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The Development of Judicial Review

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Abstract

This paper examines the development of judicial review. In doing so, it concentrates on the changes in New Zealand as well as in other common-law countries. The standard with which courts review the exercise of executive powers has changed over the recent decades. Beginning with the fundamental principles of judiciary, and the former judicial approach, the paper addresses these trends. While courts usually applied a restrictive standard of scrutiny and widely referred to barely or even non-justiciable fields of executive action in the past, such as national security, defence, and international relations, they have become more willing to go behind the arguments and follow a broader and deeper standard. These alterations concern, among others, claims of non-disclosure, the substantive decision-finding, the consideration of international law, and the review of legislation. Furthermore, courts have increasingly emphasised the validity of individual rights and principles of procedural fairness. The paper also outlines some existing limitations to judicial review, before analysing the current reform discussions, which most notably refer to the enhancement of judicial authority to invalidate unconstitutional legislation. In this context, an overview describing the power of the Federal Constitutional Court of Germany will be given. In the light of the fact that the research topic contains a broad thematic spectrum, a selection of key aspects was required.

Word length

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I Introduction

The meaning of judicial review cannot be overstated. This is all the more true when there is talk of constitutional foundations. It is generally acknowledged that the review of governmental actions by independent judges is “a cardinal feature of the modern democratic state”.¹ The High Court of Australia summarised:²

Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.

In this context, depending on the constitutional architecture, the extent of judicial scrutiny is different. In countries without any supreme constitutional law, courts have the function to review executive action in the sense of the above-mentioned High Court’s definition, but not legislative acts.³ This is the case in New Zealand, as it has no superior constitution that binds sovereign legislature and enables courts to scrutinise parliamentary decisions. Under constitutional systems which have a higher ranked (written) constitution or, at least, an overriding bill of rights, both executive and legislative actions are subject to review by the judiciary. As far as provisions and principles of the constitution are concerned, the national courts or, in some countries, specially appointed constitutional courts⁴ monitor legislative compliance with constitutional requirements and declare an Act of Parliament, where necessary, invalid under the constitution.⁵

Regardless of whether constitutional law has supremacy and, hence, extends the scope of judicial scrutiny, independent courts are an essential part of a liberal and democratic fundamental order, and an indispensable safeguard of the individual rights.⁶ As indicated by the High Court of Australia, sufficient judicial review is a crucial element of the rule of law. In this regard, the rule of law requires independent and impartial judges in order to enforce some of its essential elements, such as the legality and accountability of the

¹ *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 at [42].

² *Church of Scientology v Woodward* [1982] HCA 78, [1982] 154 CLR 25 at 70.

³ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers Ltd, Wellington, 2014) at 18.

⁴ Eg, the Federal Constitutional Court of Germany.

⁵ Joseph, above n 3, at 18–19.

⁶ Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016) at 19–20.

government under the law.⁷ A government that held the power of both making the laws and determining whether it had contravened them would not comply with the rule of law.⁸ Furthermore, there exists a “normative synergy” between legislative and judicial branch.⁹ Once Parliament as sovereign lawmaker has implemented statutory provisions, they will become subject to judicial interpretation, and their gaps will be filled by courts.¹⁰

While New Zealand’s courts have followed the doctrine of parliamentary sovereignty,¹¹ and widely referred to fields of governmental prerogative which are non-justiciable, barely justiciable, or require the court’s deference in the past,¹² there has been a significant change in the judicial approach towards broader and deeper powers of review.

The following examination concerns the above-described judicial review of the exercise of powers by public authorities. Its developments will be discussed as well as the fundamental principles and the restraints of judiciary. Finally, some red-hot reform discussions with regard to an enhancement of judicial capacities will be examined. In this context, the paper outlines some comparative aspects describing the power of the Federal Constitutional Court of Germany with particular respect to the review and nullification of legislation.

II Development of Judicial Review and Reform Discussions

A Place and Fundamental Principles

As described, judicial review is an institution of constitutional momentousness that is needed to effectuate the rule of law. At least since *Entick v Carrington*,¹³ it is clear that the courts are entrusted with the task of safeguarding the citizens from bureaucratic and executive misuse of power.¹⁴ In this context, the extent and scope of judicial scrutiny has

⁷ Palmer and Butler, above n 6, at 25–26. – See also World Justice Project “Rule of Law Index 2016 report” (2016) <<http://worldjusticeproject.org>> at 9.

⁸ Dyson Heydon “What Do We Mean By the Rule of Law” in Richard Ekins (ed) *Modern Challenges to the Rule of Law* (LexisNexis, Wellington, 2011) 15 at 21.

⁹ Danilo Zolo “The Rule of Law: A Critical Reappraisal” in Pietro Costa and Danilo Zolo (eds) *The Rule of Law: History, Theory and Criticism* (Springer, Dordrecht, 2007) 3 at 8.

¹⁰ Zolo, above n 9, at 8.

¹¹ Constitution Act 1986, s 15(1).

¹² *Choudry v Attorney-General* [1999] 3 NZLR 399 (CA) at [13].

¹³ *Entick v Carrington* [1765] EWHC KB J98.

¹⁴ Joseph, above n 3, at 853.

to be clarified (see below 1) as well as the fundamental principles which apply within the administration of justice (see below 2).

1 Foundations and point of reference

One essential preliminary aspect when examining the development of judicial review is the question of who and what is subject to the courts' scrutiny.

The core statement by *Philip Joseph* that “[r]ights of appeal are statutory; powers of judicial review are inherent”¹⁵ concisely describes the fact that rights of appeal must be conferred by Parliament, while the judicial review represents the High Court’s inherent and constituent power to adjudicate on the legality of executive actions.¹⁶ The superior courts have historically exercised jurisdiction to scrutinise the decisions of public bodies under an ancient form of common law remedy that is known as the prerogative writs which originally reflected the discretionary prerogative and extraordinary power of the monarch, acting through the Crown’s courts.¹⁷ Over time, the English superior courts have developed and refined the original instrument, that was finally adopted by New Zealand as part of common law. According to s 16 of the Judicature Act 1908, New Zealand’s High Court has continued to have all the judicial powers that it already had before the Judicature Act 1908 came into effect. The authority of judicial review is an integral component of the latter pre-statutory legal past. The posterior Judicature Amendment Act 1972 was enacted in order to implement a simplified statutory procedure for reviewing the exercise of powers derived from statute, but it has not transformed either the inherent nature or the scope of judicial review.¹⁸ The Senior Courts Act 2016, which will come into force on 1 March 2017 in its main parts, upholds this authority.¹⁹

In the past, the question as to whether a specific exercise of power was susceptible to review was relatively simple, and was answered in a formalistic manner. Actions and decisions

¹⁵ Joseph, above n 3, at 861.

¹⁶ In the light of the fact that the Supreme Court’s jurisdiction (now that of the High Court) was set out in the Supreme Court Ordinances of 1841 and 1844, the question as to whether judicial review may also be considered as statutory power is arguable.

¹⁷ For detailed information about the historical basis of prerogative writs, see Joseph, above n 3, at 1149–1150.

¹⁸ Joseph, above n 3, at 861. – Section 27(2) of the New Zealand Bill of Rights Act 1990 does also not constitute the powers of judicial review; see Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 1495.

¹⁹ Senior Courts Act 2016, s 12.

taken on the basis of statutory authority were reviewable.²⁰ But it is also acknowledged that the exercise of non-statutory public powers remains subject to review under common law.²¹ All in all, there is no bright-line rule that sets out as to which acts of which bodies are amenable to judicial review.²² According to the High Court, “[j]usticiability of necessity is not susceptible of neat rules”.²³ Therefore, it depends on the context, the nature, and the consequences of the exercise of public authority whether the action or decision is susceptible to review or not, and to which extent.²⁴ In line with this approach, New Zealand’s courts have incrementally enlarged their review jurisdiction in reaction to the changing nature of administrative and governmental conduct, as well as pursuant to the shifting understanding of their judicial responsibility.²⁵ This development has widened the spectrum of persons and bodies which are amenable to judicial scrutiny.²⁶ In correlation with this, many types of public decisions can be challenged by way of judicial review. In principle, the exercises of power are reviewable that:²⁷

... in substance are public or have important public consequences, however their origins and the persons or bodies exercising them might be characterised, ...

In summary, it can be stated that amenability to judicial review is complex and not entirely clear due to the courts’ shifting approach. At the most basic level, a decision, an action, a refusal to decide, or the failure to act of a public body, such as a government department, a local authority or another body exercising a public law function, are potentially reviewable if the individual claimant or plaintiff can assert a substantive gravamen, meaning that he or she is adversely affected by the exercise of that power or the failure to act.

²⁰ Mark Elliott “Judicial Review’s Scope, Foundations and Purposes: Joining the Dots” [2012] NZ L Rev 75 at 82.

²¹ *Mercury Energy Ltd v Electricity Corp of New Zealand Ltd* [1994] NZPC 1, [1994] 2 NZLR 385 at 388.

²² Matthew Smith *The New Zealand Judicial Review Handbook* (Brookers, Wellington, 2011) at 486.

²³ *Bradley v Attorney-General* [1988] 2 NZLR 454 (HC) at 465.

²⁴ Joseph, above n 3, at 880.

²⁵ At 880.

²⁶ At 880; Smith, above n 22, at 486–487.

²⁷ *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA) at 11; *Easton v Human Rights Commission* [2009] NZHC 805, [2009] NZAR 575 at [21]. – See also *University of Auckland v Tertiary Education Commission* [2004] 2 NZLR 668 (HC) at [54].

2 *Legal values and fundamental principles*

The manner in which justice is administered is subject to legal values, namely the judges' independence and impartiality, that are essential for the judicial branch under the rule of law.²⁸ Furthermore, general procedural principles and rules of assessment, such as procedural fairness, the right to a fair hearing, and judicial self-restraint, apply. The entirety of these principles is the complete constitutional counterdraft to the conditions of judicial lawlessness and tyranny which Josef K. had to endure in *Franz Kafka's* "The Trial" (original German title: "Der Prozess").²⁹

(a) Judicial independence and impartiality

Judicial independence and impartiality are recognised as constitutional principles that are fundamental to any system of justice and any community governed by the rule of law, so in New Zealand.³⁰

To be exactly, it can be said that the judges' independence is the sub-principle which ensures that judicial review can be administered impartially and fearlessly.³¹ At a practical level, it means that, at the inauguration into office, judges have to swear the judicial oath that they "will do right to all manner of people after the laws and usages of New Zealand, without fear or favour, affection or ill will".³² But there are also some underpinning elements in this regard. The Supreme Court of Canada basically differentiated between the *individual* independence, namely the security of tenure as well as the financial security, and the *collective* or rather *institutional* independence of courts regarding matters directly affecting the exercise of their judicial functions.³³ The latter aspect was taken up by *Anthony Mason* when emphasising that independence is not only restricted to the judges' freedom of adjudication without actual and apparent governmental interference, but it

²⁸ Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (October 2014) at 13; World Justice Project, above n 7, at 9.

²⁹ Published posthumously Franz Kafka *Der Prozess* (Verlag Die Schmiede, Berlin, 1925).

³⁰ *Wikio v Attorney-General* [2008] NZHC 1104, [2008] 8 HRNZ 544 at [12]; *Wilson v Attorney-General* [2010] NZHC 1678, [2011] 1 NZLR 399 at [40]. – In terms of criminal procedures, these principles are affirmed in s 25(a) of the New Zealand Bill of Rights Act 1990.

³¹ In this understanding, *R v Poumako* [2000] 2 NZLR 695 (CA) at [103]; *Wilson v Attorney-General*, above n 30, at [40]; Law Commission *Access to Court Records* (NZLC R93, 2006) at 59–60.

³² Oaths and Declarations Act 1957, s 18.

³³ *R v Valente* [1985] 2 SCR 673 (SCC) at [20], [27], [40] and [47].

rather “extends to the institutional autonomy of the courts”.³⁴ As far as can be seen, New Zealand’s courts and legislation have particularly emphasised the individual dimension of judicial independence. The Constitution Act 1986 protects judges against reduction of salary during their tenure, and removal from office, except dismissal on grounds of misbehaviour or incapacity.³⁵ These independence-enhancing provisions, which are also included in the recent draft constitution by *Geoffrey Palmer* and *Andrew Butler*,³⁶ must be seen as declaratory rather than as constitutive, as they reflect well-recognised maxims.³⁷ They have been availed and refined by the courts which have made clear that, beside security of tenure and salary, judges are immune from liability for the exercise of their function and have to subordinate themselves only to overruling dicta of appellate courts.³⁸

(b) Further principles

As indicated above, there are further principles that apply to judicial review. While some of them concern the procedure, others relate to substantive aspects of judicial decision-making.

One crucial element is the principle of natural justice or rather procedural fairness. The term *natural justice* is often used to describe a general concept, but it has, according to Lord Diplock’s clarification and preference pointed out in *O’Reilly v Mackman*,³⁹ increasingly been replaced by the general duty to act and adjudicate fairly.⁴⁰ Despite the fact that since *Ridge v Baldwin* in 1963 the principle has been applied also to non-judicial

³⁴ Anthony Mason “Judicial Independence and the Separation of Powers – Some Problems Old and New” (1990) 13 UNSW Law Journal 173 at 174. – See also Sian Elias “‘The Next Revisit’: Judicial Independence Seven Years On” (2004) 10 Canterbury L Rev 217 at 219, who pointed out that the question of institutional independence is controversial, and, referring to the Beijing Principles of 1995 (paras 36 and 37), advocated for more administrative autonomy for the judiciary.

³⁵ Constitution Act 1986, ss 23 and 24.

³⁶ Palmer and Butler, above n 6, at 58–59, arts 65 and 66 of the draft text with slight modifications in comparison to the Constitution Act 1986.

³⁷ Kenneth J Keith “On the Constitution of New Zealand” in Department of the Prime Minister and Cabinet (ed) *Cabinet Manual 2008* (New Zealand Government, Wellington, 2008) 1 at 2.

³⁸ *Wilson v Attorney-General*, above n 30, at [40].

³⁹ *O’Reilly v Mackman* [1983] 2 AC 237 (HL) at 275.

⁴⁰ Harry Woolf, Jeffrey Jowell and Andrew Le Sueur *Principles of Judicial Review* (Sweet & Maxwell, London, 1999) at [7-001]. – But nevertheless, the term “natural justice” has stood the test of time, Butler and Butler, above n 18, at 61.

administrative decisions,⁴¹ the duties of courts and quasi-judicial bodies are considered as still being stricter and more onerous than what is expected from governmental decision makers, especially in cases where strong policy elements are predominant.⁴² The elements that are part of the maxim of natural justice are many-faceted, and the full meaning of the concept only becomes accessible by considering the case law.⁴³ Under New Zealand law, the entirety of all (sub-)principles is affirmed by the guarantee in s 27(1) of the Bill of Rights,⁴⁴ which also binds courts in exercising judicial review.⁴⁵ The Court of Appeal recently stated:⁴⁶

The two key principles of natural justice are that the parties be given adequate notice and opportunity to be heard (*audi alteram partem*^[47]) and that the decision-maker be disinterested and unbiased (*nemo debet esse iudex in propria sua causa*).

As far as courts are concerned, the latter aspect has a strong connection to and overlap with the above-mentioned principle of impartiality.⁴⁸ The two broad categories outlined by the Court of Appeal are seen as umbrella terms for a range of individual procedural rights, such as the “rights to notice ..., to contradict, to representation, to an impartial determination, to an oral hearing, and to consultation in advance”.⁴⁹ In 1999, the Supreme Court of Canada reviewed case law and set out a non-conclusive list of five factors that would be relevant

⁴¹ *Ridge v Baldwin* [1963] UKHL 2, [1964] AC 40. – See in New Zealand: *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56 at [11] and [25]. – See in Australia: *Banks v Transport Regulation Board* [1968] HCA 23, [1968] 119 CLR 222 at [19] and [38].

⁴² *Diagnostic Medlab Ltd v Auckland District Health Board* [2007] NZHC 177, [2007] 2 NZLR 832 at [51]; *Martin v Ryan* [1990] 2 NZLR 209 (HC) at 226.

⁴³ Butler and Butler, above n 18, at 1481. – At 1481–1484, they provide a list of individual guarantees of natural justice and some offending actions.

⁴⁴ *Drew v Attorney-General* [2001] NZCA 207, [2002] 1 NZLR 58 at [28] and [79].

⁴⁵ *Pickering v Police* [1999] NZHC 1, [1999] 5 HRNZ 154 at [15]; *Taito v R* [2003] 3 NZLR 577 (PC) at 600.

⁴⁶ *Combined Beneficiaries Union Inc v Auckland City COGS Committee*, above n 41, at [11].

⁴⁷ *Audiatur et altera pars*.

⁴⁸ Apart from the topic of this paper, with respect to criminal proceedings, s 25 of the Bill of Rights Act contains some essential minimum standards of procedural fairness, namely the right to a fair and public hearing by an independent and impartial court.

⁴⁹ Butler and Butler, above n 18, at 1485.

to determining the extent of the requirement of procedural fairness.⁵⁰ In summary the Court pointed out that:⁵¹

The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

Beside the already mentioned rights, courts must grant the parties a fair preparation. This means that parties have the fundamental right to know the case with its evidential foundations, and to have full access to the facts and materials that are relevant to this matter.⁵² It is also acknowledged that the access to the subject-matter can be limited.⁵³ The permissible extent of exceptions, particularly the court-made requirements for executive claims of non-disclosure have significantly changed over time. These developments should be shown below.⁵⁴

Another principle, whose scope will be examined in the further course of this paper,⁵⁵ is the principle of judicial self-restraint. In more recent publications, there is also talk of “review with a tolerant eye”.⁵⁶ This describes a court-established approach to curb judicial power of appraisal in certain fields of public actions wherein courts are reluctant to interfere with discretionary powers given to decision-makers.⁵⁷ With reference to the Court of Appeal,⁵⁸ New Zealand’s High Court succinctly summarised that a self-fettering judiciary may be based upon:⁵⁹

⁵⁰ *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 (SCC) at [23]–[28].

⁵¹ At [28].

⁵² *Henry v Family Court at Auckland* [2007] NZFLR 167 (HC) at [27].

⁵³ At [27]. – See also Butler and Butler, above n 18, at 1485–1486, who see very little scope for justified limitations pursuant to s 5 of the Bill of Rights Act.

⁵⁴ See below II B 3 (a).

⁵⁵ See below II B 3.

⁵⁶ Smith, above n 22, at 555.

⁵⁷ Woolf, Jowell and Le Sueur, above n 40, at [1-007]–[1-009].

⁵⁸ *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 546.

⁵⁹ *New Zealand Public Service Assoc Inc v Hamilton City Council* [1997] 1 NZLR 30 (HC) at 35.

... [a] democratic imperative; (that is, the deciders derive authority from an electoral mandate, to which they are accountable); secondly, a constitutional imperative, (that government, not Courts, decides fundamental policy); and thirdly, an imperative that Courts in many, if not most areas, lack the relevant expertise to make such assessments.

This also affects the extra-judicial activism and comments out of court,⁶⁰ but particularly refers to the intensity of review of the executive.

B The Changing Approach of Judicial Review

As indicated above, the standard with which the courts review the exercise of powers by public authorities has changed over the recent decades. This development particularly relates to the former restrictive standard of scrutiny when reviewing governmental actions in the fields of defence, national security and international relations. As those fields primordially constituted judicial deference and abstention when reviewing executive decisions concerning these matters in the past,⁶¹ courts have become more willing to exercise the judicature's power more widely.⁶² They follow a more open approach and apply a deeper legal test nowadays.

1 Grounds of review

Before examining some noticeable areas, wherein the scope of review has been evolved, the courts' grounds for reversing an executive decision will be briefly outlined.

According to the fundamental exposition by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*, the grounds of judicial review can be conventionally classified into three categories: illegality, irrationality, and procedural impropriety,⁶³ although these groupings are not conclusive and mutually exclusive.⁶⁴

⁶⁰ Andrew P Stockley "Judicial Independence: The New Zealand Experience" (1997) 3 Aust J Leg Hist 145 at 169.

⁶¹ See Kenneth J Keith "Freedom of Information and International Law" in Jack Beatson and Yvonne Cripps (eds) *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (Oxford University Press, Oxford, 2000) 349 at 351–352. – See also Law Commission *Final Report on Emergencies* (NZLC R22, 1991) at [5.31].

⁶² Keith, above n 61, at 352; Law Commission, above n 61, at [4.52].

⁶³ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) at 410–411.

⁶⁴ Michael Fordham *Judicial Review Handbook* (6th ed, Hart Publishing, Oxford, 2012) at 487.

Further types of grounds may be added in the course of time.⁶⁵ New Zealand's courts have adopted this separated grounds of review,⁶⁶ among others, by emphasising that Diplock's classification also represents the firmly acknowledged approach in New Zealand,⁶⁷ and by describing the test of judicial scrutiny as the court's consideration whether the individual public authority has acted "in accordance with law, fairly and reasonably".⁶⁸

According to Diplock's triad, the justiciable principle of legality requires that the decision-makers take action within the scope of the empowering statute and the requirements which are set out there.⁶⁹ This involves that the public body and the acting person understand the governing law correctly and give effect to it.⁷⁰ In this regard, New Zealand's Supreme Court stated that courts would consider decisions of public bodies "that are outside the limits of their powers" as misuse and reverse them.⁷¹ This would be the case if the action was taken by the wrong person (eg unlawful delegation), if a discretionary power was abdicated or even abused, or if a reviewable error in making legal or factual findings was committed (eg a public body has incorrectly evaluated a fact that is crucial for deciding whether a certain power is applicable or not).⁷²

The second ground for review addresses the fairness as "the guiding principle of our public law".⁷³ It deals with the procedure for coming to a decision, rather than with its substantial quality or outcome.⁷⁴ The exercise of executive powers is bound by basic requirements,

⁶⁵ *Council of Civil Service Unions v Minister for the Civil Service*, above n 63, at 410. – It is also widely recognised that (substantive) legitimate expectation may be a ground for review, although its classification is not entirely clear. In New Zealand, also the existence of a review ground of legitimate expectation is in question; see Graham DS Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014) at 633–637.

⁶⁶ Taylor, above n 65, at 413.

⁶⁷ *Powerco Ltd v Commerce Commission* [2006] NZHC 662 at [21].

⁶⁸ *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 552.

⁶⁹ Joseph, above n 3, at 939.

⁷⁰ *Council of Civil Service Unions v Minister for the Civil Service*, above n 63, at 410.

⁷¹ *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [51].

⁷² Joseph, above n 3, at 939 and 990–993.

⁷³ *Regina v Secretary of State for the Home Department* [2003] UKHL 36 at [30].

⁷⁴ Woolf, Jowell and Le Sueur, above n 40, at [6-001].

such as the rules of natural justice,⁷⁵ as well as by procedures and conditions that are prescribed by statute, namely representations, or the holding of public hearings, inquiries, or consultations.⁷⁶

The third general ground of review is known as irrationality or, according to the English Court of Appeal judgment in *Associated Provincial Picture Houses Ltd v Wednesbury Corp*,⁷⁷ as (Wednesbury) unreasonableness. While the previous definition by Lord Greene was uncertain due to its tautological wording,⁷⁸ irrationality under Lord Diplock's classification comes into question if a decision:⁷⁹

... is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

In other words, unlike the grounds of illegality and procedural impropriety, under this category, judicial review focuses on the merit of an executive action and asks whether the decision makes sense. In this regard, common law courts pay particular attention to the proportionality principle, that was originally applicable in civil law countries or in the context of European law and the European Convention on Human Rights.⁸⁰ Nowadays, proportionality is a general principle of law recognised by civilised nations pursuant to art 38(1)(c) of the Statute of the International Court of Justice.⁸¹ New Zealand's courts have tended to reject proportionality as a distinct head of review, but have rather emphasised that a lack of proportionality may constitute the unreasonableness of a decision.⁸²

⁷⁵ See above II A 2 (b).

⁷⁶ Woolf, Jowell and Le Sueur, above n 40, at [6-002].

⁷⁷ *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA) at 229–230.

⁷⁸ According to Lord Greene, courts could interfere on the ground of unreasonableness “if a decision on a competent matter [was] so unreasonable that no reasonable authority could ever have come to it”, see *Associated Provincial Picture Houses Ltd v Wednesbury Corp*, above n 40, at 230. – See also Woolf, Jowell and Le Sueur, above n 40, at [12-002].

⁷⁹ *Council of Civil Service Unions v Minister for the Civil Service*, above n 63, at 410.

⁸⁰ Joseph, above n 3, at 1011. – In this sense, also *Council of Civil Service Unions v Minister for the Civil Service*, above n 63, at 410, although Lord Diplock alluded to the lack of proportionality as a *separate* ground of judicial review.

⁸¹ Gebhard Bücheler *Proportionality in Investor-State Arbitration* (Oxford University Press, Oxford, 2015) at 100.

⁸² *Isaac v Minister of Consumer Affairs* [1990] 2 NZLR 606 (HC) at 636; *Telecom Auckland Ltd v Auckland City Council* [1999] 1 NZLR 426 (CA) at 445; *Conley v Hamilton City Council* [2007] NZCA

2 *Standard of scrutiny in the past*

The more New Zealand's courts are willing to evolve and refine these questions of depth of judicial scrutiny nowadays, the more they emphasised the width of the powers exercised by the executive in the past. The latter directly affected the scope review as it constituted areas wherein courts had no or rather only limited control over executive actions, particularly over the exercise of discretion or the prerogative.⁸³ In order to avoid misunderstandings, it should be expressly stated that this deferential approach did not mean that New Zealand's courts lacked jurisdiction to review. They, and especially the High Court today, were never without jurisdiction, but they used to abstain or defer to executive assessments in certain fields.⁸⁴ In 1981, the Court of Appeal concisely summarised the deferential attitude and the adduced constitutional reasons for this:⁸⁵

The willingness of the Courts to interfere with the exercise of discretionary decisions must be affected by the nature and subject-matter of the decision in question and by consideration of the constitutional role of the body entrusted by statute with the exercise of the power. Thus the larger the policy content and the more the decision-making is within the customary sphere of elected representatives the less well-equipped the Courts are to weigh the considerations involved and the less inclined they must be to intervene.

As mentioned above, typical fields wherein this judicial self-restraint applied are national security, defence and international relations.⁸⁶

In 1991, the New Zealand Law Commission took up the correlation between the extent of executive discretion and the scope of judicial scrutiny in its final report on emergencies, and succinctly pointed out: “the greater the administrative discretion, the more limited the power of judicial review”.⁸⁷ Indeed, particularly in the field of public emergency powers, the courts regularly conceded a wide scope of discretion and, on the downside, granted

543, [2008] 1 NZLR 789 at [58]; *University of Auckland v International Education Appeal Authority* [2010] NZAR 1 (HC) at [123]. – The question could be left open in *Institute of Chartered Accountants of New Zealand v Bevan* [2002] NZCA 270, [2003] 1 NZLR 154 at 171.

⁸³ Law Commission, above n 61, at [4.51] and Appendix C4.

⁸⁴ Joseph, above n 3, at 900.

⁸⁵ *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 197–198. – The constitutional justification for judicial deference was taken up in *Wellington City Council v Woolworths New Zealand*, above n 58, at 546.

⁸⁶ *Choudry v Attorney-General*, above n 12, at [12]; Keith, above n 61, at 351; Joseph, above n 3, at 900.

⁸⁷ Law Commission, above n 61, at [5.106].

themselves a narrow test of review in the past.⁸⁸ For example, the exercise of power of the Governor in Council under the War Regulations Act 1914, which authorised him to make such prohibition regulations, that were, in his opinion, necessary to tackle actions compromising the public safety, New Zealand's defence, or the effectiveness of its military operations during the First World War, was deemed to be not reviewable by courts.⁸⁹ The wide discretionary authority that was prescribed in the empowering statute would remove the Court's "competence to pronounce upon the advisableness or propriety of any particular regulation".⁹⁰ According to the Supreme Court, this appraisal should also be valid in times of peace.⁹¹

A particularly significant example of the former restrictive approach is the above-mentioned judgment in *Council of Civil Service Unions v Minister for the Civil Service*.⁹² Their Lordships made clear that national security must be a non-justiciable field, wherein the executive government should be "the sole judge[s] of what the national security requires".⁹³ In this context, Lord Diplock emphasised that matters of national security should not be for the courts to determine, as the judicial process was entirely inept for this purpose.⁹⁴

A very similar approach was followed in *Liversidge v Anderson* where the majority of the Law Lords refused a deeper scrutiny of executive actions in matters of national security as they did not feel called upon to deal with the questions that arise in this context.⁹⁵ Therefore, it was held that the question as to whether the Secretary of State had reasonable cause to believe that a person posed a security threat and by reason thereof could be controlled and detained was not reviewable by courts.⁹⁶ Lord Macmillan and Lord Wright pointed out that emergency legislation which aims to protect public safety had to be

⁸⁸ At [5.31].

⁸⁹ *Hackett v Lander and Solicitor-General* [1917] NZLR 947 (SC) at 949–950.

⁹⁰ At 948 and 950.

⁹¹ At 949.

⁹² See above II B 1.

⁹³ *Council of Civil Service Unions v Minister for the Civil Service*, above n 63, at 402 (Lord Fraser).

⁹⁴ At 412.

⁹⁵ *Liversidge v Anderson* [1941] UKHL 1, [1942] AC 206 at 253.

⁹⁶ At 206.

interpreted in a way that its efficacy would be fostered instead of repressed,⁹⁷ and that courts were not allowed to interfere in the exercise of these emergency powers when the executive had acted “in good faith”.⁹⁸

3 *Wider powers of review*

The courts’ approach with regard to the breadth and depth of their powers to review executive actions has changed. In recent decades, they are more willing to perform their function as judicial safeguards of the individual rights and to tackle the misuse of public power more widely. The enhancement of judicial control is embedded in the general development towards more open government and greater controls over executive power.⁹⁹ Some significant areas wherein the scope of review has been evolved are the following:

(a) Public interests and non-disclosure

One noticeable development concerns the field of governmental claims of non-disclosure, in other words, the claim that evidence should not be made available to courts and the parties appearing before them due to rights of confidentiality, or public interests of special importance.¹⁰⁰

Under New Zealand law at present:¹⁰¹

A Judge may direct that a communication or information that relates to matters of State must not be disclosed in a proceeding if the Judge considers that the public interest in the communication or information being disclosed in the proceeding is outweighed by the public interest in withholding the communication or information.

In this context, the definition of the key term *public interest* is provided by reference to the protected interests pursuant to the Official Information Act 1982. It namely includes military secrets, matters of defence, national security, and international relations of the Government.¹⁰²

⁹⁷ At 252 (Lord Macmillan).

⁹⁸ At 259 (Lord Wright).

⁹⁹ *Choudry v Attorney-General*, above n 12, at [11–12].

¹⁰⁰ Kenneth J Keith “‘Naval Secrets’, Public Interest Immunity and Open Justice” in Karine Bannelier, Theodore Christakis and Sarah Heathcote (eds) *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case* (Routledge, New York, 2012) 124 at 124, 127 and 144–145.

¹⁰¹ Evidence Act 2006, s 70(1).

¹⁰² Official Information Act 1982, s 6(a).

In the past, the courts widely accepted the ministerial withholding of documents or categories of documents from disclosure just by asserting and certifying that otherwise public interests would be compromised.¹⁰³ In some earlier cases, courts even accepted the argument that a disclosure of materials, which were prepared or obtained within governmental powers and as part of the execution of public tasks, would impair the effective functioning of the public service by eliminating its anonymity and preventing plain-spoken comments in official documents.¹⁰⁴ In other words, solely the fact that a specific kind or category of documents was in question (eg Cabinet and ministerial papers; despatches from own and foreign diplomats; reports and certificates concerning security issues; military documents) was sufficient for the courts to grant non-disclosure.¹⁰⁵ A metaphorical statement that particularly reflected the approach of the past and attempted to justify the limitations of the right to natural justice and procedural fairness, as well as for the administration of justice caused by non-disclosure was provided in *Conway v Rimmer* in 1968. Although this decision by the House of Lords made clear that courts have the final say of whether the public-interest immunity applies or not, Lord Pearce stated:¹⁰⁶

... [I]n practice the flame of individual rights and justice must burn more palely when it is ringed by the more dramatic light of bombed buildings.

In New Zealand, the former standard was significantly shattered by the Court of Appeal in *Environmental Defence Society Inc v South Pacific Aluminium Ltd* in 1981. It was held that Cabinet papers and the like are not per se excluded from disclosure, as an absolute protection would unduly affect the administration of justice.¹⁰⁷ However, a withholding of documents can be justified in cases where an inspection by the courts, which shall only be ordered with good reason, shows that a public interest in non-disclosure actually exists, and that the interests of justice do not lead to a deviating assessment.¹⁰⁸ In the concrete case, the Court cautiously followed its own approach and granted non-disclosure in the end.

¹⁰³ *Duncan v Cammell Laird & Co Ltd* [1942] UKHL 3, [1942] AC 624 at 642–643.

¹⁰⁴ Woolf, Jowell and Le Sueur, above n 40, at [9-005] with reference to *Laffer v Gillen* [1927] AC 886 at 895–896.

¹⁰⁵ Keith, above n 61, at 352–352.

¹⁰⁶ *Conway v Rimmer* [1968] UKHL 2, [1968] AC 910 at 982.

¹⁰⁷ *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 2)* [1981] 1 NZLR 153 (CA) at 167.

¹⁰⁸ At 167–168.

In the much-noticed *Choudry* case(s) in 1999, where the GATT Watchdog organiser Aziz Choudry tackled the (covert) entering of his home by officers of the New Zealand Security Intelligence Service judicially, the Court of Appeal finally cut the Gordian knot and evolved the 1981 judgment. According to the above-mentioned tendency towards more open government and wider control, the Court unambiguously emphasised that the above-mentioned areas of governmental action are no longer considered as non- or barely justiciable.¹⁰⁹ This particularly means that the blanket assessment or the general unsubstantiated claim of public interest-immunity is not sufficient.¹¹⁰ Unlike the described judicial approach in the past, nowadays, courts “cannot be beguiled by the mantra of national security”.¹¹¹ Therefore, an effective claim of non-disclosure requires a much greater precision. In this context, Government must,¹¹²

... to the extent that to do so is not incompatible with national security, identify and describe each document; explain why immunity is being claimed for that document; and state why appropriate editing will not be sufficient to protect the security interests involved.

After providing this detailed information, the assertion of the public interest in non-disclosure is not automatically justified. Then it is the judges' task to consider all the relevant circumstances, evaluate the conflicting interests, namely the interest in maintaining confidentiality and the interest in the effective administration of justice, and determine whether non-disclosure is justifiable.¹¹³

All in all, the outlined development constitutes an essential change. It rejects the previous fundamental assumption, that Government solely has access to the required information and, thereby, alone is capable of assessing and scrutinising issues of national security, as it was taken as a legal basis by Lord Fraser in 1984.¹¹⁴

¹⁰⁹ *Choudry v Attorney-General*, above n 12, at [11]–[13].

¹¹⁰ *Keith*, above n 100, at 145.

¹¹¹ *Choudry v Attorney-General* [1999] 2 NZLR 582 (CA) at 594.

¹¹² At 596.

¹¹³ At 593.

¹¹⁴ *Council of Civil Service Unions v Minister for the Civil Service*, above n 63, at 402.

(b) Access to subjects of scrutiny

In this context, nowadays, courts also intend to reduce or remove the inequality in litigation strength that is caused by the Government's access to protected information.¹¹⁵ In other words, the more restrictive treatment of non-disclosure claims correlates with a palpable strengthening of individual procedural rights that are encompassed in the principle of natural justice.¹¹⁶

This is particularly required in cases in which the classified information directly concerns the allegations that are raised against an individual. New Zealand courts had to deal with this constellation in the *Zaoui* case. There, an Algerian suspected terrorist challenged, among others, a security risk certificate and sought refugee status. The certificate was issued by the Director of Security (appointed under the New Zealand Security Intelligence Service Act 1969), and stated that Mr. Zaoui was a security threat, in order to allow his deportation. Zaoui challenged the certificate and applied to the Inspector-General of Intelligence and Security for review. However, the Inspector-General rejected Zaoui's request to deliver a summary of the information decisive for the certificate with reference to its classification ("classified security information").

The High Court considered this case in detail and ruled that the principle of natural justice affirmed in s 27 of the Bill of Rights Act and its specific requirements of procedural fairness also apply in cases where executive counter-terrorism measures are in question.¹¹⁷ Therefore, in order to defend themselves against allegations, individuals who are subject to classified information must have access to a summary of the relevant information, as far as security interests are not affected.¹¹⁸ The access is required to exercise the minimum procedural rights to notice as to the specific content of the case against one, to contest the allegations, to consultation and to fair preparation in advance.¹¹⁹ This approach marks a turning point. The previous judicial attitude, that was widely accepted, allowed the

¹¹⁵ See Keith, above n 61, at 353.

¹¹⁶ See above II A 2 (b).

¹¹⁷ *Zaoui v Attorney General* [2004] 2 NZLR 339 (HC) at [92], [105]–[107], [110], [133] and [172]. – Affirmed by the Supreme Court, see *Attorney-General v Zaoui* (No 2) [2005] NZSC 38, [2006] 1 NZLR 289 at [92], although the appeals to the Court of Appeal and the Supreme Court did not concern this point.

¹¹⁸ *Zaoui v Attorney General* [2004] 2 NZLR 339 (HC) at [107] and [172]. – See also Susan Glazebrook "From Zaoui to Today: A Review of Recent Developments in New Zealand's Refugee and Protected Persons Law" (23 March 2013) at 3.

¹¹⁹ Butler and Butler, above n 18, at 1485.

executive branch to restrain rules on procedural fairness. Accordingly, eg, it was recognised that the principles of natural justice could be modified adversely, or severely limited if national security was concerned, or in cases in which foreigners ought to be deported.¹²⁰ Natural justice was strongly seen as a more or less flexible concept whose requirements of fairness would depend on the character of the decision-maker, the kind of decision, the subject matter, and the regulatory framework.¹²¹

This standard was rejected in the *Zaoui* case, and it was made clear that the rules of natural justice are not suspended in cases where national security is supposedly at stake.¹²² In this context, it should be mentioned that the High Court in *Bradley v Attorney-General* already slightly presaged its later approach when granting a New Zealand naval officer natural justice with respect to his downgrading notwithstanding objections of national security.¹²³

Although the *Zaoui* decisions primarily refer to the application to the Inspector-General of Intelligence and Security for a review under the Inspector-General of Intelligence and Security Act 1996, which governs special proceedings, the appraisals also show a general shift. A denial of natural justice by governmental authorities in those cases may provide a sufficient ground for judicial reversal due to procedural impropriety. And also courts have to observe the procedural rights of individuals in cases concerning defence or security matters, and must reject a blanket classification of information.

(c) Substantive appraisal

The described changes also affect the substantive decision-finding by the courts. The wide executive discretion associated with the significant judicial deference are no longer considered to be the standard. In *Attorney-General v Refugee Council of New Zealand Inc*, Glazebrook J put it pointedly: “[J]udicial supervision is not a rubber-stamping exercise”,¹²⁴ and took up a similar phrase in an earlier decision of the Court of Appeal.¹²⁵ Eg, in cases of detention of claimants for refugee status, it is required that judges scrutinise properly

¹²⁰ *R v Secretary of State for the Home Department, ex parte Hosenball* [1977] 1 WLR 766, [1977] 3 All ER 452 (Lord Denning); *R v Secretary of State for the Home Department, ex parte Cheblak* [1991] 1 WLR 890 (CA) at 902.

¹²¹ *Lloyd v McMahon* [1987] UKHL 5, [1987] AC 625 at 702–703.

¹²² In the aftermath of the *Zaoui* case, New Zealand introduced statutory provisions as to how to deal with classified information in immigration and refugee cases; see Glazebrook, above n 118, at 3.

¹²³ *Bradley v Attorney-General* [1988] 2 NZLR 454 (HC).

¹²⁴ *Attorney-General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577 (CA) at [296].

¹²⁵ *R v McColl* [1999] 5 HRNZ 256 (CA) at [26].

whether the detention and its continuation are necessary.¹²⁶ In doing so, courts oppose the attitude of the past where judges often refused to question an assertion of the proper public authority that it held the conditions precedent for the exercise of a specific power to be given, even when they had means to ascertain the actual existence of these conditions.¹²⁷

In 2004, the Supreme Court stated that national security reasons could justify the detention of an individual, but it also unambiguously affirmed that a blanket assertion is insufficient, and that “such reasons have to be tested in the particular case”.¹²⁸ This yardstick not only obliges the executive branch to deliver underlying facts, materials (within the scope of the outlined limits), and details of their assessments, but also requires courts to go behind the asserted grounds, ascertain their actual existence, balance the affected interests and make individualised decisions.

(d) Consideration of international law

A further changing aspect of judicial review is the increasing consideration of international law, particularly in the field of security law. For instance, New Zealand’s responses to terrorist threats are embedded in the framework of the international security system. It has joined 12 terrorism-related international conventions.¹²⁹ Moreover, it is a founding member of the United Nations (UN). Therefore, it is bound to the Charter of the United Nations (UN Charter) and, among others, to the Security Council Resolutions.¹³⁰

Nowadays, judicial review requires, to an increasing extent, that national courts must take into account international law. It is especially needed in three constellations. Firstly, when there exists customary international law as this is part of common law.¹³¹ Secondly, national courts progressively refer to international law “in cases where the domestic law ... is uncertain or incomplete”.¹³² Finally, international law and its interpretation can be

¹²⁶ At [296].

¹²⁷ Woolf, Jowell and Le Sueur, above n 40, at [1-007].

¹²⁸ *Zaoui v Attorney-General* [2004] NZSC 31, [2005] 1 NZLR 577 at 647.

¹²⁹ Alex Conte *Human Rights in the Prevention and Punishment of Terrorism* (Springer, Heidelberg et al., 2010) at 186. – With regard to ten of these conventions, see Terrorism Suppression Act 2002, s 3(b) and Schedule 3.

¹³⁰ With respect to counter-terrorism, there are three resolutions that are particularly relevant: UN Security Council Resolutions 1267 (1999), 1373 (2001), and 1624 (2005).

¹³¹ Kenneth J Keith “Protecting Human Rights in a Time of Terror: The Role of National and International Law” (2005) 13 *Waikato Law Review*: Taumauri 22 at 30.

¹³² See Bangalore Principles (1988), partially quoted in Keith, above n 131, at 30.

relevant when courts have to deal with domestic legislation that has been enacted to give effect to international obligations concluded by the executive,¹³³ like the Terrorism Suppression Act 2002 which should effectuate New Zealand's obligations under UN Security Council Resolution 1373 (2001) following the terrorist attacks on 11 September 2001, and implement its obligations under various counter-terrorism conventions.

Especially in the field of international human rights law, the significance of New Zealand's international obligations for judicial review is well-recognised. A judgment which particularly contributed to this development was issued by the Court of Appeal in *Tavita v Minister of Immigration*.¹³⁴ In this case, a Samoa citizen sought the cancellation of a removal order on humanitarian grounds according to the International Covenant on Civil and Political Rights as well as the United Nations Convention on the Rights of the Child. The Minister of Immigration admitted that his Department did not take these international instruments into account, and that they were even "entitled to ignore" them. However, the Court sharply disagreed with this assessment and made clear that this "unattractive argument" would disavow New Zealand's observance of its international obligations and degrade them to "window-dressing".¹³⁵ In the concrete case, the Minister was granted the opportunity to reconsider his decision. In further decisions, New Zealand's courts evolved this approach and regularly stated that "some international obligations are so manifestly important that they must be taken into account in decision-making".¹³⁶

Especially in immigration matters, the consideration of international law, such as the Convention Relating to the Status of Refugees (Refugee Convention), has main importance¹³⁷ and is even set out in some statutory provisions (eg in s 129(1) of the Immigration Act 2009 in terms of claims for recognition as refugee, or in its s 127(2)(b) relating to the legal basis of decision-making). But also in cases involving no foreign elements, international obligations like the International Covenant on Civil and Political

¹³³ *Bin Zhang v Police* [2009] NZAR 217 (HC) at [20]; Keith, above n 131, at 31.

¹³⁴ *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).

¹³⁵ At 265–266.

¹³⁶ *Refugee Council of New Zealand Inc v Attorney-General* (No 2) [2002] NZAR 769 (HC) at [193]; *Faifai v Chief Executive of the Department of Labour* HC Wellington AP 217-99, 7 June 2000 at [16].

¹³⁷ *Attorney-General v Zaoui* (No 2), above n 117; *Attorney-General v E* [2000] 3 NZLR 257 (CA).

Rights are “undoubtedly of interpretative relevance” for the decision-maker whose action is subject to judicial review as well as for the courts themselves.¹³⁸

(e) Review of legislative action

A further trend, which has a significant influence on the current reform discussions in New Zealand, is the willingness of common-law courts to review legislative decisions. At first glance, it seems that the predominant doctrine of parliamentary sovereignty is not that untouchably holy as it was in the past.

For example, in a highly publicised case in December 2004, the House of Lords had to assess a derogation by the United Kingdom under the European Convention on Human Rights.¹³⁹ The national legislation implemented an indefinite executive detention without trial only for foreign suspects of terrorist activities. Their Lordships held that the statutory measures were irrational and discriminatory¹⁴⁰. The majority of seven to one reached the conclusion that the individual legislative action was not strictly required in the sense of the proportionality principle. The distinction that was made between British nationals and foreign nationals was the decisive point. If a measure is not strictly required in the case of one group (British terrorist suspects), it cannot be strictly required in the case of the other group (foreign terrorist suspects) that poses the same threat to national security.¹⁴¹

The House of Lords also rejected the objection that the Court was obliged to exercise deference towards Parliament, or that judicial review in this regard would be undemocratic.¹⁴² Although the extent of the judicial power of the House of Lords, and the Supreme Court of the United Kingdom (since 1 October 2009) must be seen in the European context, the less deferential attitude seems to have a spillover effect. English law does not allow judicial scrutiny of primary legislation in the meaning that courts would review the constitutionality of an Act of Parliament passed at Westminster,¹⁴³ but it is permitted in cases where the legislature’s action is contrary to the law of the European

¹³⁸ *Miller v New Zealand Parole Board* [2010] NZCA 600 at [28]; *Bin Zhang v Police*, above n 133, at [20]. – See also *Baker v Canada (Minister of Citizenship and Immigration)*, above n 50, at [70]–[71].

¹³⁹ *A v Secretary of State for the Home Department*, above n 1.

¹⁴⁰ At [97].

¹⁴¹ At [132].

¹⁴² At [42].

¹⁴³ Penny Darbyshire “The UK Supreme Court – Is there anything left to think about?” (2015) 21 *European Journal of Current Legal Issues* 1 at 1.

Union or the European Convention of Human Rights.¹⁴⁴ In the latter case, the Court is empowered to issue a declaration of incompatibility. It can also be asked to review Bills of the Scottish Parliament, of the Northern Ireland Assembly, and of the National Assembly for Wales.¹⁴⁵ In addition to this, also the High Court of Australia is authorised to scrutinise legislation and invalidate it if necessary.¹⁴⁶

In New Zealand in recent times, there was also a widely discussed case wherein a number of prisoners challenged national legislation before the High Court in *Taylor v Attorney-General*.¹⁴⁷ According to s 80(1)(d) of the Electoral Act 1993 amended by the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010, all persons serving sentences of imprisonment imposed after 16 December 2010 were not entitled to register as electors in New Zealand, and hence were prohibited from voting in a general election. Five prisoners, who have forfeited their suffrage for the time of imprisonment under this provision, judicially challenged this blanket ban on prisoner's voting rights and sought a formal declaration that it violates their electoral rights pursuant to s 12 of the Bill of Rights Act.¹⁴⁸ The Amendment was widely criticised, and prior to its adoption, the Attorney-General lodged a s 7 report with Parliament which expressed his belief that the provision was inconsistent with s 12 and could not be justified under s 5 of the Bill of Rights.¹⁴⁹ Nevertheless, the Bill was passed. Parliament could also not be deterred by the fact that various courts already struck down similar provisions in other countries.¹⁵⁰

Indeed, the High Court found that the contested legislation was inconsistent with the Bill of Rights Act.¹⁵¹ When considering whether the measure could be justified under s 5 (“in a free and democratic society”), the s 7 report and the Court also assumed an

¹⁴⁴ Palmer and Butler, above n 6, at 143 with reference to s 4 of the Human Rights Act 1998 (UK); UK Supreme Court “The Supreme Court and Europe” (2016) <www.supremecourt.uk>.

¹⁴⁵ Palmer and Butler, above n 6, at 143.

¹⁴⁶ See below II D 3.

¹⁴⁷ *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791.

¹⁴⁸ *Taylor v Attorney-General*, above n 147, at [3].

¹⁴⁹ *Taylor v Attorney-General* (No 2) [2014] NZHC 2225, [2015] NZAR 705 at [5]–[6].

¹⁵⁰ According to *Taylor v Attorney-General* (No 2), above n 149, at [14], the Supreme Court of Canada, the European Court of Human Rights, the Constitutional Court of South Africa, and the High Court of Australia already considered a blanket ban for *all* prisoners to be in violation of individual rights.

¹⁵¹ *Taylor v Attorney-General*, above n 147, at [33] by referring to the reasons presented in the report of the Attorney-General.

incompatibility with New Zealand's international law obligations, namely art 25(b) of the International Covenant on Civil and Political Rights.¹⁵²

However, the most noticed aspects of the judgment were not these substantive findings but rather the unprecedented step¹⁵³ for a New Zealand Court to make a formal declaration of inconsistency.¹⁵⁴ The sitting judge Heath J held that such a declaration was an available remedy in the concrete case and stated:¹⁵⁵

The inconsistency arises in the context of the most fundamental aspect of a democracy; namely, the right of all citizens to elect those who will govern on their behalf. Looking at the point solely as one of discretion, if a declaration were not made in this case, it is difficult to conceive of one in which it would. Enactment of a statutory provision that is inconsistent with that fundamental right should be marked by a formal declaration of the High Court, rather than by an observation buried in its reasons for judgment.

The Court examined the power of courts to make such declarations of inconsistency, and, although it was not entirely clear whether this can be taken for granted, reached the conclusion that the High Court as a superior court with inherent jurisdiction was authorised to do so. It was held that s 4 of the Bill of Rights Act did not exclude this remedy, as long as the power to invalidate legislation remains ruled out pursuant to this provision, which was the case here.¹⁵⁶ The High Court judgment particularly reflected the above-described shifted judicial self-understanding, evoked debates on the limits of judicial review, and hence fuelled further reform discussions.¹⁵⁷

(f) Protection of parliamentary rights

On the other hand, there is not only a trend towards judicial review of parliamentary action. Courts are also increasingly willing to enforce parliamentary rights against the executive branch. Apart from the recent decisions of the High Court and the Supreme Court of the United Kingdom in November 2016 and January 2017, respectively, dealing with the “Brexit” where the Courts made clear, that the UK government may not trigger art 50 of

¹⁵² *Taylor v Attorney-General*, above n 147, at [2], [27] and [33]. – See also *Taylor v Attorney-General* (No 2), above n 149, at [79].

¹⁵³ See *Taylor v Attorney-General*, above n 147, at [36].

¹⁵⁴ At [79].

¹⁵⁵ At [77] (footnotes omitted).

¹⁵⁶ At [43] and [61].

¹⁵⁷ See below II D.

the Treaty on European Union¹⁵⁸ without parliamentary approval,¹⁵⁹ there were earlier judgments which were much-noticed in this regard. In 2010, the Law Lords had to decide on the implementation of two executive orders, namely the Terrorism (United Nations Measures) Order 2006 and the Al-Qaida and Taliban (United Nations Measures) Order 2006, which were passed under the United Nations Act 1946 in order to effectuate international counter-terrorism obligations. The orders contained far-reaching encroachments on individual rights and were adopted without parliamentary debate and approval. The Supreme Court sharply criticised this procedure, and made clear that fundamental rights can only be overridden with the clear authority of Parliament, either by express language or unambiguous indication.¹⁶⁰ In this respect, Lord Hope highlighted:¹⁶¹

Even in the face of the threat of international terrorism, the safety of the people is not the supreme law. We must be just as careful to guard against unrestrained encroachments on personal liberty.

The executive orders were nullified, and the Terrorist Asset-Freezing (Temporary Provisions) Act 2010 was passed in response to the judgment. This Supreme Court's ruling particularly demonstrates the close dovetailing of the exercise of parliamentary authority and the protection of human rights. This connection is not even cut through if national security is at stake – with good reason.

In New Zealand, the lack of parliamentary involvement was judicially challenged in *Fitzgerald v Muldoon* in 1976, a leading case of constitutional significance.¹⁶² With reference to s 1 of the Bill of Rights 1688, the former Supreme Court (now the High Court) held that an existing Act of Parliament can be amended or repealed only directly by Parliament or with its approval.¹⁶³ Any ministerial or executive action that denies and contravenes this parliamentary power is illegal. This Supreme Court judgment was particularly essential, although the core finding seems to be crystal clear: The *actus contrarius* rescinding a previous parliamentary Act cannot be passed without parliamentary

¹⁵⁸ This provision allows member states to withdraw from the European Union in accordance with their own constitutional requirements.

¹⁵⁹ *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

¹⁶⁰ *HM Treasury v Ahmed* [2010] UKSC 2 at [61].

¹⁶¹ At [6].

¹⁶² *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC).

¹⁶³ At 622.

participation. This principle has lost none of its validity since then, and is even relevant when deciding the Brexit case these days.¹⁶⁴ As shown above, in the context of safeguarding human rights and civil liberties, its observance is anything but minor.

C Restraints of Judicial Review

Apart from the examined developments, there exist constraints of judicial review and fields which are not justiciable. Some of them are the following:

(a) Principle of parliamentary sovereignty

Firstly, according to New Zealand's adoption of the Westminster tradition, the predominant doctrine of parliamentary sovereignty makes Parliament the supreme legal authority in New Zealand. According to s 15(1) of the Constitution Act 1986, Parliament has “full power to make laws”.

This means that courts cannot overrule its legislation, even not if the legislative action is, as seen in the case of the blanket ban on prisoner's voting rights,¹⁶⁵ inconsistent with any of the rights and freedoms contained in the New Zealand Bill of Rights Act 1990. The constitutional architecture in this regard¹⁶⁶

... is clear and unambiguous. Parliament is supreme and the function of the Courts is to interpret the law as laid down by Parliament. The Courts do not have a power to consider the validity of properly enacted laws.

According to their constitutional role, once the sovereign legislature has implemented laws, they will become subject to application and interpretation by the courts. However, the judiciary is also entrusted to fill statutory gaps. As already mentioned, in the field of individual rights, s 4 of the Bill of Rights Act underpins the principle of parliamentary sovereignty and prevents courts from nullifying incompatible provisions. Apart from the exercise of some invalidating powers under the former Constitution Act 1852,¹⁶⁷ the role allocation between the two branches has been obeyed by New Zealand's courts up to today, although there was some considerable critique, mainly out of court (eg from Lord Cooke of Thorndon).¹⁶⁸

¹⁶⁴ *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 at [86], where the High Court solely referred to *Fitzgerald v Muldoon*.

¹⁶⁵ *Taylor v Attorney-General*, above n 147.

¹⁶⁶ *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1990] NZHC 632, [1991] 2 NZLR 323 at 330.

¹⁶⁷ See Palmer and Butler, above n 6, at 142.

¹⁶⁸ For details, see II D 3.

(b) Acknowledged areas of judicial deference

Secondly, the above-described trend of deeper and broader judicial scrutiny does not mean that the previous exercise of self-restraint is entirely reversed. There are still fields and questions of governmental action which require judicial deference.

For instance, the Court of Appeal held in 2002 that the question as to which extent the Royal New Zealand Air Force should be armed, and whether an individual ministerial decision left a vacuum of sufficient defence capability, is non-justiciable.¹⁶⁹ On the other hand, it is imaginable that the question as to whether an individual military action was sufficient and reasonable, when facing a concrete threat to life and limb, is amenable to judicial review.¹⁷⁰ The latter all the more applies if the use of armed force affects individuals.

Further situations, where deference or even non-justiciability may be relevant, are cases of purely political decisions and policy judgments. In the light of the democratic and constitutional imperative,¹⁷¹ it is recognised that those matters are non-reviewable.¹⁷² For example, Cabinet's decisions and guidelines on ex gratia payments for those wrongly convicted of crimes are considered as not susceptible to judicial review.¹⁷³

The same applies in cases where religious and spiritual issues are in question.¹⁷⁴

(c) New Zealand's intelligence agencies

Thirdly, there are some current trends in the field of national security, particularly, counter-terrorism law that seem to narrow judicial review at first glance.

¹⁶⁹ *Curtis v Minister of Defence* [2002] NZCA 47, [2002] 2 NZLR 744 at [28].

¹⁷⁰ But see *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 at [85], in which their Lordships emphasised that "executive decisions dealing directly with matters of defence ... cannot sensibly be scrutinised by the courts on grounds relating to their factual merits".

¹⁷¹ See above II A 2 (b).

¹⁷² *Braude v New Zealand Securities Commission* HC Wellington CIV-2003-485-001618, 5 August 2003 at [55].

¹⁷³ *Akatere v Attorney-General* [2005] NZHC 477, [2006] 3 NZLR 705 at [39].

¹⁷⁴ *Hope v Khyentse Rinpoche Lama* [2006] NZCA 117, [2007] 1 NZLR 645 at [36].

For example, the Countering Terrorist Fighters Legislation Bill 2014¹⁷⁵ was considered as reflecting a controversial and questionable legislative approach in this regard. The Amendment¹⁷⁶ came into force on 12 December 2014 and enlarged the surveillance authority of the New Zealand Security Intelligence Service (NZSIS) in terms of suspected terrorists. Among others, it allows to undertake *warrantless* surveillance for up to 24 hours in situations of emergency or urgency.¹⁷⁷ In principle, in the light of s 21 of the Bill of Rights Act that grants “the right to be secure against unreasonable search or seizure”, the waiver of *ex ante* (judicial) scrutiny involves a significant cut, and should, according to the proportionality maxim, only apply when it is necessary.¹⁷⁸ In the concrete case, there was seen a lack of information whether the warrant process has ever caused a disadvantage for New Zealand’s security agencies,¹⁷⁹ which is why the necessity of the constraint was partially considered to be questionable.

Due to the fact that the Amendment contained a sunset clause, which causes that its provisions will be repealed on 1 April 2017,¹⁸⁰ and due to the recently presented “Report of the First Independent Review of Intelligence and Security in New Zealand”,¹⁸¹ which was required pursuant to s 21 of the Intelligence and Security Committee Act 1996, the legislation governing the intelligence agencies and their oversight is in a state of change. A comprehensive New Zealand Intelligence and Security Bill as a response to this report has already been introduced into Parliament and is under consideration by the Foreign Affairs, Defence and Trade Committee at the moment (report due date: 24 February 2017). One of the most significant changes will probably be the consolidation of the Government

¹⁷⁵ The Countering Terrorist Fighters Legislation Bill, which was an omnibus bill that amended the Customs and Excise Act 1996, the New Zealand Security Intelligence Service Act 1969, and the Passports Act 1992, was passed under urgency in December 2014.

¹⁷⁶ New Zealand Security Intelligence Service Amendment Act 2014.

¹⁷⁷ John Ip “The Making of New Zealand’s Foreign Fighter Legislation: Timely Response or Undue Haste?” (2016) 27 PLR 181 at 182.

¹⁷⁸ See Michael Cullen and Patsy Reddy *Intelligence and Security in a Free Society: Report of the First Independent Review of Intelligence and Security in New Zealand* (29 February 2016) at 140, who emphasise that these powers only apply to surveillance that is necessary.

¹⁷⁹ Katharine Briar Guilford “Countering Foreign Terrorist Fighters: Warrantless Surveillance Powers of the New Zealand Security Intelligence Service” (2016) 47 Victoria University of Wellington Law Review 95 at 99 and 122.

¹⁸⁰ New Zealand Security Intelligence Service Act 1969, s 4IG.

¹⁸¹ Cullen and Reddy, above n 178.

Communications Security Bureau (GCSB) and the NZSIS, their powers and their oversight bodies into a single Act.¹⁸² On this occasion, following the report by *Cullen and Reddy*,¹⁸³ the above-outlined *warrantless* authorisations will be retained in the proposed Act, but their procedural requirements shall be modified and specified in much greater detail. In particular, their scope of application, which is confined to counter-terrorism measures conducted by the NZSIS at present, will probably be extended to the GCSB. However, the basic rule will be that even in a situation of urgency, an intelligence warrant must be issued, but under simplified preconditions.¹⁸⁴ Only as a last resort, in cases where the application for a warrant and its delay would defeat the purpose of obtaining the warrant (“very urgent authorisations”), the Director-General of Security or the Director-General of the GCSB, respectively, may authorise the adoption of executive measures (such as surveillance, searching, and seizing), and provide a full application within 24 hours.¹⁸⁵ In those cases of high urgency, depending on the type of the authorised activities, the Director-General has to notify both the Attorney-General and the Chief Commissioner of Intelligence Warrants, or (just) the Attorney-General.¹⁸⁶ Furthermore, an authorisation given by using the simplified procedures (urgent and very urgent authorisations) must be referred to the Inspector-General of Intelligence and Security for review as soon as possible.¹⁸⁷

The latter office, established under the Inspector-General of Intelligence and Security Act 1996, oversees the activities of the NZSIS and the GCSB. The current Act (lastly amended in April 2016) states that the Inspector-General assists the responsible Minister to ensure that the activities of the agencies comply with the law, and complaints relating to these activities are independently investigated.¹⁸⁸ *Prima facie*, the role seems to be a mixture of *independent judicial* and *ministerial investigation body*. However, in practice, the office provides “the main external check”,¹⁸⁹ and its oversight function is carried out without

¹⁸² See Explanatory note of the New Zealand Intelligence and Security Bill.

¹⁸³ Cullen and Reddy, above n 178, at 118–122.

¹⁸⁴ New Zealand Intelligence and Security Bill, cls 69–75.

¹⁸⁵ New Zealand Intelligence and Security Bill, cls 77–81.

¹⁸⁶ New Zealand Intelligence and Security Bill, cls 78(1)(a) and 79(1)(a).

¹⁸⁷ New Zealand Intelligence and Security Bill, cls 75 and 81.

¹⁸⁸ Inspector-General of Intelligence and Security Act 1996, s 4.

¹⁸⁹ Cullen and Reddy, above n 178, at 63.

directions from the Minister in charge, the Prime Minister or other Ministers.¹⁹⁰ Therefore, the report by *Cullen and Reddy* recommended to replace the provision that might convey the impression that the office would actually be bound by ministerial directives.¹⁹¹ The introduced Bill emphasises the role of the Inspector-General as an “independent oversight” body that has four core functions: ensuring that the agencies observe the law and act with propriety, dealing with complaints, conducting inquiries, and advising the Government and the Intelligence and Security Committee.¹⁹² As the workload of the office has steadily increased, the Office of the Inspector-General also includes the position of Deputy Inspector-General since 2013, who carries out all the duties and powers of the Inspector-General, to the same extent.¹⁹³ In order to promote their independence, unlike the current Act which sets out their appointment on recommendation of the Prime Minister, the Bill demands the recommendation of Parliament.¹⁹⁴ The provisions concerning the oversight functions are a core element of the proposed reform. With respect to the exercise of their review duties in cases of warrantless measures, there was very little opportunity to test them. The last annual report stated that there was only one case since December 2014.¹⁹⁵ Nevertheless, the proposed Bill contains substantial provisions that will have an impact on this review. Firstly, according to the recommendation by *Cullen and Reddy*,¹⁹⁶ the Bill makes clear that the review of authorisations will not only cover their procedure but also substantive matters.¹⁹⁷ Secondly, the finding of the scrutiny does not invalidate an authorisation; the Inspector-General may report to the Attorney-General and the Chief Commissioner of Intelligence Warrants or just the Attorney-General, respectively, in these cases.¹⁹⁸ Thirdly, the jurisdiction of any court is not affected by conducting the review.¹⁹⁹

¹⁹⁰ Office of the Inspector-General of Intelligence and Security *Annual Report for the Year Ended 30 June 2016* (27 October 2016) at 4.

¹⁹¹ *Cullen and Reddy*, above n 178, at 69.

¹⁹² New Zealand Intelligence and Security Bill, cl 119.

¹⁹³ Inspector-General of Intelligence and Security Act 1996, s 5(3); New Zealand Intelligence and Security Bill, cl 128(1).

¹⁹⁴ New Zealand Intelligence and Security Bill, cls 120(2) and 127(2).

¹⁹⁵ Office of the Inspector-General of Intelligence and Security, above n 190, at 20.

¹⁹⁶ *Cullen and Reddy*, above n 178, at 70.

¹⁹⁷ New Zealand Intelligence and Security Bill, Explanatory note (general policy statement).

¹⁹⁸ New Zealand Intelligence and Security Bill, cl 126.

¹⁹⁹ New Zealand Intelligence and Security Bill, cl 125(1). – In the unlikely case that a provision of the new Act would actually limit the right to judicial review of an affected individual, the question would arise

All in all, at second, deeper glance, the arrangements made, or intended to make for New Zealand's intelligence agencies constitute a system of oversight and review which complements the existing system of judicial review rather than restricting it.

D Reform Discussions and Comparative Considerations

Apart from the above examined developments, there are some current reform discussions on the extent of judicial review. These discussions will be examined in the following. Furthermore, in this regard, some comparative aspects with respect to the function of the Federal Constitutional Court (Bundesverfassungsgericht) in Germany will be provided. In doing so, the considerations concentrate on judicial review of legislation.

1 Current reform discussions

The red-hot reform proposal that is most discussed at present is provided by *Geoffrey Palmer* and *Andrew Butler*.²⁰⁰ They have proposed a written, codified *Constitution for Aotearoa New Zealand*.

According to their draft, the constitution should have supremacy, and, hence, bind Parliament (see below (a)).²⁰¹ This would, among others, soften the concept of parliamentary sovereignty and enable the courts, particularly the Supreme Court, to enforce the constitutional rights. Judicial review of legislation would become possible, to the extent that the scope of scrutiny is confined to compliance with superior constitutional law (see below (b)).²⁰²

(a) The concept of supremacy

According to the authors, and also from an objective point of view, the adoption of a higher law constitution could be considered as a remarkable, probably the most noticeable,²⁰³ change. Article 1 of the draft states: "Where there is an inconsistency between any law and any provision of this Constitution, the provision of this Constitution prevails".²⁰⁴ This

as to whether the legislature has the legitimate regulatory competence for setting out (and limiting) the rules on judicial review; see Amy Street *Judicial Review and the Rule of Law: Who is in Control?* (online looseleaf, The Constitution Society, 2013).

²⁰⁰ Palmer and Butler, above n 6.

²⁰¹ At 16 and 20–21.

²⁰² At 20–21.

²⁰³ At 20.

²⁰⁴ At 35.

reflects the well-recognised rule on the resolution of conflicts of norms “lex superior derogat legi inferiori”.²⁰⁵ In a certain meaning, art 1 of the draft contains the main premise of the constitution that takes into account the opinion in legal theory, which was particularly held by *Hans Kelsen* and *Adolf J Merkl*, that the overriding function of law and its authorisation to trump other law should be positively stipulated if the relevant conflict rule is not inherent in concrete legal orders.²⁰⁶

The draft constitution attempts to harmonise and unify the widely scattered sources of the New Zealand Constitution that, heretofore, required compilations and conspectus provided by constitutional experts.²⁰⁷ Among others, the presented proposal sets out the constitutional fundamentals, the state institutions and organs, the powers of the three branches of government, namely the Legislative, Executive, and Judiciary, some electoral principles, as well as the individual rights and freedoms. In other words, the draft determines in “a single document the fundamental rules and principles under which New Zealand is to be governed”.²⁰⁸ In doing so, it would make New Zealand’s constitution clear and accessible,²⁰⁹ and abolish the demand of substantial unwritten constitutional conventions.²¹⁰ According to *Robert Blackburn* (albeit with reference to the constitutional reform discussion in the United Kingdom):²¹¹

The primary argument for a written constitution is that it would enable everyone to know and see what the rules and institutions were that governed and directed ministers, parliamentarians, civil servants, and all senior state officials and public office holders, in performing their public duties.

But regardless of whether there can be actually seen a necessity to compile and unite all the sources of the New Zealand constitution, the above mentioned constitutional provisions would become superior law with a considerable impact. Their overriding or rather prevailing effect would touch and relativise the principle of parliamentary sovereignty. The

²⁰⁵ Lat.: A higher level rule supersedes a lower one.

²⁰⁶ See Erich Vranes “Lex Superior, Lex Specialis, Lex Posterior – Zur Rechtsnatur der ‘Konfliktlösungsregeln’” [2005] ZaöRV 391 at 395–397 and 404–405.

²⁰⁷ See Keith, above n 37, at 1–6.

²⁰⁸ Palmer and Butler, above n 6, at 1.

²⁰⁹ At 11, 25 and 224.

²¹⁰ At 25.

²¹¹ Robert Blackburn “Enacting a Written Constitution for the United Kingdom” (2015) 36 Statute Law Review 1 at 3.

law-making power of Parliament would no longer be unlimited. Especially the catalogue of individual rights and freedoms in part 12 of the draft,²¹² that preserves the rights of the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993, and includes the rights of the International Covenant on Civil and Political Rights (ICCPR)²¹³ as well as some underpinning principles of the International Covenant on Economic, Social and Cultural Rights, would define the limits on legislative power. Admittedly, the express supremacy of these constitutional rights over other legislation seems to be a drastic measure in order to advance parliamentary compliance with human rights standards. The latter aspect, namely an improvement of compliance by Parliament with the Bill of Rights Act was recently recommended by the Constitutional Advisory Panel²¹⁴ and by the UN Human Rights Committee.²¹⁵

On the other hand, the draft constitution does not remove the doctrine of parliamentary sovereignty in New Zealand, but merely softens its sanctity. Firstly, the individual rights and freedoms in part 12 are not absolute, and may be subject to reasonable and justifiable limitations that are set out by law. Insofar, the existing s 5 of the Bill of Rights Act is carried over into art 77 of the draft²¹⁶ without any change. This enables Parliament to regulate the extent of individual rights by defining their justified limits. Thereby, the proposal primarily entrusts Parliament with the task of balancing carefully and thoughtfully between public interests, eg existing security demands, and the rights of individuals.²¹⁷ Secondly, according to art 116(1)(a) of the draft, the constitution may be repealed or amended by legislative act that has been passed by a 75 per cent majority of all members of the House of Representatives.²¹⁸ This provision grants Parliament the opportunity to

²¹² At 63–70.

²¹³ The UN Human Rights Committee recently recommended that New Zealand should amend its Bill of Rights Act in order to fully adopt the ICCPR; see UN Human Rights Committee *Concluding Observations on the Sixth Periodic Report of New Zealand* (CCPR/C/NZL/6, Geneva, 28 April 2016) at [10(a)].

²¹⁴ Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation* (November 2013) at 17 and 54–56. – See also Announcement “New Zealand Bill of Rights Act 1990: options for reform” (8 October 2014) New Zealand Parliament <www.parliament.nz/en> which refers to reform options that have been put forward by Members of Parliament and select committees.

²¹⁵ UN Human Rights Committee, above n 213, at [10].

²¹⁶ Palmer and Butler, above n 6, at 63.

²¹⁷ At 172.

²¹⁸ At 75 and 231–234.

remedy inconsistencies and, in this way, retain the final word. The constitutional hurdle must be seen in the requirement for a special majority. Therefore, the proposed superior law binds Parliament merely in the sense that it cannot be changed by simple majority. But, in principle, this sort of binding nature is nothing new under the existing constitutional law of New Zealand. Eg, the Electoral Act 1993 highlights certain core elements of the electoral system that can be altered only with a special majority of 75 per cent of the Members of Parliament (or in a referendum).²¹⁹ Furthermore, a qualified parliamentary majority as a key condition for constitutional amendments is commonly recognised in many democratic countries.²²⁰

(b) A constitution enforceable by the courts

The above-described implementation of the supremacy principle is the key feature to tackle legislation that is inconsistent with constitutional rights. It is the tool that enables courts to enforce the compliance of the executive and legislative branch with the Constitution.

As shown in this paper, judicial review of executive action is well established under the current constitutional arrangements, whereas legislation is not covered yet. The already mentioned report of the UN Human Rights Committee in 2016 recommended the strengthening of the judiciary in scrutinising the compliance of legislation with the overarching liberties of the Bill of Rights Act and the ICCPR.²²¹ This can be considered as request to implement a judicial power to invalidate parliamentary acts that are inconsistent with human rights standards. At the end of 2013, the Constitutional Advisory Panel, which widely surveyed New Zealanders about their view on the current constitutional situation and possible developments, did not perceive *significant* support (in the meaning of a majority opinion) for the proposal of granting courts the power to strike down legislation that is in violation of the violation of constitutional rights.²²²

The draft constitution by *Palmer* and *Butler* empowers courts and tribunals to determine constitutional matters within the scope of their jurisdiction and, thereby, declare any law

²¹⁹ Electoral Act 1993, s 268. – See Keith, above n 37, at 6.

²²⁰ Palmer and Butler, above n 6, at 112. – Eg, see art 79(2) of the Grundgesetz (Basic Law for the Federal Republic of Germany) which requires an approval by two thirds of the Members of the Bundestag (German Federal Parliament) and two thirds of the votes of the Bundesrat (Federal Council of Germany, that is the upper house of the German parliament).

²²¹ UN Human Rights Committee, above n 213, at [10(c)].

²²² Constitutional Advisory Panel, above n 214, at 25 and 55–56.

that is contradictory to the Constitution to be invalid to the extent of its inconsistency.²²³ Beside procedural requirements and substantive (remedial) orders, the judicial invalidation of an Act of Parliament requires the prior confirmation by New Zealand's Supreme Court in order to become effective.²²⁴ This involvement of the Supreme Court guarantees that court rulings on legislative compliance with the Constitution have the endorsement of the most senior judges.²²⁵ It also integrates a sort of a mandatory appellate review and grants a uniform and coherent interpretation of constitutional provisions nationwide.

According to the proposal, and in line with the described concept of softening (instead of removing) the principle of parliamentary sovereignty, Parliament as the elected and democratic legislature should be entitled to overrule a constitutional judgement by a special majority and, thus, have the last say.²²⁶ If Parliament wants to retain a statute that the Supreme Court has declared unconstitutional, eg as it disagrees with the judges' appraisal that an Act would illegitimately limit individual rights,²²⁷ it may pass a validating Act with a qualified majority of 75 per cent of its members.²²⁸ This *actus contrarius* which decrees the continued validity of the statute may contain modifications or limitations.

All in all, the draft constitution empowers courts to nullify legislation. In cases like *Taylor v Attorney-General*,²²⁹ under the proposed art 68, they would have had an instrument to enforce the finding that the legislation was inconsistent with individual rights.

2 Comparison with the Federal Constitutional Court of Germany

In this context, a brief comparison with the constitutional situation in Germany could be useful as it has strongly implemented the supremacy of the Constitution and established a constitutional jurisdiction that is sufficiently equipped to enforce the constitutionality of executive, legislative and judicial actions.

²²³ At 59–60, art 68(1) and (2) of the proposal.

²²⁴ At 60, art 68(3) of the proposal. – In cases where a constitutional issue arises in a court that is not a superior court, or in a tribunal, the proceedings should already previously be removed to the High Court; see art 68(6).

²²⁵ At 135.

²²⁶ At 20–21 and 144.

²²⁷ In this case of a dissenting evaluation, an amendment according to art 116(1)(a) is probably not the means of choice; see Palmer and Butler, above n 6, at 144.

²²⁸ At 60, art 68(4) and (5) of the proposal.

²²⁹ See above II B 3 (e).

(a) General role and function

While each federate state (Bundesland) of Germany has its own State Constitutional Court (Landesverfassungsgericht) with jurisdiction over constitutional disputes where the Constitution of a Land (federate state) is in question, the framers of the German Constitution (Grundgesetz²³⁰) of 1949 introduced the Federal Constitutional Court (Bundesverfassungsgericht) on the national level. It began functioning in 1951. The Federal Constitutional Court is both Germany's highest court and a constitutional organ. In particular, the weak position of the Staatsgerichtshof of the Weimar Republic, established in 1921, and the experience of the Nazi era (1933–1945) proved that it is not sufficient just to adopt a Bill of Rights without strong-willed and powerful guardians.²³¹ The Federal Constitutional Court is recognised as being the “guardian” of the German Constitution (“Hüter der Verfassung”).²³² Nowadays, the Constitution, and especially the interpretation of the fundamental rights (Grundrechte) are inextricably linked with the Court's res judicata.²³³ Its rulings are crucial and indispensable for the understanding of the written constitution as most provisions are formulated broadly in order to provide a constant, stable framework even in changing times. It is up to the Court to interpret these provisions, provide answers to the constitutional questions of today's free and democratic society, and thereby, to vitalise the Constitution.²³⁴ In doing so, its case law has also played

²³⁰ The official translation of “Grundgesetz” (Grundgesetz für die Bundesrepublik Deutschland) is “Basic Law” (Basic Law for the Federal Republic of Germany). In 1949, the name “Basic Law”, rather than “Constitution” (Verfassung), was chosen to emphasise the temporary and provisional character of the Constitution of this divided country. According to art 146 of the Grundgesetz, it was originally intended to adopt a new Constitution as soon as the German reunification would be completed. But in the aftermath of 1989/1990, it never happened. For a more detailed historical outline, see Nigel G Foster and Satish Sule *German Legal System and Laws* (3rd ed, Oxford University Press, Oxford, 2002) at 145–148.

²³¹ Dieter Grimm *Constitutionalism: Past, Present, and Future* (Oxford University Press, Oxford, 2016) at 161.

²³² Howard D Fisher *The German Legal System and Legal Language* (4th ed, Routledge-Cavendish, London & New York, 2009) at 21; Anke Freckmann and Thomas Wegerich *The German Legal System* (Sweet & Maxwell, London, 1999) at 98. – See also Taylor Cole “The West German Federal Constitutional Court: An Evaluation After Six Years” (1958) 20 *The Journal of Politics* 278 at 278.

²³³ See eg the former President of the Federal Constitutional Court Jutta Limbach “The Role of the Federal Constitutional Court” (2000) 53 *SMU Law Review* 429 at 429.

²³⁴ Kai Hailbronner and Marcel Kau “Constitutional Law” in Mathias Reimann and Joachim Zekoll (eds) *Introduction to German Law* (2nd ed, Kluwer Law International, The Hague, 2005) 53 at 72.

an exemplary role for (new) constitutional jurisdictions in some countries that faced a radical constitutional change after the political collapse in 1989/1990.²³⁵

The Federal Constitutional Court is located in Karlsruhe, far away from the day-to-day politics of the country. It consists of two senates of eight judges each.²³⁶ As the workload of the Court is high, and each year, approximately 6,000 new constitutional complaints and other proceedings are lodged,²³⁷ each senate has formed three-member chambers (Kammern) which adjudicate on constitutional disputes, especially on constitutional complaints that have no fundamental constitutional significance.²³⁸ The remaining important cases are decided by the panel of eight judges. In some rare cases, the plenum of all 16 judges shall decide on a matter. The powers of the Federal Constitutional Court are partly set out in art 93 of the Grundgesetz, and beyond that, interspersed throughout the Constitution. The details of the Court's competency and powers, the appointment of the judges, the organisation, and the procedural law are regulated by the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz). An outline of all types of proceedings is provided in its s 13. According to this, the Court's jurisdiction may be invoked in around 20 specific case configurations. It is crucial to underline that the Court solely acts on application and does not initiate proceedings on its own whenever a constitutional conflict arises.²³⁹ The question as to who can invoke the Court under which conditions, and what requirements have to be fulfilled to file an application which is admissible and, only then, can be decided substantively on the merits, depends on the sort of dispute and proceeding. The kind of constitutional matters that are subject to judicial scrutiny are many-faceted and cannot be examined in greater detail within the scope of this paper. To give an overview, for example, the Federal Constitutional Court rules:²⁴⁰

²³⁵ Grimm, above n 231, 161; Michaela Hailbronner "Rethinking the Rise of the German Constitutional Court: From Anti-Nazism to Value Formalism" (2014) 12 *International Journal of Constitutional Law* 626 at 626. – See also László Sólyom, the first President of the Hungarian Constitutional Court, established in 1989, who affirmed the enormous influence on the Hungarian law practice; László Sólyom and Georg Brunner *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (University of Michigan Press, Ann Arbor, 2000) at 5.

²³⁶ Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz), s 2.

²³⁷ Bundesverfassungsgericht "Jahresstatistiken (Annual Statistics)" (2017) <www.bundesverfassungsgericht.de>.

²³⁸ Federal Constitutional Court Act, ss 15a, 93a–93d.

²³⁹ Hailbronner and Kau, above n 234, at 73.

²⁴⁰ Extract of the list in s 13 of the Federal Constitutional Court Act.

- On the forfeiture of individual constitutional rights,
- On the unconstitutionality and ban of political parties (*Parteiverbotsverfahren*),
- On disputes in the context of parliamentary elections (electoral complaints),
- On disputes between constitutional organs on the scope of their mutual rights, duties, and powers (*Organstreitverfahren*),
- On constitutional complaints, which may be filed by any person alleging that one of his constitutional rights has been infringed by public authority (*Verfassungsbeschwerde*),
- In cases of abstract judicial review of statutes (*abstrakte Normenkontrolle*),
- In cases of specific judicial review of statutes (*konkrete Normenkontrolle*),
- In cases of disagreements concerning the rights and duties of the Federation and the Länder (federate states), especially in the execution of federal law by the Länder and in the exercise of federal supervision (*Bund-Länder-Streitverfahren*),
- On other constitutional disputes between the Länder,
- On the constitutionality of the setting up of a parliamentary enquiry committee,
- On the impeachment of the Federal President, and of federal and Land judges,
- In cases of doubt whether (specific) international law is part of the federal law and whether it creates rights and duties for the individual, when such a decision is requested by a regular court,
- In cases where the constitutional court of a Land, in interpreting the Basic Law (Grundgesetz), intends to deviate from a judgment of the Federal Constitutional Court or of the constitutional court of another Land.

In considering and deciding these disputes, the Court's scope of scrutiny is, in principle, confined to the application and interpretation of the Constitution, but it also rules on specific matters which are closely connected with the Grundgesetz or have their origin in it. The decisions of the Court apply not only inter partes, but rather bind the constitutional organs, courts and authorities at the federal and state level (erga omnes binding effect)²⁴¹. Organstreitverfahren, electoral complaints, constitutional complaints as well as the abstract and specific judicial review of statutes are numerically the most important types of proceedings in practice.²⁴²

²⁴¹ Federal Constitutional Court Act, s 31(1).

²⁴² Bundesverfassungsgericht "Jahresstatistiken (Annual Statistics)" (2017) <www.bundesverfassungsgericht.de>. – See also Gerhard Robbers *An Introduction to German Law* (4th ed, Nomos, Baden-Baden, 2006) at 79.

(b) Judicial review of legislation

The latter three types are particularly relevant when there is talk of judicial review of legislation under the German Constitution. While the constitutional complaint basically refers to all acts of public authorities, which includes actions taken by the executive branch, judiciary, and legislature, the abstract and specific constitutional review solely concerns legislative actions. These three kinds of procedures provide the opportunity to scrutinise a statute's constitutionality under all relevant aspects, and the Court's power to strike down legislation that is in violation of the Constitution.²⁴³ Such decisions of nullification have the force of law and their operative part has to be published in the Federal Law Gazette by the Federal Minister of Justice.²⁴⁴ Under exceptional circumstances, the Court may forbear to invalidate an Act or its questionable provisions despite their unconstitutionality if the nullification would cause an even more adverse situation.²⁴⁵ In the latter case, Parliament will be set a deadline by which it has to effectuate constitutional conditions in the light of the Court's findings.

The *abstract* and *specific* judicial review of statutes²⁴⁶ are very similar proceedings. In both cases, the Court has to determine the formal and substantive compatibility of federal law or Land law²⁴⁷ with the Constitution, or the compatibility of Land law with other federal law.²⁴⁸ The second question as to whether Land law is consistent with federal law is a constitutional issue as the supremacy of federal law has been elevated to constitutional status.²⁴⁹ The major difference between the abstract and specific procedure can be seen in the groups of possible applicants and public bodies that are allowed to file an application for review. The *abstract review of legislation* may be initiated by the Federal Government,

²⁴³ Federal Constitutional Court Act, ss 78, 82(1), 95(3).

²⁴⁴ Federal Constitutional Court Act, s 31(2).

²⁴⁵ Foster and Sule, above n 230, at 241.

²⁴⁶ German: Abstrakte und konkrete Normenkontrolle.

²⁴⁷ Law of federate states that was passed by state parliaments.

²⁴⁸ Basic Law for the Federal Republic of Germany, arts 93(1) para (2), 100(1); Federal Constitutional Court Act, s 13(6) and (11).

²⁴⁹ Basic Law for the Federal Republic of Germany, art 31: Federal law shall take precedence over Land law.

the government of a Land, or one quarter of the Members of the Bundestag²⁵⁰ (German Federal Parliament).²⁵¹ It is not required that the applicants assert that one of their own rights has been affected or even infringed. The main admissibility criterion is that the applicant considers federal or Land law to be void due to its unconstitutionality or, in cases of Land law, its inconsistency with federal law. But it is also admissible that an applicant wants the Court to declare the constitutionality of a statute in constellations where the applicant considers it to be valid even though a court or another public authority refused its application with reference to its alleged unconstitutionality or inconsistency with federal law.²⁵² In terms of the *specific judicial review of statutes*, the proceeding may be initiated by a referral of a regular court that considers a statutory provision relevant for the holding to be unconstitutional or, in cases of Land law, to be incompatible with a federal law.²⁵³ In other words, the constitutional question arises in a concrete court case. Unlike in cases where an executive action, a sub-statutory, non-parliamentary regulation or decree is in question, lower courts do not have the power of nullifying Acts of the Federal Parliament or of state parliaments. In deference to the democratic elected legislature, as well as in order to preserve the legislative authority and prevent opposing court rulings, the power to strike down legislation is centralised and concentrated at the Constitutional Court.²⁵⁴ These underlying motives match with the above-mentioned reasons that are provided by *Palmer* and *Butler* for their requirement of a confirmation by New Zealand's Supreme Court before a judicial nullification can have effect. The court, which stays its own proceeding and refers the constitutional issue to the Constitutional Court, has to submit a statement of reasons for its referral order.²⁵⁵ The parties to the original court case are not entitled to apply or to compel such an order.²⁵⁶

²⁵⁰ In order to advance the exercise of parliamentary self-control, and minority rights of the parliamentary opposition, the application requirement was lowered from one third to one fourth of the Members of Parliament in 2009.

²⁵¹ Federal Constitutional Court Act, s 13(6).

²⁵² Federal Constitutional Court Act, s 76(1).

²⁵³ Basic Law for the Federal Republic of Germany, art 100(1).

²⁵⁴ Fisher, above 232, at 21; Foster and Sule, above n 230, at 241–242. – With respect to the constitutions of the federate states (Landesverfassungen), the constitutional courts of the Länder have also the right to nullify Land law that infringes the individual state constitution.

²⁵⁵ Federal Constitutional Court Act, s 80(2).

²⁵⁶ Federal Constitutional Court Act, s 80(3).

Individuals alleging that a statute has infringed their constitutional rights (eg their fundamental rights²⁵⁷) have the opportunity to lodge a *constitutional complaint* (Verfassungsbeschwerde).²⁵⁸ As already mentioned, the subject-matter of a constitutional complaint can be any act of the three state powers, i.e. executive and judicial decisions as well as legislation. But the Constitutional Court is neither a super-appellate court nor part of the course of ordinary legal remedies. It just examines whether a specific decision or statutory provision is in breach of the fundamental rights and, hence, unconstitutional, but not whether it is right or wrong under simple law. Furthermore, the constitutional complaint is an extraordinary remedy that is subsidiary to the regular remedies, which means that the complainant must basically exhaust the regular remedies available before the lower courts.²⁵⁹ In cases of judicial review of legislation, it is required that complainants primarily challenge the executing decisions that have been made by public authorities and courts on the basis of the statutory provisions. At the very end, after all remedies have been exhausted, a constitutional complaint is to be held admissible. Naturally, this means that the subject-matter often is the court decision of last instance upholding and applying the statute in question.²⁶⁰ But in exceptional cases, the Constitutional Court may waive the requirement of prior exhaustion of remedies against the executing decisions of legislative acts “if the complaint is of general relevance or if prior recourse to other courts were to the complainant’s severe and unavoidable disadvantage”.²⁶¹ A prior way through the regular court channels is particularly unreasonable in cases of criminal law and law of administrative offences. No one can be required to commit a crime or an administrative offence at first in order to tackle the alleged unconstitutionality of these laws throughout all court instances up to the Federal Constitutional Court.²⁶² Therefore, the constitutional complaint can be lodged directly against the statute in those constellations.

In addition to this, two further admissibility criteria have to be fulfilled. Complainants must have *locus standi*, which is given when the asserted infringement of constitutional rights

²⁵⁷ German: Grundrechte.

²⁵⁸ Basic Law for the Federal Republic of Germany, arts 93(1) para (4a); Federal Constitutional Court Act, s 13(8)(a).

²⁵⁹ Federal Constitutional Court Act, s 90(2) cl 1. – See also Raymond Young *Sourcebook on German Law* (2nd ed, Cavendish Publishing Ltd, London, 2002) at 91.

²⁶⁰ Foster and Sule, above n 230, at 244.

²⁶¹ Federal Constitutional Court Act, s 90(2) cl 2.

²⁶² Bundesverfassungsgericht “Verfassungsbeschwerde (Constitutional Complaint)” (2017) <www.bundesverfassungsgericht.de>.

affects them personally/individually, currently and directly.²⁶³ Furthermore, unlike the abstract and specific judicial review of statutes which can be filed whenever a dispute or doubt occurs for an unlimited period, the constitutional complaint must be filed within special time limits.²⁶⁴

Once the Court holds that an application is admissible, it then will be examined as to its merits. The approach and scope of judicial scrutiny are similar (with some modifications) in the described three types of proceedings, as far as the constitutionality of a statute is in question. In determining whether a constitutional right is violated, the Constitutional Court follows a two-step assessment which was nearly predefined by the constitutional provisions on the fundamental rights, and reflects a standard in many democratic countries.²⁶⁵ The first stage contains the determination whether a particular state action (eg a statutory provision) has affected the scope of protection that is granted by an individual right.²⁶⁶ This requires the appraisal as to whether a specific private conduct is generally protected by a right, and whether the state action has actually limited the exercise of this right.²⁶⁷ The second stage of scrutiny asks whether this limitation can be justified under the Constitution.²⁶⁸ The latter aspect particularly requires that the questionable acts are consistent with the limitation clauses of the Constitution, and that its competence-related, procedural and substantive standards are not contravened. One crucial substantive requirement is the necessity to comply with the principle of proportionality. According to *Dieter Grimm*, former Justice of the Federal Constitutional Court, the predominant reason why the Court strikes down a statute in practice is the violation of the proportionality principle.²⁶⁹ Apart from the reference to judicial review of legislation, the general two-stage approach, the functioning of the limitation clause(s)²⁷⁰ and the significance of the proportionality principle are quite comparable with the New Zealand standard.

²⁶³ Foster and Sule, above n 230, at 243; Young, above n 259, at 91; Fisher, above 232, at 22.

²⁶⁴ Federal Constitutional Court Act, s 93.

²⁶⁵ Grimm, above n 231, 169.

²⁶⁶ Foster and Sule, above n 230, at 211.

²⁶⁷ Grimm, above n 231, 169.

²⁶⁸ Grimm, above n 231, 169–170; Foster and Sule, above n 230, at 211.

²⁶⁹ Grimm, above n 231, 172.

²⁷⁰ See s 5 of the New Zealand Bill of Rights Act 1990 and art 77 of the *Palmer and Butler* draft.

In the 65 years since its foundation, the Federal Constitutional Court has concluded nearly 220,000 proceedings²⁷¹ and made some crucial decisions. In recent times, in the field of national security and counter-terrorism, there were three judgments that were particularly relevant. In 2006, the Court ruled that a provision of the Aviation Security Act (Luftsicherheitsgesetz), which authorised the Government to order a hijacked aircraft to be shot down by armed force in the case that it was intended to use it against human lives, is unconstitutional to the extent that it affects innocent people on board.²⁷² In 2010, the Court nullified various statutory provisions that set out and governed the precautionary storage of telecommunications traffic data without cause for six months, as they were inconsistent with the fundamental right to privacy of correspondence and telecommunications under art 10(1) of the Constitution.²⁷³ Finally in 2016, the Court had to decide on the statutory authorisation of the Federal Criminal Police Office to conduct covert surveillance within the scope of counter-terrorism measures²⁷⁴ and stated that these powers were, in principle, compatible with the constitutional rights. However, some provisions were too unspecific and broad, and hence not certain enough. The Court also considered the present design of the investigative powers to be disproportional in some aspects. But as it held the reasons of unconstitutionality to be not affecting the core powers in question, the Court maintained most of the provisions in force (with explicit modifications and restrictions) and granted the legislator a time limit for recasting the statute by 30 June 2018.

3 Considerations on the current reform proposal

After considering the constitutional situation in Germany with its Federal Constitutional Court, one may have a vague idea of why the Court is widely considered as one of the most powerful national courts in the world.²⁷⁵ However, in this context, it should be noted that its role and powers are not unquestioned. The critical voices particularly address the political influence that its judgments have on concrete legislation, and that is regarded as being too paternalistic in some cases.²⁷⁶ In comparison to this, the described proposal by

²⁷¹ Bundesverfassungsgericht “Jahresstatistiken (Annual Statistics)” (2017) <www.bundesverfassungsgericht.de>.

²⁷² BVerfG, Judgment of the First Senate of 15 February 2006, 1 BvR 357/05.

²⁷³ BVerfG, Judgment of the First Senate of 2 March 2010, 1 BvR 256/08, 1 BvR 586/08 and 1 BvR 263/08.

²⁷⁴ BVerfG, Judgment of the First Senate of 20 April 2016, 1 BvR 966/09 and 1 BvR 1140/09.

²⁷⁵ Hailbronner, above n 235, at 626.

²⁷⁶ Danielle E Finck “Judicial Review: The United States Supreme Court versus the German Constitutional Court” (1997) 20 Boston College Intern and Comp L Rev 123 at 130; Limbach, above n 172, at 432.

Palmer and *Butler* seems to be moderate. This impression is conveyed not only at first, but also at second glance.

It is questionable whether the reasonableness of an extension of judicial power should be based on the sombre assessment by *Palmer* and *Butler*, who stated:²⁷⁷

Governments act to remain in power as long as they can and they tend to try to get away with whatever they can. The risk is that they will observe no limits so long as there are none.

But there are reasons why the proposed review of legislation could be reasonable. First of all, as already mentioned, measures to strengthen the judicial branch in scrutinising the consistency of enacted laws with human rights were recently (repeatedly) recommended by the UN Human Rights Committee.²⁷⁸ But already in 1995, the Human Rights Committee advised to give New Zealand's courts the power "as soon as possible" to invalidate inconsistent statutes.²⁷⁹ Due to the fact that the Bill of Rights Act 1990 can be overridden by bare parliamentary majority and that its individual rights are not judicially enforceable against Parliament, *Lord Cooke of Thorndon* formulated even more drastically that "the New Zealand Bill of Rights Act 1990 is regarded internationally as one of the weakest affirmations of human rights".²⁸⁰ According to him, with reference to the above described developments of judicial review in the United Kingdom,²⁸¹ "[i]t is evident that New Zealand has fallen behind the play".²⁸² Although the wording of this appraisal seems to be too sharp and harsh, particularly in the light of the significant developments of judicial review and the associated strengthening of individual rights, the criticism of *Lord Cooke* contains two accurate aspects. Even in the United Kingdom, which is supposed to be the country of origin of the doctrine of parliamentary sovereignty, things have changed and judicial review of legislation has become possible to a notable extent.²⁸³ On this occasion, it is worth it to mention that New Zealand's neighbour Australia has also adopted judicial

²⁷⁷ *Palmer* and *Butler*, above n 6, at 21 and 113.

²⁷⁸ UN Human Rights Committee, above n 213, at [10(c)].

²⁷⁹ UN Human Rights Committee *Report of the Human Rights Committee (A/50/40, 3 October 1995)* at [185].

²⁸⁰ Robin B Cooke "The Role of the Judges" in Colin James (ed) *Building the Constitution* (Brebner Print, Wellington, 2000) 371 at 373.

²⁸¹ See above II B 3 (e).

²⁸² At 374.

²⁸³ *Palmer* and *Butler*, above n 6, at 143.

review of legislation; eg, the High Court of Australia can declare a state law that is inconsistent with a federal law to be unconstitutional and strike it down.²⁸⁴ Another aspect is the protection of minority rights as a core element of a democratic country which observes human rights. Fundamental human rights, and particularly minority rights cannot be granted on condition of changing (simple) parliamentary majorities.²⁸⁵ This argues strongly for a superior Bill of Rights whose observance is enforceable by independent and impartial judges. The power of invalidating a law that violates these rights as *ultima ratio* gives them a “real bite”.²⁸⁶

On the other hand, also the proponents of the newest draft constitution must admit that the law-making procedures in New Zealand’s history have worked quite well in the vast majority of cases. Among others, the work of the ministries in preparing proposals and ministerial draft bills, the work of the Parliament’s select committees as well as the significant contribution of Royal Commissions and New Zealand’s Law Commission, and the scrutiny and report obligations of the Attorney-General under s 7 of the Bill of Rights Act are, all together, supporting institutions for an accountable legislature under the rule of law. Nevertheless, the above-mentioned judgment of the High Court in *Taylor v Attorney-General*²⁸⁷ demonstrates that there is legislative action that is inconsistent with the liberties of the people, and courts have no means to encourage or compel a legislative compatibility. In March 2014, the current Attorney-General *Christopher Finlayson* noted that there have been 62 cases (comprising 30 Government Bills and 32 Non-Government Bills) in which Attorneys-General have reported to the House of Representatives pursuant to s 7 of the Bill of Rights Act since 1990. The result: 22 Bills were not enacted (including one Government Bill); 36 Bills were enacted despite the inconsistency objection; 4 Bills were still before Parliament in 2014.²⁸⁸ Finlayson also reported on two Acts that were clearly in violation of individual rights, and where he felt “shocked” that section 7-reports were omitted at the

²⁸⁴ Kathleen E Foley “Australian Judicial Review” (2007) 6 Washington University Global Studies Law Review 281 at 287 with reference to s 109 of the Australian Constitution.

²⁸⁵ Cooke, above n 280, at 375.

²⁸⁶ Palmer and Butler, above n 6, at 142.

²⁸⁷ *Taylor v Attorney-General*, above n 147.

²⁸⁸ Christopher Finlayson “Section 7 of the Bill of Rights: An Attorney General’s Perspective” (March 2014) at 2, available at “New Zealand Bill of Rights Act 1990: options for reform” (8 October 2014) New Zealand Parliament <www.parliament.nz/en>. – See also Palmer and Butler, above n 6, at 162–163, who report on further cases of legislative inconsistencies.

time when the Bills were introduced into Parliament.²⁸⁹ The latter practical experience argues once again in favour of a stronger independent review instance whose decisions are enforceable.

Furthermore, the fundamental function of courts as being safeguards of the individual rights is not per se confined to the field of executive and administrative actions, although that is the current law under the Constitution Act 1986.²⁹⁰ An inclusion of legislative action would affect the doctrine of parliamentary sovereignty. But in cases where two conflicting principles (safeguarding function of courts and legislative supremacy) are affecting and limiting each other, it is not necessarily required that one principle has to be completely dispensed in favour of the other. Eg, according to *Konrad Hesse's*²⁹¹ theory of practical concordance (*praktische Konkordanz*), that is, among others, used as a conflict-resolving rule for balancing constitutional principles and rights under the German Constitution:²⁹²

(Constitutionally) protected legal values need to be positioned in relation to one another ... in such a way as to allow each of them to be realised, or to use a more colourful metaphor, to allow each of them to flourish.

From my point of view, the concept of *Palmer* and *Butler* follows this approach, perhaps unknowingly. It tries to combine the judicial review of legislation with its benefits on one side with the sovereignty of the democratic elected legislator on the other side. The necessary compromise is the opportunity of Parliament to have the final say and to override an invalidating court ruling by a qualified majority of 75 per cent of its members (see s 68(4) and (5) of the draft). This solution has two further advantages. Firstly, it significantly softens the concerns that fundamental individual rights, including those of minorities, could be overridden just by bare majority. Secondly, the final stage provides Parliament an additional occasion for a careful consideration on the law in question and for a balancing of the interests at stake.

²⁸⁹ At 2.

²⁹⁰ In this sense, *Palmer* and *Butler*, above n 6, at 19–20 and 142.

²⁹¹ Konrad Hesse (1919–2005) was a legal theorist and, from 1975 to 1987, Justice of the Federal Constitutional Court in Germany.

²⁹² Quoted in Hans-Joachim Cremer *Human Rights and the Protection of Privacy in Tort Law* (Routledge-Cavendish, New York, 2011) at 204.

III Conclusion

In summary, the development of judicial review in its constitutional context is many-faceted. While there is a broad agreement on the fundamental characteristics of an independent judiciary under the rule of law, the specific arrangements and manifestations have changed over time. In particular, the extent of scrutiny has been subject to continuous alteration and was frequently associated with the evolution of democracy and human rights. As described, the trend has clearly shifted towards a broader and deeper judicial scrutiny of governmental actions in recent decades – especially in the field of national security. Courts have become more willing to review the exercise of statutory discretion by governmental agencies and public bodies as well as to look behind their arguments. In doing so, the *blanket* assertion that national security is at stake is no longer considered sufficient. Judicial review basically requires access to the relevant information for reasons of substantive justice and procedural fairness. This approach in exercising judicial power also reflects the general tendency towards a more open government and the legal recognition of human rights. The latter is particularly embedded in the international context. Even counter-terrorism measures will not question the validity of these rights. Failing that and trading off individual rights against security, the government would impair the values that it seeks to protect.²⁹³ Strong-willed and powerful courts rejecting attitudes, that a government could significantly restrict civil liberties without any judicial “authority to adjudicate constitutional challenges” to those actions, demonstrate the strength of the rule of law and are its real bite.²⁹⁴

As shown, New Zealand’s courts have particularly contributed to the above-described developments. Furthermore, there are reform discussions which most notably refer to the enhancement of judicial power to consider the constitutionality of legislation, and to invalidate it where necessary. Some current trends point in this direction. The reasons for that are plausible.

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²⁹³ UN Secretary-General *In Larger Freedom: Towards Development, Security and Human Rights for All* (A/59/2005, New York, March 2005) at 37.

²⁹⁴ *State of Washington v Trump* United States Court of Appeals for the Ninth Circuit No. 17-35105, 9 February 2017 at 14 and 16–18.

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