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Common Law Constitutionalism Again

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I am honoured to give this lecture. The High Court of Australia is one of the great courts of the world and sets the standard for our region and the common law world. It is a pleasure to be able to say so in this public lecture.

New Zealand is a jurisdiction which shares with Australia habits of thought and values arising from common origins, intertwined histories and neighbourhood. So although I do not underestimate the differences in our legal orders, in choosing a topic I thought to adopt a positive tone by touching on things we have in common rather than where we diverge. One of the things we have in common is the common law inherited when we were part of the British Empire.

I do not suggest that the common law of Australia and the common law of New Zealand are the same or that they are the same as the common law at its source. The common law received in Australia and New Zealand was the whole body of law and its method. As Windeyer J said, its principles were “capable of application to new situations, and in some degree of change by development”.¹ In Australia the common law has been adapted to the circumstances of Federation and the adoption of a written constitution, neither of which is present in the New Zealand legal order. In addition to adaption for such structural reasons, the common law as introduced has adapted to meet the circumstances of our distinct societies, prompting divergence that has picked up pace since appeals to the Privy Council ended. Yet the common law remains a point of connection. We share its methods and its values.

I thought I might pick up on Sir Owen Dixon’s acknowledgement of the common law context in which even the Australian “capital C” constitution operates.² Because Lady Hale has said that “constitutionalism” is “on the march” in the United Kingdom,³ common law constitutionalism seemed an obvious topic for a neighbourly perspective.

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¹ *Skelton v Collins* (1966) 115 CLR 94 at 135.

² Owen Dixon “The Law and the Constitution” in *Jesting Pilate* (Law Book Company, Melbourne, 1965) 38; and “The Common Law as an Ultimate Constitutional Foundation” in *Jesting Pilate* (Law Book Company, Melbourne, 1965) 203.

³ Lady Hale “UK Constitutionalism on the March?” [2014] JR 201.

I realised too late that this is a complex and seriously disputed matter in Australian constitutional law on which I should never have embarked. Although I feel obliged to persevere, I have indeed come to appreciate the force of the view expressed in a High Court judgment⁴ that those whose fortune it has been to live under a unitary system seldom adequately understand federalism in all its bearing. "Many of the conceptions and distinctions inherent in federalism" do indeed strike my mind as "strange and exotic refinements".⁵ In preparing my remarks I have gained further respect for the High Court and for Australian constitutional lawyers. So I hope for some indulgence. If in the course of throwing out some thoughts on this theme I seem like a visitor from Mars, that is probably because I am a visitor from New Zealand.

"Constitutionalism" without a text

I need to say something immediately about constitutionalism without a principal text. Those are the conditions in the United Kingdom and New Zealand.

A senior British politician in the 1930s said that "unconstitutional" is a term "applied in politics to the other fellow who does something that you do not like".⁶ That may not be the sense in which it is employed where there is a primary written text. But where there is no authoritative text it is not uncommon to encounter the view that the ideas of what is constitutional or unconstitutional are legally meaningless. The view turns on the indeterminacy of an unwritten constitution and the shadow cast by the doctrine of parliamentary supremacy where a legislature is formally uncontrolled, both of which topics I now turn to.

Without an authoritative written source which distributes and limits power, what is "constitutional" is contestable. Of course constitutional indeterminacy is present even in a jurisdiction operating under a primary text because the text can never be complete. So even under a "capital C" constitution, what is "constitutional" is not divided by bright lines from other legal rules and values. Any constitution has to be understood against the background of traditions, conventions and practices without which the system of government it assumes is unintelligible. The wider legal system and its history shows through. In Australia too that includes the common law as well as ancient constitutional enactments which are, practically speaking, part of the common law.

⁴ *O'Sullivan v Noarlunga Meat Ltd (No 2)* (1956) 94 CLR 367.

⁵ At 375 per Dixon CJ, Williams, Webb and Fullagar JJ.

⁶ A remark attributed by Sir Ivor Jennings to Austen Chamberlain: Ivor Jennings *Cabinet Government* (2nd ed, Cambridge University Press, Cambridge, 1951) at 12-13.

In Australia, the written constitution means that the common law is not “transcendental”, as Sir Owen Dixon observed.⁷ But, as he also made clear, it is “antecedent” to all constitutional instruments and provides the context in which the written text is interpreted and applied. The principles of statutory interpretation are themselves common law in origin.

In Canada, another common law federation, the Supreme Court similarly draws on “unwritten constitutional principles” in interpretation of the text of the constitution.⁸ Indeed, perhaps more adventurously it does so not only to interpret the text but to “fill out gaps” in its express terms.⁹ The Court’s gap-filling has led it to recognise as “constitutional principles” democratic values¹⁰ and separation of powers.¹¹ These constitutional principles are acknowledged to have “evolved over time” in Canada and to be still evolving.¹² They do not depend on textual reference.¹³ More recently, the Court has imported “Charter values” both when interpreting the Constitution and developing the common law.¹⁴

⁷ Owen Dixon “Sources of Legal Authority” in *Jesting Pilate* (Law Book Company, Melbourne, 1965) 198 at 199.

⁸ *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319; *Provincial Court Judges Reference* [1997] 3 SCR 3; *Reference Re Secession of Quebec* [1998] 2 SCR 217; and see Peter Hogg *Constitutional Law of Canada* (5th ed, Carswell, Toronto, 2007) at [1.8].

⁹ *Provincial Court Judges Reference* at [95] and [104] per Lamer CJ, L’Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ. The preamble to the Constitution Act 1867 (an Act of the Imperial Parliament) sets up a federation “with a Constitution similar in Principle to that of the United Kingdom”. This preamble has been referred to by the Supreme Court as the “grand entrance hall” of the constitution: *Provincial Court Judges Reference* at [109].

¹⁰ *Reference Re Secession of Quebec* at [61]–[69]; *Mikisew Cree First Nation v Canada (Governor General in Council)* 2018 SCC 40 at [35] per Wagner CJ, Karakatsanis and Gascon JJ.

¹¹ *Wells v Newfoundland* [1999] 3 SCR 199 at [52]; *Mikisew Cree* at [35].

¹² *Provincial Court Judges Reference* at [106].

¹³ Although La Forest J dissented in the *Provincial Court Judges Reference* on the basis that there must always be a textual basis for importation of unwritten constitutional principles (see at [303] and [315]–[319]), the Supreme Court continues to refer to unwritten principles, as illustrated by the reasons given in *Mikisew Cree*.

¹⁴ *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd* [1986] 2 SCR 573 at 603 per Dickson CJ, Estey, McIntyre, Chouinard and Le Dain JJ (“the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution”); and *Grant v Torstar Corp* 2009 SCC 61, [2009] 3 SCR 640 at [44] per McLachlin CJ, Binnie, LeBel, Deschamps, Fish, Charron, Rothstein and Cromwell JJ (though “not directly subject to Charter scrutiny where disputes between private parties are concerned”, the common law “may be modified to bring it into harmony with the Charter”). “Charter values” may also prove relevant in statutory interpretation: *Hills v Canada (Attorney-General)* [1988] 1 SCR 513 at 558 per Dickson CJ, Wilson, La Forest and L’Heureux-Dubé JJ (but see *Bell ExpressVu Limited Partnership v Rex* 2002 SCC 42, [2002] 2 SCR 559 at [66]).

If the common law provides essential context and is “antecedent” to a written text such as the Constitution in Australia, the common law in the uncontrolled constitutions of the United Kingdom and New Zealand is the centre of the constitution. Sir John Laws, in his Hamlyn lectures, describes the common law as “the unifying principle of our constitution”:¹⁵

It is the means by which the legislature and the government are allowed efficacy but forbidden oppression.

Identifying what is constitutional with any legitimacy is much more difficult without a constitutional text. The separation of the legislative, executive and judicial powers of the state in a written text makes it clear that the constitution is law. Even that is a matter that is contested where law-making power is apparently uncontrolled. That is not so much because of the supremacy in law-making. (Even a legislature operating under limitations set by a written constitution is supreme as law-maker, at least where the legislative power is not shared).¹⁶ The problem is the theory that the law-maker is omniscient and unlimited.¹⁷ It is the theory of parliamentary sovereignty expounded in the 19th century by Albert Venn Dicey.¹⁸ It is doctrine that has been said by the legal historian, Martin Loughlin, to represent a triumph of the analytical over the historical.¹⁹

This view of unlimited parliamentary sovereignty arose at a particular moment in British constitutional history.²⁰ The assertion of parliamentary sovereignty was one of the grievances which led to the independence of the American colonies. The colonists took the view that parliamentary supremacy over the

¹⁵ John Laws *The Common Law Constitution* (Cambridge University Press, Cambridge, 2014) at 3.

¹⁶ As Peter Cane points out, it *is* shared in the United States: Peter Cane “Judicial Control of Administrative Interpretation in Australia and the United States” in Hanna Wilberg and Mark Elliott (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow* (Hart Publishing, London, 2015) 215 at 228.

¹⁷ As Anthony Mason explains, legislative omniscience and legislative supremacy are not the same thing, and a legislative body may be accorded much latitude to act even if not formally omniscient: Anthony Mason “One Vote, One Value v The Parliamentary Tradition – The Federal Experience” in Christopher Forsyth and Ivan Hare (eds): *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade QC* (Oxford University Press, Oxford, 1998) 333 at 333.

¹⁸ AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan & Co, London, 1961) at ch 1.

¹⁹ Martin Loughlin “Why the History of English Administrative Law is not Written” in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds): *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, Oxford, 2009) 151 at 153.

²⁰ As Maitland, Pennington, Loughlin and others have shown: Frederick Pollock and FW Maitland *The History of English Law before the Time of Edward I* (Cambridge University Press, Cambridge, 1898) at 182; Kenneth Pennington *The Prince and the Law, 1200–1600: Sovereignty and Rights in the Western Legal Tradition* (University of California Press, Berkeley, 1993) at 285–288; and see also Martin Loughlin and Stephen Tierney “The Shibboleth of Sovereignty” (2018) 81 MLR 989.

Crown, achieved in the 17th century constitutional upheavals in England, did not mean parliamentary sovereignty over law and the constitution.²¹ They claimed that custom and Magna Carta preserved "'reserv'd Rights' that were antecedent to and therefore binding on Parliament".²²

The legislatures in the overseas British colonies were not themselves sovereign. Whether the New Zealand Parliament and the Parliaments of the Australian colonies obtained all the powers of the Parliament at Westminster following eventual adoption of the freedom offered under the Statute of Westminster has not been authoritatively determined, but is generally assumed. (Sir Owen Dixon of course thought that it did not follow).²³ In New Zealand, the current Constitution Act does not itself constitute a new legal order. It simply says the Parliament "continues to have full power to make laws".²⁴

Wherever power is organised some fundamental assumptions, such as representative government, suggest limitations on what even a supreme law-maker can achieve. As Sir Anthony Mason suggests, it would be surprising if the Parliament at Westminster could manipulate the electoral system to deny ultimate control of the House of Commons to popular election. As he says, "the doctrine is not the master but the servant of the system of government we have."²⁵

In recent years a number of statements to the same effect have been made by judges in the House of Lords and the Supreme Court of the United Kingdom. They too have pointed out that while parliamentary sovereignty is the "general" principle of the constitution of the United Kingdom, "it is a construct of the common law" and the courts may have to qualify it if

²¹ John Phillip Reid *Constitutional History of the American Revolution: The Authority to Legislate* (University of Wisconsin Press, Madison, 1991) at 4–5.

²² Jack Greene *The Constitutional Origins of the American Revolution* (Cambridge University Press, Cambridge, 2011) at 59.

²³ Dixon "The Common Law as an Ultimate Constitutional Foundation" at 206. Lord Cooper in *MacCormick v Lord Advocate* 1953 SC 396 at 411 described the sovereignty of Parliament as a very peculiar notion which had no application to the law of Scotland.

²⁴ Constitution Act 1986, s 15. Section 14(2) defines the Parliament by reference to the continuity of the institution.

²⁵ Mason "One Vote, One Value v The Parliamentary Tradition – The Federal Experience" at 335.

circumstances arise making it appropriate to do so.²⁶ They have said that whether the sovereignty of the United Kingdom Parliament is absolute is “still under discussion”.²⁷

Such sabre-rattling predictably provokes excitement. But in legal orders lacking a primary constitutional text, keeping the constitution “under discussion” seems essential to prevent sleepwalking into erosion of important constitutional values.

Even before the Brexit upheavals, Britain seems to have been adjusting to a new constitution.²⁸ It may be drifting to federalism.²⁹ If so, it will undoubtedly obtain a primary constitutional text. Indeed, it may be that New Zealand will remain the only Diceyan ideal, at least unless the murmurings for a written constitution gain sufficient traction for structural constitutional change.

If in the United Kingdom, post-devolution, the notion of an omnicompetent parliament of Westminster seems increasingly divorced from real life, it cannot be revolutionary to suggest that the same is true even in a minimalist unitary state like New Zealand which nevertheless considers itself subject to the rule of law. If the rule of law means anything, no power is ever completely uncontrolled, even if there is no institution with the power to enforce compliance. If we are to make headway in addressing the constitutional issues of our times in New Zealand, these are ideas we will have to confront. In the meantime, under a “small c” constitution in New Zealand, the balance between government and law depends largely on common law principles, for which the judges have constitutional responsibility.

²⁶ *R (Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262 at [102] per Lord Steyn. Lord Steyn thought it was “not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism”. He suggested that, faced with an attempt to abolish judicial review or the “ordinary role of the courts”, the courts might have to consider whether “this is constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish”. In the same case Lord Hope described “[t]he rule of law enforced by the courts” as “the ultimate controlling factor on which our constitution is based”: at [107]. More recently, Lord Hodge has cautioned that the acquiescence of the courts might not extend to “the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device”. In such a case he would “not exclude the possibility” that the common law, informed by principles of democracy and the rule of law and international norms, would be able to declare such legislation unlawful: *Moohan v Lord Advocate* [2014] UKSC 67, [2015] AC 901 at [35].

²⁷ *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868 at [50] per Lord Hope.

²⁸ Vernon Bogdanor *The New British Constitution* (Hart Publishing, London, 2009) at 82. For a discussion on the implications of devolution, see Cheryl Saunders “Devolution. Federation. Constitution. From here to where?” (Sir David Williams Lecture, University of Cambridge Faculty of Law, 27 February 2015).

²⁹ Something suggested by Lady Hale: “The Supreme Court in the UK Constitution” (Speech to the Legal Wales Conference, 12 October 2012) at 23.

Federalism put paid to unlimited parliamentary sovereignty in Australia, as Dicey recognised it must.³⁰ Sir Owen Dixon said however that until lawyers became accustomed to the federal system, it was parliamentary supremacy over the law that still “dominated their thoughts”.³¹ Although it is doctrine that may seem to continue to dominate thoughts of lawyers in New Zealand and in the United Kingdom, there are indications of movement pushed by constitutional principles such as the rule of law (with which Dicey himself tempered constitutional absolutism), the separation of powers, and by what we observe all around us.

I want to come on to discuss these matters of constitutional sense. But first I want to remind you that constitutions and how we perceive them change and that important in constitutional change is common law method.

A little constitutional history

In his lectures on constitutional history, Maitland took the position that the constitution of a country can be understood only from its general law and only as a snapshot at any particular time:³²

[A] classification of legal rules which suits the law of one country and one age will not necessarily suit the law of another country or of another age. One may perhaps force the rules into the scheme that we have prepared for them, but the scheme is not natural or convenient. Only those who know a good deal of English law are really entitled to have any opinion as to the limits of that part of the law which it is convenient to call constitutional.

Maitland’s view was that there is hardly any area of law which at some time or another has not been of constitutional importance. In mediaeval times the whole constitutional law seems “but an appendix to the law of real property”.³³ Similarly, the struggle between king and parliament in the 17th century, although a “struggle for sovereignty” and therefore “a constitutional struggle in the strictest sense of the word” was not he thought understandable except through criminal law and criminal procedure. At one time, Maitland says, the whole of the constitution seemed to depend on whether committal to prison by special order of the king was or was not a good return to the writ of habeas corpus. But in order to form “any opinion about that question”, it was necessary to “know something about the ordinary course of criminal procedure”.³⁴ Even though habeas corpus might well be seen as a part of criminal procedure, “still we can see that the history of the writ is very truly part of the history of our constitution” because the writ and

³⁰ Dicey *Introduction to the Study of the Law of the Constitution* at 144.

³¹ Dixon “The Law and the Constitution” at 51.

³² FW Maitland *The Constitutional History of England* (Cambridge University Press, Cambridge, 1913) at 526–527.

³³ At 538.

³⁴ At 538.

the courts' use of it deprived the king of the power by which he could have controlled parliament and set himself up as an absolute monarch.³⁵

Constitutions then evolve, sometimes quite rapidly. That may be because of political changes, such as those that have occurred and are in prospect in the United Kingdom. But change can be judge-nudged too. Then it occurs usually without grand design, in response to actual problems thrown up haphazardly by cases. Even under the security of a primary constitutional text, constitutional movement through interpretation by the High Court is part of the institutional design, as Deakin indicated at the time of Federation, indicating that gradual reassessment through common law method was envisaged.³⁶

In New Zealand, lacking a primary constitutional text, the common law method is a principal means by which the constitution is explained and maintained. Both Australia and New Zealand, then, practice common law constitutionalism to some extent. Although some commentators suggest that the High Court is moving further away from common law roots and context,³⁷ I expect that the evolving common law will continue to provide context, as it does in Canada. As one of our judges remarked in a different context: a nation cannot cast adrift from its own foundations.³⁸

During my time in law there has been substantial constitutional movement effected by common law method in all common law jurisdictions. I mention a few of them only.

In 1981, as a young lawyer, I once watched a dramatic exchange in the New Zealand Court of Appeal between the Court and the Solicitor-General. The Court insisted on being provided with material relied upon by the Minister in

³⁵ At 539.

³⁶ At the time of federation, Sir Alfred Deakin in the second reading of the Judiciary Bill envisaged that the interpretation of the Court would allow transfusion of "the fresh blood of the living present" to enable the Constitution to "grow and to be adapted to the changeful necessities and circumstances of generation after generation". The responsibility of the High Court is to keep the Constitution fit for purpose, not by the abruptness of constitutional amendment, but by steps Deakin expected to be "gradual" and "cautious", to allow "the past to join the future, without undue collision and strife in the present": Commonwealth, Parliamentary Debates, House of Representatives, 18 March 1902, 10966–109667 (Alfred Deakin) as cited in Anthony Mason "The Australian Constitution in Retrospect and Prospect" in Robert French, Geoffrey Lindell and Cheryl Saunders (eds) *Reflections on the Australian Constitution* (The Federation Press, Sydney, 2003) 7 at 21. The method he described is the method of the common law.

³⁷ A theme developed by JJ Spigelman in "The Centrality of Jurisdictional Error" (2010) 21 PLR 77 at 80 and in "Public Law and the Executive" (2010) 34 Aust Bar Rev 10 at 12. See also Gabrielle Appleby "Unwritten Rules" in Cheryl Saunders and Adrienne Stone (eds) *The Oxford Handbook of the Australian Constitution* (Oxford University Press, Oxford, 2018) 209 at 234.

³⁸ *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 308–309 per Cooke P.

making his decision in a controversial environmental case about consents to build an aluminium smelter.³⁹ It was a near-run thing. The Court of Appeal sent the Solicitor-General out of the court to get further instructions. The relief of the Court when it was eventually advised that the Minister acquiesced was palpable. It was a constitutional moment.

The Court had correctly read the mood of the times. A year later openness in government was required by freedom of information legislation.⁴⁰ Freedom of information has transformed government and the exercise of the supervisory jurisdiction of the courts. It has also transformed criminal procedure. It shifted the constitution. It seems strange now to think that we ever strained at this result.

It was only a few years later, in the United Kingdom, that the courts dismissed the view that natural justice and its supervision by the courts in matters of prison discipline and parole would bring prisons to their knees. The opportunity arose because, as Sir Stephen Sedley says, "as luck would have it", "a deputy governor decided to practise a textbook breach of natural justice" on Leech, "the ablest barrack-room lawyer in the prison system".⁴¹ It seems very odd today to think that prisoners were thought not to be entitled to natural justice in disciplinary or parole determinations and that it was thought appropriate for the executive also to determine the boundaries of their rights. Just as it seems odd today to recall that it was necessary for appellate courts as recently as the 1980s and 1990s to decide that prisoners retain all civil rights not taken away expressly or by necessary implication.⁴²

At much the same time as these developments were occurring, Lord Diplock stated flatly that the British constitution was based on the separation of powers.⁴³ He was criticised for adopting doctrine said to have no application to the United Kingdom. Even those who did think there was a constitution of the United Kingdom thought that it consisted of one principle only – the dogma of parliamentary sovereignty.

A few years later however, in both the United Kingdom and in New Zealand, the separation of powers was drawn on by judges in reading down privative

³⁹ See *Environmental Defence Society Inc v South Pacific Aluminium Ltd* [1981] 1 NZLR 146 (CA); and subsequently *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 2)* [1981] 1 NZLR 153 (CA).

⁴⁰ Official Information Act 1982.

⁴¹ Stephen Sedley "Early Days" in David Dyzenhaus, Murray Hunt, Grant Huscroft (eds) *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, Oxford, 2009) 281 at 289.

⁴² *Raymond v Honey* [1983] 1 AC 1 (HL) at 10 per Lord Wilberforce and 14 per Lord Bridge; *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533 (HL) at 568 per Lord Bridge and 580 per Lord Oliver; *R v Secretary of State for the Home Department, ex parte Leech* [1994] QB 198 (CA) at 209; and *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 120 per Lord Steyn.

⁴³ *Duport Steels Ltd v Sirs* [1980] 1 WLR 142 (HL) at 157.

clauses which purported to exclude the supervisory jurisdiction of the superior courts. They did so on the basis that there was no distinction between errors of law within and without jurisdiction,⁴⁴ an approach which sets up a point of continuing difference with Australian judicial review.⁴⁵ Judicial power did not require such protection in Australia. Again, the restrictive interpretation of privative clauses seems to have accorded with the then contemporary mood and in New Zealand the legislature repealed many of the privative clauses on the statute book.⁴⁶ Interpretation, even strained interpretation, leaves parliamentary supremacy formally intact because, as Lord Denning once said, if the executive is not happy with an interpretation, it should go to Parliament to have the law amended.⁴⁷

In Australia, the substantial development of criminal procedural law in the 1980s to achieve fairness and justice in proof of guilt was positioned under the constitution, but drew on values of the common law. In the judgments of the High Court in that period, judges took the position that the obligation to act in protection of rights of liberty and to fair process followed from the judicial function and the vesting of judicial power under Chapter III of the Constitution.⁴⁸ In referring to the right to fair trial as being “one of several entrenched in our legal system”, Mason CJ described it as “an incident of the general power of a court of justice to ensure fairness”.⁴⁹

In the United Kingdom it was not until 1993 in *M v Home Office*⁵⁰ that Ministers of the Crown became fully answerable to the courts for the lawfulness of actions taken under the prerogative. That was a position that had been achieved in Australia 100 years earlier with inclusion of the prerogative writs in the Constitution. *M v Home Office* was however common law constitutionalism. Sir William Wade described it as “the most important

⁴⁴ *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL); *Re Racial Communications Ltd* [1981] AC 374 (HL); *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA).

⁴⁵ In *Peters v Davison* [1999] 2 NZLR 164 (CA) at 180–181 the Court of Appeal confirmed that in New Zealand “[e]rror of law is a ground of review in and of itself; it is not necessary to show that the error was one that caused the tribunal or Court to go beyond its jurisdiction”. The Court said that “may be compared with the different approach taken in Australia” in *Craig v State of South Australia* (1995) 184 CLR 163.

⁴⁶ This followed a recommendation of the Constitutional and Administrative Law Reform Committee in the early 1970s: see Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at [2.60].

⁴⁷ *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800 (CA) at 806–807.

⁴⁸ Mason CJ, Deane J and Gaudron J in particular. See also *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 346, in which Murphy J explained that the privilege against self-incrimination is “part of the common law of human rights”.

⁴⁹ *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 31.

⁵⁰ *M v Home Office* [1994] 1 AC 377 (HL).

case in constitutional law for the last 200 years” in the United Kingdom.⁵¹

The examples I have referred to (and there are many others) mean that if Lady Hale was right to say in 2014 that British constitutionalism is “on the march”, the onward march follows in the tradition of the common law. As Benjamin Cardozo explained, it is itself a method of change.⁵²

Some commentators have suggested that the United Kingdom is transitioning from parliamentary supremacy to constitutional supremacy.⁵³ In Canada the Supreme Court has said the adoption of the Charter transformed the Canadian system of government “to a significant extent from a system of parliamentary supremacy to one of constitutional supremacy”.⁵⁴ In the UK, too, some of the movement that has led to this view has occurred under the push of human rights legislation. But more recently there are in the UK indications of greater readiness to invoke common law principles rather than to rely on human rights derived from the European Convention on Human Rights.⁵⁵

In Australia it is sometimes suggested the development of constitutional principles based on broad and free-standing values drawn from the wider legal order, including values of the common law, may have given way to a focus on *vires* as the basis of judicial review. With such focus, common law values arise principally in interpretation and to provide context. But, whether they are treated as free-standing substantive standards of law (as Mason J treated them,⁵⁶ and as we treat them in New Zealand) or common law principles of interpretation (as Brennan J thought them to be),⁵⁷ or indeed whether or not such classification is a “false dichotomy” (as Gummow, Hayne, Crennan and Bell JJ thought),⁵⁸ common law principles operate as values applied in constitutional law. Chief Justice Gleeson once said that “[i]n a liberal democracy, the idea of the rule of law is bound up with individual autonomy – the freedom to make choices”.⁵⁹ The view that the rule of law is concerned

⁵¹ William Wade “The Crown – Old Platitudes and New Heresies” [1992] NLJ 1275 at 1275.

⁵² Benjamin Cardozo *The Growth of the Law* (Yale University Press, New Haven, 1924).

⁵³ John Laws “The Good Constitution” (2012) 71 CLJ 567 at 569; and see *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728 at [71] per Laws LJ.

⁵⁴ *Reference Re Secession of Quebec* at [72], referred to in *Mikisew Cree* at [36] per Karakatsanis J; and *Vriend v Alberta* [1998] 1 SCR 493 at [131] per Cory and Iacobucci JJ.

⁵⁵ A trend identified by Mark Elliott “Beyond the European Convention: Human Rights and the Common Law” (2015) 68 CLP 85 and Richard Clayton “The Empire Strikes Back: Common Law Rights and the Human Rights Act” [2015] PL 3, among others.

⁵⁶ *Kioa v West* (1985) 159 CLR 550 at 584.

⁵⁷ *Kioa v West* at 609–611; referred to in *Saeed v Minister for Immigration & Citizenship* [2010] HCA 23, (2010) 241 CLR 252 at [12]–[13].

⁵⁸ *Plaintiff S10/2011 v Minister for Immigration and Citizenship* [2012] HCA 31, (2012) 246 CLR 636 at [97].

⁵⁹ Murray Gleeson “A Core Value” (speech at the Judicial Conference of Australia Annual Colloquium, Canberra, 6 October 2006) at 2–3.

with liberty has implications for its substantive content and the manner of administration of justice. How far this is taken turns perhaps on a conception of what the separate judicial power is for. Montesquieu considered that such separation was to secure liberty.⁶⁰

A sense of what is constitutional depends on the needs of a particular time. We have seen that in the development of administrative law in the last 50 years. We see some such needs perhaps in our time in emerging issues concerning privacy and terrorism and in new challenges to ensuring access to the courts and the essential characteristics of courts themselves.⁶¹ One of the areas in which some movement may occur is in the future responses of our legal orders to human rights and the claims of indigenous peoples. These are topics I want to touch on shortly. But first I need to say something further about the dynamic common law principles which point in “constitutional” directions. How they are viewed and used may set up points of divergence between jurisdictions otherwise closely linked.

The elements of common law constitutionalism

A sense of what is constitutional depends in part on a conception of law. The historical sense in which the “constitution” was understood in England was that it was all the laws, institutions and customs observed in a legal system.⁶² That is not the commonly held view today. Maitland’s insight that what is constitutional moves according to where the seat of constitutional contest is at any time means however that a common law conception of the constitution is properly a broad one. It requires assessment of what is fundamental, a matter of degree and therefore some imprecision.

The common law principles or values which are “antecedent” to any constitutional instrument (and therefore are common in all common law jurisdictions) are the rule of law and the separation of powers.

The rule of law

The rule of law is the basis of constitutionalism. Dixon J in the *Communist Party case* said that the rule of law was an “assumption” of the Australian Constitution.⁶³ It is an assumption of any constitution. The rule of law as a constitutional principle has been legislatively recognised recently in New

⁶⁰ Montesquieu *L’Esprit des Lois*, Book xi at ch vi as cited in *R v Trade Practices Tribunal, ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 390 per Windeyer J.

⁶¹ A matter discussed by Robert French in “Essential and Defining Characteristics of Courts in an Age of Institutional Change” (2013) 23 JJA 3; and see *Kirk v Industrial Court (NSW)* [2010] HCA 1, (2010) 239 CLR 531; *South Australia v Totani* [2010] HCA 39, (2010) 242 CLR 1; and *Wainohu v New South Wales* [2011] HCA 24, (2011) 243 CLR 181.

⁶² Martin Loughlin *The Idea of Public Law* (Oxford University Press, Oxford, 2003) at 120.

⁶³ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193.

Zealand, in departure from a general reticence in expressing constitutional values.⁶⁴

I do not intend to consider the scope of the doctrine of the rule of law further (although I will say something more about the separation of powers which is one of its principal consequences). But it is worth considering a little further what is the law that rules and is “antecedent” to any constitutional instrument.

The common law constitution of the United Kingdom was described by the High Court in *Lange v Australian Broadcasting Corp* to be “an amalgam of common law and statute.”⁶⁵ Both are part of the context in which the Australian constitutional text operates. In New Zealand legislation some of the ancient statutes are explicitly recognised as “constitutional.”⁶⁶ More modern legislation, which would on any view be characterised as “constitutional”, may not have been legislatively identified but the Cabinet Manual has for 20 years provided such classification.⁶⁷ In addition, the New Zealand Bill of Rights Act 1990 provides expressly that the substantive rights and interests it enacts are “fundamental”.⁶⁸

Dicey was against any hierarchy of statutes because he considered it was inconsistent with parliamentary sovereignty. He acknowledged that there were laws in England which could be called “fundamental or constitutional”, dealing with “important principles” such as succession to the throne or the terms of union with Scotland. They were to be contrasted, he thought, with “utterly unimportant statutes”, of which he gave as an example the Dentists Act 1878. Despite the acknowledgement that some legislation is important and some is “utterly unimportant”, Dicey said that if the Dentists Act contradicted the Act of Union in some respect, the Act of Union would be *pro tanto* repealed because of the “fundamental dogma” of “the absolute

⁶⁴ In s 3(2) of the Supreme Court Act 2003, and now in s 3(2) of the Senior Courts Act 2016 it is recognised as one of the two constitutional foundations, the other being the sovereignty of Parliament. Under the legislation regulating legal practice, legal practitioners are under a duty to uphold the rule of law: Lawyers and Conveyancers Act 2006, s 4(a). In the United Kingdom, s 1(a) of the Constitutional Reform Act 2005 similarly refers to “the existing constitutional principle of the rule of law”.

⁶⁵ *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 at 562.

⁶⁶ Schedule 1 to the Imperial Laws Application Act 1988. Those identified as constitutional include parts of the Statute of Westminster the First (providing the statement of equality before the law “for the maintenance of peace and justice” that “the King willeth and commandeth ... that common right be done to all, as well poor as rich, without respect of persons”). They also include Magna Carta, the Petition of Right 1628 and the Act of Settlement 1700.

⁶⁷ It identifies as “major sources of the constitution” the Constitution Act 1986, the State Sector Act 1988, the Electoral Act 1993, the Senior Courts Act 2016, the District Court Act 2016, the Ombudsmen Act 1975, the Official Information Act 1982, the Public Finance Act 1989 and the New Zealand Bill of Rights Act 1990: Cabinet Office *Cabinet Manual 2017* at 1–2.

⁶⁸ Long title.

legislative sovereignty ... of the King in Parliament" which was incompatible with any fundamental and controlling authority.⁶⁹

Whether this sort of reasoning would be applied today must be questionable. Laws LJ indicated it would not in *Thoburn v Sunderland City Council*.⁷⁰ Even in the case of a collision between two important statutes, the Supreme Court of the United Kingdom in *HS2*⁷¹ was clearly reluctant to accept that s 9 of the Bill of Rights 1689 could be impliedly repealed even by the European Communities Act 1972.⁷² In the identification of provisions as "fundamental" and "constitutional" and the identification of common law doctrine in legislation as "constitutional" we are perhaps seeing the development of a more developed constitutional sense, with implications for implied repeal (as Laws LJ suggested in *Thoburn*) and indeed for parliamentary sovereignty.

The courts have the responsibility to make the whole coherent. The judicial function is not simply to decide cases and state doctrine to be applied but includes the function described by Roger Traynor as "interweaving"⁷³ and by Peter Cane as "system-building".⁷⁴ Although in the New Zealand system Parliament may exclude the common law by statute or restate or reform it, the judicial responsibility of statutory interpretation means that the courts decide whether statutes impact on the common law and have developed presumptions and principles of interpretation which protect against displacement of fundamental common law. These fundamental elements include those protective of liberty, access to the courts and other constitutional values. So, in *Witham*, Laws J took the view that the common law fundamental right of access to the courts could not be abrogated "save by specific provision in an Act of Parliament, or by regulations whose *vires* in

⁶⁹ Dicey *Introduction to the Study of the Law of the Constitution* at 145.

⁷⁰ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151 at [62]-[70].

⁷¹ *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, [2014] 2 All ER 109.

⁷² Although ultimately defining the clash away, the Court said (at [207] per Lord Neuberger and Lord Mance, the other members of the Court agreeing):

The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Right Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The 1972 Act, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. The common law itself also recognises certain principles as fundamental to the rule of law. It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted 1972 Act did not either contemplate or authorise the abrogation.

⁷³ Roger Traynor "The Courts: Interweavers in the Reformation of Law" (1967) 32 *Sask L Rev* 201.

⁷⁴ Peter Cane *Controlling Administrative Power: An Historical Comparison* (Cambridge University Press, Cambridge, 2016) at 220, n 57

main legislation specifically confers the power to abrogate".⁷⁵

In a federal system, particularly one with a strong sense of the separation of powers, there may be more difficulty in seeing common law and statute as one legal system than in a unitary system. That may be especially the case where there are a number of legislatures in a federal system but only one common law. While the inherited common law may be seen as one system, different statutory regimes in different states following federation may alter the common law by shrinking its scope. The common law itself may be deprived of much legislative analogy for development. The case-law of the High Court around statutory reference to the common law is very difficult doctrine indeed for an outsider with no experience of federalism to follow. It is not apparent to me why recognition of the common law in a statute is thought to transgress the separation of powers.⁷⁶ In a unitary system we may be more comfortable with developing common law by analogy with statutes and treating statutes as a source of authoritative and democratically conferred policy judgments which provide context for the judicial function.⁷⁷

Separation of powers

A separation of powers seems to me to rise inevitably out of the conception of the rule of law, even if in a Westminster system the separation of the executive and legislative powers is blurred. The separation of the judicial power is necessary if law is to rule. Although more contestable, in addition to ensuring that state power is exercised only by the agency with constitutional responsibility to exercise it, separation of powers also serves constitutional values protective of liberty and ensures that right according to law is responsibility of courts exercising the judicial authority of the state.⁷⁸

The much stronger separation of powers provided by the Australian Constitution means that judicial review of administrative action in Australia and New Zealand has developed along different lines, particularly in matters such as focus on questions of validity and jurisdiction.⁷⁹ In New Zealand the

⁷⁵ *R v Lord Chancellor, ex parte Witham* [1998] QB 575 (QB) at 581.

⁷⁶ Compare *Western Australia v Commonwealth* (1995) 183 CLR 373.

⁷⁷ *Erven Warnink BV v J Townend & Sons (Hull) Ltd* [1979] AC 731 (HL) at 743 per Lord Diplock (and, in New Zealand: *Day v Mead* [1987] 2 NZLR 443 (CA) at 451 per Cooke P; *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 298 per Cooke P); compare *Lamb v Cotogno* (1987) 164 CLR 1 at 11–12, and *Esso Australia Resources Ltd v Federal Commissioner of Taxation* [1999] HCA 67, (1999) 201 CLR 49 at [23]–[28] per Gleeson CJ, Gaudron and Gummow JJ.

⁷⁸ See *Thomas v Mowbray* [2007] HCA 33, (2007) 233 CLR 307 at [307] per Kirby J (dissenting), citing *Albarran v Members of the Companies, Auditors and Liquidators Disciplinary Board* [2007] HCA 23, (2007) 231 CLR 350 at [98]–[99].

⁷⁹ Justice Perram's lively article "*Project Blue Sky: Invalidity and the Evolution of Consequences for Unlawful Administrative Action*" (2014) 21 AJ Admin L 62 highlights some of the differences in approach. See also Michael Taggart "'Australian Exceptionalism' in Judicial Review'" (2008) 36 FL Rev 1.

supervisory jurisdiction is more simple and applies common law values as free-standing ones not dependent on questions of *vires* or validity.⁸⁰

In New Zealand and the United Kingdom the powers of the executive arise from statute and the dwindling royal prerogative (apart from the limited necessary ancillary powers).⁸¹ Diplock LJ said of the prerogative that it was 350 years and a revolution too late for the courts to develop the powers of the executive under it.⁸² That may be compared with the view expressed in *Pape* by French CJ that the constitutional power of the executive under s 61 of the Constitution “is not a locked display cabinet in a constitutional museum [and] is not limited to statutory powers and the prerogative”.⁸³ The modern Australian development of s 61 of the Constitution as an original source of substantive powers is foreign to our constitution. In a constitutional order not controlled by a constitutional text it would seem rather too tolerant of executive authority.⁸⁴

I do not underestimate the strengths brought to judicial review in Australia by constitutional positioning. So I do not intend criticism. Without the protection of judicial function provided by a “capital C” constitution and strong separation of powers, the judicial review jurisdiction in New Zealand is vulnerable, as privative clauses in a number of recent statutes demonstrate.⁸⁵ But developments such as these make it necessary to take care about

⁸⁰ It is concerned with the protection of individual interests as well as “the extent of power and the legality of its exercise” (a distinction made by Brennan J in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36). Review does not turn on whether a public power is exercised under statute. Rationality and fairness in procedure are applied as free-standing values not dependent on *vires* or validity. There is no inhibition on determining the consequences of unlawful conduct. Whether error is vitiating is a matter for assessment: it does not require focus on invalidity through excess of jurisdiction. Remedies are discretionary.

⁸¹ Although with suggestion there is a “third source” of government authority which allows to the executive the freedom of action of individuals: see Bruce Harris “The ‘Third Source’ of Authority for Government Action” (1992) 108 LQR 626; *Malone v Metropolitan Police Commissioner* [1979] Ch 344 (Ch); *R v Ngan* [2007] NZSC 105, [2008] 2 NZLR 48 at [46] per Tipping J and [93]–[100] per McGrath J; and *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [217] per Tipping J. Compare *R v Somerset County Council, ex parte Fewings* [1995] 1 All ER 513 (QB) at 524 per Laws J; *Hamed v R* at [24]–[32] per Elias CJ; and Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [18.3.3(2)].

⁸² *British Broadcasting Corp v Johns* [1965] Ch 32 (CA) at 79.

⁸³ *Pape v Federal Commissioner of Taxation* [2009] HCA 23, (2009) 238 CLR 1 at [127] per French CJ; and also [214]–[215] per Gummow, Crennan and Bell JJ (but see *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1, (2016) 257 CLR 42 at [129] and following per Gageler J).

⁸⁴ It seems indeed to have been a development regarded with some surprise in Australia: see for example JJ Spigelman “Public Law and the Executive” (2010) 34 Aust Bar Rev 10 at 20.

⁸⁵ Graham Taylor in *Judicial Review: A New Zealand Perspective* speculates at [2.59] that judicial timidity (“the willingness of the courts to interpret privative clauses enacted since *Bulk Gas Users* to mean what they say”) may have encouraged a re-emergence of such clauses in recent years.

borrowing between jurisdictions, even closely related jurisdictions.

Human rights constitutionalism

Human rights has been said to have effected a revolution in how law is perceived. It has happened very fast. In 1988 the treatment of human rights in the then-current 4th edition of Halsbury's Laws of England occupied 45 pages only and even then, as Sir Robin Cooke said, "gingerly" under the title of "Foreign Relations Law".⁸⁶ Indeed when I argued cases in the 1980s that today would be positioned under human rights law, human rights was generally something that happened overseas or for which we sought common law recognition by invoking presumptions of consistency with international treaties.

The New Zealand Bill of Rights Act changed that in 1990, although it requires the judicial branch to give effect to legislation that cannot be interpreted to conform with the Bill of Rights (as is required where such interpretation "can" be given by s 6).⁸⁷ This is not greatly different from the presumptions of the common law protective of common law values and generally grouped today under the label "principle of legality".⁸⁸ In *Momcilovic v The Queen*, French CJ thought such common law rights had "properly been described as 'constitutional rights, even if ... not formally entrenched against legislative repeal'".⁸⁹

The application of the Bill of Rights Act to the judicial branch⁹⁰ means that the common law must conform to the statements of rights. That is also a position reached in Canada⁹¹ (without any comparable provision)⁹² and the

⁸⁶ Robin Cooke "Fundamentals" [1988] NZLJ 158 at 160.

⁸⁷ Section 4.

⁸⁸ In *Coco v The Queen* (1994) 179 CLR 427 at 437, Mason CJ, Brennan, Gaudron and McHugh JJ explained that the principle of legality meant that courts "should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language." They said (at 437-438) that "curial insistence on a clear expression of an unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights".

⁸⁹ *Momcilovic v The Queen* [2011] HCA 34, (2011) 245 CLR 1 at [45], citing TRS Allan "The Common Law as Constitution: Fundamental Rights and First Principles" in Cheryl Saunders (ed) *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, Sydney, 1996) 146 at 148.

⁹⁰ Section 3 of the New Zealand Bill of Rights Act provides that it applies to acts done by the legislative, executive and judicial branches of government.

⁹¹ See the "Charter values" authorities discussed above at n 14.

United Kingdom.⁹³ In the United Kingdom and in New Zealand continuity is stressed in the legislation and the courts have said the rights are inherent in the common law.

It is true that modern statements of rights, prompted by international obligations themselves based on the common law in large part, provide more comprehensive statements than we have had before. The New Zealand Bill of Rights Act includes a few rights that have not been part of the common law (such as the right to vote considered recently by the Supreme Court of the United Kingdom in *Moohan v Lord Advocate*⁹⁴ and the right not to be subjected to medical treatment without consent, recently considered by the New Zealand Supreme Court in *New Health*).⁹⁵ But generally the rights contained in our Bill of Rights Act are reflected in values of the common law, although they have the greater emphasis of statutory recognition that they are “fundamental” and the strong interpretative direction that the court is to give them effect whenever an enactment affecting rights can be interpreted consistently.⁹⁶ The statement of rights is not however exhaustive, as the terms of the legislation make clear. In New Zealand a tort of invasion of privacy has been recognised by the Court of Appeal despite the fact that the New Zealand Bill of Rights Act had deliberately not adopted a right of privacy.⁹⁷

In New Zealand, the Bill of Rights Act itself stresses continuity and “affirmation” and does not purport to be exclusive of other rights recognised by law.⁹⁸ In the United Kingdom, the judges in *R (Daly) v Secretary of State for Home Department* have also emphasised that the rights contained in the Convention and the legislation enacting it were recognition of rights “inherent and fundamental to democratic civilised society” and were not “creation” of rights.⁹⁹ Although Lord Rodger in *Watkins* took the view that “heroic efforts” to press the common law into service were rendered “unnecessary” by the

⁹² In Australia, neither the Charter of Human Rights and Responsibilities Act 2006 (Vic) nor the Human Rights Act 2004 (ACT) applies to the courts acting in their judicial capacity. As Mark Moshinsky identifies, a report of the Victorian Human Rights Consultation Committee in 2005 indicates that “there was a concern that if courts were subject to the obligations applicable to public authorities, this could require them to develop the common law in a particular way, and this could spell invalidity for the Charter in circumstances where the High Court has held that there is a single common law for all of Australia”: Mark Moshinsky “Bringing Legal Proceedings Against Public Authorities for Breach of the Charter of Human Rights and Responsibilities” (2014) 2 Judicial College of Victoria Online Journal 91 at 94.

⁹³ See for example *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776, [2008] Ch 57 at [25] (“in so far as possible” courts should “develop the common law in such a way as to give effect to Convention rights”).

⁹⁴ *Moohan v Lord Advocate* [2014] UKSC 67, [2015] AC 901.

⁹⁵ *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59.

⁹⁶ Long title and s 6.

⁹⁷ *Hosking v Runting* [2005] 1 NZLR 1 (CA).

⁹⁸ Long title and s 28.

⁹⁹ *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 at [30] per Lord Cooke; and see [23] per Lord Bingham.

enactment of the Human Rights Act,¹⁰⁰ more recently the Supreme Court of the United Kingdom has turned again to the common law.¹⁰¹ Speaking extra-judicially, Lady Hale points to “a growing awareness of the extent to which the UK’s constitutional principles should be at the forefront of the court’s analysis”. She spoke of “simple irritation that our proud traditions of UK constitutionalism seemed to have been forgotten”.¹⁰²

It is not to question the view of the value of common law protections and their continuing value to suggest that the experience with the Human Rights Act 1998 (UK) has highlighted the capacity of the common law to develop “constitutional” or “fundamental” rights.¹⁰³ This process was already underway before enactment of the Human Rights Act, although the focus was principally on rights of access to the courts and associated rights to confidential legal advice and to communicate for the purposes of obtaining legal advice,¹⁰⁴ both bedrock principles of the common law.

The claim of Lord Donaldson MR that “you have to look long and hard before you can detect any difference between the English common law and the principles set out in the Convention”¹⁰⁵ was however an exaggeration, as the cases lost by the United Kingdom in Strasbourg and the claims of right not accepted in the domestic courts show.¹⁰⁶ That is not to say that the values drawn on in the European Convention on Human Rights were not reflected in the common law. But they often did not seem to amount to enforceable rights and were highly vulnerable to legislative and administrative erosion, in both the United Kingdom and New Zealand. The Human Rights Act (UK) and the New Zealand Bill of Rights Act were necessary to give domestic effect to many human rights and for those already more established in domestic law they added the legitimacy of democratically conferred and accessible statements.¹⁰⁷

¹⁰⁰ *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 AC 395 at [64].

¹⁰¹ Examples include *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531; *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115; *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455; *R (HS2 Action Alliance Ltd) v Secretary of State for Transport*; *A v British Broadcasting Corp* [2014] UKSC 25, [2015] AC 588; and *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 4 All ER 903.

¹⁰² Lady Hale “UK Constitutionalism on the March?” at [34].

¹⁰³ A point made by Mark Elliott in “Beyond the European Convention: Human Rights and the Common Law”.

¹⁰⁴ See for example *ex parte Witham*, *ex parte Leech* and *ex parte Simms*.

¹⁰⁵ *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 (CA) at 717.

¹⁰⁶ For example, *Brind* itself; *R v Ministry of Defence, ex parte Smith* [1996] QB 517 (CA).

¹⁰⁷ In *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 at [42], Lord Bingham referred to the “wholly democratic mandate” given to the courts by the Human Rights Act (UK). Such legitimacy is valuable in answering charges of creativity in application of s 3 as in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

Writing extra-judicially, Gageler J has suggested that in a constitutional setting where political accountability is the usual protection, the judicial power is “extraordinary constitutional constraint”, legitimate principally where political accountability is weak.¹⁰⁸ That accords with decisions of the High Court that liberty is secured under the constitution by the dispersal of power and the institutional separation of the judicial power and that it is only “to that end” that the Constitution secures the independence of Chapter III judges.¹⁰⁹ So far Australia does not seem to be attracted by the suggestion of Lord Bingham that the rule of law includes human rights.¹¹⁰ Whether it does has not had to be considered seriously in other jurisdictions with enacted statements of rights, whether they are constitutionally entrenched (as in Canada), or the weaker “parliamentary” model (adopted in New Zealand, the United Kingdom, Victoria and ACT).

It is not realistic to expect courts to undertake comprehensive recognition of rights. It is not the common law method and it is right to be concerned about judicial legitimacy in any such a project. So while in the absence of an enacted federal statement of rights in Australia there may be some movement in common law recognition, development of a comprehensive protection of rights is not I think in prospect. Our substantive law in this constitutional space is likely then to further diverge. Perhaps, as importantly, our method of constitutional argument in law and our vocabulary and presentation, are likely to be different.

Reconciling sovereignty and the interests of first peoples

In an interview shortly before her retirement, Chief Justice McLachlin of Canada spoke of four “defining” moments in Canadian constitutional history.¹¹¹ Two were political actions: confederation and enactment of the Canadian Charter of Rights and Freedoms. One was the decision of the Privy Council applying the “living tree” metaphor and holding that women were indeed “persons”.¹¹² The fourth defining constitutional moment was identified as the affirmation by the Supreme Court of Canada of “the need to reconcile First Nations’ interests with Crown sovereignty”. This “defining” constitutional moment is one being consciously addressed by the Court in

¹⁰⁸ Stephen Gageler “Beyond the Text: A Vision of the Structure and Function of the Constitution” (2009) 32 Aust Bar Rev 138 at 152.

¹⁰⁹ *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11–12 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ, drawing on *R v Davison* (1954) 90 CLR 353 at 380–381 per Kitto J and *R v Trade Practices Tribunal, ex parte Tasmanian Breweries Pty Ltd* at 390–393 per Windeyer J, and drawing on inherited constitutional history and traditions. See also *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1, (2016) 257 CLR 42 at [97] per Bell J.

¹¹⁰ Lord Bingham *The Rule of Law* (Penguin Books, London, 2010) at 66–67.

¹¹¹ Beverley McLachlin “Defining Moments: The Canadian Constitution” (speech to the Canadian Club of Ottawa, Ontario, 5 February 2013).

¹¹² *Edwards v Attorney-General for Canada* [1930] AC 124 (PC).

cases such as *Haida Nation v British Columbia (Minister of Forests)*, *Manitoba Metis Federation Inc v Canada* and *Tsilhqot'in Nation v British Columbia*.¹¹³

In the past it was doctrine developed by the courts under which the Crown was held not to owe legal duties to native populations in Canada, Australia, and New Zealand. The view was that governmental duties cannot be owed to a distinct segment of society because government must be free to act in the interests of all. The impediment was expressed as a constitutional one, derived from basic rule of law principle. Instead, it was thought that obligations owed to native peoples (whether under treaties or through the consequences of acquisition of sovereignty in other ways) were “political trust”, not legal duties which could be enforced in the courts.¹¹⁴

In Canada, Australia, and New Zealand political trust has now been rejected by the courts as an adequate account of the relationship between native peoples and the Crown: in *Guerin*¹¹⁵ in Canada, in *Mabo (No 2)*¹¹⁶ in Australia and in *Wakatu*¹¹⁷ in New Zealand. In the later case of *Wewaykum Indian Band v Canada*,¹¹⁸ Binnie J described the “enduring contribution of *Guerin*” as having been to recognise that “the concept of political trust did not exhaust the potential legal character of the multitude of relationships between the Crown and aboriginal people”, taking the view that “quasi-property”:¹¹⁹

... could not be put on the same footing as a government benefits program. The latter will generally give rise to public law remedies only. The former raises considerations “in the nature of a private law duty”

¹¹³ *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73, [2004] 3 SCR 511; *Manitoba Metis Federation Inc v Canada (Attorney-General)* 2013 SCC 14, [2013] 1 SCR 623; *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257.

¹¹⁴ *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72 at 78; *Tito v Waddell (No 2)* [1977] Ch 106 (Ch); and see PG McHugh “A History of the Modern Jurisprudence of Aboriginal Rights – Some Observations on the Journey So Far” in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds) *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, Oxford, 2009) 209 at 209.

¹¹⁵ *Guerin v The Queen* [1984] 2 SCR 335. See Dickson, Beetz, Chouinard and Lamer JJ at 379 and Ritchie, McIntyre and Wilson JJ at 350–352.

¹¹⁶ *Mabo v Queensland (No 2)* (1992) 175 CLR 1. Toohey J distinguished the political trust cases at 201–202. Dawson J considered a fiduciary obligation could arise out of a particular interest in land, but thought no such particular interest was made out in *Mabo (No 2)*: at 163–167. Other judges were less definite, but did not rule out the possibility of fiduciary duties: see Deane and Gaudron JJ at 112–113 and Brennan J at 60.

¹¹⁷ *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423. See Elias CJ at [367]–[391], Glazebrook J at [580]–[582] and Arnold and O’Regan JJ at [785]–[786].

¹¹⁸ *Wewaykum Indian Band v Canada* 2002 SCC 79, [2002] 4 SCR 245.

¹¹⁹ At [74].

Freed of political trust doctrine, court decisions in all three jurisdictions have also recognised property according to native custom unless unmistakably removed by law.¹²⁰ In Canada and in New Zealand Crown dealings in native property have been held to give rise to obligations in equity enforceable in the courts.¹²¹ The Supreme Court of Canada has said that “clear government commitments” from the Royal Proclamation of 1763 onwards set up duties comparable to those found in the private sphere in equity which go “beyond a general obligation to the public or sectors of the public”.¹²²

In Canada, the existing aboriginal and treaty rights of the aboriginal peoples of Canada are now constitutionally entrenched by s 35.¹²³ In New Zealand we do not have an equivalent to s 35 of the Canadian Constitution Act 1982, but formal undertakings of special responsibility by the Crown are found in New Zealand in the Treaty of Waitangi and in legislation which refers to it. By the Treaty Maori ceded the power of government in return for guarantees of property and other rights. We are still working these implications through. In *Wakatu* we held that a specific transaction between the Crown and Maori proprietors in Nelson gave rise to fiduciary obligations, drawing on Canadian case-law. We have not had to explore whether, more fundamentally, the clearance of native property under the right of pre-emption obtained through the Treaty gave rise to similar obligations, and may never have to.

In Australia, the Crown has not been held to owe fiduciary duties arising out of customary interests in land. But, as Toohey J dissenting in *Mabo (No 2)* pointed out, “[t]he power to destroy or impair a people’s interests [in that case through the granting of leases] is extraordinary”.¹²⁴ That is the stuff of equity. It is notable that although Brennan CJ dissented in the result in *Wik Peoples v Queensland* because of the terms of the empowering statute in issue there, he accepted that, where discretionary power “whether statutory or not” is conferred for exercise on behalf of or for the benefit of others, fiduciary obligations could arise on established equitable principle or by analogy.¹²⁵

¹²⁰ See for example *Calder v Attorney-General of British Columbia* [1973] SCR 313 and *Delgamuukw v British Columbia* [1997] 3 SCR 1010 in Canada; *Mabo (No 2)* in Australia; and *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) in New Zealand.

¹²¹ In Canada in *Guerin and Wewaykum Indian Band*; and in New Zealand in *Proprietors of Wakatu*.

¹²² *Alberta v Elder Advocates of Alberta Society* 2011 SCC 24, [2011] 2 SCR 261 at [48].

¹²³ *R v Sparrow* [1990] 1 SCR 1075. The power conferred under the Constitution on Parliament to legislate for Indian land must be reconciled with s 35 of the Constitution Act 1982 under which the “existing aboriginal and treaty rights of the aboriginal peoples of Canada are ... recognized and affirmed”. The Supreme Court has required the validity of legislation affecting rights and interests to be balanced against the proper objectives being pursued: *Tsilhqot’in Nation v British Columbia* at [13], referring to *Sparrow* at 1113–19.

¹²⁴ At 203.

¹²⁵ *Wik Peoples v Queensland* (1996) 187 CLR 1 at 96–97.

It is not inconceivable, then, that the response of the legal order to the special claims of native populations may continue to require further consideration under principles of common law and equity. This repositioning of the relationship between native populations and the state seems to me to be properly understood as constitutional shift because it is concerned with matters which are foundational of the legal order and the way in which distinct native populations with special claims to priority are to be treated.

Conclusion

In the working out of common law constitutionalism, it is possible to see the development of a sense of the constitution. Such culture of constitutionality is the best protection for the balances and protections sought to be obtained under a primary constitutional text too. Common law constitutionalism is therefore of value even in a jurisdiction with a "capital C" constitution. In an uncontrolled constitution it is life's blood. Because the common law is a method of change, we should expect that the part of the law we call constitutional will continue to adapt to respond to new constitutional and social needs as they arise. It may develop in ways we might think from our vantage point to be quite unexpected, to meet the needs of the future.
