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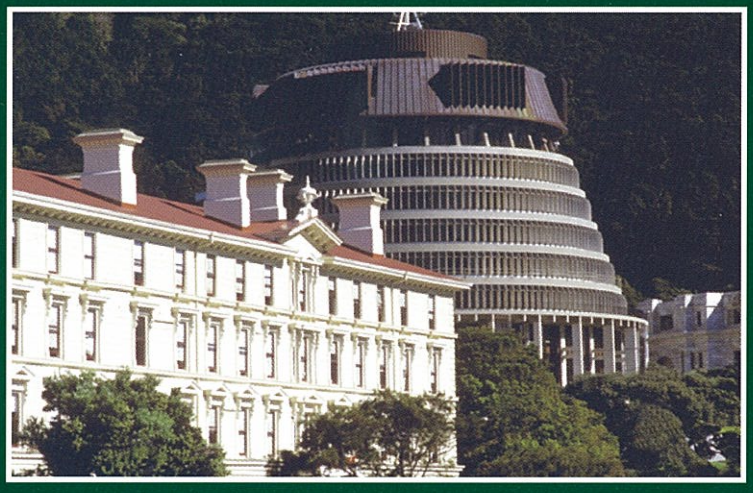

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SPECIAL CONFERENCE ISSUE: COURTS

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Margaret Wilson
Mark Tushnet
George Williams
Dennis Davis
Treasa Dunworth
Ronald Sackville
Lord Cooke of Thorndon
Sir Ivor Richardson

VICTORIA UNIVERSITY OF WELLINGTON
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THE BASIC THEMES

Lord Cooke of Thorndon*

Lord Cooke began his remarks at the final session of the conference (a panel discussion on Supreme Court reform and other topical issues) by returning to some themes of the first session — in particular, some raised by Professor Mark Tushnet and Professor George Williams.

Two expressions bandied about are "sovereignty" and "judicial supremacy" — the latter almost exclusively used by those who dispute the existence of any such alleged doctrine. Manifestly in a unitary state there is a vast field of legislation into which the courts do not intrude, accepting this as the rightful province of the political arm of government.

"Sovereignty" is perhaps equally misleading. A state may accurately be called sovereign; its people may be called sovereign under a concept gaining ground and expounded by Kirby J of the High Court of Australia[1] and Michael Kidd from the floor at this session. But in a democracy that means *all* the people, not merely a majority of them. The people as a whole, the entire society of which Michael Kidd has just spoken, may be seen to have established various agencies or arms of government — in our system the monarch or sovereign, an executive government, an elected assembly, a judicature. In a federal system the apparatus is more elaborate, as George Williams brought out. In either case, though, the system is one of checks and balances, of interaction. To isolate any one institution and claim for it sovereignty is a distortion and can even savour of arrogance.

* Distinguished Fellow, Faculty of Law, Victoria University of Wellington. After he retired in 1996 as President of the Court of Appeal, Lord Cooke sat until 2001 as a Lord of Appeal in the United Kingdom and in the Judicial Committee of the Privy Council, of which he had been a member since 1977.

1 See Michael Kirby "Popular Sovereignty and the True Foundation of the Australian Constitution" in his collected papers *Through the World's Eye* (Federation Press, Leichhardt, 2000) 145, and xvi for discussion in a foreword.

The better view is encapsulated by Professor Philip Joseph in his recent Oxford paper for the Society of Legal Scholars, "Parliament, the Courts, and the Collaborative Enterprise".[2] When Sir Ivor Richardson and I were members of the judiciary together, the two best known Court of Appeal cases were probably the first Maori Council case[3] and *Baigent*,[4] though Sir Ivor was away when *Baigent* was heard. Both were collaborative cases: in both Parliament had legislated in very broad terms; the function of the courts in both was to give positive effect to the parliamentary legislation.

The idea that there are some truly basic human rights which, if at all, Parliament can only override by unrealistically specific language was once heterodox. Now that it is adhered to by the Chief Justice of New Zealand and the Lord Chief Justice of England and Wales,[5] it can hardly be so dismissed. It is well illustrated by *Anufrijeva*.[6] For an allegedly "weak" form of judicial review, that House of Lords case is pretty strong.

These rights include various aspects of access to justice. This gives rise to the fortunately academic (perhaps) question of collision under section 3(2) of the Supreme Court Act 2003.[7] Yet, judging by some remarks by a member of the parliamentary committee by whom the Supreme Court Bill was considered, it cannot confidently be ruled out altogether. There was a suggestion, so I understood, that if judges gave a decision disapproved of by the government of the day, the government would be entitled to put through legislation to sack those judges. On that approach the concepts of the rule of law and the sovereignty of Parliament could indeed clash.

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2 P A Joseph "Parliament, the Courts, and the Collaborative Enterprise" (Paper presented at the Society of Legal Scholars Annual Conference, St Catherine's College, Oxford, 17–20 September 2003).

3 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (State Owned Enterprises Act 1986: Treaty of Waitangi: lands).

4 *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (New Zealand Bill of Rights Act 1990: remedy for unreasonable search).

5 See for example Rt Hon Dame Sian Elias "Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round" (2003) 14 PLR 148; Sir William Wade and Christopher Forsyth *Administrative Law* (8 ed, Oxford University Press, Oxford, 2000) 28, n 38.

6 *R (on the application of Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36; [2003] 3 All ER 827 (fundamental common law principles held to require notification of decision before rights could be adversely affected; statutory regulations providing that welfare benefit should cease when decision "recorded" held overridden).

7 "Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament."