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Another Way Of Skinning The Rabbit

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ANOTHER WAY OF SKINNING THE RABBIT

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I have spent a week of serenity and tranquility in these magnificent surroundings. I must say that they have stimulated my thought patterns and helped my research. I find it a particularly joyful occasion because the Dean of this law school was once my student. He was the most able student that I have ever taught anywhere.

I find Professor Soifer's paper extraordinarily elegant and persuasive. I arrive at that conclusion, of course, because it cites a New Zealand decision with approval.[1] I doubt that you want a former New Zealand Prime Minister to tell you how the Supreme Court of the United States should be deciding its cases, even if he is the only prime minister that New Zealand has ever had with an American law degree, so I decline to deal with American constitutional developments. But the paper we are reviewing has examined what it calls the Anglo American legal tradition in relation to minorities.

I want to question first of all whether an Anglo American tradition exists. I think it existed in the past. I'm not sure that it exists now. At least there are two separate traditions. There is a tradition of English law. There is a tradition of American Law. They are related in some respects, but in one of the features with which this paper is most vitally concerned they are fundamentally different. We share a common law heritage in history but the traditions have become increasingly divergent. This is particularly true with respect to the appropriate role of courts in relationship to the legislature and the extent of separation of powers.[2]

English law knows nothing of judicial review of acts of Parliament. There is no constitutional possibility in English law to have a statute declared unconstitutional. New Zealand law is the same in this respect.[3] The cases which Professor Soifer quotes from England need to be read with that understanding at the forefront of the reader's mind. The absence of that power of judicial review makes a very big difference. The English tradition depends for the protection of minorities very much more upon legislation which is passed by Parliament. And, of course, Parliament does pass

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1. King-Ansell v. Police, [1979] 2 New Zealand Law Reports [N.Z.L.R.] 531.

2. O. HOOD PHILLIPS, CONSTITUTIONAL AND ADMINISTRATIVE LAW 3-16 (7th ed. 1987).

3. G. PALMER, UNBRIDLED POWER—AN INTERPRETATION OF NEW ZEALAND'S CONSTITUTION AND GOVERNMENT 186 (2d ed. 1987); *see also* Constitution Act, [1986] 2 New Zealand Statutes [N.Z. Stat.] 984.

legislation on these subjects. The Race Relations Act is a very good example; both England and New Zealand have race relations acts.[4] Indeed, the New Zealand case that Professor Soifer quotes arose from a criminal prosecution brought under the Race Relations Act.

Nevertheless, a powerful tradition of courts protecting minorities exists in the English common law. The tradition persists despite the fact that courts do not have judicial review power in the sense that courts enjoy that power in the United States. My argument is that the record of protecting minorities in the English common law tradition is a solid achievement of the common law. That record deserves more credit than Professor Soifer gives it.

I want to bring to your attention an old case, the *Case of James Sommersett, a Negro, on a Habeas Corpus,* decided in the court of King's Bench in 1772 at a time when the old dominion of Virginia was still part of His Majesty's realm.[5]

Sommersett was a slave. He was confined in irons on a ship in the Thames. The ship was bound for Jamaica. A writ of habeas corpus issued to bring the body before the Court because Sommersett was the slave of Charles Stewart, a Virginian. Stewart wanted to send Sommersett to Jamaica to sell him as a slave. Sommersett was born in Africa and had worked in Virginia, and had been brought by his master to England. After arriving in England, he left his master's service, refusing to return. Extensive affidavits were made to the Court of King's Bench about the slave trade from Africa, the laws of Virginia and Jamaica, and the practice of selling slaves as chattels.[6]

One can tell from the very lengthy arguments in front of the court that Lord Mansfield C.J. would have preferred not to decide the case. He put it off for several months. Statements were made from the bar that there were 15 thousand people in England in 1772 who were slaves. There was also the issue of the English commercial interest in the slave trade. The case had to be decided and Lord Mansfield decided it in a very forthright fashion:

> The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory. It is so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.[7]

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4. Race Relations Act, 1976, ch. 74 (U.K.); Race Relations Act, [1971] 4 N.Z. Stat. 2246; *see also* Human Rights Commission Act, [1977] 1 N.Z. Stat. 384.

5. Case of James Sommersett, 20 HOWELL'S STATE TRIALS 2 (1771-72).

6. *Id.* These facts are gleaned from the report of the case which is lengthy, 82 pages. Some of the precise facts are not entirely clear.

7. *Id.* at 82.

The decision of the Court of Kings Bench by Lord Mansfield marks out what is, I think, still a very strong tradition in English law. The court's role is to protect minorities and to ensure that justice is done to them, whatever the political and economic effects. That tradition lives on and I am not sure that its strength and subtlety are reflected in Professor Soifer's paper.

Now, if I can just move 12,000 miles away from the United Kingdom to New Zealand, I want to say a word or two about the Maori people of New Zealand and how the common law tradition in that country has dealt with them. It is clear beyond any doubt that they are a discrete and insular minority. Twelve and a half percent of New Zealand's population is Maori. The tangata whenua of New Zealand arrived there before any Europeans. In 1867 four seats of parliament were reserved for them. The law has been changed in many respects since then, of course, but four Maori seats still exist.[8] Maori may stand for general seats as well, and this often happens. Maori can decide on which electoral roll they wish to be. In order, therefore, to decide who is Maori for electoral purposes the same issue that Professor Soifer mentioned arises. Who is a Maori? The answer is, whoever says that he or she is a Maori. That is to say, someone who claims a Maori ancestor. No way of checking such claims exists, nor is any attempt made to check them.

Furthermore, the Treaty of Waitangi, entered into between Queen Victoria and the various Maori tribes of New Zealand in 1840, has increasingly become an instrument through which the courts are giving Maori a number of very important economic rights. For years, the courts of New Zealand said that the Treaty of Waitangi was not part of New Zealand law. The Judicial Committee of the Privy Counsel, New Zealand's highest court of appeal, so held as recently as 1941.[9] However, Parliament has passed various statutes that mention the Treaty of Waitangi. In 1975, Parliament passed a statute setting up a tribunal to allow Maori to make claims regarding the treaty.[10] In 1986 the jurisdiction of that tribunal was extended back to 1840 so that grievances which had arisen back to that date could be examined and reported upon to the government by the Waitangi Tribunal.[11]

In 1986, there came before the New Zealand courts the most important case ever to come before those courts involving the Maori minority of New Zealand. The Court of Appeal said, "This case is perhaps as important for the future of our country as any that has come before a New Zealand Court."[12] It was a case in which the New Zealand Court of Appeal showed great boldness in using history to protect a minority. The government had

8. Re Hunua Election Petition, [1979] 1 N.Z.L.R. 251.

9. Hoani Te Heuheu Tukino v. Aotea District Maori Land Board, [1941] A.C. 308 (P.C.).

10. Treaty of Waitangi Act, [1975] 2 N.Z. Stat. 825.

11. Treaty of Waitangi Amendment Act, [1985] 3 N.Z. Stat. 1335.

12. New Zealand Maori Council v. Attorney-General, [1987] 1 N.Z.L.R. 641, 651.

passed the State-Owned Enterprises Act 1986. The policy was to transfer extensive government assets, land, forests, telephone companies, post offices, and coal mines to commercial corporations. The level of efficiency of those enterprises under the rules of the public service had been abysmal. The new policy was that these enterprises were to be run on commercial principles, not by ministers and public servants.

The New Zealand Maori Council brought an action in the Court to stop the transfer until provision had been made for Maori claims to be settled. The statute provided "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi."[13] The President of the Court of Appeal said:

> The prosaic language of the Court's formal orders should not be allowed to obscure the fact that the Maori people have succeeded in this case. Some might speak of a victory, but Courts do not usually use that kind of language. At the outset I mentioned that each member of the Court was writing a separate judgment. It will be seen that approaching the case independently we have all reached two major conclusions. First that the principles of the Treaty of Waitangi override everything else in the State-Owned Enterprises Act. Second that those principles require the Pakeha and Maori Treaty partners to act towards each other reasonably and with the utmost good faith.
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> The duty is no light one. It is infinitely more than a formality. If a breach of the duty is demonstrated at any time, the duty of the Court will be to insist that it be honoured.
>
> All too clearly there have been breaches in the past.[14]

The Court referred explicitly to past history. The President went on to say, "The effect of our present decision, built on the Treaty of Waitangi Act and the State Owned Enterprises Act, is that in relation to land now held by the Crown it should never again be possible to put aside a Maori grievance in that way. The Crown now has to work out a system to safeguard Maori claims regarding the land covered by the 1986 Act before any land can be transferred to a state enterprise."[15] That was done. Parliament worked out and passed a further act to ensure that all Maori claims could be protected and the Court was then pleased to dismiss the proceedings.[16]

Many other cases have arisen in New Zealand involving Maori interests. One case dealt with fishing interests. The Maori secured a great victory in that case and secured, after negotiation, 10% of the total allowable catch

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13. State-Owned Enterprises Act § 9, [1986] 3 N.Z. Stat. 1306, 1310.
14. *Maori Council*, [1987] 1 N.Z.L.R. at 667.
15. *Id.* at 668.
16. *Id.* at 719. *See* Treaty of Waitangi [State Enterprises] Act, [1988] 2 N.Z. Stat. 881.

in the New Zealand fishing industry.[17] I do not want to go into the details. What I simply want to do is to mention that perhaps Professor Soifer has been too sweeping in suggesting that the common law tradition, at least in the Commonwealth, is unable to deal effectively with the problems of minorities.

Even when traditionally no judicial review exists, the courts have shown some ability to handle these issues. They have been moderately progressive. I think that the absence of judicial review has also meant that the political organs of government are forced to respond to the problems of minorities. They are held to account. Because they are forced to respond, they pass statutes in a general way which the courts interpret in a specific way. It is easier to decide upon progressive policies for minorities so long as it is in terms of general principles. But the Parliament cannot reverse itself easily when hard cases produce politically unpalatable results. The interaction is an interesting one. The power of statutory interpretation in the common law tradition is a strong and powerful instrument in the hands of a determined court.

While not wanting to comment on the vagaries of constitutional interpretation in the United States, I've been coming to the United States long enough to see fashions change. There are occasions on which judicial review gets too far out of step with public opinion. Part of the common law tradition is the tradition of parliamentary supremacy. The American tradition these days seems to be saying legislatures for a variety of reasons cannot act. There is a pressing need to act. Therefore, the courts should act. It becomes a self fulfilling prophecy. You can hardly complain when the courts do things you do not like when they are invested with such power. Neither will legislatures do much if someone else can be found to take the heat. The purpose of my remarks has been to suggest that it is possible to skin the rabbit another way.

17. Section 88(2) of the Fisheries Act of 1983 provides that "Nothing in this Act shall affect any Maori fishing rights." [1983] 1 N.Z. Stat. 79, 135. This section has been before the courts many times in recent years. *See* Te Weehi v. Regional Fisheries Officer, [1986] 1 N.Z.L.R. 680.