Constitutional development - an introduction

K. J. Keith*

1984 demanded a review of aspects of New Zealand's constitutional arrangements. Those arrangements had been changing in significant ways over a long period, and others were in prospect in this, an election year. The Faculty of Law accordingly organised a public lecture series and this issue of the Review brings together some of those lectures along with a paper on a closely related theme by the Chancellor of the University, the Rt. Hon. Mr Justice Richardson, and the LL.B. (Hons.) paper which was awarded the R. A. McGechan Prize in 1983. The lectures cover only some of the broad matters in issue, but they should usefully contribute, the Faculty expects, to the developing articulation of the issues and the debate and action on them. They also provide an occasion for a tribute to Professor Quentin-Baxter in the context of the law and the constitution — one of his major areas of scholarly and professional concern. While mourning the loss, the enormous loss, we can continue to learn from his deep understanding of our constitution and his striving to strengthen it. Professor Quentin-Baxter encapsulated that understanding and striving in a felicitious metaphor in a passage quoted in a tribute to him by Mr Geoffrey Palmer, the Minister of Justice and his former colleague in the Faculty:[1]

> 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 buildings 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.

I. THE CONSTITUTION IN THE WEEK FOLLOWING 14 JULY 1984[2]

Mr Palmer made that tribute in a speech he gave on the constitutional issues which arose immediately after the general election of 14 July 1984. Professor Brookfield of the University of Auckland and Mr Harris of the University of

* Professor of Law, Victoria University of Wellington. As the speech cited in n.1 indicates, Prof. Keith was adviser to the incoming government on one aspect of the matters discussed in this introduction. The views expressed here are not however to be attributed to anyone other than the author.

1 "The Governor-General's constitutional discretion: an essay towards a re-definition" (1980) 10 V.U.W.L.R. 289, 290, quoted in a speech of 4 October 1984 on Constitutional Reform to the Institute of Policy Studies, Victoria University of Wellington.

2 Based on a lecture given on Thursday 19 July 1984.

Otago have also published their views on some of those events.[3] And the Government has made it clear that it intends to have the law clarified and reformed to avoid at least some of the particular problems.[4] The issues and the lessons of that week for the law and the constitution can however be further considered: they go to essential aspects of our constitutional system and to the ways in which questions about the constitution should be dealt with and resolved.

This paper considers in turn:

A. The election itself — the working out of the democratic principle.
B. The transition — the role of the outgoing government.
C. The formation of the new Ministry.
D. The role of the Governor-General in the formation of the new Ministry.

It concludes with some general comments.

A. *The election itself*

Sir Robert Muldoon has often said that our constitution in the end is the three year Parliament — or rather the general election at the end of each Parliament. It is the people, through the election, who decide who is to govern. They chose between one party and the other (or others). That proposition is absolutely basic — the democratic element, the periodic return to the electorate is a necessary condition of our system. (It cannot, however, be seen as a *sufficient* condition. Our constitutional system plainly requires other controls and of course includes many others.)

Sir Ivor Jennings, the major 20th century commentator on the British constitution, says that the constitution contains four principles of major importance:[5]

> It is democratic; it is parliamentary; it is monarchical; and it is a Cabinet system. It is democratic because it is carried out in the name of the people according to doctrines freely accepted by or acceptable to the people at a general election . . . The fundamental principle is that of democracy.

The parliamentary character of the constitution is relevant to later topics.

The basic importance of the democratic element is also to be seen in section 189 of the Electoral Act 1956: the central provisions of the constitution relating to the three year term, the right to vote and the establishing of constituencies can be altered only if the major parties in Parliament or the people in a referendum agree. It was seen as well in the outgoing Prime Minister's recognition on the night of Saturday, 14 July, that he and his government had been rejected. The new government, he warned, would face the beginning of the new election campaign (for the 1987 election) on Monday, 16 July. That recognition is completely consistent with his constitutional philosophy. Mr John Turner, on being defeated in the most recent Canadian general election, put it as follows: The people have spoken. The people are never wrong.

3 [1984] N.Z.L.J. 298 and 300.
4 See the Cabinet decision of 1 October referred to in the speech cited supra n.1.
5 *Cabinet Government* (3rd ed., Cambridge University Press, 1959), 13.

B. *The transition — the role of the outgoing government*

A new government was to be established. There was however a period of time in which the legal form did not match the new political reality. The outgoing Ministry is still the legal Ministry. It is its members who have the formal powers of Ministers, and only they for example can comprise the Executive Council whose advice and consent the Governor-General usually requires for his formal legal actions. But given the democratic principle and the clear result in the polls it would be intolerable for that Ministry to stand in the way of the incoming Ministry and to thwart its policies. After considerable controversy and uncertainty on the Monday, the position was clarified and the convention strengthened by the actions of the outgoing government. It recognised the force of the democratic principle in a letter to the incoming government, in a press statement by Mr McLay as Attorney-General on the Tuesday morning, and by the formal action it took on the Wednesday morning when the Governor-General in Council took some of the actions to deal with the financial crisis the incoming government saw itself as facing. Mr McLay's statement said that the action of the outgoing government was subject to two constitutional conventions or understandings:[6]

1. It will undertake no new policy initiatives.
2. It will act on the advice of the incoming Government on any matter of such great constitutional, economic or other significance that [it] cannot be delayed until the new Government formally takes office — even if the outgoing Government disagrees with the course of action proposed.

The formal action, on the Wednesday morning, was the participation of members of the outgoing Ministry in the Executive Council with the advice and consent of which the Governor-General acted.[7] Those members and their Ministry were in form parties to actions which they opposed. The substance was that the decisions were made by the incoming "Cabinet" whose members had been chosen the previous afternoon and who had met, still in the Opposition caucus room, earlier on the Wednesday. The outgoing Ministry of course had no responsibility at all for the advice which it formally gave. It was free to attack that advice and the decisions. Once again the formal legal position was made tolerable only by the convention: it gave real flesh to the legal bones. The convention was however at some risk, a risk increased by a dispute about the legal powers considered under the next heading.

C. *The establishment of a new Ministry*

The immediate question which arose was whether the new Ministry could be appointed earlier than the usual time of about two weeks after the election. That usual period allows the caucus of the new majority party to meet, for some of the election night uncertainties in closely contested seats to be resolved, for the Cabinet to be chosen in the way the particular parliamentary party has established, and for there to be an orderly transfer of power. The incoming administration can also be making arrangements for Cabinet committees and

6 Press statement of 17 July 1984, quoted in Brookfield [1984] N.Z.L.J. 298 and the speech cited supra n.1.

7 See S.R. 1984/191-195 for the relevant regulations.

other offices, such as parliamentary under-secretaries, the Speaker, and the Chairman of Committees. The law knows nothing of all this process: it is governed by convention and practice, for instance the practice of the Parliamentary Labour Party that it elects the people who are to be in Cabinet, the Prime Minister having determined the number and later having the task of allocating the portfolios. The only relevant legal power is that of the Governor-General (or the Queen) to appoint Ministers of the Crown, Executive Councillors and parliamentary under-secretaries, powers resulting from the prerogative and statute.[8] The legal power (of dismissal as well as appointment) is essentially unfettered in terms of advice or circumstance. The position in practice and under convention is, once again, quite different. In the first place, the monarch is a constitutional monarch and in general acts either in response to the facts which are usually clear (as in the case of the appointment of the new Prime Minister following the resignation of the defeated one) or on advice (as in the case of the appointment or replacement of all other Ministers). Secondly, the Governor-General must have Ministers for reasons of convention (that Ministers take responsibility for his acts). Further, in law, the Governor-General must have Ministers since most of his powers can be exercised only "in Council" or on the advice of a particular Minister.

On 16 and 17 July — the facts were clear — the government had been defeated at the polls and there was going to be a change of government. But would that change be made at once so that the incoming Ministry could take the urgent action that it considered was necessary? Because of the action that the outgoing government took on the Tuesday morning, the question of law did not have to be resolved. The proposed reform of the relevant legislation may mean that it will never be resolved. It is nevertheless worth considering aspects of the legal question since they illuminate more general features of our constitution and constitutional argument.

The question arose from the fact that the Governor-General, according to the Civil List Act 1979, s. 9(1), may appoint as Ministers of the Crown or members of the Executive Council only those who at the time are Members of Parliament. Were the senior members of the Parliamentary Labour Party — those re-elected on 14 July — "members of Parliament" within the meaning of that provision? The argument that they were not was simple and on the face of it compelling, so apparently compelling in fact that the opposite view is not considered in the contemporary academic commentary. The argument in its bare form is as follows:

1. Once Parliament had been dissolved on 15 June 1984 there were no Members of Parliament.[9]

8 See clause X of the Letters Patent Constituting the Office of Governor-General of New Zealand, S.R. 1983/225; and s.11 of the Civil List Act 1979 (for parliamentary under-secretaries). In some cases Parliament has also empowered the Governor-General to appoint Ministers. In general the statute merely recognises the prerogative power and action.

9 Nobody can be a member of a body which does not exist. This proposition and that in the text was accepted (but apparently without argument) in *Re Taupo Election Petition* [1982] 2 N.Z.L.R. 245, 252.

2. No-one becomes a Member of Parliament until, at the earliest, the declaration of the result of the poll by the Returning Officer in the particular electorate; that does not happen in practice until 12 days or so after the election.[10]

On this view, the Ministry in office at the time of the dissolution is saved by the proviso to section 9(2) which excepts its members from the obligation of Ministers or Executive Councillors who cease to be Members of Parliament to vacate their offices.

The argument to the contrary can be based on the assumed purpose of section 9, relevant principle, and the detail of the relevant legislation. The argument that section 9 barred the early appointment was concerned only with the last of those matters. That limit on the argument might be the matter of some comment. I do not propose, for the reasons already given, to take the detailed legislative argument very far. But some points might be made in a summary way against the view summarised above. The first is that the body that was dissolved by the Governor-General's proclamation of 15 June 1984[11] was not "Parliament". It was the "General Assembly". That is in exact conformity with the New Zealand Constitution Act 1852. Section 44 empowers the Governor-General to dissolve "the General Assembly" — not "parliament" nor "the House of Representatives". The second point is that "the General Assembly" consists of the Governor and the House of Representatives.[12]

The dissolution of the Assembly does not on its face dissolve the House. It certainly does not dissolve the Governor-General. Might it not therefore be the case that the House is a continuing body stretching back to 1852? Quilliam J. has so held.[13] On that view it is the temporary assemblage that the Governor creates out of two continuing bodies and that he dissolves. The third point is that Members of Parliament are elected to, and are members of, the House of Representatives — the continuing body.[14] And they continue to carry out their representational functions, in common parlance they are regarded as members, and they continue to be paid, notwithstanding that the Assembly is not in existence.

As indicated, the argument should not be limited to the particular legislative provisions. It should extend as well to the purpose of section 9 of the Civil List Act 1979 and to relevant principle. In New Zealand, as in other Westminster systems, convention required that the Ministry should be chosen from Parliament.

10 See the Electoral Act 1956, s.116. That was the date chosen by Quilliam J. in *Ualesi* v. *Ministry of Transport* [1980] 1 N.Z.L.R. 575, 580. He preferred it to the date of the election, the date of the return of the endorsed writ, the date of its forwarding to the Speaker, and the day fixed for the return of the writs (see ss. 119, 120 and 12). Another, later possibility is the date when the new Parliament assembles.

11 1984 New Zealand *Gazette* 2236.

12 New Zealand Constitution Act 1852, s.32. See also Acts Interpretation Act 1924, s.4, and the Electoral Act 1956, s.11.

13 In the *Ualesi* case, supra n.10.

14 Electoral Act 1956, s.13.

If a particular member of the Ministry was not a member of Parliament then convention required that the Minister obtain a seat within a reasonable time.[15] Why was that convention turned into law in 1950, by an amendment moved by the Opposition and just a few days before the Legislative Council was abolished? The text of the provision itself might be seen as giving a sufficient indication. The Ministry had to be chosen from members elected by the people. That Ministry would, in accordance with convention and practice, be chosen from the party which had the confidence of the House, the party which in general had been successful at the most recent election. That is to say, the provision incorporates the principle of responsibility and reflects the principle of democracy. Would it really be seen as standing in the way of the installation of a Ministry which has been successful at the polls and which will have the confidence of the House? If the legislation is ambiguous then broad principles, including the principle of democracy, should be weighed and should prevail.[16]

My concern is not so much with the detail of the above argument as with the process and approach. I have already suggested the need to go beyond the particular words to the purpose, relevant principles and the wider context. Indeed there is a strong argument for saying that interpretation should *begin* with the relevant principles and practice and should put the 1950 enactment into that context. That approach allows for principled constitutional development. Important constitutional changes would not be imported by a side wind. And the statutory provision would be seen as part of that broader development and articulation of the law.[17]

D. *The role of the Governor-General*

The Governor-General, subject to the point just considered, has in law unfettered powers to appoint and dismiss Ministers. But as noted in practice and under the conventions there is no real discretion — at least in the generality of the cases. It does not follow that in such cases as the July one the Governor-General has no relevant role. In the first place, to use Bagehot's famous phrase, he has the right to be consulted, the right to encourage, and the right to warn.[18] This set of rights is now enhanced in New Zealand by the obligation of Ministers under the Letters Patent constituting the Office of Governor-General to keep him fully informed concerning the general conduct of the Government and to furnish him with such information as he requests or any particular matter relating to the Government. The occasion for the operation of these provisions might well have occurred on the Tuesday. They might well have helped facilitate a resolution of the type that in fact occurred. What if they had not? Might this have been the kind of extreme case where the Governor-General could have moved to replace the Ministry?[19]

15 E.g. Jennings, op.cit. supra n.5, 60.
16 E.g. *C.S.U.* v. *S.S.C.C.* [1982] 1 N.Z.L.R. 742, 747 (C.A.), and *Wybrow* v. *Chief Electoral Officer* [1980] 1 N.Z.L.R. 147, 154 (C.A.).
17 See e.g. *Viscountess Rhondda's Claim* [1922] 2 A.C. 339, 348-380, especially at 368-373.
18 Walter Bagehot, *The English Constitution* (1867; Fontana ed. with introduction by R. H. S. Crossman), 111.
19 See e.g. the Supreme Court of Canada in *Reference Re Amendment of the Constitution of Canada* (1981) 125 D.L.R. (3d) 1, 86.

II. CONCLUSION

The events and the issues to which they gave rise illuminate three points about the interrelation of law and convention. The apparently unfettered legal powers of the Governor-General (to call the election as well as to dismiss and appoint Ministers) in reality are transformed by convention and practice. Law which served despotic kings remains unchanged in form, but in substance is quite different. As the Supreme Court of Canada put it three years ago "constitutional conventions plus constitutional law equal the total constitution".[20]

The line between convention and law can be moved. Parliament did that in 1950 with the provision which is now section 9 of the Civil List Act 1979. The difficulties which have since arisen point to the inflexibility that can be introduced by such a change[21] — or at least can be seen to have been introduced. Litigation in a number of jurisdictions suggests caution and care in such enterprises.[22]

A point related to the last is the choice of approaches to the interpretation of such constitutional legislation. The difference of view over section 9 of the Civil List Act 1979 is further testimony to the critical importance of the choice — essentially between the examination of the provision alone or in a wider constitutional and historical context.

What of conventions alone? What do the events indicate about their articulation and application? The convention about the relationship between the outgoing and incoming governments has been clarified and strengthened — the possible temporary breach, by testing it, has those effects. The events also show that in some situations at least political forces and assessments of public reactions help force compliance. The basis of the convention in democratic principle no doubt was relevant to the clarification and compliance. Its strength was however the less because of the doubts about the existence of a legal power to control a breach of it.

The final, more general point is the central importance of law, constitutional principle and legal argument in such events as those of mid July. The process is not just one of power and politics. The political power must be given legal forms. The exercise of the legal power is moreover sometimes limited by the law and is usually as well controlled by convention and constitutional principle. That law and those conventions and principles are not optional extras to the operation of the political and constitutional processes. They must all be seen together. It is essential that the relationship be properly understood.

20 Ibid. 87.

21 Even if the broader reading of s.9 is given, it would not have been possible, as it was recently in Canada, for a new leader of the majority party who was not a Member of Parliament to become Prime Minister.

22 See e.g. *Adegbenro* v. *Akintola* [1963] A.C. 614 (J.C.), *Stephen Kalong Ningkam* v. *Tun Abang Haji Openg* [1966] 2 M.L.J. 187, and *In re Articles 13 and 14 of the Constitution,* Cook Islands Court of Appeal, 29 July 1983, O.A. No. 1/83 (unreported). Some would see the Canadian case cited supra n.19 as an outstandingly successful judicial involvement with matters governed by convention but others disagree and vigorously, e.g. Forsey "The Courts and the Conventions of the Constitution" (1984) 33 Univ. N.B.L.J. 11.