Constitutional Stewardship:
A role for state or public sector bodies?

By Professor Dawn Oliver

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Executive Summary

Despite the absence of written or codified constitutions, both the United Kingdom and New Zealand respect fundamental constitutional principles: these include the rule of law, representative democracy, parliamentary government, and human rights. The systems also impose constitutional duties of public service on ministers, Members of Parliament and other public bodies: these duties are the focus of this paper.

In both countries constitutional principles are established and enforced by combinations of hard and soft law.

The New Zealand State Sector Act 1988, as amended, requires public bodies to promote the sustainability of their organisations, to give free and frank advice and information to government and to look after the assets or resources which they control. These are duties of "stewardship" that express the constitutional public service principle.

The term "stewardship" is not yet much used in relation to public bodies in the United Kingdom. However, many arm's length bodies and other public entities are in effect required to "steward" public resources. They must provide independent advice and information to government. They must take care of, among other things, the public finances, the currency, the economy and statistical information.

Hence duties of stewardship in both countries apply to a wide range of "resources" having economic value. They are not merely managerial or administrative. Indeed the constitutional arrangements of each country affect their economies and may themselves be regarded as worthy of being stewarded. Stewardship duties give concrete effect to the public service principle: they will often be constitutional in nature.

I. Introduction

In this pamphlet, I shall engage in a comparative study of constitutional guardianship and stewardship processes that operate in the United Kingdom and New Zealand with a view to drawing lessons from them. Despite the fact that neither the United Kingdom nor New Zealand has a written constitution[1] or United States-style Supreme Court striking down of "unconstitutional" laws, both countries have sophisticated constitutional systems. It is well recognised that courts and politicians play important roles in articulating and upholding what are commonly recognised to be constitutional principles and values. I sketch them below. I consider these to be "constitutional guardianship" roles and I have written about them in the past.[2] In New Zealand, explicit statutory duties of "stewardship" are developing in relation to the operation of state sector organisations. No such explicit principles apply in the United Kingdom. However, I suggest that, on examination, it may be that "stewardship" is in practice an advanced form of constitutional guardianship and that it is developing in the United Kingdom as well. This will be one of my themes in what follows.

In the next Part of this paper, I shall summarise the ways in which constitutional guardianship roles have been developed by courts and political bodies. I shall focus on the United Kingdom, but parallels with New Zealand will be clear. In Part III, I shall explore the duties of stewardship that have been imposed on state sector bodies in New Zealand and the ways in which similar duties are developing in relation to some public bodies in the United Kingdom, even though the term "stewardship" is seldom used. In Part IV, I shall reflect on these developments and their implications for the constitutional principles that both countries subscribe to and their protection and development.

Comparisons between the positions in the United Kingdom and New Zealand are illuminating because the two countries' constitutional arrangements have so much in common and yet differ in various ways. They are both representative parliamentary democracies and both are common law systems. For the purposes of this article, it is most significant that Parliaments in both countries enjoy legislative supremacy. And both have fairly well-functioning (if not perfect) systems of government regulated by laws. It is significant, however, that those "laws" include both hard law (Acts of Parliament, Orders in Council, statutory instruments and case law) and a lot of soft law. By this, I refer to constitutional conventions, parliamentary resolutions, codes, manuals and guidance documents.[3] In this respect, the two systems differ greatly from, for example, civil law systems.

The most important principles of the two countries' constitutional arrangements are first, the rule of law; secondly, representative democracy; thirdly, parliamentary government and thus minis-

1 On whether and how a written constitution for these two countries could be acquired, see Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016); Lord Lisvane and Paul Silk *Towards a New Act of Union* (Constitutional Reform Group, London, 2016). See also Andrew Blick *Mapping the Path to Codifying – or not Codifying – the UK's Constitution* (Kings College London, London, 2012).

2 See Dawn Oliver *Constitutional Guardians: The House of Lords* (The Constitution Society, London, 2015).

3 For discussion and the texts of some of these documents, see Andrew Blick *The Codes of the Constitution* (Hart Publishing, Oxford, 2016).Examples in New Zealand include: Cabinet Office *Cabinet Manual 2008*; Legislation Design and Advisory Committee *Legislation Advisory Committee Guidelines on the Process and Design of Legislation* (2014); New Zealand Productivity Commission "Regulatory institutions and practices" (June 2014); and The Treasury "Initial Expectations for Regulatory Stewardship" (March 2013).

terial responsibility to parliament; fourthly, the protection of human rights; and fifthly, public service.[4] The first four of these principles are widely cited as fundamental to the system. The fifth constitutional, and cultural, principle is often overlooked. It is, however, universally accepted in liberal democracies that government should be undertaken in a spirit of disinterested public service in the general interest (as interpreted and reinterpreted from time to time).[5]

Forgive me for dwelling on this for a moment. Of course, almost always, balances must be struck between conflicting concepts of the public interest,[6] between conflicting public interests and between public and private interests. The crucial role of politicians and politics is to find ways of managing such conflicts so as to avoid violence, to preserve the legitimacy of the system and to promote shared interests over sectional ones.

Commitment on the part of politicians, the courts, the state or public sector and the population at large to compliance with the public service principle is in my view foundational in liberal democracies. In practice, it is even more basic and fundamental than other constitutional principles to the proper functioning of a liberal democracy. It is of the essence of these systems. A liberal democratic system of government cannot function effectively in accordance with the first four principles in the absence of a sufficient degree of social cohesion to give rise to and reflect broad senses of shared and communal interests among the population and thus commitment to the public service principle. The principle can only operate if the dominant culture and general public opinion support it. This is at the core of my thesis. I shall demonstrate how this constitutional public service principle is highlighted in many hard and soft laws that govern state or public sector bodies and how duties of stewardship that reinforce the principle are being imposed on such bodies. This leads me to suggest that stewardship duties are often constitutionally rather than merely administratively or managerially important. These bodies, along with courts and politicians, often act as stewards of the constitution itself.

4 I omit parliamentary sovereignty or supremacy from this list for reasons that I shall outline in due course.

5 See generally Edmund Burke "Speech to the Electors of Bristol" (3 November 1774). See also John Locke "First Treatise of Government" in Peter Laslett (ed) *Locke: Two Treatises of Government* (3rd ed, Cambridge University Press, Cambridge, 1988) 136; Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge (MA), 1977) at 82–83; and Leon Duguit *Law in the Modern State (1919)* (Kessinger Publishing, Whitefish (MT), 2008) at 44.

6 For discussion of what is in the public interest (what its content is) and how it is to be determined (such as by deliberation, on evidence), see Brian Barry "The Use and Abuse of the Public Interest" in Carl Friedrich (ed) *Nomos V: The Public Interest* (Atherton Press, New York, 1962) 191; and Mike Feintuck *"The Public Interest" in Regulation* (Oxford University Press, Oxford, 2004).

II. Courts and Politicians as Constitutional Guardians

In case law over centuries, the courts have developed some of the most fundamental common law principles. For example, in the *Case of Proclamations*, the Court held that the executive cannot remove the liberties or rights of individuals, for example by issuing orders or proclamations, without the consent of Parliament.[7] Principles such as these were at the centre of the litigation over the United Kingdom's exit from the European Union: the Government claimed the right under the royal prerogative to initiate negotiations for exit without the consent of Parliament. Claimants pointed out that this would lead inevitably to individuals and organisations losing many rights under European law (unless in due course Parliament legislated to protect them). The Supreme Court decided by a majority of 8–3 in *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* that the authority of an Act of Parliament was required to give legal effect to the British Government's service of notice on the European Union under art 50 of the Treaty of European Union that would start the process of exit from the European Union, which might well result in the loss of these rights.[8] Ancient principles are still fundamental today.[9]

Although the courts in the United Kingdom and New Zealand do not have the power to strike down statutory provisions on grounds of unconstitutionality, they have developed important constitutional principles when interpreting legislation and when adjudicating discretionary decisions of public bodies. This is far too big a subject for me to try to summarise here. But broadly, the courts' concept of the rule of law requires public bodies to respect rights unless there is clear statutory authority for breaching them,[10] to comply with statutory requirements as interpreted by the courts, to act fairly towards those negatively affected by official decisions, to take account only of relevant considerations in their decision making, to decide in accordance with principles of reasonableness or proportionality and to give reasons for their decisions.[11]

Constitutional guardianship is not the sole prerogative of the courts: the Westminster and New Zealand Parliaments too have important roles as both architects and guardians of their constitutions. Recent UK legislation that illustrates the point includes the Human Rights Act 1998, devolution legislation in and since 1998 for Scotland, Wales and Northern Ireland, the Freedom of Information Act 2000, the Constitutional Reform Act 2005 and the Constitutional Reform and Governance Act 2010. The New Zealand position is illustrated by their Constitution Act 1986, the State Sector Act 1988 as amended, the Bill of Rights Act 1990 and the Electoral Act 1993.

A topical example of such legislation, also at issue in the Brexit litigation, is the Bill of Rights 1689. This outlaws the suspending and dispensing of laws by the executive. The United Kingdom Government's proposal to start negotiations with the European Union without statutory authority,

7 *Case of Proclamations* (1611) 12 Co Rep 74. See also *Entick v Carrington* (1765) 19 St Tr 1029: the Court would not accept a claim by Government that breaching liberties and rights was justified by "the public interest" without reference to explicit legal authority.

8 *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at [70], [73], [83] and [87] [*Miller*]. For a critique of the reasoning of the majority in *Miller* see M. Elliott 'The Supreme Court's Judgment in *Miller*: In Search of Constitutional Principle' in 76 Camb. LJ 257.

9 At [44], [50].

10 See *Entick v Carrington*, above n 7.

11 See M Elliott and R Thomas *Public Law* (3rd ed, Oxford, Oxford University Press, 2017); Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014).

it was argued, would result in the suspending and dispensing of laws currently in force in the United Kingdom when Brexit takes place, contrary to the Bill of Rights.[12]

Parliaments' internal rules also support constitutional principles, notably the public service principle, in many ways. Members of both Houses of the United Kingdom Parliament must register and declare their interests. They are precluded from acting as paid advocates for outsiders in Parliament. It is a contempt of Parliament for outside interests to seek to mandate Members of Parliament.

Both the United Kingdom and New Zealand Parliaments have developed mechanisms to restrain governments from introducing "unconstitutional" bills or pursuing "unconstitutional" policies. I mean by "unconstitutional" inconsistency with the five principles I outlined earlier. I hope I may be forgiven for backing up this point mostly with examples from the United Kingdom.[13] In the last 15 years or so, both Houses of the Westminster Parliament have developed institutions and processes for the articulation and defence of constitutional principles:

1. The Joint Committee on Human Rights scrutinises bills and draft bills for compatibility with the European Convention of Human Rights and other international human rights instruments, and reports to Parliament on them.[14]

2. The House of Lords Constitution Committee scrutinises bills and draft bills for constitutional issues and also holds inquiries into matters of constitutional significance including, for instance, on the accountability of civil servants and the constitutional implications of Brexit.[15]

3. The House of Lords Delegated Powers and Regulatory Reform Committee reports on whether proposed delegations of power to ministers are justified.[16]

These committees are highly regarded both in Parliament and in government. Their operations have effects "upstream" in government when policies are under development and bills are being drafted. They are referred to in the 2017 Cabinet Office soft law document *Guide to Making Legislation.*

The New Zealand House of Representatives' select committees perform parallel roles to United Kingdom Public Bill Committees and other parliamentary select committees in the scrutiny of

12 See *Miller*, above n 8, at [41] and [43]–[44].

13 See generally Oliver, above n 2.

14 Standing Orders of the House of Commons 2017, SO 152B; and Standing Orders of the House of Lords 2016, SO 64. See also Murray Hunt and Hayley Hooper *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, Oxford, 2015).

15 For a project to produce a "code" of constitutional principles based on the reports of this Committee: Jack Simson Caird, Robert Hazell *The Constitutional Standards of the House of Lords Select Committee on the Constitution* (3rd ed, Constitution Unit, London, 2017). See also Jack Simson Caird and Dawn Oliver "Parliament's Constitutional Standards" in Alexander Horne and Andrew Le Sueur (eds) *Parliament: Legislation and Accountability* (Hart Publishing, Oxford, 2015) 63 at 63–88. The role of this Committee resembles in some respects that of the New Zealand Legislation and Design Advisory Committee with its *Legislation Advisory Committee Guidelines on the Process and Content of Legislation* (2014) and the *Guide to Making Good Legislation*, discussed below. These Guidelines provide the criteria or standards for constitutional protection.

16 See Oliver, above n 2; and "Delegated Powers and Regulatory Reform Committee – Role of the Committee" United Kingdom Parliament <www.parliament.uk>.

bills against "constitutional" criteria. This may be more problematic in a unicameral Parliament: in the United Kingdom, the House of Lords is largely responsible for those functions. Nevertheless, both Parliaments act as constitutional guardians, despite the absence of a written constitution in either country.

These developments are particularly important in view of the doctrine of parliamentary sovereignty, which precludes the courts from striking down laws for unconstitutionality.[17] This doctrine is fundamental in both countries' legal systems. I use the word "doctrine" on purpose here. Parliamentary sovereignty is not in my view a "principle" since it is not necessarily "good" or a virtue; nor is it essential in a democracy: after all, most well-functioning liberal democracies do not subscribe to the doctrine.

Parliamentary sovereignty allows for the enactment of laws that fly in the face of even the most obvious constitutional principles, such as the rule of law and the independence of the judiciary, the requirement of fair elections, the protection of human rights. Why it is a "doctrine" at all is an interesting question. In my view, the fact that the courts defer to Parliament when statutory provisions are in issue is due to their vulnerable status in the systems. If the courts were to provoke politicians by refusing to give effect to their legislation, they could find their own independence and authority challenged as undemocratic. They could find their judgments ignored by government and thus, in practice, unenforceable.[18]

In other words, if the courts were to defy Parliament and government, the rule of law itself might be put at risk.[19] So, in these two systems, the doctrine of parliamentary sovereignty is a pragmatic arrangement resting on the need for comity between institutions. It means that responsibilities for constitutionalism in these two countries cannot rest entirely on the courts. It also rests on politicians. And, as I shall argue shortly, it is shared by a number of non-political state sector, public and arm's length bodies as well.

Members of the executive too have constitutional guardianship roles. Under the Human Rights Act 1998, the minister in charge of a bill must state either that in his view the bill is compatible with human rights or that, if they cannot make such a statement, the government nevertheless wishes to proceed with the bill.[20] Under the Constitutional Reform Act 2005, all ministers are required to uphold the continued independence of the judiciary.[21] The Lord Chancellor is supposed to have

17 European law is different and I do not have the time in this Lecture to go into the ways in which the courts' powers to dis-apply provisions in United Kingdom Acts that are incompatible with European Union law do or do not undermine or provide exceptions to parliamentary sovereignty.

18 Indications of political concerns about judges exceeding the proper limits of their power are to be found in the publications of The Judicial Power Project, available at <judicialpowerproject.org.uk>.

19 See generally Dawn Oliver "Parliament and the Courts" in Alexander Horne, Gavin Drewry and Dawn Oliver (eds) *Parliament and the Law* (Hart Publishing, Oxford, 2013) 20.

20 Section 19.

21 Constitutional Reform Act 2005, s 3(1).

special roles in relation to the judiciary and the rule of law.[22] The Law Officers have special roles, apart from those as legal advisers to government, in relation to certain public interests.[23]

I referred to the use of soft law in these two systems above. All ministers in the United Kingdom and New Zealand are bound by an important body of "constitutional" soft law. I can only give a few examples, mainly from the United Kingdom. The *sub judice* rule in both countries prevents MPs or ministers from commenting on judges or on cases during their hearing, thus protecting public confidence in the independence and integrity of the judicial process. By the United Kingdom *Ministerial Code* (which may be updated and reissued by each new Prime Minister), ministers are required to comply with the seven principles of public life,[24] which I discuss below. Ministers are also bound by the resolutions passed by the two Houses of Parliament in 1997 after the Matrix Churchill Arms to Iraq scandal to accept that they owe duties to answer questions in Parliament: they do not answer parliamentary questions or attend select committees purely as a matter of grace.[25]

I note that similar provisions as to executive responsibilities for the constitution are included in the New Zealand *Cabinet Manual* and in many Acts, including the State Sector Act 1988 and the State Entities Act 2004. Further, the role of the New Zealand Legislation Design and Advisory Committee, appointed by the Attorney General, is to enable departments to address certain standards as quality law-making through obtaining advice from that Committee. It has adopted and is currently revising a lengthy document, *Legislation Advisory Committee Guidelines*, which sets out the standards.[26]

These provisions serve to reinforce the five principles noted above, the rule of law, representative democracy, ministerial responsibility, human rights and the public service principle: politicians are servants, not masters, of the people they govern.

22 Sections 1(b) and 3(6). However, recent non-lawyer Lord Chancellors have not been very good at performing these duties. Lord Chancellor Liz Truss was slow and half-hearted in stating the importance of judicial independence and the rule of law in the light of the front page headline attack on judges as "enemies of the people" in the *Daily Mail* on 4 November 2016, the day after the Administrative Court delivered its judgment against the Government on Brexit: see *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin). In practice, these duties are not justiciable. Despite the fact that they are written into statute, they are in fact "soft law" in my view. But the Lord Chancellor was widely criticised for her attitude and was careful to defend the Supreme Court when it delivered its decision in the *Miller* case.

23 See JLJ Edwards *The Attorney-General, Politics and the Public Interest* (Sweet & Maxwell, London, 1984) at chs 4, 5, 13 and 14 (on police powers and prosecution) and 6 (on role as guardian of the public interest).

24 First Report of the Committee on Standards in Public Life, *The 7 principles of public life* (CM 2850, May 1995), available at <www.gov.uk>. These were updated in the Committee's 14th report *Standards Matter: A Review of Best Practice in Promoting Good Behaviour in Public Life* (CM 8519, January 2013) at 24.

25 For resolutions of the two Houses of Parliament on ministerial responsibility to Parliament see: (19 March 1997) HC 1047; and (20 March 1997) HL 1055–1062. See also Richard Scott *Report on the Export of Dual Use Goods to Iraq* (House of Commons Report 115, 1995); Adam Tomkins *The Government After Scott: Government Unwrapped* (Clarendon Press, Oxford, 1998); (19 March 1997) GBPD HC 1046–1047; and (20 March 1997) GBPD HL 1055–1062.

26 See above n 3. See also NZ Cabinet Paper *Report on the Operation of the Legislation Design and Advisory Committee*, 2017: the Parliamentary Counsel Office reported that the Committee was working well, adding value to the legislative development process; the PCO recommended ways in with the Committee could improve its effectiveness and enhance its value.

III. Public and State Sector Bodies and the Constitution

A New Zealand: The Development of Duties of Stewardship

Since I am suggesting that the UK can learn from the experience of New Zealand, I shall outline the New Zealand position first. Until around 1988, the civil service in New Zealand had been run on rather similar lines to the United Kingdom's for some 75 years. The Public Service Act 1912 reformed the service to be a non-political, unified, career public service. This is surely an aspect of the public service principle. The State Sector Act 1962 added a requirement that it promote efficiency, economy and improved service. The State Sector Act 1988 transferred many functions that had been carried out within ministerial departments to executive agencies and established the frameworks for these agencies and their chief executives. Generally, the advantages of agencies are that they have stronger focus than when the functions are performed within government departments, and greater expertise, and they are single minded in pursuit of agency objectives. They are also immune from party political or partisan pressures in their work.

A review of the NZ State Sector Act 1988 was launched in 2009 "to ensure that the Act is fit for purpose, meets the current and ongoing needs of the State services and accurately reflects current practice".[27] A Better Public Services Advisory Group was established in May 2011. Its recommendations were followed by major shifts in the public management model to improve the quality and direction of public services. This led to an omnibus bill, passed as the State Sector (Amendment) Act 2013. It amended the State Sector Act 1988 in a range of ways. The overall effect, together with convention, was to set out with more clarity the formal relationship between ministers and the public service, a major aspect of New Zealand's constitutional arrangements.[28]

Section 32 of the State Sector Act 1988, as amended in 2013, introduced a newly expressed set of statutory responsibilities for *stewardship* into the framework. The chief executive of a department or departmental agency is responsible to the appropriate minister for:[29]

> *... the stewardship of the department or departmental agency, including of its medium- and long-term sustainability, organisational health, capability, and capacity to offer free and frank advice to successive governments.*

Reference to free and frank advice is of course designed to deter governments from prioritising their own interests over public interests. And mention of long term sustainability is meant to galvanise these bodies to active planning for the future and to anticipate changes.

Section 32 continues: Chief Executive Officers are responsible for:[30]

… the stewardship of—

(i) assets and liabilities on behalf of the Crown that are used by or relate to (as appli-

27 State Services Commission "Introduction to Review of State Sector Act 1988" (6 August 2015) <www.ssc.govt.nz>.

28 State Services Commission "State Sector Act 1988: Explanation of Amendments in 2013" (August 2015) <www.ssc.govt.nz>.

29 State Sector Act 1988, s 32(1)(c).

30 Section 32(1)(d).

cable) the department or departmental agency; and

(ii) the legislation administered by the department or departmental agency.

The State Services Commission explains that:[31]

> *The concept of "stewardship" embodies the responsible planning and active management of another's property or finances. Common features of good stewardship include positioning an agency to meet its medium and long term objectives and strategies; and ensuring there is appropriate infrastructure, management systems and succession planning in place to enable it to do so.*

Thus, "property" has a new and very wide meaning under this concept of stewardship and it covers many governmental activities. Ayto has suggested that the government's "assets" (an alternative to "property" in the context) to be stewarded under section 32 in practice include items such as regulatory arrangements, although they do not fall explicitly within s 32(1)(d)(i).[32] "Resources" would be a less confusing term than "assets", and I shall use it from now on. Ayto adopts the approach of accountants for whom an asset (or resource) is "something within an entity's control from which future economic benefits are expected to flow".[33] On this approach very many aspects of governmental functions would count as resources that should be "stewarded". Not all of them will be regulatory: to take examples from the discussion of the United Kingdom system in the next Part of this article, the value of the currency and its vulnerability to inflation, public finances and their sustainability, official statistics, and evaluations of the effectiveness of public expenditure would all meet Ayto's criterion. Looking back to Part II of this article, "property" or "resources" could cover the rule of law, for instance, since future economic benefits flow from it. And it surely makes sense that duties of stewardship would extend to such matters in New Zealand.

Implicit in the stewardship duties is that departments should try to avoid human errors and "blunders", which may result in waste or writing-off of resources. Blunders result, according to Crewe and King, from psychological and cultural categories of human error in the management of government projects: cultural disconnect, group-think, intellectual prejudice and operational disconnect.[34] Awareness of this risk and the need to avoid it is demonstrated in the New Zealand soft law document, *Cabinet's Initial Expectations for Regulatory Stewardship*: among other things, departments exercising stewardship roles should monitor the performance of their regimes, articulate their objectives, identify, evaluate and act on problems, carry out careful implementation planning and a transparent, *risk-based* compliance and enforcement strategy (the "risks" normally being of waste, failure, blunders).[35]

B The United Kingdom: Towards Duties of Stewardship?

I now turn to the roles of executive and advisory bodies in the United Kingdom. I shall focus on the extent to which they too have been given constitutional guardianship or stewardship responsibilities by hard and soft law.

31 State Services Commission, above n 28, at [27] (emphasis added).

32 Jonathan Ayto "Why Departments Need to be Regulatory Stewards" (2014) 10(4) Policy Quarterly 23 at 23.

33 At 23.

34 See Ivor Crewe and Anthony King *The Blunders of our Governments* (Oneworld Publications, London, 2013) at chs 16–19.

35 Set out in Ayto, above n 32, at 26.

The British equivalent of New Zealand's Public Service Act 1912 was probably the Northcote–Trevelyan Reforms of 1854. These set in place a permanent, professional, merit-based civil service: the public service principle. Thereafter, of course, reforms took place from time to time. But the United Kingdom has lagged behind New Zealand. It was not until the Thatcher and then the Major Governments in the 1980s and 1990s that a raft of radical changes to the operation of the civil service took place, many of them by government fiat (soft law) or under the royal prerogative rather than Acts of Parliament.[36]

As a first step, the Ibbs Report of 1988 recommended the establishment of executive agencies, most of them within government departments, run by chief executives under terms set out in Framework Documents.[37] Their focus was to be on public service outputs in the general interest.[38] The policies of these agencies are laid down in their frameworks, but their implementation is to be non-partisan. The acknowledged model for these reforms was the Swedish system, but the parallels between the United Kingdom and New Zealand changes of 1988 are obvious. Unlike the approach in New Zealand, any law-related aspects of the United Kingdom changes were done under the royal prerogative, for the most part without the need for an Act of Parliament.[39] There has been no equivalent in the United Kingdom of the New Zealand State Sector Act 1988 and its amendments or the NZ Crown Entities Act 2004.

One of the fundamental principles of the United Kingdom system, ministerial responsibility to Parliament for the work of the agencies, was affected by these reforms: rather than answer parliamentary questions addressed to them about the work of executive agencies, ministers referred them to the CEOs. Parliament fought back. Eventually, in the face of objections from parliamentary committees that this weakened the power of Parliament to hold government to account, it was agreed that the replies of chief executives to parliamentary questions would be placed in the House of Commons Library. At least they would be available to MPs.

There followed a number of rows about the role of the House of Commons in relation to these agencies, particularly if a "blunder" had been committed. The House of Commons would demand that ministers accept responsibility, while ministers claimed responsibility only for policy, not operational matters, and blamed the chief executive.

Examples include the failure of the Child Support Agency in 1994.[40] The Agency was supposed to collect maintenance payments for children from absent parents. It fell behind substantially in collection and eventually failed. Failure was due to inadequacies in the framework within which it operated: insufficient funding, training and staffing. The Select Committee for the Parliamentary

36 See generally Dawn Oliver and Gavin Drewry *Public Service Reforms: Issues of Accountability and Public Law* (Pinter, London, 1996).

37 Cabinet Office *Improving Management in Government: The Next Steps* (1988).

38 The interests of "consumers" of public services were later promoted by Prime Minister John Major's *The Citizen's Charter: Raising the Standard* (HMSO, London, 1991).

39 The main statutory provision related to the role of accounting officers, which passed from departmental permanent secretaries to the agency Chief Executive Officers. Accounting officers have for long had personal responsibility – duties of stewardship (as opposed to acting as the alter egos of their ministers) – of the public money, in essence assets, that their agencies spend.

40 See Parliamentary Commissioner for Administration *Investigation of Complaints against the Child Support Agency* (House of Commons, Report 135, 1994–1995) at iii; Carol Harlow "Accountability, New Public Management, and the problems of the Child Support Agency" (1999) 27 Journal of Law and Society 150; and Crewe and King, above n 34, at 83–94.

Ombudsman (the Commissioner for Administration) found that:[41]

> *We expect the questioning of agency officials by Ministers to be searching and robust and for Ministers to be briefed accordingly. We are in no doubt that maladministration in the CSA cannot be divorced from the responsibility of Ministers for the framework within which it operated.*

Another row was over the escape of prisoners from a High Security Prison in 1995. The Director General of the Prison Service, whom the Home Secretary blamed for the breakout, was regularly distracted from his duties by ministerial interventions. The Home Secretary had intervened in "operational" matters, which he claimed were not his responsibility. The *Report into Prison Security* called for the relationship between the Home Office and the Prison Service to be reviewed "with a view to giving the Prison Service Agency the greater operational independence that Agency status was meant to confer".[42]

As a result of these rows, ministers are now required by Parliament to take responsibility for the general running of their agencies, for their funding and proper staffing and for their own conduct in relation to agencies if this has adversely affected their performance. They are expected to ensure that things are put right if they have gone wrong. Parliamentary committees – notably the Public Administration Committee – have conducted a number of inquiries into the operation of such agencies and made recommendations. This is all central to the operation of the constitution. And it is all "soft law".

It was not until the Constitutional Reform and Governance Act 2010 that the United Kingdom civil service was placed on a statutory footing.[43] The Government is required to publish civil service codes of conduct that articulate the public service principle: honesty and integrity, objectivity and impartiality.[44]

There have since been a series of policies to improve civil service performance, including the current Civil Service Reform Plan. This focuses on the competencies required of civil servants at each level to ensure that the objectives are clear, financial management good and so on.[45]

It is typical of the United Kingdom system that it has adjusted only incrementally and informally to "agencification" and other reforms. By contrast, the New Zealand adjustments have been set out clearly both in legislation and in soft law in the *Cabinet Manual* and other documents.

Although the terms "constitutionalism" and "stewardship" have not been used, in effect, committees in the House of Commons and independent inquiries have been pressurising ministers to accept that they have "stewardship" duties in respect of "their" department's agencies, and indeed that CEOs also have stewardship and constitutionalism duties.

Elements of such duties became more clearly articulated in an unrelated scandal in the 1990s. A political sleaze scandal blew up over MPs' acceptance of payments (bribes) for asking par-

41 Parliamentary Commissioner for Administration, above n 40, at [27].

42 Home Office *Review of Prison Service Security in England and Wales and the Escape from Parkhurst Prison on Tuesday 3rd January 1995* (HMSO, CM 3020, 1995).

43 Constitutional Reform and Governance Act 2010, pt 1.

44 Sections 5–7.

45 Civil Service Human Resources *Civil Service Competency Framework 2012–2017* (31 July 2012).

liamentary questions in 1996. A new, non-statutory Committee on Standards in Public Life was appointed to make recommendations for the future. Among them was the articulation of the seven principles of public life. These are summarised in their first report as:

1. selflessness;
2. integrity;
3. objectivity;
4. accountability;
5. openness;
6. honesty; and
7. leadership.

The seven principles were to be, and are, applied to all public bodies.[46]

The Committee's recommendations were accepted by Government. They have been widely endorsed as *constitutional* principles.[47] Both Houses of Parliament adopted the seven principles in their Standing Orders. Now they apply not only to MPs, whose conduct had given rise to the appointment of the Committee, but also to members of the Upper House, ministers and their departments and agencies, and arm's length bodies. (I shall discuss these bodies shortly.) And they have been incorporated into the mission statements and procedure guides of most public bodies, including the *Ministerial Code*.

In effect, the seven principles express the public service principle. But they are only "soft law". They are supposed to form part of the culture of all public bodies. These principles resemble elements of the "stewardship" and associated standards in relation to the New Zealand state sector, though they came into being for completely different reasons.

I now turn away from dealing with sleaze and back to specific reforms of the public service in the United Kingdom. For many years, important functions that were originally exercised by or on behalf of ministers in their departments have been assigned to or exercised by arm's length bodies. These are the rough equivalents of New Zealand's Autonomous or Independent Crown Entities. Some of these bodies are, in practice, stewards of the assets or resources that they control, though the term "stewardship" hardly appears in official documents about them in the United Kingdom. Here are a few examples.

1. The Bank of England and the Monetary Policy Committee

Under the Bank of England Act 1998, its Monetary Policy Committee has responsibility for fixing

46 Committee on Standards in Public Life, above n 24.

47 See for instance Constitution Committee (House of Lords) *The Accountability of Civil Servants* (20 November 2012) at [29], which refers to the constitutional principles of integrity, honesty, objectivity and impartiality.

the basic rate. Until then, this was a matter for the Chancellor of the Exchequer.[48] The background to this measure was the commitment of the Chancellor of the Exchequer, Gordon Brown, to ending the influence of the short-term wishes of politicians – inconsistently with the public service principle – in the setting of rates and thus to end the "boom and bust" fluctuation of rates. The Bank's monetary policy objective is to deliver price stability and control inflation and, subject to that, to support the government's economic objectives including those for growth and employment. In other words, the monetary policy mandates to the Bank a duty of stewardship of important economic resources (the currency, including the rate of inflation, growth and employment) and it clarifies its role and objectives. The Bank and the Monetary Policy Committee are independent of government, but accountable to the House of Commons. They are stewards of these resources.

2. The Treasury and the Office for Budget Responsibility

The Office for Budget Responsibility (OBR) was established shortly after the May 2010 general election by the Chancellor of the Exchequer, George Osborne. Osborne had been critical of the economic and fiscal forecasts of the previous Labour Government. The Office was put on a formal statutory footing by the Budget Responsibility and National Audit Act 2011 which seeks to buttress its independence from government.[49] The Act imposes a range of duties on the Treasury with regard to the formulation and implementation of fiscal policy, including through the Charter for Budget Responsibility.

The separate and independent OBR's main duty is to examine and report, objectively, on the sustainability of the public finances. In effect, it provides open, well-informed, free and frank advice to government which might previously have been supplied confidentially by civil servants and rejected, also secretly, by government.

The OBR produces economic and fiscal forecasts, which the government is to adopt as the "official" forecasts for the annual Budget. The OBR controls the production of the forecasts and makes the judgments that underpin them, independently of government ministers. Thus, the Chancellor of the Exchequer is no longer responsible for these judgments.

The OBR also produces long-term fiscal projections and analysis relating to the public sector balance sheet. These functions have all been depoliticised with a view to enhancing the credibility of fiscal policy and projections in the general interest.[50] In effect, these provisions place duties of stewardship of fiscal policy on the Treasury, and of data, information and judgments about the sustainability of public finances on the OBR. Both fiscal policy and information are resources from which economic benefits flow: the Treasury and the OBR are "stewards" of them. And the OBR provides shields against the use of "fake news" or "alternative facts" in the development and implementation of government policy.

48 See generally Dawn Oliver "The Politics-Free Dimension to the British Constitution" in Matt Qvortrup (ed) *The British Constitution: Continuity and Change* (Hart Publishing, Oxford, 2013) 69; and Dawn Oliver "Regulating Politics in Government" in Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide (eds) *The Changing Constitution* (8th ed, Oxford University Press, Oxford, 2015) 307.

49 See *Budget Responsibility and National Audit [HL] Bill: Committee Stage Report* (House of Commons, Research Paper 11/25, 15 March 2011) for an account of the Bill and the support of Government and Opposition members for the Office for Budget Responsibility to be fully independent of government.

50 However, the Office of Budget Responsibility has been severely criticised for its economic forecasting. It does not follow that these functions would have been better exercised if they had remained within the government department.

3. United Kingdom Statistics Authority and the Office for National Statistics[51]

The United Kingdom Statistics Authority (the Authority) was established on 1 April 2008 by the Statistics and Registration Service Act 2007 as an independent body operating at arms' length from government. It is a non-ministerial department directly accountable to Parliament. It is responsible for oversight of the United Kingdom's National Statistical Institute (NSI) and of the Office for National Statistics (ONS), which is its executive office and the largest producer of official statistics in the United Kingdom.

The background to the 2007 Act and previous arrangements for the collection and publication of statistics was concern that government might manipulate statistics for partisan and party political purposes. The Authority's statutory objective is to promote and safeguard the production and publication of official statistics that serve the public good. (The word "safeguard" is not far from "steward" in meaning.) The Authority is also required to promote and safeguard the quality and comprehensiveness of official statistics and ensure good practice in relation to them. Thus, it seeks to immunise national statistics from political manipulation in the public interest. In effect, it is the steward of a resource, the quality and comprehensiveness of official data and statistical information.

4. The Comptroller- and Auditor-General and the National Audit Office

Last in my examples of the use of arm's length bodies to perform important public functions is the Comptroller-General of the Receipt and Issue of Her Majesty's Exchequer. That person is also Auditor-General of Public Accounts. He or she is normally referred to as the Comptroller and Auditor-General (CAG). The CAG is an independent Officer of Parliament and is no longer, as earlier, treated as an arm of the executive. The CAG is the chief executive of the National Audit Office (NAO). For the most part, he or she determines his or her own work programme.

In the role as Comptroller the CAG ensures that all revenue is paid into the Consolidated Fund at the Bank of England and, on Treasury request, authorises National Loans Fund lending. The CAG's authority to the Bank of England is required before the Treasury may draw money from the funds. He or she must ensure that the limits of expenditure authorised by Parliament are not exceeded. These are executive functions, and the Comptroller is steward of these assets or resources.

In the role of Auditor-General the CAG and the NAO provide open, evidence-based, free and frank information and advice to Parliament about how public money is used. They are advisers to and accountable to the House of Commons Public Accounts Committee. But the Auditor-General and the NAO have no *executive* power of control over these resources. Hence, they are not themselves "stewards" of public money. But they are important elements in the arrangements by which Parliament (which "owns" public money and makes "appropriations" to the executive in the form of "Votes") itself acts as "steward" of that money in the hands of government and other bodies

51 This information for this section is taken from the website of the United Kingdom Statistics Authority, available at <www.statisticsauthority.gov.uk>.

financed by its grants.[52] And they provide safeguards against politicians' resort to "alternative facts" in relation to public expenditure. In these senses the CAG and the NAO are *stewards of certain constitutional arrangements*.

So, although the term "stewardship" has certainly not as yet gained much currency in official documents and other governmental literature in the United Kingdom, the changes discussed above reflect some or all of the elements of stewardship as it has developed in New Zealand. They also reflect the roles of many public bodies in both countries as constitutional guardians or stewards. Many executive agencies and arm's length bodies in the United Kingdom have control of resources as they are understood in stewardship theory: first, they are to be proactive in managing them; secondly, the culture and psychology of disinterested public service are intrinsic to the seven principles of public life, which apply as soft law across the public sector; thirdly, such bodies often give well-informed, free and frank advice to government or to Parliament; fourthly, the objectives of these bodies have come to be far more tightly defined than they were when their functions were exercised directly by ministers in their departments; and fifthly, their accountabilities, for instance to the ministers, the government or Parliament have become clearer. But so far, long-term sustainability and planning have not been made explicit tasks for these agencies. Stewardship is not an all or nothing concept.

Perhaps, like Molière's Monsieur Jourdain and his prose, we in the United Kingdom have been talking stewardship à *l'anglaise* without knowing it for several years.

52 Although "stewardship" is seldom mentioned in official documents in the United Kingdom, there has been some discussion of the concept among non-governmental organisations working in the field of public policy in the United Kingdom. The Institute for Government, in its review of accountability in the civil service, recommended in 2013 that a duty of stewardship of the department's longer-term capability should be developed since it was only weakly embedded in the system. That report also recommended that the contribution of the Permanent Secretary (a chief executive) of a department to Whitehall-wide collective leadership should be strengthened. This role, the Institute recommended, should be incorporated into the Cabinet Manual and extended to ministers. This report refers explicitly to examples of the approaches in New Zealand, Australia and Canada. See generally Akash Paun and Pepita Barlow "Civil Service Accountability to Parliament" (4 September 2013) Institute for Government <www.instituteforgovernment.org.uk>.

IV. Reflections: Public or State Sector Bodies, Stewardship and the Constitution

Are the various stewardship duties imposed on public or state sector bodies in hard and soft law in the UK and New Zealand merely managerial and administrative arrangements? Or may they also be "constitutional"?

Not all of the functions of these bodies are "constitutional" in nature. It would be claiming too much under the umbrella of constitutionalism to suggest that failures to promote efficiency, economy and improved service under the State Sector Act 1962, for instance, were "unconstitutional", though they may amount to failures of stewardship. On the other hand, requirements of disinterested public service involving integrity and the giving of free and frank advice clearly impose principles of the constitution on those subject to them along the lines set out in the Introduction to this article.

Certainly, if any of the bodies I have used as examples of United Kingdom arm's length bodies with stewardship duties were abolished, or their independence were undermined or their functions returned to ministers, that would widely be regarded as seriously "unconstitutional". So would ministerial claims to have no responsibilities for the framework within which these bodies operate. They would be challenged as undermining the principles of ministerial responsibility and public service, even putting the rule of law at risk. And there are many other arm's length bodies whose roles are clearly constitutional and which should not be abolished: the Electoral Commission for instance. The sad fact of the matter is that MPs and ministers in any country cannot always be relied upon to resist temptations to act in their own interests (such as to avoid embarrassment or to drum up electoral support) and those of their party, or on weak evidence, contrary to the duties of stewardship of public resources.

In my view, then, the duties of stewardship imposed on state and public sector bodies will commonly be "constitutional" in character and their breaches would be contrary to fundamental, even foundational, constitutional principles. The exercise of stewardship serves to protect public interests from ignorant, partisan or self-seeking influences and from blunders. In effect, state sector and public bodies are partners with politicians and the courts in the UK and New Zealand systems of constitutional guardianship, stewarding the functions they are responsible for, and indeed stewarding the (unwritten) constitutions themselves.