COMMON LAW CONSTITUTIONALISM

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Common law constitutionalism is about the authority of the courts in their relationship with the other branches of government and the extent to which it can be defined by the courts themselves. Robin Cooke, in whose memory I am honoured to present this lecture, engaged in the cutting-edge of debate on the topic in a number of decisions in the late 1970s and early 1980s.

Section 15(1) of the Constitution Act 1986 says that the Parliament of New Zealand continues to have full power to make laws. There is no express entrenched constitutional limit on that power. Common law constitutionalism may therefore be of more significance in New Zealand than it is in Australia where legislative power is constrained in a variety of ways, express and implied, by the Commonwealth Constitution. It is, however, a topic which in both our countries can be taken to embrace the authority of courts to determine the meaning of statutes, the content of the common law and the lawfulness of executive action. In Australia, common law constitutionalism also underpins the authority of the courts to interpret the Constitution, to draw implications from it and to determine the validity of laws. Whether it can extend in New Zealand to principles limiting the law-making power of the Commonwealth, is a matter which has been the subject of ongoing debate.

Robin Cooke expounded a form of common law constitutionalism in New Zealand which to some was a bridge too far. However, his was not a lone voice. The fundamental question he raised about deep-seated principles which mark the boundaries of legislative power must be visited and revisited. It goes to the essential features of our representative democracies and, in particular, to the scope and nature of judicial power which is part of our common heritance from the United Kingdom, an inheritance which has its roots deep in legal history.

William Blackstone invoked that legal history when he wrote of the long and uniform usage of many ages by which the Kings of England delegated their judicial power to the judiciary and by

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which judicial power was separated from legislative and executive power.[1] That evolved usage enabled Frederick Pollock to place at the heart of the common law, public courts which adjudicate between parties and are the authorised interpreters of the law which they administer.[2] As Sir Victor Windeyer, a former Justice of the High Court and a noted legal historian wrote in 1970:[3]

> The nature of a court and the functions of court officers were matters that were well known in England long before the Australian colonies began.

The characteristics of courts, as understood in 19th century Britain, informed their characteristics in colonial Australia and New Zealand. They included what Lord Justice Fry in 1892 called "the fairness and impartiality which characterise proceedings in Courts of justice, and are proper to the functions of a judge".[4] That characteristic and the essential and defining features of decisional independence, adherence to the open court principle and the obligation to give reasons for decision, have been found in Australia, through implications drawn from the Commonwealth Constitution, to have a constitutional significance protective against legislative incursion.[5]

Robin Cooke described the constitutional function of courts colloquially as "an exercise in line-drawing".[6] Courts as line-drawers have responsibility in Australia for the interpretation and application of the Constitution. In both of our countries, courts have responsibility for judicial review of executive action and for the interpretation and application of statutes. The interpretive responsibility, which informs much of judicial review, is essentially judge-made and derives from the common law, as do many of the substantive principles of interpretation. As a former Chief Justice of the High Court, Sir John Latham, remarked in the Law Quarterly Review in 1960, "in the interpretation of the Constitution, as of all statutes, common law rules are applied".[7]

The interpretation of statutes can be characterised as a small 'c' constitutional function. Although all manner of officials and public authorities charged with the administration of particular Acts of Parliament develop guidelines based upon their interpretations, the final and authoritative interpretation is that of the courts.

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1 Blackstone, *Commentaries on the Laws of England* (1st ed, Clarendon Press, Oxford, 1765), bk 1 ch 7 at 258.

2 Sir Frederick Pollock, *The Expansion of the Common Law* (Stevens and Sons Ltd, London, 1904) at 51.

3 *Kotsis v Kotsis* (1970) 122 CLR 69 at 91.

4 *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431 (HL) at 447.

5 *Wainohu v New South Wales* [2011] HCA 24, (2011) 243 CLR 181 at 208.

6 Robin Cooke "Foreword" in B D Gray and R B McClintock (eds) *Courts and Policy: Checking the Balance* (Brookers, Wellington, 1995).

7 John Latham "Australia" (1960) 76 Law Quarterly Review 54 at 57.

The common law constitutional function of courts in interpreting statutes does not extend to giving them a meaning that their text will not bear. To do that is to cross a boundary between judicial and legislative functions. In this respect an interesting comparison may be drawn between Australia and New Zealand on the one hand, and the United Kingdom on the other, in relation to human rights legislation requiring statutes to be interpreted compatibly with human rights.

In the 2011 case of *Momcilovic*,[8] the High Court had to consider s 32(1) of the Charter of Human Rights and Responsibilities Act 2006 (Vic) which requires that so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is "compatible with human rights".[9] A reverse onus provision in the Drugs, Poisons and Controlled Substances Act 1981 (Vic) deemed a person to be in possession of a substance for the purposes of the Act, if the substance "was found upon any land or premises occupied by the person, unless the person satisfied the court to the contrary".[10] It was therefore in tension with the presumption of innocence set out in the Charter. The Court nevertheless rejected an argument that the reverse onus provision could be construed as requiring an accused only to introduce or point to evidence of the fact that she was not in possession of drugs on her premises, rather than having to disprove that fact.

Six Justices held that the interpretive task imposed by the Charter accorded with ordinary principles of statutory interpretation. Section 32 was analogous to the common law principle of legality which requires courts to favour an interpretation of a statute, if one be available, that is compatible with common law rights and freedoms rather than an interpretation which would override them. A similar approach to the interpretation of a reverse onus provision affecting the presumption of innocence had been taken four years earlier by the Supreme Court of New Zealand in *R v Hansen*.[11]

The equivalent provision, s 3 of the Human Rights Act 1998 (UK), provides: "So far as it is possible to do so ... legislation must be read and given effect in a way which is compatible with the Convention rights". The Convention there referred to is the European Convention on Human Rights. Section 3 was described by the House of Lords in *Ghaidan v Godin-Mendoza*[12] as "apt to require a court to read in words which change the meaning of the enacted legislation, so as to make

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8 *Momcilovic v The Queen* [2011] HCA 34, (2011) 245 CLR 1.

9 Charter of Human Rights and Responsibilities Act 2006 (Vic), s 32(1).

10 Drugs, Poisons and Controlled Substances Act 1981 (Vic), s 5.

11 *R v Hansen* [2007] 3 NZLR 1 (SC).

12 *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

it Convention-compliant".[13] Lord Steyn described its function as "remedial".[14] Cautionary metaphors were deployed to ensure that the process of remedial interpretation did not get out of hand. The application of s 3 had to be "compatible with the underlying thrust of the legislation".[15] It must "go with the grain of the legislation"[16] and not remove 'the very core and essence, the "pith and substance",[17] nor violate a "cardinal principle" of the legislation.[18] Section 3 did not call for "legislative deliberation".[19] There may be seen in those cautionary metaphors a concern to limit the movement of the boundary between judiciary and parliament affected by the interpretive principle.

In the judicial review of executive action, courts are frequently required to interpret statutes in order to determine the limits of the powers they confer on public officials or authorities. Review based on the failure of a decision-maker to take into account a mandatory relevant consideration, or for taking into account an irrelevant consideration, or for exercising power for an improper purpose, or for error of law, or a failure of procedural fairness, will almost always begin the interpretation of what is required by the relevant statute for the lawful exercise of the power which it confers. Many grounds of judicial review may be embraced by the broad proposition that an administrative decision-maker exercising a statutory power or discretion must act rationally, that is to say consistently with the internal logic of the statute. It is in this area that the constitutional function of courts in authoritatively interpreting statutes, intersects with their constitutional function in reviewing the exercise of official power.

Robin Cooke's description of courts as line-drawers appeared in the Foreword to a book entitled *Courts and Policy: Checking the Balance*, which recorded the proceedings of a seminar convened by the New Zealand Legal Research Foundation in 1993.[20] I was present, heard him speak at the end of the seminar and briefly met him. I was sorry I did not get to know him. He takes his place in the history of New Zealand as its great servant in the administration of justice, most notably as President of the Court of Appeal from 1986 to 1996. He served a wider regional community sitting also on the Pacific Courts of Appeal in Samoa, the Cook Islands and Kiribati. He was a Judge of the Supreme Court of Fiji and also served on the Court of Final Appeal of Hong Kong. Following

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13 At [32] per Lord Nicholls.

14 At [49] per Lord Steyn.

15 At [33] per Lord Nicholls.

16 At [121] per Lord Rodger.

17 At [111] per Lord Rodger citing *Union Colliery Co of British Columbia Ltd v Bryden* [1899] AC 580 at 587 per Lord Watson.

18 *Ghaidan v Godin-Mendoza*, above n 12, at [113] per Lord Rodger citing *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291 at [42] per Lord Nicholls.

19 *Ghaidan v Godin-Mendoza*, above n 12, at [33] per Lord Nicholls.

20 B D Gray and R B McClintock (eds) *Courts and Policy Checking the Balance* (Brookers, Wellington, 1995).

upon his retirement from the presidency of the Court of Appeal he was made a member of the Appellate Committee of the House of Lords, on which he sat until his retirement in 2001. These are the bare bones of the life and works of a great jurist of international standing.

I remember the conference in 1993 for a number of reasons. It was also the first time I had heard Sir Kenneth Keith speak and I was impressed with his intellectual energy and almost boyish enthusiasm for his topic, which was "Policy and Law: Politicians and Judges (and Poets)".[21] Later we were to sit together in the early 2000s on the Supreme Court of Fiji. Indeed, we co-authored a joint judgment on the review of prosecutorial discretions,[22] which has been cited repeatedly in the Privy Council and the House of Lords and was recently referred to in the rather troubling case of *R (on the application of Lord Carlile of Berriew QC) v Secretary of State for the Home Department*.[23] I remember the 1993 conference also for the lively and provocative observations by other speakers, which inform the general theme of this lecture. A former Prime Minister of New Zealand, Sir Geoffrey Palmer, in the course of what Justice Michael Kirby later called "an energetic presentation",[24] made what seemed to be a rather dismissive quip about parliamentary sovereignty: "I don't give a flick about parliamentary sovereignty".[25] I am delighted to see him present in the audience this evening.

Another speaker, Professor Geoffrey Walker, from the University of Queensland, denounced the then recently delivered *Mabo* decision[26] of the High Court of Australia as a "monstrous, presumptuous obiter dictum" and "another usurpation by the Court of the constitutional power of the Australian Parliaments and people".[27] Michael Kirby, who was in attendance in his capacity as President of the Court of Appeal of New South Wales, made a presentation appropriately entitled

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21 Address to Legal Research Foundation conference, Auckland, August 1993, subsequently published as Kenneth Keith "Policy and Law: Politicians and Judges (and Poets)" in BD Gray and RB McClintock (eds) *Courts and Policy: Checking the Balance* (Brookers, Wellington, 1995) 117.

22 *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712 (Supreme Court of Fiji).

23 *R (on the application of Lord Carlile of Berriew QC) v Secretary of State for the Home Department* [2014] UKSC 60.

24 MD Kirby "Conference on Courts and Policy"[1994] NZLJ 51.

25 Address to Legal Research Foundation conference, Auckland, August 1993, subsequently published as Geoffrey Palmer "Judicial Selection and Accountability: Can the New Zealand System Survive?" in BD Gray and RB McClintock (eds) *Courts and Policy: Checking the Balance* (Brookers, Wellington, 1995) 11.

26 *Mabo v Queensland* (No 2) (1992) 175 CLR 1.

27 Geoffrey de Q Walker "Some Democratic Principles for Constitutional Reform in the 1990s" in B D Gray and R B McClintock (eds) *Courts and Policy: Checking the Balance* (Brookers, Wellington, 1995) 183 at, 189–190.

"The Exciting Australian Scene" and came to the defence of the *Mabo* decision.[28] Sir Robin, delivering what he later called 'an oral judgment at the end of the seminar', poured oil on troubled waters.

Sir Geoffrey Palmer's quip and the denunciation of *Mabo* at that conference in 1993 are not cited simply to give a touch of colour to this lecture. Parliamentary sovereignty is an aspect of the common law constitution manifested in the relationships between the branches of government inherited from the United Kingdom, although in Australia with a written Constitution and limited parliamentary powers, it may best be thought of in terms of parliament's legislative supremacy when acting within the scope of the powers accorded to it. The *Mabo* decision, which also featured prominently at the conference, declared a new view for Australia of historical events defining the relationship between Australia's indigenous people and its colonisers. That view departed from assumptions about the extent of the reception of English land law upon which Australian land law had rested in the colonies prior to Federation. As Gummow J, who made those observations in his judgment in *Wik Peoples v Queensland*, went on to say:[29]

> To the extent that the common law is to be understood as the ultimate constitutional foundation in Australia, there was a perceptible shift in that foundation, away from what had been understood at federation.

The reference by Gummow J to the common law as "the ultimate constitutional foundation in Australia" evoked words used by Sir Owen Dixon in a paper presented at the Australian Legal Convention in 1957 under the title "The Common Law as an Ultimate Constitutional Foundation".[30] He spoke of the common law as "a jurisprudence antecedently existing into which our system came and in which it operates".[31] He said it was the source of the supremacy of the Parliament at Westminster manifested in the proposition that an English court could not question the validity of a statute. He quoted Salmond's question: "whence comes the rule that acts of parliament have the force of law?", and answered in Salmond's words: "It is the law because it is the law and for no other reason that it is possible for the law to take notice of."[32]

On the function of statutory interpretation and the way in which common law rules are applied which are protective of common law principles, he asked the rhetorical question: "Would it

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28 Michael Kirby "The Exciting Australian Scene" in B D Gray and R B McClintock (eds) *Courts and Policy: Checking the Balance* (Brookers, Wellington, 1995) at 231.

29 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 182.

30 Owen Dixon "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 ALJ240.

31 At 240.

32 At 242 citing John W Salmond *Jurisprudence: Or, The Theory of Law* (2nd ed, Steven and Haynes, London, 1907) at 125.

be within the capacity of a parliamentary draftsman to frame, for example, a provision replacing a deep-rooted legal doctrine with a new one?"[33] The question was a little delphic. It was not entirely clear whether Sir Owen was raising a matter of fundamental principle about deep-rooted legal doctrines or addressing the practical difficulty of drafting a statute to displace such principles.

In comments following Sir Owen's paper, Lord Morton of Henryton in effect challenged the correctness of his observation about deep-rooted doctrine.[34] In reply, Sir Owen became less delphic and said it related to his conception of what a draftsman was really capable of doing. He mentioned many attempts in various statutes in Australia over the years to reverse the presumption of innocence and said "they have not managed it very well in the face of what courts have done".[35] This was a reference to the principle of legality which favours that interpretation of a statute which will least impact on common law principles, rights and freedoms.

Sir Owen Dixon's comment raised, if only fleetingly, the possibility of a species of common law constitutionalism extending to judge-made limits on the supremacy of parliament. Robin Cooke adverted to that possibility on more than one occasion in his judgments. In 1979, he questioned whether Parliament could confer on a body other than the courts power to determine conclusively whether or not actions in the courts were barred.[36] In 1981, in a case concerning the breadth of a regulation-making power, he questioned whether the common law doctrine of the supremacy of parliament would allow parliament to abdicate its function.[37] In 1984, he suggested in two cases that "some common law rights may go so deep that even parliament cannot be accepted by the courts as having destroyed them".[38] His was not a lone voice. His predecessor, Sir Owen Woodhouse, speaking extra-judicially in 1979, said that "there really are limits of constitutional principle beyond which the legislature may not go and which do inhibit its scope".[39]

In 1996, more than a decade after the Cooke judgments of the early 1980s, Baragwanath J considered a provision of the Fisheries Act 1983 which precluded judicial review of decisions of the

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33 Dixon, above n 30, at 241.

34 At 250.

35 At 253.

36 *L v M* [1979] 2 NZLR 519 (CA) at 527.

37 *Brader v Ministry of Transport* [1981] 1 NZLR 73 (CA) at 78.

38 *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA); and *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398.

39 Owen Woodhouse *Government under the Law* (Price Milburn for the New Zealand Council of Civil Liberties, Wellington, 1979).

Quota Appeal Authority.[40] He quoted Sir Robin's observation in *New Zealand Drivers' Association v New Zealand Road Carriers*, decided in 1982, that:[41]

> [W]e have reservations as to the extent to which in New Zealand even an Act of Parliament can take away the rights of citizens to resort to the ordinary Courts of law for the determination of their rights.

Baragwanath J did not have to resolve that fundamental question because the relevant provision not only barred a remedy, but also extinguished the asserted rights. His Honour therefore did not have to venture into what he called "an extra-judicial debate which the good sense of parliamentarians and Judges has kept theoretical".[42] Contrasting the position in New Zealand with that in the United States, Canada, Australia and the United Kingdom, since its accession to the European Community and the House of Lords decision in *Factortame*,[43] he observed that in New Zealand both Parliament and the judiciary recognised that "constitutional peace and good order are better maintained by adherence to conventions rather than judicial decision".[44] He did seem, however, to fire off a warning shot in the general direction of the legislature. He suggested that a disregard of convention would put pressure upon the unchallenged public acceptance of the constitutionality of legislation. He emphasised the utility of statutory interpretation in keeping the legislature within the bounds of convention.

In Australia, ch III of the Constitution, which deals with the judicial power of the Commonwealth, supports implications limiting legislative power, both Federal and State, with respect to Australia's courts. The source of those limitations in relation to federal courts is the doctrine of the separation of judicial power from the legislative and executive powers of the Commonwealth. The doctrine was recognised by the High Court in the *Boilermakers' Case*.[45] However, it does not have application to State courts, nor is it entrenched in State Constitutions, although it is generally supported by convention. That being said, implications drawn from ch III of the Constitution have limited State legislative powers in ways which reflect some aspects of the doctrine of separation of powers. State courts are linked to ch III of the Constitution because it contains a provision under which the Commonwealth Parliament may confer federal jurisdiction on those courts. By implication, State legislatures cannot abolish State Supreme Courts as the Constitution assumes their continuing existence. State legislatures cannot confer powers or functions on State courts or require them

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40 *Cooper v Attorney-General* [1996] 3 NZLR 480 (HC).

41 At 484 citing *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374 (CA) at 390.

42 *Cooper v Attorney-General*, above n 40, at 484.

43 *R v Secretary of State for Transport; Ex parte Factortame Ltd (No 2)* [1991] 1 AC 603 (HL).

44 *Cooper v Attorney-General*, above n 40, at 485.

45 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

to do things which are repugnant to or incompatible with that institutional integrity which bespeaks their constitutionally mandated position in the Australian legal system as part of a national integrated judiciary.[46] A State legislature cannot authorise the executive to enlist a court of the State to implement decisions of the executive in a manner incompatible with the court's institutional integrity.[47] Nor can a State legislature enact a law conferring upon a judge of a State court a non-judicial function which is substantially incompatible with the functions of the court of which the judge is a member.[48] Importantly, State legislatures cannot immunise statutory decision-makers from judicial review by the Supreme Court of the State for jurisdictional error.[49]

The key concept of institutional integrity underpinning the implied limits of parliament's power over courts, is sometimes linked to the essential or defining characteristics which mark courts apart from other decision-making bodies. Those characteristics, which are ultimately emanations of common law principles, include:

- the authority and duty to decide controversies and to discharge functions traditionally regarded as a subject of judicial power or analogous to such functions;
- the reality and appearance of decisional independence from the executive and from the legislature;
- adherence to procedural fairness effected by impartiality, in reality and appearance, and observance of the hearing rule;
- adherence to the open court principle; and
- accountability for decisions effected by publication of reasons.

Perhaps the most important of those characteristics is the decisional independence of courts from the Executive and from other external influences.

The constitutional entrenchment in Australia of judicial review of administrative action is provided by s 75(v) of the Constitution in relation to the High Court and by implication from ch III in relation to the State Supreme Courts. An interesting question for New Zealand and, perhaps, the United Kingdom, is whether common law constitutionalism would be consistent with a law precluding judicial review of executive action for want of lawful authority or, as put in Australia, for jurisdictional error. In a society in which the courts are stripped of that power, the executive decision-maker, placed beyond challenge, may become the final and authoritative interpreter of the law under which he or she acts and indeed may purportedly act under the authority of the law while

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46 *Fardon v Attorney-General* (Qld) [2004] HCA 46, (2004) 223 CLR 575; and *Assistant Commissioner Condon v Pompano Pty Ltd* [2013] HCA 7, (2013) 87 ALJR 458.

47 *South Australia v Totani* [2010] HCA 39, (2010) 242 CLR 1.

48 *Wainohu v New South Wales* [2011] HCA 24, (2011) 243 CLR 81.

49 *Kirk v Industrial Relations Commission of New South* [2010] HCA 1, (2010) 239 CLR 531.

disregarding entirely its limits. Such a consequence would necessarily affect in an important way the relationship between the courts and the Executive and the character of the Executive Government as the branch of government which must administer and apply the laws made by the Parliament. Whether common law constitutionalism imposes a qualification on parliamentary supremacy which prevents such an outcome, is a question which helps to mark out some of the territory in which it is appropriate to speak of deep underlying principles.

Parliamentary supremacy in New Zealand was asserted by the Court of Appeal in 1999 in *Shaw v Commissioner of Inland Revenue* when it quoted,[50] with approval, a passage from the judgment of Robertson J in 1991 in *Rothmans of Pall Mall (NZ) Ltd v Attorney-General*:[51]

> … the constitutional position in New Zealand ... is clear and unambiguous. Parliament is supreme and the function of the Courts is to interpret the law as laid down by Parliament. The Courts do not have a power to consider the validity of properly enacted laws.

Mr Shaw sought to challenge the validity of a surcharge on his superannuation entitlements and claimed that the courts had power to consider the validity of the content of legislation under the Declaratory Judgments Act 1908. The Court of Appeal in *Shaw* found itself, like Baragwanath J in *Cooper v Attorney-General*, "relieved from venturing" into the debate about what would happen in the extreme circumstance of a breakdown of constitutional conventions.[52] Their Honours said:[53]

> The appellant's grievance falls well short and certainly could not lead the Court to consider revisiting conventions so fundamental to New Zealand's constitutional structure. We should not be taken to be expressing a view on the debate.

The last sentence does not throw away the ultimate form of common law constitutionalism. It seems to have been another warning shot followed by a discreet holstering.

In his 2004 Robin Cooke Lecture, Kirby J referred to the Australian constitutional framework and the absence of any successful invocation of deep underlying common law rights affecting legislative power whether at the Commonwealth or State level. He concluded with a suggestion that things might be different in New Zealand:[54]

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50 *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA).

51 At [13] citing *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323 (HC) at 330.

52 At [17] citing *Cooper v Attorney-General*, above n 40, at 484.

53 At [17].

54 Michael Kirby "Deep Lying Rights – A Constitutional Conversation Continues" (2005) 3 NZJPIL 195 at 218–219 (citations omitted).

> As a nation engaged in a profound conversation about its constitutional future, New Zealand may find its own means of protecting deep rights and constitutional conventions against erosion. Perhaps it will elevate some of them to a superior legal status as constitutional norms, such as the rights of the indigenous people of New Zealand guaranteed in the *Treaty of Waitangi*.

The theoretical question whether fundamental common law principles can qualify legislative power has not been definitively answered in Australia. It is not easy to see how it would arise under the Commonwealth Constitution except in connection with its interpretation and implications which can be drawn from it which, as has been seen, may affect State legislative power in relation to the existence, functioning and independence of State courts. The omens are not promising for the proponents of a free-standing common law limitation. However, the question has been left, at least theoretically, open.

In 1988, the High Court in *Union Steamship Co of Australia Pty Ltd v King* referred to the position of the New South Wales State Parliament, authorised by its Constitution to make laws for the peace, order and good government of the State and said:[55]

> Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law ... a view which Lord Reid firmly rejected in *Pickin v British Railways Board*, is another question which we need not explore.

In *South Australia v Totani*, in a case concerning a South Australian statute, I referred to the principle of legality and its imposition of a requirement for clear statutory language before a statute will be construed as overriding common law rights and freedoms, and said:[56]

> Whether, beyond that imposition, State legislative power is constrained by rights deeply rooted in the democratic system of government and the common law was a question referred to but not explored in *Union Steamship Co of Australia Pty Ltd v King*. Whatever the answer to the unexplored question, it is self-evidently beyond the power of the courts to maintain unimpaired common law freedoms which the Commonwealth Parliament or a State Parliament, acting within its constitutional powers, has, by clear statutory language, abrogated, restricted, or qualified.

A recent summary of the position of contemporary academic comment in Australia observed that common law limits on legislative power have particular appeal in countries without a written constitution or a strict separation of powers, such as the United Kingdom and New Zealand. Judicial and academic opposition to the concept in Australia is expressed in terms of rejection of a natural rights-based system of constitutional review. The conspicuous absence of a United States style Bill of Rights, the Constitution's text and structure, and a general suspicion about undue romanticism

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55 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at [16].

56 *South Australia v Totani* [2010] HCA 39, (2010) 242 CLR 1 at [31].

about the common law, underpins that opposition.[57] As Williams and Hume have cautioned in the second edition of their book on *Human Rights under the Australian Constitution*, any resurrection of fundamental rights as an absolute limitation on legislative power would need to be attended by extreme judicial caution given its anti-democratic effects.[58] It would need to articulate principles guiding the choice of those rights, lest the result be incapacitating uncertainty in the law and "rule by judiciary rather than the rule of law".[59] The late Professor Zines made the point crisply:[60]

> To limit governmental power by reference to fundamental principles of the common law has, at best, a tenuous link with anything in the Constitution and resembles more notions of 'higher law' or 'natural law', which depend very much on personal values.

Justice Gummow, in a paper published in the Australian Law Journal in 2005, observed that the High Court has not adopted any general theory for the implication of restraints upon the legislative powers of the Commonwealth by notions of the supremacy of the common law or a distillation of its judicially attractive fundamentals.[61]

Debate about common law constitutionalism continues in the United Kingdom. Lord Woolf raised the possibility of fundamental common law constraints on the legislative power of the Parliament in an essay published in Public Law in 1995.[62] He identified two principles upon which the rule of law depended, first, the supremacy of parliament in its legislative capacity and, secondly, the function of the courts as final arbiters in the interpretation and application of the law. He acknowledged that within that framework neither institution trespasses on the role of the other, albeit legislation may confer or modify statutory jurisdictions and control how the courts exercise their jurisdiction. He seemed however, to draw a line at legislative action which would undermine in a fundamental way the rule of law on which the unwritten constitution depends, for example, by removing or substantially impairing the judicial review jurisdiction of the court. He said of that jurisdiction that it was "in its origin ... as ancient as the common law, predates our present form of parliamentary democracy and the Bill of Rights".[63]

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57 William Bateman "The Constitution and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review" (2011) 39 FL Rev 463 at 488.

58 George Williams and David Hume (eds) *Human Rights under the Australian Constitution* (2nd ed, Oxford University Press, Oxford, 2013) at 48.

59 At 48, citing Anne Twomey "Fundamental Common Law Principles as Limitations upon Legislative Power" (2009) 9 OUCLJ 47 at 71.

60 Leslie Zines "A Judicially Created Bill of Rights?" (1994) 16 Syd LR166, at 183.

61 William Gummow "The Constitution – Ultimate Foundation of Australian Law?" (2005) 79 ALJ 167.

62 Lord Woolf "Droit Public – English Style" [1995] PL 57.

63 At 68.

Lord Justice Laws, writing in the same edition of Public Law, took a more explicit position when he said:[64]

> As a matter of fundamental principle, it is my opinion that the survival and flourishing of a democracy in which basic rights (of which freedom of expression may be taken as a paradigm) are not only respected but enshrined requires that those who exercise democratic, political power *must have limits set to what they may do: limits which they are not* allowed to overstep. If this is right, it is a function of democratic power itself that it be not absolute.

Lord Bingham took a different approach in his book on *The Rule of Law*. Drawing upon Professor Goldsworthy's writing, he said:[65]

> As Goldsworthy demonstrates, to my mind wholly convincingly, the principle of parliamentary sovereignty has been endorsed without reservation by the greatest authorities on our constitutional, legal and cultural history.

Common law constitutionalist positions analogous to that of Lord Woolf have been advocated for by a number of writers in the United Kingdom, including Trevor Allan, Paul Craig, Jeffrey Jowell and Dawn Oliver. United Kingdom critics of common law constitutionalism include Thomas Poole, M Elliott and C Forsyth. Geoffrey Goldsworthy points out that there has never been a recorded case in which the courts, without the authority of parliament, have invalidated or struck down a statute.[66]

Some fundamental questions were raised in the House of Lords in a challenge to the legislative ban on fox hunting in which the courts were asked to determine whether the Hunting Act 2004 (UK) and the Parliament Act 1949 (UK) were valid Acts of Parliament. The broader issue of so-called parliamentary sovereignty was considered by Lord Steyn, Lord Hope and Baroness Hale.[67] Lord Steyn echoed Lord Woolf in his Public Law article, when he said:[68]

> In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the [Court] may have to consider whether this is [a] constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish ... .

Lord Hope said that the sovereignty of Parliament was no longer, if it ever was, absolute. He said: "Parliamentary sovereignty is an empty principle if legislation is passed which is so absurd or

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64 John Laws "Law and Democracy" [1995] PL 72 at 81.

65 Tom Bingham *The Rule of Law* (Allen Lane, London, 2010) at 163.

66 At 163 citing Jeffrey Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, Oxford, 1999).

67 *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.

68 At [102].

so unacceptable that the populace at large refuses to recognise it as law".[69] Baroness Hale, also channeling Lord Woolf, observed that:[70]

> The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny ... In general, however, the constraints upon what Parliament can do are political and diplomatic rather than constitutional.

Parliamentary sovereignty surfaced again in 2011 in *AXA General Insurance Ltd v HM Advocate*.[71] Several insurance companies in that case argued that the Scottish legislation was outside the Parliament's legislative competence on the grounds that it was irrational at common law. The argument was rejected by a seven member Supreme Court. Lord Hope however, fired off a familiar warning shot. He referred to the possibility of an executive government enjoying a large majority in the Scottish Parliament, dominating the only Chamber in that Parliament. He said:[72]

> It is not entirely unthinkable that a government which has that power may seek to use it to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual. Whether this is likely to happen is not the point. It is enough that it might conceivably do so. The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.

Typically those observations put an extreme case which has never been reached. As Professor Jowell has suggested, it would take some time, provocative legislation and considerable judicial courage for the Supreme Court to concretely assert the primacy of the rule of law over parliamentary sovereignty.[73]

The concept of common law constitutionalism considered in the debates to which I have referred, embraces the principle that there are, in extremis, common law limits on legislative power. That kind of constitutionalism, however, is at one end of a spectrum. Further along the spectrum, but still within the genus of constitutionalism, are common law concepts of the essential and defining characteristics of the branches of government and their relationships with each other, and the body of common law principles which inform strong interpretive rules capable of application to written constitutions, statutes, delegated legislation and the exercise by agencies of the Executive Government of statutory powers. Academic writings reveal different understandings of what

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69 At [120].

70 At [159].

71 *AXA General Insurance Ltd v The Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868.

72 At [51].

73 Jeffrey Jowell "The Rule of Law and Its Underlying Values" in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution* (Oxford University Press, New York, 2011) 11 at 32.

common law constitutionalism embraces and may give rise to different approaches according to their understandings.

Robin Cooke contributed to discussion of this important topic not only in New Zealand, but in both our countries. As with so much of his work, that contribution continues and properly informs an ongoing debate. This is the third Robin Cooke Lecture in which the topic has been visited. In 2004, it was addressed by Michael Kirby, and in 2005 by Chief Justice Beverley McLachlin of the Supreme Court of Canada. Its vitality is to be welcomed. It keeps alive an informed consciousness of what we can properly regard as essential characteristics of democratic government in the common law tradition. It maintains an alertness to developments which may, although we hope they never will, require a more active consideration of its application.