that it has been articulated over the last 100 or so years under the influence of Dicey.⁴³

To examine fully the proposition just made would require an analytical exercise that is beyond the scope of this paper. In an attempt to justify the proposition here, I can do no more than offer some examples.

In *Boddington v British Transport Police*,⁴⁴ the House of Lords, including Lord Steyn, described judicial review as being based in the ultra vires doctrine. Ultra vires was, as Tipping J put it in *Peters v Davison*, "the central pillar of judicial review."⁴⁵ Viewing judicial review of executive action as based in the ultra vires doctrine served the useful purpose of enabling the courts to present judicial review as a mechanism for giving effect to the intention of Parliament. Several years after *Boddington*, however, Lord Steyn acknowledged that his view had changed and that he accepted the so-called common law theory of judicial review (subject, his Lordship said, to hearing further argument).⁴⁶ That common law theory views judicial review as a manifestation of the courts' traditional function of upholding the rule of law and the principles of justice. Viewed in this way, the principles of judicial review are explicitly creations of the courts, so that rather than being

42 There is an issue as to whether this reflects a new view of the relationship between the courts and Parliament or simply marks a return to an earlier view of the role of the courts, a view that has been out of vogue for some time. I need not address that issue here.

43 See Thomas Bingham "Dicey Revisited" [2002] PL 39.

44 *Boddington v British Transport Police* [1999] 2 AC 143 (HL).

45 *Peters v Davison* [1999] 2 NZLR 164, 210 (CA) Tipping J.

46 Lord Johan Steyn "Democracy through Law" (Inaugural Robin Cooke Lecture, New Zealand Centre for Public Law, Wellington, 2002). For a useful introduction to the ultra vires/common law debate about the basis of judicial review, see Joseph, above n 14.

a mechanism for giving effect to the intention of Parliament, judicial review is a manifestation of the courts' shared power or shared sovereignty with the legislature.⁴⁷

In *R v Secretary of State for the Home Department; Ex parte Brind*,⁴⁸ the House of Lords rejected proportionality as a common law ground of review. The introduction of proportionality was considered to involve an improper substitution by the Court of its view for the view of the statutory decision-maker. However, a decade later in *R (Daly) v Secretary of State for the Home Department*,⁴⁹ the House accepted the proportionality approach, although Lord Steyn said that this did not mean that there had been a shift to "merits" review.⁵⁰ But proportionality analysis involves considering a range of factors in order to determine whether a particular decision is justifiable or reasonable. Accordingly, it must, in my view, result in greater judicial scrutiny of the merits of individual decisions of members of the executive. Proportionality analysis reflects a particular view of the constitutional responsibility of the courts in relation to the executive, and also (in combination with the previous point) in relation to the legislature.

In an article published in 1988,⁵¹ Robin Cooke (as he then was) said that there might be instances where courts could hold legislation to be unlawful on the ground that it breached a fundamental tenet of the common law. This view seemed a radical one at the time. It is now becoming more common among senior members of the judiciary, certainly in the United Kingdom.

In the area of human rights or constitutional jurisprudence, there appears to be a rethinking of the traditional approach to statutory interpretation, which is based upon the court giving effect to the intention of the legislature. As I noted at the outset, the Chief Justice has queried the utility of this approach, at least in respect of human rights or constitutional matters – a view apparently supported by Professor Joseph.⁵² The principle of legality as articulated by Lord Hoffman in *R v Secretary of State for Home Department, ex parte Simm*⁵³ recognises the power of Parliament to legislate contrary to fundamental

47 For example, see T Craig "Constitutional Foundations, the Rule of Law and Supremacy" [2003] PL 92.

48 *R v Secretary of State for the Home Department; Ex parte Brind* [1991] 1 AC 696 (HL).

49 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (HL).

50 *R (Daly) v Secretary of State for the Home Department*, above n 49, para 28.

51 Robin Cooke "Fundamentals" [1988] NZLJ 158.

52 Philip Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 KCLJ 321. But see Geoffrey Marshall "The Lynchpin of Parliamentary Intention: Lost, Stolen or Strained?" [2003] PL 236.

53 *R v Secretary of State for Home Department, ex parte Simm* [2000] 2 AC 115, 131 (HL).

principles of human rights, but requires the clearest of language before any such limitation will be recognised.⁵⁴ This approach was adopted by Elias CJ, Tipping and Thomas JJ in *R v Pora*.⁵⁵ It will be interesting to see how the courts develop interpretation principles in relation to human rights issues and to see what extent those principles spill over into statutory interpretation more generally.

As these developments take hold, it seems to me that there cannot fail to be a rethinking of the relationship between the courts and Parliament, at least as it has been viewed since Dicey. In this context, I return to Professor Coote's observation concerning the contract statutes to the effect that he was surprised at how quickly the "old" learning disappeared. But surely he should not have been surprised. For new generations of lawyers, the focus is on the contract statutes as interpreted and applied and not upon the common law which preceded them. The same process is likely to occur in areas of the "new" constitutionalism. Judges today may feel constrained by notions such as judicial restraint or deference. But the approach to such doctrines may well change as new lawyers, trained in a rights-centred environment, take their place on the Bench. It cannot be doubted that a fundamental change is occurring.

We should not underestimate the extent and significance of these changes in judicial thinking. But, importantly, it is judicial thinking that is consistent with the role that Parliament seems to see the courts playing, at least if one is to assess that by reference to the legislation that Parliament enacts.

54 See also *R (Daly) v Secretary of State for the Home Department*, above n 49; *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] 3 All ER 1, para 8 (HL).

55 *R v Pora* [2001] 2 NZLR 37, paras 53, 157 (CA), discussed in Andrew S Butler "Implied Repeal, Parliamentary Sovereignty and Human Rights" [2001] PL 586.

