Constitutions and Courts

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I am conscious of some presumption in addressing you on the subject of Constitutions and Courts. Yours is after all a legal system which operates under a written constitution supervised by a constitutional court with power to strike down legislation. I am from a jurisdiction in which the constitutional arrangements are largely unwritten, the power of the legislature is generally thought to be plenary, and lawyers in general continue to be mesmerised by Diceyan orthodoxy.

But there are three reasons why I would like to attempt a New Zealand perspective on this topic. In the first place, I have never before given an Oration. And I thought I might be permitted some indulgence in revisiting a topic I canvassed in a dissertation for my degree more than 30 years ago. You will be relieved to know that I have changed my mind completely in the intervening years. Indeed the only excruciating experience in preparing for this event has been confronting again myself at twenty. I had not realised how unattractive the certainty of youth is. And indeed, the unattractiveness of certainty is one of the subplots of what I want to say.

More importantly, the sands upon which both our constitutions are based are shifting. Quite apart from the major changes now clearly foreshadowed in both Australia and New Zealand, international obligations are challenging our constitutions and courts. Systematic stocktaking is timely. And the tragedies being played out in the Pacific suggest that commitment to constitutional fundamentals and the requirement of legality should not be taken for granted.

My third reason in attempting this topic is because it is an opportunity to raise with a public audience the role of the courts in our legal systems. That role is not well understood, particularly in New Zealand where our constitutional arrangements are largely unwritten. But I do not get the impression that matters are much better on this side of the Tasman. It should I think be a matter of concern to all of us that the functions of the courts are not widely understood within the community. Without proper understanding, the position of the courts is fragile and the balance of our constitutional arrangements is easily disturbed. Judicial decision-making in areas of controversy for the community can too easily be characterised as usurpation of power by unelected and unaccountable judges. That is a worryingly simple message which cannot be simply answered. It may not in fact be convincingly addressed by a serving judge. I always think it is faintly embarrassing to hear judges insist upon their constitutional role. Too

often they can sound defensive or power-grabbing. I am conscious that the perspective of a judge may be a limited one, but I offer my comments as a contribution to a wider debate, which is important and timely.

My theme is law and the function of the courts in upholding it against the actions of the executive and the legislature.

This "constitutional" role for the courts has not caused great anxiety in Westminster-derived legal systems, where challenges to legislation have been based upon restrictions on legislative competence or process imposed by "higher order" law, such as through a written constitution or Act of the Imperial Parliament.[1] Colonial legislation was held invalid by local courts as well as the Privy Council, even in New Zealand.[2] So our higher courts have exercised judicial review of legislation in the past, although this role has largely been forgotten in New Zealand, not only in the wider community, but also by lawyers.

Although in Australia the Commonwealth Constitution contains no specific reference to the role of the High Court in ruling on the validity of legislation, colonial history and the model of the United States were well-understood by the delegates to the 1898 Sydney constitutional convention.[3] It was plainly intended that the High Court undertake the function of judicial review of legislation for constitutional validity.[4]

The matter causes rather more difficulty in New Zealand. Since 1973, when the "peace order and good government" rudimentary restrictions of the New Zealand Constitution Act 1852 (UK)[5] were removed, the New Zealand Parliament has had untrammeled powers to make laws.[6] By the Constitution Act 1986, which has finally replaced the Imperial Constitution Act, the New Zealand Parliament is confirmed in "full power to make laws".[7] Whether this power is fettered in any way by the scheme of the Constitution Act, which provides separately for the Sovereign, the Executive, the Legislature and the Judiciary has not yet arisen for determination in New Zealand.[8] Nor has it been determined whether the legislature is constrained by implied constitutional principles not expressed in the Constitution Act.[9] It remains an open question

[1] See, for example, *Attorney-General for NSW v Trethowan* [1932] AC 526; *Bribery Commissioner v Ranasinghe* [1965] AC 172; *R v Lander* [1919] NZLR 305.
[2] See, for example, *Lander*, supra note 1.
[3] See the speech of Isaac Isaacs to the Sydney constitutional convention, *Convention Debates* (Sydney, 1898) 283.
[4] Mason, "The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience" (1986) *Federal Law Review* 1, 3.
[5] Which, incredibly, had served us since representative government was first granted to New Zealand.
[6] In fact, it is arguable that the colonial formula of "peace order and good government" contained no limitations upon the law making of the local legislatures.
[7] Constitution Act 1986, s 15.
[8] The arguments considered in *Liyanage v The Queen* [1967] 1 AC 259 and *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 might arise under the Constitution Act 1986 if there was usurpation of judicial power by legislation.
[9] See the discussion in *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154.

whether any such constraints would be amenable to judicial review. The status of the Constitution Act as an ordinary act of the New Zealand legislature means that any challenge to legislative validity will raise questions about implied repeal and a ride on what has been called the "merry-go-round" of the sovereignty of Parliament.[10]

None of this deterred Mr Shaw, an unfazed litigant in person. He recently asked the New Zealand Court of Appeal to declare part of the Income Tax Act 1976 to be invalid because it was contrary to the Magna Carta.[11] Under the Declaratory Judgments Act 1908, application may be made to the High Court for a declaratory order as to the "construction or validity" of a statute. At the time of the enactment of this provision in 1908, the Parliament of New Zealand was still subject to constraints upon its law-making powers contained in the Imperial Constitution Act. The power seems to have been overlooked in litigation until resorted to by Mr Shaw.

The Court held that the Declaratory Judgments Act did not give New Zealand courts the power to consider the validity of legislation which conformed with the manner prescribed by law for the creation of legislation.[12] Significantly, the Court did accept a responsibility under the Act to ensure that a statute is properly enacted:[13]

> In other words the Court may determine whether Parliament itself has followed the laws that govern the manner in which legislation is created. Parliament is subject to law just like every other person and body in New Zealand; it is bound by statutory requirements.

The Court of Appeal resisted an invitation to enter into the controversy whether in circumstances of legislative encroachment on fundamental rights the courts could seek to limit the power of Parliament. It referred to dicta of the former President of the Court of Appeal, Sir Robin Cooke, suggesting that there are substantive legal limits on the law-making power of Parliament[14] and to the contrary view expressed by Justice Kirby in the New South Wales Court of Appeal that judges may not deny "loyal respect to the commands of Parliament by reference to suggested fundamental rights that run 'so deep' that Parliament cannot disturb them".[15] But the Court found that Mr Shaw's grievance was not

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[10] Requiring reassessment of and consideration of Diceyan orthodoxy (see, for example, *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590).

[11] *Shaw v Commissioner of Inland Revenue*, supra note 9. Magna Carta 1297 (25 Edw.1), c 29 remains in force in New Zealand by the Imperial Laws Application Act 1988. The applicant for the declaration sought to invoke Magna Carta 1215, c 12, which he argued applied in New Zealand as part of the common law of England preserved by s 5 of the Imperial Laws Application Act 1988.

[12] Supra note 9, at 157.

[13] Ibid.

[14] See, for example, *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390; *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398.

[15] *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 405.

one which "could... lead the Court to consider revisiting conventions so fundamental to New Zealand's constitutional structure".[16]

Although the position in New Zealand remains uncertain, there are indications in the *Shaw* case that the Court of Appeal accepts that the courts supervise the legality of legislation. That is a proposition likely to be startling to many in New Zealand. But it is widely accepted in other jurisdictions to follow from the principle of legality.

Wherever power is organised and not arbitrary, its legitimate exercise depends upon observance of the formal requirements and conditions upon which it is conferred. It is the function of the courts to ensure that the exercise of power is authorised by law. Insistence upon legality in the exercise of power is the constitutional duty of the courts. The function does not alter greatly according to the power being supervised or the identity of the body exercising it. It is not the function of the court to usurp the judgment of the body which lawfully exercises power. When the use of power turns upon the exercise of judgment, the role of the court is supervisory, making sure that the power is not abused. This function is discharged by courts throughout the legal system. It is exercised for example by superior courts in supervising inferior tribunals or in supervising the exercise of powers by directors of companies or trustees. It is the function exercised by the courts in supervising the exercise of power by the executive. And it is also ultimately the same function exercised by courts in supervising legislative power.

Constitutions are laws. Why that is so was pointed out by the twenty-seven year old Richard Latham before his death in World War II:[17]

> Where the purported sovereign is any one but a single actual person, the designation of him must include the statement of rules for the ascertainment of his will, and these rules, since their observance is a condition of the validity of his legislation, are rules of law logically prior to him.

The principle of legality requires that every exercise of governmental power must be justified in valid law. Ultimately, it is for the courts to determine the validity of laws because, in the words of Chief Justice Marshall in 1803, it is "their province and duty... to say what the law is".[18] The same judicial obligation was accepted in 1995 by the Supreme Court of Israel in holding that the rule of law required the exercise of judicial review.[19] And the same obligation underlies the Australian High Court's exercise of review of legislation.

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[16] Supra note 9, at 158.

[17] RTE Latham *The Law and the Commonwealth* (1949, reprinted Connecticut 1970) 523 (citations omitted).

[18] *Marbury v Madison* (1803) 1 Cranch. (US) 137.

[19] *Bank Hamizrachi v Migdal* 49 (4) PD 221 (1995) cited in Alon Harel "The Rule of Law and Judicial Review: Reflections on the Israeli Constitutional Revolution" in Dyzenhaus (ed) *Recrafting the Rule of Law* (1999) 143, 146.

If the principle of judicial review is accepted (and for the reasons given by Chief Justice Marshall, it is difficult to avoid the conclusion that it is the duty of the judge in a common law jurisdiction), the real question is what are the rules of law which are logically prior to valid legislation? That question requires identification of what is the Constitution. And it is in the courts that the question will be asked.

Although the status of the New Zealand Constitution is more uncertain, we share with Australia the fact that even the texts which may be identified as "constitutional" are incomplete and incoherent as a statement of irreducible foundation. Without such foundation, the courts are very much exposed, even in supervising executive power. Supervision by the courts of the exercise of power too often lacks organising principles, except those identified for the particular case by the judge.

It is not surprising, in those circumstances, that the modern history of judicial review, even of executive action, has been characterised by restraint. The suggestion that modern judicial review is a recent development by activist judges insufficiently deferential to democratic process has been exposed by Sir Stephen Sedley as historically inaccurate.[20] In the United Kingdom, judicial concern not to intrude into areas of high policy resulted in no-go areas for the courts.[21] We have our own examples in New Zealand. It has also led to the fixation with what has come to be known as "*Wednesbury* unreasonableness"[22] as the standard for review on the merits. That standard, as Lord Greene noted in the *Wednesbury* case itself, was pitched at a level which shades into bad faith.

In the United Kingdom, the pendulum is now swinging back, assisted by the standards provided by the European Convention for the Protection of Human Rights and Fundamental Freedoms. In recent years, British courts have recognised that the more substantial the interference with human rights, the more the court will require by way of justification if it is to find the action reasonable.[23] But the standard of review on the merits has continued to be the high one of unreasonableness or irrationality.[24]

The European Court of Human Rights has now held[25] that the *Wednesbury* standard applied by the English Court of Appeal is inadequate to protect the right to respect for the private life of the individual[26] and itself constitutes a

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[20] Rt. Hon. Lord Justice Sir Stephen Sedley "The Sound of Silence: Constitutional Law Without a Constitution" (1994) 110 LQR 270, 277.

[21] See, for example, *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

[22] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

[23] *R v Home Secretary, ex parte Brind* [1991] 1 AC 696 , 751 per Lord Templeman; *R v Ministry of Defence, ex parte Smith* [1996] 1 All ER 257, 264 per Sir Thomas Bingham MR.

[24] *R v Ministry of Defence, ex parte Smith*, supra note 23, at 266.

[25] *Smith & Grady v The United Kingdom* 27 September 1999 (Applications nos. 33985/96 and 33986/96) (Involving British servicemen discharged on the grounds of homosexuality. Considered by the Court of Appeal in *R v Ministry of Defence, ex parte Smith*, supra note 23).

[26] Article 8 of the Convention.

breach of the right to have an effective remedy before a national authority.[27] The European Court of Human Rights found that the standard of irrationality considered by the domestic courts was "so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued", the tests by which that Court analyses complaints of breach.

With the coming into effect of the English Human Rights Act 1998 in October, it is to be expected that the standards and method applied by the European Court of Human Rights will have profound effect upon the exercise of judicial review in the United Kingdom. A straw in the wind is the decision of the English Court of Appeal in *R v North and East Devon Health Authority, ex parte Coughlan*.[28] The decision contains much food for thought. It affirms that in appropriate cases the Court will enforce a legitimate expectation as to substantive outcome where not to do so would be so unfair as to amount to abuse of power. Such cases are more likely to arise where the expectation is confined to a few people "giving the promise or representation the character of a contract". But whether the disappointment of an expectation is so unfair as to amount to abuse of power depends not on a *Wednesbury* standard (which would "constitute the public authority judge in its own cause") but requires the court to decide whether the result is fair:[29]

> Fairness in such a situation, if it is to mean anything, must for the reasons we have considered include fairness of outcome.

The judgment suggests that it is not helpful to consider the modern doctrine of legitimate expectation in *Wednesbury* terms:[30]

> We would prefer to regard the *Wednesbury* categories themselves as the major instances (not necessarily the sole ones...) of how public power may be misused. Once it is recognised that conduct which is an abuse of power is contrary to law its existence must be for the court to determine.

Although policy making ("within the law") is for the policy-maker alone and is not "ordinarily" open to judicial review, it is for the court to decide whether the application of the policy to an individual who has been led to expect something different "is a just exercise of power":[31]

> In many cases the authority will already have considered this and made appropriate exceptions... or resolved to pay compensation where money alone will suffice. But where no such accommodation is made, it is for

[27] Article 13 of the Convention.
[28] [2000] 2 WLR 622.
[29] Ibid 649.
[30] Ibid 654.
[31] Ibid 654.

> the court to say whether the consequent frustration of the individual's expectation is so unfair as to be a misuse of the authority's power.

In *Coughlan* fairness required the health authority not to resile from the promise that the plaintiff could spent the rest of her life in the same nursing home "unless there was an overriding justification for doing so". The emphasis of the Court is on unwarranted frustration of expectation. Such emphasis underscores the importance of reasons.

Well, this is quite heady stuff. In New Zealand, although there are suggestions that closer scrutiny will be paid to cases involving human rights,[32] the courts have generally adhered to *Wednesbury* deference to executive action in cases where the policy content of the decision is high,[33] and are more comfortable with legitimate expectation in process rather than in outcome. My impression is that similar restraint has been shown in Australia.

In New Zealand, the courts now have the prompt of the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. To date, invocation of the Bill of Rights Act has been largely confined to criminal procedure. It remains to be seen whether this approach will be maintained, particularly given the impetus we can now expect from judicial consideration in the United Kingdom following the coming into force of the Human Rights Act 1998. While the United Kingdom Human Rights Act 1998 is enacted to incorporate into the domestic law of the United Kingdom the rights and liberties guaranteed by the European Convention on Human Rights, that may not detract from the persuasiveness of decisions of the English courts taken under it. Traditionally, in New Zealand we have been more comfortable with English precedents than decisions of other common law jurisdictions operating under written constitutions. Indeed, it may be expected that the decisions of the European Court of Human Rights (already cited in New Zealand cases) will become more influential in New Zealand.

The New Zealand Bill of Rights Act, passed by Parliament ten years ago, is in part a restatement of principles recognised by the common law. It was enacted "to affirm, protect and promote human rights and fundamental freedoms in New Zealand" and "to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights".

The Covenant on Civil and Political Rights was one of the covenants which grew out of the Universal Declaration of Human Rights, the fiftieth anniversary of which we celebrated two years ago. It is worth recalling that these international statements were born of dreadful experiences, referred to by Justice Abella in her inspiring Oration in 1998.

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[32] *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia* [1998] NZAR 58; *Pring v Wanganui District Council* [1999] NZRMA 519.

[33] *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537; *Waitakere City Council v Lovelock* [1997] 2 NZLR 385.

Nor should we be complacent about the performance of the common law in the domestic protection of human rights. In England, to which we looked largely for our common law at the time, the distinguished public lawyer, Sir William Wade, described the "deep gloom" that settled on English administrative law in the middle of the twentieth century.[34] That mood changed as the courts realised "how much had been lost and what damage had been done to the only defences against abuse of power which still remained".[35]

The New Zealand Bill of Rights Act is an ordinary statute, which yields to other statutes if an interpretation consistent with the Bill of Rights Act cannot be achieved.[36] But it is clear from its international and common law roots and legislative history, as well as from its subject-matter and evocative title, that the Act was designed to operate within the sphere that may broadly be termed "constitutional".

The statement of rights contained in the Act is also international. Although Australia has not chosen to adopt a domestic statement of human rights, its accession to the Covenant on Civil and Political Rights and the increasing willingness of domestic courts to look to such standards in applying domestic law,[37] suggests that the development of our law may not diverge as much as might otherwise have been the case because of the New Zealand specific legislation. Indeed, adherence by both our countries to the Optional Protocol on Civil and Political Rights means that international scrutiny of our domestic observance of human rights is available to citizens who have exhausted their domestic legal remedies. The decisions of our courts are now taken upon an international stage. The British experience suggests that the effect is likely to be salutary.

It would I think be idle to suggest that the New Zealand Bill of Rights Act will not be central to the future development of the common law in New Zealand. The Act applies to acts of the judiciary as well as to acts of the legislature and executive and to all those who exercise public functions.[38]

If judicial acts are required to conform with the New Zealand Bill of Rights Act, it suggests that in developing the common law the judges are required to conform with the New Zealand Bill of Rights Act. The point has not yet arisen directly for determination in New Zealand (although it was assumed by Hardie

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[34] HWR Wade and CF Forsyth, *Administrative Law* (1994) 17.
[35] Ibid 19.
[36] New Zealand Bill of Rights Act 1990, s 4.
[37] *Tavita v Minister of Immigration* [1994] 2 NZLR 257; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *R v Secretary of State for the Home Department, ex parte McQuillan* [1995] 4 All ER 400, 422.
[38] By s 3 of the New Zealand Bill of Rights Act 1990, the Bill of Rights applies:

> "only to acts done-
> (a) By the legislative, executive or judicial branches of the government of New Zealand; or
> (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law".

Boys J in *Baigent's case*[39] and by me in *Lange v Atkinson*[40]). If so, through a "cascading" effect,[41] the Act will come to influence private as well as public law. That is a conclusion reached extra-judicially by Lord Cooke of Thorndon.[42] Similarly, Lord Irvine of Lairg, the Lord Chancellor of England, has no doubts that the English Human Rights Act 1998 has the effect of requiring the courts to develop the common law in conformity with the Act:[43]

> Clause 6 makes it clear that "public authority" includes a court and a tribunal which exercises functions in relation to legal proceedings. That inclusion, as this audience will recognise, does more than asking the courts to interpret legislation compatibly with the [European Convention on Human Rights]. It imposes on them a duty to act compatibly with the Convention.
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> We believe it is right as a matter of principle for the courts to have the duty of acting compatibly with the Convention. They will be under this duty not only in cases involving other public authorities but also in developing the common law in deciding cases between individuals.

The New Zealand Bill of Rights Act makes no specific provision for remedies where there is breach of its provisions by those subject to it. Article 2 of the International Covenant on Civil and Political Rights, which the Act explicitly affirms, requires each State Party to the covenant to ensure an effective remedy for violation of the rights confirmed and requires them to develop the possibilities of judicial remedy. In New Zealand, the courts have to date responded in two ways. First, by direct intervention to stop breach or deprive the prosecution of the results of evidence obtained by breach.[44] Secondly, by a remedy of compensation.[45]

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[39] *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667, 702.
[40] [1998] 3 NZLR 424; and see the discussion by Rishworth "Bill of Rights, Human Rights" [1998] New Zealand Law Review 585, 605-607; and in Leigh "Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth" (1999) 48 ICLQ 57, 70-71.
[41] A concept used by Rt. Hon. Lord Justice Sir Stephen Sedley in *Freedom, Law and Justice* (1999) 23, and which for the reasons he gives I consider is to be preferred to the "horizontal" effect described by other commentators.
[42] Lord Cooke "A Sketch from the Blue Train" [1994] NZLJ 10, 11.
[43] Lord Irvine of Lairg, "The Impact of a Bill of Rights on English Law", Address to the 3rd Clifford Chance Conference , 28 November 1997.
[44] Thus, in *Martin v District Court at Tauranga* [1995] 2 NZLR 419 a prosecution was stopped for delay in bringing the accused to trial. And in a number of search and seizure cases the New Zealand courts have adopted the American prima facie rule of exclusion of evidence obtained in breach of constitutional rights: *R v Kirifi* [1992] 2 NZLR 8; *R v Butcher* [1992] 2 NZLR 257. In doing this, the Court of Appeal has so far been reluctant to follow United States' justifications for the exclusion as arising out of the need to deter official misconduct (see for example, *R v Goodwin* [1993] 2 NZLR 153, 193 per Richardson J) preferring rather to vindicate the positive assurance of the right. It is also not clear whether the prima facie exclusion rule will be maintained as the usual response to breach; in recent decisions on search and seizure, the Court of Appeal has flagged a possible revision of the approach: *R v Grayson & Taylor* [1997] 1 NZLR 399.
[45] *Simpson v Attorney-General (Baigent's Case)*, supra note 39. The Court of Appeal there held that the courts have the power to grant "effective and appropriate" relief. The danger of failing to develop such a remedy, warned Cooke P, was that "both the Courts and Parliament at times may give, or at least be asked to give, lip service to human rights in high-standing language, but little or no real service in terms of actual decisions". This remedy has the potential to provide a vindication for many of the affirmed civil or political rights in which the

Although judges are immune from suit, it seems a remedy will be available against the Crown for judicial actions which breach the rights recognised in the Act in appropriate cases.[46] It is not yet clear whether in cases where no immunity applies, remedies will be granted only against the Crown.[47] Section 3 binds anyone exercising public functions, duties or powers, whether or not they are government entities.

Under s 6 of the New Zealand Bill of Rights Act, an interpretation consistent with the rights and freedoms contained in the Bill of Rights Act, must be preferred to any other meaning. And the rights contained in the Bill of Rights Act are subject under s 5 only to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". If the limitation cannot be so justified, there is an inconsistency with the Bill of Rights Act.

The White Paper which preceded adoption of the New Zealand Bill of Rights Act, proposed an entrenched Bill of Rights in which the courts would have the power to strike down legislation. That was not the solution ultimately adopted by Parliament. Instead, s 4 of the Act provides that "no court" shall hold any provision of an inconsistent enactment to be invalid or ineffective, nor can it decline to apply the inconsistent enactment "by reason only that the provision is inconsistent with any provision of this Bill of Rights".

Some commentators have seen in discussions within the cases decided by the Court of Appeal an indication that the courts will not assess whether a limitation is justifiable under s 5, but instead will simply apply it under s 4.[48] But in a recent Court of Appeal decision,[49] the Full Court indicated preparedness to examine the justifiability of a limitation before applying the non-complying statute under s 4:[50]

> Ultimately, whether the limitation in issue can or cannot be demonstrably justified in a free and democratic society is a matter of judgment which the Court is obliged to make on behalf of the society which it serves and after considering all of the issues which may have a bearing on the

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person whose rights are infringed is not being prosecuted. The rights, for example, to freedom of thought, conscience, and religion (s 13), to manifest freedom of religion in worship (s 15), to be free from unlawful discrimination (s 19); to privacy in respect of unreasonable searches (s 21), and to the right to natural justice (s 27) may be ones where this remedy is sought.

[46] Thus in *Attorney-General v Upton* (1998) 5 HRNZ 54, $15,000 compensation was awarded to a man who claimed that he had not been given an opportunity to address the District Court in mitigation of sentence, in breach of the right to the observance of the principles of natural justice under s 27.

[47] See for example *Innes v Wong* [1963] 3 NZLR 238 where Cartwright J refused to strike out a claim for breach of the Act brought against a Crown Health Enterprise; and *S v M* (HC, Auckland, M477/97, 10 June 1998) where Smellie J held damages for breach of the Act was not available against a Board of Trustees of a school, but only against the Crown.

[48] See, for example, Anna Adams "Competing Conceptions of the Constitution: The New Zealand Bill of Rights Act 1990 and the Cooke Court of Appeal" [1996] New Zealand Law Review 368.

[49] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.

[50] Ibid 17.

> individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise.

In the same case, the Court indicated that on an appropriate occasion it may be necessary for it to declare that a limitation cannot be demonstrably justified in a free and democratic society.[51] In this, the Court has assumed a power specifically conferred upon the English courts as a significant remedy under the Human Rights Act 1998. Such a declaration was thought in *Moonen* to have value "should the matter come to be examined by the Human Rights Committee. It may also be of assistance to Parliament if the subject arises in that forum".[52]

This development has been criticised.[53] But it is based upon the scheme of the New Zealand Bill of Rights Act and the decision of Parliament that encroachment upon the recognised rights must comply with s 5 to be lawful. For the reasons given by Chief Justice Marshall, it is the duty of the courts to decide what is lawful. And that duty, which arises at common law as a consequence of the rule of law, is underscored both by the Act's requirement in s 3 that the judiciary is bound by the Bill of Rights Act and by the acknowledgement of judicial supervision in s 6, subject only to the prohibition on holding a non-complying provision to be ineffective or invalid.

This restriction on the power of the courts in relation to legislation strikes me as carefully limited. In the first place the possibility that legislation may be struck down by the courts for reasons other than inconsistency only with the Bill of Rights Act is left open. That itself may be of some significance in any case involving constitutional fundamentals and raising questions of the competence of Parliament. But more importantly, what is withheld from the court in cases of inconsistency with the Bill of Rights Act is the sanction of invalidity alone. The courts are not prevented from inquiring into compliance with the New Zealand Bill of Rights Act and indeed s 4 is not reached unless the court forms the view that there is inconsistency. The inquiry as to inconsistency will require consideration of whether any limitation prescribed can be "demonstrably justified in a free and democratic society" under s 5.

Since the New Zealand Bill of Rights Act applies to "acts done by the legislative... branch of the government of New Zealand", it is arguable that the making of laws by the Parliament of New Zealand (as confirmed by s 15 of the Constitution Act 1986) is subject to the New Zealand Bill of Rights Act, subject only to the saving in s 4 of the efficacy of inconsistent legislation. If so, judicial review and a remedy other than one which strikes down the inconsistent legislation may be necessary to vindicate the law.

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[51] President Cooke had earlier expressed some doubts as to whether such a remedy was available in New Zealand in *Temese v Police* (1992) 9 CRNZ 425, 427.
[52] *Moonen*, supra note 49, at 17.
[53] James Allan "Turning Clark Kent into Superman: The New Zealand Bill of Rights Act 1990" (2000) v 9 No 4 Otago Law Review 613, 623; The Capital Letter (2000) 23 TCL 1, 6.

On this view, s 4 simply preserves the efficacy of non-complying legislation without deflecting the review of the court. If it is accepted,[54] it would be open to the court to grant a remedy other than by refusing to apply the non-complying provision or declaring its invalidity. Such remedy might include a declaration of non-compliance as a matter of statutory interpretation under s 3 of the Declaratory Judgments Act 1908 or even an order for compensation.

Such a result would cause some reassessment of traditional notions of Parliamentary sovereignty, although the decencies would be preserved if the courts do not purport to disallow legislation directly. Although some will view this development with alarm, increasingly it has come to be recognised that the notion of arbitrary Parliamentary sovereignty within its area of formal competence represents an obsolete and inadequate idea of the constitutions of both Australia and New Zealand. Indeed, it is questionable whether it ever represented an adequate idea of even the competence of the English Parliament.

Paul Craig has pointed out that generations of writers have invoked the conclusions expressed by Dicey while ignoring his analysis. That analysis is based upon a system of democracy which did not apply at the time *An Introduction to the Study of the Law of the Constitution*[55] was written. It bears even less resemblance to the present position. Craig concludes that it is "[s]mall wonder then that we have made so little real progress in ensuring that our constitutional norms are of relevance to the modern day".[56] If we are to make such progress, it is necessary to set the question of the scope of Parliamentary power in the "broader constitutional map" relied upon by Dicey and Blackstone, in which they recognised that the omnipotence of Parliament had to be founded upon some principled justification:[57]

> If we do this we may well find that, for example, the modern embodiment of a balanced constitutional order is one which does not afford unlimited power to Parliament. We may well discover that a system of government which is both balanced and normatively justifiable is one in which there are rights-based limits on the power of Parliament, which are to be policed by our courts. . . .
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> Once the methodology of the classical writers is made apparent, it becomes evident that any justification for Parliamentary omnipotence must be based on arguments of principle. It may also be the case that once matters are perceived in this way there is no longer any such principled justification for legally unconstrained Parliamentary power in the modern day. Rather, that we are led to the conclusion that some species of rights-based constraints must feature in any convincing principled picture of twentieth century government.

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[54] As suggested in *Moonen*, supra note 49, and by Thomas J in *R v Poumako* (CA565/99, 31 May 2000) (a case about retrospectivity of criminal penalty).
[55] (10th ed, 1959).
[56] Paul Craig "Sovereignty of the United Kingdom Parliament after *Factortame*" (1991) 11 YBEL 221, 238.
[57] Ibid 254-255.

A constitution is not static. It develops with the history of a country and its people. Maitland posed the question "how are we to define constitutional law?" not at the beginning but at the end of his lectures on constitutional history because of his view that the constitution of a country can be discerned only from its general law and only at a particular time:[58]

> A classification of legal rules which suits the law of one country and one age will not necessarily suit the law of another country or of another age. One may perhaps force the rules into the scheme that we have prepared for them, but the scheme is not natural or convenient. Only those who know a good deal of English law are really entitled to have any opinion as to the limits of that part of the law which it is convenient to call constitutional.

Dicey's view was that Parliamentary sovereignty is a legal conception and means "the power of lawmaking unrestricted by any legal limit".[59] In adopting this analysis, Professor William Wade developed the thesis that the ultimate rule of constitutional law was not subject to legal principle but only to political considerations.[60] On this view, where there is change in the ultimate rule as to what commands the courts' allegiance, the effect is a "revolution" outside the legal order.

This view has been criticised by modern scholars.[61] Much constitutional shift may be permitted within the legal order. The impediment posed by the judicial construct that inconsistent later legislation impliedly repeals earlier legislation[62] rests on slender authority and is unlikely to be maintained in cases touching on the fundamental legal order.[63]

The Dicey analysis as developed by Hart and Wade may also be misconceived in its emphasis on an ultimate rule of allegiance. Perhaps no single rule may be fundamental to a living constitution. The point is well made by Professor Neil MacCormick:[64]

> Understanding a constitution is not understanding any single rule internal to it as fundamental; it is understanding how the rules interact and cross-refer, and how they make sense in the light of the principles of political association that they are

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[58] Maitland, *The Constitutional History of England* (1911) 537.
[59] AV Dicey *An Introduction to the Study of the Law of the Constitution* (10th ed, 1959) 27.
[60] HWR Wade "The Legal Basis of Sovereignty" [1955] CLJ 172.
[61] TRS Allan "Parliamentary Sovereignty: Law, Politics and Revolution" (1993) 113 LQR 443-452; Neil MacCormick *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (1999) 79-95; Jennings *The Laws and the Constitution* (5th ed, 1967) University of London Press, Chapter 4; Craig, supra note 56.
[62] *Vauxhall Estates Limited v Liverpool Corporation* [1932] 1 KB 733; *Ellen Street Estates Limited v Minister of Health*, supra note 10.
[63] That is Craig's conclusion, supra note 56, at 251-253.
[64] MacCormick, supra note 61, at 93.

> properly understood to express. If there is a fundamental obligation here, it is an obligation towards the constitution as a whole. It is the obligation to respect a constitution's integrity as a constitution, an obligation that has significance both in moments of relative stasis and in more dynamic moments. These are moments when, in response to changing circumstances, legislators or the people in a referendum make amendments, or judges engage in interpretative adjustment of principles and doctrines in a way that may produce great constitutional change but that does not thereby amount to radical or revolutionary discontinuity.

After *Factortame*[65] recognised that legislation yields to Community Law, it is impossible to accept that the notion of Parliamentary sovereignty is an accurate theory of the British constitution. What is significant about *Factortame* is that the restrictions given effect by the Court related not to the composition and procedures of Parliament,[66] but to a restriction on the scope of its legislative power. That restriction was mandated by Parliament and is enforceable by the courts, notwithstanding inconsistent subsequent legislation. The change has been accomplished within the legal order. It would be truly "revolutionary" only if unilateral secession was held to have been relinquished. On this view direct legislation to accomplish secession would be given effect (unless the courts recognised a revolution), but subsequent legislation which is merely inconsistent yields. As Craig points out, if the British courts are prepared to give priority to Community Law in this way and to acknowledge some shift in the traditional view of sovereignty, it is not unlikely that they would do the same for an enactment of Rights:[67]

> This is particularly so given that a Bill of Rights would be protecting civil liberties, an area which the courts regard as important and an area with which they have traditionally been involved.

If the courts' obligation is, as MacCormick suggests, an obligation towards the "constitution as a whole", it needs to be recognised that no written text will capture "the constitution as a whole". The living constitution will include principles which are fundamental to the operation of the political association. That is why in cases concerning constitutional fundamentals, courts have found it necessary to have recourse to implied constitutional principles. That has been the experience of the Canadian Supreme Court, the Indian Supreme Court and the Australian High Court. Thus in the Quebec secession case[68] the Supreme Court of Canada explicitly recognised that, in order to endure over time, the constitution must contain "a comprehensive set of rules and principles which are

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[65] *R v Secretary of State for Transport, ex parte Factortame Ltd* [1990] 2 AC 85; *R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)* [1991] 1 AC 603.
[66] That such restrictions are effective is generally acknowledged: see, for example RFV Heuston *Essays in Constitutional Law* (2nd ed, 1964) Chapter 1.
[67] Craig, supra note 56, at 253.
[68] *Reference re Secession of Quebec* (1998) 161 DLR (4th) 385.

capable of providing an exhaustive legal framework for our system of government." Such principles and rules could emerge only from "an understanding of the constitutional text itself, the historical context, and previous judicial interpretation of constitutional meaning." The Court considered that there were "four fundamental and organising principles" of the constitution relevant to the question before it: "Federalism; democracy; constitutionalism and the rule of law; and respect for minorities".[69]

The Indian Supreme Court has found in the constitution, implied social, economic and environmental rights. In Australia, the High Court too has drawn on fundamental constitutional principles to give effect to rights not explicitly recognised in the constitutional text.[70]

Arguably, the Constitution Act 1986 in New Zealand now recognises a separation of function between the legislative, executive and judicial branches which operates as a fetter upon encroachment by Parliament.[71] Although we lack a basic constitutional text, the principles of democratic representation from which our laws gain legitimacy, may be seen as constitutional principles of law. Arguably, modern representative democracy is based also upon protection of minorities, so that majority rule is not oppressive of them. If cases arise concerning these ultimate constitutional issues, we can therefore expect to draw on the rich vein of jurisprudence as to implied constitutional principle in Australia and other common law jurisdictions with written constitutions.

Again, in New Zealand, some of these fundamental rights are now explicitly stated in the New Zealand Bill of Rights Act.[72] As such, the Act operates as "navigation lights"[73] for the legislature, the executive and the judiciary. Such navigation lights are of necessity generally expressed. But in a number of instances, the declaration of principles introduces more certainty into the law than has been the case before. For example the declaration of the right to legal representation, to access to the courts for judicial review and to vote in periodic elections which are "genuine" means they no longer have to be implied. No one can doubt that the right to participate in elections which are genuine, is a fundamental principle of the constitution. Far better to have it identified in legislative text than to be assembled by judges through case law. In New Zealand therefore, it may not always be necessary to have recourse to implied principles, although making those principles work will almost inevitably require judicial implication of more detailed rules.

The over-arching importance attached under the New Zealand Bill of Rights Act to the maintenance of a free and democratic society is made explicit by s 5, which provides that the rights and freedoms contained in the New Zealand Bill

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[69] Ibid para 32.
[70] *Australian Capital Television Pty Ltd v. The Commonwealth* (1992) 177 CLR 106.
[71] *Liyanage*, supra note 8.
[72] Although I do not suggest all human rights fall within the category of constitutional fundamentals.
[73] Geoffrey Palmer "A Bill of Rights for New Zealand – a White Paper" (Department of Justice, 1985) Introduction, 6.

of Rights Act can be subject only to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Normally in New Zealand, the remedies not excluded by s 4 of the Bill of Rights Act will be adequate vindication of the rights recognised by law and may assist the legislature in a legislative response.

It is only if the principle at stake is so fundamental that its infringement by legislation would undermine constitutional security, that judicial review to quash the legislation might be contended for. In such circumstances, the courts would have to rely upon constitutional law, recognition of which is ultimately for them. We can hope that circumstances of legislative abuse of power in this way will never occur. Constitutional brinkmanship between courts and the legislature is dangerous for everyone. It is also, as I have tried to suggest, based on an inadequate notion of law as a hierarchy of static precepts. An adequate view of law in the 21st century needs to release us from the conceptual shackles of supremacist theory, so that we may develop a rule of law based upon shared principle, rather than armed stand-off.

So far, I have tried (not entirely successfully) to avoid references to the rule of law. That is because, as Paul Craig has pointed out,[74] the phrase has a moral force which may not aid proper analysis. It is necessary to be very clear as to the particular form of justice being invoked when it is applied. The divide between formalist and substantive views of the rule of law depends upon what is meant by law. A Benthamite insistence that real law is statute law and a suspicion about the validity of judge-made law upon the grounds that it is discretionary and uncertain, seems to me to miss the nature of law, even in a formal sense.

Professor Neil MacCormick has perceptively argued that any adequate overall view of law must recognise that it is "a form of institutionalised discourse or practice or mode of argumentation".[75] The rule of law is not therefore a static "rule of rules", but "an arguable discipline" in which all norms are "defeasible".[76] Answers to legal problems are sought through propositions which seem arguable and which are tested against contrasting arguments. Decision-makers, including judges, do not approach decision in a vacuum, but in the context of constitutions, statutes, regulations, precedents, scholarly writing, history and shared moral values. The relativity of law is itself a protection against arbitrariness. MacCormick suggests that this quality should be admired in an open society:[77]

> We should look at every side of every important question, not come down at once on the side of prejudice or apparent certainty. We must

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[74] Paul Craig "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] PL 46.
[75] Neil MacCormick "Beyond the Sovereign State" (1993) 56 MLR 1, 10.
[76] Neil MacCormick "Rhetoric and the Rule of Law" in Dyzenhaus (ed) *Recrafting the Rule of Law* (1999) 163, 176.
[77] Ibid 165.

> listen to every argument, and celebrate, not deplore, the arguable quality that seems built in to law.

Contests over proper interpretation, inferences, relevance and classification:[78]

> [A]re not some kind of pathological excrescence on a system that would otherwise run smoothly. They are an integral element in a legal order that is working according to the ideal of the rule of law, so far as that insists on the production by governments of an appropriate warrant in law for all that they do, coupled with the right of the individual to challenge the warrant produced by government.
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> . . . Whatever care is lavished on the source materials of law by legislators, drafters, or judges writing opinions that attempt to state a holding or *ratio* with exemplary clarity, the rule statements these yield as warrants for governmental action aimed at vindicating public or private right are always defeasible, and sometimes defeated under challenge by the defence. Law's certainty is therefore defeasible certainty.

Law then is what convinces. It is the opposite of what is arbitrary. And it convinces until defeated by better argument. Certainty and consistency are themselves powerful arguments and will generally prevail for reasons of fairness. But where there is no settled law, or where the conditions have altered so that a former legal rule is not persuasive, the judge must call on wider considerations. And his argument, the decision, must be principled and coherent if it is to convince.

The standards provided in New Zealand by the Bill of Rights Act provide a guide. But, in common with much other open-textured legislation, they cannot be complete. As with modern legislation conferring wide discretion upon decision-makers, the judge cannot avoid confronting the justice and fairness of the outcome. The difficult cases are not those where the choice is between a strong and weak argument. They are the cases where there are two strong arguments. In such cases, a justified decision may have to be based upon ideas or standards not derived from law at all. There is nothing new for judges in that.[79] Honesty and adherence to the rule of law require that the reasons for adoption of one argument be faithfully addressed. Assertions of fairness or reasonableness without more mask "naked preferences",[80] themselves contrary to the rule of law.

There are substantial challenges for the courts here. If the discourse about constitutional fundamentals through litigation disempowers the public, if the public feels excluded by cost or formal language and is not convinced by the

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[78] Ibid 175-176.
[79] Joseph Raz *The Authority of Law, Essays on Law and Morality* (1979) 49-50.
[80] Rossi "Redeeming Judicial Review: the Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry" [1994] Wisconsin Law Review 763, 820.

argument adopted, then the courts may come to be seen not as an "auxiliary protection"[81] against arbitrary power but as an engine of it. In the United States the use of the "hard look" review where human rights interests are affected is characterised by close attention to the reasons given by a decision-maker and a refusal to assume that unexplained conclusions are based upon adequate facts and reasons. The emphasis upon reasons responds to the key concern to protect against arbitrariness. It applies equally to judicial determinations. In a working democracy, the arguments of the judges can be defeated not only by further judicial decision-making but by legislative and constitutional response.

In the United States, some of the more divisive social issues of the day may have been resolved (or at least defused) in manageable bites by litigation through the courts. But the success of such strategies has been based upon relatively widespread consensus about the proper role of the courts and a degree of trust in the judiciary. In New Zealand at any rate that trust in areas of political debate cannot be assumed and will need to be earned.

That such confidence can be obtained over time, may be seen in the work of the Canadian Supreme Court. I do not think that it is coincidental with the rise in its standing, that the Supreme Court has been conscious of the role it plays in a wider constitutional argument and has sought to assist the legislature and the wider community with advisory opinions. It has not shrunk from political controversy or scrutiny of executive conduct even in areas of high policy.[82] It has taken the view that any dispute properly constituted before it is justiciable and that the Court must inform itself about any issue properly before it. It has confronted directly the competing interests raised. And it has articulated a vision of the Canadian constitution that transcends the texts and is based upon principles identified in part from the texts, but also from historical context, the previous decisions of the Court, and the nature of Canadian society.

In the *Quebec Secession* case, the Court explained a view of the constitution based upon the rule of law, which creates the framework within which the "sovereign will" of the people in a democracy is to be ascertained and implemented. Equally, however, the Court acknowledged that adherence to the rule of law was not itself enough for legitimacy of the political system. That legitimacy required "interaction between the rule of law and the democratic principle" and appeal to moral values rather than majority rule alone. The Court has highlighted too its perception that "a functioning democracy requires a continuous process of discussion".[83]

I do not want to suggest that the role carved out for itself by the Canadian Supreme Court is one which we, with our different traditions and cultures, should consciously adopt. Indeed, I think there is much in the reasoning of the Court in its constitutional cases with which judges in our more restrained

[81] Hamilton, Madison & Jay *The Federalist* No.51 (Bigsby ed, 1992) 266.
[82] See, for example, *Operation Dismantle v the Queen* [1985] 1 SCR 441.
[83] *Reference re Secession of Quebec*, supra note 68, at paras 67-68.

tradition would feel uncomfortable. But what I think we should take notice of is the conscientious discharge of the Court's constitutional obligation to vindicate the rule of law. And the sense of cooperation and dialogue, the positive spirit in which the formal discourse of law is carried out.

The challenges that litigation about rights bring to the courts are substantial. The New Zealand Bill of Rights Act does not include rights to equality or to "equal protection of the law". That was a decision deliberately taken because it was thought that such provisions "would enable the courts to enter into many areas which would be seen in New Zealand as ones of substantive policy".[84] But the rights to natural justice and access to the courts, may import notions of equality. The Act also provides a right to freedom of discrimination[85] on grounds which now include not only colour, race, ethnic or national origins, sex or religious or ethical belief, but "disability, age, political opinion, employment status, family status and sexual orientation".[86] The rights affirmed to members of minority groups to enjoy their culture and practice their religions and culture are recognised by s 20.

Such rights may require assessment of the commitment the community is prepared to make to ensure effective protection. They may entail judgments about community values and allocation of resources which many see as unsuitable for judicial determination. But it is difficult to escape the view that the substantial challenge for the legal order in the years ahead will be concerned with what Sir Stephen Sedley has described as the "snake in the legal grass", "the unequal effect of equal laws".[87]

Human rights adjustments may be complex. Where there are a range of valid outcomes, the case will not always be well suited for judicial determination and methods.[88] Effective protection of cultural rights and effective protection of the rights to equality of women for example, ultimately rest on community commitments, not statements of rights, nor the courts. But where a case is properly brought before the courts, judges cannot avoid making decisions simply because the matter is difficult or politically contentious.

I think it is worth considering why the courts are the forum in which human rights adjustments are often made in common law systems. It seems to me that the role of the courts arises from an authentic and deep-seated view in the community that justice ultimately must be vindicated in actual cases. The thirst for justice springs from a shared ethical value that justice matters. As Sir Stephen Sedley points out, it is impossible to prove *why* it is that justice in this

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[84] "A Bill of Rights for New Zealand – a White Paper" (Department of Justice, 1985) 86.
[85] New Zealand Bill of Rights Act 1990, s 19.
[86] Considered in *Quilter v Attorney-General* [1998] 1 NZLR 523 (a claim that the refusal of the Registrar of Marriages to issue a same-sex couple with a marriage certificate was in breach of the right).
[87] Rt. Hon. Lord Justice Sir Stephen Sedley *Freedom, Law and Justice* (1999) 41.
[88] Refer Lon Fuller "The Forms and Limits of Adjudication" (1978) 92 Harvard Law Review 353.

sense matters. What is important is the existence of the "moral sensibility which says that it does".[89]

That moral sensibility is responsible for the enduring attachment of our societies to the legitimacy of the courts. It is of critical importance that the courts continue to respond to this expectation that justice will be delivered through law by the courts.

We must not be complacent here. In an age where the delivery of justice is characterised as "legal services" or "dispute resolution", and measured according to quantitative standards, it is important not to overlook the fact that the values of truth, justice and fairness which the courts serve are fundamental values for the health of our society. This is a theme Chief Justice Spigelman has developed with spirit.[90]

So although there are dangers, it is important that the courts are not deflected from their fundamental constitutional role. What needs to be conveyed is that the courts operate at the boundaries, not usurping the judgment of the body to which power has been lawfully entrusted, but making sure that it is not abused or exercised arbitrarily.

Some commentators seem to be under the impression that judges are avid for the powers they are obliged to exercise under human rights legislation. That is wrong. It should not be thought that judges welcome these cases. They are difficult, contentious and emotionally draining. As a judge I have not yet had to order a life support machine to be turned off, or decide any case conducted under heavy political and community pressure. So I do not speak of my own experience here - but I have seen my colleagues wrestling with such cases and have seen the toll it exacts. And as counsel in some of the more politically charged cases of the past decade in New Zealand, I have seen the weight descend on the shoulders of the judge at the end of the case. I would not have swapped positions willingly at all. This burden is not sought. But when it comes in a case properly constituted for judicial determination, it cannot be evaded consistently with the judicial oath.

A judge cannot decline to exercise a jurisdiction conferred by Parliament or the Constitution and properly invoked by a litigant just because it is politically inconvenient or controversial. And indeed, as Sir Stephen Sedley has pointed out, the suggestion that it is only the *use* of judicial power which is activism, dangerously obscures the truism that:[91]

> Abstention from judicial review is just as much a deliberate judicial activity, based just as much on jurisprudential and policy considerations

[89] Rt. Hon. Lord Justice Sir Stephen Sedley, supra note 87, at 47.
[90] The Hon. JJ Spigelman CJ "Seen to be Done: The Principle of Open Justice" (2000) 74 Australian Law Journal 290-297, 378-383.
[91] Rt. Hon. Lord Justice Sir Stephen Sedley, supra note 20, at 278.

> and with just as many constitutional and political repercussions as judicial interventionism.

In the end, as Judge Harold Leventhal has observed in answer to the question "How should the courts proceed in political thickets?: Carefully, pragmatically".[92]

The proper role of the judge can be discerned from the qualities identified by Paul Freund in his tribute to Justice Louis Brandeis of the US Supreme Court. He described that Judge's huge judicial qualities as being:[93]

> His power derived from a fusion of three traditions: the Biblical tradition, with the moral law of responsibility at the core; the classical tradition, with its stress on the inner check, the law of restraint, proportion, and order, achieved by working against a resisting medium; and not least, the common-law tradition, ... teaching that the life of the law is response to human needs, that through knowledge and understanding and immersion in the realities of life law can be made... to work itself pure.

Decision-making by a judge is hard work requiring the qualities identified here – moral and intellectual balance, knowledge of principle, responsibility and the inner check. Judicial business is conducted in public, "in the face of mankind", as Jeremy Bentham (no friend to judges) put it. It is not the only protection against abuse of power. But experience has taught its value. The principle of open justice is the best check against judicial overreaching. Against judicial abdication of responsibility, there is no help.

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[92] Judge Harold Leventhal "The Courts and Political Thickets" (1977) 77 Columbia Law Review 345.
[93] Paul Freund "Mr Justice Brandeis: A Centennial Memoir" (1957) 70 Harvard Law Review 769, 791-792.