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SCORECARD ON OUR PUBLIC JURISPRUDENCE

*Philip A Joseph**

This article compiles a scorecard on our public jurisprudence. Several developments give cause for confidence. The establishment of the Supreme Court was an upbeat that will energise our law through legal developments that serve local needs and aspirations. Further developments include the rejection of ultra vires scholarship in administrative law, the advancement of constitutional presumptions to protect against statutory abrogation of basic rights and the capacity for political-judicial dialogue under the New Zealand Bill of Rights Act 1990. Other developments, too, inspire confidence. But developments on the other side of the ledger conspire against our public jurisprudence. These include the Electoral (Integrity) Amendment Act 2001, the effective repetition principle under the law of parliamentary privilege, judicial "no-go" zones under the concept of justiciability, the shielding of public processes under the principle of non-intervention in the legislative process and our continuing embrace of traditional sovereignty doctrine. Our scorecard might read: "Doing well, but could do better."

I INTRODUCTION

I was persuaded to the topic "Scorecard on our Public Jurisprudence" by two presentations that impressed me: one by Lord Steyn when he delivered the inaugural Robin Cooke Lecture, "Democracy Through Law", in September 2002 in Wellington;¹ the other by Lord Cooke himself when he delivered his Commonwealth Lecture, "The Road Ahead for the Common Law", in October 2003 in London.² Both addresses traversed a range of subject-matter and were characteristically lucid and compelling. Their insights cut

* Professor of Law, University of Canterbury. Revised text of a public lecture, New Zealand Centre of Public Law, Victoria University of Wellington, 7 April 2005.

1 Lord Steyn "Democracy Through Law" in *Democracy Through Law: Selected Speeches and Judgments* (Ashgate, Aldershot, 2004) 129 ["Democracy Through Law"].

2 Lord Cooke of Thorndon "The Road Ahead for the Common Law" (2004) 53 ICLQ 273 ["The Road Ahead for the Common Law"].

through the pedagogical fog that shrouds a good many of the public law principles and doctrines they addressed. Although not claiming to emulate their successes, I propose to assess a range of topics in like vein. My purpose: to compile a scorecard on our public jurisprudence. On this scorecard, I would mark some areas of our public law as aberrant or warranting attention and some as distinguishing our law as healthy and robust. I will endeavour to give balance to our scorecard, although it is tempting to dwell more on areas perceived as deficient and warranting attention than those commending approval. This should not deceive; our scorecard will show we have cause for confidence in our public institutions and jurisprudence.

II SUPREME COURT OF NEW ZEALAND

The first of our topics that engender confidence is the establishment of the Supreme Court of New Zealand, which was constituted to commence sitting from 1 July 2004.³ In the abstract for this lecture, I wrote:

The establishment of the Supreme Court ... was an upbeat for our public jurisprudence. This patriated our appellate (judicial) processes and brought home a vital element of our constitutional system. This court will energise the distinctiveness of New Zealand law through legal principles that serve local needs and aspirations.

This Court was set up to:⁴

- end the right of appeal to the Judicial Committee of the Privy Council;
- give full expression to our national institutions and sovereignty (including our history and traditions);
- promote our values, history and traditions in determining legal issues and developing the law;
- improve access to justice through a locally-operated court of final appeal; and
- establish a comprehensive right of final appeal across the entire spectrum of New Zealand courts.

3 Supreme Court Act 2003, ss 2, 55.

4 See generally the Ministry of Justice Advisory Group *Replacing the Privy Council: A New Supreme Court* (Office of the Attorney-General, Wellington, 2002).

I supported the ending of Privy Council appeals.⁵ For some (myself included), this development was long overdue. There was a sense of unreality about retaining this historical link; the Privy Council appeal was anachronistic, unnecessary and ultimately demeaning of our national institutions and sovereignty. Yet, the proposal to sever the appeal excited intense debate that bordered at times on disrespectful put-down. Concerns were aired about judicial power that misconceived the role of the courts in a modern democracy. The pejorative term "judicial activism" became a rallying call to rein in perceived judicial excesses. Argument reduced to slogan: "Parliament is elected, judges are not." Representative democracy was a just and moral system of government, not to be diluted by the aspirations of unaccountable judges. Salvos resonated with terms such as "unelected judges", "hero judges", "over-mighty judges" and "philosopher-king judges".⁶ Severing the Privy Council appeal would, it was feared, release judges from the disciplines of Downing Street and transform them into agents of social policy. With a new, locally situated court, the Attorney-General would be free to manipulate appointments to hasten the social engineering.

These concerns were the counsel of conjecture and suspicion. Charges of judicial activism bear no relation to the work-a-day constitution that Parliament and the courts cohabit. Political and judicial powers are the essential correlatives of representative democracy and the rule of law. The political and judicial branches discharge distinct functions but espouse complementary goals (democracy, legality, equality, liberty, etc) and work collaboratively to maintain the constitutional balance. Their shared values and beliefs temper the democratic imperative of majoritarian rule and protect individual and minority rights from unjustified interference.⁷

The Chief Justice has said the new Court will silence its critics only by its performance as a court of final appeal. On 30 March 2005, the *New Zealand Herald* published the first stock-take on the Court's decisions under the headline, "Supreme Court Rulings Extolled". The article tapped legal professional opinion and recorded support for the Court's early

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- 5 See P A Joseph "Constitutional Law" [2003] NZ Law Rev 387, 395–408 ["Constitutional Law 2003"]. For earlier writings, see P A Joseph "Towards Abolition of Privy Council Appeals: The Judicial Committee and the Bill of Rights" (1985) 2 *Canta LR* 273. I appeared before the Justice and Electoral Committee in June 2003 in support of the Supreme Court Bill.
- 6 Some writers are not averse to using such terms. See for example J Allan "The Author Doth Protest Too Much, Methinks" (2003) 20 *NZULR* 519. See also the further writings cited in P A Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 *KCLJ* 321, 324 (fn 17) ["Parliament, the Courts, and the Collaborative Enterprise"].
- 7 See "Parliament, the Courts, and the Collaborative Enterprise", above n 6.

rulings, citing the *Awatere Huata v Prebble (Huata)*⁸ decision under the Electoral (Integrity) Amendment Act 2001 and the bail application decision in *Zaoui v Attorney-General*.⁹ For some, these decisions established the Court as a "weighty final appellate court" deserving of recognition.¹⁰ Much of the article bore the mark of populist sentiment rather than reasoned analysis, but I support its prediction that the early misgivings over the Supreme Court will be rapidly consigned to history. The new Court's stature will grow as it stamps its mark on legal developments, particularly as a constitutional court.

The ability of our judges to exercise the ultimate appellate function is not in question. Before the Justice and Electoral Committee, I argued that fears of political appointments to the new Court were historically unfounded and that there was ample depth within the profession to sustain appointments to our higher courts – including the Supreme Court. Our superior court judges exhibit the intellectual and professional standards necessary to maintain the international standing of our courts. All of the common law jurisdictions seek guidance from the courts of other countries (including New Zealand's) in matters of common interest. The commonwealth jurisdictions share in the unity of public law and have outgrown the institutional inferiority that afflicted earlier generations: "British attitudes of judicial superiority have succumbed to the worldwide impact of international human rights and the internationalisation of legal and judicial developments in the common law world."¹¹

History will smile on the establishment of the Supreme Court. This was an upbeat in our public jurisprudence – a "constitutional moment" in the evolution of our law and national sovereignty.¹²

8 *Awatere Huata v Prebble* [2005] 1 NZLR 289 (SC).

9 *Zaoui v Attorney-General* [2005] 1 NZLR 577 (CA & SC).

10 Fran O'Sullivan "Supreme Court Rulings Extolled" (30 March 2005) *New Zealand Herald* Auckland.

11 Submission to the select committee recorded in "Constitutional Law 2003", above n 5, 402–403.

12 The reference to "constitutional moments" is not original: see P Rishworth "Constitutional Moments: The Rise of the Anti-Discrimination Principle in New Zealand Law" in Legal Research Foundation *Liberty, Equality, Community: Constitutional Rights in Conflict?* (Auckland, 20–21 August 1999). Rishworth observed that constitutional development is reactive to needs and events which, in turn, produce the "accidental constitution". Pressure points arise or events occur that cause the State to re-evaluate the appropriate rules of governance.

III "ERROR OF LAW" REVIEW

Judicial review represents the central landscape of public law. For Lord Steyn, it is the "ground on which the contours of a modern democracy are shaped".¹³ Lord Steyn stressed the importance of the conceptual justification of the courts' function, as having practical significance. "The theoretical underpinning of the principles of judicial review is important," he observed, "because it may affect their reach."¹⁴ Unlike the position in the United Kingdom, our public law scores an "A" on the scorecard, for assiduously avoiding the cloying language of ultra vires scholarship. At least until recent times, English courts have affirmed ultra vires as the organising principle of administrative law.¹⁵

The ultra vires doctrine obscured the common law basis of judicial review. The doctrine was a convenience at a time when universal suffrage promoted the expansion of government and broad delegations to the executive. It distracted the courts from their historical, constitutional role – to uphold the rule of law and ensure public bodies comply with the law. Judicial review was transformed into a mechanism for policing Parliament's delegations to the executive. Everything turned on notional or presumed parliamentary intent. The courts quashed decisions that Parliament notionally had not authorised (where the decision was ultra vires), although the scope of Parliament's delegation may have been far from clear. Judicial review acquired new justification as the servant of representative democracy and the sovereignty of Parliament. This justification had powerful symbolic force but it was wholly artificial and strained: "The symbolism of popular democracy, while it had instant appeal, subordinated the courts' historical role as the independent arbiters of the law."¹⁶

In the United Kingdom, debate over the foundations of judicial review has continued unabated since Professor Dawn Oliver published her seminal article in 1987, challenging

13 "Democracy Through Law", above n 1, 3.

14 "Democracy Through Law", above n 1, 3.

15 See for example *R v Lord President of the Privy Council; ex p Page* [1993] AC 682 (HL); *Boddington v British Transport Police* [1999] 2 AC 143 (HL).

16 P A Joseph "The Demise of *Ultra-Vires* – Judicial Review in the New Zealand Courts" [2001] PL 354, 366.

ultra vires scholarship.¹⁷ No other contemporary legal issue has excited such intensity. Ultra vires protagonist, Dr Christopher Forsyth, has now issued a "plea for reconciliation" between the ultra vires and common law schools.¹⁸ Forsyth contrived to minimise the differences between these schools, as a war of words ("heat and light") rather than substance. But no amount of legal rule-playing can bridge the void. Ultra vires scholarship is too fictional and contrived.¹⁹

Ultra vires theorists appeal to the symbolism of representative democracy, as justification for judicial review. These theorists reconfigure judicial review as a construct to reinforce our democratic foundations. When the Courts enforce the boundaries of Parliament's delegation, they are upholding the people's wish as expressed through Parliament. This fetchingly romanticised account might excite ardent democrats but it could not withstand the *Anisminic* revolution, which established that bodies acting within power could be judicially reviewed. To accommodate this sea change (*intra vires* review), protagonists contrived the modified doctrine of ultra vires: that Parliament (had it given any thought to the matter) is *presumed to intend* the application of the common law principles of good administration. Ultra vires theorists are disarmingly frank. They concede that the attribution of a parliamentary intention is fictional and contrived. "The pervading fiction," observed Lord Cooke, "must be that Parliament cannot have intended the impugned result." The fiction of presumed parliamentary intent is erected to maintain the lifeline to representative democracy.

It is not surprising that Forsyth has sought a truce in the war of words. In "Heat and Light: A Plea for Reconciliation", he conceded "what is plainly an artificial construct: the

17 D Oliver "Is the Ultra Vires Rule the Basis of Judicial Review?" [1987] PL 543. Principal protagonists of ultra vires review include H W R Wade and C E Forsyth *Administrative Law* (8 ed, Oxford University Press, Oxford, 2000) 35, 37; C Forsyth "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review" [1996] CLJ 122; M Elliot "The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law" [1999] CLJ 129. Principal protagonists of common law review include: D Oliver "Is the Ultra Vires Rule the Basis of Judicial Review?" [1987] PL 543; Hon Sir John Laws "Law and Democracy" [1995] PL 72; P Craig "Ultra Vires and the Foundations of Judicial Review" [1998] CLJ 63; P Craig "Public Law, Political Theory and Legal Theory" [2000] PL 211. See also C Forsyth (ed) *Judicial Review and the Constitution* (Hart Publishing, Oxford, 2000) [*Judicial Review and the Constitution*], which reproduces several of the leading articles and publishes some additional ones covering much the same ground.

18 C Forsyth "Heat and Light: A Plea for Reconciliation" in *Judicial Review and the Constitution*, above n 17, 393 ["Heat and Light: A Plea for Reconciliation"].

19 "Parliament, the Courts, and the Collaborative Enterprise", above n 6, 327 (emphasis in original, footnotes omitted). The reference in the quotation to Lord Cooke of Thorndon is to his 2003 Commonwealth lecture "The Road Ahead for the Common Law", above n 2, 274.

intention of Parliament".²⁰ But there were also other factors at play. The Human Rights Act 1998 (UK) came into force in October 2000. Within a short time, this statute began transforming British jurisprudence. It incorporated the rights of the European Convention of Human Rights and Fundamental Freedoms (European Convention or Convention) into English law and redefined the boundaries of judicial review. Incorporation of the Convention rights forced the emergence of dual paradigms of judicial review: administrative law review and constitutional review. Constitutional review has moved the judicial focus from common law method to substantive evaluation of public-law values.²¹ The Convention rights imported the Strasbourg principle of proportionality into English law²² and created new judicial responsibilities in rights adjudication.²³ Under the Strasbourg principle, courts must assess whether:²⁴

- (i) the legislative objective is sufficiently important to justify limiting a fundamental right;
- (ii) the measures designed to meet the legislative objective are rationally connected to it; and
- (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

The European jurisprudence promotes the paradigm of constitutional review. The intriguing question now is whether Strasbourg proportionality will engulf irrationality as an administrative law ground of review. I believe it will. English courts now accept that proportionality criteria are "more precise and sophisticated" than common law method²⁵

20 "Heat and Light: A Plea for Reconciliation", above n 18, 396.

21 See *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 547, where Lord Steyn identified three fundamental differences in methodology when comparing Strasbourg proportionality and common law method in judicial review.

22 See for example *De Freitas v Permanent Secretary of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80 (PC) Lord Clyde; *R (Daly) v Secretary of State for the Home Department* [2001], above n 21, 547 Lord Steyn (endorsing Lord Clyde's three-stage proportionality test); *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840, 857 (CA) Lord Phillips of Worth Matravers MR.

23 See *R v Director of Public Prosecutions; ex p Kebilene* [2000] 2 AC 326, 380–381 (HL) Lord Hope of Craighead; *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, 747 (CA) Simon Brown LJ.

24 *De Freitas v Permanent Secretary of Agriculture, Fisheries, Lands and Housing*, above n 22, 80. The Canadian courts have added a fourth element to the proportionality principle: any ill or deleterious effects of a measure that impairs a right or freedom must be justifiable in light of the objective which it seeks to serve. See *R v Oakes* (1986) 26 DLR (4th) 200, 227 (SCC); *Re a Reference re Public Service Employee Relations Act* [1987] 1 SCR 313, 373–374 (SCC).

25 *R (Daly) v Secretary of State for the Home Department*, above n 21, 547 Lord Steyn.

and have questioned whether they should jettison irrationality as a test in English law.²⁶ Informed opinion would suggest that the Strasbourg jurisprudence will overtake unstructured references to unreasonableness and any lingering fixation with red haired teachers.²⁷ The iconic descriptor "*Wednesbury*" will disappear from the legal lexicon. Some might say not before time; Lord Cooke, for one, has long criticised *Wednesbury* as an "unfortunately retrogressive decision in English administrative law".²⁸

That captures the unfolding picture in the United Kingdom, but it does not represent the position here. Our courts have dexterously circumnavigated ultra vires scholarship. Twenty years ago in *Bulk Gas Users Group v Attorney-General (Bulk Gas)*,²⁹ the Court of Appeal pioneered "error of law" review. Questions of law, including those that determine the scope of a decision-maker's powers, always remain the responsibility of the courts of general jurisdiction. In *Peters v Davison*,³⁰ the Richardson Court completed what *Bulk Gas* set in train. This case finally repudiated the conceptual link between material error of law and jurisdictional error. "It [was] not necessary", said the Court, "to show that the error was one that caused the tribunal or court to go beyond its jurisdiction."³¹

Error of law review strikes a deep constitutional resonance. It grounds the court's constitutional duty to uphold the rule of law. *Peters v Davison* established that judicial review was based on the central constitutional role of the court to rule on questions of law. The essential purpose of judicial review, the Court observed, was to ensure that public bodies comply with the law.³² This conceptual linkage to the rule of law anchors the courts' role and accords legitimacy to their powers of review. English jurisprudence is now moving slowly in the same direction. Even in comparatively recent times, English courts

26 *Association of British Civilian Internees - Far East Region v Secretary of State for Defence* [2003] QB 1397, 1397 (CA) Lord Phillips of Worth Matravers MR, Schiemann and Dyson LJ.

27 In *Short v Pool Corporation* [1926] Ch 66, 91 (CA), Warrington LJ exemplified the ground of unreasonableness by introducing the red haired teacher who was dismissed because she had red hair. In *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229 (CA), Lord Greene MR endorsed this example as an exemplar of *Wednesbury* unreasonableness.

28 *R (Daly) v Secretary of State for the Home Department*, above n 21, 549. See also *Hawkins v Minister of Justice* [1991] 2 NZLR 530, 534 (CA), where Cooke P thought the "geographical epithet" *Wednesbury* added nothing to the test of unreasonableness.

29 *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA).

30 *Peters v Davison* [1999] 2 NZLR 164 (CA).

31 *Peters v Davison*, above n 30, 181 Richardson P, Henry and Keith JJ.

32 *Peters v Davison*, above n 30, 192 Richardson P, Henry and Keith JJ.

sought the sanctuary of ultra vires scholarship. In *Boddington v British Transport Police (Boddington)*,³³ the House of Lords unreservedly affirmed the ultra vires doctrine as the legitimising principle of judicial review. Ultra vires protagonists seized on *Boddington* as vindicating their cause; they could rest contented.³⁴ But Lord Steyn, who gave the leading speech in that decision, publicly renounced his views a short while later in his Robin Cooke Lecture.³⁵ "By overwhelming weight of reasoned argument," he said, "the *ultra vires* theory has been shown to be a dispensable fiction."³⁶ He acknowledged the lead New Zealand judges and writers had given in this area and concluded: "In a democracy the rule of law itself legitimises judicial review."³⁷ Lord Steyn's words are a fitting tribute.

IV PRINCIPLES OF CONSTITUTIONALITY

Statutory construction premised on public law values is a further feature of our law that scores an "A". In *Savril Contractors Ltd v BNZ*,³⁸ the High Court observed that statutory meanings depend "not solely on the black letter of Parliament's language but also upon the other considerations of public policy which it is the duty of the Court to consider." Judges apply principles of constitutionality where legislation, construed literally, would trench on rights. No statutory ambiguity is needed to trigger their application. "[E]ven in the absence of an ambiguity," said the House of Lords, "there comes into play a presumption of general application operating as a constitutional principle ..."³⁹ The courts express these principles as presumptions of interpretation but they will yield only where Parliament purposely overrides them. Sir Rupert Cross observed:⁴⁰

33 *Boddington v British Transport Police*, above n 15. See also *R v Lord President of the Privy Council; ex p Page*, above n 15.

34 See for example C Forsyth and L Whittle "Judicial Creativity and Judicial Legitimacy in Administrative Law" (2002) *Canta LR* 453, 461.

35 "Democracy Through Law", above n 1.

36 "Democracy Through Law", above n 1, 4. See also Lord Steyn's earlier views in *R v Secretary of State for the Home Department; ex p Pierson* [1998] AC 539, 591 (HL), where he endorsed the rule of law rationale of judicial review.

37 "Democracy Through Law", above n 1, 4.

38 *Savril Contractors Ltd v BNZ* [2002] NZAR 699, 705 (HC) Baragwanath J.

39 *R v Secretary of State for the Home Department; ex p Simms* [2000] 2 AC 115, 130 (HL) Lord Steyn. See also 131 Lord Hoffmann.

40 J Bell and G Engle (eds) *Cross on Statutory Interpretation* (3 ed, Butterworths, London, 1995) 166. See *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428, 470 (HL) where Lord Steyn quoted with approval the quotation from Cross.

These presumptions of general application not only supplement the text, they also operate at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts. They operate here as constitutional principles which are not easily displaced by a statutory text.

The courts set their face against legislative abrogation of the institutional values of the legal system, such as the rule of law, representative democracy, equality and liberty. So it should not surprise that there has evolved at common law a class of rights that are termed constitutional.⁴¹ Lord Steyn has identified the right of participation in the democratic process, equality of treatment, religious freedom, freedom of expression and the right of unimpeded access to the courts.⁴² Other rights might be added: for example, the right to a fair trial, the right to be free from retrospective criminal laws and the right not to be subjected to torture or disproportionate penalties. Why classify rights as constitutional? Because it strengthens their normative force and reinforces their protection against legislative abrogation. The source of rights is immaterial; both statutory and common law rights trigger the duty of active protection. The courts discharge this duty in two ways: they read down legislation to preserve intact common law rights and they "disapply" the doctrine of implied repeal to constitutional or human rights statutes. In *Thoburn v Sunderland City Council*,⁴³ Laws LJ made explicit the limits of implied repeal. "Ordinary statutes may be impliedly repealed", he said, "Constitutional statutes may not."⁴⁴ For Laws LJ, the rubric "constitutional statutes" included statutes guaranteeing human rights. In *R v Pora*,⁴⁵ Elias CJ and Tipping J decreed that Parliament must "speak clearly" if it wishes to override fundamental rights. The injunction to speak clearly leaves room for conjecture whether Parliament's language is sufficiently direct to achieve a legislative override. Lord Cooke wryly observed that Parliament may need to use "unrealistically specific language".⁴⁶

41 See *R v Secretary of State for the Home Department; ex p Leech* [1994] QB 198, 210 (CA) Steyn LJ; *R v Lord Chancellor; ex p Lightfoot* [2000] QB 597, 609 (CA) Laws J; *Thoburn v Sunderland City Council* [2003] QB 151, 186 (Admin) Laws LJ.

42 "Democracy Through Law", above n 1, 2. See also Lord Steyn "Dynamic Interpretation Amidst an Orgy of Statutes" (Brian Dickson Memorial Lecture, Ottawa, October 2003).

43 *Thoburn v Sunderland City Council*, above n 41, 185–186 Laws LJ.

44 *Thoburn v Sunderland City Council*, above n 41, 185–186 Laws LJ.

45 *R v Pora* [2001] 2 NZLR 37, 50 (CA) Elias CJ and Tipping J. For commentary see P A Joseph "Constitutional Law" [2001] NZ Law Rev 449, 451–457.

46 Lord Cooke of Thorndon "The Basic Themes" (2004) 2 NZJPIL 113, 114 ["The Basic Themes"].

The upshot of this analysis is rights-protection through increased political accountability. The duty of active protection enriches our law through preservation of fundamental principles of human rights. In *R v Secretary of State for the Home Department; ex p Simms*, Lord Hoffmann observed that rights cannot be overridden by general or ambiguous words: "the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost".⁴⁷ Parliament can override rights but it must stand to account. It cannot abrogate rights by accident, stealth or side wind. Lord Hoffmann thought there was too great a risk that the full implications of general words might pass unnoticed in the democratic process.⁴⁸

V POLITICAL-JUDICIAL DIALOGUE

The courts enjoy a remedial jurisdiction under the New Zealand Bill of Rights Act 1990 to grant declarations of incompatibility (or inconsistency) where legislation cannot be reconciled with the rights or freedoms. This jurisdiction is commended but scores only "B" on our scorecard. Its exercise is hedged by judicial reticence that threatens its utility.

In two decisions in 2000, the Court of Appeal upheld the remedial jurisdiction as being implicit in the application of the Act's operational provisions, sections 4-6.⁴⁹ *R v Poumako*⁵⁰ and *Moonen v Film and Literature Board of Review (Moonen)*⁵¹ were well-publicised decisions. In 2004, two High Court decisions confirmed that jurisdiction: *Zaoui v Attorney-General (Zaoui)*⁵² and *Reid v Minister of Labour (Reid)*.⁵³ But to my knowledge, no court has actually invoked the jurisdiction and granted a declaration.⁵⁴ The reason may be obvious: the need may not have arisen. Parliament may have been astute to respect the New Zealand Bill of Rights Act 1990 guarantees. Also, the remedy is discretionary. As *Zaoui* and *Reid*

47 *R v Secretary of State for the Home Department; ex p Simms*, above n 39, 131 (HL) Lord Hoffmann.

48 *R v Secretary of State for the Home Department; ex p Simms*, above n 39, 131 (HL) Lord Hoffmann.

49 See generally A S Butler "Judicial Indications of Inconsistency - A New Weapon in the Bill of Rights Armoury?" [2000] NZ Law Rev 43.

50 *R v Poumako* [2000] 2 NZLR 695 (CA).

51 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).

52 *Zaoui v Attorney-General* [2004] 2 NZLR 339, 381-382 (HC) Williams J.

53 *Reid v Minister of Labour* [2005] NZAR 125 (HC) MacKenzie J, albeit reserving the issue whether it is a jurisdiction to grant a formal court order or merely an "indication" that a statutory provision was inconsistent with the New Zealand Bill of Rights Act 1990.

54 Compare *R v Poumako*, above n 50, 720 Thomas J, who would have made a formal declaration of inconsistency had he been delivering the judgment of the Court.

emphasised, it is one of last resort. If legislation cannot be reconciled with the New Zealand Bill of Rights Act 1990, there may be other judicial recourses that sufficiently redress or mitigate the rights-departure. But I also detect a sub-text to the cases that may compromise the courts' jurisdiction. I glean judicial reluctance to grant the remedy.

The inarticulate premise is the political reaction the courts anticipate. They fear the political branch would construe a formal declaration as a challenge to Parliament's legislative supremacy.⁵⁵ They (rightly or wrongly) perceive themselves as the "junior partner" in the machine of government.⁵⁶ While they would not be questioning the validity of legislation, they would be passing judgment on its quality - "intruding an advisory opinion".⁵⁷ To criticise Parliament gratuitously would risk irreparable damage to political-judicial relations. Some judges fear fragility in the constitutional system, stemming from (as one judge put it) "the delicate relationship of Parliament and the Courts".⁵⁸ Parliament might also publicly contest a court's declaration and openly defend the rights-departure. To flout such an order would exacerbate the political stand-off and reinforce the institutional superiority of the legislature.

For my part, those fears lack foundation. I reject the suggestion of constitutional fragility stemming from the political-judicial pact. That pact is robust, not fragile, even if there is continuing need for mutual self-restraint and comity as between the organs. The need to grant declarations will seldom arise; but when it does, a court should not hesitate. Declarations of incompatibility promote "dialogue" between legislature and courts. Canadian constitutional writer, Professor Peter Hogg, pioneered the construct of dialogue to explicate political-judicial relations under the Canadian Charter of Rights and Freedoms.⁵⁹ For him, the legitimacy of judicial power is enhanced when legislatures and courts jointly determine the rights-implications of legislative policy. In Canada, where Hogg was writing, "dialogue" is shaped by the legislative power to enact legislation and the judicial power to adjudicate its validity against the rights guarantees. A decision to strike

55 See *R v Poumako*, above n 50, 718-720 Thomas J, summarising the arguments for and against declarations of incompatibility. The relevance of the language of parliamentary supremacy and parliamentary sovereignty is addressed below.

56 See for example *R v Poumako*, above n 50, 718 Thomas J.

57 *Temese v Police* (1992) CRNZ 425, 427 (CA) Cooke P.

58 *R v Poumako*, above n 50, 716 Thomas J, summarising the Crown's submissions.

59 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982 (Canada Act 1982 (UK), sch B). See P W Hogg and A A Bushell "The *Charter* Dialogue between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall LJ 75.

down legislation might prompt the legislature to re-enact it in revised form. Successful Charter challenges frequently prompt legislative sequels that seek to reconcile the relevant Charter guarantee. Most often, it is the legislative design rather than the objective that offends Charter values.

Dialogue as between courts and legislature is not essentially different in New Zealand, notwithstanding the lack of judicial power to invalidate statutes. In neither Canada nor New Zealand is the legislature under compulsion to respond, whether to a court decision to "strike down" or to a declaration of incompatibility. In New Zealand, dialogue consists of the court's declaration plus the legislative sequel (if any). Declarations of incompatibility allow courts to communicate directly with the political branch, while leaving to the democratic element the decision whether to introduce remedial legislation. A declaration helps to inform the appropriate political response. Under the *Moonen* methodology, the court's reasoning would identify the relative strength of the contesting legal values (assessed against the significance of the rights-guarantee and the legislative objective sought) and the legislative departure from the rights-standard. "Of necessity", said the Court in *Moonen*, "value judgments will be involved."⁶⁰ There would be no cause for angst were Parliament to address a declaration and elect to leave the offending provision intact. A declaration of incompatibility is a declaration to inform and raises no issues of res judicata: "A declaration ... throws responsibility on to Parliament to make a *deliberate, transparent and informed* decision - whether or not to remedy a legislative intrusion on [a guaranteed right]."⁶¹

In the era of rights jurisprudence, I believe declarations of incompatibility are a constitutional responsibility of the higher courts. Crown Counsel have argued that *Moonen* established a lesser remedial power to "indicate" legislative inconsistencies, not the remedial power to grant formal declarations.⁶² A judicial ruling that a legislative limit cannot be reconciled under section 5 (the "justified limitations" provision) will, of necessity, indicate a legislative departure from the New Zealand Bill of Rights Act 1990. True, but Crown Counsels' argument should not prevail. The courts have inherent powers to

60 *Moonen v Film and Literature Board of Review*, above n 51, 16–17 Tipping J for the Court.

61 P A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 6 (emphasis in the original) [*Constitutional and Administrative Law in New Zealand*].

62 See *Zaoui v Attorney-General*, above n 52, 381 (HC) Williams J; *Reid v Minister of Labour*, above n 53, para 19 MacKenzie J. In *Moonen*, the Court expressed the remedial power as one "to indicate" but the tenor of the judgment endorsed formal declarations of inconsistency. In *Zaoui*, Williams J rejected the Crown's submission and affirmed the full remedial jurisdiction to grant declarations.

develop appropriate remedies⁶³ and should not resile from granting formal declarations of incompatibility. A formal court order lends *gravitas* to the court's finding. It vindicates both the impugned right and the constitutional standing and integrity of the New Zealand Bill of Rights Act 1990.⁶⁴

The four areas I have essayed engender confidence in our public jurisprudence. Other areas, too, might warrant mention, such as our evolving rights jurisprudence under the New Zealand Bill of Rights Act 1990, the embrace of the principles of the Treaty of Waitangi in judicial review⁶⁵ and the ameliorating effect of MMP politics on governmental processes. It would be enlightening to traverse these developments also, as bearing upon the "New Zealandness" of New Zealand public law.⁶⁶ But better purpose is served by now turning to areas of our public law that sap confidence in our public jurisprudence – areas that score a "fail" on our card.

VI ELECTORAL (INTEGRITY) AMENDMENT ACT 2001

The Electoral (Integrity) Amendment Act 2001 was popularly known as the "party-hopping" or "anti-defection" legislation. This Act scores a resounding "D" on the scorecard. The statutory purpose was misconceived and its machinery a mess. Mercifully, the statute had a sunset clause that was triggered at the close of polling day at the 2005 general election. The Act has ceased to exist but it warrants examination for the lessons we can take from it. There is also further reason to revisit this Act: the party-hopping legislation is back on the political agenda following the 2005 post-election negotiations between the Labour and New Zealand First parties. Deputy Prime Minister, Dr Michael Cullen, announced that the government would reintroduce the party-hopping legislation when Parliament resumed in November 2005. The government agreed to reinstate the legislation

63 See generally *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA).

64 For the "rights-centred" approach under the New Zealand Bill of Rights Act 1990, with emphasis on vindicating rights, see *Constitutional and Administrative Law in New Zealand*, above n 61, 1055–1057.

65 See P A Joseph "Constitutional Review Now" [1998] NZ Law Rev 85; *Constitutional and Administrative Law in New Zealand*, above n 61, 779–782.

66 For reference to indigenous undercurrent in our law, see J L Ryan "The New Zealandness of New Zealand Law" (1972) 1 *Anglo-American L Rev* 204; M Taggart "The New Zealandness of New Zealand Public Law" (2004) 15 *PLR* 81.

as part of the agreement to secure the support of the New Zealand First Party on confidence and supply.⁶⁷

The Act had a lengthy gestation: it was introduced in December 1999 (at the outset of the Clark Labour–Alliance Government) but did not receive the royal assent until December 2001. Commentators had ample opportunity to warn against the statutory objective of seeking legal solutions to party-political disputes. Attempts to enforce election-night proportionality through legislation were flawed.⁶⁸ I argued the political philosophy of Edmund Burke (a member's right to exercise individual conscience and judgment) and concluded: political issues of party unity should not be translated into legal solutions.⁶⁹ Let responsibility for preserving party loyalty lie where it falls – with the party. The party organisation should devise candidate selection procedures that will minimise risk of party defections. The law should not seek to intrude.

Those warnings fell on deaf ears. The Electoral (Integrity) Amendment Act 2001 amended section 55 of the Electoral Act 1993 by adding a further ground on which a member vacated his or her seat: namely, where a member resigns his or her party membership and gives notice to the Speaker or where a party leader gives notice that a party member "has distorted, and is likely to continue to distort" Parliament's proportionality.⁷⁰ The latter application was destined to be problematic. Notice to the Speaker must state three things: that the party leader "reasonably believes" the member has distorted and will continue to distort party proportionality in the House, that prior notice was served on the member inviting the member's response and that two-thirds of the caucus supported the serving of notice.

The Electoral (Integrity) Amendment Act 2001 was "prescriptively pretentious but legally ineffective".⁷¹ Almost as the Act came into force (December 2001), the Alliance Party headed towards meltdown, with opposing factions organising around Jim Anderton

67 See "Legislation and Government" (19 October 2005 and 25 October 2005) *Brookers Legal News*. Labour, New Zealand First and the Progressive Party support the reintroduction of the legislation (58 votes) and National, ACT, United Future and the Greens oppose it (59 votes). The fate of the legislation depends on the Māori Party, which has a party vote of four.

68 See P A Joseph "Mrs Kopu's Challenge to MMP" [1997] NZLJ 413; P A Joseph "Constitutional Law" [2000] NZ Law Rev 301, 308 ["Constitutional Law 2000"]; P A Joseph "Constitutional Law 2003", above n 5, 395; *Constitutional and Administrative Law in New Zealand*, above n 61, 193–194.

69 *Constitutional and Administrative Law in New Zealand*, above n 61, 194.

70 Electoral Act 1993, s 55D.

71 "Constitutional Law 2003", above n 5, 393–394.

and Laila Harré. The Alliance Party hierarchy expelled Anderton and his supporters and declared Laila Harré their new leader. But the Electoral (Integrity) Amendment Act 2001 lay fallow, with no role to play. Anderton spearheaded a new party on the hustings (the Progressive Coalition) but he and his supporters formally remained Alliance members of Parliament until the elections in June 2002. At the beginning of a new Parliament, each party provides the Speaker with its parliamentary membership⁷² and the members retain their party membership until such time as they notify the Speaker of a change. Anderton and his supporters saw no reason to take this step. Contrary to the pretensions of its statutory title, the Electoral (Integrity) Amendment Act 2001 enhanced neither the integrity of MMP parliamentary representation nor respect for the law.

The Act did salvage some public credibility following the Supreme Court decision in *Huata*.⁷³ The Supreme Court reversed the decision below⁷⁴ and held that the Act's procedurally prescriptive requirements had been satisfied. Awatere Huata's seat was declared vacant. The ACT Party had been entitled to believe that, by her conduct, Awatere Huata had distorted party proportionality and would continue to do so by remaining in Parliament as an independent. Although she had offered her proxy to the Party and had continued to vote alongside ACT, the Court held that proportionality embraced more than voting patterns in the House. This result had instant superficial appeal (ACT had entered Parliament with nine members but finished with only eight) and struck a resonance with the public. Nevertheless, the Electoral (Integrity) Amendment Act 2001 was misconceived in both spirit and design: for claiming to promote electoral and political integrity and intruding legal prescriptions into the internal affairs of political parties. All actors affected by the legislation will have welcomed the close of polling day 2005, when the Act's sunset clause took effect.

What lessons might be drawn? First, the law should not promise more than it can give. Social engineers should understand the limits of the law and not call upon it to perform impractical tasks. The Electoral (Integrity) Amendment Act 2001 was hopelessly ambitious and had little hope of functioning effectively in the cut-and-thrust of partisan party politics. Secondly, Parliament should, as a matter of principle, refrain from legislating for its internal workings. Legislation that intrudes into the House throws into question Parliament's right of exclusive cognisance – the House's unchallenged right to regulate its

72 Standing Orders of the House of Representatives, SO 35.

73 *Awatere Huata v Prebble*, above n 8.

74 *Awatere Huata v Prebble* [2004] 3 NZLR 359 (HC & CA).

own internal proceedings.⁷⁵ Two great public interests are thrown on collision course: Parliament's right to institutional autonomy and the courts' role to expound legal meaning. Should the courts or the House rule on statutes that reach inside Parliament's precincts? When *Huata* reached the Supreme Court, the parties accepted that the Electoral (Integrity) Amendment Act 2001 was directed at extra-parliamentary acts and did not trigger Parliament's exclusive cognisance. But it was only the accommodation of the parties that relieved the Court from addressing this issue.⁷⁶ The majority of the Court of Appeal had left it open whether the scope of Parliament's privilege aligned with the views expressed in *Bradlaugh v Gossett*,⁷⁷ or the more restrictive views expressed in *Kalauni v Jackson*.⁷⁸ Matters of parliamentary governance are best regulated in the standing orders of the House, which are not laws and do not raise justiciable issues or jurisdictional disputes.

Everyone thought they had seen the end of the Electoral (Integrity) Amendment Act 2001 at the close of polling day at the 2005 elections. But the machinations of MMP politics can never be discounted. The imperative to form a government gave Winston Peters leverage to insist on the reinstatement of the legislation, as the price of New Zealand First support on confidence and supply.

VII PARLIAMENTARY PRIVILEGE AND THE "EFFECTIVE REPETITION" PRINCIPLE

The effective repetition principle registers another "D" on our scorecard. This principle threatens Parliament's freedom of speech by a side wind, contrary to Article 9 of the Bill of

75 The one exception involves special procedures of law-making ("manner and form") which condition the validity of legislation itself. No issue of parliamentary privilege affects the courts' jurisdiction to police such procedures: see *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154, 157 (CA) Richardson P, Henry and Blanchard JJ; *Westco Lagan v Attorney-General* [2001] 1 NZLR 40, 61–62 (HC) McGechan J.

76 See *Awatere Huata v Prebble*, above n 8, 305 Elias CJ and 314–315 Gault J, declining to express any concluded view on the scope of parliamentary privilege.

77 *Bradlaugh v Gossett* (1884) 12 QBD 271, 278, 280–282 Stephen J, upholding Parliament's exclusive right to superintend statutes regulating its internal proceedings that do not affect rights exercisable outside of the House.

78 *Kalauni v Jackson* [2001] NZAR 292 (Niue CA), upholding the Court's jurisdiction to administer statutes applying to the internal workings of the legislature that establish rights cognisable under the general law. See also *Queen v Speaker of the House of Representatives* [2005] NZAR 585 (HC) where Fogarty J ruled that the House is neither above the law nor seised of a special jurisdiction to interpret the law that applies to it. These decisions presage a constitutional accommodation that affirms the historical role of the courts as the authoritative expositors of the law.

Rights 1688 (Eng) (the Bill of Rights). It has a chilling effect on political and parliamentary free speech and ought to be overturned by Parliament. It works as follows.⁷⁹

Article 9 of the Bill of Rights confers the absolute privilege of freedom of speech in debates.⁸⁰ No action in the courts can be mounted directly on words uttered in the course of debates. The effective repetition principle draws on a distinction the courts make under Article 9, between proving the occurrence of parliamentary events and questioning or impeaching their propriety. *Prebble v Television New Zealand Ltd (Prebble)*⁸¹ established that Hansard can be adduced to establish, as a matter of historical record, that something was said or done in the House on a particular day; but that counsel cannot go further and challenge, impugn or question. Article 9 reads: "That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament."

The *Prebble* distinction facilitates the effective repetition principle. A member may say things in debates, go outside the House and be held to repeat the words by affirming or adopting them. Such words, when affirmed or adopted, are actionable in defamation. Effective repetition amounts to a fresh publication and, for the courts, does not involve any question of parliamentary privilege. In *Beitzel v Crabb*,⁸² a member of the Victorian legislature said on radio: "I stand by what I said." The member was referring to potentially defamatory words he had spoken in the House. Under the *Prebble* distinction, the plaintiff could adduce Hansard to establish, as a matter of record, what the defendant had said. Establishing the parliamentary words spoken completed the defamation.

79 See generally *Constitutional and Administrative Law in New Zealand*, above n 61, 410–412, and "Constitutional Law 2003", above n 5, 428; D McGee "The Scope of Parliamentary Privilege" [2004] NZLJ 84; A Geddis "Defining the Ambit of the Free Speech Privilege in New Zealand's Parliament" (2005) 16 PLR 12.

80 The freedom of speech privilege is co-extensively broader by conferring immunity from action on "proceedings in Parliament", which extends to all select committee work and matters intimately connected to proceedings or debates before the House. See *Constitutional and Administrative Law in New Zealand*, above n 61, ch 12. Article 9 is in force as law in New Zealand by virtue of the Legislature Act 1908, s 242 and the Imperial Laws Application Act 1988, s 3(1). See also the Defamation Act 1992, s 13(1): "Proceedings in the House of Representatives are protected by absolute privilege."

81 *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC).

82 *Beitzel v Crabb* [1992] 2 VLR 121 (Vic SC).

The effective repetition principle is built on flawed logic. In *Buchanan v Jennings*,⁸³ the High Court dismissed a strike-out action where former ACT member, Owen Jennings, said outside the House: "I do not resile from what I said."⁸⁴ By endorsing statements made inside the House, the defendant stepped outside the legal protection of Article 9. The full Court stated:⁸⁵

[A]n attack may be made on the truth of allegedly defamatory statements made outside the House even if that would amount to an indirect attack on the truth of the same or similar remarks made in the House.

A direct attack is impermissible; an indirect attack is permissible. How sensible is this? What is material is the attack, not whether it was direct or indirect. The effective repetition principle emasculates Article 9. In *Buchanan v Jennings*, the Court in effect condoned an attack on the truth of statements made in the House. On appeal, the Court of Appeal (Tipping J dissenting) and the Privy Council upheld the Court's reasoning and held that the effective repetition principle operated outside the legal protection of Article 9.⁸⁶

Effective repetition does not withstand scrutiny on two levels – as a matter of law and as a matter of policy. Tipping J, dissenting in the Court of Appeal, identified the legal flaw.⁸⁷ To say "I do not resile from what I said" can never found an actionable defamation. The words are innocuous. They become defamatory only when the court admits in evidence the words to which they refer – words spoken in the House under cover of privilege. To establish the defamation, the plaintiff must impugn the parliamentary words, contrary to Article 9. As truth is a defence under the law of defamation, the plaintiff must establish that the substance of the parliamentary words was false. If they were true, there can be no defamation, no matter how damaging to reputation they may be. A member could exit the debating chamber and affirm, adopt or repeat verbatim those words and incur no legal liability. In *Laurance v Katter*,⁸⁸ the Queensland Court of Appeal conceded

83 *Buchanan v Jennings* [2000] NZAR 113 (HC).

84 The newspaper interview in *The Independent* (18 February 1998) cast the defendant's statement in the third person: "Jennings said he did not resile from his claim about the officials' [sic] relationship." For the Privy Council, it did not matter whether the defendant said "I do not resile ..." or whether the reporter asked "Do you resile ...?" Nothing turned on a disputed difference of language that gave rise to no difference of meaning.

85 *Buchanan v Jennings*, above n 83, 118 Randerson and Neazor JJ.

86 See *Buchanan v Jennings* [2002] 3 NZLR 145 (CA); *Jennings v Buchanan* [2005] 2 All ER 273.

87 *Buchanan v Jennings*, above n 86, 170-194 (CA) Tipping J dissenting.

88 *Laurance v Katter* (1996) 141 ALR 447, 490 (Qld CA) Davies JA.

that proving what the defendant had said outside the House was false would prove also that what was said inside the House was false. The Court reconciled this outcome as "incidental". Plaintiffs may incidentally impeach or question parliamentary statements, notwithstanding freedom of speech under Article 9.

The effective repetition principle also offends the long-standing policy of the law. Since 1688, parliamentary proceedings have been inviolate. Parliament's freedom of speech facilitates the work of the nation's debating chamber. Members cannot discharge their civic duties if they must forever be looking over their shoulder, in fear of the Queen's writ. Looking over the shoulder undermines the public interest: it has a chilling effect on *political* and *parliamentary* free speech. Members will avoid media comment if they have made potentially defamatory statements under parliamentary privilege. The courts are quick to construe extra-parliamentary statements as an effective repetition. General allusions, such as "I do not resile from what I said" or "I stand by what I said", have been held sufficient. Refusals by politicians to speak to media neither promote open debate nor enhance representative democracy.

In addition, the Privy Council and Court of Appeal were wrong when they ruled that the effective repetition principle does not potentially inhibit parliamentary free speech. The principle strikes at the heart of the legal protection Article 9 confers. If a minister or member agrees to a media interview after the House rises, he or she may be dissuaded from making potentially defamatory statements in debates for fear of later triggering the effective repetition principle. This principle is more corrosive and insidious than the Privy Council and Court of Appeal acknowledged. Little is required to trigger its operation. The House should consider legislation to override the principle at the earliest opportunity.

In July 1998, the Speaker of the House of Representatives ruled that the *Buchanan v Jennings* action raised a question of privilege and referred it to the Privileges Committee.⁸⁹ In December 2004, my colleague Professor John Burrows, Otago senior law lecturer Mr Andrew Geddis and I were invited to advise the Committee on the constitutional implications and what remedial steps (if any) might be taken. On 31 May 2005, the Committee reported to the House that it had adopted our recommendation that legislation be introduced to overturn the effective repetition principle. The Committee accepted that this should be done by amendment to the Legislature Act 1908 rather than the Defamation Act 1992. The Legislature Act 1908 deals with matters of parliamentary privilege and is the appropriate place for a legislative override. The effective repetition principle has broader

⁸⁹ See Privileges Committee "Question of privilege referred 21 July 1998 concerning *Buchanan v Jennings*" (May 2005) AJHR I 17G, Appendix B ["Privileges Committee report"].

application than the law of defamation and might be used to establish contempt of court, statutory breaches involving imposition of penalties, civil liability for breach of confidentiality or criminal liability for offences committed in the House. The object would be to achieve the legislative override without abolishing the distinction drawn in *Prebble*. Hansard might legitimately be used in evidence to support a statutory construction,⁹⁰ to identify a person at whom extra-parliamentary statements were directed⁹¹ or to establish that something was said or done in the House on a certain day.⁹² The Committee adopted as its recommendation:⁹³

[T]hat the Legislature Act be amended to provide that no person may incur criminal or civil liability for making any oral or written statement that affirms, adopts or endorses words written or spoken in proceedings in Parliament where the oral or written statement would not, but for the proceedings in Parliament, give rise to criminal or civil liability.

Following the tabling of the Privileges Committee report, the government announced that legislation to amend the Legislature Act 1908 would be introduced after the 2005 general election.⁹⁴ All parties in Parliament except the Māori Party were represented on the Committee and its recommendation was unanimous.

VIII PRINCIPLE OF NON-INTERFERENCE IN THE LEGISLATIVE PROCESS

The principle of non-interference in the legislative process is a vitally necessary one; yet it registers a "fail" on our scorecard. The principle is founded on the need for mutual forbearance as between the branches of government. Each branch is astute to respect the institutional autonomy and sphere of action of the other. The political branch will not impede the independent functioning of the courts and the courts will not allow their process to inhibit the free functioning of the legislature.⁹⁵ The principle is not objectionable so much as the way in which it has been applied. The courts have indiscriminately struck

90 See *Marac Life Assurance Ltd v Commissioner of Inland Revenue* [1986] 1 NZLR 694 (CA); *Brown v Langwoods Photo Stores Ltd* [1991] 1 NZLR 173 (CA); *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA); *Pepper v Hart* [1993] AC 593 (HL). For discussion, see J F Burrows *Statute Law in New Zealand* (2 ed, Butterworths, Wellington, 1999) 164–182.

91 See *Hyams v Peterson* [1991] 3 NZLR 648 (CA); *Peters v Cushing* [1999] NZAR 241 (HC).

92 See *Prebble v Television New Zealand Ltd*, above n 81.

93 See my submissions reproduced in the "Privileges Committee report", above n 89, Appendix D for the draft provision to amend the Legislature Act 1908.

94 New Zealand Press Association Report, 1 June 2005.

95 See generally *Constitutional and Administrative Law in New Zealand*, above n 61, 474–475.

out actions that have sought to uphold proper process and accountability in public decision-making. Consider the following two sets of cases.

The first set illustrates the appropriate application of the principle, where the plaintiff sought to restrain legislative proceedings. In *Rothmans of Pall Mall (NZ) Ltd v Attorney-General*,⁹⁶ the plaintiff applied to enforce a government undertaking not to introduce legislation to ban tobacco advertising at sports venues. "It is elementary", observed the High Court, "that the executive may not restrict the legislative competence of Parliament by contract."⁹⁷ Similarly, in *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* (the *Sealord* case),⁹⁸ the Court of Appeal held that the courts will not entertain an action to restrain a minister from introducing a Bill into the House. An undertaking by the Crown to introduce legislation along agreed lines could have no legal effect.

Contrast the second set of cases, where the principle of non-interference was given unwarranted application. In *Christchurch City Council v Attorney-General* (*Christchurch City Council*),⁹⁹ the Court of Appeal struck out an application to review part of the report of the Roothing Advisory Group (RAG). The government appointed this group to investigate and make recommendations for the reform of the roading system and the government released its report as a public consultation document inviting submissions. The plaintiff objected to a part of the report which asserted that the commercialisation of the roading system would not affect common law rights of passage. It alleged the report was founded on error of law that would skew consultations and the policy formation process. The Court of Appeal rested its decision on the narrow ground that there was no error of law, or that the error (if there were one) was "technical" and unlikely to mislead.

In argument, the Court left counsel in no doubt that the non-interference principle rendered the entire matter non-justiciable. The consultative and policy formation processes anticipated the introduction of legislation and the Court would not interfere in the legislative process. But one might sensibly ask: how could the Court interfere? The legislative process had not begun. The consultations were part of a public decision-making process. No decision had been reached whether the reforms should proceed or, if they should, what shape they should take. The public were stakeholders and were entitled to

96 *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323 (HC) Robertson J.

97 *Rothmans of Pall Mall (NZ) Ltd v Attorney-General*, above n 96, 328.

98 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA).

99 *Christchurch City Council v Attorney-General* [2005] NZAR 543 (HC), [2005] NZAR 558 (CA). I disclose a professional interest in this litigation through my professional services as adviser to the Christchurch City Council in the preparation of its case.

meaningful consultations – not consultations founded on errors of law. The principle of non-interference had no function to perform and set a troublesome precedent. Contrary to expectations, no legislation to implement the RAG report was introduced, or indeed drafted. The commercialisation of the roading system lost traction as the vagaries of coalition politics unfolded in the first MMP Parliament (1996–99).

Christchurch City Council featured also in the second case, *Milroy v Attorney-General (Milroy)*.¹⁰⁰ *Milroy* involved the Treaty-settlements process leading to the Ngati Awa settlement. Tuhoe as cross-claimants argued that ministry officials had made reviewable errors in advising their minister. As in *Christchurch City*, they argued that the decision-making process was founded on material errors which it was the responsibility of the court to declare. The Court of Appeal disagreed. It held: "where the action challenged ... is undertaken in the course of policy formation preparatory to the introduction to Parliament of legislation, the courts will not interfere."¹⁰¹ This statement loses sight of what is intended to be protected – namely, the legislative process. The policy formation process is not legislative process; it logically precedes it. The Court of Appeal's statement ran executive and legislative processes into one when the two are functionally distinct. The principle is also unmanageable in its reach. What time-line might be included in the phrase "preparatory to the introduction of legislation"? Much government process and decision-making culminates in legislation. Does the principle against non-interference exclude scrutiny of all matters that sequentially precede that? The policy formation process might be prolonged, involving consultations and discussions over months, even years. On that basis, decision-makers could escape judicial review if they could show even a distant nexus between the decision-making and an intended legislative outcome. The responsible minister might add complicity, with he or she announcing that legislation will, at a particular point, be introduced.

The *Christchurch City Council* and *Milroy* decisions, it has been claimed, are founded on "irresistible logic". In *Comalco Power (NZ) Ltd v Attorney-General*,¹⁰² Heron J stated:

[I]f the enactment of legislation is free of any possible sanction by the Courts ... then action to bring about that legislation must likewise be privileged and protected from action by the Courts. I think it is a matter of *irresistible logic*, that if the ultimate Act is in all respects lawful

100 *Milroy v Attorney-General* [2005] NZAR 562 (CA).

101 *Milroy v Attorney-General*, above n 100, para 18 Gault P for the Court.

102 *Comalco Power (NZ) Ltd v Attorney-General* [2003] NZAR 1, 15 (HC) Heron J (emphasis added).

and beyond the reach of Courts then steps taken to reach that objective must likewise be protected.

Heron J's irresistible logic collapses. Because the final step (introduction of legislation) is protected from judicial scrutiny, it does not follow that everything that precedes it must also be protected. Errors of law or fact or defects in process that skew public decision-making should be open to correction. If such errors or defects lead to flawed legislation which no one can challenge, then it is crucially important that courts retain jurisdiction at the policy formation stage.¹⁰³ It may be too late to secure changes once a Bill has been introduced. Negotiated treaty settlements (as in *Milroy*) pose special problems. The Māori Affairs Committee will not change a Treaty settlement Bill that would alter the negotiated settlement between the Crown and iwi. Access to the courts becomes vital if Parliament will not listen once the settlement has been signed off and referred to the Parliamentary Counsel Office. In *Morrison v Treaty of Waitangi Fisheries Commission*,¹⁰⁴ the High Court formulated a preferable principle of narrower reach. Paterson J stated simply that: "Once the proposals have been included in draft legislation, they will clearly be non-justiciable."¹⁰⁵ The announcement by the Minister of Fisheries that he would soon introduce legislation in the House did not foreclose the Court's jurisdiction to review. The non-interference principle ought to be triggered by the introduction of a Bill (or drafting of a Bill for introduction), but by nothing prior.

IX JUSTICIABILITY

The principle of non-interference in parliamentary affairs is sometimes expressed in terms of justiciability. This concept holds that some areas of administrative discretion lie beyond the constitutional reach of the courts.¹⁰⁶ I take issue with this; no public administration is immune from judicial scrutiny. Lord Cooke of Thorndon condemned the suggestion as "unhappy" doctrine: to ring-fence areas of administrative discretion according to policy-content or subject-matter, and deem them non-justiciable.¹⁰⁷ Lord Steyn agreed. He refused to accept that some matters lie beyond the cognisance of the

103 See *Rediffusion (Hong Kong) Ltd v Attorney-General of Hong Kong* [1970] AC 1136, 1157 (PC) Lord Diplock for the majority.

104 *Morrison v Treaty of Waitangi Fisheries Commission* [2004] 1 NZLR 419 (HC).

105 *Morrison v Treaty of Waitangi Fisheries Commission*, above n 104, 429.

106 See for example *Morrison v Treaty of Waitangi Fisheries Commission*, above n 104, Paterson J in the dictum quoted in the text.

107 "The Road Ahead for the Common Law", above n 2, 282.

superior courts. "[I]n point of principle", he said, "there cannot be any no-go areas".¹⁰⁸ By setting up such areas, the superior courts shackle themselves and abdicate their constitutional responsibilities.¹⁰⁹

All public decision-making falls to the judicial function to uphold the rule of law. The superior courts are never without jurisdiction to adjudge the true grounds of decision and whether these fall within the province of executive government: "No matter how grave the policy issues involved, the courts will be alert to see that no use of power exceeds its proper constitutional bounds."¹¹⁰ The policy content or subject-matter of administrative discretion does not affect jurisdiction, but rather the exercise of judicial discretion. The courts are careful to respect the institutional differences between the branches and their relative functional expertise. They engage the language of deference and ask whether or not another branch of government is institutionally better qualified to decide a particular issue. The courts will defer to the political branch over national interest decisions, decisions involving macro-economic policy and allocation of State resources, polycentric decisions and decisions affecting moral choices.¹¹¹ The crucial point is that a decision not to rule on a matter is, itself, a judicial decision. The language of justiciability has no place.

The language of justiciability belongs to a bygone era, when formalism ruled. During the past 30 years, our courts have promoted the methodology of "overall evaluation" over formalist legal method.¹¹² This methodology enables courts to weigh up whether an impugned decision was genuinely founded on national interest grounds and within the exclusive province of executive government. Not everything involving the national interest is inviolate and immune from judicial review. In *Secretary of State for the Home Department v Rehman*,¹¹³ Lord Hoffmann extemporised about a rationally-supported, ministerial

108 Lord Steyn "Deference: A Tangled Story" [2005] PL 346, 351 ["Deference: A Tangled Story"].

109 "Deference: A Tangled Story", above n 108, 351.

110 *Marchiori v Environment Agency* [2002] EWCA Civ 3, para 40 Laws LJ.

111 See R A Edwards "Judicial Deference under the Human Rights Act" (2002) 65 MLR 859, 875-876; A L Young "*Ghaidan v Godion-Mendoza*: avoiding the deference trap" [2005] PL 23, 28-32. Compare Lord Hoffmann, who rejects the language of deference as conveying "overtones of servility, or perhaps gracious concession": *R (Prolife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185, 240 (HL). He expressed it as simply a question of law whether the courts or the elected branch of government have, in any particular case, the law-making power. However, his was a difference of language rather than principle. Lord Hoffmann affirmed that it is always for the courts to decide which branch has the power of decision.

112 *A J Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1, 4 (CA) Cooke J.

113 *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 (HL).

decision that deportation of a foreign national was conducive to the public good on national security grounds. No court, he said, would challenge the minister's determination of the public good but a court could properly ask whether the deportation would subject the foreign national to risk of torture or inhumane treatment, contrary to European Convention rights incorporated under the Human Rights Act 1988 (UK). Lord Hoffmann observed that, whereas the national security determination was exclusively for the minister: "This does not mean that the whole decision on whether deportation would be in the interests of national security is surrendered to the Home Secretary".¹¹⁴ Every decision is reviewable, even if courts defer to the decision-maker on particular issues. The standard grounds of review (illegality, irrationality and procedural impropriety) give a semblance of organisation and shape to the judicial function but they do not relieve courts of the final question: "has something gone wrong which requires the intervention of the court?" That question paraphrases the one Lord Donaldson of Lynton MR framed in *R v Panel on Take-overs and Mergers: ex p Guinness plc*,¹¹⁵ which encapsulates the court's discretion when it resolves whether or not to intervene on grounds of deference. The innominate ground of judicial review asks: "[has] something ... gone wrong of a nature and degree which require[s] the intervention of the court[?]"¹¹⁶

The Court of Appeal recently upheld the concept of justiciability. In *Curtis v Minister of Defence (Curtis)*,¹¹⁷ it ruled the government's decision to disband the combat wing of the RNZAF non-justiciable and refused relief. The Court reflected:¹¹⁸

A non-justiciable issue is one in respect of which there is no satisfactory legal yardstick by which the issue can be resolved. That situation will often arise in cases into which it is ... constitutionally inappropriate for the Courts to embark.

This represents not only wrong terminology; it is wrong doctrine. The decision in *Curtis* was reviewable, but it was appropriate that the Court defer to the government's determination of the national interest. Whether the RNZAF was or was not sufficiently armed was a decision for the responsible minister. The decision was rationally supported

¹¹⁴ *Secretary of State for the Home Department v Rehman*, above n 113, 193 (HL) Lord Hoffmann.

¹¹⁵ *R v Panel on Take-overs and Mergers: ex p Guinness plc* [1990] 1 QB 146 (CA).

¹¹⁶ *R v Panel on Take-overs and Mergers: ex p Guinness plc*, above n 115, 160 Lord Donaldson of Lynton MR.

¹¹⁷ *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA).

¹¹⁸ *Curtis v Minister of Defence*, above n 117, 752 (CA) Tipping J.

and there was no evidence that it had been actuated by any consideration other than genuine national security considerations.

Persisting with judicial "no-go" zones represents a further fail on our scorecard. The courts abdicate their responsibilities when they declare public decisions non-justiciable and beyond their reach. The language of justiciability is redolent of the scope of review doctrine that persisted in the post-war years, when the courts readily deferred to the political executive and were quick to assert a minister's responsibility to Parliament.¹¹⁹ This attitude inevitably succumbed in the intervening years to stricter standards of public accountability, but the language of justiciability remains.

X DICEYAN SOVEREIGNTY THEORY

Our continuing acceptance of Diceyan sovereignty theory is the most compromising "fail" on our scorecard. This theory has skewed the institutional relations that bind the branches of government and has adverse flow-on effects for our law. It has also obscured our constitutional heritage and history.

Consider the great 17th century exchanges between James I and his Chief Justice, Sir Edward Coke. These exchanges reveal much about government and the on-going conciliation of governmental power. In the first exchange reported as *Prohibitions del Roy*,¹²⁰ Coke denied James the right to exercise judicial power and championed the right of the common law judges to administer the law (justice was dispensed in the King's name but judicial power lay with his judges); and in the second exchange reported as *Proclamations*,¹²¹ Coke championed two causes: the right of Parliament over the Crown to create new offences by legislation and the right of the judges to declare the limits of the royal prerogative ("the King hath no prerogative, but that which the law of the land allows him").¹²² *Prohibitions del Roy* and *Proclamations* established an accommodation between the branches, even if the Stuarts defiantly refused to be bound. Those exchanges anticipated by some 80 years the separation of powers that the Revolution Settlement established.

119 See *Point of Ayr Collieries v Lloyd-George* [1943] 2 All ER 546 (CA); *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 (CA); *B Johnson & Co (Builders) Ltd v Minister of Health* [1947] 2 All ER 395 (CA); *Robinson v Minister of Town and Country Planning* [1947] 1 KB 702 (CA); *Shand v Minister of Railways* [1970] NZLR 615 (CA).

120 *Prohibitions del Roy* (1607) 12 Co Rep 63.

121 *Proclamations* (1611) 12 Co Rep 74.

122 *Proclamations* (1611), above n 121, 76 Coke CJ.

Prohibitions del Roy and *Proclamations* speak to the "collaborative enterprise" between the political and judicial branches.¹²³ Each branch is indispensably part of the machine of government, exercising separate functions and powers but espousing the complementary goals of representative democracy and the rule of law, equality, liberty and human happiness.¹²⁴ The notion of distinct elements exercising co-ordinate authorities is historically placed, as our 17th century precedents show; only it became obscured from the second half of the 19th century, when popular democracy and parliamentary sovereignty gave new justification to legislative power.¹²⁵ The constitutional paradigm Dicey articulated defined a relationship of supremacy (Parliament) and subordination (courts).¹²⁶ The language of *Leviathan* triumphed over notions of interdependence and reciprocity.¹²⁷ Parliamentary power was proclaimed absolutely and judicial power subordinated to lesser purposes.

Sovereignty doctrine promotes the "contest of extremes" - the "either/or" choice. Either we have parliamentary supremacy, or we have judicial supremacy.¹²⁸ Sovereignty doctrine posits absolute legislative power which imports closure; the doctrine knows only the absolutism of its own canons and can assimilate nothing in between. It operates a defensive shield by rearranging any challenge to it in its own image: "For sovereignty theorists, the debate over constitutional fundamentals reduces to a blunt choice between two extremes - *parliamentary* supremacy or *judicial* supremacy."¹²⁹ This is misguided doctrine: neither branch is supreme over the other. The legislative and judicial functions

123 See "Parliament, the Courts, and the Collaborative Enterprise", above n 6.

124 See "Parliament, the Courts, and the Collaborative Enterprise", above n 6. See also Dame Sian Elias "Sovereignty in the 21st Century: Another Spin on the Merry-go-round" (2003) 14 PLR 148.

125 See P A Joseph "The Demise of Ultra Vires - A Reply to Christopher Forsyth and Linda Whittle" (2002) 8 *Canta LR* 463, 467-472 ["The Demise of Ultra Vires - A Reply to Christopher Forsyth and Linda Whittle"].

126 A V Dicey *Introduction to the Study of the Law of the Constitution* (10 ed, Macmillan & Co, London, 1959) ch 1.

127 Thomas Hobbes' writings in the 17th century found further contemporary expression in the writings of Austin and subsequently Dicey: see C H Sabine *A History of Political Thought* (3 ed, Harrop & Co, London, 1963) ch 23.

128 See for example R Ekins "Judicial Supremacy and the Rule of Law" (2003) 119 *LQR* 127. The literature espousing the "either/or" choice is voluminous: see the citations in "Parliament, the Courts, and the Collaborative Enterprise", above n 6, 324, fn 17.

129 "Parliament, the Courts, and the Collaborative Enterprise", above n 6, 323 (emphasis in the original).

are "complementary", wrote Lord Cooke: "the supremacism of either has no place."¹³⁰ To claim sovereignty for either branch was a "distortion" and "can even savour of arrogance".¹³¹

In the English courts, there is gathering recognition of the fiction of an all-powerful sovereign, bestriding the constitutional stage. Several judges have espoused interdependence and reciprocity as between the branches – the antithesis of sovereignty theory. In *M v Home Office*, Nolan LJ stated:¹³²

[T]he proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the court as to what its lawful province is.

In *X Ltd v Morgan-Grampian (Publishers) Ltd*, Lord Bridge of Harwich advanced the notion of "twin sovereignties".¹³³

In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law.

Lord Woolf of Barnes made similar observations in *Hamilton v Al Fayed*.¹³⁴ He referred to "the wider constitutional principle of mutuality of respect between two constitutional sovereignties" (denoting the Queen-in-Parliament and the superior courts of justice).¹³⁵ These reflections are prescient, although I quibble over the continued use of the term "sovereignty". Can there be "twin sovereignties", when the term "sovereign" means "supreme ruler or head ... having supreme power residing in itself, himself or herself".¹³⁶ The expression is an oxymoron that is better avoided. The challenge is to construct language that has explanatory power. I have used the expression "collaborative enterprise" as a compendious term to depict the joint functioning of the branches. One might equally

130 "The Road Ahead for the Common Law", above n 2, 278.

131 "The Basic Themes", above n 46, 113.

132 *M v Home Office* [1992] QB 270, 314 (CA) Nolan LJ.

133 *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1, 48 (HL) Lord Bridge of Harwich.

134 *Hamilton v Al Fayed* [1999] 3 All ER 317, 320 (CA) Lord Woolf MR.

135 See also Sir Stephen Sedley "Human Rights: A Twenty-First Century Agenda" [1995] PL 386, 389, who coined the term "bi-polar sovereignty" (the Crown in Parliament and the Crown in the courts).

136 *Chambers Dictionary* (Harrap Publishers, Edinburgh, 1993).

employ the French term "entente cordiale" (a friendly understanding between two sources of potentially opposing power).¹³⁷ Entente Cordiale is the name of the Anglo-French agreement entered into in 1904, under which each country resolved it had more to gain by collaborating than warring. "Institutional concord" (two quite separate sources of power can overlap at the edges) might be a further expression.

The twin elements of interdependence and reciprocity are key. The political branch looks to the courts for judicial recognition of legislative power and the courts look to the political branch for recognition of their independence and autonomy. This relationship of interdependence also establishes reciprocity. Statutory codification has overtaken vast areas of the common law. The law that most proximately affects us, as individuals, is historically judge-made: inter alia criminal law, tort law, contract law, sale of goods, mercantile law, partnership law, administrative law, the law of remedies and principles of liberty and freedom. All of these areas of law evolved at common law, until they reached a stage of development that invited systematic stock-take and review. Statutory codification is a reciprocal process; it entails codification, not abrogation. Parliament typically retains the principles and values that inform common law developments but fine-tunes their application. "Ultimately," observed Lord Steyn, "common law and statute law coalesce in one legal system."¹³⁸

Reciprocity also finds expression in the judicial construction of statutes.¹³⁹ I prefer the term "statutory construction" to "statutory interpretation". Sovereignty theorists commit the latter term to their own ends. "The very concept of 'interpretation'", they argue, "requires respect for legislative supremacy."¹⁴⁰ They commend courts to remain faithful to the literal meanings of Parliament's legislation. But this aspiration disconnects from what the courts actually do when they construe and apply statutes. The courts do not receive Parliament's words as scripture handed down on tablets of stone.¹⁴¹ The descriptively accurate expression is "statutory construction". The courts resolve linguistic ambiguities in legislation, adapt existing legislation to cover new circumstances, build legislative meanings around undefined terms, exercise judicial discretions in legislation and develop

137 I express thanks to my colleague, Professor Gerard McCoy QC, who suggested this expression.

138 *R v Secretary of State for the Home Department; ex p Pierson*, above n 36, 589 Lord Steyn.

139 See "Parliament, the Courts, and the Collaborative Enterprise", above n 6, 337-340.

140 J Goldsworthy "Parliamentary Sovereignty and Statutory Interpretation" in R Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) 187, 188.

141 "Parliament, the Courts, and the Collaborative Enterprise", above n 6, 337. See also "The Demise of Ultra Vires - A Reply to Christopher Forsyth and Linda Whittle", above n 125, 473-478.

statutory meanings that accord with the institutional values of the legal system. They exercise a co-ordinate, constitutive role alongside Parliament itself.

Our law would prosper from reconnecting with the constitutional past. The accommodation James I and his Chief Justice, Sir Edward Coke, reached 400 years ago may not represent today's constitutional balance, but it was one firmly founded on the interdependence and reciprocity of the branches. Even the Stuart sovereigns could not resurrect notions of divine right without consulting the judges. To persist with the fallacy of omnicompetence is a deception that is impoverishing constitutional thinking. It is the major, continuing concern among the "fails" on our scorecard.

XI CONCLUSION

On this analysis, the "fails" prevail 5:4. However, constitutional evaluation involves more than arithmetic calculation. There is ample reason for confidence in our public jurisprudence and legal institutions. The protracted (at times intense) debate over the Supreme Court focused the public mind on the quality of our judges and on our ability to sustain appointments to that Court from the judicial hierarchy.¹⁴² That debate was at times bruising, involving indiscriminate attacks on our higher judiciary, but its eventual resolution was a fillip for our law and a boost to public confidence in our judges. The establishment of the Supreme Court augers well for a "significantly indigenous" jurisprudence that can assimilate common law developments in ways appropriate to New Zealand.¹⁴³ In some areas, we have led common law developments (for example, in administrative jurisprudence based on error of law review), while in other areas we have marched alongside developments elsewhere (for example, in applying principles of constitutionality in statutory construction and promoting political-judicial dialogue under the New Zealand Bill of Rights Act 1990). Severing the Privy Council appeal will not turn our law inwards or induce unhealthy judicial introspection.

Over the past 30 years, rights-based analysis has displaced formalist legal method in most areas of our public law. This jurisprudential shift will continue in the years ahead. Yet, there are still areas where our law lags behind. Our scorecard identified five

142 Supreme Court judges must either be a High Court judge (whether sitting in the High Court or the Court of Appeal) at the time of appointment or be appointed concurrently to the High Court when appointed to the Supreme Court: Supreme Court Act 2003, s 20(1). Every judge of the Supreme Court continues to hold concurrent appointment as a judge of the High Court: Supreme Court Act 2005, s 20(2).

143 See *Budget Rent A Car Ltd v Auckland Regional Authority* [1985] 2 NZLR 414, 418 (CA), where Cooke J pronounced our administrative jurisprudence "significantly indigenous".

problematic areas (although others, too, might have been included).¹⁴⁴ One (the effective repetition principle) will be overtaken by legislation following the 2005 elections and another (the Electoral (Integrity) Amendment Act 2001) ceased to be a concern following polling day at those elections. It remains to be seen whether the vicissitudes of MMP politics will play Prince Charming and dispense the kiss-of-life to the party-hopping legislation. The revival of that statute would be an unfortunate retrogression in our law. The other areas identified will require more studied response. Concerns involving "no-go" zones in judicial review and judicial disclaimers over matters preparatory to legislation will require the courts to self-correct. These matters compromise the superior courts' inherent jurisdiction to ensure that public bodies comply with the law. But the greatest hindrance to our law is the tenacious hold of Diceyan sovereignty doctrine. We need to rid ourselves of this cloying doctrine. The imperative for language that can explicate the interdependence, reciprocity and balance between the branches of government will become more acute as our rights-jurisprudence develops.

How, finally, might we rate our public jurisprudence? I suggest "B+". I can hear now my old headmaster's advice: "Doing well, but could do better."

¹⁴⁴ Inter alia the inability of the public-private law divide to settle "scope of review" doctrine in view of recent corporatisation and privatisation programmes, the lack of a developed concept of the "State" under Westminster constitutional law, the indeterminate scope of the "Crown" as a legal concept and its unsettling effect on legal doctrine, and the perceived subjugation of private property rights under the public planning processes of the Resource Management Act 1991.