The Courts and Parliament: Further cases and other developments in New Zealand

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Introduction

A previous article examined a number of cases in New Zealand bearing on the relationship between the courts and Parliament in the new MMP (Mixed Member Proportional) parliamentary environment, with particular reference to cases in the area of defamation raising issues of parliamentary privilege.[1] The major case in the latter area has since come to a conclusion in the Privy Council, New Zealand's highest court until its replacement by a domestically based Supreme Court in 2004. There have also been a number of other cases and other developments of interest to the relationship between the courts and Parliament over the course of the last Parliament (2002–5).

General Cases and Related Developments Concerning Parliament

Unsurprising Decisions

The courts have continued to dispose of some cases raising issues of a constitutional kind. For example, in *Milroy v Attorney-General*,[2] an application for judicial review of officials' advice and Ministerial decisions relating to a Treaty of Waitangi claim settlement, the Court of Appeal upheld a High Court decision to decline to get involved. It said it would not interfere in the formulation of government policy preparatory to the introduction of legislation. It reiterated the concern it had expressed in another recent case, involving a challenge to a Government decision to disband the combat section of the Royal New Zealand Air Force, that it will often be constitutionally inappropriate for the courts to review policy or political decisions of such a character as to make them legally non-justiciable.[3] It also reiterated comments in an earlier case as to the established principle of non-interference in parliamentary proceedings and Parliament remaining free to

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determine what will or will not be put before it. In the present case, the Court could not see the exercise of any statutory or prerogative power that would open the door to judicial review, or any rights affected by the policy advice. It concluded that complaints about proposed legislation may be within the jurisdiction of the Waitangi Tribunal or the subject of representations to the Select Committee of Parliament, but the courts could not help.

Similarly, in *Morrison v Treaty of Waitangi Fisheries Commission*,[4] the plaintiffs sought interim orders to prevent the Treaty of Waitangi Fisheries Commission and the Crown from proceeding with further action relating to the distribution of assets from the fisheries settlement with Maori legislated for in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. This was perhaps the culmination of a long series of proceedings relating to this settlement and an asset distribution that had been delayed for many years. The Crown argued that the applications should be regarded as non-justiciable because they bore on the ability of the Government to introduce legislation into Parliament and on the content of that legislation (which the litigants can influence through the select committee process). The High Court agreed that it could not inhibit the Minister's power to introduce legislation, although it thought that the Crown argument overstated the matter (for one thing, draft legislation had not yet been prepared) and ran somewhat counter to undertakings given in earlier proceedings as to the right of the plaintiffs to challenge the commission's asset allocation model. It also considered that neither submissions to the select committee, which would not be the appropriate forum to determine whether the commission had complied with its obligations in relation to the settlement, nor the referral of proposed legislation to the Waitangi Tribunal by resolution of the House of Representatives under section 8 of the Treaty of Waitangi Act 1975, would serve as an adequate substitute. The High Court declined the relief sought because the commission had already reported to the Minister, who had indicated an intention to introduce legislation based on its recommendations, but left open the possibility that the plaintiffs could seek a substantive hearing on the legal validity of the commission's allocation model, with appropriate declarations, before legislation was introduced. Legislation was introduced 2 months later and eventually enacted as the Maori Fisheries Act 2004. In the meantime, substantive proceedings were initiated by a number of plaintiffs. They failed in their applications for judicial review of the commission's report, except in two cases with respect to certain aspects of one fund intended to benefit Maori not affiliated to any iwi (tribe), but without casting doubt on the ability of Parliament to legislate on the basis of the report.[5] One dissenting Judge in the Court of Appeal, however, commented that it was incongruous for the courts to be considering the overall reasonableness of proposals that were presently before Parliament and that the courts ought not be engaged in a parallel enterprise on matters which, realistically, went to matters of policy rather than the strict legalities of the proposal. The distribution of the settlement assets, now worth $750 million, is now underway.

Meanwhile, there has been a continuation of challenges by some Maori to the authority of the courts, with the courts rejecting defence arguments and appeals

based on the 1835 Declaration of Independence (which predates the Treaty of Waitangi), Maori sovereignty, Acts of Parliament usurping Maori rights, etc. The High Court has observed in a recent case[6] that such defences are becoming more frequently advanced in the courts and that objections to jurisdiction on these grounds are now raised almost daily in the District Court. In view of the debate noted later in this article over parliamentary sovereignty, it is interesting to note that it is the courts that have resorted to parliamentary sovereignty to rebut arguments and defences of these kinds. The Court of Appeal has recently reaffirmed in one such case that the Courts are subservient to Parliament and must apply an Act of Parliament in the terms in which it has been enacted, that they are bound to accept the validity of Acts of Parliament, and that the persistence of these unjustified attacks on the sovereignty of Parliament and the jurisdiction of the Courts will be taken into account in awards of costs.[7]

In other cases, the issues at stake may have been less clear but the courts have reached unsurprising conclusions. For example, in *Claydon v Attorney-General*,[8] the Court of Appeal had to consider whether the rights to remuneration, allowances and other benefits of members of the Employment Tribunal established under previous employment legislation had been terminated when the Tribunal was replaced by an Authority under new employment legislation (the Employment Relations Act 2000). The questions raised included judicial independence in the case of a body with a quasi-judicial function, but the Court did not consider that any constitutional claim by the appellants arising out of that principle, including in terms of interpretation of legislation in line with the principle, could be upheld in a case that did not involve judges in courts (the Employment Court and its Judges not being at issue in the proceedings) and where the status and duration of appointments was clearly determined by statute. The independence of tribunals was said to be important, however, while they are functioning (that is, in respect of their functions and not as to security of tenure). The decisions reflected in the legislation were policy choices clearly within the province of Parliament. The point was also made that the essential purpose of judicial independence is to protect the rights of parties seeking justice in the courts, not of any particular judge or of judges in general, and that institutional independence is an important element of judicial independence.[9] The Court also commented that it would be unlawful for the Executive to continue to pay a salary to a person in relation to an office that has been abolished by statute.

The earlier article noted one case in 2002 that had included comment by the High Court and the Court of Appeal on the subject of parliamentary appropriations.[10] That case subsequently went on appeal to the Privy Council.[11] The Privy Council, in a lengthy single judgment of 5 Law Lords, overturned the Court of Appeal in favour of the decision of the High Court that the recovery of biosecurity costs at regional airports in New Zealand was on an inequitable basis and therefore unlawful under the relevant statute. During the course of its judgment, the Privy Council referred to the 'rather troublesome issue of appropriations of public funds'. It referred with approval to an article on the High Court decision by the Clerk of the House of Representatives that the government financial system did not work in the way that

departmental advisers had assumed, that is, parliamentary appropriations were provided simply for border control and quarantine services and not specified or earmarked for metropolitan airports rather than other airports. Cost recovery could not therefore be applied to one but not the other. This contributed to the Privy Council's conclusion that the relevant decisions were based on erroneous or irrelevant considerations. The Privy Council upheld the restitutionary relief which the High Court had granted. (It might be worth adding that, although this decision played no part in the changes, New Zealand legislation relating to appropriations, budgetary processes, reporting requirements and parliamentary scrutiny was substantially amended in the Public Finance Amendment Act 2004.)

Unexpected Decisions

Decisions by the courts in two major areas have had substantial impact on the other branches of government, directly involving Parliament in solutions in one case and likely to do so in due course in the other case as well. The first of these cases is *Ngati Apa v Attorney-General*,[12] comprising four judgments delivered by a full bench of 5 Judges in the Court of Appeal led by Chief Justice Elias almost one year after the hearing. The case concerned applications by a number of Maori applicants for declaratory orders that certain land in the foreshore and seabed is Maori customary land and therefore subject to investigation and vesting of title to the land by the Maori Land Court. The Court of Appeal confined itself to the question of the Maori Land Court's jurisdiction. But in answering that question, it effectively overturned the High Court decision that such land, in the case of the seabed, was vested in the Crown or, in the case of the foreshore, had had its Maori customary status extinguished where it is contiguous with dry land that had lost the status of Maori customary land. The Court of Appeal decision is long and complex and not all the judgments are easy to construe in either their reasoning or their implications. But one thing it did do was to overturn case law from 40 years earlier, indeed the Court declared that earlier Court of Appeal decision to be wrong in law, on which legislation (and the High Court decision, at least in part) had been based. This was not therefore a case of the Court drawing the matter to the attention of Parliament and leaving it to Parliament to change the law. On the other hand, one Court of Appeal Judge in a later case has commented that the decision 'did not involve a realignment of policy but a correction of jurisprudential error'.[13]

Whatever the merits of the Court of Appeal decision, it arrived with the impact of a hand grenade (as one newspaper editorial put it at the time) on the other branches of government that had seemed unsuspecting, and it created uncertainty, even perhaps a political crisis. There was an immense amount of continuing confusion and disagreement over the decision. The Deputy Prime Minister and Leader of the House led a response to it. So far as Parliament was concerned, that response included legislation, eventually passed as the Foreshore and Seabed Act 2004, to vest ownership of the public foreshore and seabed in the Crown, to protect rights of public access and navigation, and to recognise and protect relevant ongoing customary rights. Other outcomes were the establishment of a special select

committee of the House to consider that and other legislation (which failed to agree on the Bill in its report back to the House), and the issue's domination of politics for more than a year, including significant opposition to various proposed solutions, Maori hikoi (march) to Parliament, and the resignation of one member of the majority party resulting in the establishment of a new Maori Party and her return to Parliament as its member. With 4 members elected by the new party at the subsequent election, there would appear to have been a permanent transformation of the New Zealand political landscape, but it is too early to tell how much deeper the consequences of the controversy may run for New Zealand society.

The second case is really a set of cases, still ongoing, relating to an Algerian refugee applicant in New Zealand, Ahmed Zaoui, who has now become something of a cause celebre in New Zealand. Different views are possible on the merits of the case, but there is probably less disagreement that the legislative system for dealing with refugee applicants raising security concerns, particularly in terms of processing delays, has not worked properly in anyone's interest. In a perhaps unprecedented saga in the courts (except possibly for some cases in the fisheries area), there have already been at least 15 decisions at High Court level or above relating to various aspects, or twists and turns, of the case, including 3 substantive decisions by the new Supreme Court in two of which it exercised the inherent jurisdiction of the High Court to grant bail to the appellant and imposed applicable bail conditions.[14] Some of the decisions have no doubt exposed failings in immigration legislation, not least the incorporation in New Zealand law of individual provisions of an international treaty, the Refugees Convention and Protocol, enabling the courts to place their own interpretation on the scope and meaning of the international provisions.[15] The Supreme Court itself referred to 'an unnecessarily complex Act' which has grown almost ten-fold in 40 years. But whether the executive is right or wrong in its decision making in relation to this particular refugee applicant and regardless of who has won or lost particular rounds in the case, the effect of the court decisions and process has been to drive a bus through some of the legislation and to defeat Parliament's intention. This may be a case where the outcomes do not reflect well on all three branches of government.

There have been other cases pointing to further developments in the use of the New Zealand Bill of Rights Act 1990, particularly the broad right to justice set out in section 27. In one case, *Udompun v Minister of Immigration*,[16] the High Court awarded substantial monetary compensation (a remedy developed by the courts in the context of the Act, and not written into the statute) to a foreign plaintiff for unlawful administrative decisions with respect to the treatment that she received from immigration officers and the police on arrival at the border, including violation of her right to the observance of the principles of natural justice in section 27(1) due to a failure to provide adequate interpretation services, but on appeal the case has very recently been overturned on that point in the particular circumstances of the case.[17] In another case, *Waara v Te Wananga o Aotearoa*,[18] the High Court has left open whether not only the Crown but also a public body that is bound by the Act and is sufficiently autonomous from the Crown may be liable for monetary

compensation in the case of breach of natural justice in section 27(1). In some other recent cases where breaches of section 27 have been found, the remedy has been vindication of rights not amounting to monetary compensation,[19] but in other cases the courts have resisted expanding the right as not reflecting Parliament's intention.[20] In one case, it was decided that section 27(1) could not be reached because there were other statutory provisions that, in line with section 4 of the New Zealand Bill of Rights Act 1990, overrode that provision.[21] But that case is more notable for the point that the Governor-General, while not accepting unlawful advice, is not required to address issues personally and independently, and in that regard the judgment, while critical of the terms of the advice sheet tendered by Ministers to the Governor-General in relation to Orders in Council (which, inappropriately in the circumstances of the statute at issue, used the word 'recommend' rather than 'advise'), quoted from the Cabinet office manual in setting out the constitutional position that the Governor-General acts on the advice of Ministers unless the government of the day has lost the support of the House of Representatives. The Supreme Court has however hinted at possible broad application of the right in support of procedural or other protections.[22]

The application of the New Zealand Bill of Rights Act 1990 has given rise to recent public controversy and concern in relation to cases where compensation has been awarded by the courts for breaches of the rights of prisoners. Parliament has now intervened in that area with the passage of the Prisoners' and Victims' Claims Act 2005, which limits the circumstances in which such compensation can be claimed and provides for the victims of the prisoners to make first claim on any compensation that is awarded to the latter. In another case, the Court of Appeal has specifically changed and developed the common law on privacy by recognising the emergence of a new tort where there is public disclosure of certain private facts, despite the fact that Parliament had not gone down that track when it enacted the Privacy Act 1993 and deliberately excluded a right to privacy from the New Zealand Bill of Rights Act 1990, the difficulty of reconciling such a development with other rights such as freedom of expression, and the high policy content and subjectivity of the judgments to be made in this area.[23] The Court, in a 3-2 decision, considered its development of privacy law to be incremental and rejected suggestions that filling gaps in privacy law should be left to Parliament and not be a matter for the courts. One Judge made the comment: 'If Parliament wishes a particular field to be covered entirely by an enactment, and to be otherwise a no-go area for the Courts, it would need to make the restriction clear.'[24] Late in the session of Parliament, a Member's Bill to expand the scope of the New Zealand Bill of Rights Act 1990 to encompass property rights, the New Zealand Bill of Rights (Private Property Rights) Amendment Bill, was introduced into the House and referred to select committee. It remains to be seen whether it is taken up in any manner in the next Parliament.

The decision in the privacy case is echoed by the Court of Appeal's decision in another very recent case to change a long-standing common law rule by overturning barristerial immunity from negligence claims,[25] endorsing a 2002 decision of the

House of Lords but doing so in the same week that the Australian High Court ruled to retain such immunity. This was despite the argument by a dissenting Judge that to do so would run counter to a provision in the Law Practitioners Act 1982, and preceding generations of that legislation, that in effect confers such immunity as a matter of statutory entitlement and parliamentary intention. The majority decision also left unresolved the question of retrospective application of the Court's decision. This decision is now on appeal to the Supreme Court.

One very recent High Court judgment,[26] in which the plaintiff succeeded in judicial review, has applied section 1 of the Bill of Rights Act 1688 in finding that a Ministerial decision to halt consideration for 4 years of an application by an institution for university status pending completion of a review amounted to a suspension of laws by regal authority without consent of Parliament in terms of that section. This was in a situation where legislation to limit the number of universities was introduced in 2000 and had remained before the House for two years before legislation of a different kind, the Education (Tertiary Reform) Amendment Act 2002, was passed, with a further Bill introduced in 2004 and not yet enacted. Some comments in the judgment suggest that the court may have seen itself as upholding the separation between the legislative and executive branches (and protecting parliamentary prerogatives accordingly), but other comments suggest that the parliamentary or legislative steps were being seen merely as part of the executive process. The application of section 1 of the Bill of Rights Act 1688, while rare, is not unprecedented in New Zealand law. For example, in a case in 2001 which found an absence of executive power to issue certain medical certificates in the aviation industry (an omission that has since been remedied through amendments to the Civil Aviation Act 1990 that were before Parliament at the time), it was held to be adapted to the circumstances of modern government so as to apply to statutory authorities exercising delegated powers in the public interest.[27] That is a case where one of the parties supplied, in a sealed envelope, documents obtained under the Official Information Act 1982 that had been placed before the select committee of the House considering the Bill, but the judge declined to open the envelope. The High Court also noted in the university case that the Magna Carta retains contemporary force, but did not find it necessary to decide for the purposes of this case whether it supplies an independent jurisdiction to protect rights granted under it. The Cabinet Office Manual was again quoted from in this case. It is understood that this case is proceeding on appeal.

Finally, two other cases further highlight the complexities when the same issues are before Parliament and the courts, and where the one may be scrambling to keep up with developments in the other. In the first case, *Glenharrow Holdings Ltd v Attorney-General*,[28] the plaintiff, who had had a short-term mining licence issued under the Mining Act 1971 in relation to minerals, including pounamu (greenstone), within the area of the South Island iwi, Ngai Tahu, was appealing against the decision of the authorities to reject its application for a further licence on the ground that its rights had not been preserved under successor legislation, the Crown Minerals Act 1991. The case, which went to the courts twice and all the way to the

Privy Council the second time round, was decided against the plaintiff on the second occasion as a matter of statutory interpretation. While that was going on, Parliament passed the Crown Minerals Amendment Act 2003. Sections 22 to 24 inserted several new provisions in the principal Act, the effect of which was to preserve the rights before the courts in the *Glenharrow* proceedings for any person who made application for extension of mining privileges before 5 pm on 19 September 2002 (the time at which the Government made policy announcements as to the removal of rights to apply for new licences or variations to existing licences) but otherwise to rule out such extension (or compensation for the loss of any rights).

The other case exemplifies the difficulties in the problematic policy area of fisheries. Interested litigants have been pursuing cases before the courts relating to aspects of aquaculture (marine farming) permits, while at the same time (and no doubt partly in response) Parliament has had before it Government legislation to reform regulation in this area. The legislation in this area is complex, involving permits under two regimes, the Resource Management Act 1991 and the Fisheries Act 1996, but other Acts are also relevant and many legislative changes have been made in recent years. These changes have included a moratorium in 2001 on new permit applications that had to be extended by further Act in early 2004 and was not lifted until the Aquaculture Reform (Repeals and Transitional Provisions) Act 2004 was passed along with six other separate statutes. Meanwhile, litigation that was initiated by one of the permitting authorities has also now gone all the way to the Privy Council.[29] The Privy Council has upheld the decision of the Court of Appeal on the points at issue. It included the comment that the legislation lacked express provision as to the division of responsibility between the permitting authorities under the respective statutes, and referred to other eventualities for which the statutes did not provide, but otherwise was not unkindly in what it had to say about the legislation and indeed noted that in recent years New Zealand has been setting an example to the world as to how to deal with the relationship between the harvesting of resources and their conservation and enhancement. The Court of Appeal, on the other hand, was critical of fisheries legislation, noting that it had been much amended in a piecemeal way over the years, was far from being internally consistent, and had drafting deficiencies that had led to numerous cases in the courts. Of course, the courts regularly draw drafting problems with legislation to the attention of the legislature and call for amendments of one sort or the other.[30] But it also has to be said that the common law is rarely a model of clarity, which is sometimes the reason that legislation is enacted in the first place.

Other recent examples where legislation has sought to deal in some manner with ongoing judicial proceedings include section 201 of the Maori Fisheries Act 2004 (an Act referred to earlier), which simply preserved pending or existing proceedings; sections 3(c) and 31 of the Resource Management (Waitaki Catchment) Amendment Act 2004, which deferred the hearing of certain applications for resource consents until a regional plan for the allocation of water was operative; and sections 11, 12, 29 and 38(3) of the Foreshore and Seabed Act 2004, which ruled out proceedings and the jurisdiction of the courts in various

respects. There is of course no limit on Parliament's power in New Zealand to legislate contrary to judicial proceedings. Even with reference to section 27 of the New Zealand Bill of Rights Act 1990, it has been acknowledged that Parliament cannot be prevented from legislating in the national interest, and its power to overturn judicial decisions that affirm or confer rights against the Crown has been described as the ultimate safeguard of public policy.[31] It has also been noted that the Crown is a supplicant for legislation, and must put its proposals to Parliament and seek to persuade the latter to legislate in order to overturn judicial decisions adverse to the Crown's interests.[32]

However, Parliament ought always to seek to legislate in accordance with good legal principle. It is probably a rare case where Parliament will consider it necessary to legislate retrospectively, and even where it does so ought generally to seek to avoid interfering in existing proceedings and to preserve the fruits of a litigant's victory except where even that is contrary to the national interest. Among relevant principles are that Parliament should avoid legislative judgments (that is, acting virtually in place of a court in the case of a particular dispute), which would contravene the separation of powers and comity and mutual restraint between the branches of government, and, where vested private property rights are removed, pay legal costs or other compensation to those affected. A recent case in point is Part 2 of the Forests Amendment Act 2004. The Act amended prohibitions in relation to the harvesting of certain indigenous timber and the export of certain indigenous forest produce and amended other regulatory requirements on indigenous forest land. In section 20, it also ruled out entitlement of any person to compensation from the Crown for the diminution of the value or rights, or the value of indigenous timber, in the case of specified Maori land, but the Act went on to set out a mechanism for specifying criteria and methods of assessment for determining claims for financial losses suffered in relation to contracts that concerned the export of indigenous timber harvested from the Maori land and that were entered into before a particular date in 1999 (being the date on which the Act was introduced as a Bill into the House of Representatives).

When interpreting statutes, the courts must sometimes grapple with, and will sometimes criticise Parliament for a lack of clarity in relation to, the question of retrospectivity of legislation.[33] This is a difficult area for drafters. As the superstructure of legislation has built up over the years, increasingly complex transitional and consequential provisions have been required to integrate legislation and try to resolve these sorts of problems. The general principle is that legislation applies only prospectively, and indeed section 7 of the Interpretation Act 1999, reflecting a common law presumption, provides that enactments do not have retrospective effect. What is less well known is that judicial decisions, at least where they effect a change to what was understood to be the law (either the common law or the meaning that the courts have been giving to particular legislation) and at least so far as the parties to the particular dispute are concerned (but certainly wider under the doctrine of precedent where the principles are of wider application), necessarily, indeed inescapably as the very essence of the

judicial function, operate or apply retrospectively as well as prospectively, because they are deciding the legal consequences of relevant transactions or events that occurred before the decision was given. The House of Lords has had to address this issue very recently in a case where it overturned a decision of more than 25 years standing (an unpromising case as to whether a bank's charge over book debts was a fixed or floating charge in a situation where statute gave priority to creditors with floating charges).[34] For reasons of commercial certainty arising in that particular case, the House of Lords gave detailed consideration to whether, for the first time, it should specify that its decision was non-retroactive (known as prospective overruling).

The House of Lords itself recognised the constitutional implications of adopting such a practice. Prospective overruling 'would amount to judicial usurpation of the legislative function', because it would be stating what the law is, or changing the law, but only for the future, rather than deciding the dispute between the parties to it (indeed, the parties would remain bound by law that had been found to no longer represent the law, whether due to earlier error, to changed social conditions in the case of the common law, or, now, to the new interpretative obligations in the Human Rights Act 1998). 'Making new law in this fashion gives a judge too much the appearance of a legislator. Legislation is a matter for Parliament, not judges….broadly stated, the constitutional separation of power between the legislature and the judiciary in this country is that the legislature makes the law, the courts administer the law. Parliament makes new law, by enacting statutes having prospective and varying degrees of retrospective effect….When disputes arise, whether between citizens or between a citizen and the government, they are to be resolved in accordance with the law, and that is a matter for the judicial arm of the state. In this regard it is for the judiciary to decide what is the law, not the legislature or the executive.' (Some qualifications were added about judge-made law, that is, common law.) When interpreting statutes, the role of the courts is to give effect to the intention of Parliament as always expressed in the statute concerned. 'It is for Parliament, not judges, to decide when statutes are to come into effect. It is for judges to interpret and apply the statutes.'

One Law Lord quoted from a recent Australian High Court decision firmly rejecting prospective overruling: 'A hallmark of the judicial process has long been the making of binding decisions of rights and obligations arising from the operation of the law upon past events or conduct. The adjudication of existing rights and obligations as distinct from the creation of rights and obligations distinguishes the judicial power from the non-judicial power.'[35] The point was also made that, unlike legislation, judicial decisions arrive without warning, so that those affected cannot make preparations beforehand to conduct their affairs differently. There was also the practical point that prospective overruling would act as a (probably substantial) disincentive to litigants seeking judicial settlement of their disputes, at least in the absence of 'selective' prospective overruling to ensure that successful claimants still benefited from the change in the law (but that runs into further objections in principle based around equality before the law since people in like cases would be

being treated differently, even arbitrarily). Despite the objections that they themselves noted, the Law Lords declined to rule out prospective overruling for all time but decided that the present case did not meet the test. They said that it could, exceptionally, be justified as a proper exercise of judicial power in future, and Lord Hope noted that he would have applied it in the House of Lords decision noted earlier overturning barristerial immunity (a judge-made rule). However, not all saw how it could be permitted in a dispute about the interpretation of a statute. In fact, Lord Scott thought that the application of prospective overruling in such a case could amount to a suspension of laws without the consent of Parliament in terms of section 1 of the Bill of Rights 1688 and be contrary to the spirit, and perhaps the letter, of that section.

Other cases also evidence a more radical turn in the United Kingdom courts, perhaps affected by the mass of constitutional changes in that part of the world in recent years that, according to some critics, have not been well integrated or well considered,[36] and by the influence of regional European legal institutions. For example, in one recent House of Lords decision, Lord Hoffmann has criticised the use of the term 'deference' to describe the relationship between the judicial and the other branches of government: 'I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts. This means that the courts themselves often have to decide the limits of their own decision-making power. That is inevitable. But it does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference. The principles upon which decision-making powers are allocated are principles of law. The courts are the independent branch of government and the legislature and executive are, directly and indirectly respectively, the elected branches of government. Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or the executive more suited to deciding others.'[37] Lord Walker went on in that case to refer to certain principles of deference specified in an earlier case by Laws LJ, including paying greater deference to an Act of Parliament than a decision of the executive or subordinate measure, paying greater deference to the democratic powers where the subject matter in hand is peculiarly within their constitutional responsibility and less when it lies more particularly within the constitutional responsibility of the courts, and paying greater or lesser deference according to whether the subject matter lies more readily within the natural or potential expertise of the democratic powers or the courts. However, none of this appears to go far enough for Lord Steyn. Writing extra-judicially, he has specifically disagreed with Lord Hoffmann that the courts desist from making decisions in particular cases on the grounds of separation of powers and constitutional principle, and he has called for a public discussion of the subject. In his view, no policy areas or decisions are, in principle, beyond the competence of the courts.[38]

In contrast can be noted the principles as to the proper scope of judicial law making (which is in any case of a different character and kind from general, public, rule-based law that is legislation) enunciated by the House of Lords in a case in 1996, that might be considered good advice and guidance: '(1) If the solution is doubtful, the judges should beware of imposing their own remedy; (2) caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated while leaving the difficulty untouched; (3) disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems; (4) fundamental legal doctrines should not lightly be set aside; (5) judges should not make change unless they can achieve finality and certainty'.[39] One question is whether all, or how many, of the cases noted in this section of the article would pass muster in light of these principles.

Criticisms of Parliamentary Sovereignty by Chief Justice

A notable feature during the life of the last Parliament, bearing directly on the relationship between Parliament and the courts, was a series of exchanges involving particularly the Chief Justice and the Deputy Prime Minister. They were sparked not, as some might have it, by the decision in the foreshore and seabed case, but by criticisms by the Chief Justice of parliamentary sovereignty that were not permitted to go unchallenged. The Chief Justice's criticisms were expressed in an academic article following an address that she gave at the University of Melbourne in March 2003.[40] In one respect, they ought not to have come as a surprise, because she had expressed some similar sentiments prior to her appointment to the judiciary. For example, she had made the following (extracted) comments: 'Theories of Parliamentary supremacy developed in England are grounded firmly in English history and in particular the struggles between King and Parliament of the 17th century, they are not compelled by fundamental legal principle or by logic….The application of theories based on historical tradition which is only in part ours should not be assumed….In the first place, it seems well arguable that the doctrine of Parliamentary sovereignty has no application to the fundamentals of the New Zealand constitution….Its application to New Zealand ignores our own history, including the Treaty itself which sets up a fetter on the sovereignty there ceded in it….It seems to me that it is time to recognise that the notion of arbitrary Parliamentary sovereignty represents an obsolete and inadequate idea of the New Zealand constitution….If fundamental principle is breached by legislation then it is the duty of the judiciary to review the legislation if it cannot be construed in a manner consistent with the fundamental principle otherwise violated.'[41]

The problems with the article were not so much the fact that it contained comments on this topic, but rather that the assertions in the article were so contestable, at every turn. The attack on parliamentary sovereignty in the article was full frontal but selective, indeed advocating a case and opening up the possibility of court-imposed limits on parliamentary legislation. There was, for example, no reference whatsoever to the work of a leading scholar in this area, Professor Goldsworthy of the Law Faculty of Monash University in Melbourne, who has undertaken an

exhaustive analysis in the form of a whole book on the subject that points out various misconceptions in the understanding of parliamentary sovereignty, the fact that it is far more deeply rooted than is often supposed (not simply an invention of the common law), and the unreality of any branch moving unilaterally, in the absence of consensus, to effect changes to such basic constitutional arrangements.[42] He notes in his conclusions on the history of the doctrine that one of the ideas that contributed to it over the years was that 'to limit Parliament's powers to prevent it from abusing them would be to adopt a cure much more dangerous than the highly improbable disease of parliamentary tyranny'. (It can be noted that countries with judicial review of legislation have codified constitutions where courts are required to perform a role in the supervision of the constitutional instrument, not least in federal states where ruling on the allocation of powers between federal and state authorities is a necessary part of that work of the courts. None of that pertains in New Zealand.)

This is not, however, the place to enter into this debate, which has some history in New Zealand but does have barren and artificial aspects.[43] Suffice to note that the Chief Justice's particular comments ignited responses, notably by the Deputy Prime Minister (who is also Leader of the House and, in 2005, Attorney-General). Speaking during a special 150th anniversary sitting of Parliament, he singled out for response three points she had made: that the application of the doctrine of parliamentary sovereignty had been assumed in New Zealand but why was not clear; that whether there are limits to the lawmaking power of the New Zealand Parliament has not been authoritatively determined (and who might determine that); and that an untrammelled freedom of Parliament does not exist. He expressed the view that 'we are approaching the point where Parliament may need to be more assertive in defence of its own sovereignty, not just for its own sake but also for the sake of good order and government'. He went on to say that:

> It is fundamental to our constitution that lawmakers are chosen by the electorate and accountable to the electorate for their decisions. MPs are accountable, and that accountability is often exercised in a fairly brutal and harsh fashion at elections…. Judges are not accountable; they are, in fact, independent, and that is essential to their role in society. Independence and accountability are two things that cannot be easily mixed. We need the judges' impartial rulings on what the law says and how it applies in individual cases, but if they then begin to express views on what the law should be, or on what it says, they enter dangerous territory. It is dangerous not only for the case at hand, but also because it means that the public begin to perceive the judiciary as politicised — even more so when decisions run counter to the original intent of the law, or regard statutes as not much more than imprecise guides to action. If, as a nation, we want to go down that track, we may have to consider the broader issues of an entrenched higher law, a clearer separation of powers in the constitution, and other constitutional issues….my concern at this point is that we do not have a creeping process of eroding the sovereignty of Parliament to make laws, a process that is not discussed openly, not voted for by the people of New Zealand, and not assented to by Parliament….Judges, on the other hand, are all but undismissable, and certainly not for the views that they hold or the judgments that they arrive at, or for cleaning up after the consequences of

> their own decisions. That last, ironically, remains the role of Parliament, which, however unwillingly, we are forced to carry from time to time….Governments, of whatever stripe, do not favour judicial activism….Activism does not always challenge parliamentary sovereignty, but it often does. And in New Zealand amental questions have been raised about that sovereignty. It is almost as if there is an emerging view that sovereignty is to be shared between Parliament and the judiciary, with Parliament being the junior and less-informed partner. That is so because where Parliament's sovereignty is questioned it is usually accompanied by the assertion or implication that it is the courts that have the final say as to the rules.[44]

He has since followed up with further comments and articles on the subject, and again expressed the concern that the challenging of parliamentary sovereignty in the courts would amount to 'constitutional change by stealth'.[45] A leading New Zealand constitutional lawyer has entered the debate, opposing notions of supremacy and pressing the idea of a collaborative enterprise between Parliament and the courts.[46] That, in turn, has precipitated a critical response by Goldsworthy, criticising not least the author's about-turn on these issues and failure to acknowledge Goldsworthy's researches in which he had disposed of points that the author was now again raising.[47] As he put it: 'It is rather audacious to portray the doctrine of parliamentary sovereignty, which for hundreds of years has been generally accepted as fundamental to the British constitution, as 'a latter-day myth' that conceals the 'true' locus of political power in the constitution. It is also disappointing for me, the author of a painstaking book-length study of the subject, in which every argument made by the doctrine's critics is paid the compliment of a detailed rejoinder, to read that this 'myth' is a 'sleight of hand', 'perpetrated by our lazy habits of thought'.' His detailed, point by point rebuttal extended to the Chief Justice's article and, to some extent, an earlier article by another Court of Appeal Judge at the time, Justice Thomas.

This debate has formed part of the background to two other developments of direct relevance to the relationship between Parliament and the courts. The first development was the passage by Parliament of the Supreme Court Act 2003 to establish a new highest court for New Zealand. This proposal was controversial.[48] As a result of submissions made on the Bill, it was decided to add a new provision (section 3(2)) to the purpose clause to provide that nothing in the Act 'affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament' (without definition of either term). This was unprecedented in New Zealand legislation. As originally proposed to the select committee that considered the Bill, this provision would have been much more prescriptive. The majority on the select committee explained, when it reported the Bill back to the House, that they considered that the amendment in the more limited form in which it was adopted effectively restated the primacy of Parliament in making law and determining public policy issues. A proposal by a minority party member during the committee stage on the Bill in the House to add a new clause which would have mandated elaborate principles for the court to follow concerning the rule of law, separation of powers and parliamentary sovereignty was defeated by 63 votes to 51.

However, it remains to be seen what the courts make of this provision. Despite its history, there have already been suggestions that it provides scope for inventive use by the court. The 'rule of law' is, after all, a slippery term that can be used for various arguments and purposes.[49] For example, one commentator has suggested that the placing of the rule of law before the sovereignty of Parliament may mean that the court should first consider the meaning to be given to the rule of law, then use that meaning to guide its approach to the meaning to be given to the sovereignty of Parliament.[50] A second commentator has recorded the following view: 'Some argue that adherence to the rule of law may involve cutting down parliamentary sovereignty.'[51] Another commentator, the Chief Justice who presides over the Court, has written that section 3(2) does not impose any direct responsibility on the Court, but the provision captures a duality that has inbuilt tension. She went on that the inclusion in the Act of reference to these principles of the constitution 'is at first sight startling….It is possible that in the use of these terms we are seeing the beginning of an attempt to address and capture in writing the elements of our constitution.'[52] Giving evidence on New Zealand's experiences to United Kingdom parliamentary committees in 2004 considering legislation to change the United Kingdom's judicial structure, the Chief Justice noted that section 3(2) was inserted at the select committee stage as a reaction to a much more specific proposed clause that the judges should be warned off in much more explicit terms that it is not for them to make law but for Parliament and this was the compromise. She said that she did not see a huge risk of confrontation over these principles 'because parliamentary sovereignty is part of the rule of law and judges are subject to the rule of law, so that is our constitution'. She added later that it is a terrible shame that we are trapped in supremacist language and that she did not like the name 'Supreme Court' because it encourages us to look for who is trumping, and constitutions do not work like that.[53] She also noted separately that parliamentary sovereignty is a concept that has been developed by judges, by judicial determination (Goldsworthy would deny this, and indeed the point has also been made that the courts themselves are created by statute), so this system is not going to give us the power to strike down legislation.[54]

Another Supreme Court Judge has commented that section 3(2) shows the re-emergence of Dicey's duality and compares with the statement in section 16 (actually section 15) of the Constitution Act 1986 that Parliament continues to have full power to make law for New Zealand. In his view, section 3(2) 'with its inbuilt tension or even contradiction', a tension 'which some would say cannot be resolved', 'can claim to be no more than a savings provision', and he suggested that no statute could confer this power on Parliament for that would be to assume and act on the very power that is to be conferred.[55] He also stated that the rule of law 'can now be given content not simply by reference to national sources (such as Dicey's) but increasingly by reference to international human rights treaties'…. Together the 2,000 or so treaties to which New Zealand is party 'place major limits, as a matter of international law, on the legislative power of Parliament, whatever the position is under national law.' Two former Presidents of the Court of Appeal have also commented to the effect that they do not see section 3(2) as imposing

inhibitions on the Court as to who is in charge, with the latter adding: 'The interpretation and application of section 3(2) are for the Court to determine. It is the meaning of the expression in today's world that matters. Section 3(2) does not mandate any particular 19th-century or other theory. It recognises the right of Parliament to legislate in today's landscape, in the democracy and society which we are in today's world, which includes the network of international treaties and norms and the limitations on absolute power all that entails.'[56] (Interestingly, the relevant United Kingdom legislation has now been enacted as the Constitutional Reform Act 2005. It provides for, inter alia, the establishment of a Supreme Court for the United Kingdom, and states, in section 1, in its own Part of the Act, that the Act does not adversely affect the existing constitutional principle of the rule of law or the Lord Chancellor's existing constitutional role in relation to that principle. The Act also contains a guarantee of the continued independence of the judiciary, and provides for the chief justice to lay before Parliament written representations on matters of importance relating to the judiciary or otherwise to the administration of justice.)

The second development, which was not unrelated to the controversy over the first development, was the decision of the House of Representatives at the end of 2004 to establish a special select committee, the Constitutional Arrangements Committee, to undertake a stocktake of the New Zealand constitution. The committee produced both an interim report and its final report before Parliament was dissolved for the election. The final report included a background briefing paper on parliamentary sovereignty prepared by the New Zealand Centre for Public Law serving as specialist adviser to the committee. Curiously, although the paper mentions Goldsworthy's book in a footnote, it does not draw to any discernible extent on his work. It remains to be seen whether constitutional development is taken up again to any extent in the next Parliament.

International Treaties

Two earlier articles have commented on New Zealand's parliamentary procedures for examination of international treaties (including a list of treaties examined up to the end of the 1999-2002 Parliament) and on the actions of the courts with respect to treaties that have not been incorporated into domestic law by Parliament.[57] This section records a few subsequent noteworthy developments in both areas. A list of the treaties presented in the 47th Parliament (2002-2005) is set out in the Appendix (including, in two cases, treaties that were still before Parliament at the time it was dissolved). Until the end of 2003, the House of Representatives operated under the same Standing Orders in this area as set out in an appendix to the first article, but one significant amendment applied subsequently. From that time, the Foreign Affairs, Defence and Trade Committee has been specifically required to refer a treaty to another select committee if the subject matter of the treaty is primarily within the terms of reference of another select committee. This was done in recognition that the current size and number of select committees in the New Zealand system leaves little spare capacity to support a new permanent committee specialising in treaties along the lines of the Australian model and in recognition

that the importance of international treaties is such that they should be considered as part of the mainstream business of select committees. Treaty examinations have accordingly been spread around a number of committees since then. At that time, the Standing Orders Committee also considered a number of other matters of concern relating to the operation of the procedures,[58] including possible examination of treaties during the negotiation phase before they have been fixed in place upon adoption and possible expansion of the matters to be addressed in the national interest analysis (NIA) that must accompany each treaty, but no further changes to the relevant Standing Orders were recommended either in that report or in the further report of the Standing Orders Committee in June 2005.

More bilateral treaties are now being presented to Parliament under the procedures, but that remains within the discretion of the Minister of Foreign Affairs and Trade and some omissions have been noted, including a groundbreaking treaty with the United Kingdom that provided for Pitcairn Courts to sit in New Zealand for the purpose of holding certain trials under Pitcairn law and that required the passage of a substantial statute, the Pitcairn Trials Act 2002. On the other hand, treaty actions have on occasion been presented even though that may not strictly have been required under the procedures as they stand, such as certain amendments, the removal of reservations made to two treaties, and a regional agreement concerning the deployment of police and armed forces to the Solomon Islands to restore law and order and security there. This last treaty constituted the first, and so far only, treaty to be presented under the urgent procedure, where New Zealand has already become party to the treaty and both the treaty and the NIA relating to it are presented after the event. In this case, the implementing legislation was also, exceptionally, introduced prior to the treaty examination and provides an unusual case of retrospective legislation where the whole statute was deemed to have come into force some months previously so as to apply to the particular operation that was underway (see the Crimes and Misconduct (Overseas Operations) Act 2004).

It was one of the bilateral treaties, an agreement with Australia for the establishment of a joint agency for the regulation of therapeutic products that was signed in December 2003 despite a critical committee inquiry and report,[59] that produced the strongest committee response to any treaty to date after the treaty and its NIA were subsequently presented to the House. The Health Committee recommended unanimously, with strong views expressed by each minority party, that the Government not take further binding action to become party to the treaty unless a number of matters of concern relating in particular to agency powers and accountability and the split between primary and delegated legislation are addressed in the implementing legislation. The Government subsequently presented a response to the committee report defending its proposed treaty action, but no implementing legislation has yet been introduced. Criticisms of the treaty action were maintained when, as a very rare opportunity in the House, Members' orders of the day other than Members' Bills were reached on one Members' day in the House when the committee report on the therapeutics product treaty happened to be at the top of the list (where all treaties reported back to the House by select committees remain for a time).[60]

New Zealand is of course not alone in the occasional strong criticism of treaties and treaty actions. It is noted that the Free Trade Agreement between Australia and the United States generated significant controversy in Australia. This came not from the Joint Standing Committee on Treaties but rather from a special Senate select committee that conducted an inquiry into the agreement. In chapter 2 of its final report in August 2004, a majority of the committee severely criticised the process for trade treaty-making, particularly that Parliament is involved only after-the-fact which 'denies the parliament an opportunity to inform itself, and to guide public opinion, about the complex considerations at play….a more fraught and unhelpful process could hardly be imagined'. It considered that trade agreements, because of their potentially broad ranging impacts, are in a different category to other treaties, being 'significantly about the shape of Australia's economic and social future'. It was concerned that in the case of these agreements there is too much emphasis on export opportunities and too little on the domestic impacts of trade liberalisation. It proposed that there be a legislated process whereby, prior to negotiations on any trade agreement, the government would provide Parliament with the priorities, objectives and impacts of the agreement for examination by select committee and an 'in principle' vote by Parliament and, after the conclusion of negotiations, the treaty and implementing legislation would be tabled in Parliament and voted on as a package in a single 'up or down' vote.

Meanwhile, in the United Kingdom, the Public Administration Select Committee of the House of Commons reported in March 2004 on taming the prerogative through strengthening ministerial accountability to Parliament. The committee recommended to the Government a public consultation exercise on such powers, with proposals for legislation to provide greater parliamentary control over all prerogative powers including specific proposals for ensuring full parliamentary scrutiny of the treaty-making prerogative power (as well as a couple of other powers including, unsurprisingly, decisions on armed conflict). The report appended a paper by its specialist adviser, the constitutional law expert Professor Brazier, that attached a draft Bill for regulating executive powers, including parliamentary approval of certain treaties that require ratification. The Government responded to the recommendation a few months later by noting, inter alia, that the Government remains committed to considering ways of improving the efficient and effective scrutiny of treaties by Parliament without substantially burdening Parliament and undertakes to reflect further on the recommendation, while also adding that it was not persuaded as to replacing prerogative powers with a statutory framework. Perhaps this is an example of one of the roles that an Indonesian professor suggested at a recent seminar with Australia on parliamentary oversight of treaties of Parliament becoming 'a sparring partner' for the Government in the treaties area, the other roles being to verify and confirm the Government's intentions in concluding a treaty and to voice public concern over certain treaties and the likely implications. The professor also noted that legislative amendments to implement treaty obligations were often made without there being any domestic or public demand for such action.

In New Zealand's case, there has been occasional opposition to other proposed treaty actions during the course of the last Parliament, such as ILO Convention 98, the Protocol on Firearms to the Convention against Transnational Organised Crime, and the New Zealand-Thailand Closer Economic Partnership Agreement (which, like a previous CEP Agreement with Singapore in 2000, was presented even prior to signature), but the opposition has been only on the part of one or more minority parties. Committees have occasionally provided substantive comments in other cases, in particular the Framework Convention on Tobacco Control, the Convention on the Reduction of Statelessness, and the UNESCO and UNIDROIT cultural property protection conventions (where a suggestion was made that the inclusion in NIAs of risk assessments, or regulatory impact statements, would assist committees in their scrutiny work). But in the great majority of treaty examinations, committee reports are pro forma, very few recommendations are made, and the treaties are turned around quickly, often well inside the 15 sitting day period. That has been the case even where there are some treaties or NIAs that raise substantial and important issues, such as the Treaty of Amity and Cooperation in Southeast Asia which may be the most significant treaty yet to have come before Parliament under the treaty examination procedures. That issues can be missed is shown by the Cartagena Protocol on Biosafety, which was subject to a quick pro forma report by one committee and a special report a few months later by another committee after additional information came to light that was not contained in the NIA and led the committee to make representations to the Standing Orders Committee about changes to improve the content of NIAs. There is only limited evidence to date that the procedures have initiated a dialogue with the executive on treaty matters, or that select committee outcomes on treaties have had an influence on subsequent implementing legislation.

There is no indication that the courts have been (mis)using the procedures to justify greater access to unincorporated international treaties in their decisions. On such treaties generally, only 4 cases additional to the earlier article require to be mentioned here. In the first, an adoption case, a majority judge in the Court of Appeal engaged in a questionable 'rights conscious' analysis of adoption legislation based on two unincorporated human rights treaties,[61] but the judgment has since been overruled on the legislative ground by the Supreme Court and cannot be regarded as authority.[62] In the second case, the *Zaoui* case, the Supreme Court has now recognised, perhaps endorsed, the presumption that legislation should if possible be interpreted consistently with New Zealand's obligations under international law.[63] It has also applied interpretation provisions from the Vienna Convention on the Law of Treaties on the ground that they state rules of customary international law and, as such, are part of New Zealand law, and it has given liberal attention to provisions from two unincorporated human rights treaties.[64] However, it appears to have done so only to the extent of calling the provisions in aid in the interpretation of immigration legislation, including not least a provision in the Refugees Convention that it indicated has been directly incorporated into New Zealand law. So no wider principle is to be drawn from the judgment. Moreover, because of the muddled state of legislation in the refugee area, judgments

concerning it will remain something of a special case. In the third, very recent case, the Court of Appeal has upheld and increased an award of compensation for breaches of the rights of prisoners and made some additional findings.[65] However, it did not find that section 27(1) of the New Zealand Bill of Rights Act 1990 was breached or engaged in various respects as alleged, and it agreed with the High Court that the (UN) Standard Minimum Rules for the Treatment of Prisoners were not a treaty or binding international instrument that had been adopted into New Zealand domestic law or part of customary international law and were not available to the litigants accordingly. But it also agreed with the High Court that provisions of the International Covenant on Civil and Political Rights and the Convention Against Torture had been incorporated into New Zealand legislation, although that is not what the legislation actually does (except in the case of definitions in the latter case, the relevant legislation simply draws from those instruments, which therefore remain 'unincorporated treaties').

The fourth case is the most interesting due to its simple application and expression of straightforward principle. The plaintiff, a prisoner claiming to be the victim of an assault by prison officers, brought various proceedings against the Crown. The defendants successfully applied to strike out the proceedings relating to direct application of certain international instruments (some binding at international law and some not).[66] The High Court noted that the domestic courts can only apply the domestic law of New Zealand, and that treaties can be relied on only in so far as they have been incorporated into New Zealand law by act of the legislature. Associate Judge Gendall commented that *Baigent's case* (the 1994 Court of Appeal decision noted in the earlier article that established public law damages for breach of the New Zealand Bill of Rights Act) 'is somewhat of a high water mark in terms of the extent to which the Judiciary has departed from, or added to, the clear terms of legislation to take into account New Zealand's obligations at international law'. He also noted that the courts are generally reluctant to add a common law substratum to areas that are typically regulated by legislation. Despite a detour over the issue of justiciability, it was then a fairly straightforward step on his part to the conclusion that the international instruments had not been incorporated into New Zealand law and were not therefore available to the plaintiff. On the plaintiff's secondary line of argument that some of the treaty provisions reflect customary international law and are directly incorporated into (or, rather, are available in or part of) domestic law accordingly so far as they are not inconsistent with legislation or the common law, he agreed that such an argument is not untenable but that the obligations had already been given effect, and were met in other terms, under the relevant statutory regimes. (Of course, if customary international law is now going to be relied on more commonly in the domestic courts, it needs to be recognised that there is a high duty on those seeking to do so to show that relevant and applicable rules and principles of customary international law exist and are in fact at issue, which is no easy task. Mere assertion will not do.)

Cases Concerning Members of Parliament

Miscellaneous Cases

In *Edwards v Toime*,[67] the plaintiff, representing himself, brought judicial review proceedings against electoral officials in respect of alleged inconclusive findings on their part as to whether a Member of Parliament (and former Minister) had been cleared of complaints of electoral misconduct. His concern appeared to be that these findings had failed to clear the member's name and therefore damaged her political prospects. There were some curiosities about the proceedings. The High Court rapidly disposed of various interlocutory matters and left any further round in the proceedings to an indefinite date in the future due to the fact that the person concerned (no longer a member) was in Manchuria and not due to return to New Zealand for some time.[68]

A difficult select committee inquiry was conducted during the course of the last Parliament into allocations of scampi quota by the Ministry of Fisheries under fisheries legislation. The fishing company under investigation, Simunovich Fisheries, sought to challenge the disclosure of records to the select committee by the Ministry as being contrary to provisions in the Fisheries Act 1983 which protected certain information from disclosure or use in any proceedings except where the court otherwise directs. The matter was further complicated by the fact that there was a separate Government inquiry underway into the same issues. In an initial ex parte proceeding,[69] the High Court noted that it had been advised that there was presently no live issue in that the Clerk of the House had indicated that information had already been received by the select committee. It noted that the Ministry had undertaken, pending substantive determination by the court, not to supply (further) information contrary to the terms of the legislation, but that this undertaking was, of necessity, constrained by Article 9 of the Bill of Rights 1688 (protecting proceedings in Parliament from challenge in the courts) and the associated principle of comity. The court said it understood this to mean that the undertaking does not and cannot bind the Ministry in its dealings with or duties to Parliament, but it left open that the plaintiff could seek another hearing if further information were sought. In recognition of the statutory requirements, the select committee had in any event developed work-around procedures to secure the information it required while according protection to commercially sensitive information.[70] However, applications were sought from the court a few months later by the plaintiff and by representatives of the Government inquiry seeking the disclosure by, respectively, other fishing companies and the plaintiff of certain information provided to the Ministry under the fisheries legislation. The case did not therefore make further mention of the select committee inquiry, but the High Court did go on to conclude that the statutory non-disclosure provisions still applied notwithstanding their repeal and to authorise the disclosure of the information (subject to conditions) to the Government inquiry.[71]

Select committee proceedings relating to this inquiry were one of several instances of unauthorised disclosure of select committee proceedings on which the Privileges Committee was required to rule during the course of the Parliament.[72] In some of those cases, it was recognised that, while breaches of privilege had occurred, there was also a need for relaxation of the rules to enable members of select committees to engage in more open discussion of select committee proceedings. This matter was considered at some length by the Standing Orders Committee, and limited amendments were made to the Standing Orders accordingly, in December 2003, as was the case for the question of timing in raising matters of privilege relating to the proceedings of select committees.

Fallout from the select committee inquiry still continues in another way. One Member of Parliament has issued proceedings against 5 defendants (including two other members) alleging that they have defamed him with comments made concerning his alleged involvement with Simunovich Fisheries. In one case to date,[73] the High Court struck out the causes of action against one of the members on the ground that they wrongly alleged defamation directly (which requires that the words used must raise more than mere suspicion or implication but suggest actual guilt, or that there must be adoption of allegations) rather than defamation by innuendo, but left open that the causes of action could be repleaded. The court referred to the fact that, in the case of two of the alleged defamatory statements, the member had simply reported seeking advice from the Speaker as to what he should do about allegations contained in an affidavit and being told that he should lodge it with the Speaker for the latter to determine whether there was a breach of Standing Orders. The court also appeared to attach some weight to the fact that the member was chairman of the select committee that had conducted the inquiry, and could be regarded as simply doing his job in that capacity. An appeal against this decision has since been abandoned,[74] and new proceedings have been launched. If they continue, they promise to revisit much of the defamation territory involving Parliament and its members that has been established in recent years in New Zealand law, since the alleged defamatory comments were made both inside and outside Parliament and before and after privileged statements were made in the House and the proceedings involve members on both sides of the case.

Another Member of Parliament (also a Minister) ran into a problem with electoral law that could have led to challenges in court to his parliamentary (and executive) status, but Parliament intervened to remedy the problem. Following a law change in the Netherlands, the member registered with the Dutch authorities and had his Dutch nationality restored to him. But he had overlooked the provision in the Electoral Act 1993 which declares vacant the seat of any member who does or concurs in or adopts any act whereby he or she may become a subject or citizen of any foreign State or Power, following which the Speaker may, if satisfied that a seat has become vacant, publish a notice of the vacancy to initiate a by-election. Since the right of a member to sit in the House raises questions of privilege (at least so far as vacancies in certain circumstances are concerned, because amendments to the Act in 2002 have altered the position), the Speaker referred the matter to the Privileges

Committee. The committee was split in its view of the matter, both whether the provision applied in this case and whether legislative action should be taken to avoid any vacancy (and if so, what form it should take).[75] Following presentation of the committee's report to the House two weeks later, Parliament passed the Electoral (Vacancies) Amendment Act 2003 the next day to make the provision inoperable retrospectively, from the beginning of the Parliament, but with a sunset provision whereby the Act would expire with the close of the polling day for the next general election (the report itself was debated in the House the following week, by which time the legislative amendment precluded action on the Speaker's part to initiate a by-election). The Act was passed through all its stages in a single day, without any reference to select committee and with 3 parties (4 on some votes) opposed to it. More permanent amendments to the relevant provision were passed the following year, in sections 5 and 6 of the Electoral Amendment Act 2004. Different views have been expressed about this outcome, with the most criticism directed at the use of retrospective (or, rather, retroactive) legislation for this purpose.[76]

Another member faced prosecution for driving a tractor up the steps of Parliament during a farmers' protest. The police eventually decided against proceeding with a prosecution, but uncertainty over the steps taken in relation to him within Parliament resulted in the preparation and eventual adoption by the House, for the first time, of an agreement between the Speaker and the Commissioner of Police on policing functions within the parliamentary precincts, on a draft of which the Speaker initiated a report from the Privileges Committee.[77]

A member was successfully prosecuted in contempt of court proceedings. This was an unprecedented case in New Zealand. The allegations by the Solicitor-General against the member, relating to comments that he had made to the parties and the media with respect to a custody dispute (the parents of the child concerned being his constituents), were that he had undermined the administration of justice through improper pressure on a litigant and attempting to influence, and interfering with the functions of, the Family Court (including scandalising the Court and including comments made while the matter was sub judice). The High Court accepted that the member had acted in good faith and in pursuit of what he perceived to be his duties as a constituent MP, but agreed that the contempt charges were made out,[78] including describing his comment to a caregiver that Parliament is the highest Court in the land as 'coercive and intemperate'. The court found contempt on the part of the member and two co-respondents, a national television company and a national radio company respectively.

The High Court sentenced him to a fine of $5,000.[79] When it did so, it made some further remarks about this 'serious contempt', involving it said intemperate, derogatory and unfair comments by someone of his standing that impacted on a litigant, the Court and public confidence in the Court, with accompanying lack of remorse. The court denied a media comment about a 'power struggle' between the Courts and Parliament, noting that the comment failed to understand their 'different but complementary roles', Parliament making the law and reflecting the standards

and aspirations of New Zealanders who have elected members to Parliament, and the Courts applying and enforcing the law which Parliament makes. It noted that the member had lashed out at the Family Court for applying law made by Parliament and entrusted by Parliament to the Family Court, treating 'that part of the law made by Parliament with utter contempt'. The court concluded that the proper bounds had been crossed here, but hoped that its judgments 'sufficiently spelt out to the respondents and all other New Zealanders, in particular Members of Parliament in their conduct outside the House, and to the media, what are the proper bounds to conduct which may interfere with the due administration of justice'. At the request of the member, the Speaker had to consider whether this finding of contempt had any implications in terms of creation of a vacancy in the House, which occurs where a member has been convicted of a crime. In a ruling to the House on 6 April 2004, the Speaker referred to advice he had received from the Clerk of the House and concluded that the finding of contempt was not conviction of a crime under the Electoral Act 1993.

Another member was in more serious jeopardy. A list member of a minority party in Parliament, she came under investigation by the authorities for serious criminal offences concerning the use of public money made available to a foundation administered by her and her husband. In the first place, she was suspended from her party caucus. In February 2003, the Speaker ruled that this was an internal disciplinary matter which effected no change in the party's parliamentary membership or the party's total votes cast in Parliament. Shortly afterwards, the party raised with the Speaker as a matter of privilege an allegation that the member had solicited a bribe in return for her vote. The Speaker ruled that no question of privilege arose. This was an allegation of such seriousness, almost without precedent in New Zealand, that proof of a very high order, based on strong and convincing evidence, would be required to make it out, and that he could see no reasonable evidence of the funds being solicited for private personal benefit. Later in the year, the party advised the Speaker that its parliamentary membership had changed and that the member was no longer one of its members for parliamentary purposes. The Speaker ruled on 11 November 2003 that she was to be regarded as an independent member for parliamentary purposes, with certain practical consequences for the party in Parliament, and noted that the party had indicated an intention to invoke the Electoral (Integrity) Amendment Act 2001 against the member. This legislation, colloquially known as the 'party hopping' legislation, was enacted in the wake of parliamentary defections from parties under MMP as a temporary measure with the intention of maintaining proportionality of party representation in Parliament as determined at the previous election, and it expired upon the 2005 general election.[80] It provided for the seat of a member who ceased to be a parliamentary member of a party for which the member had been elected to become vacant, including upon a notification to the Speaker by the parliamentary leader of the party that satisfied various requirements, not least a statement of the leader's reasonable belief that the member's actions had distorted the proportionality of party representation in Parliament.

The member then went to the courts to resist the application of the Act against her. In an urgent application to the High Court in December 2003, she obtained an interim injunction to prevent the party leader delivering notice to the Speaker, the court basing its decision to preserve the position in the meantime in no small part on its belief that, notwithstanding the statutory basis of the procedure involved, the Speaker's decision to declare a vacancy upon delivery of the notice would be subject to parliamentary privilege and therefore beyond legal challenge.[81] But in the full hearing in February 2004, the High Court decided against her, ruling that the party leader had a reasonable belief that the member had acted in a way that distorted the proportionality of party representation in Parliament, that is, in the absence of clear mistake of law or fact, it was not for the court to second guess the reasonableness of the party leader's belief.[82] However, it rejected extensive argument from counsel for the defendants that parliamentary privilege applied because the decisions involved ongoing membership of the House and ought therefore to be non reviewable by the courts, and it also specifically rejected suggestions in an earlier case that proceedings in caucus could in some way attract parliamentary privilege. The court observed that: 'The party system means that the government controls Parliament, but it is the statute passed by the Legislature which governs the process and procedure in this case…. [Members] are accountable to Parliament for what they do so far as regards the efficiency, policy and workings of Parliament and in that respect Parliament is the only Judge. But where they are acting pursuant to legislation they are responsible to a Court of justice for the lawfulness of what they do and of that the Court is the only Judge'. In short, if Parliament invites the courts in, it does so at its peril.

The member appealed further. In July 2004, the Court of Appeal ruled, by 4-1, in her favour.[83] It categorised the appeal as of constitutional importance. It agreed that neither parliamentary privilege (neither 'composition privilege' nor the partly overlapping right of the House exclusively to regulate its internal proceedings) nor Article 9 of the Bill of Rights 1688 was in issue in these proceedings where the parties were exercising rights in litigation independent from the operations of the House, it being for the courts to determine the limits and boundaries. (Remarkably, the Court was able to work in 3 references to the Privy Council decision in the *Jennings case* (see below) delivered less than 2 days earlier.) It also agreed that caucus proceedings were not proceedings in Parliament and specifically stated that the *Rata case* was wrongly decided on this point. But it considered that, as a matter of statutory interpretation, assessment of distortion of proportionality should be limited to electoral and related matters that bear on the number of the party's seats in the House and relative voting strength, that is, where a member resigns or otherwise withdraws support from his or her party to support another party or become independent (thus amounting to a defection) and not with reference to whether a member occasionally votes against his or her party or shows other dissent that is the essence of independent minded members of Parliament in a democracy, even less where it is the party's voluntary response to a member's allegedly disloyal conduct (here, by way of effective expulsion) that causes the disproportionality.

The Court added that judicial evaluation of the parliamentary conduct of members 'is unavoidable if the actions of the leader and the caucus concerned are to be scrutinised by the courts which….the Act envisages' (but the court's more limited approach to the application of the statutory provisions would limit the range and scope of parliamentary conduct on which the courts would be passing judgment). As another judge put it: 'Parliament enacted a statute going to the heart of its own workings which does raise very real interpretive difficulties.' He also (citing Burke) expressed a preference for 'the sturdy independence of Parliamentarians in New Zealand', notwithstanding that MMP and party lists, party voting, etc have strengthened the role of parties in the parliamentary system (although MMP also forces different parties to work together, so in that sense the power of parties is reduced and the position of Parliament vis-à-vis the Executive is enhanced). The Speaker subsequently ruled, following a question from the party in the House, that the decision had no effect on the party's parliamentary membership, which is determined entirely under the House's own internal rules, the Standing Orders.

There was still one more round to go in the courts. In its first substantive judgment, the new Supreme Court in November 2004, by 5-0 (but with 5 separate judgments, 1 long and 4 short), overturned the Court of Appeal's decision.[84] It did not see a need to consider either parliamentary privilege or the point about caucus proceedings (and declined to comment on the correctness of the Court of Appeal's remarks on these matters). It doubted that, if the point had been taken, there was a statutory power of decision amenable to judicial review, but rather simply a more limited 'procedure'. It saw the relevant distorting conduct as not to do with voting conduct in the House, which 'takes a reviewing Court uncomfortably close to scrutinising the workings of the House', but rather whether a member continues in Parliament after ceasing to be a member of the party for which he or she was elected (however it comes about under the rules of the party concerned), that is, a simple factual question (although some judges thought more was required). The Court had no difficulty concluding that the party leader had grounds for reasonable belief that the member, by continuing as an independent member, had acted to distort the proportionality of the party's representation in Parliament.

One judge, who considered that account should be taken of all the actions and conduct of a member contributing to distortion of proportionality, swung back the other way from the Court of Appeal on the role of members of Parliament, even quoting from Crossman's 1963 introductory essay to Bagehot's book that their prime responsibility is no longer to their conscience or the electors but to their party and that party loyalty is the prime political virtue required of an MP, such that the point of decision has now moved from the floor of the House, where debate has become a formality, to the party meeting upstairs. This too can be criticised as an oversimplification in the MMP era, and the notion of members as mere fodder for the party machine probably does little for the quality of Parliament.[85] Nevertheless, the upshot was that the party leader was now free to deliver the statutory notice to the Speaker. The member's seat accordingly became vacant the day after the judgment, and a new list member for the party elected in her place. The former

member has since been convicted of fraud and imprisoned. The Supreme Court in April 2005 also awarded costs of $17,000 against her.[86]

Two other members, both leaders of minority parties in Parliament, were in a different kind of jeopardy (or, as the Judge put it, 'potential detrimental effect') during the 2005 election campaign. They were not invited to participate in a debate of party leaders, restricted in number, that was to be broadcast live by a private television company (TV3). On the day of the debate, they obtained a mandatory interim injunction from the High Court to compel TV3 to invite them to participate in the debate.[87] In an oral judgment, Judge Ronald Young said he was satisfied that the decision of TV3, a national free to air broadcaster, was susceptible to review because in its election coverage it was performing a public function with important public consequences and exercising a public power. One reason for this conclusion is that public broadcasters are under a public responsibility to act in certain ways under the Broadcasting Act 1989. The leaders debate had the prospect of significantly influencing the outcome of the election, and by holding it TV3 was putting itself into the public arena and performing a vital public function. It was 'a vital part of democracy'. He then had to decide whether the decision, while susceptible to review, was wrong in law, and concluded that the basis on which TV3 had selected the particular participants was both arbitrary and failed to take into account relevant considerations. The test for that was not high here where the fundamental right of citizens in a democracy to be as well informed as possible before exercising their right to vote was at issue. There had been a breach of the obligation not to act unreasonably or arbitrarily. While himself concerned at the remedy sought (mandating participation in a television programme, it being 'in principle objectionable' to direct TV3 how to run its business at least in part and thrusting him into 'unfamiliar and typically inappropriate territory for a Judge', rather than the more usual course of simply preventing the programme being shown), he considered that he had no option in the circumstances where the damage would be much greater to the plaintiffs' interests than those of the defendant and where their potentially significant, even irrecoverable, electoral disadvantage had the capacity to affect the makeup of the next Parliament and therefore the Government of New Zealand. TV3 complied with the order, but an appeal in the case has been promised.

Interestingly, this case has already been cited in another 'election campaign' case, but only to the extent of the Judge noting that he had not made reference to the decision and that both counsel had submitted that its circumstances were quite different and that its principles did not assist. The other case is *Mangu v Television New Zealand Ltd*,[88] in which an independent candidate for an electorate seat sought interim relief and other remedies for not being mentioned by the defendant in a news item, based partly on polling (as in the *Dunne case*). She alleged, inter alia, that its actions were arbitrary and unreasonable. On the interim relief application, the High Court concluded that, 'at the micro level of gathering news and presenting the news item that is the subject of this proceeding, TVNZ was carrying out a function that is not amenable to judicial review'. It was also not carrying out a public function in terms of the New Zealand Bill of Rights Act 1990. The Judge

emphasised the need for a cautious approach, that the Court could only intervene in a compelling case, and that the fact that legal rights have been affected does not by itself give an entitlement to judicial review. There has, however, been another victory for politicians over the media, in that a member obtained a ruling from the Privacy Commissioner that TVNZ was obliged under the Privacy Act 1993 to hand over to the member documents concerning a complaint he had made about a television interview that contained personal information about him.[89] That decision, too, may be subject to challenge in court.

Finally, there are a few other cases where questions concerning Parliament and parliamentary privilege have arisen. In one case, a submitter who had had a submission on a Bill before a select committee returned to him (because it contained details identifying parties in Family Court proceedings) some months later initiated proceedings on his own in the High Court, first against the Attorney-General and then against the Speaker, requiring, inter alia, that the committee hear submissions on the Bill again and that it be restrained from reporting the Bill back to the House. The Judge, in an oral judgment, struck out the first round of proceedings in April 2004, noting that the Attorney-General could not be the correct party and making some other comments (without in fact ruling) bearing on the protection of parliamentary proceedings and the right of persons to make submissions to select committees.[90] The same Judge struck out the second round of proceedings in June 2004.[91] This time, he considered the old privilege case of *Bradlaugh v Gossett* at some length before concluding, on the grounds of separation of powers and comity and, apparently, because the plaintiff's issue was not sufficiently important either to affect the public interest in the proceedings of the House being free from interference from the courts or to read down Article 9 of the Bill of Rights 1688, that the plaintiff had no prospect of obtaining a remedy. In October 2004, the Court of Appeal dismissed, as having no merit whatsoever, a further application by the plaintiff seeking leave to appeal out of time.[92] On the privilege point, the Court made the succinct comment: 'Neither the High Court nor this Court can intrude inappropriately into the business of Parliament. This is because of the critical importance of the separation of powers between Parliament and the Courts (see Bill of Rights 1688 Article 9).' Meanwhile, the Speaker had earlier ruled, after the plaintiff's proceedings against the Speaker were filed, that they involved a question of privilege. The Privileges Committee reported a year later that the House take no further action on the grounds that the House's privileges had not been impugned and that the Court had recognised those privileges and struck out the proceedings.[93]

In another case, the plaintiffs initiated defamation proceedings against a news media company for comments made about them, in particular the Internet based 'University of Newlands', by an online version of *The Australian* newspaper. The defendant challenged the proceedings on forum grounds and lack of jurisdiction. The case concerns Parliament primarily in so far as the plaintiffs sought to serve the proceedings upon an employee of the newspaper in the parliamentary press gallery. The High Court rejected this, noting that an office occupied by a single reporter or employee within the precincts of Parliament could not be regarded as a 'place of

business' for that purpose.[94] Such service does not satisfy the rules. The Court left aside any constitutional or other arguments (which there surely could have been, given that service of legal process within the parliamentary precincts is subject to the approval of the Speaker). No further action was taken on that front. The case is of wider significance, however, in that the Court, for the first time in New Zealand, applied the decision of the High Court of Australia in *Dow Jones & Co Inc v Gutnick*[95] which decided that defamation can occur in any place where the plaintiff downloads the information, that is, it is not confined to the country where the information is uploaded to the internet. Thus the act of publishing defamatory material would have occurred in New Zealand once the information had been downloaded from the defendant's website. There had been some speculation about the implications of the *Gutnick case*, including in terms of whether some sort of international recognition and protection could be required for parliamentary privilege, but it seemed to be a case not of wholly new law but rather of existing law being adapted or applied to encompass new developments. In any event, this case has since been overturned by the Court of Appeal on the ground that the plaintiffs had not produced evidence of downloading or of identification sufficient to make out a good arguable case on the merits for the New Zealand courts to assume jurisdiction in the matter.[96] This meant that the Court of Appeal did not have to decide whether publication of the alleged defamation had occurred in New Zealand. It simply said that it was proceeding on the basis, but without deciding, that *Gutnick* states the law in New Zealand.

Protests in the grounds of Parliament have not thrown up any new developments over the course of the last Parliament. There has been a conviction for disorderly behaviour for throwing an object during one demonstration, and an acquittal on New Zealand Bill of Rights Act 1990 grounds for dishonouring the flag by burning it during another protest. The question of damages sought from the police and Speaker in the *Beggs case* in 1999 relating to the exercise of trespass powers (noted in the previous article) remains unresolved, but the procedures applicable to demonstrations in Parliament grounds remain as reaffirmed most recently by the Speaker at that time.[97]

Buchanan v Jennings

The final judicial step in the most important New Zealand case concerning parliamentary privilege in the last 10 years occurred with the judgment of the Privy Council in July 2004.[98] The earlier judgments in the defamation case, which turned on the application of a doctrine of 'effective repetition' to brief remarks made outside Parliament by a member after he had made comments inside Parliament, were summarised in the previous article. The decision of the Court of Appeal majority to allow a mere allusion by a member outside the House to a statement made under privilege to support a claim for defamation has since been subject to criticism as undermining parliamentary privilege.[99] The Speaker was again represented in the proceedings before the Privy Council as an intervener, and the matter was still before the Privileges Committee.

In a short unanimous judgment, Lord Bingham upheld the decision of the Court of Appeal. It is difficult to comment on the judgment because it was so cursory, even perfunctory. In particular, the long and cogent dissenting judgment of Tipping J in the Court of Appeal was dismissed with a comment near the end that he was 'oppressed' by the difficulty of drawing a bright line and by the problems which would face parliamentarians if the rule he favoured were not adopted. It would perhaps be tempting to classify the decision as another instance of the Privy Council virtually washing its hands of a New Zealand appeal, except that one of the 5 Judges was from New Zealand, Chief Justice Elias, and it based its decision on this occasion less on New Zealand law and more on one report in the United Kingdom which was referred to in argument by counsel. Considerable attention was also given to Australian cases on adoption or repetition of privileged statements, which may thereby have given new weight to those cases. The United Kingdom report on which the Privy Council relied is that of the Joint Committee on Parliamentary Privilege in 1999, which was chaired by one of the Law Lords, Lord Nicholls. It made a number of recommendations, some quite radical, which have not been acted on even in the United Kingdom. (One of the submitters to the committee was Lord Chief Justice Bingham, who expressed the view at that time that Parliament ought not be the sole and final arbiter in the cause of one of its members whether a communication was a proceeding in Parliament or as to the regulation of parliamentary business, and the Judicial Committee of the Privy Council might play that role in case of dispute. He also expressed his own preference on the limits of absolute privilege, that it should remain for anything said in debate or in any parliamentary question or answer but that members should enjoy qualified privilege for anything else said or written in their capacity as members.)

The report was relied on for two key points: first, that while Article 9 of the Bill of Rights 1688 must not be whittled away, 'it is plain that it cannot be read entirely literally'; and second, that the practice was discontinued (in the United Kingdom and more recently in New Zealand) of requiring the leave of the House to refer to parliamentary debates and proceedings in court proceedings, leading to frequent use of *Hansard* by the courts and reinforcing the Privy Council's conclusion that it cannot now be said that mere reference to a record of what was said in the House infringes Article 9. Thus, in its view, *Hansard* provides only the text of a member's statement or proof of 'the historical fact that certain words were uttered', and there is no challenge to what was said in Parliament and no need to extend absolute privilege to the extra-parliamentary 'republication' (which may, however, still have the protection of qualified privilege). Both these arguments are, of course, diversionary. In the first place, the parliamentary statement was being referred to by the plaintiff not simply as evidence of what was said but in order to challenge its contents (because no defamation could otherwise be established), and that is precisely what Article 9 prohibits. In the second place, no-one was suggesting an extension of absolute privilege; the question was preventing the whittling back of privilege within Parliament, not whether one would be allowing it to be applied outside Parliament.

Remarkably, the Privy Council concluded with the comment that the rule that members must show a degree of circumspection if pressed to repeat potentially defamatory statements outside Parliament 'is well understood, as evidenced by the infrequency of cases on the point'. This despite the fact that the law on adoption or repetition to challenge statements made in the House on the basis of the merest fragmentary comments outside the House has only recently been developed by the courts (this is the first case in New Zealand). Moreover, as a commentator has noted about the Court of Appeal's remark that there appears to have been no substantial parliamentary or other concern about the development of the concept of 'effective repetition' or 'adoption by reference', a concept (or legal fiction) which enables litigants to smuggle statements from the parliamentary record into their litigation thus making enormous inroads into parliamentary privilege, the factual position is rather that the government and the legislature have manifested their concern by intervening in the proceedings in this very case.[100]

The Privileges Committee has since reported back to the House on the privilege implications of the case,[101] following an interim report almost 7 years earlier. The committee obtained the views (appended to the report) of three of New Zealand's leading academics in the relevant areas, all of whom expressed concern about the outcome, not least its chilling effect on public debate both inside and outside Parliament and its possible application beyond defamation to other areas of the law such as contempt of court of risk to members, select committee witnesses, media and others, and noted possible legislative solutions. The committee commented that 'if a member repeats a parliamentary statement outside the House it is no protection against the liability that a finding of defamation is tantamount to a finding that the member on the earlier occasion spoke falsely in the House. That may be an inevitable, though unexpressed, conclusion. But in an 'effective repetition' case the parliamentary statements are being put directly to the court because they are the only or the main evidence of the defamation. In these circumstances the principle of mutual restraint breaks down completely, as the court directly judges the quality of the parliamentary proceedings. This has major implications for the relationship between the legislature and the courts.'

The committee went on 'specifically to record its disagreement with one aspect of the Privy Council's judgment', concerning the purpose of Standing Order 396(1) (401(1) in the new 2005 edition) dispensing with the requirement for the permission of the House for reference to be made in court to proceedings in Parliament. It pointed out that the provision was in no way concerned with possible contraventions of Article 9 of the Bill of Rights, and indeed goes on to provide that it does not derogate from Article 9, that is, the application of Article 9 was being specifically affirmed and maintained. It went on to note that the Privy Council confused different issues and commented without the benefit of argument on the matter, before concluding that the House 'has *never* taken the view imputed to it by the Privy Council that *mere* reference to or production of a record of what was said in Parliament infringes article 9. Such a view is entirely at odds with the submissions made to the Privy Council on behalf of this House in *Prebble v*

Television New Zealand Limited and endorsed by their Lordships in that case'. In short, while litigants may have had various reasons for making reference to parliamentary proceedings (for which purpose the permission of the House was once required), impeaching or questioning those proceedings has always been prohibited and remains so.

The committee considered that doing nothing in response to the decision was not a practicable option. 'Members are being challenged in media interviews in terms directly derived from the 'effective repetition' principle.' In other words, the decision is already having a chilling effect on debate. It considered that any action ought not affect the long-established rule that republication or other repetition of a speech outside the House remains actionable, but rather ought to be targeted at the fiction of 'effective repetition', but also considered that action should be taken broadly in relation to other areas of the law, not only defamation, where the principle could operate. It therefore recommended an amendment to the Legislature Act 1908 to provide that no person may incur criminal or civil liability for making any oral or written statement that affirms, adopts or endorses words written or spoken in proceedings in Parliament where the statement would not, but for the proceedings, give rise to liability. The House has since considered the committee's report and taken note of it by 105 votes to 13 votes,[102] but no legislation has yet been introduced. Meanwhile, the case continues to attract significant criticism.[103]

Finally, it is worth noting, with respect to qualified privilege, that there has been no significant development in the law in New Zealand since *Lange v Atkinson* reduced the protection for members at the other end of the spectrum from the *Jennings case*, when members are initiating defamation actions rather than being sued in defamation, by extending the qualified privilege defence to the new area of political discussion. In one case, the High Court has left open whether the public at large could constitute persons with an interest (or duty) in receiving a communication to which qualified privilege might accordingly attach.[104] In another case, the Court of Appeal has applied the interest or duty test, but the range of persons to whom the interest or duty applied was a narrower one and the case is mainly of interest for accepting that qualified privilege will protect persons who, absent ill will or improper advantage (broadly replacing the former malice test), hit back at attacks on their reputation.[105] Another case has discussed the distinction between the concepts of ill will and improper advantage, which defeat qualified privilege.[106] In none of these cases was the extension of qualified privilege to political discussion at issue. This is another area where the judge-made common law (specifically preserved by section 16(3) of the Defamation Act 1992 in the case of qualified privilege, but see also section 54 which provides the general protection that nothing in the Act derogates from parliamentary privilege) remains very unclear.

Use of Hansard

The use of *Hansard* has become almost commonplace in the New Zealand courts.[107] It may be that reconsideration of this practice would be timely to discourage

misunderstandings of the kind that occurred in the *Jennings case*. There are a number of examples where recent use of *Hansard* appears to have played a role of some significance in the decisions of the courts concerned. Perhaps the most extensive use was by the Court of Appeal in *Attorney-General v Refugee Council of New Zealand Inc.*,[108] where recourse was had not only to *Hansard* but also to other parliamentary history materials such as the explanatory note accompanying the introduction copy of the Bill and the select committee report on the Bill. That case is to some extent unusual in that the Court of Appeal in its in-depth examination was at some pains to reject the practice of the High Court Judge who had produced both an interim judgment and an extensive supplementary judgment in the earlier round of the case. But various other cases, extending even to special jurisdiction courts such as the Employment Court, can also be mentioned.[109]

Some points may be noted about all these cases. There are certainly cases as might be expected in areas of difficult legislation, such as immigration, fisheries and the Electoral (Integrity) Amendment Act 2001. But in other cases, the lack of clarity requiring recourse to *Hansard* might be questioned and deserve further examination, and there is other difficult legislation that comes before the courts where such recourse does not appear to have been required. In some of the cases, there has been recourse to *Hansard* at one stage of the proceedings but not others, which may suggest that it is sometimes as much a matter of taste on the part of the court concerned. A Court of Appeal Judge admits as much when she uses the analogy of 'a comfort blanket', 'to confirm that what you think is clear was also clear to those enacting it' (and to share the blame for a decision with Parliament).[110] Burrows, who generally supports the development given New Zealand's pragmatic legal tradition and the long-standing purposive approach to statutory interpretation in this country (and in the absence of the matter being regulated by statute, as it is in Australia), himself notes that parliamentary history sometimes 'gives the impression of having been referred to for interest, and for the sake of completeness'.[111]

Burrows also notes that *Hansard* was referred to occasionally but that New Zealand had traditionally applied the exclusionary rule and that the practice of obtaining assistance from *Hansard* has only gained momentum in the wake of the House of Lords decision in *Pepper v Hart*,[112] which is generally regarded as having changed the law in this area. What is sometimes forgotten is that this decision only opened the door so far, by relaxing the rule excluding reference to parliamentary materials where legislation was ambiguous, obscure or led to absurdity, where the material relied on consisted of statements by a Minister (or promoter of the Bill), and where the statements were clear. The principles in this case appear to receive very little recognition or even mention in the recent New Zealand cases that have made use of *Hansard*. As one authority has put it: 'The normal rule remains that *Hansard* should not be used in the interpretation of statutes'.[113]

It is interesting to note that further consideration of the practice is now underway in the United Kingdom. The House of Lords in two cases has raised concerns on constitutional grounds,[114] as has Lord Steyn writing extrajudicially.[115] In the *Wilson*

case, in which the House of Lords decided that the Human Rights Act 1998 (and the power under it to make declarations of incompatibility) does not, in general terms, apply retrospectively (or, perhaps more precisely, retroactively) to legislation, the Court had before it concerns expressed by the Speaker of the House of Commons and the Clerk of the Parliaments about the wide scope of the inquiry undertaken by the Court of Appeal into Parliament's reasons for legislating in the particular case at issue. They had argued that the courts should not treat speeches made in Parliament, whether by ministers or others, as evidence of policy considerations which led to legislation taking a particular form, and that there are no circumstances in which it is appropriate for a court to refer to the record of parliamentary debates in order to decide whether an enactment is compatible with the European Convention on Human Rights (which is part of the 1998 Act). This was the first time that the authorities of Parliament had sought to be heard on the use of *Hansard* by the courts, and the House of Lords made a point of noting both the importance of the legislature and the judiciary not trespassing inadvertently into the constitutional territory of the other and the point made in the *Prebble case* that article 9 of the Bill of Rights is part of the wider principle that the courts and Parliament are astute to recognise their constitutional roles. It also noted the importance of recognising that there are occasions when courts may properly have regard to ministerial or other statements made in Parliament without in any way questioning what has been said there, treating the statements as the will of Parliament or in any other way encroaching upon parliamentary privilege. It went on to endorse recourse to *Hansard* as a source of background information (rather than of the law), while agreeing that the Court of Appeal had crossed the boundaries. Lord Hobhouse probably made the strongest points: 'Once one departs from the text of the statute construed as a whole and looks for expressions of intention to be found elsewhere, one is not looking for the intention of the Legislature but that of some other source with no constitutional power to make law. The process of statutory construction/interpretation is objective not subjective.... the attempt by advocates to use Parliamentary material from Hansard as an aid to statutory construction has not proved helpful and the fears of those pessimists who saw it as simply a cause of additional expense in the conduct of litigation have been proved correct.'

It is worth adding here that one of the morals of this case is, again, that if Parliament in a sense invites the courts in, it does so at its peril and may risk undermining its own prerogatives. The House of Lords was at pains to note that there could be no breach of parliamentary privilege or protocol where a court declares legislation to be incompatible with convention rights because that is a function which Parliament has assigned to the courts in the legislation (and it is a function which entails evaluating, if not challenging, legislation). They are then merely expressing the will of Parliament. Lord Rodger noted that the 1998 Act is 'beautifully drafted', and no oversight can be assumed. The convention rights that it confers 'have a peculiar potency. Enforcing them may require a court to modify the common law…The 1998 Act is unusual — perhaps unique — in its range. While most statutes apply to one particular topic or area of law, the 1998 Act works as a catalyst across the board'. (He went on to examine 'the difficult topic' of retrospectivity (of

legislation) at length, including shedding light on the distinction between retrospectivity and retroactivity and the presumptions that vested rights are not to be interfered with and that legislation does not affect pending proceedings.) Nevertheless, the case may well now be authority for the proposition that a major plank of *Pepper v Hart* (ascribing parliamentary intention to ministerial statements and giving them authoritative status) no longer represents the law.[116]

For present purposes, what is of primary importance is that *Hansard* must never be used in effect to challenge or question in court proceedings what was said in Parliament. There is no suggestion that that has been happening, although all the cases would require examination in detail to ascertain whether there are any hints of that being so. That these cases are in the context of interpretation of particular statutes does not exclude this possibility. The fact that recourse is being made to *Hansard* so frequently in the courts makes it difficult to police the boundaries and likely that transgressions will occur. The *Jennings case* shows the dangers, that one thing can lead to another, that misunderstandings can develop, and that familiarity in the use of parliamentary history materials may eventually breed a sort of contempt in which the use, or the attempted use, of the materials against Parliament or its members develops naturally. There may be a gradual erosion of parliamentary privilege, and a temptation to undertake fishing expeditions into parliamentary materials or use them to divine the tea leaves or speculate about what members meant. *Pepper v Hart* can be seen as creating a major challenge to parliamentary privilege, as has now *Jennings case*. One can probably discern a line running directly from *Pepper v Hart* to *Jennings v Buchanan*, although with a bend or detour for *Prebble case*. *Jennings* can be seen as a not unnatural extension of the *Pepper v Hart* regime.

Moreover, if reliance is placed on ministerial or other executive statements, this can amount to the executive talking directly to the courts, with the separate institution of Parliament reduced to the role of a mere medium and less attention paid to its enacted intentions (that is, to the real law by which people are bound). In that event, the courts are reflecting what one branch said about the law, and potentially binding people to ministerial statements, instead of confining their focus to what the legislative branch actually enacted. This is even less appropriate in the MMP era where the discernment of the majority will or intention of Parliament is a more complicated matter than before. What is agreed by Parliament is only what is enacted. This applies whether one is considering use only of *Hansard* or the use of other materials such as explanatory notes, select committee reports on Bills, and Supplementary Order Papers or other amendments proposed during the course of enactment. In principle, legislation ought to speak for itself, and if Parliament has not legislated and expressed its purpose clearly enough then its intentions may not be met. The aim must be to enhance, not weaken, incentives for the creation of the best possible law, particularly at a time of renewed concern about parliamentary control over delegated legislation, and not to permit shortcuts in good legislative processes, burdensome as they may be.

The courts have legislation before them when they are making their decisions, and in constitutional terms it ought to be a rare case indeed for lifting the veil, as it were, on the essentially political business of law making and going behind the text. Looking under Parliament's skirts is not respectful. It is another aspect of comity and mutual restraint between the branches. Moreover, it is the courts, not the executive, that are meant to be the interpreter of legislation, with all the established rules and techniques of statutory interpretation available to them. Looked at from this point of view, it is a moot point whether any of the cases noted earlier have reached such a compelling standard. The genie is probably too far out of the bottle to restore the requirement for permission of the House for reference to be made in court proceedings to proceedings in Parliament. Burrows suggests some tentative criteria for the admission of parliamentary material,[117] but it is suggested that the courts ought to be encouraged to be more disciplined than that.

Conclusions

It is obvious that the relationship between the courts and Parliament is complex, multi-faceted and wide-ranging. During the course of the last Parliament, judicial criticisms of parliamentary sovereignty were a new, and unwelcome, development. Such criticisms are not a constructive approach to the problem of Parliament's apparent public unpopularity. This is a long-standing problem, however, and it may just be that to some extent it goes with the territory. Wheare in the 1960s devoted a chapter to the decline of legislatures,[118] and 20 years before that Lipson, in his classic study of parliamentary history, was regretting that Parliament 'does not stand high enough in the public regard. On a candid survey of the facts one must admit that there is a wide gulf between the importance which attaches to democratic legislatures in virtue of their functions and the repute which many of them actually enjoy among those they represent and serve. Such a discrepancy must provoke grave reflection among all who have at heart the preservation and improvement of democracy'.[119] It may also be that, as research in Australia has been said to suggest, public antipathy is directed more at politicians than Parliament as an institution. What part the relationship between the courts, who generally rank higher in public esteem, and Parliament may play in all this is a matter for speculation. For its part, Parliament continues to look for ways and means of responding to public expectations. For example, in 2005 the New Zealand Parliament followed the lead of some other legislatures by instituting a system for members to make returns of pecuniary interests for registration by a registrar, doing so in Standing Orders (after agreement was reached to proceed in that manner rather than through the less satisfactory alternative of legislation).[120] Meanwhile, the right of people who consider that they have been harmed by references made to them in the House to apply to the Speaker under S.O.s 160 to 163 to have a response incorporated into the parliamentary record and published by order of the House has been successfully exercised on 5 occasions during the course of the last Parliament.

Are there any other straws in the wind? Some suggestions have been made elsewhere that may be of interest to Parliaments generally. For example, one suggestion, bearing in mind that Parliament has for long scrutinised regulations made by the executive and now scrutinises international treaties before they are concluded, is that there may be a parliamentary role in the supervision of the government contracting power, which can be used extensively for regulatory purposes.[121] It is noted that some Australian jurisdictions already operate public databases with a view to improving transparency in this area. Over and above contracting, there have also been suggestions for Parliament enhancing (or regaining) its policy role more generally. A possible role for Parliament in a 'contemplative phase' of public policy formation has been mooted in Australia and something not dissimilar in the United Kingdom.[122] In Canada, the Government proposed a number of measures in 2004 to put Parliament at the centre of national debate on policy and to renew the capacity of parliamentarians from all parties to shape policy and legislation.[123] In another example, Finland has a parliamentary committee that conducts a dialogue with the government on policy for the future and means of solving future problems.[124] At one end of the spectrum are more radical suggestions, such as in the book by Marquand (who acknowledges assistance from the House of Commons Information Service among others) that the civil service ought to be legally the servant of Parliament rather than the Crown.[125]

It may be that the real message is less legislation, more policy, in which respect it is possible that the significant recent development of affirmative resolutions may have a role to play.[126] The concern is no doubt primarily with Government legislation, where the legislative proposals, sometimes very substantial, are often virtually dumped on to the House. Some countries have experimented with exposure drafts (very rare in New Zealand) and other devices which involve some preparation of the ground with Parliament before legislation is formally introduced. But is it is also possible to envisage much more. For example, there could be a requirement for prior policy discussions of proposed legislative initiatives (if not some measure of consensus) in Parliament before legislation is ever drafted. In such manner, the Government and drafters would have a better sense of Parliament's intentions and it may be that Parliament could take greater 'ownership' of the final product (which, after all, it passes). It may be that continuing evolution in New Zealand's MMP Parliament may move matters rather further in that direction. As has already been noted,[127] the latest (2005) election and the subsequent formation of government has resulted in further development in constitutional conventions which has probably made the Government more 'fluid' than in the past and increased the role of Parliament and some of its non-executive members vis-à-vis the Executive branch. But it is still early days.

Then there is the question of the whole international policy area of 'globalisation'. It continues to have a mixed press, and indeed it is an easy task to list several pages of contradictions, imbalances and other downsides to globalisation, whatever the term really means.[128] Certainly, major protective international law is lacking or not enforced in relevant areas. In Australia, the Government foreign and trade policy

white paper in 2003, 'Advancing the National Interest', evidences the tensions, if not contradictions (Faustian bargain may be putting it too strongly), in reconciling trade and security concerns. On democracy, the Canadian critic and provocative thinker, John Ralston Saul, draws attention to the weakening of democracy with the transfer of power from the citizen at state level to the global arena without compensating for that transfer through equivalent binding powers for the common good at the international level.[129] A massive, recently completed Norwegian study on power and democracy has reached sobering conclusions about the real health of democracy even in that country.[130] But perhaps of particular interest for present purposes is the report of the ILO World Commission on the Social Dimension of Globalisation in 2004, which made a number of suggestions for enhancing the role of Parliaments in relation to governmental action at the international level. Follow up is of course a matter for each national authority. ▲

Appendix

Treaties Presented to the 47th Parliament (2002–2005) under the International Treaty Examination Procedures

Treaty	Date of presentation	Date of report
Agreement on the Privileges and Immunities of the International Criminal Court 2002	23/10/02	31/10/02 (FAC)
Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively 1949 (ILO Convention 98)	23/12/02	28/3/03 (FAC)
Amendments to the Annex to the International Convention For the Safety of Life at Sea, 2002	7/5/03	15/5/03 (FAC)
Removal of Reservation (on paid parental leave) to the International Covenant on Economic, Social and Cultural Rights 1966 and the Convention on the Elimination of All Forms of Discrimination against Women 1979	15/5/03	5/8/03 (FAC) (2)
Optional Protocol to the Vienna Convention on Diplomatic Relations, 1961	6/6/03	12/6/03 (FAC)
Optional Protocol to the Vienna Convention on Consular Relations, 1963	6/6/03	12/6/03 (FAC)
Agreement between the Government of New Zealand and the Government of the French Republic concerning the Delimitation of the Maritime Boundaries between Wallis and Futuna and Tokelau 2003	6/6/03	12/6/03 (FAC)
Convention establishing an International Organisation of Legal Metrology 1955	25/6/03	25/7/03 (FAC)
Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Region 2000	29/7/03	15/8/03 (FAC)
Agreement between the Solomon Islands, Australia, New Zealand, Fiji, Papua New Guinea, Samoa, and Tonga concerning the Operations and Status of the Police and Armed Forces and other Personnel deployed to Solomon Islands to assist in the Restoration of Law and Order and Security2003 (URGENT)	12/8/03	28/8/03 (FAC)
WHO Framework Convention on Tobacco Control 2003	7/10/03	1/12/03 (FAC)
Agreement establishing the International Organisation of Vine and Wine 2001 (and termination of Agreement for the Creation In Paris of an International Wine Office 1924)	3/11/03	7/11/03 (FAC)
Convention on the Reduction of Statelessness 1961	3/12/03	4/3/04 (FAC)
Agreement between the Government of New Zealand and the Government of the Republic of South Africa for the Avoidance of Double taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income (with Protocol) 2002	3/12/03	26/2/04 (FEC)
Convention between New Zealand and the Kingdom of the Netherlands for Mutual Assistance in the Recovery of Tax Claims 2001	3/12/03	26/2/04 (FEC)
Second Protocol amending the Convention between the Government of New Zealand and the Government of the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income 2001	3/12/03	26/2/04 (FEC)
Protocol amending the Convention between the Government of New Zealand and the Government of the Republic of the Philippines for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, 2002	3/12/03	26/2/04 (FEC)
Protocol between the Government of New Zealand and the Government of the United Kingdom to amend the 1983 Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains, 2003	11/2/04	26/2/04 (FEC)

Agreement between the Government of New Zealand and the Government of the United Arab Emirates for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income 2003	11/2/04	26/2/04 (FEC)
Convention between the Government of New Zealand and the Government of the Republic of Chile for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income 2003	11/2/04	26/2/04 (FEC)
Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, 2001	24/3/04	2/9/04 (LOC)
Agreement between the Government of New Zealand and the Government of Australia for the Establishment of a Joint Agency for the Regulation of Therapeutic Products 2003	30/3/04	18/6/04 (HC)
UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970	7/7/04	27/8/04 (GAC)
UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995	7/7/04	27/8/04 (GAC)
Amendment to the Agreement establishing the European Bank of Reconstruction and Development, 2004	7/10/04	28/10/04 (FAC)
Treaty between the Government of New Zealand and the Government of Australia establishing Certain Exclusive Economic Zone Boundaries and Continental Shelf Boundaries, 2004	7/10/04	28/10/04 (FAC)
Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000	1/11/04	12/11/04 (PPC) & 7/3/05 (FAC)
Agreement on Mutual Acceptance of Oenological Practices 2001	24/11/04	11/2/05 (PPC)
Agreement on Consular Relations between New Zealand and the People's Republic of China 2003	7/12/04	4/2/05 (FAC)
New Zealand — Thailand Closer Economic Partnership Agreement 2005	9/3/05	29/4/05 (FAC)
Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas 1993	2/5/05	10/6/05 (PPC)
Amendment to the Multilateral Agreement on the Liberalisation of International Air Transportation to allow participation on a cargo-only basis, 2005	2/5/05	13/6/05 (TIRC)
Agreement between New Zealand and the Republic of Poland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income (with Protocol), 2005	6/5/05	27/7/05 (FEC)
Final Acts (2) of the ITU Conference, 2002, and of the ITU World Radiocommunication Conference, 2003	16/5/05	10/6/05 (CC)
Treaty of Amity and Cooperation in Southeast Asia 1976 [and Erratum (Protocols, 1987 and 1998	16/5/05 1/6/05]	10/6/05 (FAC)
Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region 1992	14/6/05	24/6/05 (PPC)
Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 2002		29/6/05
Trans-Pacific Strategic Economic Partnership Agreement 2005		18/7/05

Select Committees

CC Commerce Committee
FAC Foreign Affairs, Defence and Trade Committee
FEC Finance and Expenditure Committee
GAC Government Administration Committee
HC Health Committee
LOC Law and Order Committee
PPC Primary Production Committee
TIRC Transport and Industrial Relations Committee

End Notes

[1] Bracegirdle A, 'Members of Parliament and Defamation: the courts in New Zealand raise the bar' (Spring 2002) 17(2) Australasian Parliamentary Review 140.

[2] [2005] NZAR 562.

[3] *Curtis v Minister of Defence* [2002] 2 NZLR 744. Both *Milroy* and *Curtis* have been criticised by Joseph P, 'Scorecard on our Public Jurisprudence' (address in Wellington, April 2005) for perpetuating judicial 'no-go' zones, in the first case for running together the executive and legislative processes as if they are one thing, and the second case for applying a bygone doctrine of non-justiciability.

[4] [2004] 1 NZLR 419.

[5] See *Te Runanga o Ngai Tahu v Attorney-General*, 6 November 2003, CIV-2003-404-1113 (unreported) (High Court only); *Whata-Wickliffe v Treaty of Waitangi Fisheries Commission* [2005] 1 NZLR 388 (Court of Appeal); *Manukau Urban Maori Authority Inc v Treaty of Waitangi Fisheries Commission*, 28 November 2003, CP 122-95, CP 171-97 (unreported) (High Court only); *Thompson v Treaty of Waitangi Fisheries Commission* [2005] 2 NZLR 9 (Court of Appeal).

[6] *Morunga v Police*, 16 March 2004, CRI-2004-404-8 (unreported).

[7] *R v Mitchell*, 23 August 2004, CA 68-04 (unreported); see also to similar effect *R v Harawira*, 1 August 2005, CA180/05 (not yet reported).

[8] [2004] NZAR 16.

[9] Judicial independence has also been raised in the recent case of *R v T*, CA 492/04, 28 September 2005 (not yet reported), where the Court of Appeal declined to buy into an argument, made on New Zealand Bill of Rights Act 1990 grounds, that the appointment of non-tenured (acting or temporary) judges contravened judicial independence, which was reflected in and already protected by legislation.

[10] Above n 1, at 143.

[11] *Waikato Regional Airport Ltd v Attorney-General* [2004] 3 NZLR 1. Perhaps surprisingly, this case does not appear to have featured in the recent very substantial Australian High Court decision on parliamentary appropriations where there were strong dissenting opinions about the use of departmental expenditure for 'political' advertising: see *Combet v Commonwealth of Australia* [2005] HCA 61 (21 October 2005).

[12] [2003] 3 NZLR 643. The case has generated substantial comment, resting with Brookfield F, 'Popular perceptions, politician lawyers and the sea land controversy' [2005] NZLJ 315, and 'The sea land controversy and the Foreshore and Seabed Act' [2005] NZLJ 362.

[13] See *Lai v Chamberlains* [2005] 3 NZLR 291, at 314.

[14] See, in particular, *Zaoui v Attorney-General* [2005] 1 NZLR 577, from 629 and 662; and *Attorney-General v Zaoui* [2005] NZSC 38 (not yet reported).

[15] In one recent case, the High Court has commented that the manner in which the Refugees Convention has been adopted in NZ law means that decisions by officials are challengeable for actions inconsistent with the treaty, to which they must have regard as a mandatory factor: *Ghuman v Auckland District Court* [2004] NZAR 440. On the other hand, the Court of Appeal had noted in an earlier case that 'have regard to' is a lesser standard than, and deliberately falls short of, direct implementation or incorporation of a treaty into domestic law or giving it the force of law: *Attorney-General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577, at 610 and 647.

[16] (2003) 7 HRNZ 238.

[17] *Attorney-General v Udompun* [2005] 3 NZLR 204. An application by the plaintiff for leave to appeal further was declined by the Supreme Court on 9 February 2006 ([2006] NZSC 1).

[18] 30 September 2004, CIV-2003-485-2481 (unreported).

[19] For example, *Binstead v Northern Region Domestic Violence Panel* [2002] NZAR 865 (after consideration of monetary compensation, the remedy awarded by the High Court comprised a consent order as to breach of rights, together with costs); *Re Vixen Digital Ltd* [2003] NZAR 418 (reconsideration of decision by censorship board after the court concluded that section 27(2) requires that sufficient rather than minimal reasons be given for decisions); *L v L*, 31 May 2002, AP 95-SW01 (unreported) (breach in failing to conduct a fair hearing but no remedy for other reasons); *Jones v Attorney-General*, 8 July 2002, CP 175-02 (unreported) (representative order and declaration); *N v N*, 19 October 2004, CIV-2004-404-3124 (unreported) (remitting of case back to Family Court for full rehearing after denial of opportunity to cross-examine witnesses); *Unitec Institute of Technology v Attorney-General*, 7 July 2005, HC CIV 2005-485-89 (not yet reported) (declaration only awarded, although it appears that there may be a subsequent hearing on the question of compensation); *Vinelight Nominees Ltd v Commissioner of Inland Revenue* (2005) 22 NZTC 19, 298 (section 17 of Tax Administration Act 1994 (CIR's powers to gather information) is subject to section 27(3) of NZBORA (rights in respect of civil proceedings involving the Crown)), but cf *Chesterfiled Preschools Ltd v Commissioner of Inland Revenue*, 13 September 2005, HC CIV 2004-409-1596 (not yet reported) for contrary decision.

[20] See, in particular, *Chisholm v Auckland City Council* [2005] NZAR 661 (no determination of an adjudicative character was involved). See also *Russell v Taxation Review Authority* (2003) 21 NZTC 18, 255 (section 27(1) not providing a basis for a cause of action in judicial review against a party to proceedings in other than a decision making capacity); *Reid v Attorney-General*, 2 April 2003, CP 255-02 (unreported) (section 27(2) not guaranteeing judicial review when the relevant statutes did not provide such jurisdiction, but cf *Nong v Chief Executive, Department of Labour*, 19 May 2003, AP 318-02 (unreported) as to provision in the Immigration Act 1987 being read consistently with section 27 to protect the right to natural justice); *Struthers v Department of Conservation*, 15 April 2003, A 11-02 (unreported) (section 27(1) probably not giving right to be heard at particular stages of the criminal process); *Ubilla v Minister of Immigration*, 19 February 2004, CIV-2003-485-2757 (unreported) (immigration officer's decision on a temporary entry permit not having an adjudicative character so as to bring section 27(1) into play).

[21] *Crawford v Securities Commission* [2003] 3 NZLR 160.

[22] See *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597, at 622; and *Attorney-General v Zaoui* [2005] NZSC 38 (not yet reported), at para 92. See also the earlier substantive proceedings in the latter case, at the High Court stage (*Zaoui v Attorney-General* [2004] 2 NZLR 339) and to some extent the Court of Appeal stage (*Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690), where section 27 of the New Zealand Bill of Rights Act 1990 supported decisions of the Inspector-General of Intelligence and Security being subject to judicial review despite a privative clause in the governing Act and underpinned the application of procedural safeguards in the Inspector-General's review of the relevant security certificate.

[23] *Hosking v Runting* [2005] 1 NZLR 1.

[24] *Ibid*, at 55 (per Tipping J).

[25] *Lai v Chamberlains* [2005] 3 NZLR 291.

[26] *Unitec Institute of Technology v Attorney-General*, above n 19.
[27] *Aviation Industry Association of NZ (Inc) v Civil Aviation Authority*, 24 August 2001, CP 289-00 (unreported).
[28] [2005] 2 NZLR 289.
[29] *Marlborough Aquaculture Ltd v Chief Executive, Ministry of Fisheries* [2005] UKPC 29 (not yet reported).
[30] It is probably hard to go past Lord Steyn's colourful recent extra-judicial criticisms, however. Commenting on the 'statutorification' of the law, 'the modern phenomenon of an orgy of statute making', he has referred to the 'frenzied' statute making in the criminal justice field in the UK as 'a legislative seesaw: measures based on half-baked ideas are adopted in haste, published with minimal consultation, and puffed up to be the ideal solution for solving problems of crime but then abandoned very soon after and replaced by yet another solution said to be the perfect one. The complexity of each new statute defies belief. And so, to the bewilderment of the public and judges, the process continues….In this way the Dangerous Dogs Act 1991 was enacted. In a strong field it won the accolade as the worst piece of legislation ever to go on the English statute book.' See Lord Steyn, 'Dynamic Interpretation amidst an Orgy of Statutes' (2004) 3 EHRLR 245. (One wonders why he did not notice tax legislation: on the challenge that it presents to the rule of law in its volume, uncertainty and increasing reliance on discretion, see Walker G, 'Out of the Tax Wilderness' (Winter 2004) 20(2) Policy 21.)
[31] Rishworth P, Huscroft G, Optican S, and Mahoney R, *The New Zealand Bill of Rights* (2003), at 768-769. See also Burrows J, *Statute Law in New Zealand*, 3rd ed. (2003), at 403; Bigwood R (ed.), *The Statute: Making and Meaning* (2004), at 162; and Legislation Advisory Committee, *Guidelines on Process and Content of Legislation* (2001), at 53 (and 1995 LAC report referred to therein).
[32] *Ibid*.
[33] See, for example, *Morgan v The Superintendent, Rimutaka Prison* [2005] 3 NZLR 1, from 10, where the Supreme Court, in a split decision, has already had to grapple with whether retrospective changes to release entitlements to a prisoner's detriment under the Parole Act 2002 amounted to an increase in the penalty for the offence or only to a change in the administration of a total sentence; and *Mist v R* [2005] NZSC 77 (1 December 2005), where the Supreme Court has allowed an appeal against a sentence of preventive detention on the ground that the offender had not attained the qualifying age at the time of offending. For recent House of Lords comment on the whole subject of retrospectivity, see Lord Rodger's comments in the *Wilson case* noted below (at nn 76 & 114).
[34] See *National Westminster Bank plc v Spectrum Plus Ltd* [2005] UKHL 41 (not yet reported).
[35] *Ha v State of New South Wales* (1997) 189 CLR 465, at 503-4.
[36] For a recent summary, see in particular Bogdanor V, 'Our New Constitution' (2004) 120 LQR 242.
[37] *R v British Broadcasting Corporation, ex parte Prolife Alliance* [2004] 1 A.C. 185, at 240.
[38] See Lord Steyn, 'Deference: a Tangled Story' [2005] PL 346. Surprisingly, Lord Steyn has now stepped down and been replaced by Lord Mance of Frognal. In another recent case in the House of Lords, Lord Bingham (with support from many of the other 8 Law Lords involved in the decision, who did not include Lord Steyn) has said that, rather than deference owed by the courts to the political authorities, the question should be approached on the basis of demarcation of functions and relative institutional competence

depending on the degree of political or legal content involved, and later added that, while recognising the different functions (and origin) of Parliament and the courts, the Attorney-General was wrong to stigmatise judicial decision-making as in some way undemocratic: *A v Secretary of State for the Home Department* [2005] 2 AC 68.

[39] *C(A Minor) v DPP* [1996] AC 1, at 28 (per Lord Lowry).

[40] See Elias S, 'Sovereignty in the 21st Century: Another Spin on the Merry-go-round' (2003) 14 PLR 148. See also her subsequent addresses and articles: Elias S, 'Transition, Stability and the New Zealand Legal System' (2004) 10(4) Otago LR 475 (Guest Memorial Lecture in Dunedin, 2003); Elias S, 'Something Old, Something New: Constitutional Stirrings and the Supreme Court' (2004) 2(2) NZJPIL 121 (Cooke Lecture in Wellington, 2003); Elias S, '"The Next Revisit": Judicial Independence Seven Years on' (2004) 10 Canterbury LR 217 (Williamson Memorial Lecture in Christchurch, 2004); and Elias S, 'Fighting Talk and Rights Talk' (address to constitutional law conference in Sydney on 18 February 2005).

[41] See Elias S, 'The Treaty of Waitangi and Separation of Powers in New Zealand', ch 6 in Gray B & McLintock R (eds), *Courts and Policy: Checking the Balance* (1995), at 213, 222, 223, 224 and 230.

[42] Goldsworthy J, *The Sovereignty of Parliament: History and Philosophy* (1999).

[43] Much of the academic (and judicial) advocacy of a more forceful role by the courts is British. For Australasian criticisms of judicial activism, see Ekins R, 'Judicial Supremacy and the Rule of Law' (2003) 119 LQR 127; Campbell T, 'Judicial Activism: Justice or Treason?' (2003) 9 Otago LR 307; Hodder J, 'Departure from 'Wrong' Precedents by Final Appellate Courts: Disagreeing with Professor Harris' [2003] NZ Law Rev 161; and Heydon D, 'Judicial Activism and the Death of the Rule of Law' (Jan-Feb 2003) Quadrant 9, and (2004) 10(4) Otago LR 493; cf. Kirby M, '"Judicial Activism"? A Riposte to the Counter-Reformation' (2005) 11 Otago LR 1 (who also notes, however, that a judge 'can do nothing without a case'). See also the defence of legislation and legislatures in Waldron J, *Law and Disagreement* (1999) and *The Dignity of Legislation* (1999). (However, in a public lecture in Wellington in August 2005 on judicial activism, Waldron had some strong criticisms to make of the operation of the New Zealand Parliament, suggesting that judicial review of legislation could be required to make up for deficiencies in the legislative process in the absence of a second chamber, although he may not have appreciated the extent to which Parliament is less a 'captive' of the executive than prior to MMP, he was apparently unaware of what the NZ select committee system does, and his criticisms missed some unattractive features such as the drafting of Government Bills in a few large Parts so as to expedite passage through the House and the use of Supplementary Order Papers to substantially amend Bills at a late stage in the process. He called for more academic attention to be given to Parliament, its procedures, and legislation and legislative processes. See now his article: Waldron J, 'Compared to what? Judicial activism and New Zealand's Parliament' [2005] NZLJ 441.)

[44] *Hansard* (24 May 2004), Vol. 617, at 13191-3.

[45] For example, Cullen M, 'Parliamentary sovereignty and the Courts' [2004] NZLJ 243; and 'Parliament: Supremacy over Fundamental Norms?' (2005) 3 NZJPIL 1. One noteworthy aspect of those comments is that they suggest that parliamentary sovereignty is in some way subject to, or limited by, international law, particularly international treaties to which NZ is party. That is an unusual concession, in that it is generally put that there are no fetters on Parliament's legislative powers (and the courts must give effect to legislation even if it is contrary to international law, although they might work hard at the interpretative level to avoid a conflict), but NZ would of course be liable and accountable

at international law to other states in the event of non-compliance with its international obligations. See also Cullen M, Address to the Legal Research Foundation on 25 May 2005 (including comment on the need for Parliament to pass legislation that is clear and unambiguous, and does not confer broad discretion on the courts that, as it were, may invite them to be judicially active); and Mapp W (MP), 'Judicial independence' [2005] NZLJ 7 (judicial independence not unrelated to judges' maintenance of the separation of powers).

[46] Joseph P, 'Parliament, the Courts, and the Collaborative Enterprise' (2004) 15 KCLJ 321. See also Joseph P, 'The Higher Judiciary and the Constitution: A View from Below' (address to NZ Law Foundation conference in Auckland, August 2005). See, further, Lord Cooke, 'The Road Ahead for the Common Law' (2004) 53 ICLQ 273; and Lord Cooke, 'The Myth of Sovereignty' (2005) 3 NZJPIL 39.

[47] Goldsworthy J, 'Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty' (2005) 3 NZJPIL 7.

[48] As was, but for different reasons, legislation that was also passed by Parliament to establish a new process for investigating complaints against Judges and for initiating the removal of Judges: see the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004.

[49] The Canadian Supreme Court, in a very recent decision in which it set out 3 quite broad principles of the 'rule of law', noted that 'advocates tend to read into the principle of the rule of law anything which supports their particular view of what the law should be': see *Imperial Tobacco Canada Ltd v R (British Columbia)* [2005] SCC 49 (29 September 2005). For perhaps the best, pithiest summary of this whole area, in this writer's view, see Shklar J, 'Political Theory and the Rule of Law', ch. in Hutchinson A & Monahan P, *The Rule of Law: Ideal or Ideology* (1987). For two recent book length studies of the concept, see Saunders C & Le Roy K (eds), *The Rule of Law* (2003) (which notes the point that the emergence of the institution of Parliament, with its claim to represent the people, was the mechanism through which, with the aid of the common law courts, the power of the Crown was brought under control, that is, Parliament and the courts can be seen as having allied rather than competing interests); and Maravall J & Przeworski A (eds), *Democracy and the Rule of Law* (2003) (in which one chapter discusses the displacement of the political by the juridical, that is, democracy losing ground to legality, and another chapter the use of the rule of law as a political weapon, including against democracy itself, and the judicialisation of politics in democracies particularly where governments are insufficiently accountable). See also ch. 7, 'Rule of Law', in Joseph P, *Constitutional and Administrative Law in New Zealand*, 2nd ed. (2001). Of course, 'parliamentary sovereignty' is also not without its problems: in a very recent decision of the House of Lords, Lord Hope expressed the view that 'Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified' (*Jackson v Her Majesty's Attorney-General* [2005] UKHL 56, at para 104).

[50] Cornes R, 'There's more than one song worth singing: The Supreme Court and the legal system' (2004) 15 PLR 137, at 141. The view has also been expressed that the rule of law and parliamentary sovereignty are twin pillars of the constitution, and that the first is directed at Parliament and the second at the courts. It has also been said that we have a rule of law, not rule by Kings or rule by Parliament. That may be another way of looking at it, but nor do we have rule by Courts either, since all branches of government are under the law.

[51] Palmer G, 'The New Zealand Constitution in 2005', in *New Zealand's Constitutional Arrangements: where are we heading?* (NZLS seminar booklet, May 2005), at 11.
[52] Elias S, 'Something Old, Something New: Constitutional Stirrings and the Supreme Court' (2004) 2 NZJPIL 121, at 133.
[53] Minutes of evidence from examination of witnesses before the House of Lords Select Committee on the Constitutional Reform Bill, 25 May 2004.
[54] Minutes of evidence from examination of witnesses before the House of Commons Constitutional Affairs Committee considering the Constitutional Reform Bill, 25 May 2004.
[55] Keith K, 'Sovereignty at the Beginning of the 21st Century: Fundamental or Outmoded?' (2004) 63 Camb LJ 581, at 584-5; Keith K, 'The Unity of the Common Law and the Ending of Appeals to the Privy Council' (2005) 54 ICLQ 197, at 209.
[56] Lord Cooke, 'The Basic Themes' (2004) 2 NZJPIL 113; Richardson I, 'Closing Remarks' (2004) 2 NZJPIL 115 (who also notes, however, with reasons, that 'courts can decide only those cases which litigants put before them. They are not roving ambassadors for the rule of law. Clearly, judges need to be cautious in going beyond what the determination of their case requires.')
[57] See Bracegirdle A, 'Domestic Procedures for International Treaty Actions: Description of New Zealand Procedures' (2003) 14 PLR 28; and 'Domestic Procedures for International Treaty Actions: The courts and unincorporated treaties in New Zealand' (Autumn 2005) 20(1) Australasian Parliamentary Review 54.
[58] *Review of Standing Orders*, Report of the Standing Orders Committee (Report I.18B, December 2003), at 26 and 76-79.
[59] *Inquiry into the proposal to establish a trans-Tasman agency to regulate therapeutic products*, Report of the Health Committee, December 2003. The lasting contribution of this report may be its concern that proposals demonstrate compliance with good regulatory principles and requirements (see in particular Part II, IV and V and Appendix D of the report). See also Wakefield R, 'New Zealand's treaty process' [2004] NZLJ 381 (commenting on this treaty).
[60] *Hansard* (8 September 2004), Vol. 620, at 15508-25.
[61] *Hemmes v Young* [2005] 2 NZLR 755.
[62] [2005] NZSC 47; [2005] NZFLR 887.
[63] *Zaoui v Attorney-General* [2005] 1 NZLR 577, at 646.
[64] *Attorney-General v Zaoui* [2005] NZSC 38 (not yet reported).
[65] *Attorney-General v Taunoa*, 8 December 2005, CA82/04 (not yet reported).
[66] *Clark v The Governor-General in Right of New Zealand*, 27 May 2005, CIV-2004-485-1902 (not yet reported).
[67] [2005] NZAR 140.
[68] Evidently, the former member must have returned, or the matter was resolved in some other way, because the plaintiff returned to the charge with further proceedings some time later. The High Court made some criticisms of electoral officials, but dismissed his various grounds of judicial review (*Edwards v Toime* [2005] NZAR 228). The Court of Appeal has since dismissed certain interlocutory applications pending an appeal (18 April 2005, CA 272-04 (unreported)).
[69] *Simunovich Fisheries Ltd v Chief Executive of the Ministry of Fisheries*, 13 March 2003, CP 36/03 (unreported).
[70] See *Inquiry into the administration and management of scampi fishery*, Report of the Primary Production Committee, December 2003, at 183 (where it is noted that the committee established two protocols with the ministry to access information, one on

catch history records to protect commercially sensitive details and the other on compliance to specify procedures for accessing sensitive information). See also *Review of Standing Orders*, Report of the Standing Orders Committee, December 2003, at 30-31, where it is noted, with reference to statutory secrecy provisions, that the House and its committees are obliged to respect and observe the law and should not undermine the duty of other persons to comply with it, and that committees should take all reasonable steps in negotiating with agencies concerned to find a workable solution to any difficulties that are revealed; and further on statutory secrecy provisions, McGee D, *Parliamentary Practice in New Zealand*, 3rd ed. (2005), at 435-6.

[71] *Simunovich Fisheries Ltd v Chief Executive of the Ministry of Fisheries*, 11 June 2003, CP 36/03 (unreported).

[72] See *Three questions of privilege concerning the disclosure of select committee proceedings*, Report of the Privileges Committee, May 2003; *Question of privilege relating to an article published in the Sunday Star-Times purporting to summarise the contents of a draft report of the Maori Affairs Committee on its inquiry into the Crown Forestry Rental Trust*, Report of the Privileges Committee, October 2003.

[73] *Peters v Television New Zealand*, 5 November 2004, CIV-2004-404-3311 (unreported).

[74] The Court of Appeal has awarded costs against the appellant but not full indemnity costs: see *Peters v Television New Zealand*, 2 November 2005, CA247/04 (not yet reported). Just as an aside, it may be noted that the same member has since failed in an election petition before 3 Judges of the High Court to unseat, on the ground of alleged excessive election expenses, another candidate who defeated him in his constituency seat (he being returned however as a list member): see *Peters v Clarkson*, 15 December 2005, CIV-2005-470-000719 (not yet reported).

[75] *Question of privilege relating to the application of section 55(1)(c) of the Electoral Act 1993 to Hon Harry Duynhoven*, Report of the Privileges Committee, August 2003. And see the detailed Speaker's ruling of 6 August 2003.

[76] See Geddis A, 'Membership of the House' [2004] NZLJ 30; Morris C, 'On becoming (and remaining) a Member of Parliament' [2004] P.L. 11; Waldron J, 'Retroactive Law: How Dodgy was Duynhoven?' (2004) 10 Otago LR 631 (distinguishing between legislation that is retrospective (attaching legal consequences for the present and future to past events) or more radically, as in this case and judicial decisions, that is retroactive (operating on past events as though it were in force at the time), and noting that curative or beneficial legislation may not necessarily be benign when it is changing the rules of the game, 'a certain sort of nightmare' in political systems like New Zealand of the majority using its power in the House to change electoral law). On this distinction, see also Lord Rodger's comments in the *Wilson case* (HL) noted below (see text accompanying n 114).

[77] See *Draft agreement on policing functions within the parliamentary precincts*, Report of the Privileges Committee, March 2004.

[78] *The Solicitor-General for New Zealand v Smith* [2004] 2 NZLR 540.

[79] *The Solicitor-General for New Zealand v Smith* [2004] 2 NZLR 570.

[80] However, one of the confidence and supply agreements of 17 October 2005 between 2 parties for the new 48th Parliament (2005-8) provided for the 're-introduction' of the Act. The Bill has since been introduced and referred to select committee, and this time contains no expiry clause.

[81] *Awatere Huata v ACT New Zealand*, 11 December 2003, CIV-2003-404-7014 (unreported).

[82] *Huata v Prebble* [2004] 3 NZLR 359.

[83] *Ibid*, from 382.
[84] *Prebble v Huata* [2005] 1 NZLR 289.
[85] It also compares with the position in Germany (the model for MMP in NZ) where the emphasis is said to be on MPs as representatives of the people rather than of the party: see Foitzik R, 'The Donna Awatere Huata decision' [2005] NZLJ 11. See also the criticisms of the Act by Joseph P, above, n 3. For a UK defence of parties, described as a unifying force and as the connecting link between the executive and legislative branches and between each branch and the people, see Bassett R, *The Essentials of Parliamentary Democracy* (1937); cf Amery L, *Thoughts on the Constitution* (1947), who describes the enormous development of the power of the party machine as 'the most serious political menace to our whole system of parliamentary government'.
[86] *Prebble v Huata (No 2)* [2005] 2 NZLR 467.
[87] *Dunne v Canwest TVWorks Ltd* [2005] NZAR 585.
[88] 9 September 2005, HC CIV-2005-404-4875 (not yet reported).
[89] Reported in *Sunday Star-Times*, 19 June 2005.
[90] *Queen v Attorney-General*, 19 April 2004, CIV 2004-409-543 (unreported).
[91] *Queen v The Speaker, House of Representatives* [2004] NZAR 585.
[92] *Queen v The Speaker of the House of Representatives*, 26 October 2004, CA191/04 (unreported).
[93] *Question of privilege referred on 19 may 2004 concerning an application for orders and declaration sought by Mr Darryl Bruce Queen*, Report of the Privileges Committee, May 2005.
[94] *The University of Newlands v Nationwide News Pty Ltd* (2004) 17 PRNZ 206.
[95] [2002] 210 CLR 575.
[96] *Nationwide News Pty Ltd v The University of Newlands*, 9 December 2005, CA202/04 (not yet reported).
[97] See *Hansard* (27 July 1999), Vol. 579, at 18473-4. In the *Beggs case*, the Crown has recently failed in proceedings to remove two counsel for the plaintiffs on the ground of their possible involvement as witnesses in the events at the time: see *Beggs v Attorney-General*, 2 November 2005, CIV-2000-485-797 (not yet reported).
[98] *Jennings v Buchanan* [2005] 2 NZLR 577.
[99] See McGee D, 'The Scope of parliamentary privilege' [2004] NZLJ 84; Joseph P, 'Constitutional Law' (section on 'Parliamentary Privilege and Effective Repetition') [2003] NZ Law Rev 387, at 428; Allan J, 'Parliamentary Privilege: Will the Empire Strike Back?' (2002) 20 NZULR 205.
[100] Allan, *ibid*, at 219.
[101] *Question of privilege referred on 21 July 1998 concerning Buchanan v Jennings*, Report of the Privileges Committee, May 2005.
[102] *Hansard* (1 June 2005), Vol. 626, at 20890-910.
[103] Burrows J & Cheer U, *Media Law in New Zealand*, 5th ed. (2005), at 87; Todd S (gen. ed.), *The Law of Torts in New Zealand*, 4th ed. (2005), at 702-3; Burrows J, 'Media Law' [2004] NZ Law Rev 787, at 790; Joseph P, above, n 3; Geddis A, 'Privilege, Parliament, and the Courts' [2004] NZLJ 302; Geddis A, 'Defining the Ambit of the Free Speech Privilege in New Zealand's Parliament' (2005) 16 PLR 12; Geddis A, 'Parliamentary Privilege: Quis Custodiet Ipsos Custodes', [2005] PL 696; cf Thomas T, 'Extended privilege wrong both in principle and law', *New Zealand Herald*, 9 June 2005 (but cf to that, Geddis A, 'Let public control privilege', *New Zealand Herald*, 14 June 2005).
[104] *Julian v Television New Zealand Ltd*, 25 February 2003, CP 367-SD01 (unreported).
[105] *Alexander v Clegg* [2004] 3 NZLR 586.

[106] *Hubbard v Fourth Estate Holdings Ltd*, 13 June 2005, CIV 2004-404-5152 (not yet reported).

[107] For a useful summary of the legal position on the use of parliamentary history, see Burrows J, *Statute Law in New Zealand*, 3rd ed. (2003), at 177-199. See also Bigwood R (ed.), *The Statute: Making and Meaning* (2004), at 172-4 & 230-3.

[108] [2003] 2 NZLR 577.

[109] *Southern Clams Ltd v Westhaven Shellfish Ltd*, 13 February 2003, CA154/02 (unreported) (Court of Appeal) (included use of select committee report and drafting changes during enactment); *Whakatane District Council v Keepa*, 18 December 2001, M 7/00 (unreported) (High Court); *R v Panine*, [2003] 2 NZLR 63 (Court of Appeal) (included explanatory note and select committee report, but finally relying on legislative history and actual words used in statute rather than Hansard); *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (at Court of Appeal stage) (including submission made to select committee); *Simunovich Fisheries Ltd v Chief Executive of the Ministry of Fisheries*, 11 June 2003, CP 36/03 (unreported) (High Court) (included select committee report); *Tasman Orient Line CV v Alliance Group Ltd* [2004] 1 NZLR 650 (at High Court stage) (included select committee report and Supplementary Order Paper following inquiries made of the Clerk of the House); *Thimbleby v Accident Compensation Corporation*, 12 May 2004, CA42/03 (unreported) (Court of Appeal) (included select committee report); *Chief Executive, Ministry of Fisheries v New Zealand Marine Farming Assn Inc* [2004] 1 NZLR 449 (at Court of Appeal stage) (included select committee report); *Huata v Prebble* [2004] 3 NZLR 382 (at Court of Appeal stage) (included amendments by Supplementary Order Paper); *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690 (at Court of Appeal stage) (included explanatory note and select committee report); *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268 (in the context of comment on the legal position of existing consent holders affected by the Resource Management (Waitaki Catchment) Amendment Act 2004 that was passed and came into force between the hearings and the decision in this case); *Hemmes v Young* [2005] 2 NZLR 755 (at Court of Appeal stage); *Gibbs v Crest Commercial Cleaning Ltd*, 18 July 2005, EC CC 10/05 (not yet reported) (Employment Court) (included explanatory note, select committee report, and extensive comment on executive background to Bill, but deferring to Parliament to amend the Act if, as seemed likely, the Court was unable to interpret in line with its intention); *R v T*, 28 September 2005, CA 492/04 (not yet reported) (Court of Appeal); *Mist v R* [2005] NZSC 77 (1 December 2005) (included explanatory note); cf *Lopdell v Deli Holdings Ltd (No 2)* (2002) 16 PRNZ 551 (High Court) (rejected use of a Supplementary Order Paper, particularly where a conscience vote had been involved, on the ground that parliamentary intention is to be gathered primarily from the actual words in the statute rather than from comments of one or more members of the legislature); *R v A* [2003] 1 NZLR 1 (if legislation is not ambiguous, reference to Hansard will seldom, if ever, be helpful); and *Rajabian v Chief Executive, Department of Work and Income NZ*, 12 October 2004, CIV 2004-485-671 (unreported) (High Court) (no reference to a contrary interpretation of a statutory provision available from Hansard because the Act was clear).

[110] Glazebrook Hon Justice S, 'Filling the Gaps', in Bigwood, above n 107, at 172.

[111] Above, n 107, at 186.

[112] [1993] AC 593. This case has generated a substantial literature (much of it critical, resting with Kavanagh A, '*Pepper v Hart* and Matters of Constitutional Principle' (2005) 121 LQR 98). For history and parliamentary background, see Marshall G, 'Hansard and the interpretation of statutes', ch. IX in Oliver D & Drewry G, *The Law and Parliament*

(1998); McGee D, *Parliamentary Practice in New Zealand*, 3rd ed. (2005); and *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 23rd ed. (2004).

[113] Bell J & Engle G, *Cross; Statutory Interpretation*, 3rd ed. (1995), at 156.

[114] *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, and *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816; cf *Westminster City Council v National Asylum Support Service* [2002] UKHL 38 (where Lord Steyn indicated his concerns did not extend to explanatory notes to Bills which may be admissible aids in setting the context even in the absence of ambiguity and can be used against the executive where it has provided a clear assurance to Parliament but places a contrary contention before a court, although such an estoppel or legitimate expectation approach may paradoxically give even more power to the executive vis-à-vis Parliament), and *Jackson v Her Majesty's Attorney-General* [2005] UKHL 56 (where, in a case in which 9 Law Lords unanimously rejected a constitutional challenge to a UK Act (the Hunting Act 2004) and generally recognised Parliament's legislative supremacy, although in Lord Steyn's view (with some support from others) no longer the pure and absolute Diceyan version and as a construct of the common law, while registering some concern over executive dominance of Parliament, the one Law Lord who relied on *Hansard* expressed support for the *Pepper v Hart* ruling while others considered that the conditions for doing so had not been satisfied in the present case).

[115] '*Pepper v Hart*: A Re-examination' (2001) 21 OJLS 59. For disagreement with that view, see Lord Cooke, 'The Road Ahead for the Common Law' (2004) 53 ICLQ 273, at 282-4.

[116] Certainly, Kavanagh (above, n 112) reads the *Wilson case* as a major narrowing of *Pepper v Hart*.

[117] Above, n 107, at 197-8.

[118] Ch. 9, 'The Decline of Legislatures', in Wheare K, *Legislatures* (1963) & (1968).

[119] Lipson L, *The Politics of Equality: New Zealand's Adventures in Democracy* (1948), at 315. He also goes on to suggest that one reason for Parliament's lower prestige is the fact that, unlike the executive, its activities are in large part conducted publicly ('the searchlight of publicity').

[120] See S.O.s 164, 400(g) and (h), and Appendix B. This should mean that the register and returns are not subject to the jurisdiction of the courts; cf *Rost v Edwards* [1990] 2 QB 460 where the UK register was held not to be a proceeding in Parliament under article 9 of the Bill of Rights, and evidence about entries in the register could be given and challenged in court (however, see also *Hamilton v Al Fayed* [1999] 1 WLR 1569, at the Court of Appeal stage, where Lord Woolf commented on doubt about this point but appeared to leave open whether or not it was correct, although it may follow from the Court's decision on the precise matters before it that it would not have upheld the point had it had to decide).

[121] See Saunders C & Yam K, 'Government regulation by contract: Implications for the rule of law' (2004) 15 PLR 51. See also Evans H, 'Unusual measures to scrutinize government spending' [2004] The Parliamentarian 152. For a more cerebral approach, see McLean J, 'The Crown in Contract and Administrative Law' (2004) 24 OJLS 129.

[122] Marsh I, 'Australia's Representation Gap: A Role for Parliamentary Committees?' (2004), paper in Senate lecture series. See also Judge D, 'Whatever Happened to Parliamentary Democracy in the United Kingdom?' *Parliamentary Affairs*, July 2004, 682, at 688-90. Other UK materials can also be mentioned, eg Norton P, 'Reforming Parliament in the United Kingdom: The Report of the Commission to Strengthen Parliament' (2000) 6(3) *Journal of Legislative Studies* 1 (addressing the imbalance in the

relationship between Parliament and government); and Oliver D, 'The challenge for Parliament' [2001] PL 667 (on the report of the Hansard Society Commission on Parliamentary Scrutiny on making Government accountable).

[123] Canada Privy Council Office, *Ethics, Responsibility, Accountability: An Action Plan for Democratic Reform*, February 2004.

[124] See Tiitinen S, 'The Committee for the Future in the Parliament of Finland' (2004) 54 Const. Parl. Inf. 5.

[125] Marquand D, *Decline of the Public: The Hollowing-out of Citizenship* (2004), at 145.

[126] The proliferation of the affirmative resolution procedure in its application to delegated legislation has been criticised by the Regulations Review Committee (see *Interim report on the inquiry into the affirmative resolution procedure*, Report of the Regulations Review Committee, July 2004, and S.O. 317 on the affirmative resolution procedure and S.O. 384 on whole of government directions at present provided for in sections 107-115 of the Crown Entities Act 2004), which drew attention to the constitutional implications of the procedure in this regard, but query whether there may be any role for such procedures in relation to increased parliamentary oversight of policy matters, that is, where Parliament presently has no specified statutory role or as a mechanism for Parliament to express its view on policy developments that are required to be notified to it.

[127] See, in particular, White N, 'Deconstructing Cabinet Collective Responsibility' (2005) 1(4) Policy Quarterly 4.

[128] Of particular interest perhaps are assessments of globalisation from a longer term and security perspective rather than simply an economic perspective. See, in particular, the book by a noted strategic and security analyst who turned his attention to one aspect or model of globalisation causing concern: Luttwak E, *Turbo-Capitalism: Winners and Losers in the Global Economy* (1999). On the action/reaction phenomenon, see the book by a civil society specialist: Barber B, *Jihad v McWorld: How the Planet is Both Falling Apart and Coming Together and What This Means for Democracy* (1995). And for the serious concerns about the direct challenges that globalisation presents on the security front, see Naim M, *Illicit: How Smugglers, Traffickers and Copycats are Hijacking the Global Economy* (2005).

[129] See Saul J, *Globalisation and Democracy: Looking for the Public Good*, address in Sydney in 1999: see http://evatt.labour.net.au/publications/papers/20.html.

[130] See review by Ringen S, 'Wealth and Decay' TLS, 13 February 2004.