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# THE PROCESSES OF CONSTITUTIONALISM IN NEW ZEALAND AND THE UNITED KINGDOM

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**ABSTRACT: This article explores the constitutional developments that have recently taken place in New Zealand and the United Kingdom. It is argued that administrative law is a branch of constitutional law that is uniquely susceptible to the process of "constitutionalism". The process of constitutionalism privileges values by incorporating them into the constitution. Since World War II, the neo-liberal values of economy and efficiency, and the ideals of the international human rights movement have been constitutionalised in New Zealand and in the United Kingdom. While this modern constitutionalism in New Zealand is superficially comparable with developments in the United Kingdom, the two jurisdictions are heading in different directions as the United Kingdom becomes more integrated with the European Union. As a result of the United Kingdom's engagement with Europe the Westminster Parliament's sovereignty may have been compromised. On the other hand the principle of parliamentary sovereignty has been reaffirmed in New Zealand with the passing of the Supreme Court Act 2003. The traditional constitutional theory developed by A.V. Dicey is still defendable in New Zealand, as is the *ultra vires* justification for judicial review of administrative action.**

## INTRODUCTION

In New Zealand, and in the United Kingdom, the discipline of administrative law discloses a theoretical controversy that is exacerbated by the fact that the constitutional arrangements of these two nations are rapidly evolving. While the advance of history does not at present threaten to overwhelm the Westminster systems of government operating in the two jurisdictions, recent developments may have undermined the traditional justification that is given for the legal process of judicial review. It may be the case that administrative law can be reconceived, or reinvented,[1] as an area of law that appropriately protects the fundamental values that permeate through common law legal orders but there are philosophical problems with the higher law aspects of this project. These problems must be acknowledged, addressed and explained to the public if we are to have any confidence in the political appeal of the rule of law in New Zealand and the United Kingdom.

[1] M Taggart "Reinventing Administrative Law" in Bamforth and Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart Publishing, Oxford, 2003); Harlow and Rawlings, *Law and Administration* (2nd Ed, Butterworths, London, 1997) 148–151; See also C Harlow "Back to Basics: Reinventing Administrative Law" [2000] PL 245.

This paper considers the likelihood that the United Kingdom and New Zealand will diverge in terms of administrative law. The primary argument that I will advance is that the dynamics influencing the development of English administrative law are significantly different from the drivers of change in New Zealand's public law. The institutional and cultural conditions that operate in each society will inevitably undermine cross-constitutional dialogue between New Zealand and the United Kingdom. In making this argument, I do not in any way intend to deny or downgrade the close connection between New Zealand and the United Kingdom. The relationship between New Zealand and England can be described as a special relationship.[2] We share culture, history, language, the political constitution and the beneficial inheritance of the rule of law. However, the constitutional and intellectual estrangement of New Zealand from the United Kingdom is inevitable in the face of the pressures of globalisation and constitutionalism. Even if it won't happen over night, the constitutions of New Zealand and England will eventually become significantly different from one other.

In order to defend the view that future comparative lawyers will need to be more discerning when comparing the constitutions of England and New Zealand, I rely on two assumptions. The arguments in this paper depend upon the continuation of two processes we can now observe occurring: the processes which have been described as "internationalisation" and "constitutionalism".[3] The first assumption is that these processes will continue to have effects upon the legal landscape. If these developments retain their current momentum, then the political, institutional and social arrangements existing in England and New Zealand will have to change to more closely approximate the demands of these processes. The second assumption is that administrative law is an

[2] The phrase "special relationship" comes from the title of I Loveland (ed) *A Special Relationship? American Influences on Public Law in the UK* (Oxford, Clarendon Press, 1995). Before the treaty of Waitangi was signed on 6 February 1840, trade governed the relationship between New Zealand and England. The signing of the Treaty ensured that New Zealand would share with England the common law and the same sovereign monarch. The colony established in New Zealand was populated with British migrants, who soon demanded the enforcement of the rule of law through the use of imperial military might. In return the New Zealand colony was to follow the United Kingdom into two world wars. Throughout this period New Zealand maintained a close trading relationship with the United Kingdom. The United Kingdom's entry into the European Economic Community in 1972 weakened the ties that existed between New Zealand and the United Kingdom. Today the relationship between New Zealand and England is still a special relationship, but it is less close than it has been in the past.

[3] Taggart, "Reinventing Administrative Law", above n 1, 311; Dyzenhaus, Hunt and Taggart, "The Principle of Legality in Administrative Law: Internationalism as Constitutionalism" (2001) OUCLJ 5.

important aspect of constitutional law. Properly conceived, administrative law requires the development of persuasive and desirable legal norms or values and the establishment of administrative machinery that will successfully promote these values.

For the majority of this paper I will discuss the constitutional developments that coincide with, and are driving change in the relationship between New Zealand and England. The first section will begin by asking difficult questions as to the issue of the inter-relationship between administrative law and constitutional law. This will assist the discussion of the recent constitutional developments that have occurred in New Zealand and in the United Kingdom (for the most part post-1980) in the second section. In the third section I will compare the developments in New Zealand and in the United Kingdom with reference to the modern constitutionalism that is manifest in the "human righting" of administrative law. This new constitutionalism sits uneasily with the traditional private law constitutionalism that has been associated with Albert Venn Dicey. As the contest between public law and private law constitutionalism raises issues which are relevant to the justification of the administrative law of judicial review, I will, in the fourth section, briefly summarise the implications of constitutional change for the *ultra vires* debate.

Although the United Kingdom's Human Rights Act 1998 has been ingeniously drafted so as to preserve the legislative sovereignty of the United Kingdom Parliament, public law in England is experiencing a continental drift that will ultimately undermine Parliament's sovereignty, if the European Communities Act 1972 has not done so already. The move toward Europe will require the development of a new constitutional awareness in the United Kingdom, which will inevitably differ from the New Zealand position, because the Supreme Court of New Zealand has replaced the Privy Council as New Zealand's final appellate court. This change will accelerate the divergence of the law of New Zealand from the law of England. Furthermore, the New Zealand Supreme Court Act 2003 reasserts the legislative sovereignty of the New Zealand Parliament in a way that the Westminster Parliament is unlikely to emulate.

# I. CONSTITUTIONALISM

The first problem of administrative law is a boundary problem.[4] To understand administrative law it is necessary to first understand the constitutional framework within which the checks and balances incorporated into a given system of administrative law are designed to have effect. Administrative law can be defined as the branch of public law that deals with the operation and control of the administrative processes of government.[5] From this definition it follows that a prerequisite to a system of administrative law is the establishment of the rules of law that allow a society to accept an institution as having the authority of a legal administration. The content of those rules will be determined by the circumstances in which the relevant groups or individuals have come together to create the state. Be it by conquest or by treaty, a sovereign entity must be formed and constitutional arrangements must be established before it makes any sense to talk of administrative law.[6]

While the "constitutionalism" that I intend to discuss in this paper is encapsulated by the constitutional reforms initiated in New Zealand and in the United Kingdom by neo-liberal governments in the latter part of the 20th Century, the starting point for an evaluation of the process of constitutionalism is the influential constitutional theory developed by

[4] See M Taggart (ed) *The Province of Administrative Law* (Hart Publishing, Oxford, 1997).

[5] This definition is derived from De Smith and Brazier *Constitutional and Administrative Law* (8th ed, Penguin Books, London, 1998) 504; See also W Wade *Administrative Law* (8th ed, Oxford University Press, Oxford, 2001) 4–5.

[6] The explanation of the founding of a state is more likely to be given in terms of philosophical and political theory descending from Hobbes or Rousseau than by legal analysis. It may be that the concept of the "state" has no legal identity and is not a legal concept in English law; See P Birkinshaw *European Public Law* (LexisNexis, Butterworths, Wellington, 2003) 153. Although this view may be supported by Janet McLean's argument that administrative law fails to disclose a juristic conception of the state; J McLean "The Crown in Contract and Administrative Law" (2004) 24 OJLS 129; McLean's conclusion that the common law of contract treats the Crown as a corporation aggregate could be seen as undermining the view that the concept of the state is not a scrupulously theorised legal concept. While the concept of the state is a spectacularly complex concept, it is not clear why the concept of the state should be relegated to "background theory" rather than promoted as a matter of "foreground theory". It may be better to argue that "alongside" every theory of administrative law there exists a theory of the state; See Harlow and Rawlings *Law and Administration* 1; See also C Harlow "Changing the Mindset: The Place of Theory in English Administrative Law" (1994) 14 OJLS 419.

AV Dicey.[7] In his *Introduction to the Study of the Law of the Constitution*, Dicey defined constitutional law as being the law concerned with "all the rules that directly or indirectly affect the distribution or the exercise of the sovereign power in the state".[8] If we accept this definition, then it follows that administrative law is a branch of constitutional law. Because administrative law contains legal rules and principles that are designed to regulate the exercise of state power, administrative law is consistent with Dicey's definition of constitutional law. However, instead of recognising that administrative law is an important aspect of constitutional law, Dicey famously denounced administrative law as being as foreign to the common law as the French *droit administratif.*

For Dicey the British constitution was an intellectual artifice premised upon the legislative sovereignty of Parliament.[9] The fundamental constitutional principle of parliamentary sovereignty was supported by a second concept, the doctrine of the rule of law. The rule of law is a multi-faceted doctrine.[10] In one sense the rule of law can be equated with the predominance of legislation over the existence of delegated discretionary powers. In another material sense, the rule of law requires "*equality before the law*", and this for Dicey manifests in the requirement that the same laws must be applied to public officials and private individuals. Given this second sense of the rule of law, we can understand Dicey's conclusion that the French system of "administrative law", the *droit administratif*, was incompatible with the rule of law. Dicey considered that the special administrative courts (*tribunaux administratifs*) which controlled French public officials applied rules that were more favourable than the rules which applied to

[7] AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, MacMillan Publishing, London, 1960).
[8] Ibid 23.
[9] Sovereignty as understood by Dicey was a part of the positivist tradition which found its classical articulation in the political theory of Thomas Hobbes before being updated by Austin; See J Austin *Lectures on Jurisprudence* (4th ed, John Murray, London, 1873); Leyland and Woods "Public Law History and Theory: Some Notes Towards a New Foundationalism: Part 1" in Leyland and Woods (eds) *Administrative Law Facing the Future: Old Constraints and New Horizons* (Blackstone, London, 1997) 386.
[10] Although the controversies relating to the rule of law are not the topic of this paper, I refer the reader to J Raz "The Rule of Law and its Virtue" (1977) 93 LQR 195; PP Craig "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] PL 467; D Dyzenhaus "Form and Substance in the Rule of Law: A Democratic Justification for Judicial Review" in Forsyth (ed) *Judicial Review and the Constitution* (Hart Publishing, Oxford, 2000); And the discussion in PP Craig, *Administrative Law* (5th ed, Sweet and Maxwell Ltd, London, 2003) 25–28.

ordinary citizens.[11] As a result of the French "misconception of the separation of powers"[12] and the "despotic"[13] protection of French officials from the scrutiny of ordinary courts, Dicey condemned administrative law with the observation that the *droit administratif* "rests on ideas foreign to the fundamental assumptions of our English common law, and especially what we have termed the rule of law".[14]

Despite the questionable merits of Dicey's analysis of the *droit administratif*,[15] it is a historical fact that significant consequences followed from Dicey's deprecation of administrative law. Dicey's view that it was for Parliament to legislate and for the courts to interpret legislation according to Parliament's deemed intention hardened into an unchallengeable constitutional orthodoxy. Another effect was to substantiate the view that it was not necessary for common law countries to enshrine the legal rights of citizens in constitutional documents. The unwritten constitution based upon the rule of law was regarded as being at least as effective at preserving individual liberties as a written constitution. Common law rights and liberties did not merely source from the constitution. They were the constitution.[16]

The glorification of the constitution in Dicey's *Introduction* was the propagation of a myth, but it was a successful myth that captured the hearts and minds of his conservative contemporaries.[17] It is commonly accepted that the immediate effect of Dicey's twin doctrines of the rule of law and the supremacy of Parliament was to retard the development of administrative law during the first half of the 20th century.[18] However, if it we are to understand why administrative law was so effectively mustard-gassed until

[11] Dicey, *Introduction to the Study of the Law of the Constitution*, 336.
[12] Ibid 338.
[13] Ibid 345.
[14] Ibid 329.
[15] Dicey's criticism of the French system was based upon the mistaken view that the administrative courts in France existed for the purpose of placing French officials beyond the law. This view is a caricature of reality. The French courts have controlled the executive more effectively than the English courts have; See Wade, *Administrative Law*, 23–25.
[16] Dicey, *Introduction to the Study of the Law of the Constitution*, 197.
[17] Leyland and Woods, "Public Law History and Theory: Part 1", above n 9, 379–380.
[18] PA Joseph *Constitutional and Administrative Law in New Zealand*, (2nd ed, Brookers, Wellington, 2001) 728–731; See also JL Robson (ed) *New Zealand: The Development of its Laws and Constitution* (Stevens & Son, London, 1954) 89–91, 126–129; Rt Hon Justice Keith "Public Law in New Zealand" (2003) 1 NZJPIL 3, 4–6.

Lord Reid's decision in *Ridge v Baldwin*[19] provided the fresh air of natural justice, then we should be asking why it was that Dicey's view of the constitution was so influential. Dicey's early critics were vociferous, and they had plenty that they could shout about as a result of the expansion of government following World War I.[20] As charged, the version of the rule of law associated with Dicey's unitary conception of the state based upon the absolute legal sovereignty of Parliament failed to account for the explosive growth of the executive branch of government and the increased range of social functions that were subsumed within the administrative machinery of the state in the early to mid 20th Century.

Despite the wide range of criticisms that can justifiably be leveled at Dicey's rule of law, Dicey's constitutional writing was, and is, an enduring success story for the reason that he "constitutionalised" and thereby institutionalised the values that were important to the majority of common law lawyers. The process of constitutionalism can be defined as the privileging of norms or values by incorporating these particular norms or values into a legal structure that is recognised as providing the fundamental basis for legal ordering. Although Murray Hunt works with a different view of constitutionalism, he has convincingly argued that Dicey provided the theoretical basis for constitutionalising private law rights:[21]

> [Dicey's] account of the rule of law … did nothing less than constitutionalise private law rights and with them the private law model of adjudication by which they were determined. While claiming to identify and endorse the sovereignty

[19] *Ridge v Baldwin* [1964] AC 40 (HL).
[20] Leyland and Woods, "Public Law History and Theory: Part 1", above n 9, 393–400.
[21] M Hunt "Constitutionalism and the Contractualisation of Government in the United Kingdom" in Taggart (ed) *The Province of Administrative Law* 24–25; Hunt uses the term "constitutionalism" to capture the idea that in democratic legal systems there may be "transcendent values which enjoy a constitutional status in the sense that they embody the fundamental ideals or aspirations that democracy itself presupposes", at 21–22. While the word "constitutionalism" has been employed in a variety of ways, see W Sinnott-Armstrong, "Constitutionalism" *The Stanford Encyclopedia of Philosophy (Spring 2004 Edition)*, EN Zaltra (ed) URL http://plato.stanford.edu/archives/spr2004/entries/constitutionalism/; constitutionalism is in my view best understood as a process whereby political values are transformed into fundamental legal values.

> model and unequivocally reject the idea of constitutional rights, Dicey in fact helped to legitimate a covert compromise between the two in which the courts professed unbending allegiance to the absolute sovereignty of Parliament while at the same time contriving to protect, mainly through statutory interpretation, selected values recognised and prioritised by the common law. The Diceyan model … was a particular version of constitutionalism.

Hunt's description clearly describes how Dicey's analysis privileged and thereby constitutionalised traditional private law rights. As the courts accepted Parliament's absolute legislative sovereignty, it was their legal duty to interpret Parliament's intention as manifested in legislation. Through the techniques of statutory interpretation the courts were empowered to protect individual rights and thus act as a restraint upon the executive. The only point of departure that needs to be made from Hunt's analysis of Dicey's constitutionalism is upon the issue of the "covert" compromise between Parliament and the courts. There is nothing at all "covert" about Dicey's description of the relationship between the courts and Parliament, as one of Dicey's definitions of the rule of law expressly states that:[22]

> We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us as a result of judicial decisions determining the rights of private persons in particular cases brought before the courts.

And that:[23]

[22] Dicey, *Introduction to the Study of the Law of the Constitution*, 195.
[23] Ibid 203.

> The "rule of law" lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which on foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been extended so as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land.

Dicey's *Introduction to the Study of the Law of the Constitution* was the most influential exercise in comparative law ever written by a common lawyer. The fact that Dicey was mistaken about the nature of the French *droit administratif* and the necessity of a system of administrative law in a modern state emphasises and justifies the warnings that attach to comparative law.[24] However, despite the fact that Dicey disparaged administrative law as a foreign idea, we should be aware that Dicey ultimately provided the theoretical basis for the development of administrative law as a branch of the common law.[25] In Dicey's work we find an overt focus upon private law rights, along with a high importance placed upon the availability of remedies.[26] When combined with the rejection of a jurisdictional distinction between public and private law, these features constitute the key elements of the "classic model of judicial review".[27] That the early development of English administrative law owes an intellectual debt to Dicey's political interpretation of the separation of powers is ironic, but it should hardly be controversial.

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[24] The comparative lawyer "may bring home from her comparative exercise nothing but dead facts and living errors". Frankenburg G "Critical Comparisons: Re-thinking Comparative Law" (1985) 26 Harvard ILJ 411; See also O Kahn Freund "On the Uses and Misuses of Comparative Law" (1974) 37 MLR 1.

[25] The doctrines of the separation of powers, the legislative sovereignty of Parliament and the rule of law have become the mainstay of modern administrative law. I do not read Dicey's later article on administrative law as conceding any arguments established in the *Introduction*; See AV Dicey "The Development of Administrative Law in England" (1915) 31 LQR 148.

[26] Dicey, *Introduction to the Study of the Law of the Constitution*, 199.

[27] C Harlow "A Special Relationship? American Influences on Judicial Review in England" in Loveland (ed) *A Special Relationship? American Influences on Public Law in the UK* (Oxford, Clarendon Press, 1995) 83–87; See also Taggart, "Reinventing Administrative Law", above n 1, where Professor Taggart argues that the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA) is emblematic of the classic model of judicial review.

## II. MODERN CONSTITUTIONALISM

There is no doubt that in the 21st century administrative law is rightly recognised as an important branch of the law in New Zealand and in the United Kingdom. In an era of human rights jurisprudence and "renaissance constitutionalism",[28] it is not surprising that many of Dicey's positions should be outdated. However, there is no clear answer to the question of whether Dicey's private law constitutionalism has been superseded by recent developments. If we assume that administrative law was invented subsequent to Dicey's initial writing, the question becomes whether administrative law has been "reinvented" and the private law constitutionalism underpinning the classic model of judicial review has been superseded by a new modern constitutionalism. To examine these issues it is necessary to discuss the constitutional arrangements that currently exist in New Zealand and in the United Kingdom as a result of the continuing constitutional reforms over the last quarter of a century.

### 2.1. *The New Public Management in the United Kingdom*

In the English public law of administration there has been a significant social movement towards values that could theoretically align with Dicey's preferred private rights. Since the election of Thatcher's Conservative government in 1979, reform of the administrative activities of government has been premised upon neo-classical economic theories, which advocate market orientated solutions to public service provision over what was then the traditional bureaucratic model of government regulatory activity. The distinctive feature of the "New Public Management",[29] as it has come to be called, is an intellectual commitment to the values of economy and efficiency. This commitment was made manifest with the reformation of the civil service in terms of private sector ordering, the process of privatisation and the contracting out of services which had previously been provided by the welfare state. While these developments constitute a revolution in public

[28] Lord Steyn "The New Legal Landscape" [2000] EHRLR 549, 552.
[29] C Hood "A Public Management for All Seasons?" (1991) 69 Public Administration 3.

administration since 1979,[30] from the outset the Thatcher government expressed the intention that "existing constitutional principles would remain undisturbed".[31] Despite this conservative intention, the constitutional balance in the United Kingdom did change. It is not necessary to be a legal realist to observe that by seeking to "identify a core role for government, to give better and more responsive service, to develop practices and instruments of governance that achieve policy goals without unduly hampering the private sector or citizen initiative",[32] the New Public Management was designed to limit the reach of governmental power. However, as a result of the hands-off techniques of administration ushered in by the New Public Management, the courts found it necessary to expand the scope of judicial review in order to provide protection to the rights of private individuals.[33]

### *2.2. The New Right Revolution in New Zealand*

New Zealand was at least five years behind England in adopting reforms comparable to the New Public Management. In New Zealand, public sector reform formed a part of the package of economic reforms introduced following the election of the Fourth Labour government in 1984.[34] As in Britain, the architects of the reforms in New Zealand were influenced by the neo-liberal economic theories of the New Right. However, the circumstances existing in New Zealand provided particular urgency for the reform of the system of economic regulation. Up until 1984, the state in New Zealand had operated an extremely interventionist "heavy-handed"[35] command and control model of regulation. The reform program called for the deregulation of the economy and the restructuring of

[30] Harlow and Rawlings, *Law and Administration*, 129.
[31] G Drewry "The New Public Management" in Jowell and Oliver (eds) *The Changing Constitution* (4th ed, Oxford University Press, Oxford, 2000) 170.
[32] H Wade-MacLaughlan "Public Service Law and the New Public Management" in Taggart (ed) *The Province of Administrative Law* (Hart Publishing, Oxford, 1997) 128.
[33] The test for determining whether a legal entity was subject to judicial review was transformed from a jurisdictional into a functional test in the case of *R v Panel on Take-overs and Mergers ex p Datafin* [1987] 1 QB 815 (CA).
[34] For a scathingly critical account of the processes of reform, see J Kelsey *The New Zealand Experiment: A World Model for Structural Adjustment?* (Auckland University Press, Auckland, 1995).
[35] V Heine "Understanding the Trend Towards Increasing Regulation in New Zealand" in *The Fifth Public Law Forum* (Conferenz, Auckland, 2003) 1.

the public sector along the lines of the managerial models used by private businesses. The reform process involved corporatisation, accompanied by privatisation, the transformation of statutory monopolies into contestable marketplaces, the introduction of "light-handed regulation" [36] with the Commerce Act 1986 and the reform of the public service with the State Sector Act 1988 and the Public Finance Act 1989.[37] One of the most significant aspects of the reform package was the "corporatisation" of various government departments, which were transformed into State Owned Enterprises (SOEs) by the State Owned Enterprises Act 1986. The SOEs were incorporated as companies under the Companies Act 1955 and shares in the corporations were held by the "responsible" ministers, who duly devolved responsibility for the operation of the SOEs onto the CEO and the board of directors. While the State Owned Enterprises Act required SOEs to operate as efficiently and profitably as comparable businesses which were not owned by the Crown, the ability of SOEs to be so profitable was restricted by obligations to be a "good employer" and to "exhibit a sense of social responsibility", which were imposed in the same section as that which set the "principle objective" of operating profitably.[38] As the purpose behind the creation of the SOEs was to increase managerial efficiency and accountability,[39] the executives of the SOEs aimed for profit maximisation. However, the devolution of governmental functions to such commercial entities opened up an accountability vacuum, where the minister and the board could blame each other for failures. As in England, it was up to the New Zealand courts to intervene and close the accountability gap by subjecting SOEs to judicial review, in circumstances where one of the aforementioned "public bodies" made a decision that "may adversely affect the rights and liabilities of private individuals without affording them any redress".[40]

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[36] V Heine, "Understanding the Trend Towards Increasing Regulation in New Zealand", above n 35, 6.
[37] Kelsey, *The New Zealand Experiment: A World Model for Structural Adjustment?*, 115–149.
[38] State Owned Enterprises Act 1986, s 4.
[39] GWR Palmer *Unbridled Power: An Interpretation of New Zealand's Constitution and Government* (2nd ed, Oxford University Press, Auckland, 1987) 83–89.
[40] Per Lord Templeman in *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385, 388 (PC); Note that in *Mercury Energy* Lord Templeman observed that "it does not seem likely that a decision by a state-owned enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith. Increases in prices whether by state-owned or private monopolies or by powerful traders may be subjected to voluntary or common law or legislative control or may be uncontrolled".

Although the legislative reforms undertaken in New Zealand post 1984 introduced wide-sweeping changes that revolutionised the regulatory landscape, the reformers never attempted to limit the theoretical capacity of the state to re-embark upon interventionist regulatory programmes. As Dicey would have it, Parliament remained the sovereign legislature, legally capable of passing legislation to re-nationalise all of the government departments that have been privatised since 1984. Speaking pragmatically, however, the essential details of the New Right reforms appear to be irreversible in New Zealand, because the political pain that would result from such structural re-adjustment is likely to outweigh the political gain. Although aspects of the New Right reforms were unpopular, and they destroyed the support base of the Fourth Labour government, the National government elected in 1990 continued to reform the public sector by passing the Employment Contracts Act 1991 and the Fiscal Responsibility Act 1994. The present Labour-led coalition government under the Prime Ministership of Helen Clark has presided over an increase in government regulation since 1999 but this not resulted from attempts to reverse the reforms. Regulation is engaging with new dynamics, including, for example increased use of the court system to seek what may be described as the "commercial judicial review"[41] of private bodies. The Clark led government has, however, indicated a desire to readdress aspects of the reforms initiated by the previous Labour government, in the Crown Entities Bill 2001.[42] Although the Crown Entities Bill 2001 was deferred, its substance has been recently reintroduced by incorporation into the Public Finance (State Sector Management) Bill 2003. Enactment of the 2003 Bill would initiate a movement towards more "hands on" regulation. Part Five of the Bill, would require Crown Entities to comply with ministerial directions as to government policy. However, the 2003 Bill has been designed to "strengthen the wider state sector … without losing the system's current strengths of transparency, accountability, and

[41] Victoria Heine argues that New Zealand is not experiencing "re-regulation", as in a return to the types of regulation which existed prior to the reforms of the 1980s. What appears to be occurring is regulation of a different form, dominated by the twin processes of hybridisation and juridification. For an explanation of these concepts and "commercial judicial review" see V Heine "Understanding the Trend Towards Increasing Regulation in New Zealand", above n 35, 8–22.

[42] Crown Entities Bill of 2001 (2001 No 99–1); For discussion see Chauvel, Gallacher and Denyer "Having Their Cake and Eating It? – Exploring the Level of Ministerial Accountability and Transparency in Decision-Making between Government Departments and Crown Entities" in *The Fifth Public Law Forum* (Conferenz, Auckland, 2003) 16–22.

financial management".[43] So by its own admission, the Public Finance (State Sector Management) Bill 2003 would not be sufficiently comprehensive to undo the changes wrought in the law of public administration by the New Right revolution coming to New Zealand.

### *2.3. Recent Constitutional Reforms in New Zealand*

The constitutional arrangements existing in New Zealand have been described as open textured, flexible and iterative – meaning that the constitution is in a constant state of evolution.[44] As in England, the constitution has developed historically through gradual refinement and improvement. However, the dramatic events of recent history have launched a period of rapid constitutional reform in New Zealand. The most significant development arose in response to the constitutional crisis provoked by Sir Robert Muldoon's failure to follow constitutional convention in the aftermath of his defeat in the 1984 election. Following the electoral victory of the Fourth Labour government, Muldoon refused to advise the Governor-General to take measures to devalue the currency, as he was requested to do so by the incoming government.[45] This incident resulted in the enactment of the Constitution Act 1986. Although the Constitution Act 1986 was passed as an ordinary statute, it consolidated the constitutional law of New Zealand by establishing rules based upon the principles of the separation of powers and the sovereignty of Parliament.[46] It also dealt with the issue of the transfer of power following general elections[47] and severed the remaining links to the United Kingdom Parliament.[48]

Post 1990, the constitutional developments that merit comparison with developments in the United Kingdom include the New Zealand Bill of Rights Act 1990, The Electoral Act 1993, the Human Rights Act 1993, the Human Rights Amendment Act 2001 and the

[43] See the explanatory note attached to the Public Finance (State Sector Management) Bill 2003, (2003 No 99–1).
[44] Palmer and Palmer *Bridled Power: New Zealand's Constitution and Government* (4th Ed, Oxford University Press, Auckland, 2004) 5.
[45] Palmer, *Unbridled Power*, 2–3; Palmer and Palmer, *Bridled Power*, 7.
[46] For a common law articulation of these doctrines see *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC).
[47] Constitution Act 1986, s 6.
[48] Constitution Act 1986, s 15 (2).

Supreme Court Act 2003. I will discuss these important legislative developments after commenting upon the significance of the Ombudsmen Act 1975, the Official Information Act 1982 and the Treaty of Waitangi, which was signed in 1840.

Although they are not "recent" reforms, the Ombudsmen Act 1975 and the Official Information Act 1982 have contemporary constitutional relevance.[49] The Ombudsman was a Scandinavian public office introduced into New Zealand law in 1962.[50] As Parliamentary officers, the Ombudsmen are independent public officials whose function it is to provide an independent check upon the administration. The Ombudsmen Act 1975 provides the Ombudsmen with the jurisdiction to investigate administrative acts or decisions made by central and local government.[51] Additionally, the Ombudsmen are capable of facilitating access to official information. Under the Official Information Act 1982, official information is required to be made available to citizens upon request, unless there are good reasons for withholding the information.[52] The principle favouring the open availability of information considerably enhances the importance of the Ombudsmen, who are empowered to investigate and review ministerial or departmental decisions to refuse access to information.[53] Upon finding that access should not have been refused, the Ombudsmen will recommend that the relevant minister, department or organisation disclose the information. After 21 days the recommendation that disclosure take place transforms into a "public duty" enforceable in the High Court by mandamus.[54]

[49] In his discussion of "Modern Constitutional Developments" Joseph takes us back to the abolition of the second chamber of Parliament, the Legislative Council in 1950; Joseph *Constitutional and Administrative Law in New Zealand*, 129–194; While I take "recent" constitutional reform in New Zealand to mean constitutional reform post 1984, the statutes mentioned above are significant enough to merit discussion, even though they do not count as "recent" constitutional reforms for the reason that they demonstrate elements of internationalisation, or, in more common terminology, the process of "cross-fertilisation".

[50] Joseph, *Constitutional and Administrative Law in New Zealand*, 138; G Powell "The New Zealand Ombudsman – The Early Days" (1982) 12 VUWLR 207.

[51] Ombudsmen Act 1975, First Schedule, Part III.

[52] Official Information Act 1982, s 5.

[53] Official Information Act 1982, s 28; This power extends to decisions to refuse information by organisations named in the Official Information Act 1982, First Schedule and the Ombudsmen Act 1975, First Schedule, Part II; The official information regime also applies to local government by virtue of the Local Government Official Information and Meetings Act 1975.

[54] Official Information Act 1982, s 32.

The Treaty of Waitangi (also named Te Tiriti o Waitangi, hereafter the "Treaty") is without question the most controversial of New Zealand's legal documents. The Treaty was signed by the British Crown and the indigenous Maori inhabitants of Aotearoa on 6 February 1840. The effect of the English version of the Treaty was to cede sovereignty over the North Island of New Zealand to Queen Victoria (sovereignty over the South Island was claimed by way of discovery), but the Maori version of the Treaty was drafted so as to preserve the mana and authority of the Chiefs (te tino rangatiratanga) while ceding rights of governorship (kawanatanga) to the Crown. So, while the Treaty is often described as the nation's founding constitutional document, it is completely unclear what the Treaty actually stands for.[55]

The modern legislative history of the Treaty goes back to the Treaty of Waitangi Act 1975, which established the Waitangi Tribunal as a forum for investigating claims that government legislation, policies or practices prejudicially affected Maori contrary to the principles of the Treaty of Waitangi.[56] Although the reference to the principles of the Treaty was, and is, ambiguous, the reference to the principles of the Treaty in the State Owned Enterprises Act 1986[57] allowed the Court of Appeal to make an important pronouncement of constitutional principle. In the famous SOE case Cooke J declared:[58]

> First the principles of the Treaty of Waitangi override everything else in the State-Owned Enterprises Act. Second that those principles require the Pakeha and Maori Treaty partners to act towards each other reasonably and with the utmost good faith. The duty is no light one. It is infinitely more than a formality. If a breach of the duty is demonstrated at any time, the duty of the Court will be to insist that it is honoured.

[55] D Graham *Trick or Treaty?* (Institute of Policy Studies, Wellington, 1997) 9–16.
[56] The Treaty of Waitangi Act 1975, s 6.
[57] State Owned Enterprises Act 1986, s 9.
[58] *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, 667 (CA).

The principle of partnership, and the requirement that the Crown act reasonably and in good faith, established by the SOE decision inaugurated a new era of Treaty jurisprudence.[59] The Treaty is now regarded as a living document that is capable of placing duties upon the Crown. However, despite the fact that reference to the principles of the Treaty continues to be included in legislation,[60] it is at this stage over-optimistic to view the Treaty as justifying a form of "constitutional" judicial review.[61]

Unlike the Treaty of Waitangi, the New Zealand Bill of Rights Act 1990 has a clear constitutional status – that of ordinary Parliamentary legislation. The Bill of Rights was enacted during the dying days of the Fourth Labour government as a watered-down version of the draft Bill of Rights that had been released to the public in 1985 but had failed to gain sufficient support to warrant constitutionalisation.[62] Despite the fact that it is not entrenched, the Bill of Rights Act is a significant constitutional document because it contains a declaration of the rights and freedoms that New Zealand citizens may exercise against the state. The Bill of Rights Act applies to acts done by the legislative, executive and judicial branches of government, and may also apply against "any person or body in the performance of any public function, power or duty conferred or imposed upon that person or body by or pursuant to law".[63] In the Bill of Rights Act, Parliament provides a constitutional direction to the courts by informing them that they are to interpret other legislation consistently with Bill of Rights Act.[64] Some examples of the rights contained in the Bill of Rights Act include the right to life (section 8), the right to freedom of expression (section 14) the right not to be arbitrarily arrested or detained (section 22) and the right to the observance of the principles of natural justice (section 27). However, the rights conferred, or more accurately, the rights affirmed[65] by the Bill of Rights Act may be subject to limitations. The Act preserves the doctrine of implied

[59] Joseph, *Constitutional and Administrative Law in New Zealand*, 65.
[60] Eg, the Resource Management Act 1990, s 8; See Joseph, *Constitutional and Administrative Law in New Zealand*, 74–75.
[61] Compare PA Joseph "The Demise of Ultra Vires – Judicial Review in the New Zealand Courts" [2001] PL 354; *Constitutional and Administrative Law in New Zealand*, 68–72, 779–782.
[62] Joseph, *Constitutional and Administrative Law in New Zealand*, 1018.
[63] New Zealand Bill of Rights Act 1990, s 3.
[64] New Zealand Bill of Rights Act 1990, s 6.
[65] New Zealand Bill of Rights Act 1990, s 2.

repeal,[66] so the rights can therefore be "limited" or effectively overridden in circumstances where the limitation upon the right is a reasonable limit that can be "demonstrably justified in a free and democratic society".[67] The Bill of Rights Act rights are therefore not constitutional "trumps". Additionally, the fact that the Bill of Rights is not entrenched gives rise to the possibility that the Act or specific rights in the Act could be repealed. Despite these weaknesses, the Bill of Rights Act has inaugurated a new era of rights-based jurisprudence in New Zealand.[68] The case law relating to the Bill of Rights Act demonstrates an increase in the level of legal protection that is available against the state. This is demonstrated by the availability of new constitutional remedies in the form of a public law damages award[69] and a declaration of inconsistency with the Bill of Rights Act.[70] However, the implications of the Bill of Rights Act for development of judicial review are not yet clear.[71]

The "righting" of New Zealand public law facilitated by the New Zealand Bill of Rights Act has been assisted by the Human Rights Act 1993 and the Human Rights Amendment Act 2001.[72] These statutes were designed to bring New Zealand law in line with international human rights obligations. The New Zealand Bill of Rights Act affirms the International Covenant on Civil and Political Rights 1966. Similarly, the Human Rights Act reflects the values of the Universal Declaration of Human Rights 1948 and the International Covenant on the Elimination of All Forms of Racial Discrimination 1966. In terms of domestic legislation, the Human Rights Act consolidated the Race Relations Act 1971 and the Human Rights Commission Act 1977 and linked with the anti-discrimination law in the Bill of Rights Act. The Human Rights Act also introduced new grounds of unlawful discrimination and a new complaints procedure. The new grounds of

[66] New Zealand Bill of Rights Act 1990, s 4.
[67] New Zealand Bill of Rights Act 1990, s 5.
[68] Joseph, *Constitutional and Administrative Law in New Zealand*, 1017–1061, particularly at 1018 and 1055.
[69] *Simpson v Attorney General (Baigent's case)* [1994] 3 NZLR 667 (CA).
[70] See *R v Poumako* [2000] 2 NZLR 695 (CA), (per Thomas J).
[71] See *Drew v Attorney General* [2002] 1 NZLR 58 (CA).
[72] R Harrison QC "The New Public Law: A New Zealand Perspective" (2003) 14 PLR 41; Note that the Privacy Act 1993 is another important statute but it will not be discussed for reasons of space and due to the controversies over the right to privacy.

discrimination did not apply to the government until the Human Rights Act was amended in 2001. As the Human Rights Act 1993 was designed to prohibit discrimination in set private sector contexts, the 2001 amendment introduced a less stringent balancing test so that justifiably discriminatory policy decisions or legislation could continue to be made when necessary. It is hoped that this pragmatic approach will assist the development of a human rights culture in the public sector.[73]

While Parliament retains the theoretical ability to repeal both the Bill of Rights Act and the Human Rights Act, the practical ability of the government to repeal either Act has been undermined by electoral reform. The Electoral Act 1993 provided that a system of Mixed Member Proportional (MMP) voting would replace the existing First Past the Post (FPP) model inherited from the United Kingdom.[74] The introduction of MMP in 1996 had the dramatic effect of breaking the two-party monopoly that prevailed under the FPP system. As no one political party has yet been able to acquire a Parliamentary majority under MMP, the need has arisen for the building of consensus in order to form coalition governments. The development of multi-party coalition government has the effect of placing an additional "political" restraint upon the executive. Although this development may complicate political accountability, it provides a counterbalance to the tyranny of the Parliamentary majority, which has the potential to evaporate with the tabling of controversial legislation. In the MMP environment an attempt to repeal the Bill of Rights Act would be instant political suicide, and this makes it very unlikely that repeal of the Bill of Rights Act or any other statute with similar political appeal would be attempted, let alone succeed.[75]

The electoral uncertainty caused by the introduction of the MMP electoral system has not brought a halt to the process of constitutional reform, as one of the most remarkable and

[73] PA Joseph "Constitutional Law" [2003] NZ Law Review 387, 408–415.
[74] MMP was based upon the West German system; Joseph, *Constitutional and Administrative Law in New Zealand*, 189.
[75] Section 268 of the Electoral Act 1993 specifies a list of "reserved provisions" that cannot be amended or repealed absent a 75% Parliamentary majority. However, this provision does not protect the Bill of Rights Act and is not double entrenched.

symbolic constitutional reforms that the New Zealand Parliament could ever make has just transpired with the decision to abolish the right of appeal to the Privy Council. While New Zealanders have been entitled to appeal to the Privy Council since 1841, the coming into effect of the Supreme Court Act 2003 on 1 January 2004 substituted the right of appeal to the Privy Council with a right of appeal to the Supreme Court of New Zealand.[76] The decision to establish a new Supreme Court to replace the Privy Council as the final appellate court was opposed by the business community, Maori and the majority of the legal profession. Despite determined opposition the legislation was passed, and the Supreme Court has now been established as the final appellate court for New Zealand. The Supreme Court Act 2003 is significant for a number of reasons, including the fact that the Act contains a purpose section, which states that "nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament".[77]

### *2.4. Recent Constitutional Reforms in the United Kingdom*

Although England has an illustrious constitutional history that stretches back through the mists of time as far as the Assize of Clarendon 1164,[78] the era of "recent" constitutional reform begins with the election of the New Labour government in 1997. Since that time, the reform of the public service in the United Kingdom has been overshadowed by a spectacular programme of constitutional modernisation.[79] The constitutional changes enacted by the Blair government represent a radical, or possibly revolutionary, departure from the previous constitutional set up.[80] The changes include devolution following the

[76] The Supreme Court Act 2003, s2, s 6; See also the commentary to the Supreme Court Bill 2002 (2002 No 16–1).
[77] The Supreme Court Act 2003, s 3 (2).
[78] While the Domesday Book is arguably the first example of English administrative law, the Assize of Clarendon is a better origin of constitutional history than the Magna Carta; see Pollock and Maitland *The History of English Law before the Time of Edward I* (2nd ed, Cambridge University Press, Cambridge, 1968) 136.
[79] JF McEldowney *Modernizing Britain: Public Law and Challenges to Parliament* (Centre for New Zealand Jurisprudence, Hamilton, 2002); Blackburn and Plant (eds) *Constitutional Reform: The Labour Government's Constitutional Reform Agenda* (Longman, London 1999); Jowell and Oliver (eds) *The Changing Constitution*. Although it may be a controversial point, Gavin Drewry argues that "most of the principles underlying the NPM had become matters of consensus politics" by the time that New Labour was elected in 1997; see Drewry, "The New Public Management", above n 31, 187.
[80] Bognador "Our New Constitution" (2004) 120 LQR.242, 243.

post-referenda establishment of the Scottish Parliament and National Assemblies in Wales and in Northern Ireland,[81] the introduction of electoral systems that replace the traditional first-past the post method with proportional representation,[82] reform of the system of local government in London,[83] the passing of freedom of information legislation,[84] reform of the House of Lords,[85] transformation of the departments of the Lord Chancellor into an independent Department of Constitutional Affairs,[86] and the decision which has been made to establish a new Supreme Court.[87] In addition to these dramatic developments, a significant constitutional change has been wrought by the coming into effect of the Human Rights Act 1998 on 2 October 2000. The Human Rights Act rewrites the relationship between the European Convention on Human Rights and the law of the United Kingdom.

The European Convention on Human Rights ("the Convention") was drafted by The Council of Europe, which was formed in 1949 to ensure that human beings would never again be subject to the atrocities of World War II.[88] The United Kingdom signed up to the European Convention on Human Rights when it was drafted in 1950. By its ratification in 1951, the Convention became a part of the United Kingdom's international obligations in 1953. However, the United Kingdom's ratification of the Convention in 1951 only proceeded upon the basis that the Convention right of a citizen to petition the European Commission or the European Court of Human Rights for a declaration that one

[81] See the Referendums (Scotland and Wales) Act 1997 (UK), the Scotland Act 1998 (UK), the Government of Wales Act 1998 (UK); the Northern Ireland Act 1998 (UK). The latter three statutes provide for the devolution of legislative and executive power to Scotland and Northern Ireland and the devolution of executive power to Wales.

[82] Eg, the European Parliamentary Elections Act 1999 (UK); Bognador "Our New Constitution", above n 80, 244.

[83] The Greater London Authority Act 1999 (UK).

[84] The Freedom of Information Act 2000 (UK). Note that this statute does not come into effect until 1 January 2005.

[85] The House of Lords Act 1999 (UK).

[86] See Lord Falconer "DCA Manifesto – For a New Department" at <www.dca.gov.uk/dept/manifesto.htm> (at 20/06/2004).

[87] The New Labour government announced its intention to establish a new supreme court on 12 June 2003. For an informed comment on the beginnings of this process, see A Le Sueur "The Conception of the UK's New Supreme Court' in Le Sueur (ed) *Building the UK's New Supreme Court: National and Comparative Perspectives* (Oxford University Press, Oxford, 2004).

[88] See A Lester QC, "Human Rights and the British Constitution" in Jowell and Oliver (eds) *The Changing Constitution*.

of the three branches of government had breached the Convention would not be granted in the United Kingdom. That right was granted in 1966 and the consequences were that the jurisprudence from the Strasbourg-based European Court of Human Rights began to influence the law of the United Kingdom and calls were made for the incorporation of Convention rights into domestic law.[89]

Despite the fact that the United Kingdom was bound to give effect to the rights contained in the European Convention in 1953, the Convention was not incorporated into English municipal law prior to the enactment of the Human Rights Act 1998.[90] In the Human Rights Act, "Convention Rights" are defined as the rights and freedoms contained in the Articles referred to in s 1 of the Human Rights Act.[91] These Convention rights include the right to life (article 2), the right to liberty and security (article 5), the right to a fair trial (article 6), freedom of thought conscious and religion (article 9) and freedom of expression (article 10). Article 14 prohibits discrimination on the grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Section 2 of the Human Rights Act informs us that a court or tribunal determining a

question which has arisen in connection with a Convention right must take into account any;

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
(d) decision of the Committee of Ministers taken under Article 46 of the Convention,

[89] Ibid, 94–99.
[90] See *Malone v Metropolitan Police Commissioner* [1979] 1 Ch 344, 378.
[91] The Articles are set out in Schedule 1 of the Act; See the Human Rights Act (UK), s 1(3), sch 1.

when in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen. From this direction we may be misled into believing that the European Convention has been expressly incorporated into the law of the United Kingdom. However, if we return our focus to the language of s 1 of the Human Rights Act, we can observe that the Convention has not been expressly affirmed or incorporated into English Law. Actual incorporation of the Convention has been cunningly circumvented by the incorporation of selected Convention Articles. Thus, as Birkinshaw notes, the Human Rights Act "does not strictly make the Convention *itself* a part of English or UK law".[92] The reason for not doing so is that the unequivocal incorporation of the Convention in a manner and form that allowed the judiciary to strike down legislation for inconsistency with the Convention would have undermined Parliament's legislative sovereignty. Instead of allowing the judiciary the power to strike down legislation, s 4 of the Act establishes the mechanism of a declaration of incompatibility with the Convention. A declaration of incompatibility does not affect the validity of any legislation and it does not affect the validity, continuing operation or enforcement of any incompatible provision.[93]

The attempt to reconcile parliamentary sovereignty with an increased level of rights protection results in the Human Rights Act combining the power to make a declaration of inconsistency with the direction, in s 3(1), that judges are to interpret legislation in a way that is compatible with the Convention rights affirmed in the Act. The level of rights protection is increased with the statement in s 6(1) that it is unlawful for a public authority to act in a way that is incompatible with a Convention right. The meaning ascribed to the term "public authority" in s 6, includes "any person certain of whose functions are functions of a public nature", and any court or tribunal including the House of Lords in its judicial capacity, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.[94] Remedies

[92] Birkinshaw, *European Public Law*, 391.
[93] Human Rights Act 1998 (UK), s 4(6)(a).
[94] Human Rights Act 1998 (UK), s 6(3), s 6(4).

are available in s 8, which provides that when a court finds that an act, or proposed act, of a public authority is, or will be, unlawful then the court may grant any remedy, or make any order within its powers, that it considers to be just and appropriate.[95]

Lord Lester has argued that the Human Rights Act is exerting a magnetic force over the entire political and legal system in the United Kingdom.[96] There is no doubting that the Human Rights Act is a significant reform that will have interesting effects upon the law of the United Kingdom. However, as the Human Rights Act does not incorporate the European Convention on Human Rights it is potentially less constitutionally significant than the European Communities Act 1972. That statute ensured that the United Kingdom would become a member of the European Economic Community established by the Treaty of Rome in 1957. The entry of the United Kingdom into the European Economic Community was agreed to in the Treaty of Brussels 1972. The European Communities Act was passed later in that same year to incorporate the rights, powers, liberties, obligations and restrictions arising from the treaties of the Economic Community into the law of the United Kingdom.[97] The European Communities Act is significant for the reason that it places the judges of the United Kingdom under the duties to take judicial notice of the decisions made by the European Court of Justice and to determine questions of European Community law in accordance with the principles laid down in the relevant decisions of the European Court of Justice.[98] This significant development has, however, been overshadowed by the fact that the European Communities Act accepts the position whereby legally enforceable rights and obligations may be created by the European Community.[99] By the stipulation that "any enactment passed or to be passed … shall be construed and shall have effect subject to the forgoing provisions of this section",[100] the

[95] Note, however, that important guidelines regulating the award of damages are contained in the remainder of s 8.
[96] A Lester QC "The Magnetism of the Human Rights Act 1998" (2002) 33 VUWLR 477; See also Lester, "Human Rights and the British Constitution", above n 88, 109.
[97] European Communities Act 1972, s 2(1).
[98] European Communities Act 1972, s 3(1), s 3(2).
[99] European Communities Act 1972, s 2 (1) discusses rights "from time to time created or arising by or under the Treaties".
[100] European Communities Act 1972, s 2(4); this is the most significant and controversial provision in the UK statute books.

European Communities Act 1972 legislates for at least a prima facie derogation from the principle of Parliamentary legislative supremacy. The effect that the House of Lords decision in *Factortame (No 2)* has had upon the sovereignty of the United Kingdom Parliament has given rise to debate.[101] Lord Bridge famously stated in *Factortame* that:[102]

> Some public comments on the decision of the Court of Justice, affirming the jurisdiction of the courts of member states to override national legislation if necessary to enable interim relief to be granted in protection of rights under Community law, have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament. But such comments are based on a misconception. If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the EEC Treaty it was certainly well established in the jurisprudence of the Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the 1972 Act it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national

[101] This is a matter of controversy; see Sir William Wade "Sovereignty – Revolution or Evolution?" 112 LQR 568; AW Bradley "The Sovereignty of Parliament – Form or Substance?" in Jowell and Oliver (eds) *The Changing Constitution*, 41–46; PP Craig "Britain in the European Union" in Jowell and Oliver (eds) *The Changing Constitution* 69–85; Craig, *Administrative Law*, 303–308; G Marshall "Metric Measures and Martyrdom by Henry VIII Clause" (2002) 118 LQR 493.

[102] *R v Secretary for State for Transport ex p Factortame (No. 2)* [1990] 1 AC 603 658–659.

> courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.

The decision in *Factortame* is the leading case concerning the European Communities Act 1972. In that case, the House of Lords disapplied the Merchant Shipping Act 1994 on the basis that its provisions were in conflict with the provisions of the Treaty of the European Economic Community. Despite the understandable confusion that this decision causes, *Factortame* is explicable in terms of the Diceyan orthodoxy of Parliamentary sovereignty. Sir William Wade argues that *Factortame* effected a technical legal revolution whereby the House of Lords, acting in accordance with the legislative intention expressed in the European Communities Act 1972, altered the existing rule of recognition.[103] This interpretation is consistent with Parliamentary sovereignty because it considers that Parliament voluntarily subordinated its legislative power to the European Economic Community in regard to matters of Community law. Wade's revolutionary account is not the only discussion of *Factortame*,[104] but it deals with the difficulties of implied repeal by highlighting the fact that the constitution of the United Kingdom can change to accommodate the delegation of Parliamentary sovereignty to European institutions.[105]

## III. COMPARISON OF NEW ZEALAND CONSTITUTIONALISM WITH UNITED KINGDOM CONSTITUTIONALISM

The constitutions of New Zealand and the United Kingdom are complex and intricate, and comparison of the two constitutional systems can never be complete because these are constitutions that do not stand still: they evolve as society evolves. Ideally, a constitution should respond to situations that demand constitutional change with

[103] Wade, "Sovereignty – Revolution or Evolution?", above n 101.
[104] See the alternative accounts, above n 101.
[105] Although the unification of Europe has vital and tangible influences upon constitutional change in the United Kingdom, I will not detail the post-*Factortame* international treaty developments and institutional changes that have consolidated the European Union. For an account of these developments, see Birkinshaw, *European Public Law*, above n 6.

pragmatism, patience and consensus. Gradual development is generally to be preferred to rapid constitutional change, because gradual development will allow the constitution to remain beyond the contestable free-for-all of contemporary politics. The recent constitutional changes in the United Kingdom and New Zealand have mixed law and politics together to an unprecedented extreme and are therefore fraught with the danger that respect for both constitutions will diminish. Fortunately, there is a philosophical basis for arguing that the constitution is a different thing from constitutionalism. The constitutions of New Zealand and the United Kingdom consist of conceptually unified (or unifiable) rules and conventions that can be accurately stated at any one time. Constitutionalism, on the other hand, is the process of privileging values by incorporating those values into the constitution. The distinction between the constitution and constitutionalism serves to make constitutionalism far more controversial than the constitution itself. This reflects the fact that in England and New Zealand constitutional change is always seen as more controversial than constitutional continuity.

The Conservative and Labour governments that introduced and institutionalised the neo-liberal reforms of the 1980s and 1990s risked bringing down the great wrath of the public upon their heads. In both countries there was pain, and there has been much debate as to whether there was any gain as a result. With hindsight it is clear that there has been gain, at least legally speaking. The New Public Management introduced new values - the values of efficiency, economy, effectiveness and choice - into the law and these have had far-reaching implications for the landscape of administrative law. The public sectors of England and New Zealand have been reformed, downsized and remodeled so as to introduce the managerial accountability that prevails within the private sector. If the virtues of transparency, accountability, and good financial management are indeed features of the systems of public management operating in England and New Zealand then the neo-liberal reforms will have been vindicated, but only by their own criteria – the distinctly economic criteria of efficiency, economy and effectiveness.

The recent "constitutional" as opposed to "economic" legislative reforms (which were constitutional reforms but less obviously or directly constitutional) in New Zealand can be grouped into four categories.

The first category contains the information and transparency reforms encapsulated in ombudsman and freedom of information legislation. The second category is the category based on the Treaty of Waitangi. The third category consists of human rights reforms – the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. The fourth category contains the "truly constitutional" reforms of the past era –

the Constitution Act 1986, the Electoral Act 1993 and the Supreme Court Act 2003. Of the past twenty years, these statutes have produced the most significant structural changes in New Zealand's constitution

As the recent developments in the United Kingdom are significantly more complex and numerous than the developments in New Zealand, it is more instructive to consider the constitutional reforms in the United Kingdom in terms of significant themes. I have identified four themes or movements that may influence modern administrative law by inspiring change in the United Kingdom constitution. These are *Modernisation*, *Decentralisation, Rightification* and *Europeanisation.* Modernisation is a very elastic label that can stretch out to cover each and every recent constitutional reform. However, some matters which stand out as being distinctly modernising include reform of the House of Lords, reform of the Lord Chancellor's office, reform of the court system, reform of local government, reform of electoral systems and the enactment of the Freedom of Information Act 2000. The theme of decentralisation refers to the devolution of legislative and executive power to Scotland and Northern Ireland and executive power to Wales. Rightification refers to the radiant effect of the Human Rights Act 1998. Europeanisation refers to the measures that were taken to enter the Economic Community and all the measures that have subsequently been taken to keep the United Kingdom in the European Union.

The constitutional developments that have recently transpired in New Zealand and the United Kingdom have many implications for administrative law, although some developments are more significant than others. The United Kingdom devolution is a very significant administrative law development because the creation of three new legislative and executive branches of government will clearly change the contours of the administration of public power. Devolution can, however, be discussed separately from the modernisation, europeanisation and rightification of administrative law. Although these three themes have areas of overlap, European integration stands out as the signally important process. Not only has europeanisation provided the necessary momentum for rightification of administrative law, europeanisation has also empowered new multi-state governmental institutions to legislate for the United Kingdom. This must be compared to New Zealand where rightification of administrative law is occurring as a result of New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. In New Zealand these human rights enactments were passed when there was no economic incentive do to so. The only reason to have enacted such legislation was in order to fulfill international human rights obligations.

The constitutional significance of the New Zealand Bill of Rights Act 1990, the New Zealand Human Rights Act 1993 and the United Kingdom Human Rights Act 1998 justifies comparison between the modern constitutions of New Zealand and England.[106] The rights contained in these statutes are of the same essential nature e.g. the right to life (s 8 & art 2), the freedom of expression (s 14 & art 10), freedom from discrimination (s 19 & art 14) and fair trial rights (s 27 & art 6). While the substantive rights in these statutes do not differ greatly, the enforcement mechanisms do. The United Kingdom Human Rights Act 1998 provides for the mechanism of a declaration of inconsistency and also for compensatory or other remedies. In contrast the New Zealand Bill of Rights Act 1990 provides no remedies provision. That void was left for the common law to fill. Additionally, the New Zealand Bill of Rights Act 1990 only applies to the three branches

[106] The two are frequently compared, see Huscroft and Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, Oxford, 2002); Lester QC "The Magnetism of the Human Rights Act 1998", above n 96.

of government, and before being amended in 2001 the Human Rights Act 1993 did not prohibit discrimination in the public sector. The United Kingdom Human Rights Act 1998 on the other hand applies to "any person certain of whose functions are functions of a public nature".[107] This provision, ties into the controversial question of what is a public authority.[108] While it is clear that the United Kingdom Human Rights Act 1998 applies to acts of public authorities, it is not clear what counts as a public authority. In *Aston Cantlow*[109] the House of Lords held that a Parochial Church Council was not a core public authority. In the leading speech Lord Nicholls of Birkenhead held that it was not possible to develop a universal test to resolve the matter of whether the Human Rights Act applies, given the "diverse nature of governmental functions and the variety of means by which these functions are discharged today".[110] His Lordship instead suggested that the factors that should be taken into account included "the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service".[111] This is uncontroversial reasoning that makes a complete mockery of Dicey's claim that the rule of law requires that the same laws must be applied to public officials and private individuals. Private individuals were, in this case, far better off for not being public officials or authorities, and not being subject to the same rules of law.

The Human Rights Act 1998 and the New Zealand Bill of Rights Act 1990 provide for greater protection from the abuse of power than the common law did before the passing of these statutes. Although the common law provides a much greater range of freedoms than human rights legislation, the freedoms provided by the common law are not positive

[107] The Human Rights Act 1998 (UK), s 6(3)(b).
[108] And where should the line between public and private law be drawn, if at all? See D Oliver "Functions of a Public Nature under the Human Rights Act" [2004] PL 329; Oliver "The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act" [2000] PL 476; Oliver "The Human Rights Act and Public Law / Private Law Divides" [2000] EHRLR 343; N Bamforth "The Public Law – Private Law Distinction: A Comparative and Philosophical approach" in Leyland and Woods (eds) *Administrative Law Facing the Future: Old Constraints and New Horizon*"; C Harlow "'Public' and 'Private' Law: Definition Without Distinction" (1980) 43 MLR 241.
[109] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] 3 All ER 1213.
[110] Ibid [12].
[111] Ibid [12].

rights (claim-rights) correlative to duties upon public authorities. The rights provisions contained in the New Zealand Bill of Rights Act 1990 and the United Kingdom Human Rights Act 1998 are analytically best considered as conferring liberties upon private individuals and duties upon public authorities. The success of these provisions is not based upon the fact that the duties are imposed upon public authorities, as opposed to private individuals, but is due to the fact that they are imposed at all. The fact that fundamental human rights and freedoms are now written down into legislation means that they may now be protected by powerful common law techniques of statutory interpretation that the courts may apply in cases for judicial review.[112]

The enactment of the Human Rights Act 1998 and the New Zealand Bill of Rights Act 1990 gives rise to the question of whether it is appropriate that the legal rights with which we are presently concerned ought to be legislated for and placed in a priviledged constitutional position. James Allan argues that it is inherently paternalistic to entrench rights so as to immunise them from repeal or amendment.[113] The basis of this argument is that it is anti-democratic to allow a defender of constitutionalised rights to set his or her views of what counts as a good ordering or distribution of social benefits and burdens in stone. While Allen may be correct to argue that the proponents of human rights constitutionalism are politically driven paternalists, even if they do not see themselves in this light, his objections lose almost all of their force, given that, absent human rights constitutionalism, the common law is still left with Dicey's private law constitutionalism and the politically entrenched liberty rights of propertied Victorian gentleman. Allan can also rest free from his fears of the dark creeping benevolence of the paternalistic human rights legislators, for despite the fact that human rights have been privileged and constitutionalised by being incorporated into domestic law, the values contained in human rights legislation have not been entrenched in New Zealand or England. This may

[112] The utility of these techniques is demonstrated in *R v Home Secretary, ex p Pierson* [1998] AC 539 (HL) and *R v Home Secretary, ex p Simms* [2000] 2 AC 115 (HL); See M Taggart "Administrative Law" [2000] NZ Law Review 90.
[113] J Allan "Rights, Paternalism, Constitutions and Judges" in Huscroft and Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law*, above n 106, 39.

be construed as a democratic choice to prefer the principle of Parliamentary sovereignty over the review powers of the courts.[114]

It should not be forgotten that the Human Rights Act 1998 and the New Zealand Bill of Rights Act 1990 contain constitutional directions to the courts to interpret legislation in accordance with human rights. Some commentators and members of the judiciary may have considered that this direction is sufficient justification to establish a doctrine of "constitutional statutes". This new doctrine is demonstrated in the *Thoburn* case, where Laws LJ stated that "ordinary statutes may be impliedly repealed, [but] constitutional statutes may not".[115] In the English context in which Laws LJ is speaking this comment is justified because England does have a constitutional statute in the European Communities Act 1972. Insofar as the European Communities Act 1972 requires that future legislation shall be construed and shall have effect subject to the European Communities Act, then it is a statute at odds with Parliament's legislative sovereignty and the doctrine of implied repeal. The doctrine of implied repeal developed as a consequence of Parliament's legislative sovereignty, in order to substantiate the principle that the current Parliament cannot bind future Parliaments.[116] However, the technical legal revolution that occurred in *Factortame* has made a lie of this doctrine in the United Kingdom. Unless the current Parliament repeals or amends the European Communities Act 1972, or places override clauses in conflicting legislation, its legislative intention will be thwarted by the statute of the earlier Parliament.[117]

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[114] D Mullen "The Role for Underlying Constitutional Principles in a Bill of Rights World" [2004] NZ Law Review 9, 30.

[115] *Thoburn v Sunderland City Council* [2002] 4 All ER 156, [63]; See the commentary in Marshall, "Metric Measures and Martyrdom by Henry VIII Clause", above n 101; Joseph, "Constitutional Law", above n 73, 416–420.

[116] *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 390 (CA).

[117] The doctrines established by the European Court of Justice decided in *Van Gend en Loos* [1963] ECR 1 complicate the situation. In *Costa v ENEL* [1964] ECR 565, 593–594, the ECJ argued that it was not possible for member states to withdraw from the Community because "The transfer by States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a sovereign unilateral act incompatible with the concept of the Community cannot prevail"; See Marshall, "Metric Measures and Martyrdom by Henry VIII Clause", above n 101. This argument was rejected in *Thoburn* on the grounds that the sovereign legislature cannot abandon its sovereignty. While the argument was correctly rejected, it was rejected on the wrong basis. A sovereign legislature can abandon its sovereignty. The United

Despite the fact that it is a case that deals with the controversies resulting from the doctrine of implied repeal, the true significance of the *Thoburn* decision flows from the fact that it articulates the principle that statutes should be regarded as constitutional if they recognise rights "which should be properly characterised constitutional or fundamental".[118] There is a difficulty here in that describing a statute as constitutional obscures the fact that the legal rights contained in the statute will always be established as a consequence of a compromise between competing interests. Because the parliamentary process is subject to an accountability mechanism, in the form of elections that may either confirm the mandate of the current government or provide for the legitimacy of a new government, it is appropriate that the Parliaments of New Zealand and the United Kingdom legislate to establish the existence of legal rights. Any judicial predisposition to describe some statutes as having constitutional statutes on the basis that they contain fundamental rights or values will undermine Parliament's sovereignty. This will, in turn, weaken the democratic justification for submitting to the rule of the law, as the new jurisprudence fails to provide mechanisms for legitimating the political decisions that judges will occasionally be forced to make. The claim that a decision is made in accord with constitutional principle does not justify a decision made in pursuance of the misconceived idea that some statutes are more constitutional than others.

The principle that the law protects fundamental rights and values is the wrong constitutional principle from which to start. Despite Lord Cooke of Thorndon's well-known heretical dictum,[119] there are, at present, no rights that are so fundamental that they cannot be overridden by clearly expressed legislation. Likewise there are no statutes in New Zealand or England that are so fundamental that they are legally beyond repeal. There are statutes that may justifiably be described as "constitutional" to the extent that they abrogate the doctrine of implied repeal, or otherwise derogate from the fundamental

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Kingdom Parliament has delegated aspects of its legislative sovereignty to the European Union, but this is not yet an irrevocable delegation. Complete and exclusive legislative sovereignty could be obtained at any time by passing a Bill to repeal the European Communities Act.

[118] *Thoburn*, above n 115, [63].

[119] *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398.

constitutional principle of Parliament's legislative sovereignty. The European Communities Act 1972 is one example. We may call the Human Rights Act 1998 a constitutional statute on the basis that it contains a Henry VIII clause that allows the amendment of inconsistent legislation by virtue of a remedial ministerial order.[120] However, by definition the New Zealand Constitution Act 1986, the New Zealand Bill of Rights Act 1990, the Human Rights Act 1993 and the Supreme Court Act 2003 are not constitutional statutes. These statutes deal with constitutional matters but otherwise they are as ordinary as any other statute. These statutes can be repealed because in New Zealand Parliament is supreme and is likely to remain so in the future. In regards to the United Kingdom Parliament the same cannot be said with such confidence.

## IV. *ULTRA VIRES* IN NEW ZEALAND AND THE UNITED KINGDOM

In this paper I have defined the process of constitutionalism as the process of privileging norms or values by incorporating particular norms or values into a legal structure that is recognised as providing the fundamental basis for legal ordering. It is important to clarify that constitutionalism comes in a variety of forms and there are different ways to protect, privilege or "constitutionalise" desirable norms or values. Sir Geoffrey Palmer has suggested that the administrative law process of judicial review may be explained by the existence of four potential justifications. These justifications are given in terms of Parliamentary intention under the doctrine of *ultra vires*, or alternatively in terms of the common law fortified by specific legal values, rights-based jurisprudence or the constitution.[121] A variety of constitutionalisms can be found or associated with each of these justifications for judicial review.

If we consider the theory of *ultra vires* we may observe that the norms that are privileged are the common law rights of the individuals who collectively make up the state. In his

[120] The Human Rights Act 1998, s 10; Note that the implied repeal implications of The Human Rights Act 1998 (UK) are less than clear. See Lester QC, "The Magnetism of the Human Rights Act 1998", above n 96, 487.
[121] Palmer and Palmer, *Bridled Power: New Zealand's Constitution and Government*, above n 44, 290–291.

account of the constitution, Dicey attempted to demonstrate that these rights could be protected by the ordinary courts of the land using techniques of statutory interpretation to give effect to the intention of Parliament. The *ultra vires* doctrine voided executive action that went beyond the boundaries of the power conferred upon the executive agency. The doctrine is very simple and very clear and has the support of excellent judicial authority, which either establishes the circumstances where a decision will be held to have been unlawfully made,[122] or reiterates the fact that judicial review will be available when a court holds that a decision has been made unlawfully.[123] However, *ultra vires* cannot explain judicial review in cases where the power exercised is not derived from the words of a statute.[124] The alternative theories of judicial review capitalise upon this difficulty as it provides a basis for the argument that the *ultra vires* model does not accurately explain the courts jurisdiction to undertake judicial review.[125] A further problem may arise for the *ultra vires* doctrine. If the Westminster Parliament is no longer completely sovereign as a result of the European Communities Act 1972, then it is difficult to see how we can justify judicial review in England by reference to a principle that was born of Dicey's absolutist conception of sovereignty. While some jurists have argued that there is a need to go beyond the classic model of judicial review, because the central premise of that model has been undermined by either a dynamic new rights-based jurisprudence or fundamental common law values, in my view the best basis for critique of the *ultra vires* doctrine is that of the technical legal revolution effected in *Factortame.*

TRS Allan has correctly observed that the *ultra vires* doctrine is a conceptual rationalisation that can be only be defeated by "challenging its essential postulate – the

[122] Grounds cases: see Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL).
[123] *Ultra vires* consistent cases: see *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208 (HL); *Page v Hull University Visitor* [1993] 1 All ER 97 (HL); *Boddington v British Transport Police* [1998] 2 All ER 203 (HL).
[124] Problem cases for *ultra vires*: *Datafin,* above n 33; *Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA); *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA).
[125] There is a great debate on this issue, the primary contributions to which are contained in Forsyth (ed), "Judicial Review and the Constitution". For the latest contributions to the discussion see Forsyth and Elliot "The Legitimacy of Judicial Review" [2003] PL 286; TRS Allan "Doctrine and Theory in Administrative Law: An Elusive Quest for the Limits of Jurisdiction" [2003] PL 429.

unfettered sovereignty of Parliament".[126] Accordingly, theories have been developed which provide a "rights-based" challenge to the doctrine of *ultra vires* by arguing that certain rights are more fundamental than the principle of Parliamentary sovereignty. While "rights" may appear to justify judicial review without any reference to Parliament's legislative intention, any review on the basis of the rights contained in the Human Rights Act 1998 or the New Zealand Bill of Rights Act 1990 sources from a clearly expressed Parliamentary intention. Review on the basis of human rights may therefore be regarded as being no different from review on the basis of *ultra vires*. This exact same point may be made in regard to "common law values". Dawn Oliver has argued that the key legal values are the values of dignity, autonomy, respect, status and security, and that these values support the "paramount" values of democracy, citizenship and participation.[127] The values that Oliver identifies are undoubtedly important but the fundamental problem with these values is that they appear to be arbitrarily selected. Unless some form of constitutionalism converts these values into legal rules, for example as may be done by incorporating the principles of the Treaty of Waitangi into legislation, then these values cannot justify judicial review. And while the common law rules that establish that the breach of natural justice may justify judicial review, it is still arguable that the breach of natural justice justifies review on *ultra vires* grounds.[128]

I have argued that the New Zealand Parliament is supreme and is likely to remain so in the future. If this argument is correct there is every reason to believe that the *ultra vires* doctrine can be defended and retained in New Zealand, despite the difficulty of the cases where courts have allowed judicial review of private individuals who exercise public powers. Professor Joseph's view that the "constitutionalisation" of administrative law requires a rethink of the conceptual foundation of judicial review [129] is more correctly applied in the context of the United Kingdom than in New Zealand. It would be much

[126] TRS Allen "Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?" (2002) 61 CLJ 87, 92–93.

[127] D Oliver, "The Underlying Values of Public and Private Law" in Taggart (ed) *The Province of Administrative Law*; Oliver *Common Values and the Public-Private Divide* (Butterworths, London, 1997).
[128] See the judgment of Tipping J in *Peters v Davison* [1999] 2 NZLR 164, 205 (CA).
[129] Joseph, "The Demise of Ultra Vires – Judicial Review in the New Zealand Courts", above n 61, 375.

more logical and likely for the doctrine of *ultra vires* to meet its untimely end in a United Kingdom court concerned with a pressing European Union controversy, than it would for *ultra vires* to be decisively "Wednesburied"[130] in the Supreme Court of New Zealand. The Supreme Court of New Zealand has, after all, been established by legislation that expressly declares and demands a continuing commitment to the rule of law and the sovereignty of Parliament.

## V. CONCLUSION

It is no secret that the recent constitutional reforms enacted in New Zealand coincided with a period of political controversy inspired by the neo-liberal revolution. While the Constitution Act 1986 may seem decidedly non-revolutionary, in the past twenty years New Zealand has passed a bill of rights, reformed the electoral system and redesigned the court system. There have been dramatic changes in the style of public administration as the public sector has been put through the wringer of efficiency, economy and effectiveness. These economic values have been successfully implanted into the administrative law of New Zealand, as they were incorporated into the administrative law of the United Kingdom under the New Public Management.

The assimilation of neo-liberal insights into administrative law does not distinguish the constitutionalism of the United Kingdom from the constitutionalism of New Zealand. The same can be said of the international human rights values adopted in New Zealand in the Bill of Rights Act 1990 and in the United Kingdom in the Human Rights Act 1998. But the constitutions and the constitutionalisms of the United Kingdom and New Zealand are diverging, because in England there is a need to reinvent the principle of sovereignty. The European Communities Act 1972 may breed a new constitutionalism, driven by the economic rationale that justified surrendering some aspects of sovereignty in order to integrate with Europe. Given the importance of the European Union to the United Kingdom, the commitment to the legislative sovereignty of the New Zealand Parliament in the Supreme Court Act 2003 must appear to be a luxury that is too expensive to afford,

[130] Harrison, "The New Public Law: A New Zealand Perspective", above n 72, 56.

in the long run. Nevertheless, the Supreme Court Act 2003 demonstrates the subtlety of the process of constitutionalism by privileging a fundamental constitutional principle, without going so far as being a "constitutional" statute.