The Governor-General's constitutional discretions: an essay towards a re-definition

R. Q. Quentin-Baxter*

The ceremony of installing a Governor-General prompts reflections about New Zealand's diminishing constitution. "The question now is whether the constitutional role of the Governor-General must be seen as another emptiness, or whether the trend can be turned back. If so, we must act upon the need for rules . . . ." Professor Quentin-Baxter, drawing upon events in other Commonwealth countries, here suggests that constitutional reform can most readily begin by redeveloping the potential of an existing institution.

A Governor-General of New Zealand enters upon his duties at a ceremony in Parliament grounds. Among those present are the heads of diplomatic missions, ministers of the Crown and other members of Parliament, judges, chiefs of staff of the armed forces, and other invited guests. The ceremony is required by the prerogative document,[1] last revised in 1917 during the reign of King George V, in which the Sovereign creates and regulates the office of Governor-General. After inspecting the guard of honour, the new appointee "causes the Commission appointing him to be Governor-General to be read and published", and "then and there" takes the oaths of allegiance and of office, administered by the robed Chief Justice.

If the day is at all a pleasant one, an onlooker may allow his thoughts to wander from the ceremonial to its constitutional meaning. At one level, the swearing-in is symbolic: the Governor-General attests his loyalty to the Crown and the constitution on behalf of all of us, much as a chosen athlete takes the Olympic oath on behalf of all contestants. Henceforward, while he holds office, the Governor-General will represent the Sovereign in her capacity as Queen of New Zealand. In the Queen's absence from New Zealand, most official acts will be performed by him or by his authority. Without his assent, no Bill will become

* Professor of Law, Victoria University of Wellington.

1 Letters Patent constituting the office of Governor-General, dated 11 May, 1917. *(N.Z. Gazette,* 24 April, 1919, p. 1213).

law. Wherever he goes, New Zealanders will be reminded of their national identity, and of whatever importance they attach to our inherited tradition of democratic government under law.

There is the possible rub. Symbolism can be no better than the realities that are symbolised. For some, our annual national celebration at Waitangi is a mockery, because it seems to them to pay only lip-service to multi-cultural ideals that in practice are cynically neglected. In the same way, honest men who love their country may nevertheless question the real significance of installing a Governor-General, suspecting that the oaths he swears and the trappings of his office are a camouflage, half hiding a defective constitution that places no legal limit upon the powers of the majority party in a unicameral legislature. That is the kind of question with which this paper is concerned.

A constitution is a human habitation. Like a city, it may preserve its life and its beauty through centuries of change. It may, on the other hand, become either a glorious ruin from which life has departed, or a delapidated slum that no longer knows the great tradition of its builders. Constitutions, like ancient building, need the care and protection of an Historic Places Trust, to draw attention to weaknesses in the fabric, and to suggest how present needs can be met without sacrificing the inspiration of the past. They also need an enlightened and interested general public, with a strong collective feeling about the difference between a folly and a landmark of enduring significance.

Those who advocate constitutional change, and those who think it to be unnecessary, have a common interest in establishing as clearly as possible, not only the actual performance of our present constitution, but also any improved performance of which it may be capable. Only then can it be seen, for example, how strong is the case for a "written" constitution to limit the discretion of Parliament, and how radical a change would be entailed by the adoption of such a constitution. Without such yardsticks, it is difficult to envisage that there could develop in New Zealand a national consensus in support of a changed constitution — unless, indeed, the sheer uncertainties of the present constitution make almost any alternative seem preferable.

I. BRITISH AND COMMONWEALTH PRACTICE COMPARED

A new Governor-General swears, in language that has not changed materially since Captain Hobson became New Zealand's first Governor in 1840, "duly to execute the duties of his office." This enigmatic form of words was supple enough to cover a colonial Governor's duty of obedience to directives from Whitehall, and the increasing degree of deference he owed to the wishes of local advisers as the colonial constitution took root and developed, as well as the undefined and shifting residue of his own discretion and responsibility. The words of the oath concealed, and still conceal, a vital and much debated margin of appreciation as to the extent, and even the existence, of the Governor-General's personal discretion. This area of discretion, real or hypothetical, not exercised on the advice of ministers responsible to Parliament, has traditionally been described as the Governor-General's "reserve powers."

It is unnecessary, and would be foolhardy, to try to state definitively issues about which a great and unresolved controversy has raged or simmered for more than a hundred years. It is enough to identify features that emerge with some clarity from the smoke of the battlefield. A good starting-point is a well-known despatch, sent in 1862 by the Colonial Secretary, the Duke of Newcastle, to the Governor of Queensland:[2]

> The general principle by which the governor of a colony possessing responsible government is to be guided is this: that when imperial interests are concerned, he is to consider himself the guardian of those interests; but in matters of purely local policies he is bound, except in extreme cases, to follow the advice of a ministry which appears to possess the confidence of the legislature. But extreme cases are those which cannot be reduced to any recognised principle, arising in circumstances which it is impossible or unwise to anticipate, and of which the full force can, in general, be estimated only by persons in immediate contact with them.

The Colonial Secretary amplified his reference to "extreme cases", explaining that they were

> such extreme and exceptional circumstances as would warrant a military or naval officer in taking some critical step against or beyond his orders. Like such an officer, the governor, who took so unusual a course in the absence of instructions from home, would not necessarily be wrong, but he would necessarily act at his own peril. If the question were one in which imperial interests were concerned, it would be for the Home Government to consider whether his exceptional measure had been right and prudent. If the question were one in which colonial interests were alone or principally concerned, he would also make himself, in a certain sense, responsible to the colonists, who might justify the course he had taken, and even prove their gratitude to him for taking it by supporting him against the ministers whose advice he had rejected, but who, on the other hand, if they perseveringly supported those ministers, might ultimately succeed in making it impossible for him to carry on the government, and thus, perhaps, necessitate his recall.

The first distinction lies in the phrase "a ministry which appears to possess the confidence of the legislature". Her Majesty's governmental advisers must be those who can command majority support among members elected to Parliament. Whenever doubt arises whether that condition is satisfied, the Head of State or her representative is necessarily involved, and may have occasion to exercise elements of personal discretion. As will be seen later, the question of replacing a ministry which has lost the confidence of Parliament may entail a further question whether that ministry should be allowed to seek a new mandate in an immediate general election. All of these permutations are logically prior to the Sovereign's constitutional duty to follow the advice of responsible ministers: they are therefore exactly applicable to the case of a Governor or Governor-General, who "under responsible government . . . becomes the image, in small, of a constitutional king . . . ."[3]

In marked contrast are the "extreme cases" to which the Colonial Secretary alludes, adding that they are "those cases which cannot be reduced to any recognised principle, arising in circumstances which it would be impossible or

2 Despatch dated 26 March, 1862. *Parl. Papers,* 1878, c. 2173, p. 70.

3 Herman Merivale, for twelve years Under-Secretary of State for the Colonies, quoted in Jenkyns *British Rule and Jurisdiction beyond the Seas* (Oxford, 1902) 196.

unwise to anticipate . . . ." In this orthodox expression of nineteenth century constitutional doctrine according to the Colonial Office are words to haunt all twentieth century commentators: although it is the very life-blood of the constitution that the Crown act on the advice of ministers responsible to Parliament, the Duke of Newcastle did not consider it possible, or even desirable, to place an ultimate limit upon a Governor's constitutional right to refuse or disregard such advice. If things get bad enough, he implies, a Governor may be justified in leading a revolution within the law; but, like all revolutionaries, his actions will be judged by the success or failure of the high-handed policy he has pursued.

For obvious reasons, the reserve powers of the Sovereign in the United Kingdom were stated much less expansively. It was not unthinkable that, in some part of the British dominions overseas, constitutional democracy might be manipulated — as it often has been in foreign countries — to pave the way for an unconstitutional and anti-democratic regime. In the case of the Mother of Parliaments, such a hypothesis was by definition excluded; and there were in practice good grounds for confidence that institutions and traditions forged since the seventeenth century had fortified the constitution against dangers from within. If Queen Victoria were apt to press a personal view in some governmental matters, that could serve only to put statesmen on their guard against unmanageable formulations of the Sovereign's personal prerogatives.

Doctrine tended to admit that the Queen had some personal discretion in choosing and changing her Prime Minister — provided that the person chosen proved able to command the support of the House of Commons. Commentators were, however, sceptical about the survival of the Sovereign's personal discretion, last exercised by Queen Anne in 1707, to refuse the royal assent to a Bill presented after passing the Houses of Parliament. There was thought by some to be rather more vitality in the claim that the Queen might resist advice to create peers in numbers sufficient to change a House of Lords majority adverse to the government. In one matter only — the Sovereign's right to grant or refuse a Prime Minister's request for premature dissolution of Parliament — was the Sovereign's personal discretion often asserted in a very ample manner. As this was a recurrent matter, affecting from time to time the interests of both major political parties, the views presented to the Sovereign by the political leaders consulted encouraged the growth of elaborate criteria.

When, in 1936, Evatt published his monumental study of the reserve powers of the Crown in Great Britain and the Dominions,[4] he assembled materials that propel the reader towards remarkable conclusions. The "extreme cases" envisaged by the Colonial Secretary in 1862 happily did not occur; but the notion had become well-established that a Governor's reserve powers are wider, and his role more active, than that of the Sovereign in the United Kingdom. Another accelerant, which had also made its appearance by the time of the Duke of Newcastle's despatch, fed the flame. A Governor, using the weapon of his reserve powers, had been depicted as a gladiator, vying for the support of the electorate with "the

4 Evatt *The King and his Dominion Governors* (Cass, London, 1936).

ministers whose advice he had rejected." Sometimes the outcome of the jousting did, as the Duke of Newcastle had foreseen, necessitate the Governor's recall.

It is this unfortunate stereotyping that goes some way towards explaining the Canadian Government's bitterness in the aftermath of the constitutional crisis of 1926. The Prime Minister, Mr Mackenzie King, had been returned triumphantly to power by the electorate after the Governor-General, Lord Byng, had refused his request for a dissolution of Parliament and had granted such a request a few days later to his successor and political adversary, Mr Meighen. Forsey, in the leading treatise on the royal power of dissolution of Parliament in the British Commonwealth,[5] has argued persuasively that Lord Byng acted with scrupulous correctness according to the canons of the day: but at the time Lord Byng had few, if any, academic champions. The Canadian Government was not content to procure the Governor-General's recall. They asked for and obtained, at the Imperial Conference of 1926, a full acknowledgement that the case of the self-governing Dominions was not distinguishable from that of the United Kingdom itself.

Out of evil comes much good. As a corollary to the Balfour Declaration, proclaiming the equality in status of the United Kingdom and of each of the self-governing Dominions, the 1926 Conference adopted a committee report stating

> that the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain.

The lingering conception that a Governor-General might owe a divided loyalty, to "Imperial" or British interests as well as to those of the Dominion he governed, was negated. At the next Imperial Conference, in 1930, it was agreed that the King acted on advice, when appointing the Governor-General of a Dominion, and that it was for Dominion ministers to advise the King in relation to such an appointment.

This last development, though logically inevitable and not before its time, served to spot-light the element of instability in the received doctrine of the reserve powers. On the whole, the Colonial Office had adhered to its view that only "extreme cases" justified desperate remedies. For example, in 1892 the Colonial Secretary, Lord Ripon, had advised the Governor of New Zealand, Lord Glasgow, not to refuse the advice of his Premier, Mr Ballance, to add men of Mr Ballance's choosing to the appointive upper House on the eve of a general election, unless the Governor considered that his action in refusing was likely to be "endorsed by the legislature or the constituencies". Nevertheless, as the materials presented by Evatt disclose, the prevailing view, especially in the twentieth century, had tended to be more forthright: Governors felt obliged to chance their arm, and perhaps to risk recall, if that was the only course that seemed to them to accord with principle and the public good. After 1930, as Evatt realised,

5 Forsey *The Royal Power of Dissolution of Parliament in the British Commonwealth* (Oxford, 1943) chapters V and VI.

it was apparent that a Governor-General owes his continuance in office to the goodwill — or at least the forbearance — of the very ministers whose advice he might feel obliged to resist.

Evatt's review also showed that most cases arising in the self-governing Dominions, including those that had occurred in a Canadian province or an Australian state, concerned ministries which had not been assured of majority support in Parliament. There were, however, other cases in which a Governor or Governor-General had used, or had contemplated the use of, a reserve power to restrain a ministry that enjoyed majority support from seeking to improve its position by promoting a snap election, or by adding to its nominees in an appointive upper House, or by forcing the passage of legislation of dubious legality. The most profound questions, however, had arisen where they were least expected — that is, in dealings between the Sovereign and his United Kingdom ministers. These dealings had not, as matters transpired, led to any exercise of a reserve power; but both the King and his advisers had weighed their positions and defined their options upon the premise that the advice of ministers might be refused.

The early years in the reign of King George V were rich in constitutional incident. In 1910, in his first months on the throne, the new King made it clear that he would not accept advice from his Prime Minister, Mr Asquith, to create peers in sufficient numbers to secure the passage of the Parliament Bill in the House of Lords, until a general election had been fought upon that issue and popular support proved. This being done, and the King's position being made known, opposition to the measure in the House of Lords was allowed to lapse. The feature which immediately distinguishes the King's situation from that of his Dominion Governors is that he remains in the centre of the swirl of events; he warns, he encourages and he is kept very fully informed; he is an ever-present catalyst, compelling ministers and their opponents to define and re-define their positions in contexts which subject the constitution to strain.

In 1912 and 1913 the question of Ireland divided the British electorate almost evenly, and on strict party lines. The passage of the Home Rule Bill, by a Liberal Government with a teetering majority, and therefore no unassailable mandate for the course it was pursuing, threatened civil war. The King cried out silently in a memorandum to his Prime Minister, Mr Asquith:[6]

> In this period I shall have a right to expect the greatest confidence and support from my ministers, and, above all, from my Prime Minister. I cannot help feeling that the Government is drifting and taking me with it . . . .

In 1914 the outbreak of the First World War re-united the British people. The King, in an undelivered letter to Mr Asquith, provided his own verdict upon the handling of a potential "extreme case":[7]

> Much has been said and written in favour of the proposition that the Assent of the Crown should be withheld from [the Home Rule Bill]. On the other hand, the King

6 Memorandum handed by King George V to Asquith, 11 August, 1913. Royal Archives. Quoted in Sir H. Nicolson *King George V, His Life and Reign* (Constable, London, 1952) 223.

7 Letter drafted by King George V to Asquith on 31 July, 1914, Royal Archives. Quoted in Nicolson op. cit. 234.

> feels strongly that that extreme course should not be adopted in this case unless there is convincing evidence that it would avert a national disaster, or at least have a tranquillizing effect on the distracting conditions of the time. There is no such evidence.

British statesmen do not expose such agonised questions to the public gaze, except in memoirs published long after the event. They reserve their salvoes and counter-salvoes, in public addresses or in letters to the London *Times*, for the smaller, but still important, issue of the Sovereign's discretion to refuse a request for dissolution of Parliament by a Prime Minister whose majority has evaporated. Mr Asquith, as Prime Minister in 1913, had submitted a memorandum[8] cautioning the King about the dire consequences to the monarchy of royal intervention in the great matters that were then afoot. In 1923 he could, without inconsistency (though again in his own party's immediate interest), assert the King's discretion to refuse a dissolution to a Prime Minister defeated in a Parliament which could provide an alternative ministry.

This argument has been revived in the United Kingdom in a variety of circumstances, with the aim of improving or diminishing the prospect that a contingent request for dissolution would be granted. No such request has in fact been refused; but doctrine has consolidated in support of the position taken by Mr Asquith. In 1974, in response to a parliamentary question, Mr Short, Lord President of the Council in a Labour Government which was without an overall majority in a newly elected Parliament, declined to encourage the view that the Queen would be bound to accede if dissolution were requested. He noted that[9] "Constitutional lawyers of the highest authority are of the clear opinion that the Sovereign is not in all circumstances bound to grant a Prime Minister's request for dissolution"; and he did not think it possible to specify the circumstances in which such a request might properly be refused.

The need for flexibility in this matter is perhaps most graphically illustrated by the case in which a Prime Minister seeks a dissolution of Parliament, not in his Government's interest, but in defending his own minority position within his Cabinet and party. That was the position of the South African Prime Minister, General Hertzog, who did not favour South African involvement when the Second World War broke out in 1939. The Governor-General, Sir Patrick Duncan, refused the request for dissolution — or at any rate did not encourage General Hertzog to believe such a request, if made formally, would be granted. General Hertzog therefore tendered his resignation; and the Governor-General appointed General Smuts, the leader of the majority faction in Cabinet, to form a new Government. The justification for the refusal of this request for dissolution appears to lie in the fact that General Hertzog's Cabinet had already disintegrated, and that the principle of collective ministerial responsibility could only be re-asserted by calling

8 Memorandum presented to King George V by Asquith, September, 1913. Royal Archives K. 2553 (2) 10. Quoted in Wilson *Cases and Materials on Constitutional and Administrative Law* (2 ed., Cambridge University Press, 1976) 30.

9 *The Times*, London, 11 May, 1974, quoted in Wade and Phillips *Constitutional and Administrative Law* (Bradley ed., Longman, London, 1977) 228.

upon General Smuts. The event proved that the new administration enjoyed the confidence of Parliament.

In the United Kingdom, in matters that are thought fit for public discussion, it is usual to assert the Sovereign's prerogatives boldly, but to employ them sparingly. Both tendencies were exhibited in 1950 in exchanges about the situation that would have arisen if the Prime Minister, Mr Attlee, had sought to restore his ministry's flagging fortunes by advising a dissolution of Parliament. The King's Private Secretary, Sir Alan Lascelles, writing to *The Times* under a nom-de-plume, observed:[10]

> It is surely indisputable (and common sense) that a Prime Minister may ask — not demand — that his Sovereign will grant him a dissolution of Parliament; and that the Sovereign, if he so chooses, may refuse to grant this request. The problem of such a choice is entirely personal to the Sovereign, though he is, of course, free to seek informal advice from anybody whom he thinks fit to consult.

The criteria which Sir Alan goes on to adduce make it clear that he is not contemplating the case of advice tendered by a Prime Minister with majority support.

In 1916 King George V sought informal advice from a former Lord Chancellor, Lord Haldane, whether the King could properly give to a prospective Prime Minister, as a condition of his acceptance of office, a promise to act upon his request to dissolve Parliament. Lord Haldane's negative answer was uncompromising:[11]

> The Sovereign ought at no time to act without the advice of a responsible Minister, except when contemplating the exercise of his prerogative right to dismiss Ministers. The only Minister who can properly give advice as to a dissolution of Parliament is the Prime Minister . . . . It follows that the Sovereign cannot entertain any bargain for a dissolution merely with a possible Prime Minister . . . .

The significance of this injunction is that the Sovereign and his existing ministers, up to the moment at which the latter resign or are dismissed, owe each other complete loyalty and confidence. This is a condition not easily achieved when the Sovereign feels obliged to consider the consequences of dismissing ministers that have majority support, or — which may amount to the same thing — of refusing to accept their advice to dissolve Parliament.

So the British constitution winds a silken thread of ministerial responsibility around the occupant of the throne, protecting the Queen from the taint of political involvement and restricting correspondingly her liberty of movement. Ministers who cannot retain the confidence of Parliament must go; and, should the occasion ever arise, the Queen must act, without their advice, to send them on their way. The parliamentary system of government depends always on maintaining a healthy tension between legislative and executive power: the Queen must have regard to that tension in deciding whether to grant or refuse requests for dissolution by Prime Ministers who can no longer count upon majority support within the present Parliament. In situations of great seriousness, it may be fitting

10 *The Times*, London, 2 May, 1950, quoted in Wilson op. cit. 22-23.
11 Memorandum of Lord Haldane, 5 December, 1916. Royal Archives. Quoted Nicolson op. cit. 289.

for the Sovereign to carry her discussions, with ministers who still enjoy the support of Parliament, to the point of disclosing that, in certain eventualities, she will feel obliged to consider breaking the silken thread that binds her fortune to theirs.

More than that, as the Duke of Newcastle said, it may be "impossible or unwise to anticipate". Jennings, the most skilful of analysts and most scrupulous of commentators, has suggested that the Queen[12]

> would be justified in refusing to assent to a policy which subverted the democratic basis of the Constitution, by unnecessary or indefinite prolongations of the life of Parliament, by a gerrymandering of the constituencies in the interests of one party, or by fundamental modification of the electoral system to the same end.

One might venture to add the caveat that, in the modern world, the governmental action that may seal the fate of a nation is not inevitably a legislative act. The main point, however, is that in these extreme situations a willingness to look into the abyss may be the best insurance against falling into it.

To sum up impressions so far gained, the doctrine of the reserve powers divides into a foreground and middleground, consisting of principles that can be brought into sharp focus, and a background that stretches towards infinity. In the true tradition of the "unwritten" constitution, it has been the British instinct to leave the rules at large, lest they become too cut-and-dried, or too foreshortened, to fulfil their high purpose. This imprecision has been easily tolerated because the service and containment of the monarchy is always at the centre of British political and constitutional life. Though other theories did for a time prevail, there is no essential difference between the Queen's powers and those of a Governor-General: the difference lies in their relationships with their respective governments. We must go on to see why history has cast the Governor-General in the role of an outsider, whom we require to toe a precarious line between interference and irrelevance.

II. THE NEED FOR SETTLED RULES

> . . . the obligation of the governor to act on the advice of the ministers in local matters is subject to the exception that he cannot be asked either to disobey the law or to act contrary to his instructions from the Crown, and that he is at liberty to dismiss his ministers.
>
> This power of dismissal is a reserve power which should only be used in extreme cases. The governor is a constitutional sovereign, and the duty of a constitutional sovereign is, as a rule, to take the advice of his ministers on local matters, even though he does not agree with it.

So wrote Sir Henry Jenkyns, Parliamentary Counsel to the Treasury and an unrivalled authority on the law relating to British overseas possessions, in 1899, the year of his death.[13]

12 Jennings *Cabinet Government* (3 ed., Cambridge University Press, 1959). His remarks relate, however, to the question of the dismissal of ministers. Jennings shares the general view that, in the United Kingdom, the refusal of assent to legislation has become unconstitutional.

13 Jenkyns op. cit. 110.

Nothing in this prescription is new to us, except the reference to a Governor's duty not to disobey the law. That, in itself, is obvious enough. Coupled with the colonial Governor's power to refuse assent to Bills, or to reserve Bills for the Sovereign's pleasure, it leads towards the conclusion that a Governor has a duty to satisfy himself that Bills presented for the Royal assent are not tainted with illegality. In the case of a legislature that is subject to, or shares power with, another legislature — and that was New Zealand's case until the adoption of the Statute of Westminster in 1947 ended the New Zealand Parliament's technical subordination to the British Parliament — this rule is of practical consequence. In New Zealand it lives on, as a formality the significance of which has been largely forgotten, in the Attorney-General's certificate accompanying every Bill recommended for assent. The Governor-General is assured that the Bill contains nothing which requires that His Excellency should withhold his assent therefrom.

In other circumstances — and especially those of Australia, where legislative and executive competences are divided between federal and state authorities — a Governor's duty not to disobey the law too easily became a ground to substitute the Governor's personal discretion for the jurisdiction of the state and federal courts. In 1932 the Federal Government and the Government of New South Wales were locked in bitter struggle, carried on by legislative and executive action. At length, the Governor of New South Wales, Sir Philip Game, dismissed his Premier, Mr Lang, for directing public servants to act in contravention of federal law. As Mr Lang was assured of majority support in the New South Wales Parliament, the minority leader, Mr Stevens, was necessarily granted a dissolution, and was successful in the ensuing election. The Governor's finding of illegality was not free from doubt, and that issue could have been determined by the courts. Today, the Governor's actions might best be defended, not on the narrow point of illegality, but on the broader ground that the state government had carried its vendetta with the Federal Government beyond the endurance of its own electorate. Even so, many would feel that the situation disclosed was not so desperate as to justify the Governor in substituting his own opinion for that of either his ministers or the courts.

Despite manifest differences, the most momentous dismissal of recent times — that of the Australian Commonwealth Government in 1975[14] — has features comparable with those of the 1932 crisis in New South Wales. In both cases the government dismissed was in firm control of the lower House of Parliament; and in both cases the situation arose out of a confrontation approaching deadlock between legislative bodies, each standing upon the letter of its constitutional rights, and each with its own electoral base. In 1975 the dispute was not between Parliaments, but between the two Houses of the Australian Parliament. The crisis was made possible because the Australian Senate is an elective body, and has under the Constitution no duty to defer to the wishes of the House of Representatives. Although financial measures must originate in the lower House, the Senate

14 There are already many commentaries on this crisis, including those of persons principally involved. See, generally, Sawer *Federation under Strain* (Melbourne University Press, 1977).

is free to accept or reject such measures. There was, however, no precedent for the use of this veto power to force a premature dissolution of Parliament against the will of the lower House.

In this case such a precedent was set. The Parliamentary Opposition, led by Mr Fraser, charging gross mismanagement and maladministration, used its Senate majority to refuse supply,[15] and so laid siege to a government which had twice been returned to power in the previous eighteen months. The Prime Minister, Mr Whitlam, armed with his recent electoral mandate, had no intention of surrendering the keys to the fortress, and declined the Governor-General's repeated suggestions that he advise a double dissolution of Parliament.[16] During weeks in which tension mounted, the stalemate continued, until the government was driven to plan reductions in services, and to consider makeshift arrangements for the payment of public servants, when supply ran out. The Governor-General, Sir John Kerr, moved suddenly to dismiss Mr Whitlam and to commission Mr Fraser. Sir John had already ascertained that Mr Fraser would lift immediately the Senate embargo on supply, and would then advise a dissolution of Parliament. In explaining his actions, the Governor-General took the view that Mr Whitlam, despite his majority in the House of Representatives, was in effect leading a minority government, because he could not ensure supply.

It must, no doubt, be left to Australians to resolve a constitutional riddle of their own devising. From the Governor-General's standpoint, the simplest explanation is also the best. He found the Constitution tied in a Gordian knot and strangulating: he therefore delivered his sword to the only champion willing to use it by advising a dissolution of Parliament. If this should seem too simple a view, one could point to the rule — of which colonial Governors were very conscious — that parliamentary privilege precludes the Crown from taking formal cognizance of what transpires in the debating chambers. Nevertheless, this self-denying maxim was hardly applicable to relations between the Houses. It was not in doubt that the composition of the lower House determined the complexion of the government, or that in money matters the lower House had primacy. It was observable, without prying, that the opposition to supply came from the Senate, and thereby set a new precedent which could put at risk the stability of the Australian Government, whenever the two Houses were controlled by different parties.

Setting aside the features peculiar to the Australian Constitution, the crisis in Canberra in 1975 must be recognised as one of those "extreme cases" that turn upon the question of rejecting the advice of ministers who control the lower House. In the arguments aired publicly while Mr Whitlam's Government was in power, there was emphasis upon irregularities, both in ministerial conduct before the Senate majority decided to block supply, and in the measures that were later

15 Measures proposed by the House of Representatives were not rejected, but were not allowed to proceed.

16 The Prime Minister was at length willing to advise a half-Senate election, but not the dissolution of the House of Representatives or the double dissolution that the Opposition wanted and the Governor-General considered necessary.

planned against the day when supply would run out; but illegality was not, and could not plausibly have been, an assigned justification for this dismissal. Quite evidently, Sir John Kerr was intensely conscious — as was Sir Philip Game in 1932 and King George V in 1913 — of the polarisation of public opinion, and the ugliness of the public mood, dividing the country into two great, opposing camps; he believed — as they did — that ministers must bear the main responsibility for bringing matters to their present pass; and a conviction grew that, if ministers did not relent, the initiative would pass to the Governor-General. Sir John's outlook, as he watched the hubbub and brooded on his duty, might have been mirrored in King George's words: "I cannot help feeling that the Government is drifting and taking me with it."[17]

In other respects, the nearest Westminster analogy was more than half a world away. Mr Asquith was no less sure than Mr Whitlam that the Crown was constitutionally obliged to acquiesce in the policies his government was pursuing; but he accepted that this was a matter of which the King must be persuaded. The King, for his part, was guided by the duty to confide in his ministers. Within that framework were assembled the materials and opinions on which the King relied. Outside the United Kingdom, however, ministers have been apt to assume that the role of the Governor-General is exclusively ceremonial and social, and that his acquiescence in advice tendered to him is entirely automatic. This view has never been put less subtly than by Mr Whitlam in his frequent public references to "my Viceroy," though the Prime Minister was on sound constitutional ground in insisting that he alone could advise Sir John Kerr.

Here again is evidence of the disputed margin of appreciation which had prompted Evatt, forty years earlier, to insist upon the need for rules. British ministers have not doubted the free will of the Sovereign, even when most determined that it should be exercised in their favour; but in other Commonwealth countries ministers have seldom had any real conviction about the free will of the Governor-General. For this there are historical reasons. Under a colonial constitution, the Governor personifies the heavy hand of Whitehall. With each step towards autonomy his grip relaxes, until, with the advent of self-government, his apparent powerlessness becomes a symbol of the maturity of the country over which he presides. Within the old Commonwealth, the onset of independence was gradual and blurred. British pro-consuls hauled down the Union Jack, and stayed.

From time to time — and in New Zealand more frequently in recent years — Governors-General have expressed publicly the view that, however rarely one of them may be called upon to exercise a reserve power, the discretions reposed in them by the constitution are real. No Governor-General wishes this belief to be put to the test: most must wonder how, in such a hostile environment, the nettle could be grasped. No comfort can be derived from the knowledge that in the twentieth century a reserve power has been used in Ottawa only once and in Canberra once, and that on these two occasions, fifty years apart, the Crown's intervention divided the country deeply on party political lines. Yet Governors-

17 See supra n. 6.

General perceive, with varying degrees of clarity, that they short-change the country that employs them, if they opt for the easy path. In some situations, the reserve powers of the Crown are the sole constitutional protection against an abuse of power. If the reserve powers are not credible, they are more likely to be needed, and less likely to be effective when needed. More than that, if the office of Governor-General should ever be regarded merely as an expensive adornment, it may be consigned to oblivion, and its passing will cause no more regret than that of an historic building, too far-gone to be restored.

In the Australian situation, the lack of rules fostered an intrigue that enveloped the Queen's representative, the dismissed Prime Minister and his successor. The Governor-General could not live up to Lord Haldane's injunction that "the Sovereign cannot entertain any bargain for a dissolution merely with a possible Prime Minister . . . ."[18] Sir John met the Leader of the Opposition with the Prime Minister's knowledge, as was proper in a crisis situation, and he hardly needed assurance of Mr Fraser's willingness to form a government and to advise dissolution; but the timing of Mr Whitlam's dismissal, and the pre-arranged plan to lift the Senate blockade on supply, appeared to be incompatible with a Governor-General's duty to confide in his ministers. The final corrupting influence had lain in what Australians have aptly called the "high noon" situation. The Governor-General and the Prime Minister had — and have always — the legal capacity to annihilate each other. The Governor-General reported to the Queen's Private Secretary the dismissal of Mr Whitlam. The Prime Minister, if forewarned, could have had little compunction in advising the Queen to recall Sir John Kerr.

As New Zealand is a unitary state, and as it has only one House in its Parliament, the situations that arose in New South Wales in 1932, and in the Commonwealth of Australia in 1975, cannot arise here. It must, however, be recognised that, although we escape the possibility of conflict among elective legislative bodies, we incur the alternative danger that arises from a lack of constitutional checks and balances. In Australia the parliamentary opposition was able to deny supply. In New Zealand only a government with majority support in Parliament could refuse supply, or otherwise frustrate the essential functioning of parliamentary government. To suppose such a situation is, of course, extravagant, but hardly more extravagant than situations that have actually occurred elsewhere. If, for example, a party — or, less improbably, a combination of parties — had achieved power without disclosing its commitment to radical constitutional change, a bare majority would suffice, either to bring Parliament to a standstill, or, after suspending standing orders, to push through a short Bill which would give the government plenary delegated powers. A less unlikely situation, but still a serious one, is that in which a government in power decides, with no clear mandate from the electorate, to institute an irreversible change — for example, by ceding territory or by disenfranchising classes of voters.

In such eventualities as these, New Zealand is peculiarly without constitutional safeguards — a situation that can be ascribed to a kind of national improvidence.

18 See supra n. 11.

As we outgrew our constitutional wardrobe, we seldom bothered to replace discarded garments. The constitutional code with which the British Parliament equipped us in 1852 gradually wore out, and now comprises only remnants. Although the British Parliament renounced the right to control the affairs of other Commonwealth countries, then self-governing, in the Statute of Westminster 1931, we deferred adoption of the Statute until 1947, so that we might retain at least the illusion of sheltering under the wing of a legislature superior to our own. Thereafter we reassured ourselves with the reflection that New Zealand's constitution, more than any other, was made in the image of the "unwritten" constitution of Great Britain. Even so, we soon outstripped our mentors, discarding in 1950 an upper House that, admittedly, was doing little except provide a pause before Bills became Acts. We lack also the invisible safeguards that the Parliament at Westminster derives from various prestigious non-governmental groupings that cross party lines and transcend party loyalties. Lastly, as we become more conscious of our nakedness, the United Kingdom has put on new clothes, by accepting European obligations that are judicially enforced.

The question now is whether the constitutional role of the Governor-General must be seen as another emptiness, or whether the trend can be turned back. If so, we must act upon the need for rules — a need identified but neglected, in New Zealand as elsewhere, for fifty years. After so much negativism it is worth emphasizing the one positive aspect of the Australian constitutional crisis of 1975. Despite the bitterness that Mr Whitlam's dismissal engendered, and the bizarre chain of circumstances that determined the result, national discipline respected the legal consequences of the Governor-General's actions; and the quarrel was taken to the hustings. It is this willingness to honour rules of law — at any rate until they can be modified in accordance with other rules of law — that measures the cohesiveness of nations.

III. OBSTACLES TO RULE-MAKING: LAW AND CONVENTION

There were many reasons why Evatt's call for the ascertainment of rules had fallen on stony ground. Two have already been identified. First, the 1926 Imperial Conference had pegged the powers of a Governor-General to those of the Sovereign in the United Kingdom, and the British authorities were not motivated to crystallise their own rules. Secondly, Canadian ministers, and perhaps others, had been attracted to the 1926 formula by the prevailing, if erroneous, belief that the Sovereign's discretions were less extensive than those commonly attributed to Governors-General. The decisions of the 1930 Conference seemed to have clinched the matter. Nowhere except in Australia was there much evidence of a mood of vice-regal activism. Years later, a Chief Justice of Pakistan, adverting to Evatt's account of the Conference decisions, felt able to conclude that "speaking generally, [a Governor-General] had ceased to possess the right of exercising the reserve powers of the King against the wishes of a Dominion Government."[19]

19 Muhammad Munir, C.J. in *Federation of Pakistan and Others* v. *Moulvi Tamizuddin Khan* in the Federal Court of Pakistan, 1955, reproduced in Jennings *Constitutional Problems in Pakistan* (Cambridge University Press, 1957) 98.

A third, closely connected reason for inertia was that the reserve powers are a little like a mixture of oil and water: the desire for predictability has to consort with elements of pure pragmatism. Fourthly, Evatt, disgusted with the state of the record he had uncovered, thought that the rules should be embedded in statute; but this proved to be a poor remedy for imprecision. Last, though no-one foresaw this in the 1930s, the day of the common code, applicable to comparable situations in all Commonwealth countries, was nearly over. More and more, each Commonwealth country would develop its own style. The federal constitutions of Canada and Australia already distributed legislative, executive and judicial functions in ways that differed from each other, and from the unitary constitutions of the United Kingdom and New Zealand. The new Commonwealth countries would emerge from colonial status with "written" constitutions that sometimes incorporated reserve powers, and that usually provided other controls upon legislation.

An important commentary on the points mentioned in the previous paragraph was provided in 1963, in a judgment of the Judicial Committee of the Privy Council concerning the limits of the legal power of the Governor of Western Nigeria to dismiss his Premier.[20] The Constitution of Western Nigeria detailed the relationship between the Governor and the Premier, following the general lines of British doctrine, but limiting the Governor's powers in these words:[21]

> the Governor shall not remove the Premier from office unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly.

Pursuant to this provision, the Governor had dismissed the Premier, whose government had not been defeated in any vote in the House of Assembly, on the basis of a letter signed by more than half the members of the Assembly, stating that they no longer supported the Premier.

In British or New Zealand practice, the Governor's action would have been regarded as improper, because the evidence on which he had relied was inconclusive; but that would not have affected the legality of the dismissal, because the practice rested only on convention. It was argued that the Western Nigerian Constitution had intended to codify this convention, and must be interpreted in that light. Lord Radcliffe, delivering judgment, held that the Judicial Committee could not go behind the plain wording of the section, which left it to the Governor to decide what grounds were sufficient; and he added[22]

> . . . as Lord Bryce once said, the British Constitution works by a body of understandings which no writer can formulate: whereas the Constitution of Western Nigeria is now contained in a written instrument . . . .

If the Judicial Committee had found only that the section in question did not reflect faithfully the relevant constitutional convention, the judgment would be without general significance. The Board also concludes, however, that the section supplants the convention, clearing the Governor of any charge of acting uncon-

20 *Adegbenro* v. *Akintola* [1963] A.C. 614.
21 Article 33 (10), proviso (a).
22 At p. 632.

stitutionally, even though, as Lord Radcliffe acknowledges, he may have acted unwisely. In the reference to Lord Bryce's remark, Lord Radcliffe adds a further dimension, asserting that the conventions in their entirety cannot be captured in the form of rules. Enlarging on that theme, Lord Radcliffe observes:[23]

> . . . British constitutional history does not offer any but a general negative guide as to the circumstances in which a Sovereign can dismiss a Prime Minister . . . no British Sovereign has in fact dismissed a Prime Minister . . . . In this state of affairs it is vain to look to British precedent for guidance upon the circumstances in which or the evidential material upon which a Prime Minister can be dismissed, where dismissal is an actual possibility . . . .

This last conclusion, lifted from its general context, may be too absolute — at least from the standpoint of those who must proceed without the help of courts and find guidance in constitutional conventions. Indeed, in the same paragraph of the judgment, Lord Radcliffe makes a very important balancing comment:[24]

> Discussion of constitutional doctrine bearing upon a Prime Minister's loss of support in the House of Commons concentrates therefore upon a Prime Minister's duty to ask for liberty to resign or for a dissolution, rather than upon the Sovereign's right of removal, an exercise which is not treated as being within the scope of practical politics.

A pattern of correct behaviour, followed because the persons concerned believe it to be incumbent upon them to do so, is grist to the mill of those who must identify and describe the constitutional conventions; and so are the cases in which the exercise of a reserve power, though contemplated, is not pursued.

There are, then, choices to be made. We may have rules, but sometimes only at the price of losing the depth and persuasiveness of the practice and the commentaries from which the rules took shape. Often the price should be paid, because the gain in certainty will far outweigh the embarrassment of the occasional hard case. Sometimes, a different balance must be struck — especially when, to quote one last time the Judicial Committee's judgment,[25]

> the practical application of those principles to a given situation . . . would depend less upon any simple statement of principle than upon the actual facts of that situation and the good sense and political sensitivity of the main actors called upon to take part.

Again, the rules we make may be erected into rules of positive law, reviewable by the courts; but often we may achieve a less grudging compliance by formulating a convention policed only by a reserve power.

IV. THE FORM AND CONTENT OF RULES

It all boils down to this. Our system of parliamentary government is hedged about by law, but rooted in convention. It springs from two great constitutional conventions: ministers are collectively responsible to Parliament, and the Crown acts on the advice of ministers. To the latter rule there are two, and only two, corollaries, either of which may require the Governor-General to exercise elements of personal discretion. First, before he can act on the advice of ministers, the Governor-General must find those ministers and, if necessary, he must discard ministers who have lost the confidence of Parliament. Secondly, because there is

23 At p. 631.
24 Ibid.
25 At p. 628.

no law that binds Parliament, ministers who have majority support in Parliament can subvert the constitution without breaking the law.[25a] In such an extreme situation, only the Governor-General has the legal authority to stand in their way.

It is, of course, possible to alter our constitutional arrangements by relieving the Governor-General of one or both of these discretionary functions; but it requires surgery, and the body politic needs to be in good working order before it is subjected to surgery. The patient also needs advice from physicians about what he stands to gain from surgery, and how well he can expect to get on without surgery. To answer the last question first, the prognosis is good, upon one condition: while the reserve powers of the Governor-General need not be obstructive or oppressive, they must be credible. He cannot be a straw man, liable to be blown away at the first suggestion that his duty obliges him to stand in the path of ministers. He must not be put — as his Australian counterpart was put — in the position of doing what he conceives to be his duty by stealth. He must not be devitalised and relegated to the sidelines. He must give ministers his full confidence, and that confidence must be reciprocated.

As to the advantages of surgery, the only operation that might promise a substantial benefit is also the most drastic, and the techniques for performing it are least developed. In nearly all countries, the powers of the legislature are limited by a "written" constitution, and the courts may invalidate laws that violate that constitution. If this were New Zealand's case, the questions discussed in the present paper would assume a different character. It would no longer be the whole truth to say that our parliamentary system of government was rooted in convention: it would also be rooted in law, and the ultimate burden of preserving the constitution would have passed to the judges. A change so great would require nothing less than a supreme act of national will, as well as excellent clinical services. Without disbelieving in such a possibility, it would be unwise to neglect goals that are more readily attainable.

The Western Nigerian case, discussed earlier,[26] shows that little is gained merely by giving conventional rules a statutory form. Indeed, as Lord Radcliffe pointed out, some conventions are too shapeless or diffuse to survive such treatment. Even in other cases, there is a high risk that the convention will suffer a deformity in the course of transcription, or lose its ambience when judicially interpreted. This price may be worth paying when the codified rule becomes part of the framework of a "written" constitution: for instance, the Australian crisis of 1975 might have been avoided if the convention limiting the grounds on which the Senate would withhold supply had been codified in the Australian Constitution. In other circumstances, however, convention has advantages that statute cannot match. If one were to codify aspects of the Governor-General's discretion in a statute, it might in due course invite amendment; but, as convention implies a true consensus, it is seen to be changeable only by another consensus.

25a Here and often elsewhere in this paper, the term "law" is used in the narrower sense that excludes constitutional conventions, but of course without implying that the latter give rise to less important or less binding obligations.

26 See supra n. 20.

We have therefore to consider the possibility of formulating acceptable conventional rules to deal with two very different situations. One — to pick up a metaphor used earlier in this paper — is in the foreground and middleground of our national life and must be brought into sharp focus: it concerns the rules by which it is determined who shall exercise power as ministers of the Crown. The other situation lurks in the shadows, far in the background of our national life, and cannot be brought into sharp focus: it concerns the ultimate legal safeguards against subversion or perversion of our "unwritten" constitution. In each case the reserve powers must be formulated conservatively, to avoid the traditional gap between powers claimed and powers considered usable; for the Governor-General is not a tyrant. In the first case, an invidious discretion can, if necessary, be avoided by transference of the discretion to Parliament itself. In the second case, that is not possible, because Parliament, by hypothesis, is already under unconstitutional control. The discretion can therefore be kept within bounds only by ensuring that it is confined to "last ditch" situations.

The selection and rejection of ministers is, of course, ultimately a matter for Parliament itself. Modern constitutions that derive from the Westminster model frequently contain provisions that enable a Parliament to choose and change its ministers, and to regulate the situations in which Parliament may be dissolved before its full term. Were it not for the question of premature dissolution, the rules would be simple. Parliament, by a voting procedure, would choose from its own number a future Prime Minister; and he, before taking office, would in the ordinary way select members willing to serve in his Cabinet. The rules would further provide for his replacement if he should lose a vote of confidence, subject to any right the constitution might give him to take his case to the electorate by dissolving Parliament. In a confused parliamentary situation, any set of rules will — quite legitimately — be used to the best tactical advantage by each party or faction; and that also is a point to be borne in mind in framing discretions that a Governor-General must exercise.

Modern parliamentary constitutions vary greatly in the degree to which they discourage premature dissolutions of the legislature. In practice, if not in theory, our own "unwritten" constitution leans to the view that a government, once established in office, can take its case to the electors either when first defeated in Parliament or, if undefeated, at a time of its own choosing. The reason that practice tends to diverge from theory is that it is now felt to be invidious for the Queen or a Governor-General to exercise a wide and ill-defined discretion in a matter that so closely affects the relationship between a government and its political masters. For this reason, there would be a case for a new constitutional convention, vesting the discretion to grant or refuse a dissolution in Parliament itself, if it were desired to exploit every possibility of finding an alternative government within the existing Parliament.[27] Such a convention would not require a change in the law: it would simply be understood that, in the circumstances

27 Cf. Constitution of Papua New Guinea. As the very recent replacement of Mr. Somare by Sir Julius Chan illustrates, this rule in effect precludes dissolution while there is any possibility of finding a stable majority.

specified, the Governor-General would not grant a request for dissolution unless it were supported by resolution of the House of Representatives.

It is submitted, however, that in New Zealand's case such a change would not be appropriate. The New Zealand electorate appears to believe strongly in the virtue of the triennial Parliament, with its frequent and regular appeals to the electorate. This system allows minimal opportunities for the development of parliamentary situations that were not contemplated by the electorate. When such a situation does develop, the electors will hardly be surprised or offended that their reaction should be sought; but neither members of Parliament nor their constituents are likely to welcome needless premature dissolutions. The system is, therefore, largely self-regulating; and it is only in the plainest cases of abuse that the Governor-General's refusal of a request for dissolution would seem to be warranted. These cases — none of which is probable — are a request made after losing a general election, or after being commissioned to form a government which did not obtain the firm support of Parliament, or in consequence of displacement from the leadership of the governing party or coalition. If a refusal of the request did not in these circumstances lead to resignation, the Governor-General would clearly be justified in dismissing his Prime Minister.

If these conclusions are valid, there is much dead wood that could with advantage be swept from the path of New Zealand Governors-General. The traditional criteria were well summarized in 1950, in Sir Alan Lascelles' anonymous letter to the London *Times,* mentioned earlier in this paper:[28]

> In so far as this matter can be publicly discussed, it can be properly assumed that no wise Sovereign . . . would deny a dissolution to his Prime Minister unless he were satisfied that:
> (1) the existing Parliament was still vital, viable, and capable of doing its job; (2) a General Election would be detrimental to the national economy; (3) he could rely on finding another Prime Minister who would carry on his Government, for a reasonable period, with a working majority in the House of Commons . . . .

It was by a faithful application of these criteria that Lord Byng precipitated the Canadian constitutional crisis of 1926. As Sir Alan Lascelles notes, Lord Byng turned out to be wrong about the third criterion. His mistake seems entirely excusable; but it is less easy to condone the doctrine that encouraged Lord Byng to substitute his own political judgment for that of his seasoned Prime Minister.

In this paper it has not been thought necessary to regard the choice of a Prime Minister, to fill a vacancy in that office, as raising any question of the exercise of a reserve power. Even in a situation of doubt, it is not the function of the Governor-General to form a view about the relative merit of possible contenders. His task is the more humble one of finding the true successor, by ascertaining the will of Parliament. Where no party has a majority, it will be the normal course for party leaders to conduct their own discussions until a coalition identifies itself and its leader. In such circumstances, the Governor-General will no doubt wish to satisfy himself by consultation that he understands correctly the alignment of parliamentary forces. Only in limiting situations, the responsibility for which

28 See supra n. 10.

would rest with the political leaders, should the Governor-General commission a Prime Minister whose immediate support in Parliament is not assured.

So much for the clockwork of the constitution, which may very occasionally need priming. There remains the much more serious and less debated question of ultimate safeguards against dangers that are rare, unpredictable and, until they occur, unreal. The first type of situation already considered, concerns the position of governments that are losing control of Parliament and must be replaced, unless they can make and win an appeal to the electorate. The second type of situation, now to be considered, concerns governments that are in control of Parliament, and are using that control unconstitutionally. In situations of the first type, a Governor-General may need to restrain importunate appeals to the electorate: in situations of the second type, he may need to insist that the electorate be consulted.

In both types of situation, the Governor-General can exercise a reserve power only if there is within Parliament an alternative ministry; for the Crown must not be left without advisers. When a reserve power is exercised against a government with a majority in Parliament, the action taken necessarily entails a dissolution of Parliament, on the advice of the newly-installed Prime Minister. It is this situation which has been seen to involve the Crown in politics, because the ensuing general election becomes in a sense an inquest into the propriety of Vice-regal intervention. Ascertained rules, objectively applied, are the only defence against this danger. If the rules are well understood and respected, the impending constitutional crisis may be averted. Fore-knowledge of the position reasonably taken by the Governor-General should prompt the government in power either to defer or modify the course of action to which objection has been taken, or to advise a dissolution of Parliament so that the electorate may be consulted.

Materials cited earlier in this paper[29] show that a vortex can develop where law and policy intersect. The Duke of Newcastle enunciated, more than a century ago, the steadily held Colonial Office view that a Governor who exercised a reserve power in a matter of local interest submitted himself to the political judgment of the local electorate. Lord Byng and other Governors suffered that judgment as an incident of duty, or survived because the mood of the electorate sustained them. King George V formed the view that intervention was unjustified when it could offer no promise of rallying public opinion or relieving disaster. Lord Radcliffe, delivering the judgment of the Judicial Committee of the Privy Council in the Western Nigerian case, stressed that a decision whether or not to exercise a reserve power "would depend less upon any simple statement of principle than upon the actual facts of [the] situation and the good sense and political sensitivity of the main actors called upon to take part".

Small wonder, then, that attempts to dogmatise about the nature and extent of the reserve powers are apt to end badly. The legal fact is that if the Queen or a Governor-General dismisses a Prime Minister, or refuses his advice to dissolve Parliament, or withholds assent from a Bill, the courts and every civil power will give effect to that action. The political fact is that the use of these Draconian

29 See supra nn. 2, 5, 7 and 20.

measures causes the constitution to shudder, and may set in train evolutionary or revolutionary forces. The constitutional fact is that any exercise of a reserve power affords evidence that constitutional conventions have been broken, because only such a breach on the part of ministers can justify a resumption of personal power by the Sovereign or her representative. Accordingly, the reserve powers are never without value when the possibility of their exercise causes a government to pause and think, and perhaps to conduct a dialogue with the Governor-General; but they are never fully successful if an impropriety, on one side or both, leads to their actual use.

Again, Lord Radcliffe made the essential point: "doctrine . . . concentrates therefore upon a Prime Minister's duty to ask for liberty to resign or for a dissolution, rather than upon the Sovereign's right of removal".[30] The reserve powers begin to lose their forbidding aspect when they are seen in true perspective, not as powers to interfere in the course of democratic government, but as obligations that are shared with ministers. The constitution requires that the Governor-General act on the advice of ministers responsible to Parliament, at least until those ministers advise him to act unconstitutionally. To avoid a risk of miscalculation, two things are necessary: a relationship that is close and frank enough to ensure that neither party can be taken by surprise; and such rules as may be formulated, consistently with the elements of policy choice already noted.

As to rules, a preliminary step is to narrow down the contexts in which the question of exercising a reserve power may arise. If a Prime Minister who has the confidence of Parliament advises a premature dissolution of Parliament, the Governor-General may well have questions to ask about the need for the course proposed, and the arrangements for supply; but the advice, if pressed, must be accepted, because no alternative ministry could take office without seeking and obtaining an immediate dissolution. There seems, moreover, to be little reason to dispute the generally held view that it has become unconstitutional to withhold assent to a Bill, when ministers have advised assent. If a government grossly abuses its legal powers, whether by promoting unconstitutional legislation or by implementing other unconstitutional policies, the ultimate sanction is in all cases that of dismissal from office; and the government under threat of dismissal has always the alternative of advising a dissolution of Parliament, or of tempering the timing or content of the disputed course of action to meet the Governor-General's position.

The Governor-General, for his own part, moves within an ambit of much greater constraint. It is not his role to magnify issues about which Parliament and the country are relatively unperturbed, provided that there are means of public knowledge and a moment for reflection. Again — though this question can hardly arise in present circumstances in New Zealand — it is certainly not the Governor-General's role to judge any question that can be determined by a court. Thirdly, he can and need do nothing to temper the stridency of political confrontation, even if it menaces the transaction of public business, provided that there are ministers who are responsible to Parliament and prepared to fight their political

30 See supra n. 24.

battles within the constitutional framework. These rules and provisoes being observed, and good communication being maintained between a Governor-General and ministers, the reserve powers achieve their aim of defending the constitution, and remain in reserve.

If matters are not so easily resolved, there are two additional criteria that should figure prominently in the Governor-General's discussions with ministers. First, there is the question whether the course on which ministers are determined is "irreversible" — in the sense that a later Parliament under different leadership would not be able to restore the original position. The cases usually instanced under this head are those directly affecting the regime that governs Parliament itself: a change in the three year maximum term of the current Parliament; a major change in the electoral laws (even if carried by the weighted majority prescribed in the Electoral Act 1956); a change in the composition of Parliament — for example, by creating a new second House of Parliament; or a change in the procedure for the future passage of certain classes of legislation, designed to tie the hands of future Parliaments.

Unfortunately, however, the list of "irreversible" changes is not easily closed. Matters of peace and war, matters of cession of territory, international commitments that substantially affect the supremacy of our own Parliament — all of these and many more, whether or not requiring the enactment of legislation, go to the heart of our constitution. So, above most others, does the independence of the judiciary, and its surveillance of executive action. It is worth recalling in this context that the rule of law ranks with the sovereignty of Parliament as one of the twin pillars of our constitutional edifice. That which interferes with the jurisdiction of the courts to uphold the rights and liberties of individuals amounts, in effect, to a suspension of the guarantees contained in our "unwritten" constitution, and it counts as an "irreversible" change. It is no answer that a nation whose liberties have been diminished may one day be able to regain the lost ground.

The second, and the last, question to be asked is whether the action which ministers wish to take was fairly within the contemplation of the electorate when the members of the present Parliament were chosen. Our constitution does not set its face against change; but it requires that fundamental change will proceed from the people, and not be imposed upon them. Equally, our constitution does not encourage members of Parliament to set aside their own responsibility for decisions taken: they are representatives, not delegates. Nevertheless, each general election is a reaffirmation of the consent of the governed; and the choices they have made are policy choices. Therefore the doctrine of the mandate — the duty to keep faith with the electorate — has equal place with the balancing consideration that governments are required to govern, and not to lose sight of longer-term objectives in a daily quest for popularity.

For reasons already canvassed, any set of rules must take into account the way in which the Governor-General is appointed, and his expectation of completing a fixed term of office. Existing practice is an excellent guide. When the Prime Minister recommends to the Sovereign the appointment of a Governor-General, a good deal of time is allowed for the Queen to inform herself about the

qualifications of the proposed appointee. This would seem, in fact, to be one of the few occasions on which the Queen of New Zealand, while absent from New Zealand, can do more than approve formally, upon the Governor-General's reference, a submission from New Zealand ministers. It is, of course, clear that ministers take responsibility for the Governor-General's appointment, and that their considered advice must prevail. Yet the appointment by the Sovereign of her own representative touches her prerogative more closely than any other matter; and it is well established that she will exercise her right to be fully informed.

This personal interest of the Sovereign is an encouragement to ministers to ensure that their recommendation is made with the same care that surrounds appointments to high judicial office. Obviously, however, Governors-General cannot enjoy the security of tenure that is given to judges: within the executive branch of government the constitution emphasises a spirit of voluntarism — a duty to serve during pleasure, with no vested right. The Governor-General ought to be as acceptable to a new government as to the government that recommended his appointment; but that acceptability must rest upon free will and respect for constitutional principles, not upon compulsion. The best guarantee of continuity and confidence is the development of rules relating to the exercise of the Governor-General's discretion. It is, however, a further guarantee that, when the office of Governor-General is vacant, the government is administered by the Chief Justice, or in his absence by the next most senior judge.[31]

For administrative reasons, there is traditionally an interval of at least a month between a Governor-General's vacation of office and the swearing-in of his successor; and during this interval the Chief Justice or senior judge acts in place of the Governor-General. Adherence to this regular sequence reinforces the principle that the office of Governor-General is one of substance, possessing a certain independence of the ministers who advise the Queen in matters of appointment or recall. The development of rules reduces the likelihood of disagreement between a Governor-General and ministers; but in the last resort ministers have the right to advise the Governor-General's recall. What ministers may not do is tear down, in a moment of crisis, the last constitutional safeguard by advising the immediate appointment of a new Governor-General upon whose unquestioning agreement they can count.

IV. THE NEW ZEALAND SITUATION

The final picture does not bear out traditional perspectives. At least in the New Zealand situation, there is no need for wide and ill-defined discretions to refuse a Prime Minister's advice to dissolve Parliament, or in any way to influence the processes by which an existing Parliament finds, or fails to find, a stable majority among its own members. The strong belief that the last vestiges of the Sovereign's personal discretions are to be found in this area is, from a New Zealand standpoint, a bad tradition — a source of reasonable, but avoidable, anxiety when there

31 These arrangements of course assume that, in New Zealand as in the United Kingdom, there can be no judicial review of a Royal or Vice-regal discretion. The position may be different in Australia, where other arrangements govern the choice of an Administrator

has been public discussion of a Vice-regal appointment and, at worst, an invitation to the kind of constitutional debacle that overtook Canada in 1926.

On the other hand, it would be irresponsible not to take due notice of much larger problems, which were summarised in a recent address by Mr Justice Woodhouse, a member of the New Zealand Court of Appeal:[32]

> In New Zealand it can hardly be doubted that in the final analysis Parliament recognises, as a matter of instinctive commonsense, that there are ultimate limits upon its constitutional power to legislate. And if that be so, there will be those who ask, why change: the mere possibility that Parliament might attempt to overturn basic freedoms or the constitutional machinery of the country does not carry the practical likelihood that it will be done. In itself that may be true enough. On the other hand, the answer seems equally clear. Powers are not lost by defining and accepting their terms: should Parliament define the limits of its practical and constitutional powers it would have given nothing away: why should there be hesitation to make plain what some may be ready to ignore?

Mr Justice Woodhouse reaches the conclusion that "the time has come for New Zealand to reduce its constitution to writing supported by a Bill of Rights". These goals are not alternatives to those of the present paper: they are separate, but cumulative, responses to the need for rules — a need to which attention has been drawn for more than thirty years in the occasional writing of A. C. Brassington. Each response entails the breaking of a kind of sound barrier — an invisible, conceptual limitation that ceases to hold any terror only when the will and skills to tackle the problem have been summoned. A Bill of Rights, if it is to be more than an anaemic reflection of its great American model, requires a new tradition of judicial innovation, deriving from a statutory mandate not hedged about with detailed restrictions. A "written" constitution has never yet been given by a sovereign Parliament to its own people in due course of legislation: experience would suggest that it needs legislative sanction for a new beginning, approved by constitutional referendum.

In the case of reserve powers, the breaking of the barrier depends on setting aside an inherited instinct that any display of independent thinking by the usually biddable, constitutional sovereign must immediately be checked. One incident, recorded by Keith Sinclair in his biography of Walter Nash, can serve to illustrate the predictable reaction of any New Zealand political leader at any time in the last hundred years:[33]

> The Governor-General, Sir Cyril Newall, was reluctant to sign a government recommendation remitting a sentence of flogging on four prisoners in Mt. Eden gaol. He wanted the Government to announce legislation abolishing flogging. Nash was reluctant to acquiesce in his not accepting advice, but was half inclined to agree to his terms if the Goverment did oppose flogging. Fraser [the Prime Minister, who was overseas] cabled back that Cabinet should on no account accept the Governor-General's refusal to act on ministerial advice. However, he too, hesitated. Perhaps they should not press the point. With an election pending, their decision might be misunderstood. On this occasion — probably the last on which a New Zealand Governor-General did not act on ministerial advice — the Cabinet gave in. Rex Mason, the Attorney-General, announced that flogging would be abolished; the Governor-General then signed.

32 "Government under the Law" J. C. Beaglehole Memorial Lecture, (1979) 57 Council Brief 5.

33 Sinclair *Walter Nash* (Auckland University Press, 1976) 204.

If we were not accustomed to it, we would be astonished by the distortion in the ministers' thinking. They hesitate to accept a conclusion they know to be right, because the Governor-General had led them to it. If the rules had been clearer, there would have been no doubt that this was not a matter which the Governor-General could have carried to the point of a final refusal to accept advice. He had exercised to the full his right to probe the government's position, and it was good that he did so. He had not exercised a reserve power. The ministers had abandoned their earlier advice — or, to put the position more technically, they had taken responsibility for not persisting with that advice. The attitude of ministers was an echo of the old need to restrain the power of the Sovereign — a need felt in Great Britain in the seventeenth century, and in British colonies in the eighteenth and nineteenth centuries. But in the twentieth century it is not the Sovereign who needs watching. It is ministers, the strong executive that controls Parliament and speaks with the voice of the Sovereign.

The distortion goes still further. Ministers discern, even in the kind of Vice-regal questioning that is incidental to the right to be fully informed, the first signs of a spirit of rebellion that may lead the Governor-General to a final confrontation with ministers. Both experience and commonsense would point to a diametrically opposite conclusion: it is the failure to communicate, the determination of ministers to keep the Governor-General at arm's length, that, aggravated by the lack of rules, leads on towards that dreaded situation which it is "impossible or unwise to anticipate". The annals of the "old" Commonwealth do not disclose cases in which governments set out to subvert the constitution and had to be stopped.[34] They disclose a few cases in which a power of dismissal was exercised in less extreme situations, because of mistrust or miscalculation, sometimes — as in the Australian constitutional crisis of 1975 — compounded by a gap in the relevant rules.

Without rules we are condemned to wander in perpetual gloom and fog. So K. J. Scott in *The New Zealand Constitution* gropes forlornly for a landmark:[35]

> Whether the enactment of constitutional legislation without a mandate is clearly unconstitutional is not easy to say, but probably a country that permits its Upper House first to become impotent and then to be abolished is not the sort of country that would set a high store on the doctrine of the mandate. The government's enhanced might possibly reflects enhanced constitutional right.

It is neither impossible nor unwise to anticipate the difficulties that these and other murky situations may cause in the relationship between a Governor-General and ministers. Some of the pertinent rules would no doubt find a place in a "written" constitution; but, as the Western Nigerian case shows, even such a positive development might not exhaust the need for guidelines in the form of constitutional convention. Only within such guidelines would the "main actors"

34 *Aliter*, perhaps in the Pakistan constitutional crises of 1954 when the Governor-General issued a proclamation asserting that the constitutional machinery had broken down and dissolving the Constituent Assembly which had failed, in the space of seven years, to carry out its main function of preparing a Constitution for Pakistan. See Jennings, op. cit., 1957.

35 Scott *The New Zealand Constitution* (Oxford, 1962) 54.

have, as Lord Radcliffe said, a basis for exhibiting "the good sense and political sensitivity" that would play a larger part than "any simple statement of principle" in resolving a practical problem.

At that point the sun begins to break through. It is not an accident that constitutions of the parliamentary kind, whether "written" or "unwritten", leave a central area of free play in which considerations of policy must mingle with respect for constitutional principle. This is peculiarly the province of the executive branch of government, where activity is conditioned by the flow of events and monitored by public and parliamentary opinion. In New Zealand this area is unusually large — almost certainly too large. If it were to be reduced, by the adoption of a "written" constitution and a Bill of Rights, judicially guaranteed, the area of executive discretion would still be large; and it is an open question where the limits of judicial oversight would be drawn. In the Western Nigerian case, the Judicial Committee of the Privy Council was prepared to go no further than to interpret the words of the "written" constitution; and the Committee appeared to take the view that those words had erased from constitutional memory the more rigorous standard that might otherwise have been applicable.

In any case, it is safe to say that judicial controls in policy areas must take time to develop, and will never replace the need for self-regulation within the executive branch of government. Nor should the emphasis of the present paper obscure the fact that one of the best-kept traditions of our elusive constitution is a high sense of duty and responsibility at all levels of public administration. One purpose of the present paper is to suggest that, now as in every previous period of British constitutional history, the vitality of the constitution lies in its capacity to re-develop existing principles and institutions to meet changing needs. The protection of Parliament against the personal power of the Sovereign, the protection of local New Zealand interests in competition with Imperial interests — these are aspects of the constitution that belong to history; and our attitudes towards the role of the Governor-General should not be frozen in the moulds of other centuries. It would be more consistent with his role in public life and his oath of office to recognise that the Governor-General protects the constitution, and that he alone is eligible to provide a measure of oversight in the otherwise self-regulated areas of executive government.

V. CONCLUSION

It is submitted that it could be agreed, perhaps by resolution of the House of Representatives — and, as it touches the Queen's prerogatives, with the prior approval of the Sovereign — to re-define some of the constitutional conventions discussed in this paper, upon the following lines:

The Prime Minister shares with the Governor-General the responsibility of ensuring that the Crown is never without ministerial advisers; and that, except where Parliament is dissolved in preparation for a general election, ministers must be those who have the confidence of Parliament. If the Governor-General believes that a change of ministers may become necessary, and that he has therefore a duty to inform himself about the parliamentary situation, he may, with the

Prime Minister's knowledge, consult other members of Parliament, whether or not supporters of the present government, receiving in confidence information and opinions offered upon that basis, but not expressing views or intentions other than those of which the Prime Minister has notice.

A Prime Minister has a duty to tender his resignation if the government of which he is the leader loses its parliamentary majority in a general election; or if he is no longer the leader of the government party or coalition; or if, after being commissioned to form a government, he fails to obtain the confidence of Parliament. In other circumstances, a Prime Minister who has lost the confidence of Parliament has a duty either to tender his resignation or to advise a dissolution of Parliament.

The bond of mutual confidence between the Governor-General and the Prime Minister requires that each should bring to the attention of the other any circumstance which he believes may lead to a departure from constitutional principle, or to a situation of crisis or emergency; and that each should inform the other of any development in his knowledge or assessment of the position. The Prime Minister has a duty to ensure that information available to the government is at the Governor-General's disposal.

If the Governor-General is of the opinion that a course of action, proposed by the government and opposed by segments of public and parliamentary opinion, raises a question of constitutional principle and is not merely a matter of policy to be determined from time to time by the government in power; that the proposed course of action was not, before the most recent general election, a normal or foreseeable consequence of the present government's assumption of office; and that these considerations are not outweighed by the present or pending emergency; he may so inform the Prime Minister. In that case, it shall be the duty of the Prime Minister either to defer or modify the proposed course of action in conformity with the Governor-General's opinion, or to tender his resignation, or to advise a dissolution of Parliament.

When the Prime Minister has occasion to tender advice to the Queen in relation to the appointment or tenure of a Governor-General, he shall bear in mind the need to afford the Sovereign ample time for consideration before signifying her pleasure. In principle, a new Governor-General should assume the duties of his office not less than [four] weeks, nor more than [eight] weeks, from the day on which his predecessor relinquished office.