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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

FACULTY OF LAW
Te Kauhanganui Tatai Ture

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CONTENTS

PARLIAMENT: SUPREMACY OVER FUNDAMENTAL NORMS?

Hon Dr Michael Cullen*

In this paper, the Honourable Dr Michael Cullen suggests that democratic parliamentary supremacy is the product of a fundamental norm that should be treated as first among equals, and that parliamentary government is not perfect but the processes, external obligations and democratic accountability to which it is subject provide for an adequate control on the institution. In his view, fundamental norms are considered in enacting legislation and the clear role of the courts is to interpret legislation with reference to parliament's intent. The idea that parliamentary sovereignty is merely assumed by courts ignores its place in constitutional history as a function of representative democracy, and any attempt to change this by stealth and not public mandate risks politicising and marginalising the judiciary.

The idea of parliamentary supremacy over fundamental norms suggests a dichotomy which I would argue does not exist. To affirm Parliament as the supreme authority in the land does not in any way imply an abandonment or subordination of fundamental norms in the formation, interpretation and administration of the law.

My first reason for this belief is self evident. If we are committed to a democratic form of government, then one of the fundamental norms of government must be the supremacy of the body elected by the people as its representative. Certainly that norm is one among many, although I would argue that we should treat it as first among equals. In other words, any application of norms which threatens to disenfranchise the electorate should be regarded with suspicion, if not rejected outright for that reason alone.

Having said that, I would be quick to distance myself from any rose-spectacled view of Parliament. To say that parliamentary democracy is the best form of government is not to say that it is a perfect one. And it can be especially frustrating if one is hoping for government that conforms neatly to a set of fundamental norms. As John Locke said in his

* Deputy Prime Minister, Minister of Finance, Minister of Revenue, Attorney-General, Leader of the House.

Essay Concerning Human Understanding, "[t]ruth scarce ever yet carried it by vote anywhere at its first appearance."[1]

However, the lack of any pretensions to perfection or finality is part of the genius of parliamentary democracy. Although Parliament's sovereignty is at the heart of our constitutional system, that does not place its decisions beyond criticism or reversal. Indeed, quite the opposite, and one might argue that it is that feature – the capacity to contest and revisit – that makes the sovereignty of Parliament a more stable and just form of government than the sovereignty of monarchs which preceded it.

The sovereignty of Parliament is moderated by a number of factors. First, Parliament is bound to follow established processes and conventions, rules of the game that can, at the end of the day, be changed, but only with great difficulty. These processes include, of course, important norms such as natural justice. Second, it is in some specified areas subject to international obligations which we have freely entered into by treaties and conventions. And third, it is subject to the electoral cycle, whereby each Parliament has, at most, three years before its mandate expires, and during that time cannot place any substantive fetter on what its successors may do.

These constraints provide the opportunity – and I would argue ample opportunity – for testing legislation and remedying any faults it may have. Most of the time that MPs spend in Wellington is given to the improvement of the nation's laws. In this task they are aided by a sizeable army of advisors, extending from parliamentary staff, through policy and legal advisors in the public service, to statutory bodies such as the Law Commission.

They are also aided by the interpretation that the courts make of the existing law, by the actions of a free press in highlighting perceived weaknesses in the law and by the analysis and critique provided by academics.

My point is that law-making in New Zealand is not an arbitrary process. If it appears to be so, it is due in large part to the tendency of the news media to pay attention to it only when the passage of a piece of legislation is subjected to one of those vertiginous last minute deals that make good copy, but are thankfully rare occurrences.

Therefore, it is fair to assume that fundamental norms have been taken into account and worked through with any piece of legislation that makes it to the statute books. For that reason, it is imperative that we preserve a very clear distinction between the roles of Parliament and the judiciary.

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1 John Locke *An Essay Concerning Human Understanding* (Oxford University Press, Oxford, 1979) preamble (first published 1690).

Under our current system those respective roles are quite clear. Parliament proposes, debates and enacts laws, and appoints from its own elected members an executive to administer those laws and perform the functions of government. The role of the courts is to apply the law to individual cases, which may include ordering the executive to modify any exercise of power that is ultra vires. Where legislation is found to be ambiguous, the courts must interpret the statute at issue to the best of their abilities, taking into account the intent of Parliament in passing the law. Where such ambiguities are uncovered, the deficiencies of the law should be brought to light and examined. However, it remains the prerogative of Parliament to make new law or to amend existing law to clarify its intent.

I accept that this can be a messy process, and that often it is difficult for the outside observer to discern within it the forging of a consensus based on fundamental norms. But to my mind it is the best available option.

There are those who have argued for judicial review of legislation in New Zealand under an entrenched constitution and bill of rights. An entrenched higher law offers the prospect of enshrining a set of fundamental norms in a nation's constitution and subjecting both executive decisions and legislation to those norms.

This is of course a feature of many jurisdictions which recognise higher law in some form or other, and entrust to constitutional courts the responsibility for ensuring that legislation is consistent with it.

I believe there are good reasons for not going down this route. Where the concept chiefly breaks down, in my view, is in requiring a formal separation of powers that would lead inevitably to a politicisation of the judiciary and to protracted and possibly intractable disputes over turf.

Our current constitution features an informal separation of powers, based upon convention – an agreed modus vivendi – rather than a precise specification of boundaries. It is not unlike a set of road rules, in which it is clear for the most part who has right of way, and outside of exceptional circumstances everything runs smoothly. A formal separation of powers requires a precise specification of roles, because it involves alternative sources of law making: one representative and one judicial.

I accept that there are arguments in favour of this system. Some argue that it is a better option for those who are promoting minority interests and who fear that the majoritarian nature of Parliament may be inimical to their goals. This is a moot point, however. To illustrate this, one has only to examine the struggle for minority civil rights in the United States, which has an entrenched constitution, with the parallel struggles in jurisdictions such as the United Kingdom and New Zealand.

It should be acknowledged that any significant change to the roles of Parliament and the courts is a matter essentially of swapping one set of problems for another. For us to move in that direction in New Zealand would necessitate a lengthy period of adjustment and experimentation with boundaries. And I am not convinced that it is a journey worth taking.

That is not to say I am constitutionally conservative. We have taken other journeys, and they have been worth the effort. We have fundamentally changed the nature of our democracy by shifting to proportional representation. That has made Parliament more representative of the New Zealand population, provided for a broader airing of different viewpoints, led to better representation of minorities and reduced the influence of the executive over the legislative agenda and process. Whether it has overall contributed to national welfare is, of course, a different issue and best left to future historians.

I would point out that these changes were preceded by years of analysis and debate, and by two referenda. Democracy in New Zealand was reconfigured by democratic means.

If we are to head down the track of a higher law and a constitutional court, I would argue that must also be via democratic means. However, those who advocate that position today should take into account the fact that New Zealanders have already considered the question, most recently in the mid 1980s when Geoffrey Palmer, as he then was, put forward legislation to entrench a higher law for New Zealand, including a formal recognition of the Treaty of Waitangi. At that time the notion was emphatically refused, including amongst Maori. I would be surprised if public opinion has swung to a more positive view of entrenched constitutions in the intervening period.

Earlier this year, I expressed my concern over the questioning of the principle of parliamentary sovereignty in a number of recent statements and judgments by New Zealand judges. My particular issue was the suggestion that parliamentary sovereignty may have a precarious foundation in law, specifically that it had been merely "assumed" by the courts in years past, and that correspondingly the courts could "find" that a higher law exists which modifies the constitutional status of the New Zealand Parliament.

My concern was threefold. First, as a parliamentarian, historian and Leader of the House, I must take issue with the suggestion that Parliament's sovereignty is based upon a set of "assumptions" made at particular points in our constitutional history, assumptions which may be proved incorrect. The sovereignty of Parliament is not an historical artefact, which could be proved to be bogus. Unlike the sovereignty of a monarch, it is not dependent upon establishing proof of lawful succession. It is less an assumption than an assertion; but in that respect it is the assertion that has been the major driving force of Western constitutional history, namely that executive and legislative power should be

exercised by a representative and democratically elected body, rather than a monarchy, aristocracy or even a meritocracy.

My second concern is that, whatever the merits of that argument, the challenging of parliamentary sovereignty in the courts would amount to constitutional change by stealth. It is for the public to grant the courts a larger constitutional mandate; not for the courts to build one upon an interpretation of constitutional history.

And third, any suggestion of advocacy of constitutional change by sitting judges invites the inference that the courts may not be impartial in their decision-making. If a judge has made it clear that he or she is not content with current judicial practice and favours an expanded role for judges, then litigants may perceive that their case may, for good or ill, be used as a test case to this end. Any perception that the courts are working to develop a common law jurisprudence which imposes new limits on the power of the Parliament and the legitimacy of the laws it enacts would threaten the credibility of both institutions.

I do not wish to place too much stress on this issue. I think New Zealanders have every reason to be confident in their Parliament and their judiciary. They are both robust institutions, pursuing their mandates with skill and determination.

Some testing of the boundaries is necessary from time to time, and possibly healthy. It is a challenging task to reconcile the glacial movement of the common law, as precedent upon precedent exerts its force, with the dance of legislation, for the most part modestly paced, but occasionally speeding up to a jig. However, I am confident that that reconciliation can leave both Parliament and the judiciary as stronger institutions, better able to serve the people.