Steering the ship of state - functions of Parliament

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The following lecture was delivered at the University of Waikato, Hamilton, on 5 July 1979 as the first in a series entitled "Steering the Ship of State: Direction and Control in Government". In the course of the lecture, Sir Alexander discusses both the theoretical and practical limitations on Parliament's power to legislate. He is concerned at the passing of legislation that is vague and difficult to enforce. He is also concerned at the use of regulations to legislate on matters of principle and policy.

New Zealand is a parliamentary democracy. The word "democracy" is currently used to describe widely different political systems, but whatever definition is adopted, our state must be included as meeting all the essential qualifications. It is a parliamentary democracy, because the legislative powers, and power to control administrative decisions, are vested in an assembly elected by the citizens, and it is a unicameral parliamentary democracy, because these powers are vested in one elected chamber, not, as in many parliamentary democracies, in two chambers, acting complementarily one as a check upon the other.

The fact that legislative power is vested not simply in a Parliament, but in a one-chamber Parliament, whose members are all elected by popular vote, perhaps encourages citizens to believe that in the absence of any check by a Legislative Council there are no limits to the power of the single chamber, the members of which they have elected by vote. The belief is widely held, that there is no human situation so bad but that legislation properly designed will effectively be able to cure it. Governments in power are inclined to be rather more sceptical about this than are Oppositions. They can perceive difficulties which can in practice prevent legislation being enacted, or if it is enacted can prevent it being effective. Opposition members, on the other hand, tend, while in Opposition, to promote the belief that whatever is wrong in society is really to be attributed to a failure on the part of the government to legislate about it; and some of them even come to delude themselves into believing that this is true.

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It is my purpose tonight to examine this attitude, widely enough accepted. I propose to inquire with you, what are the limits (if any) on Parliament's power to legislate, by which I mean, to legislate effectively, for I am not going to allow you to imagine that ineffective legislation is in reality legislation at all. To discuss this question it will be found convenient to inquire where the legislative power of our Parliament comes from. This will quickly show us what are its inherent theoretical limits, if there are any left. Then I hope we will proceed to ask ourselves, insofar as we may find that the power of Parliament is unlimited in theory, or within such theoretical limits as there still may be, what are the practical matters which in fact impose a limit on Parliament's power to legislate effectively. At the end we may note some disquieting signs that Parliament, freed from the last vestiges of constitutional restraint upon its legislative powers, is now disposed to surrender to the executive some substantial part of the legislative functions to which it ought to cling fast on behalf of the people who elect its members.

In the discussion of this subject I do not propose to cite textbooks, or recall to you the opinions of political philosophers. It is not going to be that kind of lecture. Instead I am going to invite you to think with me about facts fairly generally known, and to see where these facts lead us. Whether we are led to think of any possible amendment to our political system is another matter; the kind of conclusion which I hope we may reach may be no more than a realisation of the fact that there are some limits, real limits, to Parliament's effective legislative powers; and that those limits are for the most part not now to be found in the country's constitution, but in practical considerations, the force of which no amount of legislation can really alter. I hope that we may also conclude that such limits as are left are sufficiently inherent in the nature of democracy to encourage us not to try to alter them, but to prize them, as factors preservative of our liberty. But before we come to these practical considerations let us first enquire what are the theoretical limits to legislative powers of the New Zealand Parliament.

Any theoretical limit on the power of a Parliament to legislate must necessarily be looked for in the constitution of the country concerned. Some countries rejoice in a written constitution. The United States of America is a prime example; its legislation derives its authority from a written document agreed to and signed by representatives of those who originally came together to form the community of which the present United States is the successor. So too, the powers of the Federal Government and of the States of Australia, are to be found in the Australian Constitution, an official written document. The British North America Act, with the Constitution of Canada, is another example. In New Zealand, however, the simplicity of the structure of the nascent state seemed at the time of the establishment of self-government here not to require the complicated government which seemed necessary in Canada or Australia, and a fairly simple Act of the Imperial Parliament, the New Zealand Constitution Act 1852, was deemed sufficient to constitute the New Zealand Parliament, then to consist of two chambers, the master, within certain limits, of its own destiny.

Before we examine these limits, and see what they were, let us remember that all the legislative power which our Parliament has, must necessarily derive

from the (Imperial) New Zealand Constitution Act and the English legislation which was subsequently grafted upon it. The Treaty of Waitangi had in 1840 effected the fusion of the Maori aboriginals with the European settlers into one society; but that society was governed from Westminster, and until 1852 the New Zealanders were without power to legislate for themselves. By the New Zealand Constitution Act 1852 it was provided that there should be within the colony of New Zealand a General Assembly, to consist of the Governor, a Legislative Council, and a House of Representatives. And by section 53 of that Act it was provided further that it should be competent to the said General Assembly (except and subject as in the statute mentioned) to make laws for the peace, order and good government of New Zealand, provided that no such laws be repugnant to the law of England.

This power to legislate was not absolute, even within the limits which the section expressly set out, for all legislation passed by the New Zealand Parliament still required to be submitted to Her Majesty for her assent, and section 58 provided that she should be free to disallow the legislation within the period therein provided for.

These are the provisions, amplified and qualified by other legislation since enacted at Westminster, which have supplemented and succeeded them, from which all our legislative power has been derived. There is no other source. Whether we like it or not, we are as a matter of history an originally British community: (and in this I include of course the members of the Maori race, for in 1840 they had all become British subjects) to whom a British Government at Westminster has delegated power to legislate for themselves; and except and in so far as these powers have been originally delegated, or have since been amplified, there is no inherent power.

You will have noticed the principal limits which the sections expressly set. New Zealand laws could be enacted only for the peace, order and good government of New Zealand; and only in so far as not repugnant to the law of England. It is not a part of this lecture to analyse these restrictions, as they were originally defined; much of their limiting force has since been sheared away. But as the Act of 1852 stood, and for the best part of a century thereafter, it probably was not within the power of the New Zealand Parliament, for instance, to provide that a New Zealand citizen committing a murder in Australia could, on coming back to New Zealand, be arrested here and tried here for the crime committed beyond the seas; for it might have been argued that to provide that a murder in Australia amounted to a crime in New Zealand could not be a measure "for the good government of New Zealand". That such a limitation could be placed upon the power of New Zealand's Parliament to legislate can be seen from the fact that in *R* v *Fineberg* (No. 2)[1] only so short a time ago as 1968, it was found possible to discuss this argument in the present New Zealand Court of Appeal.

But we are anticipating. In 1931 the British Parliament enacted the famous Statute of Westminster, for the benefit of all the self-governing Dominions who

1 [1968] N.Z.L.R. 443.

chose to adopt it, and by this statute it was provided that[2]:

> No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England . . .

and[3]

> It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extraterritorial operation.

But these emancipatory provisions did not apply in New Zealand, any more than in any other self-governing Dominion, unless and until the Statute of Westminster was expressly adopted by the legislature of the Dominion concerned, and New Zealand had to wait for sixteen years until, following the prescribed procedures, this assent was duly signified by the passing of the New Zealand Constitution Amendment (Request and Consent) Act 1947 and consequent (Imperial) New Zealand Constitution (Amendment) Act 1947. By that last mentioned Act the New Zealand Parliament was at last authorised to:[4]

> alter, suspend, or repeal, at any time, all or any of the provisions of the New Zealand Constitution Act, 1852.

It was thought for a while that the effect of the passing of the statutes of 1947 would free New Zealand entirely from the limits imposed, in the original grant of legislative power, by the words "for the peace, order and good government of New Zealand"; and in fact it was so argued in the Supreme Court, so late as 1967 in *R* v *Fineburg*,[5] a case to which I have already referred. The argument for the prisoner (for it was a criminal case, in which the power of a New Zealand court to try a non-citizen on a charge of attempted murder on the high seas was challenged) failed; but not on the argument in question, as to which Moller J. (but possibly obiter) expressed the opinion that:[6]

> the legislative powers possessed in the New Zealand Parliament are not as wide as those possessed by the Parliament of the United Kingdom, and laws passed by it can, in proper cases, still be challenged as being *ultra vires*.

The point was not re-presented by counsel on further argument in the Court of Appeal in the same case, and in that Court the judgment given depended principally on the facts. The result was that the Court of Appeal had no opportunity to pronounce on the legal conclusion to which Moller J. had come.

Following on the Report of the Special Committee on Admiralty Jurisdiction presented to the Minister of Justice in March 1972, it was thought necessary, or at least expedient, to embark on a little further New Zealand legislation, adding a further statutory authority to put beyond doubt, if this were possible, the power of the New Zealand Parliament to legislate extra-territorially on all

2 Section 2(2).
3 Section 3.
4 Section 1.
5 [1968] N.Z.L.R. 119.
6 Ibid. 122.

subjects without any restriction whatsoever. Accordingly by the New Zealand Constitution Amendment Act 1973 it was provided in section 2 of that Act that:

> The General Assembly shall have full power to make laws having effect in, or in respect of, New Zealand or any part thereof and laws having effect outside New Zealand,

and the section went on expressly to validate every Act of the General Assembly duly passed on or after the 25th day of November 1947, on which date the Statute of Westminster Adoption Act 1947 had been passed.

The result of all this seems to be, that the New Zealand Parliament, far from having and always having had the power to do entirely what it liked legislatively, was undoubtedly limited until 1947 by the restrictions imposed by section 53 of the (Imperial) Constitution Act 1852; and was held in the Supreme Court in 1967 still to be limited by at least some of these restrictions. This point was thought sufficiently doubtful so late as 1973 as to persuade the government of the day to pass a further Act in that year designed to make Parliament's powers as absolute as possible.

If we have managed however after a century and a quarter to arrange matters so that our Parliament has unrestricted, or almost unrestricted, powers of legislation, we must also realise this. There are in practice some limits to the distance to which it will willingly go in legislating; and, perhaps more important still, some limits on its power to have its laws enforced. We will in a few minutes pass on to consider these limits, and to consider how much they constitute real practical restrictions on Parliament's effective legislative powers.

One more thought, however, before I pass on from the theoretical limits on the legislative powers of Parliament. How far, if at all, can Parliament by legislation limit the power of future Parliaments? I have already referred to the fact that in 1950 Parliament passed an Act effectively amending its own constitution by abolishing the Legislative Council established by the Constitution Act 1852, and thus transforming itself from a bicameral into a unicameral legislature. If our House of Representatives at this late hour had second thoughts, and was persuaded that its second state was worse than the first, could it now effectively restore the authority of the old Legislative Council, and thus shackle itself, by chains which it could not afterwards remove, with a new written constitution of its own making? Or could it effectively legislate so as to nominate some selected topics as entrenched topics, as to which it would be forbidden in the future to legislate unless (say) two-thirds or three-quarters of the House were in favour? There have been, and still are, enthusiasts who favour such proposals, and I for myself agree that if such legislation could be made effective, it might be thought a step in the right direction, helping to preserve our existing bulwarks against bureaucracy, such as they are. But unfortunately it is impossible to contend that such procedures would be effective; for what Parliament does today it can undo tomorrow, and history tells us that as soon in the future as a political crisis of sufficient magnitude arises, in which the government of the day finds itself balked in its programme by measures passed by a previous government, it would use its majority to repeal the (now) objectionable legislation. By amending the con-

stitution so carefully drafted for us at Westminster, and abolishing the Upper House, we have plucked the fruit from the tree, and it cannot now be put back again. Here then is one thing that it is impossible for Parliament to effect by legislation — it cannot effectively limit the legislative powers of its successors.

I now come to the factors which in practice can be said effectively to limit the absolute legislative powers of the New Zealand Parliament. It might be thought that the first limit to be noticed might be, that in fact Parliament cannot by words effectively declare that a thing is that which in fact it plainly is not — but this we must at once acknowledge as a fallacy. If Parliament were to pass an Act saying that black is indistinguishable from white, it is true that the two colours would not forthwith become in fact actually indistinguishable by you or me; but double-talk of this kind is easily enough incorporated into the law — by a statutory provision declaring that henceforth black shall be deemed for all purposes to be indistinguishable from white. The effect of this sort of provision is that the two colours become indistinguishable in law; and statutes like this do in fact get passed. The Commissioner of Inland Revenue, when dissatisfied with the genuineness of the return of income which you have so carefully prepared, is empowered by the income tax legislation to assess you as on a different figure, which he is authorised to fix, presumably by the process of "thinking of a number" — and you will then be deemed for tax purposes to have earned the number of dollars which he has so fixed. I am not joking — this procedure, I am told by those who have experienced it, is nothing to joke about. And there are people among us who by the statute dealing with New Zealand citizenship and nationality are deemed to be and always to have been born in countries in which neither they or their parents have ever been physically present.

Applying therefore the test of effectiveness, we can readily conclude that Parliament may, effectively enough, provide that black is white — and that it does so from time to time. Let us pass therefore to another limit which the hard facts of life impose on Parliament — the limit which we all experience when we are tempted to break our word.

Here we must consider legislation contrary to treaty obligations, or to contractual obligations. Just as is open to you, and to me, to break a solemnly pledged promise, if we are faithless enough to put selfish monetary interest before our pledged word, so it is within the power of Parliament to legislate so as unilaterally to nullify, or substantially to amend, treaty obligations solemnly entered into — and contractual obligations likewise. But should it ever do so? Does it find it easy to do so? Will the Parliament of New Zealand, even though it has the power, ever allow it to be said that it has repudiated unilaterally solemn contractual obligations duly entered into? Is not the question really, not whether it has power to do this by legislation, but rather, whether, any more than any decent citizen, it will break its pledged word because it is inconvenient to keep it? So, most of us might think that Parliament would inevitably recoil from passing a measure that expressly flew in the face of a provision of the Treaty of Waitangi; and the amendment of contractual obligations such as arose from the Comalco Agreement had to be done by deliberate processes of negotiation, resulting in

mutual agreement, rather than by a unilateral declaration of repudiation. Now we have reached a point where in law Parliament has power to pass a statute, but in practice it will hesitate long before doing what a decent citizen would not do.

Laws which cannot be enforced form the next section on which Parliament will not readily embark. For these only make the legislature look foolish. We have already seen that too-widely drawn extraterritorial legislation falls within this class, and have concluded that there is here a real limit beyond which Parliament will be unlikely to go, for fear of making itself look absurd. Another illustration of this limit may now be discussed in the kind of law to the making of which many people would vaguely give their support, but which it is found impossible to draft satisfactorily because its terms are too hard to define. We have now come, you see, to matters on which it is impossible to legislate satisfactorily because we do not know what we are talking about. Stories about Irish bulls are not generally considered as examples of the clearest thinking; but the Irishman who said, "how do I know what I think till I hear what I say?" spoke words of crystal clear wisdom. It is startlingly true that he who cannot put his proposition clearly into words of unambiguous intent must find, if he examines the matter, that his inability to express his impressions is due to the fact that he is as yet incapable of thinking clearly about them. So when Parliament passes laws containing vague or inexact expressions, no doubt with the best intentions, to suppress indecency, or to penalise unlawful assembly, or offensive behaviour, or blasphemy, but has failed to ask itself the essential question, what is indecency?, what is an unlawful assembly?, and so on, its legislation, be it never so well-intentioned, must in effect fail because different people mean different things by the terms that Parliament has used. The use of the word "indecency" sufficiently illustrates what I had in mind. It has never been satisfactorily defined. Most of us, asked to define it, would be driven to reply, well, an expression, or act, is indecent, if it offends reasonable people — to whom one would reply "and who (beside myself) is a reasonable person?" and again, are all offensive expressions or acts indecent? The answer must be No, I mean offensive because of their indecency. And similarly we have all laughed at the silly contention that offensive behaviour can be defined as behaviour calculated to offend "right minded people". Who is right minded?

A notion, then, in the mind of Parliament is not enough; that notion must be capable of exact expression in unambiguous words, before it can be made the subject of effective legislation. This is indeed one of the effective limits in practice to Parliament's power to legislate — and the difficulty has recently raised its head when the wording of the Human Rights Commission Act 1977 came up for consideration.

Section 4 of this Act established in New Zealand a Commission to be called the Human Rights Commission; and section 5 defined some of the functions of this Commission as:

> (a) To promote, by education and publicity, respect for and observance of human rights:

(b) To encourage and co-ordinate programmes and activities in the field of human rights:

(c) To receive and invite representations from members of the public on any matter affecting human rights:

(d) To make public statements in relation to any matter affecting human rights . . .

and in section 6 the Commission was entrusted with the function of reporting to the Prime Minister from time to time upon any matter affecting human rights, and upon the desirability of the acceptance by New Zealand of any international instrument on human rights.

"Human rights", however, are nowhere defined by the Act. Does it not seem just a little strange to you that the Commission should be entrusted by Parliament with all these duties and functions, but that Parliament should find itself unable to say in words what the functions are about. One might, if one were exact in the use of language, perhaps observe, weighing each word, that the explanation lay in the fact that Parliament did not know what it was talking about. Ask yourself, what are human rights? Rights, one might think, which are the due inheritance of every human being. I have heard political philosophers say, with a sad smile, that there is no such creature as a human right. People in different political societies have what are thought in those particular societies their own inalienable rights, but these rights, on examination, will be found to have their origin in the tacit consent of the members of the particular political society — not on the fact that the claimant is a human being. I am afraid that this Act may be instanced as an example of legislative delusion, in which Parliament, dazzled by words, found itself able to believe that vague phrases, whose meanings become more and more obscure as they are examined, can be used effectually to regulate human conduct. Exact words are necessary for this; and before you can use exact words, you must first have thought out matters to an exact conclusion. To legislate otherwise is mere self-deception.

I suppose that there may be some among you who will say at this point — what about the framers of the Constitution of the United States? They were legal philosophers par excellence, and they were users of words too. And did they not know a human right when they saw one? Perhaps they did and this is what they said:[7]

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute a new Government . . .

But let us not forget, and I say this sadly and humbly, these founders of the United States knew what they meant when they talked of human rights, because they were believing Christians. It was Orthodox Catholic thinking that inspired G. K. Chesterton's famous epigram — "In religion all men are equal, as all pennies are equal, because the only value in any of them is that they bear the image of the King". If the New Zealand Parliament in passing the Human Rights Commission Act 1977 had based its Act on a general belief current throughout the

7 The Declaration of Independence, July 4, 1776.

community that all men are created equal, because endowed by their Creator with certain inalienable rights, then I would accept that there may be rights which in this country we can accept because they are human rights; but the most cursory examination of our society shows how far we have drifted away from any such creed. The proof of the pudding is in the eating; and the distance we have come is such that Parliament has been unwilling, because it has been unable, to define human rights in its statute.

If I were to ask you each to write down the kind of improvement in our society which you think would most contribute to a contented civilised life, one might say, an increase in material wealth, others, perhaps, wider and deeper education, or an improvement in the standards of health. But many, and I might be among them, would vote for an improvement in the general standards of behaviour in the community. More mutual respect; more gentleness and courtesy in manners, more self-discipline, more consideration for the feelings and senses of others, less noise, less vulgarity, less violence, less selfishness. As soon as one says this, in a lecture such as this, one perceives immediately another important set of real limits to Parliament's power. Parliament is completely powerless to move people to any of these ends which I have just catalogued. I am going to leave you with this thought. Be its power never so limitless in theory, Parliament cannot even begin to bring about this change in manners, in tastes, in morals and in self-discipline, upon which the happiness of future generations so plainly depends. Our discontents cannot be cured by Parliament, and cannot lie at its door. The fault, dear Brutus, lies within ourselves.

It is an axiom of those skilled in the science of jurisprudence that no act or omission should be stigmatised as a criminal offence by the law unless it is reprehended by a very substantial majority of the community. This cardinal rule of legislative theory is based upon three obvious enough facts. The first is that it is the responsibility of the government to enforce the criminal law. A government which declares an Act or omission criminal, and prescribes its penalty, is flagrantly failing in its duty if it omits to bring offenders to book by the processes of prosecution and conviction. The second fact is that liability for crime in this country is in the hands of juries. The third is deduced from the two first — unless an act or omission is reprehended by a large majority of the community, juries will usually include in their number persons who feel that the law is unfair, unjust, or unrealistic, and will refuse to acquiesce in a verdict of guilty. In the result, though Parliament is perfectly free to pass a law declaring that an Act, which a majority of members think morally wrong, is a crime, yet such a statute will be a mockery, because it cannot be enforced unless the law is supported by a very substantial majority of the citizenry.

And what do I mean by a very substantial majority? It is hard to get experts to say exactly where the line should be drawn, but certainly much more than a bare majority. Some think two-thirds would be sufficient, if a count were taken; others would say three-quarters; but a majority of this order.

When Parliament is asked to legislate on a matter in which the public is still divided, making that act a crime which was not a crime before, it is simply not

good enough to leave it to members of Parliament to vote "as their consciences dictate". It is abject foolishness to contend that Parliament is doing its duty by declaring an act to be a crime, while ignoring altogether the likelihood of being unable to persuade juries to convict those prosecuted. In altering the criminal law a responsible government will always remember that, whatever the conscientious beliefs of the individual members, government will have the responsibility of enforcing the statute on which a vote is being taken; and, so realising, it will not sponsor, nor will it allow any private member to sponsor, a measure leaving it to enforce legislation which must ultimately prove impossible of enforcement.

It will be strange if you have not realised that what I have been saying has had a recent illustration in the furore on the subject of the amendments to the law of abortion. I do not propose to say one word this evening either for or against the argument on principle advanced by either side on this topic; but the difficulties created by the legislation that Parliament passed on a "free vote" will be clearly seen when, as must ultimately happen, the government finds itself compelled by a section of the public to prosecute for breaches of its criminal provisions. It will just prove impossible to get convictions. How many juries do you think will in practice turn out to be without persons of strong views one way or the other on this question? And it does not promote respect for the criminal law of the country when no one is convicted, though everyone knows that the law is frequently being broken.

I am not speaking of a state of affairs which could not in practice come about. Such things have happened in the past. The difficulties of obtaining a conviction under the abortion laws in force say forty or fifty years ago were notorious. People were constantly acquitted who on the plainest evidence should have been found guilty. Bookmaking is another such instance. In the twenties and thirties prosecutors had the greatest difficulty in persuading juries to convict, even on the plainest evidence, because the jury did not think it wrong to make a book. All this amounts to an example of a real limit to parliamentary power. It is impossible to legislate effectively so as to increase the severity of the criminal law, unless with the support of a massive majority of the people. There is no way round this, while trial by jury remains the right of the citizen; and we may yet see governments urged by pressure groups to abolish jury trial, or to exempt certain types of crime from jury jurisdiction, because of this supervision which, in the event, juries may still exercise over Parliament's legislation. Myself I hope that juries may ever continue to flourish.

We have already seen how Parliament has been successful in steadily extending its own powers to legislate until in theory those powers are now all but absolute. In noticing this there are many who will regret that the increased powers which Parliament has been given, or has taken, are not now exercised, as they were originally intended to be, by a bicameral legislature. One House now exercises full legislative powers, not two; and we are without the check on hasty, dictatorial, and ill-considered legislation, that prior to 1950 the old Legislative Council gave us. It must be acknowledged, of course, that the change to a unicameral legis-

lature was made with the clear intention of vesting the legislative power solely in the elected representatives of the people, who, in open debate in which the particular subject is considered and adequately canvassed, so that all can hear, make a democratic decision. True, so far as it goes; but the good intentions of one day too often make way for the political manoeuvring of the next, and a rather sinister tendency in a different direction has now become observable — a tendency for Parliament, instead of using its legislative powers itself, in open debate, as one would expect of a truly democratic institution, to delegate them to the executive, whom it invests with authority to legislate, without open discussion, behind the back of the people.

It might be answered — but has this not been going on for at least three-quarters of a century? Is legislation by regulation a new thing? Has not every year since 1940 seen its fat volume of statutory regulations, and since 1960 how many years have there been in which two or three volumes of regulations have not been issued? Yes; but it has been well understood that government by regulation is constitutionally permissible only so far as the Act under which a regulation is made has authorised its making. No one has questioned, until recently, the fact that no regulation can be promulgated without statutory authority; and unless by a section in the statute the minister, or the Governor-General, is expressly empowered to make regulations of the kind actually made, these may be set aside by the courts as ultra vires. This power of the courts to set aside regulations as ultra vires is an extremely important one, and there have been plenty of cases where it has been a powerful weapon for freedom. In 1939, for instance, in *Jackson* v *Collector of Customs*[8] Mr Gainor Jackson succeeded in setting aside the whole of the Import Control Regulations 1938 as originally gazetted, because the Act under which they purported to be gazetted contained in fact no power to make them. The government of the day was told by the court that if it thought it necessary to make such regulations an Act of Parliament must first be passed empowering the executive to make them. Then remember the brave cyclist who in Christchurch in the 1930's had the regulations containing the first Right Hand Rule set aside in the courts, because under the Motor-vehicles Act 1924, which would have been sufficient to authorise a regulation controlling motor traffic, no authority could be found to regulate the movement of cyclists. Ah the 1930's were the days, were they not? I remember with joy that the cyclist, who in defending himself before the Magistrate on a charge which might have made him liable to a fine of £1-0-0 upset the regulation containing the original Right Hand Rule, rejoiced in the name of Turner. Let us remember too the parent who in 1958 had the regulations authorising school zoning in Auckland set aside, because the Education Act gave no power to make regulations zoning children out of schools which they were previously attending.

These cases stand as witnesses of the fact that while Acts of Parliament, which must be debated in the open, are almost impregnable to attack in the courts, government by the executive by regulation, behind the back of the people, can

8 [1939] N.Z.L.R. 682.

still be supervised, up to a point, by judicial process, and regulations made ultra vires can be set aside. In extreme cases, where the merits of the matter support such an action, regulations set aside by the courts as made ultra vires may be made the subject of restorative action in Parliament. It is of course always open to Parliament to pass an Act expressly giving the executive power to do what it had previouly attempted to do without that power. But public opinion may have been aroused sufficiently to persuade the government of the day that such a course may be dangerous. In *Reade* v *Smith*[9] for instance, after the decision setting aside the school zoning regulations had been issued, the Minister of Education immediately announced that the matter would at once be remedied by legislative action. But it was never attended to in this way; the government aware of the difficulties which must beset the passage of the necessary legislation, never got round to introducing it, and the decision in *Reade* v *Smith* is still the law.

Government by regulation, with such limits as I have mentioned, is now so thoroughly established that it is impossible to contemplate the direction of the welfare state without it; and no political philosopher would contend that every detail of all legislation must be contained in statutes, the wording of which it is the duty of every member of Parliament to scrutinise. But surely there must be limits to this? If it is not the duty of members to scrutinise the details of intricate regulations word by word, it is at least essential that they examine the parts of legislation that define the tenor of the laws, and, in delegating the power to make regulations as to details, to declare at least the general limits within which such regulations shall be made. But history shows that a government impatient of such processes may be inclined to favour the incorporation into statutes of a blanket authority authorising the Governor-General or a minister to make regulations of almost any kind, thus removing from the field of preliminary public debate legislative provisions the discussion of which might embarrass members. The text most commonly favoured in cases of this kind is one which empowers the Governor-General (on the advice of course of the minister) to make all such regulations as in his opinion may assist the purposes of the Act, without specifying in any way the kind of topics which the regulations might cover. Do not think I am exaggerating, or speaking of things which no longer happen. Let me read to you section 11 of the Economic Stabilisation Act 1948, which is still in force today and frequently used. By this section the Governor-General is empowered from time to time to

> . . . make such regulations . . . as appear to him to be necessary or expedient for the general purpose of this Act and for giving full effect to the provisions of this Act and for the due administration of this Act.

The general purposes of this Act are defined, in the Act, as being "to promote the economic stability of New Zealand". It may occur to you that there is virtually no limit to what the Governor-General might prescribe as the law to be observed by you and me, under the powers given to him by this section.

Almost anything is possible if the administration has previously armed itself with a section in this kind of form. Such a type of legislative authority ought

9 [1959] N.Z.L.R. 996.

firmly to be resisted by any Parliament professing democratic principles, even though Government Whips exert pressure, and present plausible arguments, designed to exact their support; for unless a government is able and willing to specify at least the kind of circumstances for which it thinks it may be necessary to provide by regulation in the future, it cannot really make out any adequate case for regulating that matter by Order-in-Council at all.

While I am speaking of government by regulation and the temptations to bureaucracy inherent therein, let me mention another terrifying piece of draftsmanship that officialdom slips into Bills before Parliament from time to time, in the hope that it may get through — a clause empowering the making not only of regulations of unlimited scope, but also of regulations that will have the effect of over-riding or amending statutory provisions already in force. Again I assure you that I am not joking. There was such a regulation in the Education Act for quite a long time — section 6 of the Education Amendment Act 1915 (No. 2), which provided that:[10]

> The Governor in Council may make such regulations as he thinks necessary or expedient for avoiding any doubt or difficulty which may appear to him to arise in the administration of the principal Act by reason of any omission or inconsistency therein, *and all such regulations shall have the force of law, anything to the contrary in the principal Act notwithstanding.*

but after unfavourable comment in the Supreme Court this power was dropped, and the provision did not reappear when the Act was consolidated in 1964.

And we may remind ourselves that it was provided in the Emergency Regulations Act 1939 that[11]

> Any emergency regulations, and any order, rule, or by-law duly made in pursuance of emergency regulations, shall have effect, notwithstanding anything inconsistent therewith contained in any enactment other than this Act . . .

It might be said that the Emergency Regulations Act 1939 was passed on September 14th of that year, immediately following the outbreak of the Second World War, and that this fact should be accepted as excusing its drastic provisions. Perhaps; but we will also remind ourselves that at the end of the war this objectionable provision was not repealed; it was too convenient to successive governments. It was not till 1964, a quarter of a century later, that the then government got round to repealing this "emergency" provision — a first-rate example of how difficult it is to get the door shut again, after once it has been opened.

We seem to be led, then, to the conclusion that the tendency, at present plainly perceptible, to authorise legislation by regulation in wide undefined fields, and indeed as to matters in which now no such legislation should be tolerated, is one which should be noted, and deplored, and resisted, if we do not want to find ourselves left in the end without an effective voice in the legislative process. I conclude this part of my address by mentioning the recent suggestion by the

10 Emphasis added.
11 Section 3(4).

Prime Minister that Parliament may in the present session be asked to consent to entrusting future changes in the rates of income tax to ministerial regulation. One must of course acknowledge that what is proposed is no more than a regulation which will diminish the rate of tax; but so far it has not been usual to find income taxation rates changed by Order-in-Council at all. A change in the rates of income tax has in the past seemed pre-eminently to be a matter in which members of Parliament should not be shut out of the debate without opportunity of being heard. I am not a parliamentarian, and I may be mistaken, but I simply cannot recall any previous Finance Minister seriously proposing to the House that it should give away its control over the country's revenues and entrust to ministerial discretion the power to alter rates of income tax. But perhaps I had better read to you, from the official copy of the Budget, what the Prime Minister said. He said this:[12]

> I have often stressed the need for flexibility and for frequent adaptation of policy if the New Zealand economy is to be kept on a steady course in the face of the great uncertainties which currently characterise the world economy. At present it is possible to vary fiscal policy by reducing or increasing taxes only while the House is in session. In practice this means that fiscal measures tend to be formulated and announced at the time of the Budget to deal with events of up to 12 months ahead, or even beyond. Authorisation for fiscal measures can be obtained by recalling Parliament, should the need for action arise when it is not in session. This is, however, not always practicable.
>
> The effectiveness of our present policy instruments would be improved if the Government was empowered to reduce income tax rates when the House was not in session. With such legislation, action could be taken in the summer when Parliament is not traditionally in session, thus permitting more flexible and precise policy responses for changing circumstances. With this in mind, it has been decided to seek appropriate enabling powers later in the current session.

If this be proposed to the House, I hope that there will be members on both sides who will have the courage to resist it, and to insist, as Hampton insisted to Charles the First, that taxation is not a matter for executive decree, but one for the people's representatives themselves to decide. If it is said, that it is not proposed to give the Minister power to increase rates of income taxation; that what is proposed is only to empower the Minister to lessen them, my answer will be in the words of the famous French epigram — it is the first step which is difficult. After the boot is in the doorway, and the first resistance has been overcome, the next step is easier. This innovation carries many signs of danger.

Another type of legislation with some degree of similarity to the one we have just been discussing is found in retrospective (sometimes called retroactive) legislation. Any standard book on statutory interpretation will show the student at once how reluctant the courts are to construe a statute as having a restrospective operation unless this intention appears plainly from the words of the statute itself. The injustice, except in the most unusual cases, of imposing upon citizens liability in respect of statutory commands or prohibitions, of which they were not aware at the time of their conduct, is too plain to be elaborated here. But there is no doubt at all, however, that such legislation is well within the powers of Parliament. The only question is, how often, if ever, and in what circumstances,

12 Page 8.

Parliament should so legislate. It will be as far as we can go if we conclude, as I think will be generally agreed, that while extraordinary circumstances may sometimes justify retroactive legislation in a particular case, this is the type of legislation which can only seldom be defended; and that the stringency of this cautionary counsel should not be relaxed simply because better justice may effectually be done in the particular case by retrospective provisions. It is better that some suffer, with a less just result, in particular cases, for the sake of a good rule, than that retrospective legislation should ever come to be regarded as a respectable tool of government.

It may be said that retrospective legislation is defensible where, for one reason or another, in a case in which immediate legislation is impracticable, the government gives due warning to all concerned that a measure will (later) be introduced into Parliament taking effect as from the date of the warning, and retrospective only to that date. The most usual circumstances in which this course has in the past been taken have been where some statutory amendment becomes urgently necessary to deal with an existing situation, but Parliament is not at the moment in session. The complaint cannot be valid, in such a case, that the subject to be affected by the restrospective provisions was unaware of the fact that it would be enacted, and the argument based on injustice therefore fails in cases like this. But how often should the House go on meekly implementing threats of legislation made by ministers, passing the subsequent retrospective legislation of which they have given notice, without objection, and showing up Parliament as a mere rubber stamp for executive policy? Members should think, perhaps more carefully, and perhaps more independently and courageously, than they have in some recent sessions seemed to do; and governments should more carefully weigh the wisdom of threatening subsequent retrospective laws, when by calling Parliament together the same result could be reached without the constitutional objection to which retrospective legislation exposes them.

In conclusion, hasty legislation must have a few words. Of course, Parliament may, if it likes, legislate, as effectively as it can, as hastily as it likes. In our own times we can all remember occasions when, sometimes for good enough reasons, an Act prepared in the greatest haste has been produced, read, debated, and passed, in one evening, to meet some real or imagined emergency. One does not doubt Parliament's power to do this. But it will not be inappropriate to add hasty legislation to the list of legislative acts which, though within Parliament's powers, must not become too common, because hasty legislation, while to it may at first sight be attributed the virtues of promptitude and resolution, yet is often ineffective legislation, often unjust, and generally insufficiently considered.

It is said by some that Parliament's powers have been blunted in recent times by over-complicated phraseology, and there are those who advocate saying "in plain and simple language" what is meant, avoiding legal verbosity. Alas, it is not always the lawyer who is at fault here. It is too often the complicated nature of the modern economy that is at the root of the matter. The days of the laws of the Ten Commandments or of the Twelve Tables are gone. It is quite impossible to recapture such simplicity now, unless indeed one is content with a

legal system consisting of a dozen general moral precepts, to be interpreted, not by a court as we know it, but by a people's tribunal, whose members think not with their brains but in their blood and their bones. More exact use of words, not less exact; more care in understanding exactly what is to be comprehended in a statute, not less, is needed. We have too many laws, too rapidly rushed through Parliament. The Town Planning Act 1977, the Matrimonial Property Act 1976, and the abortion legislation are notable recent issues, all contributing substantially to the current overloading of the courts. Do you remember what Solon said to the Athenians who sought his authority to make a new law? Let the Athenians first observe the laws that they have, he said, and it will be time to consider making a new one. A modern Solon might perhaps say, When Parliament is satisfied with the wording of one piece of legislation, it will be time to turn to the next.

Well, here we are at the end of our lecture. We have covered quite a bit of ground, perhaps in a rather rambling kind of way. Let us see if I can recapture the principal points in a concluding summary.

Our Parliament's legislative power is not inherently absolute; as a matter of history it is derived from grants by Acts of the Imperial Parliament of Great Britain. It was originally severely restricted; but subsequent statutory relaxations have now left us with a completely unrestricted, or almost completely unrestricted, power. So wide is our liberty that our House of Representatives has been able, within its charter, to abolish its own Legislative Council, and we saw that it may if it wishes effectively declare that black is indistinguishable from white, at least in law. Our Parliament may also purport to make Frenchmen in Paris or Negroes in Africa amenable to New Zealand criminal law — with what effect, however, I shall leave you to judge.

While this is the theory of the matter, in practice certain limits to Parliament's real powers become evident on examination. Parliament, though free to do so, will not easily be persuaded to pass legislation in breach of treaty obligations or of contractual promises. Bad faith in legislation brings no dividends. It is obvious that Parliament will not attempt to legislate in the fields of good taste, good manners, or self-discipline, for it is entirely powerless in these fields, and only succeeds in looking foolish if it attempts to interfere legislatively therein. It must recognise that in the very important field of criminal liability, no act or omission can be effectively made a crime, if it is not sufficiently strongly reprehended by a large majority of the people. To provide that an act becomes a crime by virtue of a statute passed on a "free vote" of the House is jurisprudential nonsense. Parliament must ultimately note the absurdity of legislating by the use of words and phrases to which no sufficiently exact meaning can be attached, for the use of vague language is a signal of confused thought; it will be ultimately impossible to discover the intent of Parliament in such legislation, and hence impossible to enforce it.

Finally we looked at some fields in which there are signs that Parliament, in exercising its legislative powers, is becoming less concerned than it used to be with the preservation of the people's liberties. We decided that little objection could

be taken to the extensive use of Orders-in-Council which is so conspicuous a characteristic of modern legislation, so long as these are used to prescribe or define matters of detail; but that Parliament has a duty to distinguish matters of detail from matters of principle or policy, and should be jealous in matters of this kind to retain its control. We deplored the success of bureaucracy in persuading Parliament from time to time to surrender to its decision, in these fields, matters which it should have been astute to keep in its own hands. We found time in this connection to regret the inclusion in the Budget speech a fortnight ago of an intimation that legislation was intended authorising the regulation of rates of income tax by Order-in-Council. True, it is intended that only regulation downwards should be so authorised — but, will this not be the foot in the door? The use of retrospective legislation, once regarded as unthinkable in any circumstances, seems to be acquiring a dangerous degree of respectability. We concluded, I hope, that members of Parliament who acquiesce in this kind of legislation, or tolerate without protest ministerial threats to use it, showed themselves as too subservient to the party Whips. There is always some good excuse for any inroad on the people's liberties — expense, efficiency, promptitude, or even the personal convenience of members of Parliament, and the inconvenience of calling them together if out of session. But the question must always be sternly asked: are such reasons really sufficient? The price of liberty is eternal vigilance.

I thank you for the attention with which you have listened to this address, and the University for its invitation to me to come here and address you.

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