Themes of constitutional development: the need for a favourable climate of discussion

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Professor Quentin-Baxter introduced the public lectures by reviewing the two traditional major themes of the constitution: the protection by the Common Law courts of life and liberty, and the role of convention and other developments in controlling the apparently absolute power of the government in and through Parliament. But there is now, he argues, a third major theme: the impact of the international environment. The international standards, universal or regional, provide a persuasive precedent for constitutional development.

I. INTRODUCTION

Those of us who know least of Maori culture have in the last few years become aware of the concept of *turangawaewae* — the importance to the stature of men and women of the land on which they stand, of the place they are entitled to call their own. For the pakeha it is even less easy than for the Maori to make the mental and spiritual leap from the everyday world of argument and disunity to the self-discipline of respect for shared values. Yet, without that leap, it may be a waste of time to speak of constitutional development. Constitution-building is not a numbers game: respect for majority decisions — within their legitimate sphere, and subject to the proper safeguards — is the consequence of constitutional maturity, not the cause of it.

There are perhaps three major themes of constitutional development. The very heart of the matter, and the special care of the legal profession, is the Common Law, which — with minimal parliamentary intervention — for centuries provided constitutional guarantees for the lives, liberties and property of citizens. Respect for the law, built up by this process, is threatened when the law is perceived to be nothing more than a partisan expression of the will of a transient parliamentary majority.

Secondly, while much could be done to extend the beneficial influence of the Common Law by providing for judicial definition of fundamental rights, there

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is need for parallel development in the other branches of government. The "rule of law" — the very spirit of the constitution we inherit — does not confine itself to judicial controls. It demands that power and responsibility should never be separated. All of the checks and balances built into government administration are devices, not to supplant ministerial responsibility, but to facilitate the discharge of executive responsibilities that are as large as the awesome powers to which they correspond. Parliament, to share those responsibilities more fully, must gain public acceptance of a different scale of priorities, so that the important, but low profile, tasks of parliamentary committees can receive a larger share of members' energies and attention.

Thirdly, there is the matter to which I first referred. The development of the New Zealand constitution is important for us precisely because we have become in the full sense responsible for our destiny as a nation. We have grown up in the shelter and the comradeship of Great Britain and the Commonwealth; but now, if we would wish to remain independent, we must learn to stand upon our own ground. Despite the ties of law and language and culture, we have now a separate heartbeat from the United Kingdom; and the forces that frame our destiny are not primarily those of western Europe. We have far greater affinities — but less sense of identity — with the people of Australia; and we need to find a new balance between these two cardinal points of external reference. We need to make the most of ourselves, and of the awakened Maori consciousness, with its eloquent and insistent plea for recognition and respect and partnership. We need to see the outside world — with all its problems and divisions — as an environment in which we can prosper, if we will only be ourselves. When our government gives a circumstantial account to the United Nations of the observance of human rights in New Zealand, it is an exercise in objective self-appraisal. The duty we owe to the international community as one of its more fortunate members is the same duty we owe to ourselves. For New Zealand — as for the United Kingdom and for others — our international obligations in the field of human rights are a guideline and an incentive to constitutional self-improvement at home.

II. THE WESTMINSTER TRADITION

Constitutional development is a slippery subject, hard to get by the tail. National constitutions, however much they may differ one from another, are sets of rules that organise and discipline the functioning of a state. Traditionally, English lawyers have not worried about the problem of first causes: for them it is enough that authority can be found in Acts of Parliament and decisions of the courts. This, one might argue, is an abandonment of responsibility: the lawyer simply leaves to others the questions that are too profound. The truth, however, is that the lawyer's dogma enshrines the first principles of democracy. "The King", said Lord Chief Justice Coke in 1611, in the most momentous judgment ever delivered by an English court, "cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament".[1] Under Parliament, the protection of the

1 *The Case of Proclamations* (1611) 12 Co. Rep. 74, 75.

citizen against the misuse of power would depend, not on the discretion of the great officers of state, but on "the artificial reason and judgment of law",[2] administered by the courts.

In the seventeenth century, Bench and Bar were front-line troops in the fight for democracy, taking their full share of casualties; and often lawyers became members of Parliament to ensure that the legislature upheld the integrity of the Common Law. After the passage of the Bill of Rights in 1689, the different and complementary roles of the three branches of government seemed well-established — so well, indeed, that Montesquieu's[3] interpretation of the seventeenth century English constitution could give rise to the distinctively American version of the doctrine of the separation of powers. In England, however, in the eighteenth and nineteenth centuries, the courts held to their own ground, making a virtue of the distinction between law and policy; and it was left to the philosophers of government to monitor the changes that were occurring in the relationship between Parliament and the executive. It is therefore no accident that Bagehot, the foremost exponent of the modern English constitution,[4] was not a lawyer. The courts obeyed Parliament and controlled the King's ministers; but it was no business of the courts that, through the cabinet system, the King's ministers were beginning to control Parliament.

So the stage was set — in regard to New Zealand and to other countries that inherited the Westminster system, as in regard to the United Kingdom itself — for a new period of constitutional instability. As the leaders of a loyal parliamentary majority, the executive government can wield an authority more absolute than that of any English King, combining legislative power with a centralised administration, and affecting almost every aspect of the citizen's daily life. Slowly, in terms of an individual lifespan — but quickly, in terms of the historical pace of constitutional change — the institutions of government have begun to adapt to the needs of the modern situation. The courts, mainly in the last thirty to forty years, have extended their techniques and refined their practice for reviewing the exercise of powers delegated by Parliament. Parliament, for its part, has created a network of quasi-judicial authority, charged with making decisions or recommendations in the vast areas in which the ordinary course of policy-making and administration may vitally affect private interests. There remains, however, a no-man's-land, in which constitutional principle yields no certain guidance. What limitations should the constitution place upon the legislative discretions of a sovereign Parliament?

Until the nineteenth century extensions of the franchise, leading to the rise of modern political parties and to the growth of the state's responsibilities in all the field of economic and social welfare, this would have been considered a frivolous question. The judges' respect for the will of Parliament was matched by Parliament's respect for the Common Law and for the independence of the judiciary: if Parliament intervened at all in matters affecting the judicial pro-

2 *Prohibitions del Roy* (1607) 12 Co. Rep. 63, 65.
3 *L'Esprit des Lois* (1748).
4 *The English Constitution* (1867).

tection of the private citizen from acts of power, its purpose was usually to reinforce Common Law principles and procedures. Less than a century ago, Dicey — still the greatest of modern English constitutional lawyers — could enunciate the twin principles of the rule of law, and of the sovereignty (or supremacy) of Parliament, as the pillars of the English constitution;[5] but he was in no doubt that this was a limited explanation, governed by what Coke had called "the artificial reason and judgment of law". For the sake of its own clarity and effectiveness, the law chose to know nothing about the play of political forces which moulded legislation.

So far I have given an orthodox account, in terms appropriate to an English or New Zealand constitutional lawyer, of the dilemma of the modern Westminster-style constitution: the legal dogma that saved democracy in the seventeenth century betrays it in the twentieth century. At best, the powers of a sovereign Parliament, dominated by one political party or another, are subject to electoral control only in matters of such overriding public concern that they may sway the outcome of a general election. This undifferentiated, political control reduces to an aspect of team play the individual responsibilities of ministers to Parliament; and it also encourages the provision of indemnities for the illegal or tortious consequences of any official action taken in good faith.

Legal doctrine had, therefore, to be rescued from the ignominious premise that the constitution placed no limits on the discretions of an organised Parliamentary majority. Dicey himself had made the all-important first move, by identifying a body of rules which he described as constitutional conventions.[6] Many things that were not illegal were nevertheless unconstitutional. The rules that the courts administered, found in statute or in Common Law, were supported by other rules which the courts could not directly enforce. The very mainsprings of the modern constitution — that is, the rules that the Crown has a duty to act on ministerial advice and that ministers are collectively responsible to Parliament — were contained only in conventions. As Bagehot had discovered, the "efficient secret" of the constitution was the cabinet — a body unknown to statute or to Common Law — which united the executive and legislative branches of government and ruled the country in the Queen's name.[7] After Bagehot's time, Parliament, now organised on party lines, lost its ascendancy over the executive government.

How, then, should New Zealand deal with a problem which, in greater or less degree, affects all countries with parliamentary constitutions of the Westminster kind? There is already in New Zealand some support for a "written" constitution — or, at any rate, for a Bill of Rights that binds Parliament and is enforceable by the courts. All Commonwealth countries which have attained independence since the Second World War have "written" constitutions; and these constitutions bring within the jurisdiction of the courts some matters which, in the United Kingdom or New Zealand, are governed only by constitutional convention. Because Canada and Australia are federal states, and must regulate the distribution of

5 *The Law and the Constitution* (1 ed. 1885), Parts I and II.
6 Ibid. Part III.
7 Op.cit. supra n.4, Ch. I.

powers between their central and regional authorities, they, too, have "written" constitutions — and, in the case of Canada, a new Charter of Rights. In some of these constitutions there are guarantees of individual rights, though they have often been conceived as restrictions on legislative power, rather than as substantive rights.

The Parliament at Westminster — the original law-giver, from which the legislatures of most Commonwealth countries derive their own law-making capacity — has sent each member of the "new" Commonwealth out into the world, not only with a Parliament of its own, but with constitutional rules which bind that Parliament until changed in accordance with whatever special procedure has been provided. New Zealand has done the same for Western Samoa, for the Cook Islands, and for Niue. Yet, in the United Kingdom and in New Zealand, though nowhere else in the Commonwealth and in few countries outside it, there is a complete absence of "entrenched" rules and formal procedures to restrict the sovereign will of Parliament.

As New Zealand is apt to rely in all matters upon the United Kingdom's example, it is worth emphasising that responsible legal opinion in that country is no longer content with the existing situation. Fifteen years ago, the present Lord Chancellor, Lord Hailsham, then a front-bench member of the parliamentary opposition in the United Kingdom, said that Parliament had become "virtually an elective dictatorship. The party system", he added, "makes the supremacy of a government like the present, automatic and unquestioned."[8] Later, in office, Lord Hailsham expressed a much more reserved opinion — as did Lord Gardiner, when holding office as Lord Chancellor in a Labour Government.[9] Ultimately, both of these eminent lawyer-politicians have declared themselves in favour of a break with tradition; and Lord Justice Scarman, in his 1974 Hamlyn lectures, has made an extended and cogent plea for a new Bill of Rights[10]; but legal and political opinion remains deeply divided, and the controversy has not aroused great public involvement.

There are special elements of drama in the British situation. As a party to the European Convention on Human Rights, the United Kingdom is bound by regional arrangements that enunciate human rights, and provide supervisory and judicial machinery to ensure compliance with convention requirements. The jurisdiction of the European Court of Human Rights can be invoked by a private petitioner in the United Kingdom; and the court's judgments decide whether, in any given case, the member state concerned is complying with its obligations under the convention. In substance, therefore, the United Kingdom Parliament, as well as the courts and the executive government, are bound by the European court's decisions. Yet the whole weight of legal and constitutional tradition shrinks from reflecting in English law a situation that places a judicial

8 Quintin Hogg *New Charter* (1969) quoted in Zander, *A Bill of Rights?* (British Institute of Human Rights, London, 1975) 9.
9 See Zander op.cit. 10-11 and 9.
10 Scarman *English Law — The New Dimension* (Stevens, London, 1974).

authority above Parliament. In terms of inherited constitutional doctrine, such a change appears to be revolutionary; for the English constitution rests ultimately on the existing, time-honoured, "unwritten" relationship between Parliament and the courts. It is as if an irresistible force had quietly — very quietly — come up against an immovable object.

III. SOME COMPARISONS BETWEEN THE BRITISH AND NEW ZEALAND SITUATIONS

With the action stopped and tensions mounting, this seems the right moment to look more closely at the similarities and differences between the British and New Zealand situations; but, before we do so, there is room for a word of warning. A constitution, like a house, is more than a roof over one's head: it is a design for living. We are therefore concerned, not only with deciding what constitutional rules may be desirable and within our reach, but also with appraising the motivation to adopt such rules, and to make them work. In the flush of new constitutions, put in place since the Second World War, this question of motivation has often been overshadowed, because the adoption of the constitution was a step on the road to independence; but many a newly independent state has not succeeded in making its first constitution work.

In some ways it is an even more difficult matter to renovate an existing constitution, which is familiar and precious to the people to whom it belongs. After all, constitutions are supposed to last, and to grow with the communities they serve. That is especially true of constitutions built on the Westminster model, in the days before "written" constitutions became a universal requirement. In 1920 this was explained grandiloquently by the Lord Chancellor, Lord Birkenhead, in a Privy Council opinion that is as true of New Zealand as of the Australian states to which it refers:[11]

> It was not the policy of the Imperial Legislature, at any relevant period, to shackle or control in the manner suggested the legislative powers of the nascent Australian Legislatures. Consistently with the genius of the British people what was given was given completely, and unequivocally, in the belief fully justified by the event, that these young communities would successfully work out their own constitutional salvation.

In principle, therefore, the British and New Zealand constitutions are rare survivors of a kind of constitution that does not need formal amendment, because no part of the constitution is protected against the normal processes of legal change. Our constitution fades into the rest of the legal system, and its boundaries are not marked. (This causes a problem for the compilers of the New Zealand Official Yearbook, who pad out the short section on the constitution with a detailed statement of the salaries and allowances currently payable to the members of the executive and of the legislature.) The whole of our legal system — that is, the laws made by Parliament or under its authority, the Common Law as declared by the judges, and the conventions of the constitution as practised by all the actors in our public life — has as much capacity for growth and

11 *McCawley* v. *The King* [1920] A.C. 691, 706.

change as does the human body between birth and dying. Moreover, some processes of constitutional change are already hard at work in New Zealand.

Nevertheless, in English legal theory, the price of all this flexibility is the fixed relationship between Parliament and the courts. Because the constitution was self-generating, taking shape as the attributes of the Crown were slowly distributed among the three branches of government, there is in English law nothing more fundamental than this unchanging relationship. It is true that Lord Chief Justice Coke and his predecessors saw the position differently, regarding the Common Law as the embodiment of universal reason, and therefore superior to statute,[12] which merely solemnised arrangements that suited men's convenience; but this view did not outlast the revolutions of the seventeenth century. It is a maxim of the modern constitution, often acted upon by the courts, that a sovereign Parliament can in law do anything except bind its successors —for, if it could do that, succeeding Parliaments would have lost their sovereignty. The effect of the maxim is that neither Parliament nor the courts can bring about a constitutional change which obliges Parliament to leave the final decision on any matter to the courts. This is, of course, one of the cardinal differences between the British and American forms of government; for the Supreme Court of the United States, as the guardian of the American Constitution, judges the validity of the acts both of the executive and of the congress.

Because the recognition of Parliament by the English courts arose independently of statute, it is not certain that the courts in the United Kingdom would feel able to act upon any statutory provision which changed the ultimate definition of the Westminster Parliament. In the cases of other Commonwealth countries, it is, however, now well-established that, subject to any special requirements of the particular constitution, the plenary powers of Parliament extend to re-defining its own legislative authority, and to changing its own composition. New Zealand's sovereign Parliament has done both; and the abolition, thirty years ago, of its own upper house has not caused any question of invalidity to be raised in the courts. By the same process in reverse, New Zealand's unicameral legislature could fetter its own sovereignty — for example, by requiring that the whole electorate constitute a second chamber to approve or reject by referendum certain classes of bills, after their final passage through the House of Representatives. This was, in effect, done validly by the Parliament of New South Wales in one particular context, fifty years ago.[13] It would seem that in New Zealand there is a constitutional convention, which no government in power has ever been tempted to break, against the use of a Parliamentary majority to fetter the discretion of a different majority in a subsequent Parliament. If "entrenching" legislation of this kind were ever to be passed without violating the constitution, it would appear that the pre-condition must be virtual unanimity in Parliament, and near-unanimity in the country at large.

It could be argued that this particular difference between the British and

12 *Dr Bonham's case* (1610) 8 Co. Rep. 113b, 118a.
13 See the resulting litigation, *Attorney-General for New South Wales* v. *Trethowan* [1932] A.C. 533.

New Zealand situations is indicative of a more general difference: we live more dangerously than the British, because — at least until very recently — our unreasoned confidence in the adequacy of the Westminster model has been unshakable. As I have just noted, we rely upon constitutional convention in a fundamental matter which may in the United Kingdom be safeguarded by the courts. We have dispensed with the precaution of an upper house of Parliament, which at least ensured that the general public would have a little more time to consider the implications of fast-track legislation. We are without the umbrella of the European Convention on Human Rights and its adjudicative machinery, which guarantees that English law will respect the standards of a Bill of Rights binding Parliament, even while English law does not itself incorporate these standards. Furthermore, the relatively small New Zealand community has not the reservoir of authoritative opinion, organised on all-party or non-party lines, that is brought to bear in London on any critical constitutional issue.

IV. CONSTITUTIONAL CONVENTIONS AND COURT-ADMINISTERED LAW

The next questions then suggest themselves: how justified is our faith in constitutional conventions, and what might be gained by moving to substitute an "entrenched" or fundamental law, administered by the courts? Some of the key constitutional laws are those which decide how other laws will be made. We accept, for example, that a political party's right to govern is determined by the number of seats gained in Parliament, not by the size of the popular vote. We accept that draft legislation becomes law if it gains the support of the majority in the House of Representatives, even if the result turns upon one member of Parliament crossing the floor. The orderly transaction of the state's business depends upon public acceptance of the applicable process, even in the cases in which the process works unconvincingly.

Constitutional conventions temper the rigour of the law, at the expense of absolute precision in its application. There have been cases, both in the United Kingdom and in New Zealand, in which governments have used parliamentary majorities to pass legislation prolonging the life of the existing Parliament; and in dire emergency the discretion is valuable. We can, however, be reasonably confident that the government which now used this power in a partisan or high-handed manner would, in New Zealand, court rejection when it did meet the electors, and disorder if that meeting was long delayed. On the basis of very limited precedents in other Commonwealth countries, we may be a little less sure that a government facing electoral defeat would not be tempted to steal a march on its successor in some unconstitutional way. Nevertheless, the Governor-General's own duty to act on the advice of ministers is also based only upon convention, and does not tie his hands if ministers persist in a manifestly unconstitutional course of action. In the nineteenth century, colonial governors in New Zealand and elsewhere have declined advice to make appointments to the upper house of Parliament, when the advice was tendered by ministers who had soon to face the electors.

We have, then — as lawyers have been broad-minded enough to recognise, in the century since Dicey first drew attention to the point — two kinds of

constitutional rules, one kind being enforced by the courts, while the enforcement of the other kind is finally in the hands of the electors. The difference in function of the two kinds of rules could be very roughly represented as the difference of function between the referees or umpires in football or cricket matches and the supporters of the game. The code would not prosper if the public were to lose confidence in the way the game was played. Therefore any widespread dissatisfaction will have its influence, not only when the rules of the game are under review, but also in the attitudes and conduct of administrators and players. There will be things that are not done, though they do not feature in the rule book. Yet nothing will replace the hard-edged decisions of the referee or umpire as to the observance of the rules that govern play.

It is not easy to make a persuasive case for "entrenching" rules that are usually observed as constitutional conventions. If, for example, we wish to codify the rule about the three-year maximum term of Parliament, we must either have an elaborate provision which may invite litigation, or we must forego the possibility of postponing an election in a crisis situation. We would also reduce the possibility that, when there is greater confidence in the working of our constitution, a four-year parliamentary term could be tried. In the same way, there is no real occasion to ask the New Zealand people for a final vote of confidence — say, by a two-thirds majority of all electors voting in a referendum — in the present structure of our Parliament. Admittedly, there would be little support at present for any change in that structure, but we should remember Lord Birkenhead's advice about trusting those who follow us.

More generally, the Westminster constitution has proved over the centuries its capacity to meet new situations, evolving in ways that reflect the genius of the people for self-government, rather than the deliberate planning of experts. Even now, it has not been shown that there is great advantage in the attempts that have been made to embody in a formal constitution the rules governing the selection of a Prime Minister, and the extent of his right to remain in office or to seek a premature dissolution of Parliament. More than one government has found it disconcerting that constitutional laws which were intended to codify existing practice have produced a different result. That is almost inevitable, because convention leaves some latitude for "the good sense and political sensitivity of the main actors called upon to take part" — the words are Lord Radcliffe's, delivering the opinion of the Judicial Committee of the Privy Council in the leading case on this subject; but, once embodied in a constitution, "it is in the end the wording of the Constitution itself that is to be interpreted and applied" by the courts.[14]

It would be wrong to suppose that we are now speaking only of the rarified matters that are likely to reach the highest courts, and to involve the highest office-holders in the state. Every public servant who makes, in the ordinary course of duty, a decision involving an exercise of discretion — for example, about the application of the criteria governing the priorities for tenure of a state house — is expected to act impartially and objectively, but also with "good

14 *Adegbenro* v. *Akintola* [1963] A.C. 614, 628, 632.

sense and political sensitivity": in other words, within the applicable rules, he must weigh up, as best he can, both the human situation and the tenor of government policy. Against a background of ministerial responsibility to Parliament, administrators must make decisions which in sheer volume, complexity and cost would overload any court system; and, in general, they make those decisions better than any court system, because the administrators are not tightly bound by "the artificial reason and judgment of the law".

This is the very heart of the distinction between statute or Common Law, administered by the courts, and constitutional convention. Statute and Common Law can afford to stand back a little, because no-one in authority is free to do whatever the law allows him to do. Within the ambit of statute and Common Law, everyone in authority is accountable to Parliament and the people for the way in which he exercises the powers and responsibilities of the official position he occupies. It is never an answer for him to say, "The courts are the keepers of my conscience, and the law has not found me out." This is one of the great gifts of the modern Westminster tradition, and there can be no question at all of deliberately departing from it.

As the volume and variety of public administration has grown, more and more steps have been taken to set up, within the executive branch of government, authorities with quasi-judicial or semi-judicial functions. Sometimes their purpose is to make final decisions within a context more specialised than that provided by the ordinary courts. Sometimes — and this is the case of the ombudsmen — their function is advisory; and their aim is to ensure that official discretions are exercised sensibly, sensitively and with reasonable uniformity. The guidance they give helps to maintain the standard of administrative decision-making, provides redress or reassurance for individuals who believe their interests have been adversely affected, and draws public and parliamentary attention to areas of weakness.

These aims are powerfully supported by New Zealand's most recent legislative venture in the constitutional field — the Official Information Act 1982, which is designed to expose the workings of government to the public gaze, insofar as that can be done without destroying the necessary confidentiality of relationships between ministers and their advisers. This new legislation requires of the Chief Ombudsman a judgment of Solomon in balancing the claims of openness and confidence. For the present, it is enough to say that the discussions surrounding the workings of this Act give a sharper definition to the problem of finding the proper dividing-line between the spheres of judicial and administrative competence.

The older pattern of relationships between ministers and public servants has lost much of its coherence. One minister stresses the privacy of the advice which it is his responsibility to adopt or reject. Another minister distances himself from his department, noting that, on a particular matter, the department's view was allowed to prevail; but now he is asking the same question again, and will reconsider his position when he has the department's response. Cabinet and parliamentary committees cut in upon the private line between a minister and his department. A party leader in opposition is sufficiently uncertain of the

prevailing *mores* to announce that, in government, his party will require the resignation of any permanent head who is unable to go along with its policies.[15] Probably in New Zealand we have already gone too far ever to reinstate the simple doctrine that a minister and his department are one.

The dilution of ministerial responsibility is of key significance to the issue that I have been discussing. It is one thing to establish tribunals and other quasi-judicial authorities in order to strengthen and systematise the administrative processes for which ministers take responsibility. It is quite another thing to use these tribunals and authorities as a more pliable alternative to control by the ordinary courts. The members of administrative tribunals and similar authorities are appointed for short terms — often three years — and have no security of tenure. Their decisions, if binding, relieve ministers of responsibility for the course followed, and offer them the luxury of publicly dissenting from an unpopular decision. There may also be public pressure not to reappoint the current members of such a tribunal, when their terms expire. Yet the very justification for the tribunal may be the need to remove decisions that vitally affect individuals from direct political control and public prejudice.

It is less easy to characterise the situations in which the tribunal or other authority has an advisory function. Ministers are fully entitled to reach their own final decision, when the legal and political responsibility rests with them. In a new situation, such as that created by the Official Information Act 1982, there are so many questions of principle at large that a settling down period is inevitable, and differences of opinion are wholesome. We have made ourselves a laboratory for one important kind of constitutional reform. Nevertheless, it seems clear enough that the counterpart of this effort is to place equal emphasis upon enlarging the role of the courts. The constitutional conventions that underpin our democracy should be safe in the care of public opinion and the ballot box; but this control is too broad to ensure, on its own, that individuals and minorities receive justice. Canada has very recently acted upon that view, by establishing its own Charter of Rights.

V. THE BURDEN OF NATIONAL SOVEREIGNTY

Now I must widen the frame of reference, so that we may consider New Zealand's place in the world. History and geography have given these islands and their inhabitants a separate national identity. Until twenty or thirty years ago, we could bear this responsibility lightly, because New Zealand's relationship with the United Kingdom was congenial, comprehensive and not in the least cramping. As a founding member of the League of Nations, this country had achieved in 1920 an international personality, and a voice — used sparingly — in world affairs. In the years between the wars, there were corresponding changes in the constitutional status of the "old dominions", culminating in the passage of the Statute of Westminster 1931. Canada and Australia were the instigators of these constitutional changes — New Zealand would not have been content

15 See the 1984 annual report of the State Services Commission.

with less than they, but did not share their need for equality of status with the United Kingdom.

In many ways New Zealanders were sturdily provincial. While the "home boats" continued to carry all our exports to England, we needed no other market. Internal self-government, and a fair share of influence in Commonwealth and regional affairs, including questions of trade, covered most of the situations in which we wished to speak with a distinctively New Zealand voice. In other, larger concerns we were not disfranchised; for we knew ourselves to be British subjects as well as New Zealand citizens. London was our capital of the heart, the place of residence of our sovereign, the well-spring of our culture, the seat of our highest court, and the destination of most New Zealanders who felt a personal or professional need for the life and opportunities of a metropolis. Some of our people continued to find careers in the British armed forces or colonial service. Our media, fed by the international news agencies, told New Zealanders how British representatives had spoken or voted at international meetings, seldom stopping to enquire whether New Zealand was also represented.

Of this seemingly secure environment, hardly a shred remains. After several centuries of world responsibility, the United Kingdom has returned to Europe. Freedom of trans-frontier movement is now shared by Britain, not with Commonwealth countries, but with its partners in the European Economic Community. The bonds of the community are more rigid than the old ties of Commonwealth: some elements of sovereign discretion have passed from London and other capitals to the headquarters of the community; and decisions of competent community organs leave their mark upon the common law. New Zealand trade flows to Britain in diminishing quantities, under the arrangements permitted by the European Economic Community. We have responded to the change in trading patterns, learning rapidly to become self-reliant in everything that concerns diversification of export produce and overseas markets, and finding a measure of security in an agreement for closer economic relations with Australia.

It has not, however, yet been fully realised that the massive changes in our international environment render constitutional development both more necessary and more difficult to achieve. No country can arrange its international environment to suit its own preferences; and no country can prosper if it fails to meet the challenge of that environment. Both in the United Kingdom and in New Zealand, the need to make these adjustments entails a psychological strain. For the United Kingdom, independence and interdependence are now like two aspects of a reversing figure: the European regional organisations to which it belongs obey the collective will of the member states; but they impose that will on the individual member states. For New Zealand, the easy blend of dependence and independence that marked the old relationship with the United Kingdom has gone for ever; and that kind of loose linkage would be hard to achieve in a bilateral relationship between New Zealand and Australia.

For the United Kingdom, the choice has been made: for New Zealand, there are elements of choice still to be exercised. Several months ago, the former Deputy Prime Minister of Australia, Mr Anthony, touched on this matter in remarks made at the time of his retirement from public life. His reported

conclusion — no doubt tempered by his earlier, private soundings during a recent visit to this country — was that "political union, if it ever came, was still many years off". The truth is that we were far too long an "old dominion", enjoying a nominal parity with the young giant across the Tasman, free to mingle and not to merge. The right to mingle is now more important to us than ever before; for New Zealanders, who once were able to make their home and careers in the United Kingdom or other parts of the Commonwealth, now have an open door only to Australia. Without making too much of the parallel, there is some resemblance between the way in which South Pacific Island countries look to New Zealand, and the way in which New Zealand looks to Australia. The smaller country needs the stimulus of interaction with the larger, and yet fears the draw-off in people and talent and national vitality.

Mr Anthony, instancing the United Kingdom's experience in Europe, made the sound point that closer economic relations lead naturally to closer political relations. If New Zealanders wish that closer relationship to take a form other than political union within the framework of the Australian federal constitution, it will rest with them to produce a viable alternative. There is no reason to suppose that Australia will exert any deliberate pressure to narrow New Zealand choices. Australia's interest lies in a stable and prosperous New Zealand, sufficiently like-minded to pose no threats to Australian policies, and sufficiently different to add something to the Australian mix. At times — and notably when New Zealand gave a lead in Pacific decolonisation, while Australia fumbled with the huge problems of Papua-New Guinea — we have come close to meeting these criteria.

Whether we put the emphasis on self-sufficiency or on compatibility with Australia, we have to learn, and inwardly digest the knowledge, that we are citizens of a small country. In relation both to the Falklands crisis and to sporting contacts with South Africa, Australia — under its present government and under the previous one — has shown a greater awareness than we that standing and influence in world affairs depend on the whole of a country's conduct. This is not a matter of bending before every wind that blows: it is more a matter of integrity, in the original sense of the word. Foreign and domestic policy cannot be kept in separate compartments. Our increasing concern with disarmament issues in the United Nations, reflecting an active public opinion in this country, is therefore a sign of maturity: we have something authentic to say, because we are speaking both to a home audience and to an international audience, and because we have tried to combine home-grown opinion with the best assessment we can make of the international situation.

In the continuing British debate regarding a new Bill of Rights, the constitutional and international aspects are never separated. It is generally agreed that such a Bill should follow the standards established by the European Convention on Human Rights, which also meets the requirements of the corresponding United Nations treaty — the International Covenant on Civil and Political Rights. This is, of course, partly a matter of convenience, so that compliance with the international obligation is more easily established, but it is also a recognition that the content and drafting of a domestic Bill of Rights could be

an extremely contentious matter, if there were not an international standard to invoke. As to the method of establishing the Bill in domestic law, Lord Justice Scarman has drawn attention to sections 2 and 3 of the European Communities Act 1972, which acknowledge the existence of a source of law, and a court, not controlled by the British Parliament.[16] This precedent, by which the sovereignty of Parliament yields to the obligations contained in a treaty — but without any final surrender — could, as Lord Justice Scarman observes, have been similarly applied in relation to international obligations in the field of human rights.

Although New Zealand cannot become a party to the European Convention, it is bound by the International Covenants on Human Rights adopted by the United Nations General Assembly in 1966. In 1983 the New Zealand Government submitted to the committee established by the International Covenant on Civil and Political Rights a first comprehensive report upon New Zealand's compliance with that instrument.[17] This provides another excellent example of interaction between constitutional measures and international standards. Every state that becomes party to a treaty of this kind accepts that it is answerable internationally for what is done in its own country to carry out the requirements of the treaty; and, in the course of answering, it has the necessary incentive to look closely at its own performance. The only disappointing aspect of New Zealand's reporting is, once again, that the steps taken in pursuance of an international obligation create hardly a ripple of domestic interest, because the action takes place outside the range of New Zealand's news gathering.

It is because New Zealand is a sovereign state that the question of constitutional development assumes special importance. Membership of the international community creates a tension which can be invigorating or totally destructive. We have, in principle, no need to be defensive: in most respects, our record will stand up to international inspection. But when we do become defensive, enquiring endlessly why our case should be examined when others have more of which to be ashamed, we put ourselves at risk. It is then only one further step to the point at which people appeal to organised international opinion against conditions in their own country, and those who believe that they are upholding United Nations principles are denounced for disloyalty in doing so. Ignorance, rather than bad intention, is the root cause of these situations. The best cure may be to import relevant international standards into our own laws and procedures, so that they do not have the character of an unexplained, foreign interference in our domestic affairs.

VI. THE IMPORTANCE AND THE EMPTINESS OF RULES

Lawyers deal in laws, and laws are only rules. Rules are observed because people believe in them, or because they are so much a part of our experience that we take them for granted, or because the practical inconvenience of not

16 Scarman, op.cit. supra n.10, 21-27.

17 See Ministry of Foreign Affairs, Information Bulletin No. 6 (January 1984), *Human Rights in New Zealand*. This contains the Civil and Political Rights Covenant, the New Zealand Report on it and a presentation of the report to the Human Rights Committee.

observing them is too great. In discussing the advantages of a "written" constitution, or a Bill of Rights binding Parliament, one must avoid the fallacy that some new pledge, taken by majority vote, can cure dissension and disaffection within our own society. A proposal for a Bill of Rights, which has the favour of one main political party and the disfavour of another, is already moribund. Unity cannot be imposed — and that is especially true in our society; for we are among the minority of states that places no reliance on a military or paramilitary force to guarantee internal order. In countries in which education and living standards are low, or in which ethnic or tribal or religious antagonisms are deep, democracy has no recourse except reliance on organised force, striving to ensure that it is used benignly and remains a servant, not a master. In New Zealand, however, before that stage was reached, we would have lost whatever aspirations we may have to separate statehood.

Therefore we cannot hedge our bets. We are committed to government by consent of the governed; and that consent is based upon reason and habit. To satisfy reason, we have to provide better means for people to evaluate the actions and processes of government; and we have to be able to show that these actions and processes embody a sense of fairness. To satisfy habit, we must ensure that change is evolutionary — that our institutions are true to their own spirit, even while they are changing. The themes of this lecture attempt to meet those criteria, tracing the tradition of Parliamentary government according to the Westminster model, and its gradual unfolding to meet the needs of a modern society. I have tried to show also that, in New Zealand's case, sovereign statehood introduces another new element, as large and as challenging as any of the changes that have gone before. Each of these changes has been in its time a cause for alarm — the greatest of the liberal constitutionalists of the eighteenth century believed that universal male suffrage would bring ruin in its train, and the same idea in relation to women lasted more than a century longer.

The agency of change is a spirit of discontent moving through society. Though free and regular elections are an essential means of channelling such discontent, no important constitutional change ever depends upon a majority vote in an election or referendum. The extensions of the franchise required the protest of the disfranchised. The advent of the welfare state, and the growth of taxation, were responses to a rising tide of insistence that freedoms in a democratic society could not be limited to their negative side: a share in social and economic opportunity was also an essential ingredient. Even the United Kingdom's entry into the European Economic Community — perhaps the most momentous constitutional change in England since the Norman conquest — was decided neither by the electorate nor by the government of the day: after much canvassing, the issue was determined by a free vote of the House of Commons. In Canada the new Charter of Rights is the product of a bargain between federal and provincial leaders. Constitutional development is never a simple matter of choices: it is more a matter of instinctive adaptation to a changing environment; and the role of intelligence is not to frustrate instinct.

Bearing these things in mind, and remembering that constitutions are as devoid of function as an empty seashell unless there is life within them, I think

we can be grateful for the manifestation of Maori discontent that has attached itself to the annual celebration of our national day at Waitangi. It brings together so many of the elements in the composite situation that we have been considering. If New Zealand has a destiny as a separate nation, rather than as a detached part of Australia, it will be principally because these islands were a meeting-place of two great races, and because — even in the worst times — their dealings with each other never lacked a certain grandeur. It is, of course, a flawed record; but the world has no better record and can ill afford to lose this one. In return, the theory and practice of the modern international law of human rights can reinforce our resolution to do whatever may be needed to reduce, and finally to eliminate, margins of disadvantage suffered by the Maori and island peoples in health, in education and in professional and other attainments. In richness of culture, they will have the advantage; but it will be a shared advantage, for Maori cultural tradition has never been exclusive.

Protest is the yeast working in our society or in world society, provided in either case that the protest is made within a framework of superior loyalties. If the proviso is disregarded, and the protest amounts to outright rejection, it can only be a step on the road to anarchy. Every day's news stories tell us about societies that are travelling that road, with no goal in sight except an equality of devastation and squalor. Often the excuses amount to special pleading: why should we observe the rules when others do not? Why should we mind what African countries feel about sporting contacts with South Africa, when all kinds of excesses have occurred elsewhere in Africa? Why should we not denounce the observance of Waitangi Day, when the provisions of the treaty have not been observed? There is no human achievement that is proof against this form of attack, because progress is always uneven and imperfect. The judges of the seventeenth century helped to ensure the sovereignty of a Parliament in which only wealth and rank were represented. Neither the principle of the rule of law, nor all the safeguards of fair trial, prevented eighteenth and nineteenth century judges from passing savage sentences on men who stole loaves of bread to feed their starving families.

Yet consider, for example, the civil rights revolution which took place in the United States in the period after the Second World War. To us it seems hardly believable that, under Jefferson's constitution and the tradition of the common law, American citizens could, in their own country and in the mid-twentieth century, be subjected, by reason of their race and colour, to the petty insult of segregated seating in public transport and elsewhere, and to more serious victimisation, for example, in relation to schooling and to the exercise of voting rights. Here, you might suppose, was ample cause of alienation. Yet victory could be snatched out of the jaws of defeat, because the protesters had positive goals within their own society, and because the United States could mobilise its constitutional strength on the side of justice.

The international order does not yet have this constitutional strength. Double standards are all too often the order of the day; but that is not a sufficient reason for any New Zealander to complain. If there were more fairness in the world, something of our privileged position might be lost. Fortunately for us,

such world order as we have is based upon rights of sovereignty, and therefore supports the title of our three million people to remain unmolested in these magnificent islands. In return, we owe the world some ground-rent; and, if our attitudes are sensitive and sincere, our standing in the international community will be good. Our Maori people are equally well-placed to obtain justice and recognition within their own country. After the land wars of the nineteenth century, and the physical and cultural decline of the Maori people extending into the present century, the ceremony at the treaty-house loses nothing by sharing centre stage with a large and vigorous contingent of a people revitalised, holding their language and their culture and standing upon ancestral rights.

It is true that in 1984 the meeting with the Governor-General — the symbolic coming together of the races — narrowly failed to take place. Much the same might be said about New Zealand's rendez-vous with the outside world; and it remains a possibility that this country, like the hikoi, could melt away, its mission uncompleted. Nevertheless, it seems more likely that the spell will be broken; for there are ample indications that the old greatness of spirit lies just below the surface. When the first European settlers came to New Zealand, they brought with them everything except the stratified class society of England and Europe. The characteristic New Zealand demand, now taken up by the Maori, was always for fairness and equality of opportunity — an affirmation of the intrinsic worth of every human being, found also in the Universal Declaration of Human Rights. It is to that demand that discussions of constitutional development should be addressed, looking within and beyond the traditional areas of constitutional law.

VII. CONCLUSION

In opening up areas of discussion, I have suggested that there are three, rather than two, great themes to be pursued: the role of the courts; the role of constitutional convention, and of all the processes not judicially administered; and the impact upon constitutional development of the international environment: the third of these major trends could provide a catalyst in the re-balancing of the other two. Treaty obligations bind all the organs of the state, including Parliament; and it is now commonplace for states to accept treaty obligations relating to the way in which they govern their own citizens.

Nearly all states are attracted to international standards, when reformulating their own laws relating to the protection of human rights. The trend is of potential value to us, because it offers an ample source of persuasive precedent.[18]

18 It is very much in this context that Professor Quentin-Baxter saw the idea, mentioned in Professor Keith's paper, of a relevant treaty arrangement with Australia. The arrangement might relate as well to the Treaty of Waitangi, and might extend to South Pacific countries. The idea is, as ever, a stimulating and fundamental one.