SEPARATION OF POWERS IN NEW ZEALAND

Philip A Joseph*

Abstract: In New Zealand, the separation of powers is not an organising principle of constitutional thought. It loosely underpins the country's institutional framework, but it does not feature prominently in its public law discourse. The conflation of executive and legislative personnel in New Zealand represents a major departure from the ideal of the separation of powers. This ideal is realised only in relation to the judicial branch of government, which is legally independent of the political executive. The article identifies four models of separation, three of which are relevant to New Zealand. Its New Zealand's governmental arrangements variously evidence a legal, functional and *de facto* separation of powers but not a constitutional separation. The absence of a constitutional separation leaves a lacuna that governments might exploit in untoward ways. A case study included below exemplifies the potential for abuse when powers are not constitutionally vested in separate organs.

Keywords: *separation; powers; independence; taxonomy; legal; functional; constitutional; de facto; judiciary; abuse*

I. Introduction

In New Zealand, the quest to locate the separation of powers is slightly enigmatic.[1] The separation of powers loosely underpins New Zealand's institutional framework, but it does not feature prominently in its discourse and is not an organising principle of constitutional thought. The separation of the judicial branch is the most complete as between the three branches of government — the executive, legislature and judiciary. This separation secures the principle of judicial independence which, in turn, promotes the ideal of the rule of law. In contrast, executive and legislative powers are largely merged under the Westminster parliamentary system that New Zealand inherited.

This article identifies four models of separation. These correspond to a *legal*, *functional*, *constitutional* and *de facto* separation of powers. New Zealand's governmental arrangements variously evidence legal, functional and *de facto* separations but not a constitutional separation. A constitutional separation exists in countries with a supreme law constitution that separates the executive,

* Professor of Law, University of Canterbury, New Zealand.

1 For a more extensive examination, see Philip A Joseph, "Separation of Powers" in *Constitutional and Administrative Law in New Zealand* (Wellington: Thomson Reuters, 4th ed., 2014) Ch.8.

legislative and judicial powers and vests them in correspondently separate organs. New Zealand lacks a supreme law constitution which would be required to make the separation of powers a vehicle for constitutional challenge.

The absence of a constitutional separation of powers can give cause for concern. A case study included below exposed shortcomings and raised serious rule of law issues. The National Government under Prime Minister John Key (2008–2017) enacted, under urgency, an amendment to New Zealand's public health and disability legislation that retrospectively withheld access to justice. The Act prevented litigants from accessing the Human Rights Review Tribunal or the courts to challenge unlawfully discriminatory government policy. The Act usurped the judicial power of the courts but remained impervious to legal challenge. There was nothing to stop Parliament from trespassing on the judicial domain and abrogating citizens' rights of redress for unlawful executive action.

The separation of powers in New Zealand may be examined from either of two perspectives: by retaining the orthodox classification of the executive, legislative and judicial branches or by reconfiguring them into a binary relationship denoting the political and judicial branches. The latter perspective — viewed through the lens of a binary relationship — is the more meaningful one owing to the conflation of executive and legislative personnel under the Westminster parliamentary system. A defining feature of this system is the principle of the parliamentary ministry, under which ministers of the Crown must also be elected members of Parliament. Where there is mixed or merged personnel as between the branches, any separation as exists is functional only. This is in contrast to a "paper" or "physical" separation, where there is no mixed or merged personnel. The distributive clauses of the United States Constitution exemplify the latter as these vest the respective powers in physically separate organs.[2]

II. Four Models of Separation

There are four distinct models of separation. First, a *legal* separation exists where the law establishes separate organs of government and invests each with its corresponding powers of government — executive power, legislative power and judicial power. In New Zealand, a legal separation exists as between the political and judicial branches of government but not as between the executive and legislature. Law secures the independence of the judicial branch, but the executive and legislative branches are not themselves institutionally separated under the law. The latter branches collectively comprise the political branch of government.

Second, a *functional* separation exists where there is neither a legal nor constitutional separation, but the respective branches exercise distinctively different functions. In New Zealand, the membership of the political executive and

2 *Ibid*., para.8.5.2.

the legislature is merged but there can still be discerned a functional separation as between the branches. Government ministers acting *qua* members of the executive may not purport to assume legislative functions. They assume such functions only when they act as parliamentarians in the course of proceedings in Parliament (as that expression is used in art.9 of the Bill of Rights 1688).[3] The New Zealand decision of *Fitzgerald v Muldoon*[4] is recorded below to illustrate the discipline that the functional separation imposes on cabinet ministers.

Third, a *constitutional* separation exists under supreme law constitutions that establish the organs of government and invest them with their respective powers — executive, legislative and judicial powers. New Zealand, the United Kingdom and reputedly Israel are the only modern States that do not operate under codified supreme-law constitutions. The case study below reveals the unsettling implications of a governmental system that is not predicated on a constitutional separation of powers. The political executive may exploit Parliament's legislative freedom to seize control over judicial proceedings brought to uphold private rights.

Fourth, a *de facto* separation exists where none of the other models apply, but politicians and bureaucrats respect the need to maintain a separation. In New Zealand, this model of separation has special relevance for the third element of the principle of judicial independence — the institutional independence of courts. This element is critically important to the functioning of courts but is not formally set out in the law or secured by constitutional convention. Without the protection of law or convention, the courts' institutional independence is the least secure element of the principle of judicial independence. The courts must rely on the principle of comity and the mutual respect and restraint that this principle enjoins in the political–judicial relationship.[5] Public arrangements may be structured in such a way as to secure, in a *de facto* sense, the institutional autonomy and independence of courts. The separation of powers is most tenuous when premised on *de facto* arrangements.

III. Legal Separation

A. Judicial independence

The legal separation of powers in New Zealand is largely synonymous with the principle of judicial independence. This principle secures the courts' independence from the political branch of government, the political executive (ministers of the Crown) and the legislature. The separation of judicial power is termed "legal" as

3 New Zealand inherited as law the Bill of Rights 1688 1 Will & Mar, Sess 2 c 2, when it was established as a Crown colony in 1840 (as confirmed by the Imperial Laws Application Act 1988 s.3 and the First Schedule to the Act).

4 [1976] 2 NZLR 615 (SC).

5 *Pickin v British Railways Board* [1974] AC 765, 799 (HL) (Parliament and the Courts have each been astute to respect the sphere of action and privileges of the other). In New Zealand, the principle of comity has statutory definition under the Parliamentary Privilege Act 2014 s.4(1)(b).

the law under New Zealand's unwritten constitution[6] guarantees security of judicial tenure and security of judicial salaries. Constitutional convention supplements these guarantees, and also the processes for making judicial appointments. The appointments process is a further feature of the legal separation of judicial power, as supplemented by constitutional convention.[7] The following addresses each of those elements in turn.

(i) Appointment of judges

In 1999, New Zealand standardised its judicial appointments process under transparent, uniform procedures. In former times, appointments were shrouded in secrecy which did not engender confidence that the process was robust and fair. The system came under mounting scrutiny and pressure for change: "[T]he appointments criteria were not publicised, judicial vacancies were not advertised, expressions of interests were not called for, candidates were not interviewed, and consultation procedures were *ad hoc* and uncertain."[8] The 1999 changes addressed these concerns and quieted calls for reform.

Law and convention coalesce under the appointments process. The Governor-General appoints judges under the royal prerogative delegated by the Letters Patent Constituting the Office of Governor-General.[9] By convention, however, the Governor-General makes appointments only on the recommendation of the Attorney-General, who exercises responsibility for senior and lower court appointments. When making recommendations, the Attorney-General acts in his capacity as First Law Officer of the Crown, rather than as a cabinet minister dispatching government business. The Attorney-General is the guardian of the public interest and is bound by convention to act independently of party political interests. The Attorney-General's responsibility for recommending appointments is subject to three exceptions: the Prime Minister recommends the appointment of the Chief Justice, the Minister of Māori Affairs recommends the appointment of Māori Land Court judges and the Minister of Justice recommends the appointment of community magistrates. In all other cases, appointments are the responsibility of the Attorney-General.

The conventions governing the office of Attorney-General secure an extra-legal separation between the political and judicial branches when the Attorney recommends judicial appointments. New Zealand is happily free of accusations that

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6 The expression "unwritten constitution" is typically used to describe the United Kingdom and New Zealand constitutions but it is a misnomer. These constitutions are, of course, pre-eminently written — in legislation, the judgments of Courts, prerogative instruments, cabinet manuals, the standing orders of the Houses of Parliament and diverse instruments recording the practices and understandings of executive government. The epithet "unwritten" denotes a non-supreme law constitution that can be altered through the ordinary legislative process, untrammelled by special "manner and form" requirements.

7 Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004.

8 See Joseph, *Constitutional and Administrative Law in New Zealand* (n.1) para.21.4.1(1).

9 Letters Patent Constituting the Office of Governor-General of New Zealand 1983 (SR 1983/225), Clause 10.

judicial appointments are made for personal or political reward. Appointments are made on the basis of merit, having regard to legal ability (sound legal knowledge and experience of the law), qualities of character (personal honesty and integrity, open mindedness and impartiality), personal technical skills (ability to time manage and expedite the work of the court) and reflection of society (sensitivity to the diversity of New Zealand society).[10] Appointments to the senior courts are typically made from the upper echelons of the independent bar, although appointments might also be made from the litigation teams in leading law firms. The New Zealand legal profession is not split, meaning that lawyers may practise as both barristers and solicitors. Larger size law firms typically litigate in the courts on behalf of their clients.

(ii) Security of judicial tenure

New Zealand did not inherit the guarantee of judicial tenure when it became a Crown colony in 1840.[11] It fell to early colonial legislation to re-enact the guarantees introduced under the Act of Settlement 1700 (Eng).[12] These guarantees were carried over under successive consolidating statutes and are now contained in ss.23–24 of the Constitution Act 1986.[13] A Judge of the High Court (which includes Judges of the Court of Appeal and Supreme Court) may not be removed from office, except by the Sovereign or Governor-General acting upon an address of the House of Representatives. Such address might be moved only on the ground of the judge's misbehaviour or incapacity to discharge the office. No such address for the removal of a judge has been moved in the history of New Zealand. Before the Constitution Act 1986, senior court judges might also have been suspended from office but that power was not carried over.

Lower court judges do not hold the same security of tenure as their senior court counterparts. Lower courts of limited statutory jurisdiction include the District Court,[14] the Employment Court,[15] the Environment Court,[16] the Māori Land Court,[17] the Māori Appellate Court,[18] Coroners Courts[19] and Courts Martial.[20] Subject to

10 *Judicial Appointments Protocol* (Crown Law Office, 1749404_4, 26 April 2013) pp.3–4.

11 *Attorney-General v Mr Justice Edwards* (1891) 9 NZLR 321 (CA); *Terrell v Secretary of State for the Colonies* [1953] 2 QB 482 (QBD). The Imperial Laws Application Act 1988 confirmed that New Zealand inherited some parts of the Act of Settlement Act 1700 12 and 13 Will III but not that part guaranteeing judicial independence.

12 Supreme Court Judges Act 1858 s.4.

13 See Joseph, *Constitutional and Administrative Law in New Zealand* (n.1) paras.21.3.2–21.3.3. See also Philip A Joseph "Appointment, Discipline and Removal of Judges in New Zealand" in Hoong Phun Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge: Cambridge University Press, 2011) pp.76–89.

14 District Court Act 2016 s.7.

15 Employment Relations Act 2000 s.186.

16 Resource Management Act 1991 s.247.

17 Te Ture Whenua Māori Act 1993 (Maori Land Act 1993) s.6.

18 *Ibid.*, s.50.

19 Coroners Act 2006 s.103.

20 Armed Forces Discipline Act 1971 s.118.

one exception, the Governor-General may, "on the advice of the Attorney-General, remove a Judge [of one of the above courts] from office on the grounds of inability or misbehaviour".[21] The need for an address of the House of Representatives is dispensed with. Employment Court judges are the exception. They enjoy the same security of tenure as senior court judges and may be removed only following an address of the House of Representatives moved on either ground of misbehaviour or incapacity.[22]

As with senior court judges, there are no precedents for the removal of an inferior court judge under the formal procedures. Nevertheless, there have been several instances of forced resignation from the Bench for "unjudicial" conduct. Most complaints against inferior court judges have been resolved out of public view, with judges resigning in order to avoid public spectacle.[23]

The statutory abolition or restructuring of courts may pose special problems for security of judicial tenure. The abolition of a court entails loss of judicial office in the absence of the judges' redeployment in another court. Likewise, the restructuring of a court might lead to downsizing of the court's jurisdiction and reduction in the number of judges. Under New Zealand's constitution, the statutory guarantee of judicial tenure cannot protect against the abolition or restructuring of courts, or consequent loss of judicial office. Nevertheless, former Australian High Court Judge, Michael Kirby, believed such possibilities posed a "grave threat to judicial independence".[24] Judicial officers whose court was abolished or restructured, he believed, should be reappointed to a court of the same or higher rank, with similar status, salary and benefits of office. Kirby also believed that a judge who declined an offer of reappointment should receive the benefits of office until the statutory retirement age. Otherwise, the inference was that judicial tenure was effectively at the will of the executive government.[25]

Recent experience in New Zealand indicates there is little political appetite for "idealised" arguments over judicial independence. The Coroners Act 2006 reformed the coronial system and disestablished all existing coroner positions (around 55 mostly part-time coroners). Coroners had been appointed under the Governor-General's warrant,[26] and coroners exercising judicial authority under the former legislation were inferior courts.[27] However, this did not cause the Labour-led Clark Government (1999–2008) to resile from its reforms.

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21 District Court Act 2016 s.29(1) (the same or similar removal power is replicated in each of the aforementioned court's constituent statute).

22 Employment Relations Act 2000 s.204.

23 See Joseph, *Constitutional and Administrative Law in New Zealand* (n.1) para.21.3.3(2)(a) for discussion of the known precedents.

24 Michael Kirby, "Abolition of Courts and Non-Appointment of Judicial Officers" (1995) 12 Australian Bar Review 181, 205–206.

25 See *Claydon v Attorney-General* [2004] NZAR 16, 42, 45 (CA) for partial acceptance of Kirby's propositions.

26 Coroners Act 1988 s.32(1). See now, the Coroners Act 2006 s.103(1).

27 Inferior Courts Procedure Act 1909 s.2(c).

(iii) Security of judicial remuneration

The Act of Settlement 1700 (Eng) supplemented security of judicial tenure by guaranteeing judicial salaries. This guarantee removed the king's ability to exert covert pressure on judges under threat of a reduction in remuneration. The Supreme Court Judges Act 1858 introduced this protection for New Zealand's colonial judges by guaranteeing that a judge's remuneration may not be reduced during the continuance of the judge's commission. This protection was carried over under successive statutes and is now contained in s.24 of the Constitution Act 1986. Judges' remuneration includes salaries, allowances and superannuation contributions and subsidies.[28] Judicial salaries may not be reduced even for ostensible cause. The government would be in breach of s.24 were it to reduce a judge's salary owing to non-performance of office.[29] The remedy for non-performance is to have the judge removed.

North American decisions have addressed breaches of the guarantee securing judicial remuneration. Indirect non-discriminatory reductions in judicial salaries do not breach the guarantee of judicial independence. The United States Constitution guarantees judicial salaries, and the courts have held that failure to increase these to offset inflation is not a violation of the constitutional guarantee.[30] Inflation afflicts the public at large and is an indirect, non-discriminatory burden.[31] Similarly, general increases in income tax affect all wage-earners, including judges, and do not breach the principle of judicial independence.[32] On the other hand, an indirect reduction in judicial salaries that is discriminatory — as singling out judicial officers — will breach the principle of judicial independence.[33] So, too, will a non-discriminatory but direct reduction of judicial salaries.[34] Security of judicial remuneration also concerns the quantum of judicial salaries. For the Canadian Courts, a judge's remuneration must not fall beneath a minimum level that could be perceived as exposing the judge to political pressure through economic manipulation.[35] Exposure to that risk, even if only perceived, compromises the financial security of judges.

In New Zealand, security of judicial remuneration is guaranteed at law, but it lacks the supreme law protection it enjoys in North America. Unlike in the United States and Canada, legislative power in New Zealand is unfettered by any

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28 Remuneration Authority Act 1977 ss.2 and 12B.

29 *Meymott v Piddington* (1877) Knox 306, discussed by Sir Anthony Mason, Consultancy Report: System for the Determination of Judicial Remuneration (study commissioned by the Hong Kong Judiciary, 2003).

30 *Atkins v United States* 556 F 2d 1028 (US Court of Claims 1977).

31 See Joseph, *Constitutional and Administrative Law in New Zealand* (n.1) para.21.3.4(1).

32 *Cooper v Commissioner of Income Tax for Queensland* (1907) 4 CLR 1304; *O'Malley v Woodbrough* 307 US 277 (1938); *Beauregard v Canada* [1986] 2 SCR 56; *United States v Hatter* 532 US 557 (2001).

33 *United States v Hatter* (n.32).

34 *United States v Will* 449 US 200 (1980). Contrast *Reference Re Remuneration of the Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3.

35 *Reference Re Remuneration of the Judges of the Provincial Court of Prince Edward Island* (n.34), 89–90.

constitutional limitations.[36] Legislation imposing a direct reduction in judicial salaries, or an indirect but discriminatory reduction, would be legally valid and effective. Such legislation might be expressed to apply notwithstanding s.24 of the Constitution Act 1986, or be held to have *pro tanto* impliedly repealed s.24. The separation of judicial power is *legal*, not *constitutional*. What the law gives, the law may take.

(iv) Conventions, practices and expectations

A raft of conventions and expectations supplement the legal protections guaranteeing judicial independence. Some have been noted concerning the appointment of judges. Constitutional convention requires judicial appointments to be made on the basis of merit and not for political or personal reward. The Attorney-General, when recommending judicial appointments, must not be swayed by party political considerations.[37] The Attorney must act independently and is exempt from the obligations of collective responsibility when acting in that capacity.[38] By convention, the Attorney must engage in extensive consultations with the Chief Justice, the New Zealand Law Society and the New Zealand Bar Association, before recommending appointments.

Convention requires that ministers and public servants refrain from criticising judges or judicial decisions. Ministers may comment on sentencing policies or the effectiveness of the law but they may not impugn the performance of the courts,[39] or say that a judge was mistaken or wrong,[40] or reflect adversely "on the impartiality, personal views, or ability of any judge".[41] Nor should ministers make public comment calculated to influence the courts in future cases.[42] These are well-established restraints codified in the *Cabinet Manual 2017*, although not always are they respected. Ministers and members of Parliament do, from time to time, publicly attack judges through frustration, ignorance or lack of self-discipline.[43] Happily, such attacks are rare: "Occasional irreverent outbursts are the exception, not the rule."[44]

Parliament acknowledges the need to respect the integrity of the courts and maintain a healthy separation. The *Standing Orders of the House of Representatives* codify the *sub judice* rule in debates for matters under or awaiting adjudication in,

36 Constitution Act 1986 s.15(1). For discussion, see Joseph, "Parliamentary Sovereignty" (n.1) Ch.15.
37 Cabinet Office, *Cabinet Manual 2017* (Wellington: Department of the Prime Minister and Cabinet, 2017) para.4.4.
38 *Ibid*.
39 *Ibid.*, para.4.16. See paras.4.12–4.16 for the conventions governing ministerial comment on judicial decisions.
40 *Ibid.*, para.4.14.
41 *Ibid.*, para.4.13.
42 *Ibid.*, para.4.14.
43 See Joseph, *Constitutional and Administrative Law in New Zealand* (n.1) para.21.3.6.
44 *Ibid.*, para.21.3.7.

or suppressed by order of, the courts.[45] *The sub judice* rule is subject to waiver at the discretion of the Speaker, who must weigh the "public interest in maintaining confidence in the judicial resolution of disputes" and the "mutual respect that exists between the legislative and judicial branches of government".[46] The Standing Orders also prohibit members in debates using offensive words against any member of the judiciary.[47]

Judges themselves adhere to an unwritten code of conduct for maintaining their independence and integrity. Judges do not engage publicly in political or contentious issues and do not reply to criticisms of their judgments (academic or otherwise), except to correct errors of fact for the public record.[48] Judges are constrained by the expectations of their peers and the profession to act "judicially", without fear or favour, affection or ill-will: "Their circumspection is vital to their stature and independence."[49]

(v) Institutional independence of courts

The institutional independence of courts in New Zealand is examined under the heading "*De facto* separation". This is the most contested element of the principle of judicial independence. The institutional separation of courts exists only as a *de facto* arrangement worked out between politicians, bureaucrats and the courts. Successive Chief Justices have lamented the institutional setting in which the courts must operate.[50] An insufficient institutional separation of courts may compromise the actual independence of judges, and negatively affect a judge's sense of social responsibility and integrity in discharging the office.

B. Separation of the legislature and central government bureaucracy

New Zealand law institutes a strict separation between the legislature and central government bureaucracy. Statute disqualifies public servants from holding dual membership of Parliament. Public servants standing for election must be placed on leave of absence,[51] and are deemed to vacate office as a public servant if they are elected.[52] "Public servant" includes any person in the service or employ of the

45 *Standing Orders of the House of Representatives* (Wellington, New Zealand: House of Representatives, 2017) SO 115(1).
46 *Ibid.*, SO 115(2)(3).
47 *Ibid.*, SO 117.
48 R Mundy, "The Judge Who Answered His Critics" [1987] CLJ 303.
49 See Joseph, *Constitutional and Administrative Law in New Zealand* (n.1) para.21.3.6.
50 Sir Thomas Eichelbaum, "The Inaugural Neil Williamson Memorial Lecture: Judicial Independence Revisited" (1997) 6 Canta LR 421; Dame Sian Elias, "'The Next Revisit': Judicial Independence Seven Years On" (2004) 10 Canta LR 217; Dame Sian Elias, "Fundamentals: A Constitutional Conversation" (Harkness Henry Lecture 2011, Hamilton, 12 September 2011).
51 Electoral Act 1993 s.52.
52 *Ibid.*, s.53(2).

Crown and includes police officers and employees subject to the State Sector Act 1988. The mirror image disqualification also applies to members of Parliament. A member automatically vacates his seat upon becoming a public servant,[53] and commits an offence by sitting or voting after the seat is vacated.[54] These disqualifications uphold the public service principle of political neutrality,[55] which is recognised as a constitutional convention.[56] Public servants' advice to ministers must be "fair, impartial, responsible, and trustworthy",[57] regardless of the political party or parties in office. A public servant must not publicly align with a political party but is expected to uphold the professional public service ethic (knowledge, fairness and integrity).[58]

The legal separation of the bureaucracy is essential for the public service non-political career structure. Departmental heads must act independently of the government in matters of appointment, promotion, transfer and discipline,[59] and ministers must not interfere in the administrative or operational functioning of departments. The State Services Commissioner, who appoints leaders of the public service (including departmental heads), must also act independently when making decisions on individual public servants.[60] An exception is made for departmental heads, whom the government may choose over the recommendation of the State Services Commission.[61] In all other respects, ministers retain an arm's length relationship with the public service.

C. No executive–legislative legal separation

The New Zealand legislature and political executive are each separately, legally constituted but they do not operate under a legal separation of powers. On the contrary, the law merges their membership. Section 14 of the Constitution Act 1986 carries over the New Zealand Parliament which was established under New Zealand's early Imperial legislation. Parliament consists of the Sovereign in right of New Zealand and the House of Representatives[62] and is declared to be the same body as that which was established by the New Zealand Constitution Act 1852 (Imp).[63] The political executive is likewise independently constituted

53 *Ibid*., s.55(1)(e).
54 *Ibid.*, s.48.
55 See Cabinet Office, *Cabinet Manual 2017* (n.37) para.3.58.
56 Official Information Act 1982 s.9(2)(f).
57 See Cabinet Office, *Cabinet Manual 2017* (n.37) para.3.57.
58 *Fraser v Public Service Staff Relations Board* [1985] 2 SCR 455, 470. In New Zealand, public servants must comply with a code of conduct, *Standards of Integrity and Conduct*, issued by the State Services Commissioner: Cabinet Office, *Cabinet Manual 2017* (n.37) para.3.66.
59 State Sector Act 1988 s.33.
60 *Ibid.*, s.5.
61 *Ibid.*, s.35(11).
62 Constitution Act 1986 s.14(1).
63 New Zealand Constitution Act 1852 15 & 16 Vict. c.72 s.32 (revoked as law in New Zealand by the Constitution Act 1986 s.26(1)(a)).

under the prerogative instrument, the Letters Patent Constituting the Office of Governor-General of New Zealand.[64] This instrument authorises the Governor-General to appoint as ministers of the Crown and members of the Executive Council such persons as are eligible for appointment under the Constitution Act 1986.

The eligibility criterion under the Constitution Act 1986 merges the membership of the legislature and political executive. Section 6(1) restricts the appointment of ministers and members of the Executive Council to persons who are elected members of Parliament.[65] Any separation as exists between these two organs is neither *legal* nor *constitutional* but *functional*.

IV. Functional Separation

A. Executive–legislative separation

A functional separation of powers has relevance for the legislative and executive branches under Westminster constitutions. A functional separation exists where merged personnel straddle two branches of government but discharge distinctively different functions as members of each branch. Under the Westminster system, ministers of the Crown straddle the legislative branch as they must also be elected members of Parliament.[66] This major departure from the separation of powers explains why the doctrine does not feature prominently in countries that follow the Westminster tradition.

The apogee of a separation of powers is where there is a "physical" or "paper" separation, entailing no merged personnel. The exemplar is the United States of America. The distributive clauses of the American Constitution vest federal legislative power in Congress, federal executive power in the President and federal judicial power in the federal courts organised under the Supreme Court. Neither the President nor the President's advisors are members of Congress, and members of neither the President's administration nor Congress straddle the judiciary. The only exception is the Vice President, who is also President of the Senate. However, the Vice President does not exercise a deliberative function and rarely presides

64 Letters Patent Constituting the Office of Governor-General of New Zealand (n.9).

65 Section 6(2) of the Constitution Act 1986 allows some temporal flexibility by authorising the appointment of a person as minister if that person was a candidate for election to Parliament at the general election held immediately preceding the person's appointment. However, that person must vacate office if he or she fails to gain election within 40 days of the appointment. This flexibility was introduced to ensure that a new government could be sworn in immediately following a general election where a national emergency requires the new government to act immediately. Ordinarily, members are not sworn in until after the day fixed for the return of the writs, when the election results are officially confirmed. See Joseph, *Constitutional and Administrative Law in New Zealand* (n.1) para.6.3.1.

66 Constitution Act 1986 s.6. This requirement operated as a constitutional convention but it was codified under the Civil List Act 1950 (see now the Constitution Act 1986 s.6(1)).

(a president tempore is appointed in his stead). The Vice President votes only in the event of a tie.[67]

The Westminster system, in contrast, entails no physical or paper separation as between the political executive and the legislature. Nevertheless, a *functional* separation may differentiate the branches, even where there is merged personnel. When formulating cabinet policy and attending to portfolio responsibilities, ministers exercise executive functions, but when introducing, debating and voting on Bills and defending the government's record on the floor of the House, they exercise legislative functions as members of Parliament. New Zealand's iconic constitutional decision in *Fitzgerald v Muldoon*[68] graphically illustrates the functional separation. Wild CJ held that the Prime Minister had suspended an Act of Parliament without Parliament's consent in breach of art.1 of the Bill of Rights 1688 (Eng). The Bill of Rights enforces a functional separation as between ministers and Parliament; arts.1–2 proscribe the suspending of, or dispensing with, Acts of Parliament "by regall authority".

Fitzgerald v Muldoon arose out of the 1975 general election campaign. The National Party promised that a National Government would repeal the Labour Government's legislation, the New Zealand Superannuation Act 1974. National won the general election and Robert Muldoon was sworn in as Prime Minister. Three days later, he announced by press statement that the compulsory employee/employer deductions and contributions under the New Zealand Superannuation Act 1974 would cease as from that day. Parliament, when assembled, would repeal the Act with retrospective effect from the date of the press statement. The Chief Justice granted a declaration that the Prime Minister had suspended Parliament's law without its consent. He had acted "by regall authority" within the meaning of art.1 of the Bill of Rights: he was the Prime Minister who had "lately received his commission by royal authority, taken the oaths of office, and entered on his duties".[69] Muldoon had made his public announcement in the course of his official duties.

The decision exemplified the functional separation as between the political executive and Parliament. The Prime Minister could lawfully do in and through Parliament what he had unlawfully sought to do as minister outside of Parliament. The Chief Justice accepted that the Government would repeal the legislation when Parliament had assembled, and declined the further remedies for reinstating the statutory scheme.

B. Executive–judicial separation

A functional separation can be discerned when judges perform certain extra-judicial roles. The most prominent of such roles is when judges accept appointment

67 Constitution of the United States of America art.1 s.3(4).
68 *Fitzgerald v Muldoon* (n.4).
69 *Ibid.*, 622.

as royal commissioners to inquire into matters of public interest. There is a long tradition in New Zealand of using judges to conduct public inquiries.[70] In the period 1976–2010, there were 34 royal commissions or commissions of inquiry (an average of one per year);[71] of these, 16 were chaired or conducted by serving or retired judges.[72] Judges are skilled at processing materials and analysing complex factual issues, and are naturally suited to the role of royal commissioner. Royal commissions are appointed under the Letters Patent Constituting the Office of Governor-General of New Zealand,[73] and are formally part of the executive branch of government.[74] However, when acting as commissioners, judges do not make binding decisions as they would from the Bench. Their functions are analytically different from when they adjudicate as courts of law. Commissioners may proceed inquisitorially and lead the questioning of witnesses, and make non-binding findings and recommendations which the government may or may not elect to act upon.

The law buttresses the functional separation between commissions and courts. Neither a royal commission (appointed under the Letters Patent) nor a commission of inquiry (appointed under the (former) Commissions of Inquiry Act 1908)[75] can assume the civil or criminal functions of courts. A commission may not inquire into or determine civil causes between party and party, or inquire into or determine the guilt of any person.[76] In *Cock v Attorney-General*,[77] the Governor-General in Council appointed under the Commissions of Inquiry Act 1908 a Supreme Court judge as a commissioner to inquire into allegations of bribery, which was a crime punishable under the criminal law. The Court granted prohibition as the commission could not inquire into the guilt or innocence of any person. The same outcome would have resulted had the commission been appointed as a royal commission under the Letters Patent. The Imperial Acts 16 Car I, c 10 and 42 Edw III, c 3 applied as law in New Zealand, and these statutes prohibited commissions from assuming criminal functions. The former Act abolished the Court of Star Chamber and declared all courts but the ordinary courts of justice to be illegal, and the latter Act declared that no person shall be put to answer for a crime unless in the manner prescribed by law.

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70 See G Palmer, "Judges and the Non-Judicial Function in New Zealand" in Hoong Phun Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge: Cambridge University Press, 2011) pp.460–468.

71 Section 37 of the Inquiries Act 2013 repealed the power to appoint new Commissions of Inquiry. Royal Commissions and Commissions of Inquiry differed mainly in symbolism and prestige (the former were thought to have higher standing) but each enjoyed the same legal powers and performed similar types of inquiry.

72 See Palmer, "Judges and the Non-Judicial Function in New Zealand" (n.70) p.462.

73 Letters Patent Constituting the Office of Governor-General of New Zealand (n.9).

74 Section 6(1)(a) extends the provisions of the Inquiries Act 2013 to cover Royal Commissions, which are deemed to be public inquiries under the Act.

75 See now the Inquiries Act 2013.

76 *Cock v Attorney-General* (1909) 28 NZLR 405, 423–425 (CA).

77 *Ibid*.

Today, judges might conduct (respectively) public inquiries or government inquiries under the Inquiries Act 2013.[78] Judges appointed under the Act retain their judicial warrants but technically become part of the executive branch of government. Persons conducting inquiries must present a final report to the Governor-General (for public inquiries) or the appointing minister (for government inquiries), setting out the inquiry's findings and recommendations (if any).[79] A public inquiry includes a Royal Commission, which can exercise all the powers of a public inquiry appointed under the Act.[80] Judges conducting inquiries do not hand down binding decisions on the rights and liabilities of persons. The Act declares that an inquiry has no power to determine the civil, criminal or disciplinary liability of any person.[81] This statutory disclaimer endorses the rulings in *Cock v Attorney-General*,[82] and expressly preserves the functional separation as between judiciary and executive.

Other features of public and government inquiries are intrinsically "judicial" but without negating the functional separation between inquiries and courts. Inquiries have the power to issue witness summons for persons to attend and give evidence,[83] and to take evidence on oath or affirmation.[84] An inquiry may award costs against any person if that person's conduct has lengthened or obstructed the inquiry, or has added to its cost.[85] A costs order, if filed in the registry of a court of competent jurisdiction, becomes enforceable as a judgment of that court in its civil jurisdiction.[86] Moreover, persons may be held in contempt of an inquiry in proceedings commenced in the High Court,[87] just as a person may be held in contempt of court. These "judicial" attributes are intended to enhance the effectiveness and utility of inquiries, not blur the functional separation between inquiries and courts.

Using judges to act as royal commissioners or conduct public inquiries has not occasioned controversy in New Zealand, "and is not regarded as undermining the independence of the judiciary".[88] One exception was the Mahon Royal Commission, which reported in 1981. The commissioner, Hon Justice Peter Mahon, reflected adversely on Air New Zealand management when investigating the cause of the Air New Zealand crash on Mount Erebus, Antarctica, in November 1979. Two hundred and fifty-seven passengers and crew were killed.[89] Mahon concluded that

78 See the Inquiries Act 2013 ss.4 and 6 for the types of inquiry under the Act.
79 Inquiries Act 2013 s.12.
80 *Ibid.*, s.6(1)(a).
81 *Ibid.*, s.11(1).
82 *Cock v Attorney-General* (n.76).
83 Inquiries Act 2013 ss.23–24.
84 *Ibid.*, s.19(b).
85 *Ibid.*, s.28(1).
86 *Ibid.*, s.28(4).
87 *Ibid.*, s.31.
88 See Palmer, "Judges and the Non-Judicial Function in New Zealand" (n.70) p.461.
89 Hon P Mahon, "Royal Commission to Inquire into the Crash on Mount Erebus, Antarctica of a DC10 Aircraft Operated by Air New Zealand Ltd" [1981] AJHR H.1.

Air New Zealand officials had led "palpably false" evidence, which he reported had originated in "a pre-determined plan of deception" resulting in "an orchestrated litany of lies".[90] Prime Minister of the day, Robert Muldoon, rallied in defence of the airline and its Chief Executive, and publicly attacked Mahon. The following year, Mahon resigned his commission as a High Court Judge.[91]

Judges may perform further extra-judicial functions while retaining their judicial warrant. Serving judges have been appointed as President of the New Zealand Law Commission, a specialist advisory body "established by statute to undertake the systematic review, reform and development of the law of New Zealand".[92] Although the Commission is part of the executive branch of government, judges appointed as President have continued to sit judicially, part-time during their presidency. Others have returned to the bench full-time at the end of their term. As with Royal Commissions and inquiries, a functional separation distinguishes the role of judge from the President of the Commission. The President oversees law reform proposals for government implementation, which is a distinctly different function from when adjudicating from the Bench.

The Chief Justice of New Zealand performs a unique executive function as Administrator of the Government. Under the Letters Patent, the Chief-Justice — or, if he or she is unavailable, the next most senior judge — acts as Administrator of the Government where the Governor-General is, for any reason, unable to perform the office.[93] Administrators have been used increasingly over recent years with the Governor-General undertaking state visits to countries to promote New Zealand's bilateral relationships.[94] The Administrator attends to the Governor-General's domestic duties whenever the Governor-General is visiting abroad. Again, the Administrator's role is distinctly separate from the Chief Justice's role as a sitting judge and head of the New Zealand judiciary.

Serving judges are appointed to (and often chair or preside over) an array of executive bodies. A functional separation is maintained between a judge's full-time judicial role and part-time executive role. Serving judges are appointed to: the Parole Board, the Disputes Tribunal, the Immigration and Protection Tribunal, the Waitangi Tribunal, the Liquor Licensing Tribunal, the Real Estate Agents Disciplinary Tribunal, the Legislation Advisory Committee, Land Valuation Tribunals, the Taxation Review Authority, Customs Appeals Authorities and the Health Act Board of Appeal.[95] Many of those bodies exercise a quasi-judicial role that draws on a judge's training and expertise. A serving High Court judge, Hon

90 *Ibid.*, para.377.

91 In *Re Erebus Royal Commission* [1983] NZLR 622 (PC), the Privy Council upheld the New Zealand Court of Appeal in *Re Erebus Royal Commission*; *Air New Zealand Ltd v Mahon (No 2)* [1981] 1 NZLR 618 (CA) in holding that the commissioner had failed to follow the rules of natural justice (failure to warn the airline officials of adverse findings he was proposing to make).

92 A description of the Law Commission and its work which appears at p.ii of every Commission report.

93 Letters Patent Constituting the Office of Governor-General of New Zealand (n.9) Clause 12–13.

94 See Joseph, *Constitutional and Administrative Law in New Zealand* (n.1) para.17.3.2.

95 See Palmer, "Judges and the Non-Judicial Function in New Zealand" (n.70) pp.470–472.

Justice Lowell Goddard, was appointed to chair what is now the Independent Police Conduct Authority, an independent statutory body that investigates complaints of police misconduct.[96] This represented an exception to the functional separation noted above. The chair of this body was a full-time position which Justice Goddard held while retaining her judicial warrant.

V. *De facto* separation

The institutional independence of courts must be distinguished from the other elements of the principle of judicial independence — security of judicial tenure and security of judicial remuneration. The institutional independence of courts is, at best, *de facto*, not legal. *De facto* institutional independence implies several "bottom lines": adequate resourcing and administrative support services for courts; judicial control over the assignment of judges, sittings of courts, court lists, and allocation of courtrooms and direction of court staff; the courts' control over judges' information technology systems; and the separation of courts from the central bureaucracy under the control of government ministers.[97] Until 2003, the Department for Courts provided the necessary administrative support for courts, which was compatible with the principle of judicial independence. The Department was a stand-alone administrative entity that worked closely with the judges. This arrangement gave judges and their staffers sufficient institutional autonomy and independence from the central government bureaucracy. However, that administrative structure was abandoned in 2003 when the Department for Courts was disestablished and integrated within the Ministry of Justice. Cost efficiencies trumped the need to preserve the courts' institutional independence.

The Ministry is a central government department under the direction and control of the Minister of Justice, who is responsible to Parliament. Integrating the courts' administrative support services within the Ministry gave ministry staff control over court personnel, court resources and the courts' information technology system. Ministry officials have attempted to wrest the assignment of judges, rostering of cases and sittings of courts from heads of bench, who traditionally have organised such matters in liaison with their judicial resources managers. The Ministry has competing policy priorities from those of the courts, whose function is to hold governments and officials to account according to law. Integrating the courts within the Ministry of Justice is an odd "fit" as the Ministry sometimes has a direct interest in matters litigated in the courts. The Chief Justice, Dame Sian Elias, has noted that the executive government is the principal litigant in the courts and ought to be at arm's length from the judiciary.[98] She despondently acknowledged the greater

96 Independent Police Conduct Authority Act 1988.
97 See Joseph, *Constitutional and Administrative Law in New Zealand* (n.1) para.21.3.5.
98 See Elias, "Fundamentals: A Constitutional Conversation" (n.50) p.11.

institutional autonomy of courts enjoyed by her counterparts in the United States, Canada, the United Kingdom and Australia.[99]

The administrative arrangement fails the requirement of the institutional independence of courts. Compromising the courts' institutional independence reveals an incipient lack of understanding of the judiciary's constitutional role. A perception among senior bureaucrats is that judges are just another species of public servant, who must be managed according to the disciplines applying to the bureaucracy generally. A separation of powers based on *de facto* arrangements will invariably remain exposed to two pressures: the public-service management culture and the constant push for public service cost-savings and efficiencies. The *de facto* institutional independence of courts will always be under pressure to yield to bureaucratic disciplines.

VI. Case Study

A. Constitutional affront

This case study exemplifies the potential for executive overreach where there is no constitutional vesting of state powers in correspondingly separate organs.[100] The National-led Government (2008–2017) under Prime Minister John Key promoted legislation that retrospectively denied redress to litigants who had suffered loss under a discriminatory family care policy. The government policy excluded payment for caregivers who cared for disabled family members. A test case had established the unlawfulness of the policy (discrimination on the basis of family status),[101] and the Government's legislation abrogated the litigants' right to seek redress. The legislation also excluded the courts' jurisdiction to determine whether any future family care policies were unlawfully discriminatory.

The legislation was a constitutional affront. It violated the kindred concepts of the separation of powers and the rule of law. The worrying thing is how casually all of this happened. There were isolated (albeit spirited) constitutional protests[102] but these passed seemingly unnoticed. The Key Government encountered no perceptible repercussions or loss of popularity. Retrospective legislation excluding access to the courts seemed not to be cause for concern.

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99 *Ibid.*, p.12.

100 This analysis draws upon the writer's examination of the New Zealand Public Health and Disability Amendment Act 2013 in [2015] NZ L Rev 683, 699–705.

101 *Ministry of Health v Atkinson* (2010) 8 HRNZ 902 (HRRT), (2010) 9 HRNZ 47 (HC), [2012] 3 NZLR 456 (CA).

102 See A Geddis, "I Think National Just Broke Our Constitution" *Pundit* (17 May 2013), available at https://www.pundit.co.nz/content/i-think-national-just-broke-our-constitution; Philip A Joseph, "Constitutional Law" [2015] NZ L Rev 683, 699–705. Media commentators also lamented the Government's actions but the issue quickly passed under the pressure of unfolding news.

B. Test case

Ministry of Health v Atkinson[103] was a test case. It was the first decision of the Human Rights Review Tribunal (the Tribunal) to review a government policy for inconsistency with the right to freedom from discrimination under s.19 of the New Zealand Bill of Rights Act 1990 (NZBORA). All previous Tribunal rulings had entailed challenges to legislation, for which the only remedy is a declaration of inconsistency under the Human Rights Act 1993.[104] Such declarations are formal only and do not affect the validity, application or enforcement of a discriminatory enactment.[105] In contrast, a discriminatory government policy can be declared unlawful and invalid, and give rise to actions for redress before the Tribunal or the courts. *Atkinson* threw down the gauntlet: How was the Government to react to a Tribunal declaration that a government policy was unlawfully discriminatory under the NZBORA?

The Key Government unsuccessfully appealed the Tribunal decision to the High Court and Court of Appeal. Excluding payment for family carers was discriminatory on the ground of family status and was not a justified limitation under the NZBORA.[106] Following the Court of Appeal decision, the Government announced it would not seek leave to appeal to the Supreme Court.[107] This left the Government three options: amend and rectify the discriminatory policy (the simplest option), or legislate to validate the policy for all future claims of discrimination by family carers, or legislate retrospectively to validate the policy to prohibit all existing and future claims of discrimination by family carers. The Government plumped for the third option (the "nuclear option"). The New Zealand Public Health and Disability Amendment Act 2013 had one object: to validate the policy retrospectively and end all existing and future claims under it. An exception was made for the nine claimants who were party to the *Ministry of Health v Atkinson* litigation. Their claim could be continued or settled as if the Amendment Act had not been passed.[108] All other claimants, however, were statute-barred. Fifty-six complaints had been lodged with the Tribunal. Twenty complainants had had their complaints suspended pending the outcome of the *Atkinson*, and a further number had allowed their complaint files to be closed believing that the decision would allow them to obtain redress through the courts.

The New Zealand Public Health and Disability Amendment Act 2013 was objectionable not only for what it did but the steps taken to enact it also breached all conventions of accepted parliamentary practice. With contumelious disregard, the Minister of Health introduced the Bill under urgency, without warning, and

103 *Ministry of Health v Atkinson* (n.101).
104 Human Rights Act 1993 s.92J(1) and 92J(2).
105 *Ibid.*, s.92K(1).
106 See Joseph "Constitutional Law" (n.102) pp.683, 701–702 for an analysis of the Courts' reasoning.
107 Hon Tony Ryall, "Govt Will Not Appeal Family Carers Decision" (Press Release, 12 June 2012).
108 New Zealand Public Health and Disability Amendment Act 2013 s.70G(1).

promoted its passage through all three readings on the one sitting day. There was no opportunity for meaningful deliberation. The urgency motion pre-empted select committee scrutiny and all 16 paragraphs of the Regulatory Impact Statement accompanying the Bill had been redacted. Members of Parliament were debating a Bill the reasons for which were unknown to them. The Act was the epitome of legislative bad practice.

C. Flawed drafting

As fate would have it, the Government failed to achieve its unconscionable purpose. Related litigation in *Attorney-General v Spencer*[109] exposed shortcomings in the Amendment Act that allowed claimants to pursue their claims under the discriminatory policy. The High Court and Court of Appeal held that the Atkinson family care policy fell outside the Act's definition of "family care policy". The Atkinson policy imposed a blanket prohibition on remunerating family disability carers, whereas the statutory definition of a "family care policy" meant a policy "that permits … persons to be paid, in certain cases, for providing support services to their family member".[110] The Atkinson policy did not contemplate payment under *any* circumstances, whereas the statutory definition did (in certain cases). The policy in issue in *Ministry of Health v Atkinson* was a "no exceptions policy" that fell outside the statutory definition.[111]

The Court of Appeal augmented its statutory interpretation by appealing to constitutional principle. The interpretation section of the NZBORA commended the narrower interpretation of the statutory definition of family care policy,[112] and the principle of legality at common law protects rights against abrogation by general or ambiguous legislation.[113] Parliament must use explicitly clear words to override rights, and Parliament had failed to do that in its legislative response to *Ministry of Health v Atkinson*. The Court of Appeal then turned to the objectionable features of the legislation:[114]

> "It contained a number of features that are traditionally regarded as being contrary to sound constitutional law and convention — on the Ministry's interpretation it has retrospective effect, authorises discriminatory policies, withdraws rights of judicial review and access to the Tribunal and did not go through the normal Parliamentary Select Committee and other processes."

109 [2015] 3 NZLR 449 (CA); *Spencer v Attorney-General* [2014] 2 NZLR 780 (HC).
110 New Zealand Public Health and Disability Act 2000 s.70B(1)(a).
111 *Attorney-General v Spencer* (n.109), [68].
112 NZBORA s.6 (a meaning that is consistent with the rights and freedoms affirmed must be preferred).
113 *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 131(HL); *R v Pora* [2001] 2 NZLR 37, [52], [56] (CA).
114 *Attorney-General v Spencer* (n.109), [84].

Following *Attorney-General v Spencer*, the Government amended its family care policy to remunerate some family carers but not others (namely, spouses, civil union partners and *de facto* partners of disabled persons). This policy avoids the *Attorney-General v Spencer* loophole as it is not a blanket prohibition on paying all family carers, and therefore falls within the statutory definition of "family care policy". However, this means that the deleterious effects of the old policy continue to afflict family carers who do not qualify under the new policy. They continue to be discriminated against and are prevented under the privative clause from seeking judicial redress. Their causes of action remain statute-barred.

D. Constitutional challenge

The new Pt.4A inserted in the principal Act would not have survived constitutional challenge in countries where there is a constitutional vesting of state powers. The Act usurped the judicial power to rule government action unlawful and to grant redress for loss suffered. In New Zealand, where there is no constitutional vesting of powers, affected persons have no judicial recourse. The doctrine of parliamentary sovereignty means that Parliament may lawfully trample on the separation of powers.[115] What Parliament enacts cannot be unlawful.

Two well-known decisions illustrate the reach of a constitutional vesting of powers. One decision is from Australia and one from Ceylon (now Sri Lanka). In *Kable v Director of Public Prosecutions (NSW)*,[116] the High Court of Australia struck down a state statute for breach of the federal separation of powers. The statute authorised the New South Wales courts to issue multiple detention orders against a named individual, who had threatened harm to persons when he was released from prison. The Act applied to that person and none other. The High Court struck down the Act as it removed the protections inherent in the judicial process and implicated the courts in a legislative plan to incarcerate a named individual.[117] A state statute could not dispense with the requirements of judicial integrity, independence and impartiality in the exercise of federal jurisdiction by a state court.[118]

The second case is a striking application of the constitutional vesting of judicial power. In *Liyanage v R*,[119] the Privy Council upheld the separation of judicial power as an implied constitutional principle that survived from Ceylon's earlier constitutional charter. Their Lordships struck down legislation of the Ceylon Parliament for breach of the implied constitutional principle. The statutes were retrospective in operation enacted to secure the conviction and enhance the punishment of prisoners awaiting trial. The statutes enlarged existing offences,

115 See Joseph, *Constitutional and Administrative Law in New Zealand* (n.1) Ch.15 for the doctrine of parliamentary sovereignty as it applies in New Zealand.

116 (1996) 189 CLR 51.

117 See Joseph, *Constitutional and Administrative Law in New Zealand* (n.1) para.8.4.3(a).

118 *Kable v Director of Public Prosecutions (NSW)* (n.116) (Gaudron, McHugh and Gummow JJ).

119 [1967] 1 AC 259 (PC).

authorised trial without jury, excused departures from criminal procedure laws and allowed in inadmissible evidence. They were to remain in force only for the duration of the trial. The Judicial Committee held the legislation to be in breach of the constitutional separation of judicial power: "The Constitution's silence as to the vesting of judicial power is consistent with it remaining, where it had lain for more than a century, in the hands of the judicature."[120] Their Lordships inferred a constitutional vesting against which offending legislation could be struck down.

On a continuum, the legislation in issue in *Kable v Director of Public Prosecutions (NSW)* and *Liyanage v R* was more egregiously objectionable than the New Zealand Public Health and Disability Amendment Act 2013. The offending statutes were aggressively *ad hominem* in violation of the protections of due process and natural justice. Nevertheless, the difference is one of degree only. The New Zealand Act would not have survived challenge had there been a constitutional vesting of judicial power. The Act arrogated judicial power and foreclosed access to the courts for the protection of rights. New Zealand's lack of a constitutional separation of powers exposes it to political overreach more so than most other Western democracies.

VII. Conclusion

The doctrine of separation of powers rarely features in discussions about New Zealand's constitutional arrangements. The Westminster system renounces the triangulation of powers that Baron de Montesquieu famously publicised for achieving liberty.[121] The parliamentary ministry conflates, not separates, powers. The separation of powers is at its most meaningful in relation to the judicial branch, which is legally separate from and independent of the political branch. Nevertheless, Parliament's legislative supremacy means that it can, at any time, usurp judicial power and invade the judicial domain. The legislation to post-validate the Key Government's family care policy demonstrates the lack of constitutional protection. That legislation, although repugnant, was beyond challenge.

Such separation of powers as exists in New Zealand is the legacy of political and constitutional history. The Glorious Revolution resulted in the rout of the Stuarts and a governmental framework that survives to the present day. Parliamentarians colluded with judges to end the abuses of monarchy and set in place the legal framework of government. The evolution of the cabinet system from that time on established a constitutional monarchy under the rule of law. Historical evolution produced this state of affairs, not any conscious adherence to doctrine. The irony is that Montesquieu, to whom is attributed the separation of powers doctrine, took his inspiration from England. Liberty did reside there but England has never espoused

120 *Ibid.*, 287.

121 CL Montesquieu, *De L'Esprit des Lois* (1748) Book 11 reproduced in SM Cahn (ed), *Classics of Modern Political Liberty: Machiavelli to Mill* (New York: Oxford University Press, 1997) pp.345–353.

the separation of powers.[122] The cabinet system of government was already fully functioning when Montesquieu published his theory in 1748.

New Zealand inherited the Westminster system, and vicariously the history that shaped it. However, it would be unkind to Montesquieu to end on those observations, without acknowledging his contribution to political thought. Montesquieu is upheld as one of the great political philosophers of the modern era. Consequently, might his theory stand for something more than the correct organisation of the State? The true worth of Montesquieu's theory, it is submitted, lies in championing that most basic of principles — *limited government*. The separation of powers promotes liberty through government that is limited, compassionate and accountable. Distributing the functions of government among correspondingly separate organs is indispensable to that ultimate principle of legality — the rule of law.[123]

122 See Joseph, *Constitutional and Administrative Law in New Zealand* (n.1) para.8.3.

123 *R (Jackson) v Attorney-General* [2006] 1 AC 262, [107] (Lord Hope of Craighead) (the *Fox Hunting* case).