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NEW ZEALAND LEGAL RESEARCH FOUNDATION

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THE STRUGGLE FOR SIMPLICITY

LORD COOKE AND FUNDAMENTAL RIGHTS

The Hon Justice Michael Kirby AC CMG

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The Hon Justice Michael Kirby AC CMG*

THE ELUSIVE GRUNDNORM

The identification of the fundamental source of law should be a simple matter. In earlier times (at least for lawyers in New Zealand and Australia) it was. We were all subjects of a Sovereign who was "everywhere throughout the Empire in the contemplation of the law"¹. All our laws could be traced,

* Justice of the High Court of Australia. President of the International Commission of Jurists.

1 *Hull v McKenna* [1926] Ir R 402 at 404. See P Joseph, *Constitutional and Administrative Law in New Zealand*, 1992 at 441. Cf *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 152; *Bradken Consolidated Ltd v BHP Co Ltd* (1979) 145 CLR 107 at 135-6; G Winterton "The Evolution of a Separate Australian Crown" (1993) 19 *Monash Uni L Rev* 1 at 2. To see the development of the doctrine in the United Kingdom with the dismantling of Empire and the entry into the European Union see H W R Wade, "Sovereignty -

Footnote continues

ultimately, to the will of that Sovereign in Parliament. By that, we meant not our own local legislatures - pale shadows of the mother of parliaments. We meant the Parliament at Westminster comprising the King (or Queen), the Lords Spiritual and Temporal and the Commons of the United Kingdom. The validity and authority of our law could ultimately be traced back "Home" to our benign colonial "masters".

This font of law might have upset a few patriots such as Kruger in South Africa, Gandhi in India and Nkrumah in the Gold Coast (Ghana). But after the Imperial Parliament learned the lessons of the revolution in the American colonies, the settler communities (whose peoples derived mainly from the British Isles) did not find it either intellectually or emotionally disturbing. It had the advantage of providing historical continuity. This is always a comforting thing for those searching for legitimacy in the use of power. It provided a ready means of tracing the lineage of any law. Like a mighty game of snakes and ladders we could follow the sources back to the Sovereign's prerogative, to the decisions of the Sovereign's judges and to the Sovereign in Parliament beyond the seas.

The theory had tough-minded expositors in the land of its birth. No-one in those days suggested that A V Dicey's doctrine of parliamentary omnipotence was a "huge, ugly, Victorian monument that has dominated the legal and constitutional landscape and exerted a hypnotic effect on the legal perception"². It was not until much later that we were ever told that we had been "brain-washed ... in [our] professional infancy by the dogma of legislative sovereignty"³. The times I am talking about are times of "fairytale", of the Aladdin's cave of the common law, of the declaratory theory of law⁴ and the "Victorian monuments" of legal positivism.

Recent events in many countries, including my own, reveal how beguiling and enduring for the political psyche are these legal simplicities. Even attempts to talk seriously about such issues and to explore reality in a way that is the people's right

2 G deQ Walker, *The Rule of Law - Foundations of Constitutional Democracy*, MUP, Melbourne, 1988 at 161; M D J Conaglen, "Judicial Supremacy: An Alternative Constitutional Theory" (1994) 7 *Auckland Uni Law Rev* 665 at 666.

3 H W R Wade, *Constitutional Fundamentals*, 1980 at 68.

4 Lord Reid, "The Judge as Law Maker" (1992) *Journal Soc Public Teachers of Law* 22.

invites calumny upon the heads of the judges or scholars who attempt it⁵. Denunciatory epithets and slogans are their reward. Such is the *political* quest for simplicity. Simplicity, if it is deceptive, can be bought at too high a price. Alas, life, not least in the law, is often infuriatingly complex.

In Australia, a point was reached, some time after I left university and before my present judicial appointment, when the simple theory of our legal *Grundnorm* would no longer work convincingly. It would be a mistake to ascribe this point to the moment when the Queen gave her Royal Assent to the *Australia Acts* of 1986⁶. To a very large extent those Acts, apart from terminating the remaining appeals from Australian State courts to the Privy Council, merely regularised and recognised Australia's legal separation from the United Kingdom established in fact

5 See eg M D Kirby, "Judicial Activism?". Unpublished paper for the Indian Law Institute given as the 5th Bar Association of India Lecture, New Delhi, 6 January 1997; cf Editorial *Z v Z* [1997] NZLJ 37 at 38.

6 See *Australia Act* 1986 (Cth); *Australia Act* 1986 (UK) (1986, Ch 2) enacted pursuant to the *Australia (Request and Consent) Act* 1985 (Cth) and with the concurrence of each State of Australia. See *Australia Acts Request Act* 1985 of each Australian State.

years before⁷. Now the search is on for a new fundamental basis of the legitimacy of Australian laws.

In Australia it has been suggested, including judicially, that this legal foundation may be discovered in the will (express or implied) of the people⁸. That theory has some historical support. After all, the Australian federal Constitution, now nearing its centenary, was only adopted when it was accepted by referenda conducted in the several Australian colonies. Sadly, New Zealand held out from the Commonwealth although its membership is contemplated in the covering clauses⁹. I have not ceased to remind the people of New Zealand that it is never too late to repent¹⁰. Further support for the "people of Australia"

7 See *Viro v The Queen* (1978) 141 CLR 88 at 160-167 per Murphy J.

8 *Australian Capital Television v The Commonwealth* (1992) 177 CLR 106 at 138 per Mason CJ. Cf *McGinty v Western Australia* (1996) 70 ALJR 200 at 239 per McHugh J. The difficulty of knowing the will of "the people" has been acknowledged since early times. See eg *Deakin v Webb* (1904) 1 CLR 585 at 630-631.

9 Clause 6 of the covering clauses to the *Commonwealth of Australia Constitution Act* 1901 (UK), 63 and 63 Victoria, chapter 12.

10 See eg M D Kirby, "Closer Economic and Legal Relations Between Australia and New Zealand" (1984) 58 ALJ 383. I Barker and B A Beaumont, "Trans-Tasman Legal Relations - Some Recent and future Developments" (1992) 66 ALJ 566. See also P Joseph and M D Kirby in "Trans-Tasman Relations - Towards 2000 and Beyond", in P

doctrine can be found in the uniquely Australian procedure for the amendment of the Constitution by the referendum facility adapted from Switzerland¹¹. If the Constitution is now to be regarded as free standing, if all Australian laws can now ultimately be traced to the Constitution and if the people of Australia must give their assent to any change in the Constitution, it may be said that they, the people, are the ultimate source of legitimacy of all law in Australia. This is a simple doctrine. For that reason it is attractive. It has the merit of seeming to accord with the democratic character of the polity which the Australian Constitution put in place. The doctrine may ultimately achieve ascendancy.

But, once again, simplicity should not be bought at the price of rewriting history and law. The referenda at the end of the 19th century included women in only two of the Australia colonies¹². The Constitution was not adopted, in history or law, *because* it was approved by such referenda. History shows that it was taken, cap in hand, to the imperial authorities at Westminster, whose statute was undoubtedly seen as essential

Joseph (ed), *Essays on the Constitution*, Brookers, 1995 at 129.

11 Australian Constitution, s 128.

12 South Australia and Western Australia.

to the legitimacy of legal separation and the creation of Australian nationhood. The imperial authorities tinkered with the document presented by the Australian colonists, although wisely limiting their interference in its terms¹³. The Constitution, although now referred to as a separate instrument, is in form a part of an Imperial Act¹⁴. The people of Australia who have amended its formal text rarely and reluctantly did not on its adoption, or for most of the century, specifically include the indigenous people of the continent - Aboriginals and Torres Strait Islanders¹⁵ - where this might have been expected. Wrapped as it was in the garments of an imperial statute and presented with the authority of the (almost) unbroken legal lineage of a millennium, it was little wonder that the quest for simplicity in identifying the source of law should have held colonial legal minds in its grip for so long.

13 s 74 of the Constitution, for example, was accepted by the founding fathers "only as the price that had to be paid to prevent more drastic amendments of the Constitution". *Commonwealth Parliamentary Debates*, vol 13 at 108 per Edmund Barton. See also *Deakin v Webb* 1904) 1 CLR 585 at 622, 627, 631; *Viro v The Queen* (1978) 141 CLR 88 at 160 per Murphy J. Unlike the case of Canada, the Australian Constitution has not been renamed. The *British North America Act* has been renamed as the *Constitution Act* 1867.

14 63 and 64 Victoria chapter 12.

15 Australian Constitution, s 51(xxvi) and s 127.

Lawyers desire a chain of title. In the case, at least, of Australia's written Constitution (as of the written constitutions of Britain's other ex-colonies) the chain could be faithfully chartered. Dire warnings were given, where needed, of the perils that awaited any severance of the chain, whether in the name of autochthonous legitimacy or of facing up to revolutionary reality¹⁶. In Australia, we missed the first and have happily avoided the second. But everyday evidence demonstrates the retreat of the United Kingdom's political, legal, defence and even cultural hegemony in this part of the world. That is why the quest is now on for a new and simpler foundation for the ultimate authority of our laws. For those who find the "people" too nebulous, unhistorical or unpredictable, the siren song of a higher moral principle has proved specially attractive. As I shall show, it is a principle with a long and interesting lineage in the common law of England. Most interestingly of all, for present purposes, it gained support, of increasing assertiveness, from Lord Cooke of Thorndon during his

16 G Winterton, "Extra-constitutional Notions In Australian Constitutional Law" (1986) 16 *Fed L Rev* 223 esp 239; G Winterton "Constitutionally Entrenched Common Law Rights: Sacrificing Means to Ends?" in C Sampford and DK Preston, *Interpreting Constitutions*, Federation 1996 121 esp 142-145.

service as President of the New Zealand Court of Appeal. It is relevant to the doctrinal basis of the function of courts in upholding fundamental human rights.

As fundamental human rights represent one of the great themes of the judiciary of the common law as it enters a new millennium we must not depart these reflections on Lord Cooke's career and contribution without noticing his views on this topic and asking whether they are the purest heresy or the seeds of a novel and simpler foundation for legal legitimacy to replace the Imperial one which has now reached its used by date.

RIGHTS WHICH LIE SO DEEP¹⁷

In his handsome tribute to the contributions of Sir Anthony Mason as Chief Justice of Australia, Lord Cooke quoted with approval a remark of Lord Lloyd of Hampstead in his book *The Idea of Law*¹⁸. The idea was to the effect that, whilst the concept of natural law was regularly denigrated, "it seems to

¹⁷ *Fraser v State Services Commission* (1984) 1 NZLR 116 at 121 per Cooke J.

¹⁸ London, Penguin, 1977 at 86.

possess almost inextinguishable powers of survival"¹⁹. Certainly, it is clear, that its fascination has worked upon Robin Cooke's mind during his long years of service in the New Zealand judiciary. The cases in which the *obiter dicta* (for such they mostly were) appeared are well known to legal observers. Allow me, as with a rosary, to recount them again. No words of mine will put the thought as clearly as Lord Cooke himself.

The first appearance was in 1979. The case, *L v M*²⁰, concerned whether the Accident Compensation Commission of New Zealand enjoyed exclusive jurisdiction to determine whether a person had suffered personal injury by accident. Here was an instance, of which earlier examples had arisen, whereby the legislature (in this case of New Zealand) had sought by an ouster clause to prevent the courts from performing their ordinary

19 Lord Cooke of Thorndon, "The Dream of an International Common Law" in C Saunders et al *Courts of Final Jurisdiction*, 1996, 138 at 139. Lord Cooke's contribution, described as that of one "long the thinking judge's judicial pin-up boy" is classified as "idealist[ic]". He is "evidently schooled, like Sir Anthony [Mason] in a sincere belief in the judicial calling which brings to mind the ideally democratic law envisioned by the US constitutional scholar James Boyd White, a belief grounded in the decency of those who make and apply it". P Pether, Review, (1997) 22 *Alternative LJ* 50 at 51.

20 [1979] 2 NZLR 519.

constitutional functions²¹. Courts have never liked such provisions. This is partly because they tend to be challenged in cases revealing apparently serious abuses of power and partly because they give rise to a self-fulfilling assertion of power which may appear to conflict with the rule of law itself. The response of courts to such provisions has been described as a "polite rebellion"²². By techniques of strict construction and by ascribing to Parliament attention to basic rights which may sometimes seem naive, courts have found many ways to circumvent, over-ride or exclude the operation of such ouster provisions, where justice appeared to demand that course.

But what of the case where the Act is completely clear? Was there then nothing that a court could do? Justice Cooke was not convinced²³:

"It would be a strong and strange step for Parliament to attempt to confer on a body other than the Courts power to determine conclusively whether or not actions in the Courts are barred. There is

21 *Anisminic Ltd v Foreign Compensation Corporation* [1969] 2 AC 147 is a well known example. See discussion Walker, above n 2, at 151.

22 Walker, above n 2, 155.

23 [1979] 2 NZLR 519 at 527.

even room for doubt whether it is self-evident that Parliament could constitutionally do so."

Young lawyers should always keep their eyes peeled, for a thought such as that laid down here by the mind of a creative and influential judicial spirit. Such ideas may be used beneficially in future cases when the right one presents, to nudge the concept forward a little. Such is the way the common law develops.

No one, academic or professional lawyer alike, seems to have noticed this *dictum*²⁴. But soon afterwards, another case was presented to Justice Cooke to offer a reminder. This one concerned the validity of regulations made under the *Economic Stabilisation Act* 1948 (NZ) providing for "car-less days". In *Brader v Ministry of Transport*²⁵, Justice Cooke asked himself the question again: What happens when the courts get pushed to the brink²⁶:

"It may be added that the recognition by the common law of the supremacy of Parliament can

24 J Caldwell, "Judicial Sovereignty - A New View" [1984] NZLJ 357.

25 [1981] 1 NZLR 73.

26 *Id* at 78.

hardly be regarded as given on the footing that Parliament would 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."

Once again, according to commentaries, the idea was not picked up²⁷. Perhaps it was seen as nothing more than an application of the tried and tested doctrine of courts construing apparently oppressive laws by reference to the imputed conformity of Parliament to fundamental human rights and the scheme of the Constitution in upholding them²⁸.

Justice Cooke returned to his theme in a third case, this time writing with the concurrence of Justices McMullin and Ongley. In *New Zealand Drivers' Association v New Zealand Road Carriers*²⁹ the issue was the validity of the wages freeze regulations which purported to prohibit the Arbitration Court of New Zealand from determining industrial disputes over wages. The judges of the Court of Appeal observed³⁰:

27 Caldwell, above n 24, at 357.

28 Cited by Caldwell *loc cit*.

29 [1982] 1 NZLR 374.

30 *Ibid* at 390.

"Indeed, 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."

Mark that the language is muted. Note that the first three citations are expressed in terms of "room for doubt", "not to be supposed" and "we have reservations". At a pinch, the old time-honoured techniques of judicial interpretation could afford the explanation of what the judges were saying. But then came *Fraser v State Services Commission*³¹ where the "doubts ... were dispelled"³², at least so far as Justice Cooke was concerned. After referring to a speech of Lord Hailsham in which he had suggested that the rule of law requiring an office-holder under threat to be told of the matter put against him and that it was a "fundamental" rule³³, Justice Cooke commented in the vivid phrase which was to sound trumpets of alacrity or alarm³⁴:

31 [1984] 1 NZLR 116.

32 Caldwell, above n 24, at 357.

33 Citing *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155 at 1161; [1982] 3 All ER 141 at 144.

34 [1984] 1 NZLR at 121. Emphasis added. See also B V Harris, "The Law-Making Power of the Judiciary" in P A Joseph (ed) *Essays on the Constitution*, Brookers, 1995, 264 at 269-270.

"This is perhaps a reminder that it is arguable that some common law rights *may go so deep* that even Parliament cannot be accepted by the Courts to have destroyed them."

Now it is true, that the phrase was still qualified ("it is arguable"). But what a challenge to the sovereignty of an ostensibly unlimited Parliament lies there. By what right could the courts ever withdraw acceptance, save by a right asserted by the courts themselves that *their* assessment of what was law was higher, greater, purer and stronger than the enactment of Parliament itself.

Leaving no time to pass, Justice Cooke returned to his theme in *Taylor v New Zealand Poultry Board*³⁵. That case related to whether the relevant Act (*Poultry Board Act 1980* (NZ)) could authorise regulations to override the common law tradition that a person accused of an offence may remain silent: the so-called right to silence. Justice Cooke made his position perfectly clear³⁶:

35 [1984] 1 NZLR 394.

36 *Id* at 398.

"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."

The judge referred to the string of cases set out above. He also noticed an essay by F A Mann "Britain's Bill of Rights"³⁷ in which was postulated a possibility that in "extreme circumstances" judges of our tradition might revert to notions of fundamental or natural law. There was more than a hint of this in the earlier refusal of the English judges to enforce the laws of Nazi Germany depriving Jews of German citizenship³⁸. Such laws were described as "so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all"³⁹. If this could be said of a foreign law, ostensibly duly made by the law-making organs of a foreign country and entered in the equivalent of the statute books of that country, might not the same be said in an extreme case of a law of one's own Parliament which involved "so grave an

37 (1978) 44 LQR 512.

38 *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249.

39 *Id* at 278.

infringement of human rights" that it could not be recognised "as a law at all". Obviously, Justice Cooke thought that such a point *could* be reached.

There may be a sixth case in this series⁴⁰. I refer to *Keenan v Attorney-General*⁴¹ which related to the power of the police to obtain fingerprints from persons in lawful custody. The section of the relevant statute⁴² permitted the taking of fingerprints for the purpose of identification of the person. The argument was that it did not authorise the taking of fingerprints to strengthen the police case. The New Zealand Court of Appeal unanimously upheld the decision of the primary judge⁴³ affirming the police right⁴⁴. But in reviewing the case law, the President (Cooke P) observed that a suggested statutory duty to answer

40 P Joseph, "Literal Compulsion and Fundamental Rights" [1987] NZLJ 102 at 102-103.

41 [1986] BCL 1501.

42 *Police Act* 1958 (NZ), s 57(1).

43 Hardie Boys J.

44 [1986] BCL 1501

questions asked by a police officer "takes the matter into a different field". He said⁴⁵:

"A duty to answer questions by a police or other officer is usually only imposed by express enactment and is never in this country enforceable by literal or physical compulsion."

These remarks require analysis. Was it being said that Parliament does not, as a matter of course, grant such powers to police or other officials? Or was it being said that, if Parliament tried, the courts would not uphold such laws as valid laws⁴⁶?

It is always desirable to view judicial *obiter dicta* in a wider context than the epigrammatic statement reported in the media or hurled by counsel at an appellate court to make a forensic point. The context of the particular case is essential. The context of social and legal events also provides the backdrop against which the words in question were written. The remarks of Justice Cooke in the foregoing cases must be understood as

⁴⁵ [1986] BCL 1501 There was a cross-reference to *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398-406.

⁴⁶ P. A. Joseph, above n 40, at 103.

having been written at a time and in a country where there was deep concern about instances of the misuse of governmental power and a lively debate about the need for a written Bill of Rights which would put some fundamentals beyond the power even of Parliament readily to change them⁴⁷. Judges in their courtrooms looking at the way at which a determined Executive Government appeared to ignore, or treat with contempt, the Parliament they reverently described as "sovereign", may have found it more difficult than previously to mouth the orthodox pieties about "the assembly of the people", "the house of democracy" and "the guardian of the people's liberties".

In New Zealand, things came to something of a head in 1975 with the election of the Government of Prime Minister Muldoon. The Government took office on 12 December 1975. Three days later, the Prime Minister issued a press statement which asserted that "compulsory requirements" for employee deduction and employer contribution under the *Superannuation Act* 1974 (NZ) "will cease" from the date of the press release. The statute was purportedly suspended by Prime Ministerial

47 P Rishworth, "The Birth and Rebirth of the Bill of Rights" in G Huscroft and P Rishworth, *Rights and Freedoms* at 1.

*fiat*⁴⁸. The same document foreshadowed that legislation would be introduced to give force to the stated purpose "with retrospective effect". The Board administering the statutory scheme treated the Act as at an end. But Chief Justice Wild granted a declaration that the Prime Minister had acted unlawfully⁴⁹ and in breach of the *Bill of Rights* 1688 (GB). There followed several other events of this character⁵⁰. These caused Justice Cooke's predecessor as President of the Court of Appeal, Sir Owen Woodhouse, in 1979 to remark in words similar to those used by Justice Cooke in his judgments⁵¹:

"There really are limits of constitutional principle beyond which the Legislature may not go and which do inhibit its scope ... In New Zealand it can hardly be doubted that in the final analysis Parliament recognises as a matter of instinctive commonsense, that there are ultimately limits upon its constitutional power to legislate. And if that be so, there will be those who ask, why change: the mere possibility that Parliament might attempt to overturn basic freedoms or the constitutional machinery of the

48 P A Joseph and G R Walker, "A Theory of Constitutional Change" (1987) *Oxford Journal of Legal Studies* 7 (2) at 161.

49 *Fitzgerald v Muldoon* [1976] 2 NZLR 615.

50 Joseph and Walker, above n 48, at 162-163.

51 O Woodhouse, "Government Under Law", J C Beaglehole Memorial Lecture, cited *loc cit*.

country does not carry the practical likelihood that it will be done. In itself that is true enough. On the other hand, the answer seems equally clear. ... Powers are not lost by defining and accepting their terms; should Parliament define the limits of its practical and constitutional powers it would be giving nothing away: why should there be hesitation to make plain what some may be ready to ignore?"

Whereas Sir Owen Woodhouse's remarks appear ultimately to accept legislative power (for why else would a Bill of Rights be needed to restrain it?) the special feature of Justice Cooke's observations appeared to be the denial that such a power existed. Pushed to the limit, would Cooke hold that it did not?

In New Zealand, occasional reflections on the foregoing debates have arisen before the courts. Thus, Justice Baragwanath in *D'Elsa v Attorney-General and Ors*⁵², considering an alleged deprivation of property rights, was taken to the "high authority"⁵³ of Justice Cooke in the previous writings and in extra-curial remarks⁵⁴. But he concluded:

52 Unreported, 7 May 1996, High Court of New Zealand.

53 *Ibid* at 5.

54 "Fundamentals" [1988] NZLJ 158; Dethridge Memorial Address, 1984 "Practicalities of the Bill of Rights" (1984) 2 *Aust Bar Rev* 189.

"I am ... relieved from venturing into what happily remains in New Zealand an extra-judicial debate, which the good sense of parliamentarians and judges has kept theoretical, as to whether in any circumstances the judiciary could or should seek to impose limits on the exercise of Parliament's legislative authority to remove more fundamental kinds of substantive rights. Our small society has to date found it unnecessary to equip itself with techniques of judicial challenge to Parliament and its work. Whereas other larger societies have done so - the United States of America by the Supreme Court judgment in *Marbury v Madison*⁵⁵, Canada by its Charter of Rights and Freedoms, Australia by its Constitution (see for example discussion in *Polyukhovich v The Commonwealth*⁵⁶) and even the United Kingdom by its accession to the European Community⁵⁷ - and in constitutions of the new Commonwealth such provisions are the rule, in New Zealand both Parliament and the judiciary recognise that Constitutional peace and good order are better maintained by adherence to conventions rather than judicial decisions. ... Disregard of convention will however bring pressure upon such legitimacy, in the sense of unchallenged public acceptance of the constitutionality of legislation, as occurred in England with the legislative reversal of a judicial decision in *Burmah Oil Co Ltd v Lord Advocate*⁵⁸: see *Nissan v Attorney-General*⁵⁹. ... But the case illustrates why both legislative and judicial limbs of the Crown should give unremitting attention to preserving the convention. ... In the result ... there is no basis for the proposition that a New Zealand

55 1 Cranch (5 US) 137 (1803).

56 (1991) 172 CLR 501.

57 *R v Secretary of State for Transport; Ex parte Factortame Ltd [No 2]* [1991] 1 AC 603 (HL). See discussion H R W Wade, "Sovereignty - Revolution or Evolution" (1996) 112 LQR 568 at 569.

58 [1965] AC 75.

59 [1968] 1 QB 286 at 309-310.

judge could, let alone should, characterise the plaintiff's claims as of such fundamental moment as to warrant the uprooting of the principles observed by our courts since 1688."

Despite the negative conclusion, even this passage does not close the door. Is it a door that should be left open? If so upon what basis of legitimacy could the courts purport to advance their claims?

THE ENSUING DEBATE

Justice Baragwanath was right to say that most of the debate which has been sparked by Justice Cooke's string of decisions has been extra-judicial. The debate has certainly been lively in academic circles where scholars and commentators have been bristling for the chance to get back to a *Grundnorm* and to question the fundamental reasons why an Act of Parliament is obeyed in the first place. If, for countries like New Zealand and Australia, it is no longer enough to say that an Act is obeyed because it traces its origins to the legitimate root of legislative title in the Sovereign in Parliament at Westminster, what new basis can be presented which is historically and legally accurate but at the same time enjoys unanimous, or near unanimous, assent?

In the good old days of legal positivism, the answer as to why courts obey an Act of Parliament, if anyone stayed to ask the question, would have involved either an historical excursus to Westminster or the positivist excuse that this was simply so because of the legal paradigm in which we are operating⁶⁰:

"Legal positivism, with its commitment to the primacy of Parliament, operates within a closed system. Closure occurs at the summit of the positivist hierarchy, at the recognition rule. Legal positivism eschews institutional behavioural norms - it is concerned only with the fact of legislative enactment. Theorising on political, economic, ideological, societal or organisational matters is largely absent."

It was Justice Cooke's string of cases that helped release lawyers in New Zealand from the unquestioning acceptance of the positivist model. Whilst most (perhaps nearly all) prefer not to think about such matters and simply to accept an Act of Parliament because it is there, Justice Cooke's *dicta* at least did the service of forcing us to ask deep questions. Many observers have found this an interesting and timely exercise, particularly in the New Zealand context of challenges to parliamentary reputation and the end-of-millennial questioning about the future direction and character of the polity. There is nothing that legal

60 Joseph and Walker, above n 48, at 177.

philosophers like so much as to have their minds taken back to the *Grundnorm*, if only they can find it. According to two knowledgeable commentators, the outcome of Justice Cooke's *dicta* in New Zealand is that "the new discourse [has] addressed what might loosely be called natural law concerns"⁶¹.

When the deep questions are asked as to where sovereignty lies in the complex thing called a modern democracy, different answers will be given by different observers. Some will continue to say it is in Parliament. Some will suggest that it lies in the mystical "people". A declining number (like Justice Baragwanath) will reinvent the Crown, in one of its various guises, to assume this mantle. Others (especially living under a written Constitution) may say it resides in the courts - because unless and until the courts uphold an Act of Parliament, the statute's authority is provisional - susceptible to being challenged and possibly overturned on one footing or another.

The concept of courts as the overturners of statute is often traced to *Marbury v Madison*⁶² in the early days of the republic

61 *Ibid* at 177.

62 1 Cranch (5 US) 137 (1803).

in the United States of America. But historians know that the role of a court-like body in striking down the validity of legislation was actually established in the American colonies long before the Revolution by the supervisory functions of the Privy Council. Other historians suggest that the early United States judges were greatly affected by the natural law doctrines which asserted that the power and *legitimacy* of Parliament (at least after the execution of King Charles I and the Glorious Revolution of 1688) was to be found in the moral authority of the laws which Parliament enacted, without which the laws would lack the legitimacy which alone deserved the obedience of the people⁶³.

One did not even have to go back to old doctrine to find judicial support for the view that obedience to Parliament, as expressed in a statute, was itself a doctrine of the common law made by the judges. Why do judges obey and enforce statutes? According to this thesis, they do so because it is a doctrine which judges of the common law have themselves accepted, viz that Parliament's enactments should be obeyed. Yet if this is a law which judges have *made*, may they *unmake* it? Or may they

63 See eg *Calder v Bull* 3 Dall (3 US) 386 (1798) per Chase J. Cf *Adamson v California* 332 US 46 (1947) per Frankfurter J criticised by Black J (diss) in *Griswold v Connecticut* 381 US 479 (1965).

modify it? Or may they control it with limitations and exceptions? May they withhold their recognition of the statute as "law" even though it has all the paper forms and appearances as a true enactment?

Lest you think that this is an ancient opinion, long ago discarded in the age of modern democratic parliaments (or in case it seems to be the revolutionary cogitations of a legal anarchist) it should be noted that it has some support in the writing of that most famous of Australia's judicial sons, Sir Owen Dixon⁶⁴. In a paper written whilst he was Chief Justice of Australia titled "The Common Law as an Ultimate Constitutional Foundation"⁶⁵, Dixon expressed his conviction thus:

"It is part of the thesis of this paper that the common law is the source of the authority of the Parliament of Westminster. It is a proposition of the

64 Sir Owen Dixon was a Justice of the High Court of Australia from 1929 to 1952 when he was appointed Chief Justice. He resigned that office in 1964.

65 (1957) 31 ALJ 240. Cf R Cooke, "The Suggested Revolution against the Crown", in PA Joseph (ed), *Essays on the Constitution*, Brokers, 1995, 28 at 29. See also R Latham, "The Law and the Commonwealth" at 523 noted and explained in C Forsyth, "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review" [1996] *Cambridge LJ* 122 at 138-139.

common law that a court may not question the validity of a statute but, once having construed it, must give effect to it according to its tenor. And that is only another way of expressing the doctrine of parliamentary supremacy over the law. It has appeared to me that not a little of the difficulty that was felt about the decision of the courts here and of the Privy Council in *Trethowen's Case*⁶⁶, and twenty years later about the decision of the courts in South Africa in *Harris v Minister of the Interior*⁶⁷ was due to the failure to understand that the principle of parliamentary sovereignty was a doctrine of the common law as to the Parliament of Westminster and not otherwise a necessary part of the exception of a unitary system of government."

Is this, then, the ultimate foundation of legal obedience to statutes in countries such as New Zealand and the United Kingdom without a written constitution of the kind found in Australia? Professor Wade answered this question by calling the questioner back to practical realities⁶⁸:

66 *Attorney-General for New South Wales v Trethowan* (1930) 31 SR (NSW) 183; (1931) 44 CLR 394; [1932] AC 526 (PC).

67 1952 2 SA 428 AD. Discussed C Forsyth [1996] CLJ at 138.

68 H W R Wade, "The Basis of Legal Sovereignty" (1955) CLJ 172 at 188. See also A Ross, "Diluting Dicey" in (1989) 6 *Auckland Uni L Rev* 176 at 195.

"The rule of judicial obedience is in one sense a rule of common law, but in another sense - which applies to no other rule of common law - it is the ultimate *political* fact upon which the whole system of legislation hangs."

Hanging there is where some academic commentators, at least, preferred to leave it. Thus, Professor George Winterton, writing before the recent rediscovery of implied constitutional rights in Australia, urged caution in that regard, even invoking Thomas Jefferson to his side⁶⁹:

"Australia is indeed fortunate that extra-constitutional notions should have appeared in so benevolent (indeed beneficial) a context as the protection of human rights and the termination of obsolete British Sovereignty over Australia. But our constitutional heritage also includes some darker moments, and we may indeed be thankful that principles of 'necessity', which have figured so prominently in the jurisprudence of other countries have largely by-passed us. However, we should not forget that extra-constitutionality is a slippery slope, and that the principle of 'necessity' which may enable the courts of a democracy, such as Canada or Cyprus, to prevent a breakdown in the legal system can also be employed to legitimate a coup d'état as in Pakistan, Uganda, the Seychelles, Nigeria and Grenada. Hence, all extra constitutional

69 Winterton, above n 16, at 238-239. Citations omitted.

notions should be treated with extreme caution. Once the realm of extra-constitutional powers has been entered, there is no logical limit to its ambit; only the constitution can fix the boundaries from the lawful exercise of power. Once the constitution is removed as the frame of reference for the lawful exercise of authority, the only substitute is the balance of political - and ultimately, military - power in the nation. As Thomas Jefferson noted wisely in 1791: 'To take a single step beyond the boundaries ... specially drawn around the powers of Congress is to take possession of a boundless field of power, no longer susceptible of any definition.'

DEEP RIGHTS TESTED - THE BLF CASE

In 1986, when I was President of the New South Wales Court of Appeal, the Court was were faced with an argument that we should give effect to Justice Cooke's *dicta*. The case, *Builders Labourers' etc Federation v Minister for Industrial Relations*⁷⁰ concerned a challenge to a special Act of the New South Wales Parliament which had gone through all the usual legislative steps and was designed to "remove doubts" and to validate certain Ministerial acts in relation to the legislative

⁷⁰ (1986) 7 NSWLR 372. Hereafter the *BLF Case*. See also *Eastgate v Rozzoli* (1990) 20 NSWLR 188 (CA) at 202; *Galea v New South Wales Egg Corporation*, unreported, NSWCA, 21 November 1989 at 13.

cancellation of the registration of a trade union. The Act also purported to terminate the right of parties to costs in appellate proceedings which were pending. The union sought a declaration that the special legislation was invalid. The Court unanimously dismissed the application.

Much of the argument in the *BLF case* centred around the proposition that the Parliament of New South Wales, given authority to make laws for the "peace, welfare and good government" of the State, could not enact a law of such a character under such a grant of legislative power. This proposition was rejected although some members of the Court appeared to think that, in an extreme case, it might have some force⁷¹. A subsequent decision of the High Court of Australia, whilst not finally closing the door on the argument, appears to give it little comfort⁷².

Relevant to the present point were the arguments, picking up Justice Cooke's remarks, that access to the courts was so

71 Street CJ, at 382-385, and Priestley JA, at 421.

72 *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10. See also *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 636.

fundamental in our kind of polity that it could not be removed even by Parliament itself. Whilst noting the lineage of this doctrine through Chief Justice Coke's judgment in *Dr Bonham's Case*⁷³, *Day v Savadge*⁷⁴ and John Locke's *Second Treatise on Government*⁷⁵, I traced the modern rejection of the thesis but noted the series of opinions of Justice Cooke which appeared to give the idea his support. Writing, as I would point out, in the context of the then understanding of the New South Wales *Constitution Act* I concluded with an endorsement of Lord Reid's rejection⁷⁶ of the notion that an Act of Parliament could be disregarded because it was contrary to the law of God or the law of nature or of natural justice⁷⁷:

"I do so in recognition of years of unbroken constitutional law and tradition in Australia and, beforehand, in the United Kingdom. That unbroken

73 (1609) 8 Co Rep 107a at 118a; 77 ER 638 at 652.

74 (1614) Hob 85 at 87; 80 ER 235 at 237.

75 Par 135 cited T R S Allan, "The Limits of Parliamentary Sovereignty" [1985] *Public Law* 632 at 635.

76 In *British Railways Board v Pickin* [1974] AC 765 at 782.

77 *BLF v The Minister for Industrial Relations* (1986) 7 NSWLR 372 at 405-406. The decision merits reconsideration since the decision of the High Court of Australia in *Kable v Director of Public Prosecutions* (1996) 138 ALR 577.

law and tradition has repeatedly reinforced and ultimately respected the democratic will of the people as expressed in Parliament. It has reflected political realities in our society and the distribution of power within it. I also do so in recognition of the dangers which may attend the development by judges (as distinct from the development by the people's representatives) of a doctrine of fundamental rights more potent than parliamentary legislation. Such extra-constitutional notions must be viewed with reservation not only because they lack the legitimacy that attaches to the enactments ultimately sanctioned by the people. But also because, once allowed, there is no logical limit to their ambit. They may thereby undermine a rule of law and invite the only effective substitute, viz the rule of power. In the end, it is respect for longstanding political realities and loyalty to the desirable notion of elected democracy that inhibits any lingering judicial temptation, even in a hard case, to deny loyal respect to the commands of Parliament by reference to suggested fundamental rights that run 'so deep' that Parliament cannot disturb them. ... [I]f the legislation is clear, and though the judge considers it to be unjust or even oppressive, it is not for him to substitute his opinion for that of the elected representatives assembled in Parliament."

Commenting on Justice Cooke's suggestion that Parliament could not exercise "literal compulsion, by torture for instance"⁷⁸ to enforce its will observed⁷⁹:

⁷⁸ In *Taylor v N Z Poultry Board* [1984] 1 NZLR 394 at 398.

"Yet imprisonment, solitary confinement as a punishment and other severe physical and financial restraints have clearly been considered, even in recent times, to be within the power of Parliament. Substituting judicial opinion about entrenched rights for the lawful powers of Parliament, unless anchored in a Bill of Rights duly enacted, inevitably runs into difficulties in defining what those 'common law rights' are and of explaining how they are so basic that they cannot be disturbed. The developments in legislation on capital and corporate punishment illustrate that perceptions of such 'basic rights' are likely to vary in place and over time. ... Our protection against such predicaments remains, fundamentally, a political and democratic one."

My opinion was reflected in the approach of Justice Glass⁸⁰ and Justice Mahoney⁸¹. If less enthusiastically, it was accepted by Chief Justice Street⁸² who confessed himself to have "a strong affinity for the judicial philosophy revived by Sir Robin Cooke". Justice Priestley was equally reluctant but obedient to authority⁸³.

79 (1986) 7 NSWLR at 406.

80 (1986) 7 NSWLR at 407.

81 *Ibid*, at 407-413.

82 *Ibid*, at 387.

83 *Ibid*, at 413ff.

My approach was, I regret to report, criticised by some academic commentators who considered it insufficiently attentive to the protection of truly fundamental rights and unduly influenced by Diceyan positivism⁸⁴. However, I remain unrepentant believing, as I do, that the survival of the common law system and the entrustment of great powers to judges, depends upon their commonsense acceptance of the legal and political setting in which they operate. To claim "sovereignty" to themselves (because they have a residual power to submit legislative or administrative acts to scrutiny for lawfulness) is to misunderstand the subordinate and residual function of a judge operating in a political system with an elected Parliament and an accountable Executive Government. That system may have its occasional breakdowns. It may sometimes work injustices. But the judges have, in truth, ample means of repairing the worst defaults and attaining justice without pretending to sovereignty or to a power greater than the people, greater even than the

84 See eg P Fairhall "Peace, welfare and good government: limitations on the powers of the New South Wales Parliament" *Law Society Journal* 26 (3) April 1988. Cf G deQ Walker, "Dicey's Dubious Dogma" (1985) 59 ALJ 276 noted with commentary in relation to the *BLF Case* (1987) 61 ALJ 53. See also J McCarthy, "Contemporary Advocacy: Value Free?" (1996) 14 *Aust Bar Rev* 97 at 108-112.

Constitution itself. Such notions, if stated, may be misunderstood as going beyond a theoretical construct. If asserted, they could invite response from the other branches of Government to remind the judges of the limits of their legitimacy. If such pretensions were actually believed by the judges themselves, they would run into the peril of converting the judicial belief to a conviction that the judges opinions about "deep rights" were worth more than those of the members of the legislature, elected by and accountable to the people. Without a legal foundation for such an assertion, it is my view that judges should not make it, still less convert it into action.

JUDICIAL METHOD

Some lawyers are left unsatisfied by the appeal to democratic theory repeatedly expressed in judicial decisions⁸⁵. But over the centuries, the judiciary of the common law has developed a number of methods to respond to suggested

⁸⁵ See eg *Quebec Association of Protestant School Boards v Attorney-General of Quebec [No 2]* (1982) 140 DLR (3d) 33 at 52. Cf *Herald & Weekly Times Ltd v The Commonwealth* (1966) 115 CLR 418 at 437; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 318; *Re Director of Public Prosecutions; ex parte Lawler* (1994) 179 CLR 270 at 296 and *Leask v The Commonwealth* (1996) 70 ALJR 995 (HC) at 1024-1025.

concerns about derogations from fundamental human rights in legislation. These methods are available even in countries, such as Australia and New Zealand, which do not have an elaborated, constitutionally entrenched and judicially enforceable Bill of Rights. I mentioned some of these in my opinion in the *BLF Case*⁸⁶. Since 1987 there have been further developments which should be noticed.

(a) *Interpretation of statutes*

First, there is the well known principle that courts will construe legislation, made by Parliament, in ways protective of fundamental rights. Such rights may only be abolished or diminished by legislative language which is expressed in the clearest of terms⁸⁷. This is where our system of government fulfils, and occasionally fails, our legal theory. Because Parliament is made up of citizens accountable to the people, returned in regular elections, it will not ordinarily affront the

86 (1986) 7 NSWLR 372 at 405-406.

87 *Black Clawson International Ltd v Papierwerke AG* [1975] AC 591 at 638; *Sorby v The Commonwealth* (1983) 152 CLR 281 at 289, 309, 311; *Baker v Campbell* (1983) 153 CLR 52 at 96-97, 104, 116, 123; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 348.

people's basic liberties. Thus, generally, legislation is reasonable or at least rational. That fact encourages courts to impute reasonableness, rationality and a sense of justice to those who make legislation.

The theory breaks down in practice for several reasons. They include the mass and rush of legislation today; the enormous amount of subordinate legislation and administrative practice affecting people's rights; the real power of political parties, the bureaucracy and Executive Government to propose ill-considered legislation; the power of party caucuses and the controls of political ambitions which may sometimes limit the effectiveness of the scrutiny or repair of unjust provisions; the influence of populist causes or the oppression of minorities which may be provoked by ill-considered media and other campaigns producing legislation oppressive to those affected by it.

Parliament and the people accept that the courts have the right to go through statutes with a fine tooth comb. This is part of the relationship between Parliament and the courts in countries such as ours. But the relationship is accepted on the premise that the courts will not, without legal authority, go beyond their proper function. If the law is clear, subject to any over-riding constitutional or similar legal controls, the judge, like anyone else, is obliged to obey the law. The law must be enforced by the court's orders. Out of their professionalism,

most judges have no real difficulty with this situation. Having discharged their scrutiny, if they must enforce a law which they consider infringes fundamental human rights, they salve residual qualms in various ways. By making a suggestion for law reform. By exercising such moderation in the application of the law as is compatible to the tenor of the law. By adopting a mental attribution of any error or injustice to the lawmakers and by accepting the fallibility of their own opinions. After all, it will often, if not usually, be the case that the collective opinions of the many who must be involved as legislation passes through Parliament will be a more reliable reflection of common wisdom than the individual views of a judge, however experienced.

(b) Use of international jurisprudence.

In interpreting legislation, and in developing, by analogy, the principles of the common law, an important development has occurred in most Commonwealth countries since Justice Cooke's *dicta* were written in the 1970s and 1980s and since I wrote my *BLF* decision in 1986. I refer to the growing influence of international law, including the international law of fundamental human rights. This is, as Justice Cooke was to remark in the

New Zealand Court of Appeal in *Tavita v Minister of Immigration*⁸⁸ "a law ... undergoing evolution".

In a series of decisions in the New South Wales Court of Appeal, I referred to the facility of reference to international law as a means of guiding the judicial decision-maker to an appropriate decision where the common law was relevantly silent or obscure or where a statutory provision was ambiguous⁸⁹. I have always acknowledged that the use of international law may not be invoked, where the law in question is not, as such, part of domestic law and where legal authority or a correct understanding of legal principle stands in the way. The High Court of Australia has made it plain that such use of international law may not become a means of incorporating unincorporated treaties into municipal law "by the back door"⁹⁰. However, the

88 [1994] 2 NZLR 257 at 266.

89 The cases to that time are collected in M D Kirby, "The Impact of International Human Rights Norms: A Law Undergoing Evolution" (1995) 25 *Western Australian L Rev* 1 at 10-11; see also S Donaghue, "Balancing Sovereignty and International Law: The Domestic Impact of International Law in Australia" (1995) 17 *Adelaide L Rev* 213.

90 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 291. See note M Taggart, "Legitimate Expectation and Treaties in the High Court of Australia" (1996) 112 LQR 50.

likelihood that fundamental human rights, expressed in international law (and particularly in treaties to which our countries subscribe) will come to influence the common law was stated most clearly by Justice Brennan in *Queensland v Mabo (No 2)*⁹¹. The same point was picked up by Justice Cooke in *Ministry of Transport v Noort*⁹² and later in *Tavita*⁹³.

The decision of the High Court of Australia in *Teoh*⁹⁴ held that the ratification by the Executive Government of a treaty, not incorporated by Parliament into domestic law, could give rise to a legitimate expectation that administrators would take the treaty's provisions into account in exercising their powers. That holding has produced a response. One State (South Australia) enacted its own legislation designed to ensure that such a treaty would "not have the force of domestic law"⁹⁵. Similar federal

91 (1992) 175 CLR 1 at 42. See also *Mabo v Queensland* (1988) 166 CLR 186 at 217-218.

92 [1992] 3 NZLR 260.

93 [1994] 2 NZLR at 266.

94 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

95 *Administrative Decisions (Effect of International Instruments) Act 1995* (SA). See J Sempill, "Developments - Australia and New Zealand" (1996) 7 *Public Law Review* 118 at 119.

legislation was foreshadowed during the Keating government in Australia and a Bill was introduced⁹⁶. It lapsed with the prorogation and dissolution of the Australian Parliament for the 1996 general election. The Howard government announced that it would not proceed with the Bill⁹⁷. Instead, considerable attention was first paid to other means of ensuring the proper operation of treaty-making by Australia. A Discussion Paper *Treaty Making Reforms*⁹⁸ was circulated. The Government welcomed the improvements in the procedures of the United Nations Human Rights Committee operating under the Optional Protocol to the *International Covenant on Civil and Political Rights*⁹⁹. Then, in February 1997, a Joint Statement by the Australian Minister for Foreign Affairs and the Federal Attorney-General¹⁰⁰ made it plain that legislation would be introduced into

96 Note R Pirtrowicz, "Unincorporated Treaties in Australian Law" [1996] *Public Law* 190. Cf New Zealand Law Commission, Report 34, *A New Zealand Guide to International Law and Its Sources* (1996); R Harrison, "Domestic enforcement of international human rights in Courts and law: Some recent developments" (1995) 21 *Commonwealth Law Bulletin* 1290.

97 *The Australian*, 11 September 1996 at 8.

98 Australia, Department of Foreign Affairs and Trade, *Treaty Making Reforms*, May 1996, Discussion Paper.

99 News release of Federal Attorney-General 8 July 1996.

100 Joint Statement, "Government Response to *Teoh Case*" by Minister for Foreign Affairs and Attorney-General, 25 February 1996.

the Australian Parliament to reverse the effect of the *Teoh* decision and to uphold what was described as "the proper role of Parliament in implementing treaties in Australian law"¹⁰¹. The establishment, in Australia, of comprehensive procedures to enhance the participation of the Parliament, the States and Territories and the wider community in the treaty-making process was again referred to.

Both Australia and New Zealand subscribe to hundreds - even thousands - of treaties. Improved procedures in the making of treaties are to be welcomed. In the United Kingdom, a Private Member's Bill¹⁰², introduced into the House of Lords, proposes reform in that country. But nothing so far said or done by Parliament appears to undermine the growing use of international law as a source of general principle to fill the gaps of domestic law and to help resolve ambiguities in legislation.

The reconciliation of municipal and international law represents a great challenge to the legal system. The growing integration of all countries within a regional and global economy,

101 *Ibid.*

102 Treaties (Parliamentary Approval) Bill 1996 (UK).

facing many international problems and with world concern about fundamental human rights, makes the gradual process of establishing an effective relationship between municipal and international law both inevitable and desirable. In the field of human rights, as Lord Scarman pointed out long ago, it will rarely cause any affront to people in countries such as Australia and New Zealand. This is because, even without Constitutional Bills of Rights, the common law is itself a great repository of basic human rights principle. Certainly in the *Universal Declaration of Human Rights* and the human rights treaties which have sprung from it, the influence of Anglo-American lawyers is writ large.

(c) *Constitutional implications*

There is a third development which should be mentioned. It concerns constitutional implications. I leave court interventions which may be available by the application of an entrenched and comprehensive constitutional Bill of Rights or by invoking, in countries affected by them, treaty procedures such as those provided under the *European Convention of Human Rights* (in the case of the United Kingdom)¹⁰³ and the First Optional Protocol to

103 See now proposed Human Rights Bill 1996 (UK).

the *International Covenant on Civil and Political Rights* (in the case of Australia and New Zealand)¹⁰⁴. Without such provisions, there may still be constitutional implications to which courts may refer in offering, where lawful, the protection of fundamental human rights.

In the *BLF Case*, the applicants referred to the emphatic endorsement of constitutional implications expressed by Justice Murphy in the High Court of Australia¹⁰⁵. As those opinions were expressed in dissent and sometimes provoked thinly disguised scorn on the part of other members of the High Court, they could not be given effect in the *BLF* decision. However, since that time a change has occurred in Australian authority on the jurisprudence of implied rights derived from the language and structure of the Constitution. Lord Cooke in his essay to honour Sir Anthony Mason suggested that the "Mason Court" had tied the notion of fundamental rights to the constitutional document "partly for readier acceptability and partly to negotiate the obstacles that the framers of the Constitution rejected the

104 See for example *Privacy (Sexual Conduct) Act 1995* (Cth).

105 See eg *McGraw-Hines (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 670; *Western Australia v The Commonwealth* (1975) 134 CLR 201 at 283-284; *Attorney-General (Cth) Ex Rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 70-71.

inclusion of comprehensive guaranteed individual rights"¹⁰⁶. He suggested that, this notwithstanding, the implied limitations were "in essence natural and fundamental rights in a democracy". That claim may be disputable. However, a string of decisions of the High Court, particularly in the so-called free speech series¹⁰⁷, has contained the Court's conclusions about implied rights and legislative limitations not expressly stated in, but necessarily implied from, the language or structure of the instrument. As the Court has recently reserved a challenge to this line of authority (in one of the cases, mounted by a former Prime Minister of New Zealand¹⁰⁸) I will be forgiven for taking this analysis no further.

However, it can be noted that the High Court of Australia found implications in the Constitution in *Kable v Director of Public Prosecutions (NSW)*¹⁰⁹. That case bears some analogies

¹⁰⁶ Lord Cooke in *Saunders*, above n 19, at 139. For similar earlier developments in the United States see *Pierce v Society of Sisters* 268 US 510 (1925); *Apotheker v Secretary of State* 378 US 500 (1964); and *Griswold v Connecticut* 381 US 479 (1965).

¹⁰⁷ *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Nationwide News* (1992) 177 CLR 1; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104.

¹⁰⁸ *Lange v Australian Broadcasting Corporation*, reserved, April 1997.

¹⁰⁹ (1996) 138 ALR 577 (HC).

to the *BLF* case, and may therefore be usefully considered in this context. The New South Wales Parliament had enacted the *Community Protection Act* 1994 (NSW) with the stated object of protecting the community by the preventive detention of a named prisoner, Gregory Wayne Kable. The Act did not authorise the making of a detention order against any other person¹¹⁰. Where an application was made, it empowered the Court to make an order that the specified person be detained in prison for a specified period. The majority of the High Court¹¹¹ held that the Act was invalid. It concluded that it was incompatible with Chapter III of the Australian Constitution providing for the judicature of the Commonwealth. Specifically, the Court held that such an Act would weaken confidence in the judicial institutions brought into existence by the federal Constitution. Because, in Australia, State courts are invested with federal jurisdiction, it was held that such courts could not be required to act in a manner incompatible with the postulates of Chapter III of the Constitution. The Act in question was incompatible with the exercise by the State Supreme Court of the judicial power of the Commonwealth. It included the performance of obligations which could not be imposed upon a

¹¹⁰ s 3(1).

¹¹¹ Toohey, Gaudron, McHugh and Gummow JJ; Brennan CJ and Dawson J dissenting.

court. Neither the Commonwealth nor a State could legislate in a way which might alter or undermine the integrated constitutional scheme established by Chapter III.

Constitutional implications have been found in many other countries with written constitutions. Thus, a series of cases in the Supreme Court of India concerned the so-called implications from the "basic structure or framework" of the Constitution"¹¹². The story of the development of this principle, which imposes a judicial check even on the amendment of the Indian Constitution itself is recounted in an interesting paper by Mr F S Nariman¹¹³. After an early series of false starts in which it was contended that the Constitution of India could not be changed in

112 *Golaknath v State of Punjab* AIR 1967 SC 1643; *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461 (fundamental rights case). See also *Indira Gandhi v Raj Narain* AIR 1975 SC 2299; *Kihoto Hollorhan v Zachillhu* AIR 1993 SC 412. Discussed C C Aikman, "The Debate on the Amendment of the Indian Constitution" (1978) 9 *Victoria Uni Wellington L Rev* 357; C C Aikman, "Fundamental Rights and Directing Principles of State Policy in India" (1987) 17 *Victoria Uni Wellington Law Rev* 373; U Baxi, "The Constitutional Quicksands of *Kesavananda Bharati* and the 25th amendment" (1974) 1 *Supreme Court Cases* 45-67; D G Morgan, "The Indian 'Essential Features' Case" (1981) 30 *International and Comparative L Q* 307; H M Seervai, "Constitutional Law of India: A Critical Commentary" Vol 2, Bombay, Triphthi, 1984 at 2653-2605.

113 F S Nariman, "Judicial Review of Constitutional Amendments" (1991) 23 *The Indian Advocate* at 1.

contravention of the fundamental rights stated in it, the Supreme Court sat its largest Bench (13 Justices), for a period of four months, to decide an issue of the greatest constitutional moment. Once again the Court was sharply divided. Six Justices held that the power of constitutional amendment conferred by Art 368 was unfettered, reaching every part of the Constitution including the chapter on fundamental rights. There were no inherent limitations on the amending power. Six other Justices held that such a fundamental part of the Constitution could not be amended.

The case was decided by the casting vote of Justice H R Khanna whose opinion contains the principle for which the case now stands. He held that the power to amend, although wide, did not include the power to abrogate the Constitution itself or to alter its basic structure or framework. That implication was derived in part from history, in part from the structure of the Constitution itself and in part from a judicial conception as to the very role of a constitution. Thus, the secular and republican character of the Indian Constitution and the faculty of judicial review are generally accepted as being within the "basic structure or framework" which cannot be altered. But how far the principle extends is a matter of continuing doubt and controversy.

Lord Cooke might argue that the rationale of the limitation

upheld in India is actually to be discovered in natural law notions which put a check on what even Parliament can do where the challenged rights "lie so deep" that they are deemed "basic" and "structural" by the judges. No other explanation readily justifies withdrawing from the people themselves the right to do as they please, including with constitutional "fundamentals". Still other judges might contest this development and question its authority and wisdom.

(d) *Protecting the integrity of judicial process.*

There is one final potential limitation, not yet fully explored, which may be mentioned. It is said to arise from the constitutional doctrine of the separation of judicial powers from those of the political branches of government¹¹⁴. It was urged upon the High Court of Australia in a recent application for special leave to appeal. However, it was rejected by the Court by a majority. A full exploration of the issues will not, therefore, arise in that case. But perhaps the arguments advanced are

¹¹⁴ The separation of the judicature is discussed in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220 (HC).

worth rescuing from the generally inaccessible transcripts of lost causes. I refer to *PJE v The Queen*¹¹⁵.

That case concerned the provisions of the *Crimes Act* 1900 (NSW) s 409B. That section provides that in the trial for prescribed sexual offences (of which *PJE* was an illustration) evidence which discloses or implies that a complainant has, or may have had, sexual experience or a lack of sexual experience or has, or may have taken part, or not taken part, in any sexual activity, is inadmissible in the trial. Prescribed exceptions were inapplicable to the case. The applicant asserted before the trial judge, the Court of Criminal Appeal and the High Court that he would be irreparably prejudiced by the operation of the section in three areas. It would exclude absolutely evidence of what the accused had told arresting police officers when first confronted by the allegations; of the circumstances in which the complainant had first complained to her mother; and of the mother's alleged boast, before the charge was made, that she would prevent the applicant ever seeing the children of the marriage again by raising allegations of sexual abuse as she had allegedly earlier done in the case of the child's natural father.

¹¹⁵ (1996) 70 ALJR 905 (HC). Special leave was refused on 9 September 1996 by Brennan CJ, McHugh and Kirby JJ, by majority.

The trial judge found that the accused would indeed be gravely prejudiced "to a substantial degree" in his defence by the operation of the section. The judge could not imagine any direction which he could lawfully give which would counter-balance the denial of fairness arising out of the statutory confinement of the accused's defence. Accordingly, the judge provided a permanent stay of the prosecution of the indictment "until the impediments to a fair trial ... cease to exist"¹¹⁶. This order was unanimously set aside by the New South Wales Court of Criminal Appeal¹¹⁷. Announcing the judgment of the High Court, refusing special leave, Chief Justice Brennan said¹¹⁸:

"The decisions below are clearly correct. To grant special leave would elevate to the level of arguability the proposition that a court may decline to exercise its jurisdiction to try a criminal case because it forms the view that a law enacted by Parliament is unfair. That is not a view to which a court is entitled to

116 Decision of Judge Dent, District Court of New South Wales, unreported, 5 April 1995 at 15.

117 *The Queen v PJE*, Court of Criminal Appeal (NSW), unreported, 9 October 1995. Cf *Crofts v R* (1996) 139 ALR 455 (HC) at 465 but see *NSW v Canellis* (1984) 181 CLR 311.

118 At 905. Note that there was a suggestion, unanimously accepted, that s 409B of the Act be reconsidered by the New South Wales Parliament.

give effect in determining whether to exercise its jurisdiction when it is properly invoked."

The way in which the applicant for special leave ultimately put his case was this. Under the doctrine of separation of powers, Parliament has its functions to perform. But so to have the courts. The development of the stay jurisdiction, asserted by courts, upholds not only the individual's right to a fair trial¹¹⁹. It also maintains the manifest integrity and justice of the courts as 'temples of justice'¹²⁰. Upon that footing, it was argued, although Parliament could, for reasons which seemed best to it, enact a law for the legitimate purpose of protecting witnesses in sexual assault cases, courts retained the function, and the duty, to consider individual cases coming before them and to ensure that the law, as enacted, did not itself become an instrument of injustice in the circumstances of the particular case. In this sense, each branch of government fulfils its own separate functions.

¹¹⁹ *Jago v District Court (NSW)* (1989) 168 CLR 20.

¹²⁰ Roberts J in *Sorrells* 287 US 435 at 457 (1932). See also *R v Seaboyer & Game* (1991) 83 DLR (4th) 193.

The authority of the High Court's decision in *PJE* rejecting special leave to advance these arguments cannot be questioned. However, it is possible that the implications derived from the constitutional establishment of an independent judicature, will bear further exploration in the years ahead. In Australia, any such consideration will necessarily be traced back to the language and structure of the constitutional document. But even in countries without a written constitution, implications may be derived from the existence of an independent judiciary. The provision of stays of proceedings by the judiciary is a well established but exceptional doctrine. It is sometimes explained in terms of the judges defending the integrity of the process in which the judges are themselves engaged.

CONCLUSIONS

Where does this analysis leave the rights that lie so deep that even Parliament cannot disturb them?

The answer, as it seems to me, is this. Judges of the common law do not ordinarily question for too long the authority and legitimacy of parliamentary law. Unless struck down when measured against an overriding constitutional or like provision, Judges give effect to the will of Parliament. In doing so, they recognise the realities of the polity in which they also operate

and from which they draw the legitimacy of their limited functions. They respect and uphold the democratic character of that polity. They should not undermine it. Whether, as a matter of legal doctrine, parliamentary law is observed and upheld because of a common law rule, devised by the judges, is a question of interest only to legal theorists. Most people today would say that parliamentary law is upheld because it is supported by the democratic character of Parliament making the law: drawing as it does, by regular elections, upon the express or imputed will of the people who are citizens.

For many reasons, which I have explored in this essay, Parliament will sometimes enact a law which may appear to the judicial eye to involve a serious affront to fundamental human rights. When this happens, the judicial method sometimes provides the judge with remedies which can be offered to the litigant who complain to the courts. In most countries (but not Australia, New Zealand or the United Kingdom) the judge may invoke a constitutionally entrenched and comprehensive domestic charter of fundamental human rights. He or she may measure the impugned legislation against that charter's language. If it is found wanting, the judge then has the constitutional authority to strike the legislation down, holding it void because it is in breach of the constitution's requirements.

In those comparatively few remaining countries in which judges do not have a superior constitutional means to invoke in order to uphold basic rights, the judicial method, developed by the common law, sometimes provides a remedy. Judges do not have to appeal to natural law notions, as such, to put checks upon Parliament. They may invoke, in proper cases, the principles of interpretation. They may read down offending legislation, if its language permits that course. If the language is ambiguous, and the common law itself is silent or obscure, they may, in proper cases, resolve the ambiguity or fill the gap by reference to the fundamental principles, many of them now found in the developing jurisprudence of international human rights. They may do this so long as that jurisprudence is not inconsistent with established legal authority or legal principles. Especially in countries with written constitutions (but not only them) implications may sometimes, exceptionally, be drawn, as necessary, from constitutional arrangements or from the language of the constitutional text. Such constitutional implications may put a check on inconsistent statutory provisions offending against fundamental rights. There may even, in some circumstances, be a residual function of the courts to protect their own process against being required by the other branches of government to perform functions which would be inconsistent with the judicial function.

When these means of upholding fundamental human rights are considered, it cannot in all truth be said that the judicial method has failed and is in need of "deep lying rights" to rescue it. In my view, at least in societies such as ours, it is unnecessary to postulate such "deep rights". Unless one of the foregoing techniques of orthodox judicial method is apt to provide relief in the particular case, the judge is duty bound to give effect to the law as stated by Parliament. The judge is a citizen too. He or she lives in a democratic community. By challenging the power of Parliament with notions of "deep rights" the proponent, in my respectful view, challenges the democratic character of the system of which the judiciary is part and which sustains the judiciary's own legitimacy.

It may seem a trifle ungracious to rebuff Lord Cooke's thesis of "deep rights" in a closing session of a conference called to honour his magnificent contribution to the law. But it is a tribute to his intellect, his lively intelligence and his judicial stature that his thesis of "deep rights" has captured such widespread attention. In my view, the principle of judicial respect for Parliament is now to be taken as one that lies so deep that courts will just accept it so long as Parliament has

acted as a Parliament and within power¹²¹. For once, the quest for simplicity and the discovery of a new and more fundamental basis for our obedience to parliamentary law has proved unfruitful. And this is because a modern democracy is not simple. It is extremely complex. In it, the branches of government (including the judicial branch) each performs its respective functions and respects the others.

So let us have no more talk of "deep rights" - unless they are in the constitution already or unless citizens can persuade Parliaments, and themselves to put such rights in an entrenched Bill of Rights which has the stamp of the people's legitimacy¹²². That stamp alone, and not the opinions of judges, will give such "deep rights" the authority to check and limit what Parliament can do. It is good that Lord Cooke has sparked this debate. But heresy is heresy. And it may be dangerous heresy besides¹²³.

121 Cf Dawson J in *Kable v Director of Public Prosecutions* (1996) 138 ALR 577 (HC) at 590.

122 J Allen, "Bills of Rights and Judicial Power - A Liberal's Quandary" (1996) 16 *Oxford J Legal Studies* 337 at 345ff; N Lyell, "Whither Strasbourg? Why Britain Should Think Long and Hard Before Incorporating the European Convention on Human Rights Into Our Domestic Law" (1996) 18 (2) *Liverpool Law Rev* 115.

123 Cf Sir John Laws, "Law and Democracy" [1995] *Public Law* 72 at 79 and comments by C Forsyth [1996] CLJ 122 at 139-140 where Sir William Wade is cited as saying "The

closer judges come to constitutional bedrock the more prone to disorientation they seem to be". H R W Wade and C Forsyth *Administrative Law* (7th ed) p vi.