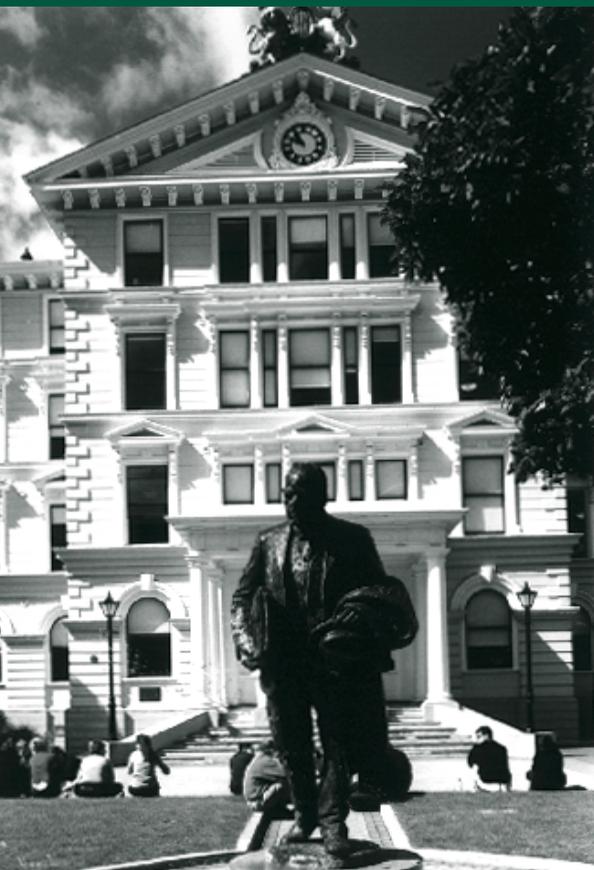


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## Democracy Through Law

by Lord Steyn

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To find out more about the Centre please contact the Administrator, The NZ Centre for Public Law, Faculty of Law, Victoria University of Wellington, PO Box 600, Wellington. Contact details are: Phone +64-4-463 6327, fax +64-4-463 6365, email [Claire.Blanchfield@vuw.ac.nz](mailto:Claire.Blanchfield@vuw.ac.nz). Web site: [www.vuw.ac.nz/nzcpl/](http://www.vuw.ac.nz/nzcpl/)

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# DEMOCRACY THROUGH LAW

LORD JOHAN STEYN

In his last case in the House of Lords Lord Cooke of Thorndon delivered the unanimous opinion of the Appellate Committee. On that occasion I said:<sup>1</sup>

. . . it is appropriate to pay tribute to [Lord Cooke's] massive contribution to the coherent and rational development of the law in New Zealand, in England and throughout the common law world. His opinion in the case before the House is characteristically lucid and compelling.

Like great cricketers great judges select themselves. Robin Cooke is in that small but select international band. A small country has produced a towering figure in the law. It is a great honour for me this evening to deliver the first Robin Cooke lecture under the auspices of Victoria University of Wellington. I have chosen what I hope you will regard as an important topic.<sup>2</sup> Lord Cooke will not agree with all I will say this evening. But on the testing ground of real cases I am reassured by the fact that when we sat together, as we often did, I almost invariably ended up on the same side as Robin.

It was however adventurous of the Dean to invite me to be the first lecturer in this series. He could not have been aware of my record. One example will suffice. Recently in *MacFarlane*<sup>3</sup> there was before the House of Lords a case of parents of an unwanted healthy child born as a result of negligent sterilisation advice. The parents wanted compensation for the cost of bringing up the child. Unanimously, but for different reasons, the House ruled against the claim. This decision was unpopular among barristers who conducted a profitable business in such cases. They invited the Law Lords to explain their decision. In cowardly fashion we all refused. But we could not escape ultimate scrutiny in legal journals. Professor Thompson savaged our reasoning.<sup>4</sup> He was very severe on my colleagues. He said that they had abandoned all principles of tort law. I thought he was going to say my judgment was a notable exception. Not a bit. He said that I had not only abandoned the law of tort but law itself.

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<sup>1</sup> *Delaware Mansions Limited and Others v Lord Mayor and Citizens of the City of Westminster* [2002] 1 AC 321, 324 E.

<sup>2</sup> The title was suggested to me by Professor Jeffrey Jowell's article "The Venice Commission: Disseminating Democracy Through Law" (2000) PL 675.

<sup>3</sup> *MacFarlane and Another v Tayside Health Board* (Scotland) [2000] 2 AC 59.

<sup>4</sup> Thompson, "Abandoning the Law of Delict?" (2000) Scots LT 43.

## ***I THE DEMOCRATIC IDEAL***

In Britain the press frequently criticise the power exercised by unelected judges. It is suggested that it is anti-democratic. This is a fundamental misconception. The democratic ideal involves two strands. First, the people entrust power to the government in accordance with the principle of majority rule. The second is that in a democracy there must be an effective and fair means of achieving practical justice through law between individuals and between the state and individuals. Where a tension develops between the views of the majority and individual rights a decision must be made and sometimes a balance has to be struck. The best way of achieving this purpose is for a democracy to delegate to an impartial and independent judiciary this adjudicative function. Only such a judiciary acting in accordance with principles of institutional integrity, and aided by a free and courageous legal profession, practising and academic, can carry out this task, notably in the field of fundamental rights and freedoms. Only such a judiciary has democratic legitimacy. The judiciary owes allegiance to nothing except the constitutional duty of reaching through reasoned debate the best attainable judgments in accordance with justice and law. This is their role in the democratic governance of our countries. At the root of it is the struggle by fallible judges with imperfect insights for government under law and not under men and women.

## ***II THE CRIMINAL LAW***

A primary function of the judiciary is, of course, to maintain the Queen's peace by enforcing the criminal law. How should the judiciary approach its task? Among judges a liberal view has gained the upper hand. The purpose of the criminal law is not punishment for its own sake. Its aim is to permit everyone to go about their daily lives without fear of harm to person or property. It promotes values of stability and order in which democracy can flourish for the benefit of all. It is the premise of our criminal justice systems that in the words of John Stuart Mill the only purpose for which power can be rightfully exercised over any member of a civilised community is to prevent harm to others. If this objective requires severe punishment, in a particular case, so be it. Above all, a modern judge must have in mind the values of the pluralistic, liberal and tolerant society of which he is a member, in the context of the triangulation of the interests of the accused, the victim and his family, and the public. Undoubtedly, a judge must be alive to the concerns of the public. The baying of a lynch mob, however it

manifests itself in modern society, can be dismissed with what Burke called the cold neutrality of the impartial judge. But the concerns of fair-minded citizens are of critical importance because public confidence is the pivot on which the criminal and civil justice systems rest. The rule of law is undermined if communities come to fear that the criminal law offers them no protection. That is why in England in recent years civil injunctions, backed up by criminal penalties, have been extensively used to buttress the criminal law, eg against young thugs who terrorise neighbourhoods. The practical advantage is, of course, that the hearsay rule does not apply in the civil proceedings for an injunction. On the other hand, expediency must not be allowed to prevail over justice. Sometimes there are tensions between competing values and intractable problems which one can identify but not entirely solve. Perhaps it is an illusion to think that all problems can be solved: sometimes one may have to settle for containment and the least bad choice.

### **III JUDICIAL REVIEW**

In my view judicial review is the ground on which the contours of a modern democracy are shaped. The theoretical underpinning of the principles of judicial review is important because it may affect their reach. The orthodox view in Britain is that the statute based part of judicial review is legitimised by the *ultra vires* doctrine. With the agreement of other Law Lords I repeated this mantra in 1999 in *Boddington v British Transport Police*.<sup>5</sup> Academic lawyers in England and New Zealand have argued persuasively that this theory is incomplete, formalist, contrived and fictional.<sup>6</sup> Britain has much to learn from New Zealand jurisprudence about the legal foundation of judicial review. I have found it instructive that by and large, your courts have not found it necessary to invoke the *ultra vires* doctrine. In *Peters v Davison* your Court of Appeal put the matter quite simply by saying that “the judicial review powers of the High Court are based on the central constitutional role of the court to rule on questions of law”.<sup>7</sup>

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<sup>5</sup> *Boddington v British Transport Police* [1999] 2 AC 143.

<sup>6</sup> Jeffrey Jowell QC, “Beyond the Rule of Law: Towards Constitutional Review” (2000) PL 119; Phillip A Joseph, “The Demise of Ultra Vires – Judicial Review in the New Zealand Courts” (2001) PL 354.

<sup>7</sup> *Peter v Davidson* [1999] 2 NZLR 164, 192.

As a department of state the judiciary is charged with the constitutional duty to control abuse of power by the state, its officials and emanations. In a democracy the rule of law itself legitimises judicial review. I now accept that the traditional justification in England of judicial review is no longer supportable. By overwhelming weight of reasoned argument the *ultra vires* theory has been shown to be a dispensable fiction.<sup>8</sup>

An examination of the architecture of judicial review requires consideration in particular of four matters, viz the principle of the separation of powers, the rule of law, the principle of constitutionality or legality, and the reach of judicial review.

#### **IV SEPARATION OF POWERS**

In all democracies there is a division of the departments of government between the legislature, executive and judiciary. Invariably there is a principle of separation of powers, ranging from a strong principle, as in the United States, to a comparatively weak one as in Britain, notably as between the legislature and executive. I am, however, only concerned with separation of powers between, on the one hand, the legislature and executive, and on the other hand, the judiciary. Even in this respect the principle of separation of powers is not absolute. On the other hand, the insulation of the judicial role from the executive and legislature is reinforced by the constitutional principles of judicial independence and the rule of law. How the line could be drawn is illustrated by the evolving jurisprudence on the power of the Home Secretary to decide if and when life sentence prisoners should be released. As a result of decisions of the European Court of Human Rights the system was judicialised in 1991 for discretionary life sentence prisoners (the most dangerous category of life sentence prisoners) and in 1997 for young persons found guilty of murder and detained during Her Majesty's pleasure. The Home Secretary continued to exercise his traditional power over mandatory life sentence prisoners for example, adult murders. In May 2002 European Court observed in *Stafford v The United Kingdom*.<sup>9</sup>

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<sup>8</sup> Bearing in mind the lesson of *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet (No2)* [2000] AC 119 I must insist that this view, and indeed all the views expressed in this lecture, are obviously subject to hearing further argument.

<sup>9</sup> *Stafford v The United Kingdom* (28 May 2002) Application no 46295/99.

the continuing role of the Secretary of State in fixing the tariff and in deciding on a prisoner's release following its expiry, has become increasingly difficult to reconcile with the notion of separation of powers between the executive and the judiciary, a notion which has assumed growing importance in the case-law of the Court.

This issue returns to the House of Lords in November this year when, exceptionally, it will be decided by seven rather than five Law Lords.

In Britain there are still the historical anomalies of the Lord Chancellor sitting from time to time in the Appellate Committee of the House of Lords and the privilege of Law Lords to speak and vote in the legislative chamber. Save to say these anomalies are in the process of withering away in scope and importance before our very eyes, I will not on this occasion discuss the Lord Chancellor's dwindling judicial role.<sup>10</sup> It is, however, interesting to reflect that the probability is that rightly New Zealand will soon have its own Supreme Court and that in the United Kingdom the natural and obvious development of a Supreme Court is not presently high on the agenda of a government dedicated to constitutional reform.<sup>11</sup> What happens next in England may be dictated by events.

Threats to judicial independence usually come from governments irked by a judiciary fulfilling its traditional role of standing between the executive and the citizen. The observation of Nolan LJ (subsequently Lord Nolan) in *M v Home Office and Another*<sup>12</sup> is pertinent. He said that the proper constitutional relationship between the executive and 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. This is the constitutional principle of separation of powers in action. In Britain it is sometimes necessary to add the elementary proposition that government policy is

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<sup>10</sup> I discussed this subject under the heading "The Case for a Supreme Court" in my 2002 Neill Lecture delivered at All Souls, Oxford: 118 *Law Quarterly Review* 382. Shortly afterwards Lord Bingham of Cornhill delivered a lecture entitled "A New Supreme Court for the United Kingdom" which was published by The Constitution Unit, London. Lord Cooke has argued to the contrary: "The Law Lords: An Endangered Heritage".

<sup>11</sup> The Senior Law Lord, Lord Bingham of Cornhill, advocated such a development in the United Kingdom in *M v Home Office and Another* [1992] 1QB 270.

<sup>12</sup> *M v Home Office and Another*, above 11, 314 – 315 A.

not a source of law. Unquestionably separation of powers is a cornerstone of judicial review.

## **V THE RULE OF LAW**

From the time of Dicey to the present day the concept of the rule of law has been used in a number of different senses. The authors of a book called *The Noble Lie* observed that the “rule of law, elastic though it may be, comes as close as anything to signposting our unique compact”.<sup>13</sup> There are two core meanings of the rule of law. The first is a jurisprudential concept. The rule of law is a norm of institutional morality. It conveys the idea of government under law. But that is not enough. Totalitarian regimes, such as Nazi Germany and South Africa in the apartheid era, often achieved their oppressive aims by scrupulous observance of legality. During the Second World War some Jews were in prison in Germany as a result of sentences imposed before the War broke out. The Gestapo did not touch them. When they had served their sentences the Gestapo waited for them at the gate. They were then taken to the death camps where they died. So the formal rule of law was observed.<sup>14</sup> The rule of law as a principle of institutional morality utterly rejects the instrumentalist conception of law that enables an oppressive government to attain its aims by the use of law. It addresses the moral dimension of public power. It contemplates a civil society under equal and just laws. This is the sense in which the rule of law is expressly mentioned in a preamble to the European Convention on Human Rights. It permeates the later, more comprehensive and more sophisticated international instrument ratified by New Zealand, namely the International Covenant on Political and Civil Rights.<sup>15</sup> In this sense the rule of law is a fundamental moulding force of democratic values.

In its second sense the rule of law is a principle of law. Justice Scalia called it a law of rules.<sup>16</sup> That is a rather impoverished concept. The rule of law means

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<sup>13</sup> I Harden and N Lewis, *The Noble Lie: The British Constitution and the Rule of Law* (Hutchison, London, 1986).

<sup>14</sup> I owe this example to Aharon Barak, the President of the Supreme Court of Israel.

<sup>15</sup> International Covenant on Political and Civil Rights (19 December 1966) 999 UNTS 171.

<sup>16</sup> Hon Scalia “The Rule of Law as a Law of Rules” (1989) 56 U Chi L Rev 1175

much more. It is an overarching principle of constitutional law. It has many applications. It captures the spirit of liberty which is a major theme of the common law. Whatever is not specifically forbidden, individuals and their enterprises are free to do. By contrast the government and its agencies may only do what the law permits: what is done in the name of the people requires examination and justification. Since the Second World War the reach of the rule of law has been expanded by the lessons of the Holocaust and the growing recognition that human rights must be effectively protected. Where a human rights instrument proves inadequate to its task the rule of law is the safety net. Its terrain of application is closely linked with the values of a liberal democracy in which the pluralism of our societies is recognised and the rights of minorities are protected.

A central focus of the rule of law is to constrain the abuse of official power. An interesting example of the application of the rule of law is *Venables and Thompson* where the majority of the House of Lords quashed the Secretary of State's decision setting a tariff for the custodial term to be served by child murderers.<sup>17</sup> One factor was that the Secretary of State had based his decision on a press campaign for an increase in the tariff. The rule of law abhors arbitrariness. In *Wheeler v Leicester City Council* a local authority withdrew the licence of a football club because some of their members had visited South Africa.<sup>18</sup> There was, however, no law prohibiting contact with South Africa. The local authority's decision was held to be contrary to the rule of law. Legal certainty is a fundamental requirement of the rule of law. It enforces minimum standards of substantive and procedural fairness through our public law.<sup>19</sup> It has been invoked by judges in many diverse circumstances.<sup>20</sup> There is no closed category of cases in which it may be applied.

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<sup>17</sup> *R v Secretary of State for the Home Department ex p Venables and Thompson* [1998] AC 07.

<sup>18</sup> *Wheeler v Leicester City Council* [1985] AC 1054.

<sup>19</sup> *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539, 59.

<sup>20</sup> Compare Jeffrey Jowell, "The Rule of Law Today", in Jowell and Oliver (eds) *The Changing Constitution* (3 ed, Oxford Clarendon, 1994) 57-77.

## VI THE PRINCIPLE OF CONSTITUTIONALITY.

The supremacy of Parliament no longer means what it did in the time of Dicey. It is a more complex concept. Subject to Parliament's power to legislate expressly to withdraw from the present 15-nation European Union – an unthinkable hypothesis – our membership created a divided concept of legal sovereignty. This is illustrated by the second *Factortame* case.<sup>21</sup> There was a clash between community law and a later Act of the United Kingdom Parliament. Within the Community legal order, the Queen in Parliament is not sovereign. Community law is supreme. The House of Lords granted an injunction to forbid a Minister from obeying the act of Parliament. The act was disappplied. Only an express enactment of Parliament could terminate our membership of the European Union. The view may also prevail that arguments that the Human Rights Act 1998 was impliedly repealed by a later statute would not be upheld by the courts: it is a constitutional measure and only an express repeal may be recognised. Similarly, in regard to the legislation devolving powers to Northern Ireland, Scotland and Wales, the better view may be that there is no scope for an implied repeal. If Parliament wishes to abrogate a political settlement of a constitutional character, it will have to say so expressly. The Westminster Parliament has qualified its own sovereignty.

In the *International Tin Council* case the House of Lords held that treaties which are not incorporated into domestic law by Parliament, cannot give rise of rights or obligations.<sup>22</sup> This view is now being questioned. The rationale of the principle is that the executive must not be allowed to bypass Parliament and oppress citizens by entering into treaties which are not incorporated into domestic statute law. Human rights treaties ratified by the executive are untouched by this rationale. It is arguable that where the reason for the rule stops the reach of the rule may end. There is scope for the evolution of a more realistic notion, which may place in a special category decisions of international human rights tribunals to which a country submitted pursuant to an unincorporated treaty. This issue has not yet been addressed. But there has been

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<sup>21</sup> *Factortame v Secretary of State for Transport (No 2)* [1991] AC 603, 658-659.

<sup>22</sup> *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry International Tin Council* [1990] 2 AC 418.

an important development. By resort to a constitutional due process clauses the Privy Council in two recent cases held that condemned men in Caribbean countries could not be executed until the determination of their appeals to the Inter-American Human Rights Committee, the jurisdiction of which depended on an unincorporated treaty.<sup>23</sup> This development gnaws at the vitals of the doctrinaire reasoning in the *International Tin Council*<sup>24</sup> case. Lawrence Collins has said that “it may be a sign that one day the courts will come to view that it will not infringe constitutional principle to create an estoppel against the Crown in favour of individuals in human rights cases”.<sup>25</sup>

Where does this leave the relationship between Parliament and the courts? The traditional view is that Parliament has the power to pass any legislation other than legislation purporting to bind itself for the future. There has been a vigorous debate in which the supremacy of Parliament has been questioned. I take the traditional view. Parliament has the sovereign legal power to legislate as it thinks fit. The courts will give effect to the clearly expressed will of Parliament. The courts have said so on countless occasions. On the other hand, it is of fundamental constitutional importance that the courts must interpret and apply legislation on the assumption that Parliament does not write on a blank sheet. Parliament legislates for a modern liberal democracy. This gives rise to what Rupert Cross described as a presumption of general application which operates as a constitutional principle.<sup>26</sup> General words in a statute should not be allowed to abrogate fundamental rights. Yet until recently this principle remained dormant. In 1998 in *Pierson*<sup>27</sup> Lord Browne-Wilkinson and I in separate judgments tried to bring together the rich strands of authority in support of this principle. It was not however part of the ratio of the decision. Two years later in *Simms*<sup>28</sup> the House of Lords authoritatively restated the principle. In that case the

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<sup>23</sup> *Thomas v Baptiste* [2000] 2 AC 1; *Lewis v Attorney-General of Jamaica* [2000] 3 WLR 1785 (PC).

<sup>24</sup> *International Tin Council* above n 21.

<sup>25</sup> Lawrence Collins “Foreign Relations and the Judiciary” (2002) 51 ICLQ 485, 496.

<sup>26</sup> Rupert Cross *Statutory Interpretation* (3 ed, Butterworths, London, 1995) 166.

<sup>27</sup> *R v Secretary of State for the Home Department ex p Pierson* [1998] AC 539, 575D.

<sup>28</sup> *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 131.

rationale and reach of the principle was aptly described by Lord Hoffmann as follows:

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

It is now firmly re-established in English law.<sup>29</sup> If this principle is followed by your courts, it will strongly reinforce the protection of fundamental rights in New Zealand.<sup>30</sup>

## **VII THE REACH OF JUDICIAL REVIEW**

The paradigm of judicial review is the exercise of public power under statute. It has however long been recognised that judicial review extends to trade unions, trade associations and corporations with *de facto* monopoly power.<sup>31</sup> But the reach of judicial review goes wider. In *R v Panel on Take-overs and Mergers, ex p Datafin plc*<sup>32</sup> the Court of Appeal held that decisions of the Take-over Panel, which exercises its functions as part of a self-regulatory framework, are judicially reviewable. For the Court of Appeal the decisive factor was not the source of the power of the Take-over Panel but the nature of the functions it exercised. The Court of Appeal regarded the common law as the true foundation of this branch of public law. In *Electoral Commission v Cameron*<sup>33</sup> the New Zealand Court of

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<sup>29</sup> *R v Special Commissioner and Another, Ex parte Morgan Grenfell & Co Ltd* [2002] UK HL 21.

<sup>30</sup> Compare the observation of Elias LJ and Tipping J in *R v Pora* [2001] 2 NZLR 37, 50.

<sup>31</sup> Craig, *Constitutions, Property and Regulation* [1991] PL 538.

<sup>32</sup> *R v Panel on Datafin plc* [1987] QB 815.

<sup>33</sup> *Electoral Commission v Cameron* [1997] 2 NZLR 241, CA.

Appeal came to a similar conclusion. It is true that in some decisions in England a different test has been employed, namely whether it can be said that “were no self regulatory body in existence, Parliament would almost inevitably intervene to control the activity in question”.<sup>34</sup> This is fiction run riot. Murray Hunt has convincingly explained:<sup>35</sup>

The test for whether a body is ‘public’, and therefore whether administrative law principles presumptively apply to its decision-making, should not depend on the fictional attribution of derivative status to the body’s powers. The relevant factors should include the nature of the interests affected by the body’s decisions, the seriousness of the impact of those decisions on those interests, whether the affected interests have any real choice but to submit to the body’s jurisdiction, and the nature of the context in which the body operates. Parliament’s non-involvement or would-be involvement, or whether the body is woven into a network of regulation with state underpinning, ought not to be relevant to answering these questions. The very existence of institutional power capable of affecting rights and interests should itself be a sufficient reason for subjecting exercises of that power to the supervisory jurisdiction of the High Court, regardless of its actual or would-be source.

In my view this is the correct approach. If this reasoning is correct, it calls into question the decision of the English Court of Appeal that the Jockey Club is not amenable to judicial review.<sup>36</sup> After all, those wanting to race their horses had no alternative but to subject themselves to the rules of the Jockey Club. Why should it be beyond the reach of judicial review? There is, however, a more important dimension. In an era when it is government policy to privatise public services, and to contract out activities formerly carried out directly by public bodies, it

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<sup>34</sup> *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex p Wackmann* [1993] 2 All ER 249, and see *R v Football Association Ltd ex p Football League* [1993] 2 All ER 833.

<sup>35</sup> Murray Hunt “The Province of Administrative Law” in Michael Taggart (ed), *Constitutionalism and the Contractualisation of Government in the United Kingdom*, 32-33; see also Lord Justice Sedley, *Freedom, Law and Justice*, Hamlyn Lectures, 1999, Chapter 2 (Law: Public Power and Private Power) 19.

<sup>36</sup> *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 1 WLR 1993; *R v Football Association Ltd, ex p Football League Limited* [1993] 2 All ER 833.

may be necessary to develop a functional test of reviewability in order to hold accountable entities who de facto perform public functions.<sup>37</sup>

### **VIII THE EVOLUTION OF CONSTITUTIONAL RIGHTS.**

Britain has no written constitution. Nevertheless, the courts have recognised certain fundamental rights as constitutional. The courts protect as constitutional the right of participation in the democratic process, equality of treatment, freedom of expression, and religious freedom. Another constitutional principle is that all citizens (including prisoners convicted of heinous crimes) have a right of unimpeded access to courts. Even before the incorporation of the European Convention on Human Rights into English law the courts held that everybody has an absolute constitutional right to a fair trial which if breached must lead to the setting aside of the conviction.<sup>38</sup> By contrast considerations of proportionality apply to the requirements for the content of a fair trial.

What is the significance of classifying a right as constitutional? It is meaningful. It is an indication that added value is attached to the protection of the right. It strengthens the normative force of such rights.<sup>39</sup> It virtually rules out arguments that such rights can be impliedly repealed by subsequent legislation.<sup>40</sup> Generally only an express repeal will suffice. The constitutionality of a right is also important in regard to remedies. The duty of the court is to vindicate the breach of a constitutional right, depending on its nature, by an appropriate remedy.

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<sup>37</sup> Part 54 of the Civil Procedure Rules speaks inter alia of the review of “a decision . . . in relation to the exercise of a public function”. Compare: *R (on the application of Heather and Others) v Leonard Cheshire Foundation and Another* [2002] 2 AER 936. A comprehensive review of the pre-Human Rights Act case law is to be found in the judgment of Moses J. *R v Servite Houses, ex p Goldsmith* (2000) 3 CCL Rep 354.

<sup>38</sup> *R v Brown (Winston)* [1994] 1 WLR 1599; *R v Bentley* (2001) 1 Cr App Rep 307. Now the absolute guarantee of a fair trial is governed by article 6.1 of the European Convention: the relevant case law is reviewed in *Mills v Lord Advocate* (Scotland Act), 22 July 2002, (PC).

<sup>39</sup> *Mohammed v The State* [1999] 2 AC 111.

<sup>40</sup> *Thoburn and Others v Sunderland City Council and Others* (18 February 2002, DC).

The importance of the development of constitutional rights has not come to an end with the advent of the Human Rights Act. One illustration is sufficient. The anti-discrimination provision contained in Article 14 of the European Convention is parasitic inasmuch as it serves only to protect other Convention rights. There is no general or free-standing prohibition of discrimination. This is a relatively weak provision. On the other hand, the constitutional principle of equality developed domestically by English courts is wider. The law and the government must accord to every individual equal concern and respect for their welfare and dignity. Everyone is entitled to equal protection of the law, which must be applied without fear or favour. Except where compellingly justified distinctions must never be made on the grounds of race, colour, belief, gender or other irrational ground. Individuals are therefore comprehensively protected from discrimination by the principle of equality. This constitutional right has a continuing role to play. The organic development of constitutional rights is therefore a complementary and parallel process to the application of human rights legislation.

## **IX      *BILLS OF RIGHTS***

Ten years after your Bill of Rights came into force the United Kingdom first acquired a Bills of Rights in the modern sense. Time only allows me to comment on a few perspectives.<sup>41</sup> Values of liberty, equality and justice underlie Bills of Rights. In the decision of the Privy Council in *Matadeen v Pointu*, Lord Hoffmann, giving the judgment of the Privy Council, said:<sup>42</sup>

What the interpretation of commercial documents and constitutions have in common is that in each case the court is concerned with the meaning of the language which has been used. As Kentridge AJ said in giving the judgment of the South African Constitutional Court in *State v Zuma* ‘ If the language used by the

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<sup>41</sup> A comprehensive and valuable review is to be found in two recent lectures given in New Zealand by Lord Lester of Herne Hill: “The Magnetism of the Human Rights Act 1998; Parliamentary Scrutiny of Legislation under the Human Rights Act 1998”. The first will be published in the New Zealand Law Review; and the second in the Victoria University of Wellington Law Review and European Human Rights Law Review.

<sup>42</sup> *Matadeen v Pointu* [1999] AC 94, 108F.

lawgiver is ignored in favour of a general resort to “values” the result is not interpretation but divination.<sup>43</sup>

This is an important observation. So far as it goes it is also a valuable statement. But it has wrongly been pressed into service in aid of the austere argument that values are irrelevant to questions of interpretation of Bills of Rights in constitutions. That cannot be right. The strait-jacket of legal logic is not enough for a human rights system. Bills of Rights aim to promote the rule of law and standards of decency and justice in fair and tolerant democracies. Bills of Rights in Commonwealth countries are the progeny of the Universal Declaration of Human Rights (1948) and are a distillation of ethical values. An assessment of the weight of competing moral values, such as liberty and equality, or individualised justice and stability and order needed in a democracy, are of the essence of decision making under Bills of Rights.

The Human Rights Act 1998 has created, and will continue for sometime to create, changes in murkier areas of English law. It opened up a new landscape. Historically English lawyers have been sceptical about rights based legal reasoning. Nevertheless, in the last twenty years such a system has slowly evolved. Now there has been a decisive shift towards a rights based system. A legal culture of demanding justification for inroads on fundamental rights and freedoms now prevails. This re-examination of existing law is a profoundly valuable one for the United Kingdom. Its impact will extend beyond the limits of the statute. It did not create a separate regime. There is one legal system in which the common law, statute law and the 1998 Act coalesce. As English courts become used to applying the principle of proportionality in convention right cases, they are likely also to apply it in other cases whenever logically appropriate. In this sense the German Federal Constitutional Court has captured the right nuance by holding that the German Bill of Rights has a radiating effect throughout the legal system.<sup>44</sup> That does not mean that I would argue for a direct horizontal application of our bill of rights. I now turn briefly to this complex subject.

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<sup>43</sup> *State v Zuma* (1995) 4 BCLR 401, 412.

<sup>44</sup> B S Markesinis *Always on the Same Path*, Volume II (2001, Hart Publishing) Chapters 7 and 8.

Bills of rights apply vertically, viz they protect fundamental rights of individuals against the state and its agencies. The question is whether a Bill of Rights also has direct horizontal application between private parties. Generalisations on this subject are unwise. It depends crucially on the terms of each instrument. There has been a vigorous debate on the point in England.<sup>45</sup> The importance of the point can be illustrated by the potential scope of guarantee of privacy in the Convention. English law knows no tort of privacy. Does the guarantee of privacy under the Convention empower the English courts to create a free-standing tort of privacy? The matter is still undecided and any view must be provisional. I am inclined to share the view of those who argue that the structure of our Act rules out direct horizontal application. If this is right, it is beyond the power of the English courts to develop a general tort of privacy. On the other hand, by its radiating effect the Act may indirectly lead to the incremental development of existing remedies which protect rights of privacy e.g. based on a duty of confidentiality. Some may be disappointed by this unheroic stance. For my part, as I said in *Simms* with the agreement of a majority, freedom of expression in a democracy is the “primary right” and “without it an effective rule of law is impossible”. Freedom of speech is the lifeblood of democracy. Lincoln’s participatory democracy - government of the people, by the people, for the people – can only flourish if there is freedom of speech and, may I add, freedom of information.<sup>46</sup> Inroads on freedom of expression must therefore be carefully contained. Even the excesses of the tabloid press in England may have to be tolerated for the larger purpose of not undermining freedom of expression.

There are, of course, important structural differences between our bills of rights. The English model was framed with the benefit of experience of other Commonwealth models including the New Zealand Bill of Rights Act 1990. The strong interpretative obligation under section 3 of the Human Rights Act 1998, linked with the express power and duty under section 4 to make a declaration of incompatibility, affords stronger protection of fundamental rights than your

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<sup>45</sup> Sir William Wade QC “Horizons of Horizontality”, (2000) 116 LQR 217 argued in favour of direct horizontality. Lord Lester of Herne Hill QC and David Pannick QC “The Impact of the Human Rights Act: The Knights Move” (2000) 116 LQR 380 explained the structural arguments against direct horizontality.

<sup>46</sup> *R v Secretary of State for Home Department, Ex P Simms* above, n 26, 126

system. On the other hand, my impression is that your Act has been successful in mandating constitutional adjudication. Your Court of Appeal has placed your jurisprudence on a secure foundation in developing the doctrine of an implied remedial jurisdiction to issue declarations of inconsistency.<sup>47</sup> The good sense of this approach is anchored in democratic values. I am confident that the New Zealand Parliament would not wish to gather en passant in substantial judgments that it has passed legislation which is inconsistent with the 1990 Act. Rather it would wish your Court of Appeal to address the issue directly so that the public and Parliament know how the judicial branch of government views matters. Given this development, the divergence between our bills of rights is less marked than may at first glance appear. With some diffidence I would, however, suggest that New Zealand could profitably consider creating a Parliamentary Committee on Human Rights, like our Joint Committee on Human Rights which is empowered to consider matters relating to human rights in the United Kingdom, excluding individual cases. It may strengthen the scrutiny of legislation in New Zealand. It is my impression that this can be done without legislation under the Standing Orders of your Parliament.<sup>48</sup>

## **X INCHING TOWARDS BECOMING CONSTITUTIONAL STATE**

Having sketched some steps along the road towards the constitutionalisation of public law, one may pose the question whether our countries can now be described as constitutional states. For England the answer at present must be no. But the landscape is changing. I mention three positive developments in Britain, ranging from the banal to the fundamental. First, by and large, English judges no longer refer to subjects: they speak about citizens. Secondly, historically in English law the state had no legal identity and the state was not a legal concept.<sup>49</sup>

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<sup>47</sup> *Moonen v Film & Literature Board of Review* [2000] 2 NZLR 9; *R v Poumaka* [2000] 2 NZLR 695; compare *R v Pora* 2001 2 NZLR 37: I have had the benefit of the examination of this subject by Philip A Joseph "Constitutional Law" (2000) NZ Law Rev 301, 313-319; and Andrew S Butler, "Judicial Indications of Inconsistency – A New Weapon in the Bills of Right Armoury?" (2000) NZ Law Rev 43.

<sup>48</sup> Compare the Companion to the Standing Orders and Guide to the Proceedings of the House of Lords, 2000, para 3.31; para 8.20-23; and para 9.53. The second lecture of Lord Lester of Herne Hill above n 37 is particularly illuminating.

<sup>49</sup> Patrick Birkinshaw, "The Main Features of British Constitutional Law", British Report in T Schwarz (ed) *Die Entstehung einer europäischen Verfassungsordnung*, (2000).

A reason may have been the idea encapsulated by the claim of Louis XIV that “L’etat c’est moi”. Or perhaps the fact that the United Kingdom has four law districts – England, Wales, Northern Ireland, and Scotland – may have played a role. In any event, this mystification has now disappeared. The state has become a legal concept. Thirdly, the idea that injunctive relief could not be granted against Ministers of the Crown, or only exceptionally, lingered on in our system.<sup>50</sup> It was a relic of an age of deference towards Ministers of the Crown. In a recent case from Grenada the Privy Council has held that Ministers have no immunity or quasi immunity. The rule of law applies even to the most powerful holders of office.<sup>51</sup> This is a development of constitutional and symbolic significance. England can fairly claim to be inching towards becoming a constitutional state. And New Zealand is already thereabouts.

## **XI        CONSTITUTIONALISM**

That brings me to the principle of constitutionalism.<sup>52</sup> It is neither a rule nor a principle of law. It is a political theory. It holds that the exercise of government power must be controlled in order that it should not be destructive of the very democratic values which it was intended to promote. It requires of the executive more than loyalty to the existing constitution. It is concerned with the merits and quality of institutional arrangements. In aid of political liberty it sets minimum standards of constitutional government. Two particular applications of this political theory are important. It is not sufficient that the holders of high office are public spirited men of great competence and honour. What matters is that the institutional arrangements must provide for effective control of the abuse of executive power. The second feature is that absolute executive power must be avoided by a diffusion of authority. This can be achieved by nurturing independent centres of decision making. Such autonomous centres introduce checks and balances in a democratic system. Thus at the apex of our constitutional system there is the neutrality of the sovereign which is the essential and indispensable constitutional pivot on which our entire unwritten constitution

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<sup>50</sup> *M v Home Office* [1994] AC 377.

<sup>51</sup> *Gairy v The Attorney-General of Grenada*, 19/6/2001.

<sup>52</sup> I have drawn on my article in 1997 PL 83. I repeat my acknowledgement of my indebtedness to M J C Vile *Constitutionalism and the Separation of Powers* (1967).

depends. A politically neutral civil service is a vital centre of independence. So is an independent police force. A wholly independent academic and practising legal profession is a substantial check on absolute executive power. A free press reflecting diverse points of view is a great servant of the cause of democracy.

Constitutionalism is not often at the top of the agenda of business of governments. But there has been progress. The Bank of England Act 1998 gave the Bank of England independence in the setting of interest rates. By legislation parliament created a Scottish Parliament and Assemblies for Northern Ireland and Wales. The post of a Mayor for London was created. A plan to create Regional Assemblies in regions of England is far advanced. Following a number of public health scares, an independent Food Standards Agency has been set up under the Food Standards Agency Act. A Freedom of Information Act 2001 has been enacted. Unfortunately, it is a rather weak measure, notably because the information commissioner is given limited powers. Yet overall constitutionalism has been advanced.

## **XII THE EUROPEAN DIMENSION AND COMPARATIVE LAW**

The isolation of England from European legal culture has ended. The dominant influence has been our membership of the European Economic Community and the European Union. The direct impact on our substantive law has been enormous. By analogy general principles of community law have influenced the development our public law, eg in regard to principles of non-discrimination, legal certainty, legitimate expectations, proportionality, and the variable intensity of judicial review depending on the interests at stake. The European Convention on Human Rights, and the jurisprudence of Strasbourg, has brought us into the mainstream of the Human Rights movement. Many multi-lateral treaties are incorporated into our law. Such treaties are products of a mixture of civil law and common law influences and techniques. Our universities teach not only community law but the modern *jus commune* of Europe. Our country is a European liberal democracy. In the words of the Treaty on European Union, as amended by the Amsterdam Treaty, the Union “is founded on” the principles of liberty, democracy, and respect for human rights and fundamental freedoms.<sup>53</sup> Those values must inevitably be the context

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<sup>53</sup> TEU, Arts 6, 7. See also the commentary in Craig and De Burca, *EU Law: Text, Cases, and Materials* (2 ed 1998), 332-333.

against which judges will have to interpret statutes and develop the common law. The process of our integration into the legal culture of Europe through directives and regulations is irreversible and continuing. And it cannot but strengthen the constitutionalisation of our public law.

As a result of the European dimension, and the work of writers such as Professor Basil Markesinis QC of University College, University of London, it is not too bold to say that comparative law has come of age. Our highest court expects, for example, that counsel should research the case law and literature of Australia, Canada and New Zealand and other countries in cases where the possibility of common problems exist. So in *MacFarlane* the Law Lords were taken on a tour d'horizon of the law and practice in many common law and civil law jurisdictions. This review showed that in most jurisdictions the cost of bringing up a healthy unwanted child is not recoverable. In New Zealand there is, of course, a no-fault compensation scheme. But we took account of two decisions of the Accident and Compensation Authority, which held that there is no causal connection between medical error and a cost of raising such a child. This case demonstrates that the discipline of comparative law does not aim at a poll of the solutions adopted in different countries. It has the different and inestimable value of sharpening our focus on the weight of competing solutions. In this way a judgment of the Canadian Supreme Court led the House of Lords recently to depart from earlier English authority and to rule that the owners of a boarding house may be vicariously responsible for the warden's sexual abuse of boys.<sup>54</sup> Making due allowance for cultural differences, however, it is in the field of constitutional law, public law and human rights law, that our system has profited most from comparative techniques. And for us in England the intellectually rigorous judgments of your powerful Court of Appeal have been of inestimable value.

Nowadays, the cross-pollination between international jurisdictions is accelerating. There is an international dialogue among appellate courts.<sup>55</sup> It is

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<sup>54</sup> *Lister and Others v Hesley Hall Limited* [2002] 1 AC 215 and *Bazley v Carry* (1999) 174 DLR (4th) 45.

<sup>55</sup> Madam Justice L'Heureux Dube of the Canadian Supreme Court has eloquently described this process: "The Importance of Dialogue: Globalization And The International Impact of the Relinquish Court" (1998) 34 *Tulsa Law Jnl* 15.

right that the appellate courts of our countries should play a full part in this process. When the link with the Privy Council has been cut, and you have your own Supreme Court, the time may be ripe for creating regular judicial exchanges between our two countries. I can assure you that my colleagues will queue up to visit this beautiful country.