The courts and the constitution

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The role of the courts is in one sense unchanging: it is to resolve the matters, especially the disputes, brought before them. But the ways in which they carry out that role and some of the principles relevant to it are changing — possibly fundamentally — and greater changes may be in the offing. In this paper Professor Keith considers aspects of those larger questions, returning at the end to Professor Quentin-Baxter's emphasis on the international environment.

I shall consider three questions:

1. What do the courts do?
2. How do they go about their task? That is to say, what matters do they take into account in reaching their decisions? By what are they bound? What matters are relevant to their decisions? And what weight do they give to those relevant matters?
3. How might their tasks change?

These are vast questions — even when they are confined, as they will be, to constitutional matters. They require much greater wisdom, knowledge and experience, and, I might add, time, than I can bring to bear tonight.

The vastness and difficulty of the questions is increased by the fact that at the moment the law is subject to major change. This is true in particular of fundamental matters with which the courts deal. One of our leading judges last August spoke of how his court, the Court of Appeal, has been faced in the last year or so with a continual surfacing of policy cases. This, he said, brought home how many fundamental issues remain unsettled or reassessable in these restless years, creating a constantly strengthening awareness that our responsibility must be to aim at solutions best fitting our particular national way of life and ethos.[1]

I will be mentioning a number of these fundamental changes in the public law field later. Let me refer to just one at this point. The Privy Council, last year, held that the Hong Kong immigration administration was bound by a statement which it made, without any specific statutory authority at all, regulating

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1 Sir Robin Cooke "Divergences — England, Australia and New Zealand" [1983] N.Z.L.J. 297.

the procedure which it said it would follow in dealing with the hundreds of thousands of illegal immigrants who reach that island each year.[2] The Privy Council gives almost no reason for the decision. So far as principle is concerned it refers only to the requirements of good administration. So far as case authority is concerned it mentions one decision of the English Court of Appeal which is not directly in point. I don't quarrel with the result. It does appear to be a sensible one. It is certainly one that ombudsmen in various countries have commonly reached. My difficulty is that it would be very hard to find any justification for it in the existing law. It is a major step forward which is presented without clear reasoning. It reminded me of the step which the International Court took when it held ten years ago that France was bound by various statements which had been made by ministers not to continue to test nuclear weapons in the South Pacific. That particular holding as well caused surprise and, in the minds of some more conservative commentators, alarm at the judicial process involved.[3]

What do I mean when I say that I am going to be concerned with constitutional matters? I am concerned with disputes about the powers of public agencies, especially when individuals are challenging a particular exercise of power. That is still a vast field. It includes, for example, criminal law and the law of taxation. I have to be selective. What I propose to do is to take a few cases from a number of jurisdictions within the common law world to illuminate aspects of the three questions — the present facts, the processes relevant to those facts, and the possible prospect.

I. WHAT DO THE COURTS DO?

One general answer to the first question — what do courts do? — is simple. They decide the disputes and other matters which are brought before them. In accordance with the judicial oath the judges "do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will."[4] But they also sometimes do a second thing — they contribute to the statement of the law. Their role is not exclusively particular to the case. I will be giving greater attention to that general law-making and law-declaring role. We must not, however, forget the particular function from which that general role arises. The one colours and both strengthens and confines the other in vital ways.

In almost all of the cases I shall be considering there is another vital relationship: that between Parliament and the courts. As Professor Quentin-Baxter reminded us in the first lecture in the series, the books tell us that as a result of the seventeenth century constitutional arrangement we have in law an all-powerful Parliament; the Common Law courts, it is said, have agreed that

2 *Attorney-General of Hong Kong* v. *Ng Yuen Shiu* [1983] 2 A.C. 629.
3 *Nuclear Tests* cases (*Australia* v. *France* 1974 I.C.J. Rep. 253; *New Zealand* v. *France* 1974 I.C.J. Rep. 457), criticised for example by A. P. Rubin "The International Legal Effects of Unilateral Declarations" (1977) 71 A.J.I.L. 1.
4 Oaths and Declarations Act 1957, s.18.

Parliament can pass whatever law it likes and the courts must give effect to that law. That vision of an almighty Parliament raises a basic question for my topic, for can the courts really have a significant role in our constitutional system in the face of that juggernaut, one moreover, which, because of the development of our system of cabinet government, is under the firm control of the executive? I shall try to suggest that it has most significant roles, even in the face of that principle and that development. I shall also call attention to the fact that the principle may not be as rock solid as we sometimes think.

I shall now consider a number of cases which bear on the principle and on the role of Parliament and the executive. The first concerns the scrapping by the 1975 National Government of the Labour Government's superannuation scheme.[5] Many of you will know that in the litigation which followed the statement made about that scheme by the Prime Minister late in 1975 the Chief Justice, Sir Richard Wild, held that the government had acted unlawfully. Quoting the Bill of Rights of 1689 and Dicey, the Chief Justice held that the Prime Minister had no power to unmake the law which had been made by Parliament. That could be done only by a new statute. That holding, that the Prime Minister had acted unlawfully, was a reminder and reinforcement of the structure of our constitutional system. Parliament is the law-maker. The executive in general is not, except to the extent that Parliament has so authorised. As the reference to the Bill of Rights shows, that holding goes back to the seventeenth century constitutional settlement. But the Chief Justice also recognised the combination of political and constitutional reality; he adjourned for six months the proceedings in so far as they sought coercive relief setting the superannuation scheme in action again. This was done in the expectation that the government would introduce legislation to give effect to the Prime Minister's statement and on the basis that there could be little doubt that the legislation will be enacted. "[It] would be an altogether unwarranted step to require the machinery of the [1974 Act] now to be set in motion again, when the high probabilities are that all would have to be undone again within a few months".[6] This case was a relatively simple one. That is not so of the next group of cases.

These cases concern the regulations made by governments over the last twelve years under the Economic Stabilisation Act 1948. There have been five reported cases and a number of complex judgments on difficult issues.[7] Over the whole of that twelve-year period the Act has been used for the introduction of far-reaching wage and price controls and freezes and other controls over economic activities, and also for the introduction of the carless days scheme.

5 *Fitzgerald* v. *Muldoon* [1976] 2 N.Z.L.R. 615.

6 Ibid. 623.

7 *New Zealand Shop Employees Union* v. *Attorney-General* [1976] 2 N.Z.L.R. 521, C.A.; *Auckland City Corporation* v. *Taylor* [1977] 2 N.Z.L.R. 413; *Brader* v. *Ministry of Transport* [1981] 1 N.Z.L.R. 73, C.A.; *New Zealand Drivers Association* v. *New Zealand Road Carriers* [1982] 1 N.Z.L.R. 374, C.A.; and *Combined State Unions* v. *State Services Co-ordinating Committee* [1982] 1 N.Z.L.R. 742, C.A. For an excellent comprehensive discussion of the 1948 Act and the use made of it, see D. Shelton *Government, The Economy and the Constitution* (1980) LL.M. thesis, Victoria University of Wellington.

The 1948 Act confers wide powers to make regulations relating to economic stability. The Court of Appeal has made it clear in deciding these cases that its role is a limited one:[8]

> It is elementary that the Court is not concerned with the wisdom or otherwise of regulations, nor with whether the Court considers them necessary, nor with assessing the comparative values of social policies.
> The Court is concerned with whether, on the true interpretation of the parent Act, regulations are within the powers conferred by Parliament. They will be invalid if they are shown to be not reasonably capable of being regarded as serving the purpose for which the Act authorises regulations. If the only suggested connection with that purpose is remote or tenuous, the Court may infer that they cannot truly have been made for that purpose.

The courts have not yet held that the government has breached that limit. The restraint which they recognise is a weak one. The regulations will survive if they are "reasonably capable of being regarded as contributing to the promotion of economic stability". It will be a brave court which wishes to make a negative judgment of the government's action by reference to that standard. It is not just a question of saying that it does not think that the government's policy will promote economic stability. The court would have to say that no rational government could *conceivably* think that the freeze or other control measure would possibly contribute to the promotion of economic stability.

The courts have, however, shown a greater willingness to make more specific arguments and on two occasions regulations made under the 1948 Act have been struck down. These arguments have related back to constitutional principle, in the first place the relationship between Parliament and the executive. Thus the Court of Appeal has referred to "the important constitutional principle that subordinate legislation cannot repeal or interfere with the operation of a statute except with the antecedent authority of Parliament itself".[9] Accordingly the Court of Appeal late in 1982 held invalid parts of the then wage freeze regulations because they derogated from the statutory processes in the state services sector.[10] The majority judgment of four judges is in various ways an elliptical and subtle one. The court did not hold that regulations made under the Economic Stabilisation Act could *never* derogate from statutes. They thought that the scheme of the Act indicated that that would sometimes be possible. In this case, however, they thought that Parliament in the state services legislation had in a sense put a fence around that statute and made it impossible for it to be amended except with clear statutory authority or by Parliament itself. In the end the court saw the issue as involving a weighing of alternatives; that is to say the matter was not clear cut:[11]

> Our constitutional duty is to resolve any conflict or doubt that arises in favour of the supremacy of Parliament. That is to say, special legislation as strongly worded as the 1977 Act is not to be overridden by mere regulations unless the authority to override it has been squarely and undoubtedly given by Parliament. Any other

8 *Drivers Association* case [1982] 1 N.Z.L.R. 374, 388.
9 *Combined State Unions* case [1982] 1 N.Z.L.R. 742, 745.
10 *Combined State Unions* case, ibid. For the legislative response see the Economic Stabilisation Amendment Act 1982.
11 Supra n.9 at 747.

> resolution would be too dangerous a constitutional precedent. In a case balanced as this one is, it is vital that the Court should come down firmly on the side of that basic principle of democracy.

The other specific constitutional argument which has been made relates to the right of access of individuals to the courts. One of the wage fixing cases, that brought by the Drivers' Union, involved an argument that individuals were being deprived of their right of access to the Arbitration Court. The Court of Appeal was plainly very attracted by this argument. In the end it failed because the right of access that the regulations removed was the right of access in respect of disputes of interest, that is to say disputes where changes in terms of conditions of employment were being sought. Had the regulations removed the right of the individual to have the award or contract of employment interpreted and to have rights under the instrument declared or enforced the result would probably have been a different one. The court indeed shows that its attachment to the right of access of the individual to the courts for the enforcement of legal rights is of a very basic kind. It said "we 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."[12] What does that mean about parliamentary sovereignty? The passage is to be related to another in the carless days case, another challenge, also unsuccessful, to regulations made under the 1948 Act. In that case the court said:[13]

> It may be added that the recognition by the Common Law of the supremacy of Parliament can hardly be regarded as given on a footing that Parliament could abdicate its function. It is not to be supposed that by the 1948 Act the New Zealand Parliament meant to abandon the entire field of the economy to the Executive.

These two statements are to be related to a number of others made by Mr Justice Cooke which I had in mind when I earlier suggested that perhaps one of the most fundamental principles in our constitutional system was now in question. Is there in the two statements I have just read a recognition of a basic constitutional settlement involving some degree of separation of function that cannot be upset by Parliament? First, Parliament cannot hand over to the executive the whole of its powers, say, to control the economy, and second, at least in some degree, the right of individuals to go to court to have legal disputes resolved must be left unrestrained.

Sir Robin Cooke returned to this question again in a judgment given on 18 April 1984, when he made a stronger statement:[14]

> I do not think that literal compulsion, by torture for instance, would be within the lawful powers of Parliament. Some Common Law rights presumably lie so deep that even Parliament could not override them.

What do these various statements amount to? They are appropriately brief

12 *Drivers Association* case, supra n.8 at 390.

13 *Brader's* case [1981] 1 N.Z.L.R. 73, 78.

14 *Taylor* v. *New Zealand Poultry Board* [1984] B.C.L. 565. Cooke J. referred to the *Drivers Association* and *Brader* cases, *L* v. *M* [1979] 2 N.Z.L.R. 519, 527, *Fraser* v. *State Services Commission* [1984] 1 N.Z.L.R. 116, 121, and F. A. Mann "Britain's Bill of Rights" (1978) 94 L.Q.R. 512.

and tantalising. I have some concern in making any comment at all about them. But I will venture one or two comments nonetheless.

At the least, the judges are making it clear that there is in their mind an ideal constitution which they will take into account in interpreting legislation. They will require a very clear legislative indication before that constitutional system is seen as being upset.

A further additional reading of the statements is that they are relevant to arguments in the legislative and political context. They may be addressed as much to conventional restraints. It is, moreover, possible to contemplate legal rules which are not enforceable or justiciable in the courts.

Yet another gloss on the statements is that they may, particularly in the case of the last one about torture, relate to the wider international context in which our constitution is now to be seen. As I shall mention later, there are increasing indications from the judges that that context is relevant to the interpretation of legislation. What is the position now if we are in breach of our international obligations because of legislative actions? Once, the view was easily taken that the one action had no impact on the other as a matter of New Zealand law. Parliament was supreme. The executive by making treaties did not affect the law. There have certainly been recent hints in the opposite direction in the United Kingdom.

Or is it the case that the judges are starting to ask questions about the exact nature of the seventeenth century constitutional settlement? Are they saying that the settlement was not all that clear in the first place? Are they saying that there were certain understandings within that constitutional settlement and that those understandings must be complied with by all parties or the original agreement is up for reassessment? Are we being taken back to 1610 to Sir Edward Coke, who said:[15]

> It appears in our books, that in many cases, the common will controul Acts of Parliament and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right, or repugnant or impossible to be performed, the court will controul it, and adjudge such Act to be void.

These intriguing statements from one side of Molesworth Street suggest at least that one of the absolute fundamentals of the constitution — or rather one of our assumed fundamentals — may be subject to question. As I said, I do not wish to take this matter very far. I would, however, note that there have been growing suggestions in England, with the development of European law, that the basic principle about Parliament's power was subject to question, that doubts have always been held about the principle by Scottish lawyers, and that in any event Parliament and its products are not to be seen solely in terms of Parliament's apparently all-emphatic power. That power must be seen always in a wider context. That brings me on to the next part of my paper in which I wish to

15 *Dr Bonham's Case* (1610) 8 Co. Rep. 114a, 118a. For differing views of that passage see T. F. T. Plucknett (1926) 40 Harv. L.R. 30, and S. E. Thorne (1938) 54 L.Q.R. 543.

discuss aspects of the relationship between Acts of Parliament and non-legislative material.

II. HOW DO COURTS SEE STATUTES?

I mention four aspects of that relationship. All call for much fuller treatment. The brief mention also indicates different ways in which legislation can be seen. Legislation is not necessarily merely a particular formal manifestation of government decision-making. That is frequently the way the politicians see it. For others, it often becomes part of a larger fabric.[16]

First are the principles of administrative law. These principles operate very much as a gloss on statutes. A major example is the principle of natural justice: in certain circumstances the government is not to take decisions affecting the rights and other interests of individuals without giving those individuals an opportunity to be heard. The courts are willing to infer such a procedural obligation from the statute, or even to supplement it when this is necessary to achieve justice, without frustrating the apparent purpose of the Act.[17] An apparently bald statement in a statute authorising, for example, the dismissal of policemen on the grounds that they have acted negligently or are in other ways unfit to hold their position has been read as being subject to natural justice.[18] Another principle, already mentioned, is that the individual has the right to go to court to ask for a decision whether an administrative body has exceeded its power. The courts insist on this right of access even in the face of legislation which apparently says that the court is not to. The courts once again assert constitutional principle.[19] In both of these areas, natural justice and access to the courts, there is a danger that the courts can by asserting general principle not be sufficiently sensitive to the particular aspects of the legislation in question. That is a danger that has to be watched. It does not however deny that the legislation must be seen against the background of principle.

In the cases that I have just mentioned the gloss added to the statute protects the individual against the unlawful or abusive assertion of the statutory power. In the second group of cases concerning the relationship between the statute and other aspects of the law the court goes in the opposite direction, to enforce the legislation. These are the cases where a statute prohibits certain action and establishes an enforcement procedure, usually by way of prosecution for breach with a penalty by way of a fine. In these cases the courts will sometimes attach as well their civil remedies to the legislation. That means that those individuals who have been affected by the breach of the statute are entitled to seek damages to compensate their loss, they may seek an injunction to prevent any further breach of the statutory prohibition, and in some cases the courts allow them to seek information from the allegedly offending party. This means that a statute

16 See J. M. Landis' brilliant essay "Statutes and the Sources of Law" (1932) reprinted in (1965) 2 Harv. J. Lgn. 7.

17 *Daganayasi* v. *Minister of Immigration* [1980] 2 N.Z.L.R. 130, 141.

18 E.g. *Ridge* v. *Baldwin* [1964] A.C. 40.

19 E.g. *Pyx Granite Co. Ltd* v. *Ministry of Housing and Local Government* [1960] A.C. 260, 286.

which at first appears to do no more than create an offence possibly with a minor fine as the maximum penalty has suddenly become a major source of private right with something equivalent to a search warrant attached to it.[20]

The third aspect of the relationship between legislation and other material looks to the physical material which can be used in interpreting the legislation. What material is relevant to the process of interpretation? I note two aspects; the use of legislative history, particularly the course of the preparation of the Act, and the use of international standards. The traditional view, still adhered to in the United Kingdom for instance, is to allow only very selective use of legislative history and then only for limited purposes. Thus Hansard is forbidden reading.[21] And such historical material as is available is to be used only to discover what was wrong with the previous law but not to discover the remedy.[22] Practice in this part of the world shows signs of breaking completely from that; Australian High Court judges have quoted Hansard in interpreting legislation;[23] enabling legislation is now before the legislatures in Canberra and Melbourne to further facilitate that;[24] Cooke J. in the case in which he made the statement about torture used the explanatory note to a Bill;[25] New Zealand lawyers sitting in Pacific Island courts have used material similar to Hansard to confirm the meaning of constitutional provisions which were before them for interpretation;[26] and judges increasingly refer to relevant law reform committee reports.[27] It appears to me that this is a sensible development so long as it is kept within balance. There is the danger, to use a quip of Mr Justice Frankfurter of the United States Supreme Court, that it is only when the legislative history is doubtful that you go to the statute. As he continued, while courts are no longer confined *to* the language of the statute they are still confined *by* it.[28]

International standards, particularly those contained in a relevant treaty, will often be part of the legislative history to which I have just referred. And, paradoxically given their attitude to Hansard, the United Kingdom courts do look to it. There was an interesting recent case, for example, where Lord Wilberforce was faced with a statement, very much in point, made by Mr R. O. Wilberforce Q.C. (as he then was) as leader of the United Kingdom delegation to a conference which was rewriting an international agreement about the liability of air carriers.[29] In New Zealand Mr Justice Richardson, to take another example, in interpreting

20 E.g. *Busby* v. *Thorn EMI Video Programmes Ltd* [1984] B.C.L. 702.
21 *Davis* v. *Johnson* [1979] A.C. 264, 329, 337, 349, 350, and *Hadmor Productions* v. *Hamilton* [1983] 1 A.C. 191, 232-233.
22 *Black Clawson International Limited* v. *Papierwerke Waldhof Aschaffenburg AG* [1975] A.C. 591. Lord Wilberforce has now recanted: *Symposium on Statutory Interpretation* (Australian Government Publishing Service, Canberra, 1983) 8-9.
23 E.g. *Wright* v. *McLeod* (1983) 51 A.L.R. 483, 530-532 (citing other recent instances).
24 See now Acts Interpretation Act 1901, s.15 AB (Aust.), assented to on 15 May 1984.
25 *Taylor's* case, supra n.14.
26 E.g. *Attorney-General* v. *Saipa'ia Olomalu* (1983) Western Samoa C.A., reported in (1984) 14 V.U.W.L.R. 275, 290-292.
27 E.g. *Harding* v. *Coburn* [1976] 2 N.Z.L.R. 577. For a recent valuable survey see J. F. Burrows "Statutory Interpretation in New Zealand" (1984) 11 N.Z.U.L.R. 1.
28 "Some Reflections on the Reading of Statutes" (1947) 47 Columb. L.R. 527, 543.
29 *Fothergill* v. *Monarch Airlines* [1981] A.C. 251.

a 1980 amendment to the Criminal Justice Act which prohibits the retroactive application of criminal law, referred to a provision of the International Covenant on Civil and Political Rights.[30] The New Zealand legislation, he said, implements that particular provision which New Zealand had ratified a year or two before. By use of that provision he was able to deal with an argument by the government which would have given a narrow reading to the New Zealand legislation. He noted as well the provisions to the same effect of the Universal Declaration of Human Rights and the European Human Rights Convention.

International standards can be used even when the legislation in question is not designed to give effect to them. This is to be seen, for example, in a case concerning allowances for teachers on transfer. The ministerial regulation discriminated against married women teachers as compared with married men. In holding that regulation to be invalid the court made use of various international instruments, some of which were not directly binding on New Zealand.[31] It seems to me that a very similar — indeed stronger — argument is available in respect of the Treaty of Waitangi. An argument that would invoke its broad language in the interpretation of legislation would, I think, be helped by the fact that Parliament has already given some legislative recognition to that fundamental document in the 1975 Act establishing the Waitangi Tribunal.[32]

That leads into my fourth point. In a sense it turns my third one around. A statute might be invoked by a court which is attempting to determine the scope of another statute or a Common Law rule even although the statute in question is not directly relevant. Another recent Court of Appeal judgment provides me with an example.[33] This case concerns the extent of public interest immunity, that is the law which limits the right of access of the litigant to information held by the Crown and relevant to that litigation. The Court of Appeal refused to follow a decision of the House of Lords which stated the law somewhat restrictively. One of the two reasons was to be found in the new policy of greater openness to government information which all the judges saw in the Official Information Act and, for one judge, in the report of the Danks Committee. Similarly, although in this case the decision went in the direction of protecting confidences, the Court of Appeal in determining a question about the scope, under the Common Law, of the solicitor-client privilege found evidence in legislation which was not conceivably directly in point. The express exclusion by that legislation of the solicitor-client relationship from a grant of a new statutory power to intercept information was seen as reflecting a general policy.[34]

30 *Department of Labour* v. *Latailakepa* [1982] 1 N.Z.L.R. 632, 635-636.

31 *Van Gorkom* v. *Attorney-General* [1977] 1 N.Z.L.R. 535, 542-543; [1978] 2 N.Z.L.R. 387, 395, C.A.

32 The fascinating 1879 *Kauwaeranga* judgment of Chief Judge Fenton published in (1984) 14 V.U.W.L.R. 227 also suggests further lines of argument. See also the articles by John Sutton (1981) 11 V.U.W.L.R. 17, and Paul McHugh (1984) 14 V.U.W.L.R. 247.

33 *Fletcher Timber Ltd* v. *Attorney-General* [1984] B.C.L. 571.

34 *R.* v. *Uljee* [1982] 1 N.Z.L.R. 561, 569 and 571. The court invoked the reservation of the privilege in narcotics legislation. See also the New Zealand Security Intelligence Service Act 1977, ss. 4A(1)(d)(ii) and 4B.

There is, I think, a need for much greater attention to be given to these questions of the relationship between legislation and other sources of decision. Legislation is still a Cinderella for lawyers. That is so notwithstanding its dominating importance. It is fair to say that at this university much greater attention is given to it. The profession, I think, needs to follow suit. In at least some of the cases I have mentioned the arguments have been developed by the judges rather than by counsel.

In the four areas that I have mentioned, as in the earlier discussion of Parliament's basic powers, there is evidence of a great fluidity. In the 25 years that I have been reading judgments there has been a marked change, some would even say a revolution, in the reasoning processes of many courts. That leads me into a tentative evaluation of our present position before I come to look a little to the future.

III. SHOULD THE COURTS DO MORE — OR LESS?

The first evaluative point is that the courts do seem to be alert, and often expressly so, to the proper limits to their role. I know that there are some, such as the eloquent president of the Auckland District Law Society, who see the matter differently and who see the courts as taking power which belongs to the executive.[35] In some ways this is a matter of personal impression but it does seem to me, trying to look at the matter according to principle, that the courts while undoubtedly now exercising wider powers try to make a careful judgment of the limit. In the regulation cases which I mentioned earlier they have from time to time referred back to a basic statement made by Mr Justice Callan in a case in which he held that the import licensing regulations 1938 were invalid. He said:[36]

> The Courts have no concern with the reasonableness of the regulation; they have no concern with its policy or that of the government responsible for its promulgation. They merely construe the Act under which the regulation purports to make, giving the statute . . . such fair, large, and liberal interpretation as will best attain its objects. Then they look at the regulation complained of. If it is within objects and intention of the Act, it is valid. If not, however reasonable it may appear, or however necessary it may be considered, it is *ultra vires* and void.
>
> A Court is not entitled to disallow regulations which appear to be within the intention of Parliament merely because the Court thinks them unreasonable, nor has it any power to allow regulations which are not within the intention of Parliament merely because the Court considers it unreasonable.

Much the same point was made in a recent House of Lords judgment concerning the dismissal of a police constable. The House of Lords there held that the action was unlawful because a fair hearing had not been given to the constable in question. Lord Brightman insisted that:[37]

35 D. F. Dugdale, *1984 New Zealand Law Conference Papers,* vol. 2, (1984) 12.

36 *F. E. Jackson & Co. Ltd* v. *Collector of Customs* [1939] N.Z.L.R. 682, 720-721. The first paragraph is a quotation from *Carroll* v. *Attorney-General* [1933] N.Z.L.R. 1461, 1478. For a recent citation see *Brader's* case, supra n.13 at 80, and see also the quotation from the *Drivers Association* case, text accompanying n.8 supra.

37 *Chief Constable* v. *Evans* [1982] 1 W.L.R. 1155, 1173, H.L.

> Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the Court is observed, the Court will, in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.

I mention that passage in part because it is one which New Zealand judges have quoted in dealing with challenges to decisions made by the Minister of Immigration.[38] You may have noticed that there has been some dispute recently about whether the courts have wrongly interfered with immigration decisions. In 1984, in the course of preparing submissions on the Immigration Bill, particularly its provision which would appear to prevent or at least restrict judicial review, I read all of the available decisions of the High Court on challenges to immigration decisions. I think that there is one case which can properly be criticised on the basis that the judge had gone an inappropriate distance into the substance of the Minister's decision.[39] For the rest, however, the judges have been careful to adhere to Lord Brightman's line. The same sensitivity to the scope of ministerial and government power is also to be seen, for example, in the unsuccessful legal attacks on the grant of immigration visas to the members of the Springbok rugby team and on the decisions relating to the Aramoana development taken by the government under the National Development Act.[40] The courts have been concerned throughout those decisions with the extent of government power and with proper process. There is no sufficient evidence of the abuse to which Lord Brightman refers.

The second evaluative point is that the courts and the legislature are not necessarily to be seen as a being in a confrontation. Indeed they should generally be seen as collaborating and co-operating in the understanding and development of the legislative scheme. This is to be seen, for example, in a judgment in which the Court of Appeal, invoking the principles of natural justice, required the minister to give an overstayer a fair hearing prior to deportation. The court was able to find support for that action in amendments which Parliament had made over the course of two years to the immigration legislation to give those who were being deported greater procedural protection. In other words the court could say that far from thwarting the intention of Parliament it was helping to manifest it more fully.[41]

The third evaluative point is that courts, of course, have to justify their position. They have to give reasons for their conclusions. It is not for them merely to assert. Legislatures by contrast produce law without any formal official statements of reason or purpose. This emphasis on reason and on justification is coming through more generally in our legal and constitutional system. Both the courts and the legislature, particularly in the Official Information Act, have placed greater emphasis on reasoned justification.

38 E.g. *Mohu* v. *Attorney-General* (1983) 4 N.Z.A.R. 168, 174.

39 *Nair* v. *Minister of Immigration* [1982] 2 N.Z.L.R. 571.

40 *Ashby* v. *Minister of Immigration* [1981] 1 N.Z.L.R. 222, and *CREEDNZ* v. *Governor-General* [1981] 1 N.Z.L.R. 172. For a fascinating account by a major participant in these cases, see Sir Robin Cooke "The Courts and Public Controversy" (1983) 5 Otago L.R. 357.

41 *Daganayasi* v. *Minister of Immigration,* supra n.17 at 142.

The next point is that the changes to which I have been referring lead to a larger responsibility for counsel in arguing cases. They must now often present a wider range of material and of argument. Part of that responsibility, one that rests on the courts as well, is to develop the indications that have already been given of when it is appropriate for the courts to develop the law.[42]

My final evaluative point is that the executive and the legislature can engage in a debate with the court and the lawyers about the law as stated by the courts. If the executive or legislature think it appropriate, they can, of course, produce different answers from those given by the courts. Parliament can alter the law, although, as it should already appear, some major issues of structure, process and approach may remain very much within the hands of the court. It is, to take an example or two, for Parliament to decide that the tort action for personal injury should be replaced by accident compensation and what its general extent should be, or whether we should have a wage and price freeze. Those cannot be matters on which the court, as a matter of policy, can have a view. Inevitably, however, decisions will also generally have to be made by someone other than Parliament about the application of that substantive decision to particular cases, and often the courts will have a part in resolving disputes about those decisions. In that event the courts will also make decisions which at times go to the fundaments of our system.

What does all this mean in terms of the view that is often expressed — for I now come to the question whether the power of the courts should be enhanced — that the kinds of tasks which are thrown up by a Bill of Rights are foreign to the judges' experience?[43]

There is an enormous range of relevant experience on which we can draw in looking very briefly at the Bill of Rights questions. I wish to make only a few points, largely by way of assertion, from the United States and Privy Council experience. So far as the United States Supreme Court is concerned, I make four points:

At various times the court has intervened disastrously to flout important initiatives by democratically elected legislatures to deal with central issues of policy. Among the principal examples are the decision holding unconstitutional legislation of the congress making slavery unlawful in the United States territories, the decision holding the income tax to be unconstitutional, and decisions striking down legislation relating to Roosevelt's New Deal.[44]

As against that, however, the United States Supreme Court has moved in the most important and critical ways to strengthen democratic freedoms and to

42 For recent most interesting discussions, see the judgments of the Court of Appeal in *Templeton* v. *Jones* [1984] B.C.L. 551, and *Busby* v. *Thorn EMI Video Programmes Ltd,* supra n.20.

43 See e.g. the balance of the submissions made in 1963-1964 on the proposed Bill of Rights, *Evidence Presented to the New Zealand Constitutional Reform Committee* (1965).

44 *Dred Scott* v. *Sandford* 19 How. 393 (1857); *Pollock* v. *Farmers Loan and Trust Co.* 157 U.S. 429, 158 U.S. 601 (1895); and Jackson *The Struggle for Judicial Supremacy* (1941), Ch. 4 ("The Court Nullifies the New Deal").

protect the most basic of human rights. This is to be seen, for example, in decisions relating to freedom of speech, requiring the reapportionment of gerrymandered legislatures, and making school segregation unlawful.[45] The court has been in the vanguard of promoting those most basic rights and of protecting and enhancing the democratic process. That second function points to a distinction which it seems to me is critical. It is the distinction between the process and the product. It seems to me that, as a broad proposition, courts have much more to contribute to the former than the latter. You will recall Lord Brightman's similar point about review of administrative action by the courts.

My third point about the United States Supreme Court is that it has a very lengthy experience of that constitutional litigation. The court has not come under sudden unexpected pressure. It was not until 1803 that for the first time it held an Act of Congress to be unconstitutional[46] and it was not until this century that the court had to deal seriously with questions of the constitutionality of laws that infringed on speech.[47] Consider by contrast the position faced by the Canadian Supreme Court in dealing with its new Charter of Rights. After just two years that court has more than thirty cases before it. It has given so far just one decision.[48] It is not surprising that in that judgment it indicates a certain amount of nervousness about its bold new role.

Associated with that is my final point. The United States court has been cautious and conservative at various times in its dealing with constitutional issues. To go back to the beginning of this paper it insists that it decide only real disputes. It also often insists that it will deal with constitutional issues only when they cannot be avoided. By such devices, it has managed to keep away from many critical disputes for a very long time.[49]

My other examples come from the growing experience of the Privy Council as a constitutional court interpreting Bills of Rights. This jurisdiction has not been the subject of very much published comment notwithstanding the fact that English and Scottish judges, with occasional input from other Commonwealth judges including New Zealand ones, have now handed down more than 30 opinions on matters relating to the Bills of Rights of a number of Commonwealth countries.[50] What indication does this litigation give of the possible role of the judges in our tradition in dealing with Bill of Rights questions? There are some

45 E.g. *New York Times Co.* v. *United States* 403 U.S. 713 (1971) (Pentagon Papers Case); *Baker* v. *Carr* 369 U.S. 186 (1962) (reapportionment); *Brown* v. *Board of Education, Topeka* 347 U.S. 438 (1953) (school desegregation).

46 *Marbury* v. *Madison* 1 Cranch 137 (1803). This was the only such judgment of the Marshall court. The next was the *Dred Scott* judgment, supra n.44.

47 *Schenk* v. *United States* 249 U.S. 47 (1919).

48 The case is *Re Skapinker and Law Society of Upper Canada.* For the Ontario Court of Appeal decision (reversed by the Supreme Court) see (1983) 145 D.L.R. (3d) 502.

49 For a classic, if now somewhat dated, statement see Brandeis J. in *Ashwander* v. *T.V.A.* 297 U.S. 288, 346-358 (1936) and compare the majority and minority views in *Baker* v. *Carr,* supra n.45, when the Supreme Court decided to enter the "political thicket" of reapportionment.

50 For a useful introductory survey, see E. Hird *Judges and a Bill of Rights* (1981) LL.B. (Hons) legal writing requirement, Victoria University of Wellington.

good things. For example, there is a splendid statement by Lord Wilberforce used in a number of recent decisions, about the basic approach to the interpretation of constitutions. He drew a distinction between Acts of Parliament concerned with specific subjects and constitutional enactments. He said of the latter:[51]

> It can be seen that this instrument has certain special characteristics.
> 1. It is, particularly in Chapter I, drafted in a broad and ample style which lays down principles of width and generality.
> 2. Chapter I is headed "Protection of fundamental rights and freedoms of the individual". It is known that this chapter, as similar portions of other [Commonwealth] constitutional documents drafted in the post-colonial period, was greatly influenced by the European Convention for the protection of human rights and fundamental rights and freedoms. . . . That convention was signed and ratified by the United Kingdom and applied to dependent territories. . . . It was in turn influenced by the United Nations Universal Declaration of Human Rights of 1948. These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called "the austerity of tabulated legalism", suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.

Further on he elaborated what he meant by "a generous interpretation":

> It was to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation on its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are all relevant to legislation of private law.

That approach has certainly been carried through in some cases including that particular one. I would like, however, to mention two cases which suggest a rather more limited approach. Both concern capital punishment.[52]

Rhodesian legislation, in force before UDI, provided for the death penalty for certain acts of arson. The Constitution provided that no person was to be subjected to torture or to inhuman or degrading punishment or other treatment. This language goes back to section 10 of the Bill of Rights 1689 and is reflected as well in the Eighth Amendment to the United States Constitution. The defendants did not argue that the death penalty was itself or necessarily inhuman or degrading punishment. The argument was rather that punishment carried with it the notion of the infliction of a penalty which is deserved or warranted by reason of the commission of the particular offence. That means that a punishment which is out of relation to that which in the particular circumstances is deserved may be an inhuman punishment. The Privy Council rejected that argument. It said that its task was limited to whether the particular punishment was itself inhuman or degrading. That could not be said to be so. The court found no assistance in United States cases because, it said, the wording differed manifestly from the wording with which it was concerned, and different conceptions were involved. (The Eighth Amendment prohibits "cruel and unusual punishment".) The court also said that it is not for the courts, unless clearly so empowered or directed, to rule as to the necessity or propriety of the particular legislation. It is not, they said, for the courts to engage in the legislature's pursuit of questions of

51 *Minister of Home Affairs* v. *Fisher* [1980] A.C. 319, 329.
52 *Runyowa* v. *The Queen* [1967] 1 A.C. 26 (Rhodesia), and *Riley* v. *Attorney-General* [1983] 1 A.C. 657 (Jamaica).

policy. They said all this notwithstanding the fact that the legislation applied mandatorily (for the court had no option but to pass a death sentence), that it extended not just to the immediate perpertrator of the crime but also to other parties to the offence, that it dealt as well with attempts, and that it applied, in the case of arson against a residence, whether or not at the time any other person was present in the residence.

A somewhat similar narrow view is to be seen in a much more recent case involving appeals from Jamaica. The defendants had been sentenced to death at dates five or six years before the appeal was heard. This delay had occurred in large part because of a debate in Jamaica about the abolition of the death sentence. They argued that they had been subjected to "inhuman or degrading . . . treatment" in breach of the constitution. The Jamaican constitution, as is common in a number of recent Commonwealth constitutions, provided that nothing which the pre-independence law provided for could be held to be inconsistent with that prohibition. The argument which the majority of the Privy Council accepted was that since capital punishment was lawful in Jamaica before independence there could be no argument that the proposed executions were in breach of the constitutional prohibition. For the dissenters, Lord Scarman and Lord Brightman, this was an arid argument. For them the question was not whether the particular *punishment* was lawful under the earlier law. It plainly was. The question was whether the *treatment* which was involved in executing people after such a long delay was a treatment which was inhuman or degrading. They thought that it was. They would have allowed the appeal. They regretted the austere legalism which had been preferred to the generous interpretation which Lord Wilberforce had held to be appropriate. The dissenting judges had no doubt that the applicants had proved that they had been subjected to a cruel and dehumanising experience — the long period of anguish and suffering, the anguish of alternating hope and despair, the agony of uncertainty and the consequences of such suffering on the mental, emotional and physical integrity and health of the individual.

I should try to reach a broad conclusion, based as well on other relevant judgments of the Privy Council. I do not think that we should be too sanguine about this experience or leave too much to judicial protections. United States experience does show that in certain circumstances the role of the court can be of enormous and central importance. Some of the really significant developments in the United States public life have been brought about by its Supreme Court. But that experience is a special one. It has important limits as well as black marks. It is not at all clear whether it can be transferred. The Commonwealth experience is nowhere near as significant. And even in the United States there are those who would agree with Learned Hand. That great judge said:[53]

> What do we mean when we say that first of all we seek liberty? I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon

53 Learned Hand "The Spirit of Liberty" in Dilliard (ed.) *The Spirit of Liberty — Papers and Addresses of Learned Hand* (1953) 189. See similarly Jackson *The Supreme Court in the American System of Government* (1955) 81-82.

> courts. These are false hopes, believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can ever do much to help it. While it lies there it needs no constitution, no law, no court to save it.

No doubt this is an overstatement. One American commentator goes so far as to say it is a triumph of logic over experience. Learned Hand does, however, remind us again of the wider contexts, especially the context of mind and spirit.

I would like to end with a reference to parts of the institutional contexts. These are partly national and partly and increasingly international. We should not neglect them. It is not only through the courts that basic principles, rules and laws are enforced. Consider, for example, the growth of the powers of the ombudsman, most recently in the context of developing the broad principles of the Official Information Act 1982. Consider too the growing role of parliamentary committees which are much more active than they were say fifteen years ago. Among the standards that can be invoked before them are the international ones mentioned earlier. Those standards are relevant as well to the general work of the Human Rights Commission and to arguments that go on within the executive when new policies and laws are being elaborated. And our law and policy must now increasingly be measured against those standards in reports to, and appearances before, international committees. We have yet to properly grasp the importance of that development. Either on the one hand the development is distorted completely beyond recognition as in the current debate, if it can be called that, over the convention on the elimination of discrimination against women. On the other hand the development can be completely ignored, as with the complete failure of press coverage of New Zealand's presentation of its report on our human rights law to the United Nations Human Rights Committee in Geneva last year.[54] Compare the very lengthy coverage of the proceedings before the Privy Council in the Air New Zealand case. I have no doubt which was the more important process.

Those international references together with a proposal made recently by the chairman of the Australian Rights Commission for consideration of a Pacific Regional Human Rights Commission lead me to my final thought. It is actually Professor Quentin-Baxter's. There have been a number of proposals in recent years, particularly in the context of closer economic relations with Australia, that trans-Tasman commercial courts or arbitral bodies need to be established. Should such a body be concerned with the application, interpretation and enforcement of relevant treaty obligations including the Treaty of Waitangi, our two countries could gain something of the advantages which the United Kingdom legal system undoubtedly gains from the European system. Compared with them we would have the further advantage of a rather more homogenous Common Law view of the treaty obligations. And we would have moved to narrow the gap which

54 See Ministry of Foreign Affairs, Information Bulletin No. 6, January 1984, *Human Rights in New Zealand* for the texts of the International Covenant on Civil and Political Rights, New Zealand's report under the Covenant, and the statements made by Mr C. D. Beeby, Assistant Secretary in the Ministry, on the presentation of the report.

exists at the moment between our domestic constitutional arrangements and our international obligations. Such institutional developments might provide us with a wider and better constitutional framework within which to work out our destiny in this part of the world.