

**London School of Economics and Political Science**

***Becoming National: Contextualising the Construction of the  
New Zealand Nation-State***

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### **Abstract**

Much legal literature on constitutional change in New Zealand presumes that the NZ state has been transformed from a dependent British colony into an independent, liberal nation-state. However, this nationalist narrative is a recent development, and is only one of three narratives of constitutional change, the other two being a 'Britannic' (or pan-British) narrative and a Maori narrative. All three suggest and justify a particular form of the NZ state. All three give an incomplete picture of NZ's constitutional history, separating 'law' from its various contexts.

This thesis focuses mostly on the nationalist narrative, how it emerged and how the liberal nation-state became the only acceptable form for the NZ state to take. It attempts to provide a more nuanced approach to constitutional history. This is done by a broad examination of a number of subject areas: constitutional historiography, the economy, citizenship, NZ's relationship with the Privy Council, the Crown, and various constitutional developments (in particular, proposals for bills of rights) in the periods 1950-1970 and 1970-2005, and placing legal signposts in economic, historical and political context.

Greater contextualisation suggests that asserting that the NZ nation-state is inevitable is a response to the fragility of NZ's present, brought on by the collapse of empire, the emergence of a community of nation-states, and domestic change. The emergence of the liberal constitutional nation-state in NZ is better seen as the contingent product of both various structures (international, British and domestic) and choices made by New Zealanders themselves. To treat this transformation as inevitable ignores that there were other alternatives possible. Moreover, it is wrong to see changes in NZ's constitutional arrangements as a shift from dependency to liberty: rather, there has been a reconfiguration of constraints and enablements.

This thesis is 95,614 words in length (including footnotes).

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## *Introduction*

Although a general history of New Zealand's constitution in the twentieth century has yet to be written, and may even be controversial,<sup>1</sup> there is currently a vaguely formulated theory about how it has come to take the form it has. It posits that NZ has over time gained its 'independence' from British control and became an independent sovereign nation-state, through a series of gradual steps, with 'the constitution' reflecting these broader changes. This is the nationalist narrative of NZ constitutional history.

This thesis has three aims. First, focusing primarily on the nationalist narrative of NZ constitutional change—although there are also 'Britannic' (or pan-British) and Maori narratives—it tries to explain how this nationalist narrative came to enjoy dominance: as a response to the uncertain present and an unknowable future. Second, it argues that this narrative presents an incomplete picture of NZ constitutional history by ignoring context. Finally, the thesis attempts to provide a more nuanced approach to some aspects of the history of NZ's constitution. There has not been a shift from dependency to freedom at all, but rather a shift in sets of interdependencies. NZ's constitution has changed to meet the exigencies of changing internal and external environments.

Rejecting the nationalist narrative of NZ constitutional history by insisting on a greater attention to context, this thesis argues that three points emerge from NZ constitutional history. First, the NZ nation-state and the liberal nation-state form were not inevitable. The nationalist narrative assumes there has been a shift in NZ's status from dependent colony to independent nation-state by the latter half of the twentieth century. This shift from 'dependence' to 'freedom' is seen as a 'natural' development, and highly desirable. A corollary of this is that the previous predominant political formation, empire and the associated Britannic narrative were unnatural, and subject

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<sup>1</sup> See the discussion in the *Inquiry to Review New Zealand's Existing Constitutional Arrangements: Report of the Constitutional Arrangements Committee* [2005] AJHR I.24A.

to inevitable dissolution. 'Empire' operated to 'obstruct' the emergence of the 'authentic' nation.

This is a myopic view of NZ's constitutional history. This thesis will argue that NZers, like the other 'settler communities', continued to see themselves as British within the Greater British world until at least the 1950s and 1960s. This sense of Britishness was not a case of 'false consciousness' but a real belief understandable for cultural, political and social reasons, and particularly because of the international context.

Empire, a certain kind of political formation, was still dominant even after WW1. The end of WW2 marked the end of many empires, but not all: the British empire remained, although in modified form; the Russian empire only ended in the 1980s; a debate is presently being waged today over whether the US has an 'informal empire' or not;<sup>2</sup> and of course there is China and Indonesia. The 'transition' from a world of empires to a world of nation-states is highly uneven, and by no means settled; and the NZ nation-state and the present liberal nation-state form needs to be seen rather as a product of the interaction between NZ's internal politics, British imperial politics, and the broader international environment. In short, there is a need for greater contextualization: this was no inevitable trend.

Second, the history of NZ's constitutional arrangements is not simply one of increasing autonomy: constitutional changes can enable *and* constrain. The nationalist narrative ignores the agency of NZers (and the 'old British'). NZers thought Westminster-style government and Diceyan parliamentary sovereignty were appropriate for their governing arrangements not simply because this was what had been given to them, but because they were happy to emulate what they saw applied everywhere in the Greater British world.

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<sup>2</sup> Andrew Bacevich *American Empire: The Realities and Consequences of US Diplomacy* (Harvard University Press, Cambridge, 2002); and Michael Mann "Can the New Imperialism Triumph in the Age of Nation-States?" (2004) 43 *Hist & Theory* 226, 230-1.

There was no simple dialectic of ‘dominance’ and ‘resistance’ between the ‘Old British’ and the ‘New British’. British imperial decisions were sometimes acts of determinative force, but they often stemmed from British weakness; and British imperial law was often disregarded or greatly modified in the settler communities. Thus, there has been no ‘decolonisation’ in NZ, because NZ was never a ‘colony’ in the sense that India was controlled by the metropole; if anything, NZers were colonizers, not colonized, particularly in their relationship towards Maori.

With the apparent transition from a world of empires to one of nation-states, more and more NZers find it desirable to adopt those accoutrements by which all nation-states are recognized: an indigenous head of state, a written constitution, a bill of rights, and narrower definitions of who counts as a ‘citizen’.<sup>3</sup>

Third, the focus on this trajectory from constrained colony to independent nation-state has obscured the fundamental nature of the modern state, which is to manage political conflict and provide security to those within its borders—and the changing international environment within which it must operate and to which it must respond. The nationalist narrative fails to examine motive, intention or various practices which suggest a continuation of what existed before. Modifications to the NZ constitution did not necessarily indicate greater freedom or signify societal consensus; often what was achieved was momentary agreement in contingent circumstances. There might be more localized, indigenous law, but what has not changed is the essentially political, state-building nature of the activity of constitution-making. Recent changes in the NZ constitution are better seen as a reconfiguration of the state to ensure the loyalty of its subjects.

The thesis will deal with a number of subject areas broadly defined as ‘constitutional’, concerning either the constraint and enablement of political power, or the relationship between state and citizen: the economy, the Privy Council, citizenship, the Crown, and rights and institutions in the second half of the twentieth century. No attempt is

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<sup>3</sup> Bruce Ackerman “The Rise of World Constitutionalism” (1997) 83 Virg L Rev 771.



made to be comprehensive: indeed the aim is to illustrate and examine developments in a number of eclectic subject areas (rather than the obvious constitutional enactments) and how these developments have been understood through one or more of the three narratives outlined.

Chapter one is a discussion of NZ's 'constitutional historiography': it is a brief history of writing about NZ's constitution. For much of the twentieth century, NZ constitutional history has been a Britannic Whig narrative which emphasised progress from dominance to freedom within a British model. More recently, a nationalist narrative has asserted a progression from colony to independent nation; from British dominance to 'NZ' freedom and independence. Maori constitutional narratives have been critical of both interpretations for ignoring the special status and history of Maori. This chapter establishes the framework for the chapters following. Each chapter is an attempt to recount the nationalist narrative's explanation of the development of a particular area of constitutional law, and then inject a greater sense of context.

Chapter two is about the NZ economy. This chapter aims to provide us with a broader context within which to understand the many changes which took place in NZ over the twentieth century. The argument in this chapter is that the NZ economy has acted as a trigger for and a constraint on NZ politics. Moreover, a discussion of the history of the NZ economy helps us understand that some legal changes are not as significant as they are sometimes claimed to be; often they were modified or made redundant by economic arrangements. Moreover, changes in the relationship between state and economy mirror changes in the relationship between state and citizens.

Chapter three discusses NZ's relationship with the Judicial Committee of the Privy Council. In later years, this relationship was treated as anachronistic and dysfunctional, implying domination and subordination. But for most of its history, the relationship was seen in NZ as beneficial. The PC appeared to offer to Britain a means of influence, but in practice the British spent much time modifying the institution to the needs of its allies. NZers' views of the PC were not merely a product of their desire to be part of a

Greater British world, but were also connected to their anxieties about NZ's external relations.

Chapter four discusses changing ideas about citizenship in NZ. The inclusiveness of British subjecthood law was limited through local interpretations and immigration laws, giving lie to the idea that NZ slavishly followed Britain. The later shift to more liberal citizenship and immigration laws was the result of domestic concerns, but also international changes: competition for immigrants, pressure from the Asia-Pacific region, and finally the new understanding that citizenship should identify those who 'belong' to the 'nation'.

Chapter five is about changing—and unchanging—conceptions of the Crown in NZ. For many NZers, particular those of British or European extract, the nature of the Crown has been intimately linked with its British history, which was in the past embraced but is now being repudiated, through 'localisation' and calls for a republic. For Maori, on the other hand, the Crown has been both protector and betrayer of promises made under the Treaty of Waitangi. For this reason, many Maori argue that the Crown, with all its 'British' associations, must be retained.

Chapter six concerns some, but not all, of the proposed constitutional reforms in the 1950s and 1960s. Proposals were made to re-establish a second chamber, enact a written constitution and/or a bill of rights. For the most part, these events have been forgotten, since the end result was failure. The proposals' genesis and outcome show how strong the influence of British ideas about constitutional arrangements were, but also that British ideas could also generate arguments for constitutional reform. If the suggested changes failed, it was because the British constitutional model was still influential, and was not challenged by persuasive alternative arrangements.

Chapter seven discusses more recent developments in NZ constitutional law: the proposal for an entrenched bill of rights, the eventual enactment of an 'interpretive' bill of rights, and a growing discomfort over the state of NZ's uncodified constitution—now seen as 'exceptional'. Most of these are seen as stemming from

domestic developments: in particular, the rise and reign of Robert Muldoon and Maori claims to justice. These certainly triggered dissatisfaction with the contemporary arrangements, but it was the rise of a new model of the modern state—the liberal constitutional nation-state—embraced by local elites and encouraged by geopolitical change which promoted a particular form of the state and shaped the reforms which followed. By implication previous forms were unacceptable.

‘New Zealand’ will be abbreviated to ‘NZ’ in this thesis; and those living in NZ will be broadly referred to as ‘NZers’. But where possible distinctions will be made between ‘Pakeha’ (non-Maori, but particularly those of British or European decent) and Maori, the indigenous people of NZ. The four former ‘self-governing Dominions’ of NZ, Australia, Canada and South Africa will be referred to as ‘settler communities’.

## *Chapter 1: The New Zealand Constitution and Its History*

### **Introduction**

Paul McHugh has argued:

The tale of Crown sovereignty in New Zealand in the modern period is essentially one of the struggle to inject a modern sense of historical legitimacy into a set of constitutional arrangements built upon a contrary foundation.<sup>1</sup>

What has helped hold the NZ state together from its inception to the mid-twentieth century—its institutions, habits, practices and traditions—is not a territorially-bound national consciousness, but rather a pan-Britishness, a ‘Britannic’ identity. It was a Whig mindset based on a (white) homogenous polity, a belief in progress, responsible government, and shared ideas about a common history and destiny.

The NZ constitution has long been seen as very much like the British constitution, in that it has no central framing document, and what it does have is unentrenched, amendable as ordinary legislation. Like the British constitution, it is history which gives the NZ constitution its form and purpose. And so how history is seen by constitutional lawyers becomes very important.

Adapting McHugh’s framework,<sup>2</sup> we suggest that there have been three ideal narratives employed to understand the history of NZ’s constitutional arrangements. Generally, these narratives suggest a particular form of the NZ state and a particular trajectory to its development. The first is the Britannic narrative, which saw settler communities like NZ becoming more British over time. The second is the nationalist narrative, which sees changes moving towards the realisation of a liberal

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<sup>1</sup> Paul McHugh “Tales of Constitutional Origin and Crown Sovereignty in New Zealand” (2002) 52 U Toronto LJ 69, 72.

<sup>2</sup> Paul McHugh “The Historiography of New Zealand’s Constitutional History” in Philip Joseph (ed) *Essays on the Constitution* (Brooker’s, Wellington, 1995) 344; “A History of Crown Sovereignty in New Zealand in Andrew Sharp and Paul McHugh (eds) *Histories Power and Loss: Uses of the Past—A New Zealand Commentary* (Bridget Williams Books, Wellington, 2001) 189; and “Tales” above n 1.

constitutional state based on an authentic 'nation'. The final narrative is the Maori narrative, which centres itself around the Treaty of Waitangi and the Crown.

The focus in this chapter is on these narratives, but in particular the nationalist narrative. This nationalist narrative does not so much describe a 'new' state of affairs as provide a remedy to the fragility of the present, an attempt to present the world as coherent and stable, rather than as contingent and unstable. The Britannic narrative no longer provided a comforting past or future; the nationalist narrative is an attempt to remedy this.

More generally, these three narratives, especially the nationalist narrative, are important for the rest of the thesis. First, the presence of three different ways of understanding the history of the NZ constitution suggests that no one narrative is complete. Second, the Britannic narrative provided a trajectory to constitutional development which was thought inevitable, just as the nationalist narrative presently does, suggesting that in fact neither trajectory was inevitable. Third, the nationalist narrative, currently the mainstream approach to understanding NZ constitutional history, provides a useful foil for a more nuanced understanding of aspects of NZ constitutional history.

### **The Britannic Narrative: Being British in a British World**

The Britannic narrative conforms to what Paul McHugh has called 'the Whig paradigm', an approach to history which has dominated discussion of NZ constitutional development since European settlement. In his work, McHugh has focused on the ways in which the Whig paradigm obscured the exact significance and status of the Treaty of Waitangi, but it is referred to here as the Britannic narrative to emphasise both the 'Britishness' of this narrative, and that its persuasiveness stemmed from Britain's position in the world at the time.

As McHugh describes it, the Whig paradigm involves a strong narrative of progress; analysis of the past by reference to the present; and a tendency to judge historical

actors. It is also “a success story: the story of the triumph of constitutional liberty and representative institutions.”<sup>3</sup> This is done through an emphasis on custom and immemoriality, presumptions against the tyrannous disruption of traditional laws and rights, and a constant attention to the principle of representation.

By the mid-nineteenth century, the British constitution was thought by historians and lawyers alike to embody perfection. There was a separation of law and history, and what had once been a product of history became transcendent truth.<sup>4</sup> Albert Venn Dicey, a British legal scholar who had a strong influence on British and Commonwealth constitutional law, had rejected history as a means of understanding the constitution.<sup>5</sup> A historian is primarily concerned with origins; but the common lawyer wishes to understand the constitution as it now stands, not how it came about. This was a result of the ‘common law mindset’, which was a mix of scientific rationality (emphasising general principles) and the ‘irrationality’ of custom (which saw law as past and present collapsed in a simultaneity).<sup>6</sup> For the common lawyer, then, history mattered only insofar as it justified the present state of affairs: what was important was not ‘history’ but continuity. However, Dicey and British historians had in common a belief in the idea of representative government and sovereignty as the end-point of history. Even those British texts slightly more attentive to history were subject to this overarching principle.<sup>7</sup> All this was transmitted to NZ.

Thus there was an assumption that there was no ‘history’ in NZ worth mentioning: the idea of sovereignty, responsible government, and the rule of law existed out of time. All Commonwealth countries aspired to such ideals: political and legal justifications for it were unnecessary, for all British peoples were identified by their love of order

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<sup>3</sup> “Historiography”, above n 2, 344-348, quoting JW Burrows *A Liberal Descent: Victorian Historians and the English Past* (Cambridge University Press, Cambridge, 1981), 2.

<sup>4</sup> “Tales”, above n 1, 69-72.

<sup>5</sup> AV Dicey *Introduction to the Law of the Constitution* (8 ed, Liberty Fund, Indianapolis, 1982 [1915]), cxxxii-cxxxvii.

<sup>6</sup> On this, see WT Murphy *The Oldest Social Science? Configurations of Law and Modernity* (Clarendon Press, Oxford, 1997), 89-90.

<sup>7</sup> Arthur Berriedale Keith *Responsible Government in the Dominions* (2 ed, Oxford University Press, Oxford, 1928) and Kenneth Wheare *The Statute of Westminster and Dominion Status* (5 ed, Oxford University Press, London, 1953).

and liberty. The history of NZ's constitution was thus to be written to replicate as closely as possible the British experience: liberty, order, homogeneity and continuity.

This belief in the ultimate superiority of a British trajectory had a cultural basis in the settler communities. James Belich has argued that from the late nineteenth century till mid-twentieth century, NZers believed in a vision of NZ as a 'Better Britain', a land in which all the virtues of Old Britain were maintained and all the vices absent.<sup>8</sup> Even after 'achievement' of Dominion status in 1907, NZers, like those from the other settler communities, maintained a 'Britannic nationalism', a belief in the superiority of the British peoples.<sup>9</sup> This belief also underpinned the 'Dominion Idea', a blend of national and imperial status, a model of development which saw the settler communities as becoming more British even as they gained their constitutional 'freedom': modernity and Britishness would coincide. Britain's status provided the basis for this confidence in the British model of development. Until WW2, it was still considered the premier great power, or close to this position. This belief was pan-British, a narrative shared by the other settler communities, particularly Australia.<sup>10</sup>

There were also 'external' factors reinforcing this. For much of the nineteenth century until the end of WW2, there was a global imperial order: empire as a political formation was the norm and not the exception; many European states had their own empires.<sup>11</sup> 'Sovereign equality' and self-determination were not yet established principles of the international community: and the nation-states who could exercise effective internal and external sovereignty were few and mostly long-established.<sup>12</sup> Thus a set of constitutional arrangements tying a state and its development to Britain could be seen not as contradictory or backwards but quite normal.

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<sup>8</sup> James Belich *Paradise Reforged: A History of the New Zealanders from the 1880s to the Year 2000* (Penguin Books, Auckland, 2001), 21.

<sup>9</sup> John Darwin "A Third British Empire? The Dominion Idea in Imperial Politics" in Judith Brown and W Roger Louis (eds) *Oxford History of the British Empire, Vol 4: The Twentieth Century* (Oxford University Press, Oxford, 1999) 64, 72.

<sup>10</sup> Deborah Gare "Britishness in Recent Australian Historiography" (2000) 43 *His J* 1145 and Neville Meaney "Britishness and Australia: Some Reflections" (2003) 31 *JICH* 121.

<sup>11</sup> See generally John Darwin *After Tamerlane: The Global History of Empire* (Allen Lane, London, 2007).

<sup>12</sup> Helen Thompson "The Modern State and its Adversaries" (2006) *Govt and Opposition* 23.

Both Hight<sup>13</sup> and Bamford's<sup>14</sup> 1914 text *The Constitutional History and Law of New Zealand*<sup>15</sup> and McIntock's<sup>16</sup> *Crown Colony Government in New Zealand*<sup>17</sup> are examples of this Britannic narrative. McHugh used the latter text to illustrate his arguments, but here the former is mostly used. Both works treat NZ's constitutional development as culminating in representative government under a British Crown.

McHugh noted that actors who helped fulfil NZ's destiny were treated as agents of progress; those whose actions did not aid in this development were treated as enemies. Thus Hight and Bamford portrayed the NZ Company ('the Company'), which had encouraged migration to NZ, and in particular Edward Gibbons Wakefield (a 'theorist' of selective immigration) as noble and enlightened. They had the 'vision' to see that NZ was a land open for settlement, and establishing a plan of organised migration, carefully selecting the 'best stock' to people NZ.<sup>18</sup> Without the Company, NZ might not have acquired representative government so quickly.<sup>19</sup>

However, in its desire to create a transplanted British settler society, the Company met with opposition from recalcitrant missionaries, whom Hight and Bamford and McIntock portrayed as well-meaning but misguided. There was also a British executive reluctant to further extend its empire.<sup>20</sup> This reluctance was compounded by the nature of the colonial system: frequent changes in political party in Britain meant frequent changes in imperial policy, as well as an amateurishness in administration.<sup>21</sup> These two groups constituted obstacles to 'progress': the NZ that was to be.<sup>22</sup>

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<sup>13</sup> See Appendix 2.

<sup>14</sup> Ibid.

<sup>15</sup> J Hight and HD Bamford *The Constitutional History and Law of New Zealand* (Whitcombe & Tombs Ltd, Wellington, 1914).

<sup>16</sup> See Appendix 2.

<sup>17</sup> AH McIntock *Crown Colony Government in New Zealand* (Government Printers, Wellington, 1958).

<sup>18</sup> Hight and Bamford, above n 15, 67; 83; 254-5.

<sup>19</sup> Ibid, 256.

<sup>20</sup> Ibid, 50.

<sup>21</sup> Ibid, 138-9.

<sup>22</sup> Ibid, 49-50.



But the major ‘obstacle’ to the colony’s commercial and industrial development was Maori. The key discourse to understand Crown-settler-Maori relations in Hight and Bamford was that of civilisation.<sup>23</sup> Maori as ‘savages’ needed to be protected, and better that they be subject to the humanity and good sense of the British. Indeed, Maori supposedly welcomed the British Crown because it was able to impose order and protect them, both from settlers and from the other colonising powers.<sup>24</sup>

Maori violence over land and increasing lawlessness only illustrated the necessity of imposing uniform British justice, and a stable, more certain system of land title. The Colonial Office finally agreed, sending its emissary, William Hobson,<sup>25</sup> to declare the British Crown’s sovereignty over NZ—but before doing this, Hobson was to ensure the Maori consented to this annexation. This culminated in the Treaty of Waitangi (the Treaty’) in 1840, signed by many North Island Maori chiefs.

The Treaty was seen as a product of these events and forces. It consisted of a preamble and three articles; and there was an English version, and a Maori version, which were not at crucial points direct translations. Article One in the English version stated that Maori signatories ceded “sovereignty”, while the Maori version stated Maori signatories ceded “*kawanatanga*” (governance over a ‘protectorate’). Article Two in the English version guaranteed to Maori the full exclusive and undisturbed possession of their lands and other properties so long as they wished, and the Crown’s right of first refusal, while the Maori version stated Maori retained unqualified exercise of their “*rangatiratanga*” (chieftainship) over their lands and property. Both versions of Article Three were roughly equivalent, promising to Maori all the rights and duties of British subjects. The Treaty has had a checkered past in NZ

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<sup>23</sup> Martti Koskenniemi *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press, Cambridge, 2004), chapter 2; and see for instance Hight and Bamford, above n, 88; 190-1; 272.

<sup>24</sup> Hight and Bamford, above n 15, 53.

<sup>25</sup> See Appendix 2.

constitutional history, having gone from a document of little value to its present status as perhaps the key fundamental document in NZ constitutional law.<sup>26</sup>

Hight, Bamford and McLintock argued the idea of the Treaty as one of cession was a myth. If the Treaty was a one of cession, this implied that Maori previously possessed sovereignty and thus would have rights to land which existed before the Crown. But all authors argued that while the British had insisted on Maori consent before a declaration of sovereignty, this did not suggest Maori were sovereign. Maori might have exhibited a more sophisticated culture than other native races encountered by the British, but all authors rejected the idea that Maori were capable of exercising sovereignty as contrary to contemporary understandings of international law and the rights of savage natives: thus NZ was 'free' for occupation.<sup>27</sup> NZ was a colony of settlement, not cession. The Treaty could be dismissed as a "hasty improvisation to meet a problem created largely by impractical idealists".<sup>28</sup> It was a barrier to the realization of self-government in NZ.

In spite of these 'obstacles', NZ was eventually colonised, and its 'beginning' was identified with a new and splendid period in British colonial policy, roughly corresponding to the long reign of Queen Victoria. Its society would mirror that of Britain, peopled with excellent stock and containing the free institutions of the British, in accordance with the 'Magna Carta' of the settler communities, the 1839 *Durham Report*.<sup>29</sup>

The 'native problem' remained, however, and was intimately connected with the role of the Governor and the failure to establish representative government. Governor George Grey,<sup>30</sup> for instance, was portrayed by Hight and Bamford as a 'strong hand'

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<sup>26</sup> On the Treaty, see generally Claudia Orange *The Treaty of Waitangi* (Allen & Unwin, Wellington, 1987) and Peter Spiller, Jeremy Finn and Richard Boast *A New Zealand Legal History* (2 ed, Brookers Ltd, Wellington, 2001), 123-186.

<sup>27</sup> Hight and Bamford, above n 15, 91-2; 226-233. Now shown to be false: see Paul McHugh *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991).

<sup>28</sup> McLintock, above n 17, 63.

<sup>29</sup> Hight and Bamford, above n 15, 256.

<sup>30</sup> See Appendix 2.

for engaging with Maori, insisting on uniform British justice, and ultimately initiating military force against Maori.<sup>31</sup> McLintock was more hostile, characterising Grey in terms of his opposition to representative government. McLintock called Grey a “dictator” for the way he governed colonial affairs.<sup>32</sup> The Company and settlers convinced the Imperial Parliament to enact a constitution for NZ, which had taken place in 1846; but it was never allowed to come into force. Grey had advised the Colonial Office against its operation in NZ, ostensibly because he feared that the acquisition of responsible government by the settlers would result in deleterious consequences for the natives, but also because Grey loved power. An early opportunity to achieve responsible government was ‘lost’.

In Hight and Bamford, the 1852 Constitution Act was passed to “universal satisfaction” and responsible government was established soon after in 1856.<sup>33</sup> These were seen as natural developments, part of a broader ‘British’ trend. Once the institution was in place, the principle of representative government was simply realised. By contrast, McLintock focused on the machinations of Grey. Grey emasculated the central settler-run Parliament and devolved many powers onto Provincial legislatures. Again, we can see the division of actors into those who promoted the principle and those who tried to thwart it.<sup>34</sup>

McLintock’s history ended with the 1852 Constitution Act. In Hight and Bamford ‘history’ after the acquisition of responsible government was given short shrift: the period before colonisation till 1856 occupied over 280 pages (two-thirds of the book), but the period 1872-1912 just over 20 pages. Hight and Bamford thought there were only two important developments in this period: the abolition of provincial government and the emergence of ‘continuous ministries’—the beginnings of stable political parties. Both were seen as constitutionally significant because they

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<sup>31</sup> Hight and Bamford, above n 15, chapter XIII.

<sup>32</sup> McLintock, above n 17, 256.

<sup>33</sup> Hight and Bamford, above n 15, chapter XVIII.

<sup>34</sup> “Historiography”, above n 2, 351.

represented a trend towards the creation of a more centralised, unified state and a more comprehensive approach to country-wide problems.<sup>35</sup>

Discussion of the 'Native Wars'—what are now referred to as the 'New Zealand Wars',<sup>36</sup> involving long-running battles between Maori, settlers and imperial troops over Maori land and the assertion of Crown sovereignty in the 1860s—was limited. Hight and Bamford simply noted that they stemmed from a "misunderstanding" and that "the Queen's sovereignty prevailed."<sup>37</sup> Maori protests over land simply disappeared from Hight and Bamford's text once the Colonial Office's approach to native affairs changed, and the Crown's pre-emptive right was waived to allow for the sale of Maori land in the early 1850s.

In short, despite a 'brief' period of turmoil, British institutions were seen by Hight and Bamford to have taken root in NZ soil with little trouble by the 1850s—although Belich has argued that there existed large areas of the North Island still subject to Maori control until the late nineteenth century.<sup>38</sup>

To these histories we can add a third history: Robson's<sup>39</sup> *New Zealand: The Development of Its Laws and Constitution*,<sup>40</sup> first published in 1954. Robson was the general editor of the book on NZ, and also authored an introductory chapter on the history of the state with KJ Scott,<sup>41</sup> and in the second edition, with Colin Aikman.<sup>42</sup> There was also a chapter on the history of Parliament, written by Scott (and later Aikman).

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<sup>35</sup> Hight and Bamford, above n 15, 289-290.

<sup>36</sup> See James Belich *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Auckland University Press, Auckland, 1986).

<sup>37</sup> Hight and Bamford, above n 15, 285.

<sup>38</sup> *New Zealand Wars*, above n 36, 306, quoted in Richard Boast "Maori and the Law" in Peter Spiller, Jeremy Finn and Richard Boast *A New Zealand Legal History* (2 ed, Brookers Ltd, Wellington, 2001) 123, 135.

<sup>39</sup> See Appendix 2.

<sup>40</sup> JL Robson (ed) *New Zealand: The Development of Its Laws and Constitution* (1<sup>st</sup> ed, 1954; 2<sup>nd</sup> ed, 1967, Stevens & Sons, London). All references are to the first edition unless otherwise stated.

<sup>41</sup> See Appendix 2.

<sup>42</sup> *Ibid.*

Robson's introductory chapter began: "When the New Zealand Parliament acquired plenary powers in 1947, the New Zealand constitution became, in all essential aspects, the same as the British."<sup>43</sup> We can see the continuities here between Robson and earlier histories: 'we' as one of the British peoples had reached 'our' goal, and the chapter was thus framed accordingly: how did NZ get to this point?

Like earlier writers, Robson argued that sovereignty had been established because of the increasing lawlessness in the 1830s. The Treaty was not a treaty of cession, because the Maori were not capable of exercising sovereignty. Robson also dealt with the NZ Constitution's further development. The 1852 Constitution provided that the 'General Assembly' (meaning the NZ Parliament, which consisted of the House of Representatives and the Legislative Council) had full power to make laws for NZ. However, this was subject to a number of restrictions: the doctrines of repugnancy and disallowance, an inability to legislate with extraterritorial effect, the power of the Governor to reserve certain bills, and constitutional amendment was subject to the assent of the Monarch. But more importantly, "the Act established a representative legislature, but not a responsible executive."<sup>44</sup>

Maori were again seen as a 'problem'. Native Affairs and internal defence did not come under ministerial control till 1864. As effective sovereignty over NZ was asserted—apparently by the establishment of representative government—the 'Maori problem' in Robson's narrative disappeared.<sup>45</sup> The adoption of representative centralised government which could impose its law upon everyone allowed for the absorption of Maori into the British polity, which could thereafter be assumed to be homogeneous.<sup>46</sup> Here, then, were continuities shared with earlier histories like Hight and Bamford.

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<sup>43</sup> Robson, above n 40, 1.

<sup>44</sup> Robson, above n 40, 8.

<sup>45</sup> "Historiography", above n 2, 349.

<sup>46</sup> "Tales", above n 1, 75. This phenomenon can be seen very clearly in the discipline of history. During the period of 'recolonisation' (1880s-1940s), in which links between colony and the metropole were tightened, Maori were 'whitened' and the history of race-relations was harmonised in retrospect: see James Belich "Colonisation and History in New Zealand" in Robin Winks (ed) *The Oxford History of the British Empire, Vol V: Historiography* (Oxford University Press, Oxford, 1999) 182, 185.

The remainder of Robson's history involved the gradual removal of limitations on the General Assembly in the 1852 Constitution. Much of this was a genealogy of statutes, establishing legal continuity with the Imperial Parliament. Through statute, the doctrine of repugnancy was gradually reduced, and the NZ Parliament was given greater powers to amend its own laws. Some provisions were rendered redundant by convention. The power of the Governor (later, Governor-General) to reserve bills was brought under control by Colonial Office instructions and convention. Limitations fell away and NZ was able to assert its autonomy. In short, even though there were limitations on the NZ Parliament's sovereignty, constitutional development in NZ remained 'peaceful' and 'uneventful'.

The adoption of responsible government allowed the settlers to carry out innovative legislative programmes. "The orthodoxy of the old world, although it had its champions in New Zealand, was no match for those who wanted to avoid the evils of the old world as they saw them."<sup>47</sup> This readiness to use legislation to deal with social and economic questions made NZ a 'Better Britain'. Various legislative reforms were listed (comparing favourably to Britain): NZ was the first "British" country to give women the right to vote in 1893;<sup>48</sup> a comprehensive social welfare system in 1935. The State had become a benevolent Leviathan: under the Liberal Government of the 1890s-1912, social legislation had been passed and land monopolies broken up to ensure equality for all.<sup>49</sup> It was more 'democratic' too: there was greater representation of the population on the electoral rolls as early as the 1850s.<sup>50</sup> Here was another sign that NZ had done better than Britain.

There was a rude shock in 1903 when in the case *Wallis v Attorney-General*,<sup>51</sup> the Privy Council ('PC') had the temerity to both reverse a decision of the NZ Court of Appeal ('NZCA') and criticise the Solicitor-General and the judges for bowing to the

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<sup>47</sup> Robson, above n 40, 24.

<sup>48</sup> Robson, above n 40, 81.

<sup>49</sup> Paul McHugh "Maori Sovereignty This Century: Maori and the Common Law Constitution" (2000) 31 VUWLR 187, 198-199.

<sup>50</sup> Robson, above n 40, 80.

<sup>51</sup> [1903] AC 173 (PC).

will of the executive. The NZ bench and bar made an extraordinary protest, suggesting that the PC appeal right be abolished.<sup>52</sup> *Wallis* was a brief blot on an otherwise relatively error-free record of harmony between Britain and NZ's judiciary.

Confidence and independence also manifested itself at the various Imperial Conferences. In 1907, the settler communities became self-governing 'Dominions'. In 1926, the Dominions had evolved to a point where they were granted political recognition of their equality with the Imperial country; and this was later given legal imprimatur with the enactment of the Statute of Westminster 1931 (UK) ('SOW'), which purported to provide that no future Dominion statute could be held void by reason of repugnancy with UK law. It further provided that no law passed by the UK Parliament after this point would extend to a Dominion.

However, both Australia and NZ chose not to adopt the SOW, and had insisted on the Imperial Parliament inserting a section providing that the SOW would not be operative unless the Dominion Parliaments requested and consented to it. It was left to the respective Antipodean Parliaments to adopt the SOW. This Australia did in 1942, because of concerns about its extraterritorial jurisdiction over its troops overseas. The NZ Parliament was not to adopt the SOW till 1947.

The adoption of the SOW by the NZ Parliament came about by a sidewind. The Leader of the Opposition, Sidney Holland,<sup>53</sup> advocated the abolition of the Legislative Council, the upper house of the NZ Parliament, in order to sow discord amongst members of the Labour Government. The Labour Government insisted on introducing a bill enabling the NZ Parliament to amend the 1852 Constitution first. Therein passed an exchange of statutes which culminated in the NZ Parliament acquiring absolute sovereignty.<sup>54</sup> In 1950 the National Party became the government and enacted the Legislative Council Abolition Act 1950 (NZ). NZ now had a unicameral Parliament.

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<sup>52</sup> *Protest of Bench and Bar* (1903) NZPCC (1840-1938) 730.

<sup>53</sup> See Appendix 2.

<sup>54</sup> WK Jackson *The New Zealand Legislative Council* (University of Otago Press, Dunedin, 1972).

For Scott and Aikman, the abolition of the Legislative Council was seen as 'progress'. It had once been a bastion of conservatism, but had been rendered toothless in the late nineteenth century. It was portrayed as adding little to NZ democracy: it represented no special interests; it was not elected; and it had not acted to stop hasty legislation.<sup>55</sup> In short, the Council was seen from its early days to be either a malign institution obstructing liberal reforms or a rubber stamp for the government. Both views were in conflict with the idea of popular representative government.

Still, the Council's abolition caused some anxiety, and there were calls for the re-establishment of the Legislative Council or for some equivalent. It even led to proposals for an entrenched constitution and bill of rights, once in 1961, and again in 1963.<sup>56</sup> But nothing came of this at the time. In the second edition of Robson's book, there was a new section in the chapter on Parliament entitled, "Safeguards for the Citizen".<sup>57</sup> It was relatively brief, covering the recent proposals, but concluded that public interest on the matter was low. While a concern for the rule of law and civil liberties had occasionally cropped up as the object of discussion in NZ constitutional history, the focus was more on the idea of equality before the law, and the role of Parliament in improving people's living standards, than individual rights.

### **The Emergence of a New Zealand Nationalist Narrative**

The historiography of NZ constitutional law underwent an important change in the 1960s onwards. There were seen in the past signs of a unique NZ nation; the corollary of this was the tendency to take a more caustic view of NZers' past attachment to British ideals. The destination of 'history' was no longer a closer replication of Britain, but rather the realisation of a nation's desire for its own state. It was the Whig paradigm nationalised: the nationalist narrative of NZ constitutional history.

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<sup>55</sup> Robson, above n 40, 2 ed, 37-40.

<sup>56</sup> See chapter 6.

<sup>57</sup> Robson, above n 40, 2 ed, 50.



'Nationalism' here refers to Billig's 'banal nationalism'—the sense of being in a nation in everyday life, not 'hot' nationalism—a malign force tearing states apart.<sup>58</sup> Banal nationalism has a mimetic quality: to "claim to be a nation is to imagine one's group to fit a common, universal pattern."<sup>59</sup> Every new nation, in order to be recognized both by its 'own' people and by other nations, must take on the conventional symbols of nationhood—national flags, an anthem, and so forth. This is seen most clearly in the creation of new nations, especially those emerging after imperial collapse, and of which NZ is an example. One of these banal symbols may now be a codified constitution.<sup>60</sup>

There was now a distinction between 'us' (NZers) and 'them' (the Old British); evidence questioning the validity of this distinction was to be forgotten. In this narrative NZers were autonomous actors: what they did was read as either promoting or impeding the realisation of a distinctly NZ nation-state. This was 'progress'. The accession of Britain to the EEC in 1973 was a grave political event for NZ, but 'our' independence had already been secured legally; and there was little suggestion that NZ's independence was forced rather than being chosen.

There was also another characteristic, which although present in earlier Whig histories, distinguished works in this period from works in the previous period: a stronger emphasis on individual rights and constitutional liberty. The 'lessons' to be learned from constitutional history were thought to have changed. The path of NZ's constitutional history was previously seen as concerned with the gradual acquisition of parliamentary sovereignty. The 'new' approach reflected 'opinion' that parliamentary sovereignty was a dangerous doctrine;<sup>61</sup> that there had been in the past instances of its abuse. Judges' gnomic dicta about the doctrine's potential were now seen as prophetic. In Diceyan terms, the emphasis in legal discourse shifted from parliamentary

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<sup>58</sup> Michael Billig *Banal Nationalism* (Sage Publications, London, 1995), especially chapter 4.

<sup>59</sup> Ibid, 85.

<sup>60</sup> Bruce Ackerman "The Rise of World Constitutionalism" (1997) 83 Virg L Rev 771, 778.

<sup>61</sup> Philip Joseph and Gordon Walker "A Theory of Constitutional Change" (1987) 7 OJLS 155; and also Paul Rishworth "The Birth and Rebirth of the Bill of Rights" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brooker's, Wellington, 1995) 1.

sovereignty to the rule of law. The previous history of the acquisition of sovereignty was not forgotten; but this was now regarded ambivalently. Above all, it was said to be the experience of Robert Muldoon's<sup>62</sup> National Government (1975-84) which led to a revision of how Parliament ought to be viewed.

However, the continuities were also clear: there was still the tendency to see everything in the past as converging in the present, still the tendency to impose moral judgment upon historical actors, still the tendency to see progress. Responsible government was still a fundamental principle, for it was through this principle that NZ's unique national character was realised. In short, although the nationalist narrative emphasised change, what it promised was more of the same: a comforting past, a legitimate present and a certain future.

The emergence of this 'new' narrative came about for various reasons, which will be covered in more detail in the following chapters. The most obvious reason was demographic: NZ-born citizens began to outnumber British-born ones; there were increasing numbers of non-British migrants. These two groups felt little connection to Britain. The Maori population urbanised, forcing Pakeha to re-examine their history with Maori. More generally, the growth of local tertiary education, a local scholarly community and a sizable educated audience led to the emergence of nationalist histories of NZ.<sup>63</sup>

There were factors external to NZ. A key event was the decisive British turn to Europe, particularly through its entrance into the EEC in 1973.<sup>64</sup> This signified a final rejection of the idea of 'Greater Britain' and a Greater British world, excluding those from the settler communities from the definition of 'British'. This also conveniently marked the end of the slow—but not inevitable—collapse of the British Empire and Britain as a great power. As Britain declined economically, politically and socially,

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<sup>62</sup> See Appendix 2.

<sup>63</sup> Jock Phillips "Of Verandahs and Fish and Chips and Footie on Saturday Afternoon: Reflections on 100 Years of New Zealand Historiography" in Judith Binney (ed) *The Shaping of New Zealand History: Essays from the New Zealand Journal of History* (Bridget Williams Books Ltd, Wellington, 2001) 321.

<sup>64</sup> JGA Pocock "History and Sovereignty: The Historiographical Response to Europeanisation in Two British Cultures" (1992) 31 *J Brit Stud* 358.

institutions long associated with the British state's success, became tarred with its decline. The British state was no longer considered a model to follow.

Britain's imperial decline was part of a much broader set of events: the uneven collapse of a global imperial order. For it was not merely the British empire which ended in the second half of the twentieth century, but almost every European empire.<sup>65</sup> There ended an order based on economics, security, culture and racial hierarchy. Out of the ruins of this global imperial order came a new global order of nation-states. The European state was universalized as the only form of government which would provide equal status in the organised international community.<sup>66</sup> Connections to and participation in an imperial order conflicted with the norms of this new international community. All states claimed themselves to be democracies: a product of rational human will. This desire to be a 'pure' nation-state only intensified in the aftermath of the Cold War.

The 'model' to follow became a North American one: a liberal market constitutional state. But like the British constitution before it, the US constitution itself was subject to a "flat constitutionalism", which saw it as "a document fixed in print, formed in content, and uniform in the basis of its authority."<sup>67</sup> The constitution was venerated for its role in the nation's historical and political development: it was a synecdoche for the US nation itself and an explanation for its global success. What was most salient about flat constitutionalism was its ahistorical tendency: for instance, US constitutionalism, or what overseas commentators perceive as US constitutionalism—judicial review of legislation and the protection of individual rights—was something which only emerged in the mid-twentieth century.<sup>68</sup> It was not the US constitution itself which led to a focus on the protection of human rights, but the impact of 'external' events such as World War Two and the Cold War. It was the constitution

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<sup>65</sup> See generally *After Tamerlane*, above n 11.

<sup>66</sup> *Gentle Civiliser of Nations*, above n 23, 175.

<sup>67</sup> Michael Foley *The Silence of Constitutions: Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government* (Routledge, London, 1989), 38.

<sup>68</sup> Jonathan O'Neill "Marbury v Madison at 200: Revisionist Scholarship and the Legitimacy of American Judicial Review" (2002) 65 MLR 792; and Richard Primus *The Language of Rights* (Cambridge University Press, Cambridge, 1999).

which was seen to have provided the nation's unity, and the role of history in consolidating the Union was downplayed. The temptation was to presume that parts of a whole in the present have been logically articulated rather than contingently associated.<sup>69</sup>

The causes of NZ change became 'domesticated' (or 'nationalised'). For instance, two NZ legal academics, Philip Joseph and Gordon Walker in a 1987 article listed a succession of controversies under the Muldoon Government which undermined the hitherto consensus about the legitimacy of Westminster government in NZ.<sup>70</sup> These controversies were often mentioned by other commentators detailing the background to the constitutional changes of the 1980s and 1990s.<sup>71</sup> There were infamous 'dawn raids' to catch suspected those overstaying their entry visas. There was the unlawful suspension of a statute by the Prime Minister, Robert Muldoon,<sup>72</sup> which led to a court case upholding the rule of law as set out in the 1688 Bill of Rights.<sup>73</sup> Maori protests intensified. A statute reversed a decision of the Planning Tribunal which had refused the Government planning consent to build a dam which was part of the National Government's autarkic policy. The Economic Stabilisation Act 1948 was used to pass regulations to control the economy—everything from 'car-less days' to wage and price freezes.

One final controversy was the constitutional crisis following a snap election in 1984. The Muldoon government had been ousted from power, and the incoming Labour government had called for an immediate devaluation of the NZ dollar. Muldoon had refused, which resulted in a 'constitutional crisis': there were no mechanisms in place for a swift transfer of power. The crisis was averted when Muldoon finally capitulated.

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<sup>69</sup> Paraphrasing from Harro Hopfl and Martyn Thompson "The History of Contract as a Motif in Political Thought" (1979) 84 Am His Rev 919, 923.

<sup>70</sup> Joseph and Walker, above n 61, 161-163.

<sup>71</sup> See, for instance, Geoffrey Palmer *Unbridled Power? An Interpretation of New Zealand's Constitution and Government* (2<sup>nd</sup> ed, Oxford University Press, Auckland, 1987), 1-4, 222-225; "Birth and Rebirth", above n 61.

<sup>72</sup> See Appendix 2.

<sup>73</sup> *Fitzgerald v Muldoon* [1976] NZLR 615.

This was the immediate cause for the revision and consolidation of the NZ's key constitutional laws in the Constitution Act 1986.<sup>74</sup>

All of these domestic events were said to have caused a 'shift' in the way the legal profession, key officials and the political elite thought about governance. Their concern was expressed in various speeches, essays and case law, of which the most well-known (in NZ, anyway) were a set of cases by the then Justice Cooke.<sup>75</sup> Cooke had argued that perhaps there were common law rights so deep that no Parliament could take them away.<sup>76</sup>

Many of the constitutional developments which took place in the late twentieth century, then, were to be seen as a result of the Muldoon era. There was a strong tendency to assume the constitutional changes followed naturally from legal developments. Thus the New Zealand Bill of Rights Act 1990 was seen as a natural extension of developments in legal doctrine noted above, which had highlighted the potential threat that Parliament's sovereignty posed to civil liberties. Rights were seen to even have a life of their own—they had become an independent historical force.<sup>77</sup> More general constitutional change was attributed to the events of the Muldoon era as well. Changes to Parliamentary procedure were seen as re-establishing control by Parliament, and removing control from the Executive. Similarly, changes in the electoral system (from 'first past the post' to proportional representation) ensured a more responsible and accountable Parliament. In this sense, the nationalist narrative was still very much like the previous narrative: colonial NZ history had had Governor Grey as its threat to representative democracy, late twentieth century NZ had Robert Muldoon.<sup>78</sup> And yet here was a success story—responsible government and liberty had been localised and revitalised. Here was progress, 'Kiwi style'.

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<sup>74</sup> Department of Justice *Reports of an Officials' Committee on Constitutional Reform* (Government Printer, Wellington, 1986).

<sup>75</sup> See Appendix 2.

<sup>76</sup> This is covered in greater detail in chapter 7.

<sup>77</sup> "Birth and Rebirth", above n 61, 29.

<sup>78</sup> Sir Geoffrey Palmer's work is a clear example of this: see the various editions of *Unbridled Power* and most recently his "Muldoon and the Constitution" in Margaret Clark (ed) *Muldoon Revisited* (Dunmore Press, Palmerston North, 2004) 167.

History was again employed for the present. Proposals to entrench a written constitution and a bill of rights in the 1950s and 1960s were examined, but the point of such analyses was to pave the way for the more enlightened, rational present. Academics at the time had rejected a bill of rights, but they were now seen as too self-confident in light of what had happened since. The content of the proposals (the right to work, and the right to monetary stability in New Zealand) was mentioned to hint at their impracticality.<sup>79</sup> This fit with ‘modern’ arguments for a bill of rights, which insisted on the exclusion of any rights which might encroach upon the government’s ability to govern the economic sphere.<sup>80</sup>

The key texts in this period are Philip Joseph’s<sup>81</sup> *Constitutional and Administrative Law in New Zealand*<sup>82</sup> and Mai Chen<sup>83</sup> and Sir Geoffrey Palmer’s<sup>84</sup> *Public Law in New Zealand*.<sup>85</sup> Both were published in the early 1990s, were voluminous (Joseph just under 1000 pages; Chen and Palmer just over) and aimed at giving an overall picture of NZ public law. Joseph’s book was more in the traditional textbook style, aimed at comprehensiveness, each chapter being in narrative form, with comprehensive citations; while Chen and Palmer’s was a casebook, with excerpts from relevant cases, statutes, and texts, occasionally interspersed with questions. Both offer an insight into how things had changed; and how much things remained the same.

Chen and Palmer’s casebook was an attempt to base the compulsory public law course on the New Zealand public law system as it currently functioned. The idea was to give

<sup>79</sup> “Birth and Rebirth”, above n 61, 8.

<sup>80</sup> See DAR Williams “Some Operational Aspects of the Bill of Rights” in *A Bill of Rights for New Zealand* (Legal Research Foundation, Auckland, 1985) 75, 80-82. Williams was one of the drafters of the New Zealand Bill of Rights Act 1990. See also Geoffrey Palmer *New Zealand’s Constitution in Crisis: Reforming Our Political System* (John McIndoe, Dunedin, 1992), 57.

<sup>81</sup> See Appendix 2.

<sup>82</sup> Philip Joseph *Constitutional and Administrative Law in New Zealand* (Law Book Company, Sydney, 1992). There is now a third edition, which has not changed in essentials: Philip Joseph *Constitutional and Administrative Law in New Zealand* (3 ed, Brookers’, Wellington, 2007). References are made to the first edition, unless otherwise noted.

<sup>83</sup> See Appendix 2.

<sup>84</sup> Ibid.

<sup>85</sup> Mai Chen and Geoffrey Palmer *Public Law in New Zealand* (Oxford University Press, Auckland, 1993).

students an understanding of the system, give them tools so that they might work inside it for their clients, and allow students to diagnose the ills of the system so that reforms could be carried out. It was also designed as a sourcebook for the reference of officials, pressure groups and practitioners. The image here of the legal profession was not so much a vaunted vocation as a technocratic elite specialising in policy analysis.<sup>86</sup>

Equally as important, however, Chen and Palmer's book was *not* modelled on "a formalistic understanding of how the New Zealand constitution should, or *used to*, operate."<sup>87</sup> This was consistent with Palmer's approach to law in general. Palmer had always been a strong proponent of 'realism', although it is a realism, Joseph has commented, devoid of theory (it would be more accurate to say it is a realism underpinned by the Whig principle of representation).<sup>88</sup> For Palmer, it did not matter what had been; only what was, and whether it was reasonable and rational. But it followed that for Chen and Palmer, the question of national identity was not in issue: NZers were simply NZers; the British were British:

New Zealand is beginning to come of age in a constitutional sense and shake off the vestiges of its colonial inheritance. This has taken longer in the law than it has taken in New Zealand society generally, but there are clear signs now that we are prepared to strike out on our own. Public law in New Zealand is becoming increasingly indigenous although it has not yet altogether outgrown some of its English origins.<sup>89</sup>

The only question now was how to bring the law into line with NZ's clearly separate national identity, given the 'antiquated' laws and options available. Hence, Chen and Palmer kept constitutional history to a minimum. There was a section devoted to the various legal enactments (mainly imperial) by which NZ acquired sovereignty, but there was no commentary whatsoever.<sup>90</sup> Why had these been passed? What was the British understanding of the Acts and their meaning in terms of the Imperial-

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<sup>86</sup> GWR Palmer "The New Public Law: Its Province and Function" (1991) 22 VUWLR 1.

<sup>87</sup> Chen and Palmer, above n 85, xv. Emphasis added.

<sup>88</sup> Joseph, above n 82, 109; and "Sovereignty This Century", above n 49, 199.

<sup>89</sup> Chen and Palmer, above n 85, xv.

<sup>90</sup> Ibid, 176-188.

Dominion relationship? What had been the response of NZers at the time? It did not matter. It was an example of the common law tendency to remember only that history which had relevance in the present. But it was also an example of Ernest Renan's aphorism in action—that "forgetting ... is a crucial factor in the creation of a nation."<sup>91</sup>

Chen and Palmer did have an entire section of the casebook devoted to 'the Maori dimension', covering everything from the historical debates (abridged to gain the essence, of course), customary Maori rights, Waitangi Tribunal claims to the academic debate. But this was consistent with the emphasis on contemporary utility for lawyers in the here and now. These were just matters a technocratic elite had to know to solve present-day problems and pave the way for a bright future.

Joseph, on the other hand, devoted several chapters to constitutional history and the question of autochthony. Joseph's work was more thoughtful than Chen and Palmer's was about origins and legal authority; and, being so, betrayed a much greater anxiety about the foundations of NZ's constitution.

Joseph himself was nationalist in approach. In his chapter on modern constitutional developments in NZ, Joseph listed a miscellany of noteworthy matters: various statutes broadly relating to responsible, representative government: constitutional amendments; the establishment of the Ombudsman and Human Rights Commission; the Official Information Act 1982; and the Constitution Act 1986. But Joseph also elided the term 'constitutional' with 'independence' and 'nationhood'. For instance, Joseph made note of the developments in the convention on the appointment of the Governor-General. It was a 'constitutional' development in that the NZ Parliament now made recommendations. And it was also now convention that a NZ citizen hold the office. Similarly, various Acts passed were said to signify a change in the *grundnorm* or rule of recognition for NZ's constitution. For instance, the passing of the Royal Titles Act 1974, which redefined the Queen of the United Kingdom and Her

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<sup>91</sup> Ernest Renan "What is a Nation?" in Homi Bhabha (ed) *Nation and Narration* (Routledge, London, 1990) 8, 11.



Other Realms and Territories' as 'Queen of New Zealand', "promoted New Zealand's national and constitutional self-image."<sup>92</sup> Previously there was a convention that the various Commonwealth governments would agree collectively on the royal style and titles, but in 1974 NZ simply informed its Commonwealth partners of the change.<sup>93</sup> History was now being ransacked for differences between NZ and the UK, rather than similarities. The goal was no longer replication of the British constitution. Similarities were lamented.

This in part stemmed from Joseph's reliance on secondary sources, the majority of which were themselves Whiggish. The key 'legal' authorities that Joseph relied on were McIntock and Robson, which meant there was much continuity between the old and the new. It was still a history in which the key organising principle was that of responsible, representative government. However, the key historian that Joseph relied upon was Keith Sinclair,<sup>94</sup> an historian whose work had had a great impact on the way NZ history was written after the 1950s.<sup>95</sup> Sinclair had argued that a populist rather than a loyalist nationhood had existed over a long period of time in New Zealand. Sinclair's work was strongly nationalist in orientation—'nationalist' here not being used pejoratively, but rather to suggest an approach which sees all events as leading to the evolutionary endpoint of history: the realisation of the nation (preferably represented by a state).

While Joseph included substantial material on the Treaty, the substance of his constitutional history remained Whiggish. Joseph set out the 'orthodox' theory: the Treaty was not a treaty of cession, since at that time, international law did not recognise that native tribes had the capacity for political organisation and thus the

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<sup>92</sup> Joseph, above n 82, 122.

<sup>93</sup> Ibid. Note that Canada had 'patriated' the Queen and Crown in 1952; Australia in 1973. Carl Bridge and Kent Fedorowich "Mapping the British World" (2003) 31 JICH 1, 10. These parallel developments suggest that the Commonwealth has had a longer role in national histories than is often thought.

<sup>94</sup> See Appendix 2.

<sup>95</sup> "Colonisation and History", above n 46, 187. Joseph, above n 82, chapter 4. In the third edition of his work, Joseph also makes reference to Michael King, a historian perhaps more interested in Pakeha-Maori relations, but also nationalist in orientation: 3 ed, 51.

exercise of sovereignty.<sup>96</sup> He then juxtaposed this with the contrasting view, which saw Maori as politically organised and capable of exercising sovereignty. Joseph himself clearly preferred the orthodox view. In the third edition of his text in 2007, Joseph maintained this stance, arguing that examining the international status of the Treaty was an “exercise in historical curiosity”, the Treaty’s international status “not affecting its significance as a national symbol.”<sup>97</sup> For Joseph, then, how the Treaty had been (mis-)understood—its ‘history’—was to be separated from its present-day ‘nationalisation’. Thus, Joseph could be sceptical about the Treaty’s origins and legal significance while extolling it as a potential limitation on Parliament’s sovereignty, along with human rights and constitutional conventions. For him, as with Chen and Palmer, the main point was recognition of the establishment of NZ as an independent liberal constitutional nation-state. Recognition of the Treaty made NZ legal culture unique, and conformed to international standards, but it could not ultimately threaten the sovereignty of the NZ state.

Indeed, both textbooks were self-consciously ‘about’ a new field of law: *New Zealand* constitutional law. By setting out what constituted this field, they were asserting its coherence, unity and matter-of-fact existence.<sup>98</sup> These scholars were not alone in insisting on the separation of NZ from the UK, and the emergence of a specifically ‘NZ’ identity, which manifested itself in the law. Sir Robin Cooke commented NZ’s national identity had come about “naturally.”<sup>99</sup> ‘We’ had apparently acquired sovereignty and independence in a fit of absence of mind, peacefully and harmoniously. Much of Cooke’s article was devoted to the abolition of the right of appeal to the PC—a key connection to Britain. Cooke ended by stating he supported abolition: “We must accept responsibility for our own national legal destiny ... Not to

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<sup>96</sup> Joseph, above n 82, 49-50. The NZCA has avoided the question of the exact status of the Treaty: see the discussions of the five judges in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (HC and CA); or later, in *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA).

<sup>97</sup> Joseph, above n 82, 3 ed, 53-54.

<sup>98</sup> Adam Tomkins “Inventing Human Rights Scholarship” (1996) 16 OJLS 153.

<sup>99</sup> Sir Robin Cooke “The New Zealand National Legal Identity” (1987) 3 *Canta L Rev* 171, 172.

take the obvious decision now would be to renounce part of our nationhood.”<sup>100</sup> Signs of being British were to be shed like old skins.

Cameron’s<sup>101</sup> article on the history of NZ law reform saw the history of NZ common law as one of “emancipation from the stunting shadow of English law”<sup>102</sup> to confident nationhood, perhaps marred only by the continued existence and influence of the final appeal to the PC. Legislation was the key to NZ difference: it was the willingness to adopt solutions by statute which made NZ different. But there was a feeling that this reliance on legislation may have gone too far: NZers thought every social ill could be solved by legislation, but in their zeal they were prone to discount the effect of such totalising legislation. What was once the virtue of a Better Britain was in danger of becoming a national vice.

The lackadaisical approach of NZers to constitutional reform and the matter of rights, democracy and liberty was at this stage everywhere the subject of criticism. NZers were apathetic, overly pragmatic, anti-theoretical and anti-intellectual.<sup>103</sup> It was their complacency that led to the crises of the late 1970s and early 1980s. NZ’s constitutional history was now a wasteland of lost opportunities, although this could not be pushed too far. For instance, there was no suggestion here that, in acceding to the European Economic Community, Britain had rejected NZ and forced NZ to deny an important part of itself. Joseph briefly mentioned it, but this was thought to only sever “emotional” ties.<sup>104</sup> Events ‘outside’ the law were not to threaten the harmonious progression to the present.

Hence, there was the simultaneous presence of assertions of self-confidence, but also manifestations of anxiety. The opening question in Joseph’s chapter on ‘New Zealand constitutionalism’ was “Why has New Zealand resisted a formal Constitution when

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<sup>100</sup> Ibid, 183.

<sup>101</sup> See Appendix 2.

<sup>102</sup> BJ Cameron “Legal Change over Fifty Years” (1987) 3 *Canta L Rev* 198, 204.

<sup>103</sup> Joseph, above n 82, 107-111; 3 ed, 139-142; *Unbridled Power*, above n, 1.

<sup>104</sup> Joseph, above n 82, 398; 3 ed, 466.

virtually every state has one?”<sup>105</sup> Britain here was no longer a model to be emulated; the enactment of a formal constitution would signify NZ ‘catching up’ with the modern world. Joseph returned to this theme in trying to establish the autochthony of the NZ constitution. Like Robson before, much of this was a genealogy of statutes set out to display legal continuity. NZ’s constitutional history was comparable to the UK’s. However, Joseph was not approving of, as earlier writers might have, a similarity between Britain and NZ, but simply stating fact. Earlier, Joseph had noted:

Apart from [the 1860s and Australian federation in the 1890s], New Zealand’s progression from Crown Colony to independent sovereign state has been regular, continuous and uneventful. At times, New Zealand was so disinclined towards Britain’s offer of increased autonomy as to have appeared positively ungrateful ... Since 1947, New Zealand has experienced little of the political trauma that causes states to proclaim a new existence.<sup>106</sup>

This continuity, Joseph later argued, had been a factor preventing ‘us’ from gaining independence from ‘them’, and enacting a new constitution. This was a dilemma for all settlement colonies: peaceful devolution meant all had derived their legitimacy from their historical continuity with the Imperial Parliament. Since such nation-states had become independent, continuity was also something discomfoting: it suggested dependency.<sup>107</sup> Finally, a Maori narrative suggested that the NZ state’s transformation was far from “uneventful”: the means by which continuity had been achieved had not been of benefit for everyone. Recognition of independence from Britain was forcing NZers to re-examine the sources of the legitimacy of their rule: thus there was a tendency to look for revolutionary ‘moments’.<sup>108</sup> Joseph’s own answer was to identify a breach in continuity in the 1973 Constitution (Amendment) Act (NZ), the revolutionary effect of which had passed mostly unnoticed by the NZ legal community. In the most recent edition, looking for something more stable, Joseph has

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<sup>105</sup> Ibid, 96. Note in the third edition, Joseph removed his chapter on ‘NZ constitutionalism’, merging it into a chapter on constitutional development; but he still asks the same question: Joseph, above n 82, 3 ed, 135.

<sup>106</sup> Ibid, 107; 3 ed, 139.

<sup>107</sup> Ibid, 411; 3 ed, see chapter 13.

<sup>108</sup> Peter Oliver *The Constitution of Independence: the Development of Constitutional Theory in Australia, Canada and New Zealand* (Oxford University Press, Oxford, 2005), chapter 8.

sourced autochthony—the indigenisation of constitutional legitimacy—in a “national psychology” and “sociological fact”.<sup>109</sup>

In short, many scholars were still writing Whiggishly, but this approach was detached from, and used to erase, its own origins. All the features of the previous narrative were present: treating the past with reference to the present, a focus on progress, moral judgment of historical actors—but all of these operated now to exclude a crucial factor in explaining how NZers—and their law—had come to be what they were. NZers were no longer British; they were NZers. It did not make sense to draw upon their ‘Britishness’ to legitimise what they had become. But this was also to obscure that some matters had changed—and some had stayed the same. For instance, another major constitutional change in this period was the adoption of a system of proportional representation: this was seen to end the problem of executive tyranny and revitalise democracy in NZ—but it could also be seen as a reinforcement of the principle of representation long held by NZers.

This process continued in the new century. In late 2004, the Constitutional Arrangements Committee (‘CAC’) established to review NZ’s constitutional arrangements examined NZ’s constitutional history as part of its review. Its report (‘*CAC Report*’) characterised NZ constitutional history, and NZers’ approach to constitutional change, as “pragmatic evolution”: that is, an “instinct to fix things when they need fixing, when they can fix them, without necessarily relating them to any grand philosophical scheme”,<sup>110</sup> once again giving the impression that NZ’s constitution has been one without ‘history’ or an overarching theory.

An appendix entitled “New Zealand’s Constitutional Milestones since 1835” covered various events representing significant developments in NZ’s constitution. A first draft was circulated as a public discussion document and modified to reflect submissions received. The CAC admitted that compiling such a list was not easy,

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<sup>109</sup> Joseph, above n 82, 3 ed, 478-485.

<sup>110</sup> *Inquiry to Review New Zealand’s Existing Constitutional Arrangements: Report of the Constitutional Arrangements Committee* [2005] AJHR I.24A, 12.

because it was difficult to decide what was ‘constitutional’, and stated that attempting to achieve consensus on the matter was unwarranted, and even if achieved only temporary.<sup>111</sup> It took an inclusive approach, arguing the focus ought to be on “significant events which have shaped the ways in which power is exercised; the structure of government ... in New Zealand; and the rules governing its exercise of power.”<sup>112</sup>

What was included from this chronology is noteworthy. For instance, there were far more events relating to Maori: for instance, the 1835 Declaration of Independence by a number of tribes and the 1892 opening of the Kotahitanga Parliament. A number of events relating NZ to the wider world were also included: NZ’s refusal to federate with Australia; the acquisition of Dominion status; NZ’s admission to the UN; the adoption of international treaties such as the International Covenant on Civil and Political Rights. More generally, events listed were far more ‘domestic’ than previous histories had been—an indication of present-day concerns.

A number of traditional matters were omitted. For instance, there was no mention of the 1839 *Durham Report*; the Colonial Laws Validity Act 1865; and various events indicating the end of the link between Britain and NZ, such as the separate declaration of war at the beginning of WW2 and the emergence of a constitutional convention of appointing a NZer to the office of Governor-General; or the decision of Britain to join the EEC.

In short, it was a narrative showing ‘us’ how we had got to where we are today. So, for instance, NZ’s admission to the League of Nations was omitted, because the League no longer exists, although it would be pertinent to a history of NZ’s international status. Similarly, some of the events previously thought to signal a separation from Britain were omitted, because NZ’s status as an independent nation-state with its own separate history was now matter-of-fact. Although references to imperial constitutional law showed the slow erosion of links between Britain and NZ,

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<sup>111</sup> Ibid, 11.

<sup>112</sup> Ibid, 30.

and thus ‘demonstrated’ the growing independence of NZ, these links had also functioned to highlight the continuity between the British and NZ constitutions. This is now unsatisfactory, and being forgotten.

‘Domestic’ events were now seen as more relevant. ‘New’ events now included were events which had always been ‘out there’; it was just they were now seen to have greater significance, read through a different narrative. The emphasis was on NZers’ agency and the events over which they were seen to have control.

### **Maori Understandings of the ‘New Zealand’ Constitution**

Perhaps the most important development in recent writing on NZ constitutional history, illustrated by the *CAC Report*’s discussion of ‘constitutional milestones’, has been the issue of the Treaty’s constitutional significance, Maori sovereignty and agency. It is beyond the scope of this chapter—or indeed, this thesis—to discuss the complexity of constitutional issues as they relate to Maori, since the aim here is to show the decline of a Britannic narrative of NZ constitutional history and the emergence of a nationalist narrative. However, some discussion of Maori views is necessary, since they have had a momentous impact and influence on how to understand NZ’s constitutional history, and have highlighted the inadequacy of previous constitutional narratives.

Depending on who was writing, Maori history could be simply ‘slotted in’ to give political legitimacy to the constitution; it could be a means by which the sovereignty of Parliament could be limited; or it could be the very foundation of the constitution itself. In short, there is no single Maori narrative, but many. Much is the story of dispossession and disempowerment. Much focuses on the meaning of the Treaty—mainly the Maori text—and its implications for the present. Thus a brief history of case law relating to the Treaty is required.

In *Wi Parata v The Bishop of Wellington*,<sup>113</sup> the NZ Supreme Court under Prendergast CJ held that a Crown grant of Maori land was an act of state which courts could not look behind. Courts could not ask whether native land title had been extinguished by the Crown grant: it was enough for the Crown to simply assert it. Further, it was held that the Treaty was “a simple nullity” to the extent it purported to cede sovereignty.<sup>114</sup> A later set of cases challenged this ruling. In *Hoani Te Heuheu v Aotea District Maori Land Board*, the PC noted that the Treaty only had effect insofar as it was incorporated in domestic law via enactment by the sovereign NZ Parliament.<sup>115</sup> The result of such cases was to remove the Treaty and its relationship to the authority of the NZ Parliament from legal discussion. This approach ensured that the transplantation of the British constitution in NZ was seen to be seamless: there was no break in legal continuity at all.<sup>116</sup> This made easier the belief that NZ had managed to replicate the UK constitution—which could tolerate no alternative source of sovereignty—perfectly.

Maori approaches to NZ constitutional history became more conspicuous by the late 1970s and early 1980s for a number of reasons. The first was the very public protests made by Maori, beginning in the late 1960s. The second reason was the establishment of the Waitangi Tribunal in 1975,<sup>117</sup> a response to growing Maori protests and an attempt to remove Maori issues from political debate.<sup>118</sup> The Tribunal was given jurisdiction to hear and make recommendations to Parliament on Maori claims and grievances, and in 1984 this was extended to investigating claims back to 1840. Various reports brought out in the early 1980s made recommendations for recompense based on the Treaty, and introduced Maori concepts like *kawanatanga*, *rangatiratanga* and *taonga* (‘treasure’) into national political discourse.

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<sup>113</sup> (1877) 3 NZJR 72 (NZSC).

<sup>114</sup> Ibid, 78.

<sup>115</sup> [1941] AC 308 (PC). The PC also saw the Treaty as one of cession, but this went unnoticed at the time.

<sup>116</sup> See generally “Tales”, above n 1.

<sup>117</sup> On the Waitangi Tribunal, see Janine Hayward and Nicola Wheen (eds) *The Waitangi Tribunal* (Bridget Williams Books, Wellington, 2004).

<sup>118</sup> Andrew Sharp “The Trajectory of the Waitangi Tribunal” in *ibid*, 195.



The third reason—given a great deal more emphasis by legal commentators—was the decision of the NZCA in the 1987 *Lands* case.<sup>119</sup> This case came at a time when the Labour Government was selling state assets worth an estimated \$NZ nine billion. The fear of the NZ Maori Council was that once the government had sold state assets—much of which was the subject of Maori claims at the Waitangi Tribunal—there would be no way of getting them back again. The key provision was section 9 of the State Owned Enterprises Act 1987, which provided that nothing in the Act “shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.”

All five NZCA judges in the *Lands* case held that to ignore section 9 would be to ignore the intent of Parliament in passing it. The principles of the Treaty had to be taken into account. This meant preparing a system of safeguards to ensure that lands and waters would not be transferred to State enterprises so as to prejudice any Maori claim. Although this could be seen as an extension of parliamentary sovereignty, since really all the NZCA was doing was giving effect to a statutory provision, it was seen as revolutionary: earlier cases had simply ignored similar provisions.

Fourthly, scholars began to revise the Whiggishness of NZ’s constitutional history, criticising, excavating and introducing old cases, pointing to the ways in which such decisions impacted on and were understood by Maori, positing alternative pathways to the singular worldview held by most NZers over the late nineteenth century and much of the twentieth century. *Wi Parata*, for instance, has been shown by Paul McHugh to involve a serious misreading of both international law and British law.<sup>120</sup> By insisting that the Crown grant of land was an act of state and unreviewable Prendergast CJ violated the long-standing rule that there could be no act of state by the Crown against its own subjects. Moreover, by insisting that Maori never held sovereignty, Prendergast CJ was rejecting the long-recognised prerogative right of Crown to determine for itself questions of international legal personality.

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<sup>119</sup> *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

<sup>120</sup> “Crown Sovereignty” above n 2, 193-197. See also *Nireaha Tamaki v Baker* (1901) NZPCC 371 (PC).

Similarly, after *Wi Parata*, Maori claimants tried to test the abolition of their customary rights by appealing in a number of cases to the PC. One of these was *Wallis*, mentioned earlier, which was used by historians to indicate a nascent sense of independence from Britain. Chief Judge Edward Durie<sup>121</sup> and Paul McHugh<sup>122</sup> have looked at *Wallis* from a ‘Maori perspective’. *Wallis* concerned the alienation of land by Maori to the Bishop of NZ to build a college. The question was whether the land should revert to the Crown or the original Maori owners after a long period of non-use. The NZCA held that the land had reverted to the Crown. The PC reversed this, and criticised the NZCA for bowing to the wishes of the executive.

The NZ bench and bar protested. But Durie and McHugh argued that what was significant about *Wallis* was that the PC had held that Maori had had native title to land, independent of the Crown. This was contrary to what NZ lawyers at the turn of the nineteenth century and later writers had argued. *Wallis* was later overruled by the Native Lands Act 1909; but we can see that the broader context of Maori dispossession was forgotten in later redescriptions of the case. And what the NZ judges and lawyers were anxious about—the need to replicate the British constitution in NZ—was, and is, played down.<sup>123</sup> What mattered was the PC’s lack of understanding of local conditions.<sup>124</sup> But the point here is rather that with the emergence of Maori voices, it was no longer so simple to celebrate progress towards independent nationhood: independence could also mean disenfranchisement; constraint rather than enablement.

The work of Claudia Orange<sup>125</sup> and the Waitangi Tribunal give a sense of the Maori narrative to constitutional history. Claudia Orange’s history of the Treaty,<sup>126</sup> was the

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<sup>121</sup> See Appendix 2. Edward Durie “Part II and Clause 26 of the Draft New Zealand Bill of Rights” in *A Bill of Rights for New Zealand* (Legal Research Foundation, Auckland, 1985) 171.

<sup>122</sup> See Appendix 2. PG McHugh “Aboriginal Title in New Zealand” (1984) *Canta LR* 235, 248-250.

<sup>123</sup> “Tales”, above n 1, 81-82.

<sup>124</sup> See *New Zealand Legal History*, above n 26, 244-245; K Keith “Public Law in New Zealand” (2003) 1 *NZJPIL* 3, 14.

<sup>125</sup> See Appendix 2.

<sup>126</sup> Orange, above n 26.

flip side to the previous Whiggish narratives of NZ's history. Whereas previous narratives were a story of the gradual acquisition of sovereignty and responsible government—or the slow emancipation of a people from 'external', imperial bonds—Orange's history of the Maori and their relationship with the Crown and the Treaty was one of steady internal dispossession. Orange's history painted a picture of a people who at the arrival of British settlers were quite capable of acting as political agents, and were able to understand and make sophisticated political arguments. Save Hight and Bamford, none of the previous constitutional histories discussed above considered native political life before settlement: constitutional history began with British sovereignty.

The acquisition of responsible government by NZers for NZers, celebrated in Britannic and nationalist narratives of the constitution, in Orange's history coincided with, and was the cause of, the disenfranchisement of the Maori. Further, while British control of native affairs had been poor, matters became even worse under the rule of settler Governments. Maori were overwhelmed by settlers in sheer numbers, the loss of land increased, and the Treaty was gradually reduced to a mere nullity. Still, the Treaty became a symbol for Maori to gather around and organise themselves and their arguments. They were revealed as flexible and adaptive: where one avenue failed, a new strategy was adopted, again and again.<sup>127</sup>

In essence, Orange wrote an 'alternative' history through which to read constitutional developments, and one that was at odds with the nationalist narrative. Here was the history of a people organised around a single text which recognised their already-existing sovereignty. But it also gave lie to the idea that there had ever been a 'Better Britain'; an homogenous 'whole' in NZ; even the idea of progress seemed inappropriate.

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<sup>127</sup> See Ranginui Walker *Ka Whawhai Tonu Matou: Struggle without End* (Rev ed, Penguin Books, Auckland, 2004); and Richard Hill *State Authority, Indigenous Autonomy: Crown-Maori Relations in New Zealand/Aotearoa 1900-1950* (Victoria University Press, Wellington, 2004).

The work of the Waitangi Tribunal is voluminous,<sup>128</sup> but a gist of its work can be given. In the *Waiheke Island Report*,<sup>129</sup> the Tribunal held that Crown policies had essentially rendered Ngati Paoa landless. Although members of Ngati Paoa had sold some of their land voluntarily, other sections were sold under pressure. Moreover, reserves were not created and the remaining land was sold by individuals under Native Land legislation. A majority of the Tribunal held that the Crown had a duty to protect the interests of the tribe under the Preamble and article 2 of the Treaty, which it had failed to meet by not ensuring that sufficient land remained for the future of Ngati Paoa.

The *Orakei Report*<sup>130</sup> had a broader impact because of public protests which had taken place over the disputed land in the late 1970s. In essence the Tribunal held that tribal ownership of land had been wilfully broken up by the Native Land Court. The Tribunal held that the Crown failed to ensure that an adequate amount of land remained to Ngati Whatua; moreover, by individualising land title over time, the Crown effectively destroyed the authority of Ngati Whatua, which was based on the community ownership of land. In short, 'the Crown' violated the provisions of the Treaty.

The *Ngai Tahu Report*<sup>131</sup> focused on a vast amount of land in the South Island previously owned by Ngai Tahu. Ngai Tahu had agreed to various purchases, but not to the extent of area sold. Moreover, Ngai Tahu claimed that the Crown had failed to make adequate provision for reserves for the tribe. The Tribunal held that Ngai Tahu had consented to the various purchases, but the Crown had failed to provide sufficient land for reserves, thus failing to meet the duty of protection required under the Treaty.

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<sup>128</sup> Useful summaries of many of the Tribunal's reports, from which the discussion below is taken, can be found in Janine Hayward and Wheen, above n 117; and see here in particular Tom Bennion "The Lands Reports" in Hayward and Wheen, above n 117, 67.

<sup>129</sup> Waitangi Tribunal *Report of the Waitangi Tribunal on the Waiheke Island Claim* (Brooker & Friend Ltd, Wellington, 1987).

<sup>130</sup> Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim* (Brooker & Friend Ltd, Wellington, 1987).

<sup>131</sup> Waitangi Tribunal *The Ngai Tahu Report, Vols 1-3* (Brooker & Friend Ltd, Wellington, 1991).

The *Lands* case, then, coupled with Tribunal reports and new histories (like Orange's *The Treaty of Waitangi*) eroded the separation of history and law, posited by both Britannic and nationalist narratives. As McHugh noted, in Tribunal reports and the *Lands* case, a new history was emerging which McHugh has called 'Lockean' or contractarian.<sup>132</sup> That is, the Treaty was incorporated into constitutional history, conceived of as a contract with obligations to which the Crown was subject. However, Crown institutions like the Tribunal and the Courts who employed this conception tended to focus more on the Crown's ability (and all too often failure) to meet these obligations, their 'histories' being state-centred.<sup>133</sup> Others, however, made more radical claims, arguing that the Treaty was the product of a meeting between two sovereign peoples, and thus represented a qualification on Crown sovereignty.<sup>134</sup> On this view, the Treaty was more than a mere document: it was the fundamental document in NZ constitutional law. But such claims were often marginalised by Crown institutions. All the same, the impact of Maori narratives of NZ's constitutional history was fundamental, rendering previous narratives suspect or unpersuasive. Put differently, Maori narratives treat the nationalist narrative as if it was the same as the previous Britannic narrative: there was no difference.

Some historians are sceptical of some of the claims made in the name of Maori, however. It may be that too much attention is being paid to the Treaty as the sole object of legal argument. Whatever the Treaty might have meant in nominal terms, the actual acquisition of state sovereignty was not complete till perhaps the end of the nineteenth century. Boast has argued that it might be wise to treat various deeds signed in NZ over the late nineteenth century as treaties in themselves—since the effect of such deeds was not merely to convey land, but extend the effective sovereignty of the state.<sup>135</sup>

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<sup>132</sup> "Historiography", above n 2, 354-5; "Crown Sovereignty", above n 2, 200-6.

<sup>133</sup> "Crown Sovereignty", above n 2, 202-203.

<sup>134</sup> JGA Pocock "Law, Sovereignty and History in a Divided Culture: the Case of New Zealand and the Treaty of Waitangi" in *The Discovery of Islands: Essays in British History* (Cambridge University Press, Cambridge, 2005) 226.

<sup>135</sup> Boast, above n 38, 134.

Other historians have pointed to the Whiggishness of the Tribunal's own approach to history—that is, an approach which examines the past in accordance with the needs of the present.<sup>136</sup> Oliver has been sharply critical of the Waitangi Tribunal's reading of 'history'. Looking at two major reports in the 1990s, he noted that the Tribunal was "less concerned to recapture past reality than to embody present aspiration."<sup>137</sup>

Oliver argued that the Tribunal's approach to history stemmed from a number of factors: the Tribunal's statutory objectives, Maori tribal history and the common law mind. The Tribunal is statutorily required to ask if the Crown was responsible for acts which were prejudicial to Maori interests; and were such actions in breach of the principles of the Treaty. The Tribunal assumes, perhaps understandably from its statutory remit, that the Crown should have kept its promises, and that timeless Treaty principles—a gift from the common law thinking—bound the Crown. Given this, it behoved the Tribunal to ask what the Crown ought to have done according to these timeless, broadly construed Treaty principles (that is, the guarantee of *tino rangatiratanga* and a duty of active protection).

Thus, the Tribunal's approach to the past "was not to realise the past in its distinctiveness but to indict it for its reprehensibility, and to do that by constructing an ideal (but feasible) alternative."<sup>138</sup> In the *Muriwhenua Report*,<sup>139</sup> the Tribunal focused on the Crown's failure to promote Maori economic well-being; there should have been 'consensual' annexation. In the *Taranaki Report*,<sup>140</sup> the Tribunal argued that the Crown had not done enough to develop customary institutions and protect Maori *rangatiratanga*.

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<sup>136</sup> WH Oliver "The Future Behind Us: The Waitangi Tribunal's Retrospective Utopia" in Andrew Sharp and Paul McHugh (eds) *Histories Power and Loss: Uses of the Past—A New Zealand Commentary* (Bridget Williams Books, Wellington, 2001) 9; and Michael Belgrave "The Tribunal and the Past: Taking a Roundabout Path to a New History" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Auckland, 2005) 35.

<sup>137</sup> Oliver, above n 136, 9.

<sup>138</sup> Ibid, 20.

<sup>139</sup> Waitangi Tribunal *Muriwhenua Land Report* (GP Publications, Wellington, 1997).

<sup>140</sup> Waitangi Tribunal *Taranaki Report: Kaupapa Tuatahi* (GP Publications, Wellington, 1997).

But this ideal ‘past’ which the Tribunal argued could have been is questionably feasible. In the *Muriwhenua Report*, the Tribunal presumed a highly interventionist government with a pervasive and efficient bureaucracy, and maintaining an ideology of biculturalism to meet the needs of Maori could exist in the nineteenth century. In the *Taranaki Report*, the Tribunal presumed that the Crown could create constitutional structures allowing for political equality between Maori and Pakeha which even today are not present. Oliver again:

[W]hile the past is given a location in the present, by a reversal of direction the present in the form of its hopes for the future is given a location in the past. This retrospective reconstruction has a utopian character: a vision of the future and a present programme designed to realise it is reinforced by the discovery of its essential characteristics in the past.<sup>141</sup>

What the Tribunal wanted to happen in the present and in the future—harmonious race-relations, better consultation and greater political agency and capacity for Maori—was projected backwards into the past, as a past that could have, or ought to have, been. Oliver argues that “[a]t the heart of the Tribunal’s depiction of a ‘possible’ past is a ‘known’ future, a kind of paradise lost at the dawn of colonial time.”<sup>142</sup> This utopia is paradoxically similar to the nineteenth century vision of colonisation: a chance for a new world for those deprived in the old; a life like that of the old country but shorn of its defects and impurities. In short, the Tribunal’s utopian history is the mirror image of a ‘Better Britain’.<sup>143</sup>

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<sup>141</sup> Oliver, above n 136, 26.

<sup>142</sup> Ibid, 27.

<sup>143</sup> Ibid, 27.

## Conclusion

Authors of the Britannic narrative of NZ constitutional history devoted themselves to proving that there had been a smooth, harmonious path to constitutional maturity, culminating in the replication of the British constitution in NZ: it was Whiggish. It meant reading into the past the concerns of the present, judging historical actors in terms of their role in promoting or impeding representative government, and presuming in all of this inevitable progress. The history of the NZ state was read so as to create an homogenous, liberty-loving, self-governing polity.

In the latter half of the twentieth century, the 'history' of NZ's constitutional arrangements changed. Emphasis was placed on the inadequacy of protection for constitutional liberties, the events of the recent past seen as a warning about the doctrine of 'absolutist' parliamentary sovereignty—itself treated as something 'British' and therefore 'foreign' to NZ. Causes of this change were domesticated. The emphasis was on the flowering of the separate, constitutional nation-state of NZ—now the standard model imported from 'overseas'. Signs of a distinct NZ nation were read back into the past, as if it had always been there. In doing so, however, it was necessary to omit how NZers had once seen themselves: as the Better British. Yet the constitutional changes that would be made in the 1980s and 1990s were also shaped by the vision which the NZ polity had inherited of itself: a responsible government under the rule of law. Thus there was both change and continuity.

Maori readings of constitutional history, despite contradictions in some versions, presented a challenge to this project. Whig history is a view of time in which the march of reason and knowledge steadily diminishes the relative power and extent of immorality. The corollary of the 'development' and 'progress' of history is a corresponding diminution of responsibility for the past.<sup>144</sup> Presently, NZ Pakeha are confronted with a people for whom the past is ever present. Pakeha still retain the mindset of Whigs, but the presence of Maori narrative which insisted on Maori

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<sup>144</sup> Oliver MacDonagh *States of Mind: A Study of Anglo-Irish Conflict 1780-1980* (George Allen & Unwin, London, 1983), 10-11.



sovereignty and identified Pakeha NZers as enjoying the fruits of Maori dispossession, created an anxiety from which escape seemed impossible. Pakeha were being dragged back into the past: a past which was populated with the unwelcome memories of being British. The Pakeha response was to shore up what remained by reinforcing representation, accommodating Maori 'rights' and settling claims within the old Whig framework.<sup>145</sup> The increasing chorus of (mostly Pakeha) voices calling for a constitution and/or a republic—a new 'origin'—is another response to this uncertainty: it aims to 'end' history or perhaps confirm the apparently already-existing NZ nation.

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<sup>145</sup> *Tales*", above n 1.

## *Chapter 2: The Economy*

### **Introduction**

The objective of this chapter is somewhat different from other chapters in that it does not explicitly deal with 'law'; but it does aim to give a broader context to the constitutional changes which took place in NZ, particularly over the twentieth century, and to highlight how changes in the economic sphere have both mirrored and affected changes in the political sphere.

Domestic political stability was achieved by linking the NZ economy to the imperial economy and to some extent excluding the outside world. In the first half of the twentieth century, economic relations between Britain and NZ tightened due to international economic instability. However, the British economy itself existed within a broader global economy; and British actions in responding to this global economy did not always accord with NZ interests. In time, the links between Britain's economy and NZ's became attenuated, and NZ's economy became both more regional and more international.

Of course, NZ's economy had a dynamic of its own; and NZers had their own responses to scarcities. Indeed, the argument here is that the NZ state was often seen as a means of ensuring economic stability, and its role within the NZ economy contracted and expanded accordingly. Reliance on the British economy and ultimately the global economy both constrained and enabled the domestic management of NZ politics. Thus state legitimacy was often linked to its relationship with the economy; just as state legitimacy was linked to its relationship with the citizens under its control.

Finally, the path of the NZ economy provided a basis for the Britannic and nationalist narratives purporting to explain how the NZ constitution has developed. Well into the twentieth century, the idea that NZ would remain within a British orbit seemed plausible; divergence from this path was deeply unsettling, particularly in times of

economic instability. It was only with the definite weakening of links between NZ and Britain and the internationalisation of NZ's economy that a history which focused on NZ as an independent nation-state as part of a community of nation-states seemed more attractive and persuasive.

### **1840-1918: The Foundations of a Colonial State**

NZ had the distinct characteristics of a settler community. It was established by large-scale British immigration and capital; indigenous people were separated from their valuable land; the economy consisted in exporting a narrow range of raw materials to the British market and was protected by British naval power.

But NZ had three features which made NZ's economic development difficult. First, it was geographically the most distant from Britain, so that invisibles (transport, insurance) were always costly. Second, it was in a poor position geopolitically: NZ had nothing to attract the great powers.<sup>1</sup> Finally, NZ was the smallest of the settler communities, in terms of population, land and market. Self-sufficiency was unlikely: NZ would be highly dependent on international trade.

NZ's economy had its origins first in trade with Maori, and latterly with the Australian colonies. Collectively the Australian colonies remained NZ's biggest trading partner until the 1870s.<sup>2</sup> Wool and gold were the key exports for the first half century.<sup>3</sup>

Domestically, the key determinants for much of the nineteenth century economy were Maori land and private British investment. The British government itself was parsimonious in funding the colonies, and so NZ Governors and later local Parliaments fueled the NZ economy and the state through the sale of land to settlers. In 1840, Maori had roughly 27 million hectares of land; by 1860, this had dropped to

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<sup>1</sup> Henry Albinski "The Economic Policy of a Small Nation" in Ralph Heyburn and Bill Webb (eds) *Economic Strategies and Foreign Policy* (University of Otago Press, Dunedin, 1979) 160, 163.

<sup>2</sup> James Belich *Paradise Reforged: A History of the New Zealanders from the 1880s to the Year 2000* (Penguin Press, Auckland, 2001), 49.

<sup>3</sup> James Belich *Making Peoples: A History of the New Zealanders* (Penguin Press, Auckland, 1996), 341-344.

9 million hectares.<sup>4</sup> Settlers owned two-thirds of NZ, but this was mostly in the South Island; less than one-quarter of the North Island was under settler control.<sup>5</sup> Settler greed and Maori anger over land sales led to the New Zealand Wars of the 1860s, in which North Island Maori fought British and colonial troops for control of their land. The cost of the Wars was also a major factor in the British surrendering control of local affairs to domestic politicians. How the colonial economy was dealt with, and economic considerations was the subject matter of NZ politics itself.

The North Island Maori were eventually broken, and land sales increased. The 1863 New Zealand Settlements Act and the 1865 establishment of the Native Land Court were key means of shifting land from Maori to Pakeha possession. The former was used to confiscate land for 'public use'; the latter was used to bring Maori land under European law, removing possession from tribes to individuals. By 1890, land owned by Maori had halved (4.5 million hectares).<sup>6</sup>

The development of NZ and its economy were highly influenced by changes in the British economy. By the latter half of the nineteenth century, Britain had a shortage of land and a surplus of labour and capital, while for the settlement colonies it was the opposite.<sup>7</sup> A complementary 'imperial' division of labour evolved whereby the centre provided manufactures, services, and investment, and the periphery provided food and raw materials. NZ's early economic structure was a product of this imperial division of labour. Further, British investment in the settler communities remained high because they were regarded as safe investments: default was unheard of.<sup>8</sup>

NZ profited from British enthusiasm for easy investment.<sup>9</sup> Julius Vogel, the British-born NZ Colonial Treasurer (later Premier) with strong connections to British banking

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<sup>4</sup> Philippa Mein Smith *A Concise History of New Zealand* (Cambridge University Press, Melbourne, 2005), 78.

<sup>5</sup> Ibid, 68.

<sup>6</sup> Ibid, 78.

<sup>7</sup> PJ Cain and AG Hopkins *British Imperialism 1688-2000* (2 ed, Pearson Education Ltd, London, 2002), 200-205.

<sup>8</sup> Ibid, 214.

<sup>9</sup> *Making Peoples*, above n 3, 349-360.

adopted an expansionist policy in 1869, taking advantage of Britain's surplus capital at a time when NZ's economy was stagnating.<sup>10</sup> Vogel's chief achievements were the development of basic infrastructure and an enormous population increase. But Vogel had also established the expectation amongst NZers that the state existed to promote the colony's economic welfare where private enterprise was lacking.<sup>11</sup>

NZ's increasing debts intensified its relationship with Britain: in order to meet repayment, NZ had to increase exports, and in the context of a massive increase in population.<sup>12</sup> In 1879, the NZ government almost failed to meet debt repayments, and with this the banks began to tighten credit in the colony; government borrowing became politically unacceptable. The 'Long Depression' began. But the problem was not just a result of poor speculation, but also with the British economy, which had begun to lag in the late 1870s and for most of the 1880s.

The period from the 1890s till the immediate interwar period was a period of high prosperity. Fundamental was the invention of refrigeration, which allowed NZ farmers to build upon the already-existing wool industry and expand into the production of meat and dairy products.<sup>13</sup> By the beginning of the twentieth century, NZ's export sector consisted of a 'holy trinity': wool, meat and dairy products. From the 1890s onwards NZ has consistently enjoyed a balance of trade surplus on the merchandise account. But economic prosperity in this period also had a domestic source: land annexed from Maori, and offered to migrants at low prices.<sup>14</sup> During the 1890s, the remaining 4.5 million hectares of Maori land was used to fund state experimentation and boost the pastoral economy. By 1900, Maori had only 2.5 million hectares left.<sup>15</sup>

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<sup>10</sup> WJ Gardner "A Colonial Economy" in Geoffrey Rice (ed) *The Oxford History of New Zealand* (2 ed, Oxford University Press, Auckland, 1992) 57, 70.

<sup>11</sup> Ibid, 71.

<sup>12</sup> CF Simkin *The Instability of a Dependent Economy: Economic Fluctuations in New Zealand 1840-1914* (Oxford University Press, Oxford, 1951), 147.

<sup>13</sup> *Paradise Reforged*, above n 2, 53-68.

<sup>14</sup> Tom Brooking "Economic Transformation" in Geoffrey Rice (ed) *The Oxford History of New Zealand* (2 ed, Oxford University Press, Auckland, 1992) 230, 242.

<sup>15</sup> Smith, above n 4, 78.

The invention and application of refrigeration and NZ's British-driven prosperity shifted the focus of the NZ economy from Australia towards Britain.<sup>16</sup> But refrigeration also drove NZ and the Australasian colonies further apart. In 1870, 46% of NZ's total exports went to Australia and 35% of NZ's total imports came from Australia; by 1900, this dropped to 14% and 17% respectively. Britain took 83% of NZ's exports. The Australasian colonies (later Australia) and NZ became rivals for the prized British market. And NZ's British-driven economic success was a key factor in the decision not to federate with the other Australian colonies in the period 1890-1901.<sup>17</sup> In these ways, the economy, and NZ's economic interactions with Britain, influenced the present-day shape of the NZ nation-state.

NZ operated on a sterling exchange standard until the twentieth century. There was no central or state bank in NZ until 1934. Credit was mostly determined by trading patterns—by the London balances of various trading banks established in NZ (mostly Australian-owned).<sup>18</sup> Export receipts were held in these banks: when London balances were high, the banks would release credit; when low, credit was tightened. The trading banks fixed the NZ pound at parity with the British sterling. Thus, events in London had a greater impact on the 'management' of the NZ economy than any domestic actor. NZ bankers shared their British counterparts' orthodox views of finance: insistence on the maintenance of parity with gold (and sterling), and deflation and balanced budgets where necessary.

One key difference between Britain and NZ was that in NZ the state had a greater role in public finance. This role had begun with European settlement and land policy,<sup>19</sup> but was cemented in place with the election of the Liberals, who came to power in 1891. NZers shifted to a party promising shelter from hard times. The Liberals created a proto-welfare state complete with pensions and accident insurance, mostly financed by the introduction of income tax. The Liberals also profited from refrigeration: NZ

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<sup>16</sup> Cain and Hopkins, above n 7, 226.

<sup>17</sup> *Paradise Reforged*, above n 2, 49.

<sup>18</sup> GR Hawke *Between Governments and Banks: A History of the Reserve Bank of New Zealand* (AR Shearer, Wellington, 1973), chapter 2.

<sup>19</sup> See generally Michael Bassett *The State in New Zealand, 1840-1984: Socialism without Doctrines?* (Auckland University Press, Auckland, 1998).

had a good reputation in London by contrast with the poorly-performing Australian colonies.<sup>20</sup> Public borrowing began again. Both the Liberal government and its successor, Reform, provided cheap credit to purchase farming land, the source of NZ domestic prosperity. The British economy was presumed to be an unchanging variable.

### **1918-39: Depression and Dependence**

#### *The 1920s and the Depression*

The interwar years showed, however, that the British economy was not an unchanging variable. NZ's economic prosperity and domestic harmony had mostly been a product of Britain's vibrant economy. As the British economy faltered in the face of the international economy, NZ's economy and domestic politics suffered.

In the 1920s, the long boom ended as the planned wartime economy was dismantled and the international economy adapted to the interwar conditions. NZ suffered a series of recessions.<sup>21</sup> Ominously, the interest on public debt in the 1920s was twice the size of NZ's export surplus.<sup>22</sup> The British began to tighten investment flows; capital dried up in NZ.

The structure of NZ's economy had changed: in 1896, the primary sector employed 42% of the workforce, the secondary sector 25% and the tertiary sector 36%. By 1926, these proportions were respectively 30%, 25% and 45%. NZ resembled other Western countries in terms of the supplanting of the primary sector by the industrial and service sectors, but in terms of foreign exchange NZ was an urban country which relied almost exclusively on agricultural exports.<sup>23</sup> This structural issue had been mostly masked by continued spending and buoyant export receipts.

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<sup>20</sup> Gardner, above n 10, 86.

<sup>21</sup> Brooking, above n 14, 231.

<sup>22</sup> Cain and Hopkins, above n 7, 512.

<sup>23</sup> Brooking, above n 14, 231.

Economically, ties between UK and NZ continued to tighten: in 1920, 74% of NZ's exports went to Britain; this rose to 80% by 1930.<sup>24</sup> By contrast, in 1920, exports sent to Australia had dropped from 14% to 5% of NZ's total exports, and would remain at this level until the late 1960s.<sup>25</sup> But these ties to Britain also meant that economic instability in Britain was easily transmitted to NZ. Again, reliance on Britain was beneficial, enabling the NZ state to provide stability, but also had its drawbacks.

Internationally, the end of capital flows in the late 1920s and the operation of the Gold Standard (requiring deflation in those countries losing gold, but not requiring reflation for those gaining) led to falling prices, incomes and employment rates everywhere.<sup>26</sup> Many countries erected tariff barriers to protect their own industries, contracting the international economy. The open British market became attractive to other countries; NZ had to face greater competition.<sup>27</sup>

Over the period 1929-31, NZ's export income dropped by 39%. As export receipts fell, the structural weaknesses of NZ's economy were exposed. At the peak of the Depression, there were around 80000 registered unemployed, or 12% of the workforce. Gross domestic product dropped by up to 30%.<sup>28</sup> It was the deprivation relative to the mostly prosperous times before which was shocking.<sup>29</sup> Unlike larger countries with diversified economies, it was difficult for NZ to switch resources to different markets. This response was exacerbated by the actions of the United and United-Reform governments, who resorted to orthodox remedies: cutting public expenditure and salaries, and balancing the budget.<sup>30</sup> This was much the same immediate response as

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<sup>24</sup> Adapted from GT Bloomfield *New Zealand: A Handbook of Historical Statistics* (GK Hall, Boston, 1984), 294-296.

<sup>25</sup> *Paradise Reforged*, above n 2, 52.

<sup>26</sup> Barry Eichengreen *Globalizing Capital: A History of the International Monetary System* (Princeton University Press, Princeton, 1996), 61-92.

<sup>27</sup> GR Hawke *The Making of New Zealand: An Economic History* (Cambridge University Press, Cambridge, 1985), 128-9.

<sup>28</sup> *Ibid*, 124-7.

<sup>29</sup> *Paradise Reforged*, above n 2, 254-9.

<sup>30</sup> *Making of New Zealand*, above n 27, 148-151.



that of the British. No one had any idea of the depth and persistence of the recession at the time,<sup>31</sup> and the 'Gold Standard mentality' was international orthodoxy.<sup>32</sup>

#### *Ottawa, the Sterling Bloc, and New Zealand Vulnerability*

A key factor in recovery was the Ottawa Preference system.<sup>33</sup> In 1932, representatives from Britain and the Commonwealth met to discuss trade. Loss of the British market would have been catastrophic for the Antipodean economies: protectionism elsewhere was rife. Britain granted various concessions to the settler communities. In return, NZ undertook to increase tariffs on imports of manufactures to give British goods a wider margin of preference.<sup>34</sup>

Britain thus continued to dominate NZ's foreign trade: in 1937, the UK took 76% of NZ's exports, and 50% of all imports were from Britain.<sup>35</sup> For Australia, the British market share increased from 40% to half of all Australia's foreign trade.<sup>36</sup>

Imperial preference demonstrated an unrealistic faith in the potential of the Empire to provide for Britain.<sup>37</sup> Britain did most of its trade with Europe: in the period 1871-1931, Europe took more British exports than India, Australia, NZ, Canada, the West Indies and US combined.<sup>38</sup> This was still so even in 1938. Britain lost more than it gained: the settler communities were able to export more to Britain, and at the expense of non-Commonwealth exporters.<sup>39</sup> Nor did the settler communities themselves did reduce their own preferential tariffs significantly to allow more British imports.<sup>40</sup>

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<sup>31</sup> John Singleton "New Zealand in the Depression: Devaluation without a Balance-of-Payments Crisis" in Theo Balderston (ed) *The World Economy and National Economies in the Interwar Slump* (Palgrave Macmillan, Basingstoke, 2003) 172, 177.

<sup>32</sup> Barry Eichengreen and Paul Temin "The Gold Standard and the World Depression" (National Bureau of Economic Research, Massachusetts, Working Paper 6060, June 1997).

<sup>33</sup> See generally Ian Drummond *British Economic Policy and the Empire 1919-1939* (George Allen and Unwin, London, 1972).

<sup>34</sup> "New Zealand in the Depression", above n 31, 184-5.

<sup>35</sup> Cain and Hopkins, above n 7, 468.

<sup>36</sup> Ibid, 468.

<sup>37</sup> Andrew Thompson *Imperial Britain: The Empire in British Politics, c. 1880-1932* (Pearson Education Limited, Harlow, 2000), 104-9.

<sup>38</sup> JDB Miller *Survey of Commonwealth Affairs: Problems of Expansion and Attrition, 1953-1969* (Oxford University Press, London, 1974), 267.

<sup>39</sup> Ibid, 441.

<sup>40</sup> See generally Drummond, above n 33.

Still, this arrangement was also beneficial to the British. Finance was important to the British because of their belief in the strength of the pound as a basis for British power.<sup>41</sup> A starting point is the Sterling Bloc ('SB'). It was an informal association of countries who had a number of features in common: they traded and held their reserves in sterling in London; their key market was Britain; they agreed to limit imports from those outside the SB; and often they were partners in the preferential tariff arrangement.

For the British, the SB and imperial preference were invaluable. Many members were heavily dependent on Britain's capital and services. The concern was that any one of these members might default, threatening the value of the sterling. The preference system was beneficial because although its immediate impact was to increase British imports from the empire, this also strengthened the value of sterling, since export receipts took the form of sterling balances in London.<sup>42</sup> Moreover, with access to the British market, SB members improved their financial position: allowing more imports reduced the potential for default.

But the SB was not entirely beneficial to its members. The British were highly conservative and hankered after a strong sterling. The settler communities all called for an expansionary imperial monetary policy, but Britain refused. The British feared that this would weaken the sterling; thus they insisted that the settler communities ought to pursue deflationary policies domestically. Recovery for SB economies was quicker than for Gold Standard economies, but this could have been made less traumatic had Britain decided earlier to reflate its own economy.<sup>43</sup>

The economic dependence of the Antipodean settler communities suggests that the 'equality of status' in the 1926 Balfour Declaration and later in the 1931 Statute of

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<sup>41</sup> Cain and Hopkins, above n 7, 464-5.

<sup>42</sup> Ibid, 472-3.

<sup>43</sup> "New Zealand in the Depression", above n 31, 188.

Westminster “was no more than a polite fiction”.<sup>44</sup> Most British politicians involved in the drafting of these ‘constitutional’ declarations were in fact ardent imperialists: “[British] Ministers ... did not believe that the *form* in which imperial relations were cast would affect the *substance* of the relationship between the mother-country and her former settlement colonies”,<sup>45</sup> the ‘substance’ here being the sentimental and economic links between Britain and its ‘daughters’. This is far from the Britannic or nationalist narratives’ trajectory of colony to self-governing independent nation, which relies on ‘constitutional’ signposts for its logic. NZ and the other settler communities remained within Britain’s orbit during the interwar years. In NZ little time was spent discussing the constitutional implications of the Statute of Westminster, and much more time was devoted to imperial trade. NZ politicians were more rightly worried about domestic stability than constitutional niceties.<sup>46</sup> In a context where countries were ‘retreating’ to protectionism and the League of Nations visibly weakening, a vision of a country separate from Britain would seem threatening; better to promote the idea of a continued ‘Better Britain’.

But the SB (and later the Sterling Area) did have the unforeseen consequence of also intensifying the settler communities’ financial independence. The SB’s informal arrangements required members to increase trade surpluses to meet debt obligations. This was often only possible through programmes of import substitution and industrialisation, which upset the imagined complimentary relationship between centre and periphery.<sup>47</sup>

Central banking was another aspect of the SB, but was also unwittingly a basis for much of the settler communities’ sense of financial independence. In the 1920s, the British were encouraging the settler communities to establish their own central

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<sup>44</sup> Cain and Hopkins, above n 7, 491.

<sup>45</sup> John Darwin “Imperialism in Decline? Tendencies in British Imperial Policy between the Wars” (1980) 23 HJ 657, 662 (*italics in original*).

<sup>46</sup> Angus Ross “New Zealand and the Statute of Westminster” in Norman Hillmer and Philip Wigley (eds) *The First British Commonwealth: Essays in Honour of Nicholas Mansergh* (Frank Cass and Co Ltd, London, 1980) 136, 142-144

<sup>47</sup> Cain and Hopkins, above n 7, 520.

banks.<sup>48</sup> Britain had left the Gold Standard in 1914, and there had been more obvious divergences from par between various settler communities' currencies and sterling.<sup>49</sup> Exchange rates became an issue. The British saw independent central banks as a means of ensuring the successful management of settler communities' currencies and their impact on the sterling. Economic pressures encouraged constitutional change.

For NZ, the main reason to establish a central bank was the need to separate the NZ economy from the Australian economy and encourage British investment.<sup>50</sup> Four of the six NZ banks were Australian-owned, and they made no distinction between the London funds held on behalf of Australia and those held for NZ. Australia was suffering from an adverse balance of trade.<sup>51</sup> Historically Australia has often been blamed for NZ's economic troubles.<sup>52</sup>

British desires and NZ concerns coincided. In 1931, Sir Otto Niemeyer, formerly of the British Treasury and financially conservative, was invited to NZ by PM Forbes, and drafted a report on a proposed Reserve Bank of New Zealand ('RBNZ'). Niemeyer's RBNZ was an independent central bank whose primary duty was to ensure the stability of the NZ pound, in line with British adherence to the Gold Standard.<sup>53</sup> It was also given sole power to issue bank notes and acquire the trading banks' gold reserves. The RBNZ was established by the Reserve Bank Act 1934.

However, the depression and British reassertion of orthodoxy coincided with the expansion of the franchise and the emergence of working class political parties in Western democracies, adding a fundamental complication to the way in which monetary relations were managed. Until the late 1920s, it was still possible to subordinate domestic policy to the external balance: deflationary measures could be

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<sup>48</sup> Ibid, 492.

<sup>49</sup> *Governments and Banks*, above n 18, 16-22.

<sup>50</sup> Ibid, chapter 3. See also John Singleton "Central Banking in the British 'Dominions', c. 1930-2000" (unpublished paper, November 2005).

<sup>51</sup> *Governments and Banks*, above n 18, 18-22.

<sup>52</sup> Gardner, above n 10, 68.

<sup>53</sup> Paul Dalziel "The Reserve Bank Act: Reflecting Changing Relationships Between State and Economy in the Twentieth Century" in Brian Roper and Chris Rudd (eds) *State & Economy in New Zealand* (Oxford University Press, Auckland, 1993) 74, 79.

adopted in order to maintain the parity required under the Gold Standard system.<sup>54</sup> The inclusion of the working classes in national politics—including NZ politics—meant that political parties had to take their interests into account in determining election prospects. Economic policy became ‘politicised’ as it had not before: the discussion of how power ought to be used became publicised, although this remained channelled through political parties.

Public perception was that United-Reform government’s handling of the economic and social crisis had been incompetent. In 1935, the NZ Labour party—a worker’s party—was elected on the basis of its policies of economic restoration, employment and welfare via government expenditure. Put differently, economic conditions helped lead to a far more intrusive style of government intervention. Labour expanded welfare, provided cheap loans and housing, but also implemented a more progressive taxation system. This was necessary for capital-intensive services like health and education.<sup>55</sup>

One of the first actions of the first Labour Government was to amend the Reserve Bank Act to give complete control to government, so that it might utilise the “people’s credit”.<sup>56</sup> The RBNZ was nationalised and required to give effect to government monetary policy and to promote the “economic and social welfare of New Zealand”.<sup>57</sup> The Labour government ignored the Bank of England-recommended RBNZ Governor,<sup>58</sup> and required the RBNZ to provide credit for various government programmes. An institution intended as a financial constraint became an ‘enablement’ for the colonials.

Labour was voted back in 1938, promising to implement a broad social security program to meet health, unemployment and pension needs. Expenditure on the social welfare system, an increase in import orders and a drop in world commodity prices

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<sup>54</sup> *Globalizing Capital*, above n 26, chapter 1.

<sup>55</sup> Brooking, above n 14, 252.

<sup>56</sup> Robert Chapman “From Labour to National” in Geoffrey Rice (ed) *The Oxford History of New Zealand* (2 ed, Oxford University Press, Auckland, 1992) 351, 356.

<sup>57</sup> Reserve Bank of New Zealand Act 1936, s 10, quoted in “The Reserve Bank Act”, above n 53, 80.

<sup>58</sup> *Governments and Banks*, above n 18, 66-71.

caused a financial crisis in late 1938: NZ's sterling balances dropped from £29m to £8m in 6 months.<sup>59</sup> Deflation would increase unemployment; reflation would raise living costs: import controls were seen as the best solution. Import controls would be a key feature of the NZ economic policy of 'insulationism' for a half century—which had the impact of insulating the NZ economy from a troubled international economic order.<sup>60</sup>

NZ was forced to ask London in 1938 for financial aid. The British were not pleased with NZ's expansionary monetary policies and import controls. The NZers threatened default, however, and the British capitulated. The British might have left NZ to face the consequences of its actions.<sup>61</sup> However, there was pressure on the pound; to allow NZ to default might harm the sterling.<sup>62</sup> Still, the British imposed tight restrictions: NZ was given just enough to roll over various expiring loans.<sup>63</sup>

### **World War Two: The Beginnings of Financial Independence?**

War has often been the engine of state reconfiguration, and WW2 was no exception. Economically WW2 served to strengthen the Anglo-NZ relationship. In terms of trade, NZ had a guaranteed market for all its goods: Britain contractually agreed to purchase in bulk all of NZ's meat and dairy produce over this period, and would continue to do so till 1954. In the short term, this solved NZ's financial crisis.

The key institution of importance was the Sterling Area ('SA'), the interwar Sterling Bloc systematised by necessity.<sup>64</sup> Britain was in need of dollars and gold to finance its war effort: by pooling the dollars of the SA, Britain was able to remain financially viable. SA members agreed to impose more formal import and exchange controls, sell all their surplus dollars and gold to Britain, and hold their reserves in sterling, but agreed not to press their claims. This was done by common 'agreement', although the

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<sup>59</sup> "From Labour to National", above n 56, 365.

<sup>60</sup> *Making of New Zealand*, above n 27, 163.

<sup>61</sup> Cain and Hopkins, above n 7, 514.

<sup>62</sup> *Ibid*, 479; 484.

<sup>63</sup> "From Labour to National", above n 56, 365.

<sup>64</sup> Miller, above n 38, 268.

dependent colonies had no choice, and both Australia and NZ could hardly have done otherwise: Britain was their key market. But to focus on the constraints of the Anglo-NZ relationship would ignore the fact that it enabled the NZ state to provide domestic political and economic stability.

WW2 acted to intensify the bases of financial independence for NZ in other ways.<sup>65</sup> NZ's balance of payments crisis was remedied: reserves rose from £8 million to £78 million.<sup>66</sup> The government also used export receipts to pay off as many overseas debts as possible. By 1951, 11.5% of the public debt was owed overseas (almost half of that in 1939); and official debt interest had dropped to 1.2% of export receipts. With financial independence and solvency, the NZ state had a basis to expand policies of welfare and employment.

War also encouraged greater state centralisation and control over the population and the country's resources in NZ. Taxes rose: before WW2, indirect taxes made up two-thirds of total taxation, and income tax one-third; by the end of WW2, the ratio had been reversed.<sup>67</sup> The war effort was funded domestically: prices and wages were controlled, and savings were encouraged. All these were intended to restrain inflation, but they also intensified government control over the economy. Moreover, successful wartime intervention into the economy gave state administrators and politicians confidence that government intervention could work. It is worth noting the parallel in the economic and legal spheres: in the economic sphere, the Keynesian welfare state was underpinned by the assumption that state intervention in the economy would be carried by experts.<sup>68</sup> This was mirrored in the legal sphere by the Diceyan belief in an ethical class who would keep parliamentary sovereignty within limits.<sup>69</sup>

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<sup>65</sup> For a contemporaneous report on NZ's economy, see Leicester Webb "New Zealand in the World Economy" (1946) 22 *Royal Instit Int'l Affairs* 174.

<sup>66</sup> John Singleton and Paul Robertson *Economic Relations between Britain and Australasia, 1945-1970* (Palgrave Macmillan, Basingstoke, 2002), 45.

<sup>67</sup> *Making of New Zealand*, above n 27, 301.

<sup>68</sup> Robert Skidelsky *The World After Communism* (Macmillan, London, 1995), 78; and Robert Skidelsky *John Maynard Keynes, Vol 2: The Economist as Saviour 1920-1937* (Macmillan, London, 1992), 224.

<sup>69</sup> Martin Loughlin *Public Law and Political Theory* (Oxford University Press, Oxford, 1992), 152.

### **1945-73: Stability, Complacency and Internationalisation**

#### *The International Context, Britain and the Sterling Area*

Although a new 'world order' of nation-states was emerging, this was neither inevitable nor foreseeable; and various contingencies, international and domestic, operated to preserve the British Commonwealth.

Before the end of WW2, the US and Britain had met at Bretton Woods to discuss a new postwar international economic order.<sup>70</sup> The Bretton Woods international monetary 'system' envisioned a regime of moderately fixed exchange rates, with the right to devalue, and supporting financial institutions (the International Monetary Fund and the World Bank). In practice, it was a gold exchange standard with a deflationary bias.

The General Agreement on Tariffs and Trade (GATT) was meant to encourage a multilateral trade order, but in practice industrialised countries dominated. Although the trade of manufactures was liberalised, agricultural protectionism remained rife. Perhaps the chief impact of GATT on Commonwealth countries was that it limited the operation of imperial preference: as a condition of membership, NZ agreed (along with Australia and Britain) to the 'no new preference' rule. The new international economic order began encroach upon the hitherto closed Commonwealth system.

For the British, WW2 was a disaster. Britain was now the world's biggest debtor.<sup>71</sup> Sterling was inconvertible because of Britain's precarious financial state. Various countries had accumulated large sterling balances, and the British feared that the holders would call in their debts, requiring immediate repayment or convertibility, threatening Britain's economy and the strength of the sterling.<sup>72</sup> In 1945, Britain's sterling balances were seven times the size of her gold and dollar reserves.<sup>73</sup>

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<sup>70</sup> *Globalizing Capital*, above n 26, chapter 4.

<sup>71</sup> Cain and Hopkins, above n 7, 623.

<sup>72</sup> This was unlikely: see Catherine Schenk *Britain and the Sterling Area: From Devaluation to Convertibility in the 1950s* (Routledge, London, 1994).

<sup>73</sup> Cain and Hopkins, above n 7, 623.



The British still dreamed of remaining a world power: after all, the empire had in wartime again proved its value. Moreover, imperial economic cooperation seemed better than the alternatives: Europe was in ruins.<sup>74</sup> As they had done in the aftermath of WW1, the British in 1945 set out to reconstruct an empire to meet the exigencies of the postwar world.<sup>75</sup>

The key problem of the immediate postwar period was the dollar shortage. Everyone needed US dollars, but few were in a position to earn them. For Britain, a lack of US dollars meant cuts in imports, reconstruction and redevelopment.<sup>76</sup> Moreover, the British government had many domestic commitments which required massive expenditure: full employment, the establishment of a welfare state; and defence spending.

The Sterling Area was one means by which Britain could remain financially strong. At the end of the 1940s, half of all international transactions were still conducted in sterling.<sup>77</sup> There were three key elements to the SA: the pegging of exchange rates to sterling; exchange and import controls against the rest of the world while enjoying free trade within the SA; and the maintenance of reserves in sterling and the pooling of foreign exchange earnings.<sup>78</sup> The SA was essentially the Bretton Woods system on a regional basis: a multilateral payments system and free trade. NZ was a member because the vast majority of its trade was with Britain: maintaining sterling reserves lowered transaction costs. Further, NZ had run a deficit with the US before WW2, and there were no other means by which it could earn dollars.<sup>79</sup> NZ, like the other settler community SA members, was free to draw upon the dollar pool according to its

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<sup>74</sup> Ibid, 628.

<sup>75</sup> John Darwin "Was There a Fourth British Empire?" in Martin Lynn (ed) *The British Empire in the 1950s: Retreat or Revival?* (Palgrave Macmillan, Basingstoke, 2005) 16.

<sup>76</sup> CCS Newton "The Sterling Crisis of 1947 and the British Response to the Marshall Plan" (1984) 37 *Econ His Rev* 391.

<sup>77</sup> Cain and Hopkins, above n 7, 631.

<sup>78</sup> Schenk, above n 72, 8. See also Kenneth Wright "Dollar Pooling in the Sterling Area, 1939-1952" (1954) 44 *Am Econ Rev* 559.

<sup>79</sup> *Economic Relations*, above n 66, 43.

'essential' needs.<sup>80</sup> Thus, in spite of gaining a modicum of 'independence' from Britain, NZ was still beholden to Britain because of the precarious international economy.

The chief beneficiary of the SA was Britain. It could draw upon a broader pool of foreign exchange, and the inconvertible sterling balances were in effect "loans to Britain volunteered by creditors who had virtually no choice in the matter".<sup>81</sup> Since the aim of the SA was to preserve dollars, and encouraging the use of sterling, intra-SA trade was also encouraged at the expense of trade with the dollar area via exchange and import controls, thus reinforcing the imperial preference system, and the privileged position of Britain.

Initially, the US had regarded imperial preference and the SA as contrary to its vision of a multilateral trading order. Britain, under US pressure, had tried to restore sterling convertibility in 1947 with disastrous results.<sup>82</sup> The dollar shortage was so intense that SA members traded away their sterling for dollars, rapidly reducing Britain's dollar reserves. American views changed with the intensification of the Cold War and the 1947 crisis.<sup>83</sup> Britain and the Commonwealth were now seen as a bulwark against Communism: the SA and imperial preference were tolerated to rebuild Britain's economy as quickly as possible.

Thus, despite signs of decline in the Commonwealth constitutional and cultural order, with the accommodation of republics, the shrinking of the Privy Council's jurisdiction and the emergence of local citizenship, imperial preference and the SA remained and operated as a Commonwealth economic order. Put differently, the continuing economic connection between Britain and NZ provided a basis for the belief in a continuing mutual relationship.

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<sup>80</sup> David Fieldhouse "The Labour Governments and the Empire-Commonwealth, 1945-1951" in R. O'vendale (ed) *The Foreign Policy of the British Labour Governments 1945-1951* (Leicester University Press, Leicester, 1995) 83.

<sup>81</sup> Cain and Hopkins, above n 7, 627.

<sup>82</sup> Newton, above n 76, 397-401.

<sup>83</sup> David Painter *The Cold War: An International History* (Routledge, London, 1999).

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Britain and its economy were still seen to be more important to NZ's economy than the wider international economy: this was partly because of imperial loyalty, but also because Britain was still an economy of global significance. Further, there seemed to be no palatable alternatives: Europe and Japan were in ruins, and the US engaged in agricultural protectionism. Finally, NZ's economic situation seemed generally buoyant at the time: there was no need to join Bretton Woods.<sup>84</sup>

NZ Prime Ministers Fraser, Nash (Labour) and later Holland (of National) were all broadly in favour of accession to Bretton Woods, but domestic politics made them all hesitate.<sup>85</sup> Much of the Labour Party mistrusted the IMF and the World Bank and saw in the Commonwealth a buffer against an American-led international capitalist order. The National Party, on the other hand, still had a strong empire unity contingent. Acceptance of the American-led Bretton Woods system was seen as an attack on empire unity. But the British were furious at NZ's refusal to join, because this meant one less 'British' vote in the IMF.<sup>86</sup>

NZ was still heavily trade-dependent on Britain. In 1950, 65% of NZ's total merchandise export receipts came from Britain; and Britain still supplied 60% of NZ's total imports. Even in 1960 these were 53% and 43% respectively.<sup>87</sup> This continued linkage of the NZ economy to the British economy meant that any stability for the former was premised on the healthy state of the latter.

The NZ Labour (1946-49; 1957-60) and National governments (1949-57; 1960-72) had no coherent plan of development. Both parties had accepted by the late 1940s that the primary objective of economic policy was to insulate employment from external shocks.<sup>88</sup> The key event shaping NZ postwar economic policy was the Depression: the emphasis remained on stability. Similarly, NZ's industrialisation programme was not

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<sup>84</sup> *Economic Relations*, above n 66, 40.

<sup>85</sup> Malcolm McKinnon "The New World of the Dollar" in Malcolm McKinnon (ed) *The American Connection* (Allen & Unwin Press, Wellington, 1988) 109.

<sup>86</sup> *Economic Relations*, above n 66, 42.

<sup>87</sup> Bloomfield, above n 24, 294-296.

<sup>88</sup> *Economic Relations*, above n 66, 78.

export-oriented, but aimed to displace industrial imports.<sup>89</sup> Many thought that the revival of the developed economies would benefit NZ as a producer of pastoral goods.<sup>90</sup> In 1950, NZ was still Britain's fourth largest supplier.<sup>91</sup> For NZ, the SA and Commonwealth preference were ideal arrangements: they also complemented domestic political policies. There was still little reason to look 'outside' the British economic order.

NZ's full employment policy was underpinned by agricultural exports and the bulk purchasing agreements.<sup>92</sup> Insulationism, which consisted of import substitution and controls and careful scrutiny of foreign investment was also important. Much of the industrial sector consisted of the assemblage of finished goods: employment here relied on the constant flow of imports, which fuelled inflation.<sup>93</sup>

The Korean War boom further encouraged spending; inflation rose; and National was forced to reintroduce import controls. Many SA members had reacted to the Korean War in a similar way, loosening import controls and increasing dollar expenditure, shrinking the dollar pool. SA members were admonished by Britain to reduce imports from the dollar area and increase export capacity. Both NZ and Australia had responded to the 1951-52 crisis by restricting all imports. The British were disturbed by this violation of the Preference system.<sup>94</sup>

The 1949 election illustrated how the relationship between politics and the economy was understood. The management of the economy was often a major factor in determining the survival of a presiding government. Economists talked of a 'political business cycle': in election years political parties introduced expansionary budgets

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<sup>89</sup> Ibid, 53.

<sup>90</sup> Ibid, 85.

<sup>91</sup> *Paradise Reforged*, above n 2, 53.

<sup>92</sup> Gary Hawke "Economic Trends and Economic Policy, 1938-1992" in Geoffrey Rice (ed) *The Oxford History of New Zealand* (2 ed, Oxford University Press, Auckland, 1992) 412, 417-420.

<sup>93</sup> Ibid, 416.

<sup>94</sup> *Economic Relations*, above n 66, 103.

and the loosening of import controls, but then contracted the economy after the election for fear of inflation or balance of payment crises.<sup>95</sup>

NZ governments kept interest rates low to encourage consumption and maintain full employment.<sup>96</sup> But this discouraged investment and caused inflation.<sup>97</sup> The RBNZ, along with monetary policy, had a minor role for most of this period: everything was subordinated to maintaining full employment. In 1950, National amended the RBA 1936 so that the RBNZ's role was to promote price stability and full employment. The two aims were not seen as contradictory. National's amendment showed it too accepted the policy of full employment. The actions of the two main political parties over this period showed a consensus over state involvement in 'the economy'. But it is worth reminding ourselves that at least Keynes' understanding of state intervention in the economy involved the work of disinterested bureaucrats rather than politicians.

From 1947 to 1955 the full employment policy was literally that: the monthly average of registered unemployed never reached 100 (in a workforce of around 350,000).<sup>98</sup> There grew an expectation of full employment which would persist until the late 1970s. Workforce structure reflected the full employment policy: rising numbers in the industrial sector and a declining primary sector.<sup>99</sup>

Land played a 'minor' role in this period because there was little left to be taken. However, the shrinking land base pushed a rising Maori population into the cities, creating social and ultimately political pressures.<sup>100</sup> Labour demand in the industrial sector absorbed much of this rapidly urbanising Maori population as well as Pacific Island migrants.

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<sup>95</sup> Paul Dalziel and Ralph Lattimore *The New Zealand Macroeconomy: Striving for Sustainable Growth with Equity* (5 ed, Oxford University Press, Melbourne, 2004), 69-72.

<sup>96</sup> "Central Banking in the British 'Dominions'", above n 50.

<sup>97</sup> Ibid.

<sup>98</sup> John Gould *The Rake's Progress? The New Zealand Economy Since 1945* (Hodder and Staughton, Auckland, 1982), 55.

<sup>99</sup> Graeme Dunstall "The Social Pattern" in Geoffrey Rice (ed) *The Oxford History of New Zealand* (2 ed, Oxford University Press, Auckland, 1992) 451, 461-2.

<sup>100</sup> Ranginui Walker "Maori People since 1950" in Geoffrey Rice (ed) *The Oxford History of New Zealand* (2 ed, Oxford University Press, Auckland, 1992) 498, 499-500.

By the mid-1950s, the postwar commodity and dollar shortage had ended, and the British lost interest in maintaining a safe market for the Commonwealth. Bulk purchasing ended in 1953-54, and Britain committed itself to the subsidisation of agriculture. NZ and Australian farmers were forced to compete in the British market for the first time since the Depression.

Commonwealth preference tariffs were eroded by inflation, and there was little possibility of a revitalisation of the system. In the late 1950s, both Australia and NZ wanted to lower preference margins in order to gain access to other countries' markets.<sup>101</sup> The willingness of the Antipodeans to bargain away Commonwealth preferences indicated the British economy was not as attractive as other economies: SA members were being drawn into the orbit of faster growing economies.<sup>102</sup> The Commonwealth was too small a market for British goods. Moreover, as the rest of the SA began importing less from Britain, there was also less reason to support the SA via capital exports. The (imagined) idea of complementarity was collapsing.

NZ's failure to join the IMF was of little significance. In the 1950s, government borrowing remained relatively modest. Labour had been embittered by the 1930s experience of borrowing from the British, refusing British development capital in the early postwar period.<sup>103</sup> National was more willing to borrow from London. But (dollar-earning) development projects were few.

British capital remained the predominant source of investment in NZ, even into the 1960s. Over the 1950s, on average 73% of all foreign investment in NZ came from Britain.<sup>104</sup> Britain was willing to offer finance to NZ to maintain the cohesion of the SA. Hence, NZ "remained a financial colony into the 1960s."<sup>105</sup> By the mid-1950s,

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<sup>101</sup> *Economic Relations*, above n 66, 108.

<sup>102</sup> Miller, above n 38, 281.

<sup>103</sup> *Economic Relations*, above n 66, 79.

<sup>104</sup> Schenk, above n 72, 110.

<sup>105</sup> *Ibid*, 98.

NZ's demand for capital was relatively high. In 1954-56, 12% of Britain's capital imports to the Commonwealth went to NZ; by contrast, 16% went to Australia.<sup>106</sup>

More problematic was that the NZ governments' objective of overseas borrowing had shifted from investment in dollar-earning projects to consumption and dealing with balance of payment crises. Many British officials encouraged NZ to join the IMF. Britain's line of vision was narrowing: the criticism was that capital should be invested at 'home' rather than 'overseas'. As borrowing in London became more costly, the attractiveness of joining Bretton Woods increased for NZ.<sup>107</sup> Moreover in 1958, Britain finally achieved convertibility, and British interest shifted towards the Eurodollar market.

By the end of the 1950s, NZ's non-membership in the IMF had become a disadvantage. A balance of payments crisis in 1958 had seen NZ borrow in London and in Australia simply to replenish its reserves.<sup>108</sup> By the 1960s, London markets lost interest in NZ as investment material.<sup>109</sup> IMF loans were cheap by comparison with those given by London. Moreover, NZ governments found that non-membership signalled a lack of creditworthiness.<sup>110</sup> In 1961 NZ joined the IMF despite continued domestic opposition.

The NZ 1957-58 crisis again shows the interaction between the economy and domestic politics. The official reserves had dropped from £113 million in June 1957 to £45.5 million in December, because of an increase in import orders by those anticipating Labour's election in November 1957. Labour won, but was immediately confronted by a balance of payments crisis. The Minister of Finance Arnold Nordmeyer introduced a tough budget which became known as "the Black Budget",

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<sup>106</sup> Ibid, 87.

<sup>107</sup> Ibid, 87-8.

<sup>108</sup> Malcolm McKinnon "Trading in Difficulties? New Zealand in the World Economy" in Malcolm McKinnon (ed) *New Zealand in World Affairs, Vol II: 1957-1972* (New Zealand Institute of International Affairs, Wellington, 1991) 145, 161-2.

<sup>109</sup> Miller, above n 38, 449.

<sup>110</sup> *Making of New Zealand*, above n 27, 228.

because of taxes on cars, tobacco and alcohol—losing Labour the 1960 election.<sup>111</sup> The National Party's 1960 economic policy slogan was "Steady does it". It was fortunate for National that by 1960 the economy had already bounced back, and for most of the 1960s, there was relative prosperity and stability.<sup>112</sup>

This relative prosperity persuaded some that the NZ state still had the capacity to meet the expectations of its population, but it masked deep structural changes. National as the party of the propertied reaped the benefits, and remained in power for over 12 years. More generally, 'constitutional' issues did not appear pressing under such conditions of prosperity. Government action in the economy was seen as generally legitimate if it secured stability and prosperity.

#### *Britain's Decision to Join the EEC: the NZ Response*

The basis of insulationism and NZ stability—the reciprocal relationship between NZ and Britain—was slowly being undermined. The 1950s had seen a loosening of Commonwealth ties. Sterling had been made convertible in 1958, although NZ continued to maintain its overseas reserves in sterling. In 1961, NZ finally acceded to Bretton Woods as Britain began to tighten controls over overseas investment. The Commonwealth preference system was collapsing.

Britain's focus shifted to Europe. By 1961, Europe exceeded Britain's combined trade with the Commonwealth and the US. Britain's trading relations with the SA had decreased from half Britain's foreign trade in the late 1940s to one quarter in the early 1970s.<sup>113</sup> Postwar reconstruction had meant a temporary focus on empire, but if Britain waited any longer, it would be excluded from Europe.<sup>114</sup> Hence, in 1961, Britain made its first application to join the EEC, provided the EEC could ensure some protection for Commonwealth exporters.<sup>115</sup>

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<sup>111</sup> "From Labour to National", above n 56, 381.

<sup>112</sup> Gould, above n 98, 87-90.

<sup>113</sup> Cain and Hopkins, above n 7, 632.

<sup>114</sup> Miller, above n 38, 289.

<sup>115</sup> *Economic Relations*, above n 66, 169.



NZ faced economic catastrophe if Britain entered the EEC without safeguards on Commonwealth trade.<sup>116</sup> The loss of this key market threatened major political and social instability.<sup>117</sup> Most threatening to NZ trade was the EEC's Common Agricultural Policy ('CAP').<sup>118</sup> Firstly, it would reduce NZ's access to the British market, still NZ's most valuable market. Secondly, the CAP would encourage farmers across the EEC to engage in inefficient agricultural production. Large surpluses of agricultural products would be dumped on the international market, lowering prices worldwide. Finally, the CAP would intensify British self-sufficiency in agricultural products, and undermine traditional trade patterns.<sup>119</sup> All of these in fact did eventuate.

NZ negotiated with Britain and the EEC for continued access to the meat and dairy produce markets, taking a less aggressive approach than Australia.<sup>120</sup> Australia had less to lose than NZ: in 1960, 22% of Australia's total exports went to Britain; for NZ it was 53%.<sup>121</sup> Moreover, there were no other easily accessible markets. The EEC's CAP, and the agricultural protectionism of the US and Japan all violated the GATT, but it continued.<sup>122</sup> NZ succeeded: Britain agreed to negotiate on NZ's behalf, with an eye to the British public's sympathy towards NZ's plight, as well as domestic political factions who were still pro-Commonwealth.

Britain's first application was vetoed by De Gaulle in 1963, but there was no doubt Britain would try again. It had become clear that the British were unwilling to protect NZ's interests, being prepared to sacrifice Commonwealth access in return for entry to the EEC. NZ and British interests were clearly separate. The idea that NZ and Britain

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<sup>116</sup> Ibid, 171.

<sup>117</sup> See, for instance, Keith Jackson (ed) *Fight for Life: New Zealand, Britain and the EEC* (Price Milburn, Wellington, 1970).

<sup>118</sup> Alan Milward *The European Rescue of the Nation-State* (2 ed, Routledge, London, 2000), chapter 5.

<sup>119</sup> Jim Tomlinson "Economic Policy" in Roderick Floud and Paul Johnson (eds) *The Cambridge Economic History of Modern Britain: Volume III: Structural Change and Growth, 1939-2000* (Cambridge University Press, Cambridge, 2004) 189, 195.

<sup>120</sup> Rita Ricketts "Old Friends, New Friends: Cooperation or Competition?" in Malcolm McKinnon (ed) *New Zealand in World Affairs Vol II, 1957-1972* (New Zealand Institute of International Affairs, Wellington, 1991) 171, 185-186.

<sup>121</sup> *Economic Relations*, above n 66, 166.

<sup>122</sup> AG Kenwood and AL Loughheed *The Growth of the International Economy 1820-2000* (4 ed, Routledge, London, 1999), 286.

would remain linked seemed less and less likely; this also meant there was less reason to emphasise a shared past with Britain.

During 1967-72, much NZ government energy was concentrated in placing NZ's case before Britain and the EEC. NZ had to show the EEC it was making attempts to diversify the economy, but not so much that it was successful. NZ was also careful not to alienate the British by putting themselves between Britain and the EEC. All of this illustrated NZ's essential weakness, and made NZers aware that they were 'alone'.

In 1971, the Six officially recognised the particular dependence of NZ on the British market. The Luxembourg protocol provided for continued access to Britain for NZ dairy products over a transitional period. This was a "continuing arrangement subject to review" periodically. NZ was given valuable time to adjust to the end of free access to the British market. This marked the beginning of a period of uncertainty for NZ, which had run-on effects in domestic politics. Moreover, a certain 'internationalisation' began to take place, in which NZers began to see their country as one 'nation-state' amongst an international community of nation-states.

#### *Diversification and Australia*

Another response to the decline of Britain was the diversification of both NZ's export markets and composition. In terms of markets, in 1950, 66% of NZ's total exports went to Britain; by 1970, this had fallen to 36%—but this was still the leading market.<sup>123</sup> NZ exports to the US rose respectively from 6% to 16%; and for Japan from less than 1% to 10% of NZ's total exports.<sup>124</sup> But both markets were subject to protectionism.

A major reason for NZ's growing economic stagnation was the narrowness of its export base. Much of the developing world had neither the taste nor money for pastoral goods. Further, agricultural produce prices declined over time compared with those of industrial goods. This was exacerbated by the protectionist policies of key

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<sup>123</sup> *Paradise Reforged*, above n 2, 309.

<sup>124</sup> "Trading in Difficulties?", above n 108, 155.

powers.<sup>125</sup> Moreover, the old pattern of trading raw materials and foodstuffs for manufactures between periphery and centre was being supplanted by a new pattern of trade where increasingly manufactures were exchanged between rich industrial countries.<sup>126</sup> Old 'clubs' were being dissolved; and new ones formed. NZ was excluded from both.

By the late 1960s, more than 80 countries were signatories to one or more of 17 regional trading agreements.<sup>127</sup> In 1965, the NZ-Australia Free Trading Agreement (NAFTA) was signed, a product of Britain's relative decline and the scramble by the Antipodean settler communities to find new markets. For both NZ and Australia, their neighbours across the Tasman were the most obvious candidates for trade—although for much of the twentieth century, trading within the Antipodes remained remarkably low.<sup>128</sup>

The immediate reason for entering into the agreement was NZ's desire to ensure a protected market for its growing timber and pulp industry,<sup>129</sup> soon to become the key addition to NZ's 'holy trinity' of exports by the 1960s. But the Australian government, worrying about NZ's economic and political stability, had pushed for a broader arrangement.<sup>130</sup> The two governments settled on an arrangement whereby anything included in the agreement was to be freely traded; anything not included could be inserted after discussion.

The actual impact of NAFTA was small: the 1967 devaluation was of greater importance in boosting Trans Tasman trade.<sup>131</sup> NAFTA was significant because it

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<sup>125</sup> John Singleton "New Zealand in the Nineteenth and Twentieth Centuries". EH.Net Encyclopedia, edited by Robert Whaples, at <http://eh.net/encyclopedia/article/Singleton.NZ> (last accessed 21 June 2008).

<sup>126</sup> Tomlinson, above n 119, 191.

<sup>127</sup> Kenwood and Loughheed, above n 122, 289

<sup>128</sup> Bruce Brown "New Zealand in the World Economy: Trade Negotiations and Diversification" in Bruce Brown (ed) *New Zealand in World Affairs, Vol 3: 1972-1990* (Victoria University Press, Wellington, 1999) 21, 32.

<sup>129</sup> *Economic Relations*, above n 66, 200-201.

<sup>130</sup> Frank Holmes *An ANZAC Union?* (IPS Policy Paper No 14, Wellington, 2002), 3.

<sup>131</sup> "Economic Trends", above n 92, 437.

established a platform for both countries to build on.<sup>132</sup> NAFTA was the beginning of an attempt to preserve a measure of economic security for NZ. Australia's economy was becoming more prosperous, mostly as a result of the minerals industry; NZ was being pulled into its orbit.

### *The End of Sterling Dominance*

Another sign of the growing importance of Australia to NZ and the declining role of Britain in the NZ economy was the impact that both countries had on NZ decision-making concerning foreign reserves and exchange rates. The devaluation of sterling by the British in 1967 prompted SA members to intensify the diversification of their reserves, maintaining greater proportions of dollars and gold. This was partly because of wider trading needs, but also because of worries about sterling stability.<sup>133</sup> NZ, too, also began to diversify, although in 1968 it agreed to keep 70% of its official external reserves in sterling.<sup>134</sup>

NZ had joined the IMF in 1961; with it the formal link of NZ currency to the sterling ended, since one condition of joining was that NZ set a par value for local currency in terms of US dollars.<sup>135</sup> Exchange rate changes were beginning to be driven by rising relations with Australia. In 1967 the NZ government took advantage of the sterling devaluation by Britain and devalued against the Australian dollar. In the same year NZ also adopted decimal measures and a dollar currency, influenced by the 1966 Australian decision.<sup>136</sup>

By the late 1960s, the Bretton Woods monetary system was breaking down with devaluations of both the sterling and the dollar. The 1971 Smithsonian Agreement was an attempt to stabilise exchange rates, requiring members to set a central rate expressed in terms of an intervention currency, and margins around which they would defend the exchange rate. Australia nominated the US dollar as its intervention

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<sup>132</sup> "Trade Negotiations and Diversification", above n 128, 33.

<sup>133</sup> Miller, above n 38, 285.

<sup>134</sup> Malcolm McKinnon *Independence and Foreign Policy: New Zealand in the World since 1935* (Auckland University Press, Auckland, 1993), 213.

<sup>135</sup> "New Zealand Exchange Rates" Reserve Bank of New Zealand Bulletin (August 1978).

<sup>136</sup> Smith, above n 4, 197.

currency, severing the Australian dollar's relationship to the sterling. NZ was trying to develop manufacturing relations with Australia. A weak sterling might cause too much instability in this relationship, and so in 1971 NZ followed Australia: NZ declared the US dollar to be its intervention currency and pegged the NZ dollar to the US dollar to devalue the NZ dollar against the Australian dollar. The link between sterling and the NZ dollar was broken: Britain was no longer the country from which NZ drew strength.

The Smithsonian system failed to prevent instability: the US dollar, sterling and 17 other currencies were floated. Soon after, NZ ended the fixed relationship between the NZ and US dollars. These floats marked the beginning of a period of unstable exchange rates and inflation internationally, and in which successive NZ governments revalued and devalued the NZ dollar in accordance with the condition of the balance of trade.

### **1973-84: Crises, Internationalisation and Nationalisation**

#### *Crises and the 'Failure' of the NZ State*

The 1970s saw the NZ economy hit with three overlapping crises: the oil shocks, falls in commodity prices and the accession of the UK to the EEC. These crises led to an intensification of government involvement in the economy, but the failure of these interventions provided evidence for a growing belief that government intervention only worsened matters. Moreover, economic instability led to a general disenchantment with the traditional political parties and the consensus over management of the economy: this period saw an increase in party disalignment, voter instability and the fragmentation of parties.<sup>137</sup>

In 1973, the oil crisis struck: the price of oil tripled. NZ's import bill rose, as did domestic costs; there was a world recession; agricultural protectionism intensified.

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<sup>137</sup> Peter Aimer "The Changing Party System" in Hyam Gold (ed) *New Zealand Politics in Perspective* (2 ed, Longman Paul, Auckland, 1987) 260, 271; and Robert Chapman "Political Culture: The Purposes of Party and the Current Challenge" in Hyam Gold (ed) *New Zealand Politics in Perspective* (Longman Paul, Auckland, 1989) 14, 22.

NZ's terms of trade (the ratio of export prices to import prices) dropped dramatically from 136.7 to 95.2 in 1975 and 80.3 in 1976 (where the terms of trade index was set at 100 in 1970). These falls were greater for NZ than those in the 1929-1933 Depression.<sup>138</sup> The balance of payments dropped from a surplus of NZ\$153 million to a deficit of NZ\$1.37 billion, or 13.7% of GDP, the highest deficit ever. The terms of trade continued to fluctuate violently over this decade.

The demand for NZ's traditional export products had been declining for some time. In the late 1960s, the demand for wool, meat and dairy began to fall: wool because of the challenge of synthetics, and meat and dairy because of protectionism and dumping.<sup>139</sup> The oil crisis worsened this trend.

NZ continued to trade with Britain and the EEC at a reduced rate. But the Anglo-NZ relationship was dwindling. Britain was less global and more Europe-oriented than ever before; and its own economy was also suffering.<sup>140</sup> NZ also sought new markets, with limited success.<sup>141</sup> Diversification and exporting more were ineffective in a world where all export markets were contracting.<sup>142</sup> In short, here was a crisis which NZ faced 'alone' without the insulating effect of a guaranteed British market.

Successive NZ governments chose to borrow from overseas to spread adjustment over several years. Again, deflation was considered politically unwise, because of the full employment policy; it would also increase inflation. Import controls could be tightened, but this would harm the manufacturing industry. Once again, the survival of a Labour government depended on events mostly outside its control: the boom and subsequent bust of the early 1970s was too big to be managed successfully by any democracy.<sup>143</sup> The Labour government lost the 1975 election. Again, the National Party slogan was telling: "New Zealand the way *you* want it"—a pledge to restore

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<sup>138</sup> "Trade Negotiations and Diversification", above n 128, 21.

<sup>139</sup> Phil Briggs *Looking at the Numbers: a View of New Zealand's Economic History* (NZIER, Wellington, 2003).

<sup>140</sup> Tomlinson, above n 119, 195.

<sup>141</sup> See generally "Trade Negotiations and Diversification", above n 128.

<sup>142</sup> "Economic Trends", above n 92, 437.

<sup>143</sup> Gould, above n 98, 133-134.

NZ's economy, as well as the offer of a generous superannuation scheme funded entirely by general taxation.<sup>144</sup>

In time-honoured fashion, the new National government began by tightening demand. Attempts to deregulate the economy began, but had the effect of raising prices. Deregulation was halted as unemployment and inflation worsened. In 1973, interest on the overseas debt was less than 2%, but 1977 had risen to 6.3%. Inflation rose to 20% in 1977. By 1978, the unemployment rate had reached 1%, which, given almost 30 years of (literally) full employment, signaled trouble. This continued to rise to 4.4% in 1983. Unemployment was accompanied by net emigration.

#### *The Critique of NZ Economic Policy*

A general critique of the NZ economy had been forming over the 1960s and 1970s.<sup>145</sup> This acknowledged NZ's historical dependence on Britain, and the impact of Britain's accession to the EEC, but saw NZ's economic failure as having strongly domestic roots. The policy of insulationism, the insulation of NZ from the international economy, came in for particular criticism. Heavy regulation and the capture of the economy by interest groups was stifling the effective operation of 'the market' and the ability of the NZ government to adapt and respond to change. NZ was seen as almost 'socialist'.<sup>146</sup>

Government expenditure remained steady for the postwar period, only rising in the 1970s. The share of income taken in taxation (around 25%) did not change much over this period.<sup>147</sup> NZ was not a high taxing country: total tax revenue as a percentage of GDP between 1965 and 1977 was around 35%, compared with the UK (37%) and Australia (30%)<sup>148</sup> Admittedly, however, this changed under the National government.

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<sup>144</sup> Alan McRobie "The Politics of Volatility, 1972-1991" in Geoffrey Rice (ed) *The Oxford History of New Zealand* (2 ed, Oxford University Press, Auckland, 1992) 385, 390.

<sup>145</sup> Gould, above n 98, 198-99.

<sup>146</sup> Geoffrey Palmer *New Zealand's Constitution in Crisis: Reforming Our Political System* (John McIndoe, Dunedin, 1992), 45.

<sup>147</sup> *Making of New Zealand*, above n 27, 301-303.

<sup>148</sup> *Ibid*, 303.

More generally, the feeling that NZ government was omnipresent within the economy may have stemmed from the small size of the population, the centralised nature of government and the reception of monetarist and free market ideas from overseas. The vicious politics of PM Robert Muldoon reinforced this 'internalist' critique of the NZ economy and postwar economic policy. Indeed, it is worth noting that this went both ways: the broad criticism of state involvement in the economy, or 'managed capitalism', paralleled and reinforced a similar critique in the politico-legal sphere. There, the argument was that Parliament was simply too powerful. Collectivist agency threatened individual autonomy; the state was something which had to be constrained, because it threatened individual ('natural') liberties.

There was an element of comparison about NZ's economic decline: one measure being NZ's falling position within the OECD rankings which measured GDP per capita. In 1950, NZ was sixth, just behind Australia; in 1960, eleventh; in 1970, twelfth (Australia third).<sup>149</sup> But the comparison was not entirely meaningful: NZ's unusually high initial ranking was a result of Europe's weak economic situation in the immediate postwar period.

Here was another kind of 'internationalisation': NZ was not now just part of the international economy, it was modelling itself upon and comparing itself to other members of this community—nation-states. In line with this, the quest for greater autonomy via collective agencies such as political parties and the state was gradually being questioned.<sup>150</sup> Now an alternative vision was being proffered: autonomy was thought best met through individual and private action.<sup>151</sup>

At the same time, however, as the postwar peace continued and traditional concerns about physical insecurity diminished, state legitimacy everywhere in the West came to

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<sup>149</sup> Brian Easton *In Stormy Seas: The Post-War New Zealand Economy* (University of Otago Press, Dunedin, 1997), 27.

<sup>150</sup> Peter Wagner *A Sociology of Modernity: Liberty and Discipline* (Routledge, London, 1994).

<sup>151</sup> Doris Janiewski and Paul Morris *New Rights New Zealand: Myths, Moralities and Markets* (Auckland University Press, Auckland, 2005).



rest increasingly on the provision of economic security.<sup>152</sup> NZ was no exception: indeed, at the same time criticisms were increasing, the role of the state and the definition of 'security' (or 'need') was expanding with the introduction of the Domestic Purposes Benefit, a no-fault accident compensation scheme and a national superannuation funded entirely out of general taxation.<sup>153</sup>

National responded to the second oil shock in 1979 by further intervention into the economy. 'Car-less days' were implemented. More important was the establishment of large self-sufficiency projects, collectively labeled 'Think Big'. This was another attempt to isolate NZ from the unstable international economy, but was highly unsuccessful, requiring massive capital investment.<sup>154</sup> Muldoon's government imposed a wage and price freeze in 1982, later extended till 1984. However, inflation and unemployment continued to rise.

#### *CER and the Strengthening of the NZ-Australia Relationship*

The Australia New Zealand Closer Economic Relations Agreement (ANZCERTA, 'CER' for short) was the key trading event of the period.<sup>155</sup> The problem with the previous agreement, NAFTA, was that everything was excluded unless included in the agreement. Disappointment with the Tokyo Round of GATT (1973-79) to liberalise agricultural trade led both countries to refocus on their trading relationship. In 1977, a NZ Deputy PM stated that "[NZ's] relationship with Australia is more important to us than our links with any other country in the world."<sup>156</sup> The proportion of NZ's total exports to Australia rose from 4.5% in 1960 to 12% in 1980.<sup>157</sup>

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<sup>152</sup> G John Ikenberry "What States Can Do Now" in TV Paul, G John Ikenberry and John Hall (eds) *The Nation-State in Question* (Princeton University Press, Princeton, 2003) 350, 360.

<sup>153</sup> WH Oliver "Social Policy in New Zealand: An Historical Overview" in *Report of the Royal Commission on Social Policy, Vol 1: New Zealand Today* (Government Printer, Wellington, 1988) 3; and Michael Belgrave "Needs and the State: Evolving Social Policy in New Zealand History" in Bronwyn Dalley and Margaret Tennant (eds) *Past Judgment: Social Policy in New Zealand History* (University of Otago Press, Dunedin, 2004) 23.

<sup>154</sup> Paul Wooding "New Zealand in the International Economy" in Brian Roper and Chris Rudd (eds) *State and Economy in New Zealand* (Oxford University Press, Auckland, 1993) 91, 105.

<sup>155</sup> See generally Stephen Hoadley "Trans-Tasman Relations: CER and CDR" in Bruce Brown (ed) *New Zealand in World Affairs, Vol 3: 1972-1990* (Victoria University Press, Wellington, 1999) 177.

<sup>156</sup> *Ibid*, 181.

<sup>157</sup> *Paradise Reforged*, above n 2, 441.

The CER Agreement was signed in 1983. The key principle of CER reversed that of NAFTA's: everything was included unless otherwise stated. All tariffs, subsidies or incentives on goods traded across the Tasman were to be removed either immediately or phased out by an agreed automatic formula; there were to be no increases in tariff quotas or quantitative restrictions; and all quantitative barriers were to be phased out. There were to be reviews of the agreement every 5 years.

### **1984-2005: Changes and Continuities**

The 1984 election and its aftermath arguably marked a turning point for the NZ economy, although the significance of this turning point is still controversial. NZ's economic situation is often portrayed as being uniquely in a quandary, but this was also used as a justification for the reforms that followed. Australia faced similar issues at the same time.<sup>158</sup> NZ appeared in decline: its OECD ranking in 1980 was nineteen.<sup>159</sup> The balance of payments deficit reached NZ\$1.9 billion (5.4% of GDP) in 1984; in 1986, NZ\$4 billion (8.8% of GDP).<sup>160</sup>

Muldoon called a snap election in 1984. A financial crisis ensued. Many predicting devaluation had begun to sell NZ dollars for foreign currency, despite exchange controls. NZ's reserves were shrinking quickly, and to prevent further depletion, the RBNZ closed the financial markets and foreign exchange reserves days before the election. Labour won the election, but a constitutional and economic crisis arose: Muldoon refused to comply with the incoming government's request to devalue the dollar to meet the crisis. Calmer heads prevailed, and the NZ dollar was devalued by 20%. The cost of defending the NZ dollar was later estimated at 2.3% of GDP in 1984.<sup>161</sup> In March 1985, the NZ dollar was floated, following the Australian float a year before.<sup>162</sup>

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<sup>158</sup> Tim Hazeldine and John Quiggin "No More Free Beer Tomorrow? Economic Policy and Outcomes in Australia and New Zealand since 1984" (2006) 41 Aust J Pol Sci 145.

<sup>159</sup> Easton, above n 149, 27.

<sup>160</sup> Dalziel and Lattimore, above n 95, 153.

<sup>161</sup> Ibid, 27.

<sup>162</sup> Gregory McCarthy and David Taylor "The Politics of the Float: Paul Keating and the Deregulation of the Australian Exchange Rate" (1995) 41 Aust J Pol Sci & His 219.

The perceived failure of the state to meet the crises of the 1970s and early 1980s, coupled with the immediate crisis of 1984 provided justification for a reform program implemented by the Fourth Labour government. The objective of these reforms, headed by a group of like-minded Treasury and RBNZ officials, was to adapt the NZ economy to the international economy. Britain could no longer provide a buffer zone: there was 'no alternative'. The state was reorganised along different lines to ensure efficiency, the reforms touted as a means of leading 'us' from adversity and long-term decline to a prosperous future.<sup>163</sup> The reforms—locally known as 'Rogernomics' after the key figure, Finance Minister Roger Douglas—were influenced by the theories of public choice and the new institutional economics, both of which had been applied in Britain and the US.<sup>164</sup> These theories assumed that 'the market' was the preferred order of things, private enterprise was more efficient than public enterprise, and democratic government often created economic rents.<sup>165</sup> These theories denied the notion of 'the public interest', and took a negative view of the state, preferring outcomes produced by 'the market' rather than those produced by the political system.

Insulationism and full employment was rejected.<sup>166</sup> All tariffs, subsidies and import licensing were to be eliminated. The state itself was restructured: various state departments were reorganised along business lines, so that funders were separate from providers, and 'managers' became subject to 'output' and profit requirements. Various state companies were sold off or transformed into state-owned enterprises (SOEs), leading to further unemployment and dislocation.

Under the new 1989 Reserve Bank Act ('RBA 1989'), the RBNZ's sole function was to formulate and implement monetary policy to ensure price stability and temper inflation. All references to social welfare and employment were removed.<sup>167</sup> The RBNZ now had independence: monetary policy was to be set by a Policy Target

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<sup>163</sup> Janiewski and Morris, above n 151, 77.

<sup>164</sup> See generally *ibid.*

<sup>165</sup> Michael Taggart "The Nature and Functions of the State" in Peter Cane and Mark Tushnet (eds) *The Oxford Handbook of Legal Studies* (Oxford University Press, Oxford, 2003) 101.

<sup>166</sup> See generally on the 1984 reforms Jane Kelsey *The New Zealand Experiment* (Auckland University Press and Bridget Williams Press, Auckland, 1995).

<sup>167</sup> "The Reserve Bank Act", above n 53, 84.

Agreement (PTA) negotiated between the RBNZ Governor and the Minister of Finance. In one sense, a new 'constitutional' settlement was being put in place, in which the state rejected its previous relationship with the economy, and 'allowed' 'the market' took over. Once again, these changes were ones encouraged by an external order: here, not Britain or the Commonwealth, but international organisations like the World Bank and the International Monetary Fund.<sup>168</sup>

Economic reform continued under the new 1991 National Government, despite one reason for National's success being the unpopularity of Labour's economic policies. Extensive welfare, and health law reforms were implemented. In 1994, the Fiscal Responsibility Act was passed, aimed at locking in the decade's reforms. Section 4 set out basic principles of responsible fiscal management binding on the Minister of Finance, such as a prudential level of Crown debt; prudent management of fiscal risks; operating expenses kept lower than operating revenues; and the level and stability of tax rates kept reasonably predictable. This, along with the RBA 1989, was supposed to create a stable macroeconomic environment.<sup>169</sup> Most arresting about this set of arrangements was the explicit justification: to remove 'interference' in the economy by politicians.

The object of the 1984 reforms was characterised by its makers as an attempt to 'cut back' on 'the state' and its purported excesses; but this was rarely true in practice. Sometimes there was simply a shift of these excesses from the state to 'society'. Ending import controls did not stop the perennial balance of payments problem, caused by NZers' habit of importing more than they could afford.<sup>170</sup> NZers' evolving expectations had always outrun their capacity to meet these expectations. Deregulation and the tightening of credit leading to an overvalued dollar exacerbated the problem. Public debt fell from nearly 50% of GDP in the late 1980s to 20% in 1999—because of the sale of state assets—but total overseas debt rose from 47% of

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<sup>168</sup> Kelsey, above n 166. See also Jane Kelsey *Reclaiming Our Future: New Zealand and the Global Economy* (University of Toronto Press, Toronto, 1999).

<sup>169</sup> Dalziel and Lattimore, above n 95, 78-9.

<sup>170</sup> "Trade Negotiations and Diversification", above n 128, 55.

GDP in 1983 to 70% in 1990, and to 103% in 1999. Public sector debt dropped, but private sector debt rose.<sup>171</sup>

One problem for pre-1984 NZ governments was maintaining the NZ dollar at parity with the sterling, and later, the US dollar: balance of payments deficits were crises because of the perceived need to deflate (threatening unemployment) and/or restrict imports. The floating of the NZ dollar in 1984 meant that the balance of payments deficit no longer seemed immediately pressing.<sup>172</sup> But floating did not mean a loosening of constraint, but rather a change in the nature of constraint. The RBNZ is required to keep inflation low: thus, where inflation threatens, interest rates may be pushed up, which may have the unintended effect of an overvalued NZ currency.

Inflation was reduced: in 1987, inflation had stood at 18.4%; in 2000, 1.5%—although internationally inflation also declined. But the cost was a rise in unemployment as part of the credit squeeze to reduce inflation. In 1986, the official unemployment rate was 4%; in 1992, it rose to a high of 10.6%; but by 2000, it had fallen to 6.6%.<sup>173</sup> Much of this fell on the Maori and Pacific Island working population.<sup>174</sup>

Workforce structure also changed.<sup>175</sup> By 2001, the service sector grew to 77.6% of the workforce. The manufacturing and primary sectors fell to 13.7% and 8.7%.<sup>176</sup> There was an increase of NZers emigrating. Large numbers of NZers continued to arrive in Britain but similar numbers were also travelling to Australia.<sup>177</sup> At present roughly 10% of the NZ population (400,000) live in Australia. But NZ was little different from other developed countries in the 1980s and 1990s.

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<sup>171</sup> *Paradise Reforged*, above n 2, 421. See also Srikanta Chatterjee "The Balance of Payments and Exchange Rates" in Stuart Birks and Srikanta Chatterjee (eds) *The New Zealand Economy: Issues and Policies* (3 ed, Dunmore Press, Palmerston North, 1997) 282.

<sup>172</sup> A similar phenomenon is present in current-day British economic policy: see Tomlinson, above n 119, 195.

<sup>173</sup> Dalziel and Lattimore, above n 95, 153.

<sup>174</sup> *Ibid*, 34-5.

<sup>175</sup> Philip Morrison "Employment" (2001) 42 *Asia-Pacific Viewpoint* 85.

<sup>176</sup> Dalziel and Lattimore, above n 95, 6.

<sup>177</sup> Holmes, above n 130, 3.

It was not clear that 'the state' had been weakened through the reforms. For instance, the tax system was reformed: the top tax rate and company tax was reduced; but a Goods and Services Tax of 10% was imposed.<sup>178</sup> NZ's reforms were part of an international trend: most OECD countries during this period cut personal taxes, while broadening the tax base: and tax revenue as a percentage of GDP actually increased between 1980 and 1994 in every OECD country except the US. What was in question was not the state's ability to tax, but only how and what was to be taxed.<sup>179</sup>

But what is most important about the post-1984 reforms and the economic theories propelling them was that they affected understandings of politics and its management, and the various unintended consequences. For instance, the Waitangi Tribunal gained *mana* from the economic reforms, because it was a means of blocking and even questioning the reforms.<sup>180</sup>

At an abstract level, the reform of the state and the economy, as well as the theories propelling the changes ran in a striking parallel to moves in the politico-legal sphere. The attempt to put the RBNZ and fiscal policy beyond the control of the Executive was mirrored in the calls to put rights beyond the control of Parliamentary majorities via a Bill of Rights. In both, the artificiality of the state was to be contrasted with an 'authentic', more 'natural' self, like the spontaneous and efficient market or the 'natural' or 'universal' rights of individuals.<sup>181</sup> Both were attempts to end 'politics' or remove from public argument the issue of how to use power and for what ends.

In the attempt to reorganise the state, many legal forms of control and accountability were replaced with market-based forms. Yet, paradoxically, 'law', a key instrument of state power, was fundamental in the speedy implementation of the reforms, ostensibly aimed at 'reducing' the role of the state. Further, many have argued the speedy dismantling of the postwar consensus and establishment of the new market order

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<sup>178</sup> Dalziel and Lattimore, above n 95, 73-4.

<sup>179</sup> Helen Thompson "The Modern State and its Adversaries" (2006) *Govt and Opposition* 23, 31-2.

<sup>180</sup> JGA Pocock "Law, Sovereignty and History in a Divided Culture: the Case of New Zealand and the Treaty of Waitangi" in *The Discovery of Islands: Essays in British History* (Cambridge University Press, Cambridge, 2005) 226, 253.

<sup>181</sup> Martii Koskeniemi "The Future of Statehood" (1991) 32 *Harv Int'l LJ* 397.

could only have happened because of the dearth of legal checks on executive power.<sup>182</sup> In short, the reforms should not be perceived as having reduced ‘the state’ but are better seen as ‘reconfiguring’ of the state to strengthen it in a changed environment.

CER continued, and the Australian and NZ economies became more and more integrated as the Anglo-NZ relationship diminished.<sup>183</sup> In 1988, the first review of CER led to its acceleration, its extension to services and further harmonisation of relevant laws. Full free trade in goods was achieved by 1990.<sup>184</sup> By 1999, Australia was NZ’s main trading partner, taking 21.4% of NZ’s total exports and supplying 22.1% of NZ’s imports.<sup>185</sup> Australia is NZ’s biggest source of foreign investment.<sup>186</sup>

With greater harmonisation and integration, rudimentary debate has grown over the idea of monetary union, mostly in NZ, but the key stumbling block remains ‘sovereignty’. Trans Tasman trade currently only constitutes 20% of NZ’s export trade. On the other hand, with banking sector deregulation, 84% of the banks in NZ are now Australian-owned.<sup>187</sup> But this is no zero-sum matter: CER has been an additional means for the NZ state to deliver on its promises of economic security, ensuring stable trade and employment.<sup>188</sup>

The Uruguay Round of GATT (1986-94) required the end of quantitative quotas on agricultural products; the phasing-out of already-existing tariffs; and more generally the establishment of a World Trade Organisation with greater powers of supervision.

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<sup>182</sup> Smith, above n 4, 213-4.

<sup>183</sup> PJ Lloyd “Completing CER” in Arthur Grimes, Lydia Wevers and Ginny Sullivan (eds) *States of Mind: Australian and New Zealand 1901-2001* (Institute of Policy Studies, Wellington, 2002) 153.

<sup>184</sup> Hoadley, above n 155, 192.

<sup>185</sup> Statistics New Zealand *New Zealand Official Yearbook 2000* (Statistics New Zealand, Wellington, 2000), 531.

<sup>186</sup> New Zealand Ministry of Foreign Affairs and Trade “New Zealand-Australia Trade and Economic Statistics” at:

<http://www.mfat.govt.nz/Foreign-Relations/Australia/1-CER/0-key-trade-stats.php> (last accessed 21 June 2008).

<sup>187</sup> Alan Bollard “Supervising Overseas-owned Banks: New Zealand’s Experience”, available at:

<http://www.rbnz.govt.nz/speeches/0155840.html> (last accessed 21 June 2008).

<sup>188</sup> Ikenberry, above n , 365-6.

The result has been a reversal of the decline of demand for NZ's staple export goods of meat and dairy products.

By 1999, Australia was NZ's top trading partner, followed by the US and Japan. The UK was still the fourth largest export market and the sixth largest importer.<sup>189</sup> More generally, however, the key export market of growth for NZ was now the North Asian market: China, Taiwan and Korea. But as before, along with trade dependence came vulnerability. In 1997-99, trade fell as a result of the Asian crisis.<sup>190</sup> The 1997 Asian financial crisis and China's growing economic power is leading to the formation of an East Asian economic (and potentially political) bloc, pressuring NZers to ask themselves if they can be part of East Asia.<sup>191</sup>

Despite diversification, trade remained heavily reliant on pastoral products. Meat, dairy and wool products still made up 36.5% of NZ's export receipts.<sup>192</sup> The 'newer' industries of the postwar era, forestry and horticulture products, made up another 25%, but prices fluctuated.<sup>193</sup> In the service sector, the two key foreign exchange earners are now education, and tourism.<sup>194</sup> But the invisibles account remains consistently in deficit. Most imports come from the US, Japan and Australia, all located in the Asia-Pacific region. Overall the terms of trade remained relatively stable in the 1990s, but the traditional structure of NZ's economy remained. It did not appear that various state reforms had made any appreciable improvement. NZ's ranking within the OECD remains low. In 1990, NZ was nineteenth in the rankings; in 2000, twentieth place.<sup>195</sup>

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<sup>189</sup> *Official Yearbook 2000*, above n 184, 531.

<sup>190</sup> Harvey Franklin "The Economy" (2001) 43 *Asia-Pacific Viewpoint* 47, 48.

<sup>191</sup> See Yongjin Zhang "Globalisation and Regionalisation in East Asia: The China Factor" [2006] *Outlook* (New Zealand Foundation, Wellington).

<sup>192</sup> *Official Yearbook 2000*, above n 184, 515-521.

<sup>193</sup> Franklin, above n 190, 53.

<sup>194</sup> *Ibid*, 53.

<sup>195</sup> Easton, above n 149, 27. Easton has updated his work to 2003 at: <http://www.eastonbh.ac.nz/article98.html> (last accessed 21 June 2008).



## Conclusion

The NZ state's legitimacy depended, to a great extent, on its relationship with the economy. From their beginnings, the NZ state and economy were interdependent. The NZ state has been an important actor in the economy, organising land sales for hungry settlers and depriving Maori of their land; mobilising the country for war; establishing and expanding a safety net for the weak in society; and finally in the late twentieth century creating the conditions for 'the market' to flourish.

The economy has functioned as both a constraint and an enablement in NZ politics. NZ's domestic political stability was based on a regular economic—and political—relationship with Britain, which provided stability given the relative turbulence of the international economy. The British-NZ economic relationship has also 'enabled' the NZ state, giving it relative freedom to act domestically. On the other hand, it constrained the choices available to NZers: constitutional niceties like the Statute of Westminster took second place to the issue of ensuring prosperity.

1984 is often represented as a 'change' in the way NZ state and the economy related to each other, but there were also continuities. The NZ state was again modified to meet the exigencies of the moment—but now in response to an international economy in which Britain was in decline. The state was transformed to enhance its capacity to ensure delivery on domestic promises and preserve domestic stability. Similarly, like the Sterling Area and Imperial Preference in the early twentieth century, CER is part of the history of attempts by NZ governments to provide economic security and stability for its population, and buttress the claims of the NZ state on its citizens, while also being a constraint on the NZ state's future action.

The path of the economy mirrored and sometimes influenced the relationship between state and citizens. Previously, the expansion of autonomy ('modernity') was thought best addressed through collective institutions. In the economic sphere, this could be seen through state intervention; in the politico-legal sphere, in the dominance of parliament and political parties over individuals. By the 1980s, there was a reconfiguration of this relationship: the state was seen as something artificial and

harmful to the private order of the market and individuals were sovereign; in a similar way in the politico-legal sphere the state was seen as a constraint on rights-bearing individuals.

The trajectory of the NZ economy has been a disturbing one of contingent shifts in loyalties and interdependencies. This unsettling path has led to the emergence of the nationalist narrative: such a narrative suggests the present state of affairs is as it should be—the product of a journey from ‘constraint’ to ‘freedom’—allaying worries about the present and the future.

### ***Chapter 3: The Judicial Committee of the Privy Council and New Zealand***

#### **Introduction**

The right of appeal to the Judicial Committee of the Privy Council ('PC') has recently been abolished in NZ, and a new NZ Supreme Court ('NZSC') established. The NZ legal literature on the Judicial Committee of the Privy Council is vast, but generally speaking, of little depth. It tends to be written in a nationalist narrative: it ignores context, focusing solely on the inevitable unravelling of the relationship between the British and NZ courts, and the establishment of the NZSC. As a corollary, there is a tendency to ignore what happened elsewhere.

The PC connection has been a function of NZers' changing understandings of NZ's relationship with the world. NZers were mostly content with the PC, a minor institution in a much wider imperial system; but it was also seen as one means of ensuring a link to Britain. The history of NZ-British relations has often involved making a virtue out of what was a necessity, and NZ's relationship with the PC has been no exception. But slowly the issue became one of local factors: various contingencies, inertia, institutional problems and alternatives. Even recently beliefs about national sovereignty have not completely overwritten other views contrary to the idea that the 'national' and political units should coincide.

#### **1840-1970: An Imperial Institution**

The origins of the PC lie in the theory that the monarch is the fount of all justice within his realms, and that his subjects could petition him to rectify wrongs.<sup>1</sup> As the British empire expanded, this practice was extended to cover the monarch's 'overseas realms': the PC acted as an appeal court from various jurisdictions. As the number of territories and appeals increased, the formal Judicial Committee of the Privy Council

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<sup>1</sup> For a useful discussion of the PC and its origins, see David Swinfen *Imperial Appeal: The Debate on the Appeal to the Privy Council, 1833-1986* (Manchester University Press, Manchester, 1987).

was established by statute in 1833. In theory this formalised the PC's jurisdiction, turning it into an institution resembling a 'court'.

This ignored the PC's imperial dimension: it was not merely deciding cases, but adjudicating matters from a variety of countries with different legal systems and gradually 'indigenising' political elites and government, whose interests could differ widely from those of the metropole. As the settler communities and colonies became more independent, the haphazard staffing and arrangement of appeal committees was considered inadequate, and there was pressure to professionalise or modify the 'court'.<sup>2</sup> The history of the PC is one of dissatisfaction on the periphery—because of ignorance of local circumstances, cost, inefficiency—and repeated British attempts to accommodate these criticisms and retain a semblance of control.

The PC served as NZ highest appellate court from European settlement. There was a right of appeal either 'as of right' (which could be regulated by local statute) or by special leave (by leave of the PC itself). Perhaps the first case of note in the history of the relationship between NZ and the PC is *Wallis v Attorney-General*.<sup>3</sup> In *Wi Parata v The Bishop of Wellington*<sup>4</sup> the NZ Supreme Court (then NZ's highest domestic court) rejected earlier authority<sup>5</sup> and held that a Crown grant of Maori land was an act of state. The court could not ask whether native land title had been extinguished by the Crown grant: it was enough for the Crown to simply assert it. Further, Prendergast CJ held that the Treaty of Waitangi ('the Treaty') was a nullity to the extent it purported to cede sovereignty. The case took place against a context in which the separation of Maori from their land was essential to European expansion in NZ and the NZ economy. *Wi Parata*, along with the 1865 establishment of the Native Land Court, gave judicial imprimatur to the European land seizures, which were contrary to the Treaty. *Wi Parata* remained good law until the 1980s. Maori claimants tried to test the abolition of their customary rights by appealing in a number of cases to the PC. These they mostly lost.

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<sup>2</sup> Robert Stevens *The Independence of the Judiciary* (Clarendon Press, Oxford, 1993), 17.

<sup>3</sup> [1903] NZPCC 23.

<sup>4</sup> (1877) 3 NZJR 72 (SC).

<sup>5</sup> *The Queen v Symonds* (1847) NZPCC 387 (SC).

In *Wallis*, the Ngati toa tribe had ceded land to the Bishop of Selwyn so that he might set up a school. The Government had waived any right of pre-emption. This had been done before the 1852 Constitution Act, which had made it unlawful for anyone else to acquire land from Maori. In 1858, the Bishop transferred the land to trustees. By 1898, the trustees had accumulated a sizeable amount of money through rent, and it was unlikely the land would ever be used for a school. The trustees then applied to the court for directions in administering a charitable scheme. The Crown became involved because it had an interest in ensuring charitable trusts were administered properly. The Solicitor-General, however, argued that the land and endowment reverted to the Crown, since the original purpose of the grant had failed.

The NZ Court of Appeal (now NZ's highest domestic court) decided the Crown grant was void, and the land and money had reverted to the Crown, the root of all title. The PC allowed the trustees' appeal: they were allowed to keep the land for charitable purposes. The Crown's role was rejected as contrary to its role as protector of charities.

There were two controversial aspects to the PC judgment. First, Lord Macnaghten for the PC had made disparaging remarks about the NZCA, suggesting that they had bowed to the executive, since the NZCA seemed unwilling to reject the Crown's argument.<sup>6</sup> Second, the PC assumed that native title was an independent legal ground in itself rather than being dependent on Crown recognition.<sup>7</sup> Macnaghten suggested that Maori had title to and ceded the land under the Treaty. This went to the heart of NZ settlement policy: if native title was valid, and the Treaty was a valid source of law, the work of successive settler governments would be undone.<sup>8</sup>

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<sup>6</sup> *Wallis*, above n 3, 35.

<sup>7</sup> *Ibid*, 26-27; 34.

<sup>8</sup> The earlier case of *Nireaha Tamaki v Baker* (1900-1) [1840-1932] NZPCC 371 had also rejected *Wi Parata* on native title issues: see John William Tate "Hohepa Wi Neera: Native Title and the Privy Council Challenge" (2004) 35 VUWLR 73.

A joint protest by the NZ bench and bar was organised, which, although of no formal effect, was highly unusual.<sup>9</sup> Although ostensibly the reason for the protest was the PC's criticism of the NZCA's submission to executive pressure, the judges also protested the PC's account of native title in NZ. All the judges argued that the PC's decision would result in a loss of security and stability of land settlement in NZ.<sup>10</sup> Stout CJ, for instance, noted that if the PC was correct, "no land title in the Colony would be safe."<sup>11</sup> He suggested abolition, but did so in terms suggesting he was a British imperialist, not a NZ nationalist:

A great Imperial judicial tribunal sitting in the capital of the empire, dispensing justice even to the meanest of British subjects in the uttermost parts of the earth, is a great ideal. But if that tribunal is not acquainted with the laws it is called upon to administer, it may unconsciously become the worker of injustice. And if such should unfortunately happen, that Imperial spirit which is the true bond of union amongst his Majesty's subjects must be weakened....[The PC] has shown it knows not our statutes ... or our history.<sup>12</sup>

The conflict was ended by the enactment of the Native Lands Act 1909, invalidating claims based on customary rights. NZ retained appeals to the PC. The legacy of *Wallis* was ambiguous: it represented the potential danger of relying on an overseas court lacking 'local knowledge';<sup>13</sup> but it was also seen as evidence that NZers were capable of asserting their independence if they so wished. It was an example not of NZ nationalism, but rather 'loyalist dissent', of thinking oneself part of a group, and confident enough to criticise because part of that group.<sup>14</sup> Until the end of the nineteenth century NZ was free to criticise Britain, confident in its ties to Britain, but also in Britain's power. Criticism only stopped when British power began to decline.

In the early twentieth century, Britain faced challenges from Germany, Japan and the USA. The Boer War and Social Darwinism had led to a wave of Britannic nationalism,

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<sup>9</sup> *Protest of Bench and Bar* (1903) NZPCC (1840-1938) 730.

<sup>10</sup> *Ibid*, 732, per Stout CJ; 747-755, per Williams J; 757, per Edwards J.

<sup>11</sup> *Ibid*, 746, per Stout CJ.

<sup>12</sup> *Ibid*. See also Sir Robert Stout "Appellate Tribunals for the Colonies" (1904) 2 Cth L Rev 3.

<sup>13</sup> Paul McHugh "The Appeal of "Local Circumstances" to the Privy Council" [1987] NZLJ 24.

<sup>14</sup> Malcolm McKinnon *Independence and Foreign Policy: New Zealand in the World since 1935* (Auckland University Press, Auckland, 1993), 2-10. For an example of this, see R McVeagh "Quarrels and Calamities of the New Zealand Judiciary" (1940) 16 NZLJ 50.

tightening relations between Britain and the settler communities.<sup>15</sup> At Imperial Conferences, there were calls for greater Dominion participation in the Empire, with Australia advocating, amongst other things, an Imperial Court of Appeal.<sup>16</sup> *Wallis* was soon forgotten.

There were a number of problems with such proposals. The settler communities insisted upon equality, so that theoretically, Britain itself ought to be subject to the proposed body's jurisdiction. This was unthinkable in the British domestic context, not simply because of British parochialism, but also logistically: who would sit, and where? Contemporary institutional arrangements suggested there was some difference between the British in the British Isles and the British in Greater Britain. Moreover, none of the settler communities wished to have their appeals heard by other 'colonial' judges, who might be of inadequate 'quality'.<sup>17</sup> Finally, although the PC was disagreeable, there was no consensus in the settler communities on a better alternative: it was better to preserve the status quo.<sup>18</sup>

By the mid-1920s, there were moves towards abolition, particularly by the Irish, South Africans and Canadians. Viscount Haldane had discussed the nature of the PC upon hearing the first petitions from the new Irish Free State in 1926:

The Judicial Committee of the Privy Council is not an English body in any exclusive sense ... The Sovereign is everywhere throughout the Empire in contemplation of the law. He may as well sit in Dublin ... or in India as he may sit here, and it is only for convenience and because we have a Court and because the members of the Privy Council are conveniently here that we do sit here; but the Privy Councillors from the Dominions may be summoned to sit with us and then we sit as an Imperial Court which presents the Empire and not any particular part of it ...<sup>19</sup>

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<sup>15</sup> John Darwin "A Third British Empire? The Dominion Idea in Imperial Politics" in Judith Brown and W Roger Louis (eds) *Oxford History of the British Empire, Vol 4: The Twentieth Century* (Oxford University Press, Oxford, 1999) 64.

<sup>16</sup> Swinfen, above n 1, 74; *Independence*, above n 2, 65.

<sup>17</sup> *Ibid*, 77-8.

<sup>18</sup> *Ibid*, 82.

<sup>19</sup> *Hull v M'Kenna* [1926] IR 402, 403 (PC).

It was an argument to persuade the recalcitrant Irish to remain within the Empire. The PC was not an English institution which Ireland was subordinate to, but rather an Empire-wide institution in which Ireland could 'participate'.

Lord Dunedin for the PC a year later in *Robins v National Trust*<sup>20</sup> added a further complication: the House of Lords ('HL') could also serve as the final court to the 'colonies':

When an appellate Court in a Colony which is regulated by English law differs from an appellate Court in England, it is not right to assume that the Colonial Court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme Tribunal to settle English law, and that being settled, the Colonial Court, which is bound by English law, is bound to follow it. Equally, of course, the point of difference may be settled ... by a judgment of this Board.<sup>21</sup>

A colonial court under the PC's jurisdiction was bound to follow a court which technically was not part of its judicial hierarchy. But in NZ, the PC and House of Lords were both thought British: it did not matter.<sup>22</sup>

In 1929, the NZ legal profession were alarmed to hear that the MacDonald Government had announced that it would allow any Dominion to abolish the right of appeal to the PC. Sir Robert Stout, former critic, stated:

I do not think there is a single Dominion or Colony that, if asked to abolish the appeal to the Privy Council, would agree to the suggestion... We should do what we can to strengthen the Empire, not weaken it, and to keep it together, Anything that tends to create severance between the different parts of the Empire is a mistake, and it shows a want of loyalty to the Constitution...<sup>23</sup>

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<sup>20</sup> [1927] AC 515 (PC).

<sup>21</sup> Ibid, 519.

<sup>22</sup> *Robins* was later accepted as good authority by the NZCA: *Gooch v NZ Financial Times* [1933] NZLR 257 (CA).

<sup>23</sup> Quoted in "Right of Appeal to Privy Council" (1929-1930) 5 NZLJ 241.



JB Callan's<sup>24</sup> 1930 article provided the fullest justification for retention by NZers at that time.<sup>25</sup> *Wallis* was Callan's starting point, but he saw the *Protest* as having taught the British judges a lesson (despite no evidence of this). NZers had recognised the value of retaining the PC, but the PC should not be taken for granted. Callan noted that he had been asked by members of the English bar about NZ's position towards the PC. The eyes of the Old British were on us; we became important under the brightness of their gaze.

Callan touched on the main problem surrounding the imperial arrangements of the interwar years: maintaining cohesion.<sup>26</sup> As with all imperial institutions, the value of the PC was a function of the confidence member countries had in it; it was weakened by moves towards separation. NZ was loyal: the problem was the other, potentially perfidious countries. Callan asked: What were the advantages in maintaining the PC? There were three reasons. The first made reference to the changing security environment:

Are we satisfied that the world is yet a safe place? Do we know there is to be no more war? In an unsafe world, can this small, isolated, thinly populated country stand alone? If not, in what group does it stand? What are the ties that bind this group? Are we as important to the centre as the centre is to us? If the ties are slight and intangible, what are the probable ultimate consequences of every gesture of severance we may make?<sup>27</sup>

The 1930s was a decade of uncertainty. Centrifugal forces inherent in the Empire-Commonwealth were threatening its imagined integrity; the British at that time were oscillating between Europe or the Empire as the key linchpin in their foreign and economic policies.<sup>28</sup> The Empire-Commonwealth filled a need for NZ which the UN has today. It was a system of collective security based on faith and self-interest. The more tied into Britain NZ was, the more the British would be reminded of their ties to the Southern Hemisphere.

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<sup>24</sup> See Appendix 2.

<sup>25</sup> JB Callan "The Appeal to the Privy Council" (1930-1931) 6 NZLJ 94.

<sup>26</sup> See generally Darwin, above n 15.

<sup>27</sup> Callan, above n 25, 97.

<sup>28</sup> RF Holland *Britain and the Commonwealth Alliance, 1918-1939* (Macmillan, Basingstoke, 1981), chapter 8.

However, Callan mostly focused on the second reason: the need for unity and uniformity in the law. The law was judge-made, and that it had to adapt to its local circumstances. Therefore, unless there was some active means of preserving unity, the various countries' legal systems would diversify and grow apart.<sup>29</sup> Callan was willing to admit that "the independent efforts of New Zealand judges might accomplish as near an approximation to abstract justice as the efforts of English judges,"<sup>30</sup> but this was risky. Callan adhered to a mechanistic approach to law-making in which the application of intellect to a particular case was all that mattered.<sup>31</sup>

Finally, there was an argument about the smallness of NZ; and the fact that everyone knew each other. The PC sitting at a "serene and Olympian distance" was a valuable safeguard. It was a superficially attractive argument, repeated for the rest of the century; and this in spite of the fact that the cohesion of English common law came more from the English judiciary's small size.<sup>32</sup>

British officials were already resigned to abolition of the right of appeal.<sup>33</sup> But talk of abolition came to little, except in the case of the Irish Free State: there the right of appeal was abolished in 1935. The attitudes of the other settler communities to the PC varied too widely in this period to make any generalisation. For Australia and South Africa, the PC never became a flashpoint for conflict. Appeals from both countries had been limited early on: there was little opportunity for the PC to decide controversial matters.<sup>34</sup> The constitutional structure of the settler communities also played a role: South Africa and NZ were both unitary, removing the potential entanglement of the PC in federal-state relations; whereas in Canada the PC's involvement on centre-province relations were a key reason for eventual abolition.

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<sup>29</sup> Callan, above n 25, 98.

<sup>30</sup> Ibid, 99.

<sup>31</sup> *Independence*, above n 2, 146.

<sup>32</sup> AWB Simpson "The Common Law and Legal Theory" in William Twining (ed) *Legal Theory and Common Law* (Basil Blackwell, Oxford, 1986) 1, 21-24.

<sup>33</sup> Swinfen, above n 1, 103-4.

<sup>34</sup> Ibid, 157-8.

It was not until the 1930s that consensus in Canada crystallised over abolition after the PC invalidated much of the Canadian government's 'New Deal' legislation designed to deal with the effects of the Depression.<sup>35</sup> Prior to this, Canadian politicians had tolerated the PC, but also remained opposed to any reform of the PC: in particular, French Canadians thought the PC better protected their rights.<sup>36</sup>

In short, the 'trend' towards abolition and the establishment of a national court was never inevitable: much depended on the moment and the domestic balance of interest groups in the settler communities. On the British side, the PC provided the illusion of unity, while allowing the maximum amount of local autonomy. For British judges, the PC continued to reflect the ideal of a unified common law and the beneficence of British law and values.

#### **1945-70: Decolonisation and Attempts to Adapt**

In June 1947, before the adoption of the Statute of Westminster ('SOW') in NZ,<sup>37</sup> the *New Zealand Law Journal* published an editorial<sup>38</sup> discussing the Canadian case *Attorney-General of Ontario v Attorney-General of Canada*.<sup>39</sup> The PC decided that Dominion Parliaments could abolish appeals to the Judicial Committee, since the Statute had removed all possible limits on the powers of Dominion legislatures adopting it. The editorial warned: "if we adopt the Statute, the way would be open for the destruction of this valued right of final appeal."<sup>40</sup>

Adoption of the SOW did not lead to abolition. In the period 1940-49, five of seven NZ appeals which went to the PC were allowed. In 1950-59, none of the seven cases before the PC were overturned. In 1960-69, five of 12 were allowed.<sup>41</sup> One reason

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<sup>35</sup> See, for instance, *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326 (PC); *Attorney-General for British Columbia v Attorney-General for Canada* [1937] AC 405 (PC).

<sup>36</sup> Swinfen, above n 1, 99.

<sup>37</sup> The Statute was eventually adopted in late 1947 in the move to abolish the upper house of Parliament, the Legislative Council.

<sup>38</sup> "The Statute of Westminster and Privy Council Appeals" [1947] NZLJ 143.

<sup>39</sup> [1947] 1 All ER 137 (PC).

<sup>40</sup> "Statute of Westminster", above n 38, 144.

<sup>41</sup> New Zealand Law Commission *The Structure of the Courts* (NZLC No 7, Wellington, 1989), 275.

why NZ retained the appeal right for so long was that there was a dearth of controversial cases which proponents of abolition could latch onto.

It was unlikely that appeals to the PC could have been abolished in NZ at this point. It was only in 1957 that a permanent Court of Appeal ('NZCA') was established, despite four attempts made between 1908 and 1947. Prior to this, Supreme Court judges had sat in rotation on the NZCA. Earlier establishment had failed for institutional reasons like a small judiciary, but justifications for a permanent NZCA focused on a greater efficiency, specialisation, and consistency in judgment. But there was no suggestion that a permanent NZCA could develop a specifically NZ jurisprudence; there was simply 'the law' and the administration of justice.<sup>42</sup>

This mechanistic approach to the law and law-making also preserved adherence to the PC. If judging was simply a matter of declaration and application, then personalities, politics and nationality were irrelevant.<sup>43</sup> It was still possible to imagine a court which was based on the quality of the judges alone and a shared common law.

The PC's role as NZ's highest appellate court remained the same. In a 1956 case,<sup>44</sup> the NZCA had held that where there was conflict between an earlier NZCA decision and a later HL decision, the NZCA's duty was to obey the HL, "the supreme tribunal of the British Commonwealth",<sup>45</sup> following *Robins*. The distinction made between the two institutions became an issue in the 1962 case of *Corbett v Social Security Commission*.<sup>46</sup> The issue was reconciling conflicting authority between an earlier more 'liberal' PC decision,<sup>47</sup> and a later 'conservative' and controversial wartime HL decision.<sup>48</sup> The three NZCA judges decided in favour of the PC, but the case illustrated the difficulty in maintaining uniformity, and the ambiguous grounds upon

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<sup>42</sup> LP Leary "A Permanent Court of Appeal" [1954] NZLJ 109; TP Cleary "Supporting Arguments" [1954] NZLJ 114.

<sup>43</sup> *Independence*, above n 2, 150.

<sup>44</sup> *Smith v Wellington Woollen Manufacturing Co Ltd* [1956] NZLR 491 (CA)

<sup>45</sup> *Ibid*, 500.

<sup>46</sup> [1962] NZLR 878 (CA).

<sup>47</sup> *Robinson v State of South Australia (No 2)* [1931] AC 794 (PC).

<sup>48</sup> *Duncan v Cammell, Laird and Co Ltd* [1942] AC 624 (HL).

which the relationship between Britain and NZ and the institutions they ostensibly held in common were based.

In the postwar period, the PC's jurisdiction began to shrink. Several former colonies like India (1949) ended the right of appeal at independence, although Ceylon did not because of its domestic politics.<sup>49</sup> Two settler communities ended appeals, Canada (1949) only because abolition in wartime would have been politically awkward, South Africa (1950) because of a change of government. New reasons had to be sought to justify the PC's existence. The British government's policy in relation to the PC was to modify the institution, while retaining the maximum possible influence.<sup>50</sup> Various proposals for modification were made, culminating in the proposal for a Commonwealth Court. At least three Lord Chancellors during the 1940s to 1960s—Jowitt, Kilmuir and Gardiner—were all advocates of some sort of modification of the PC.<sup>51</sup> This stemmed partly from their substantive formalism, which saw quality as the only criterion, an eagerness to retain influence over the Commonwealth and the beneficence of British law and values.

The key problem to establishing a peripatetic court was racial. A proposal for a peripatetic court in the 1940s was dropped as British officials were concerned that the settler communities would object to Indian judges sitting in their countries. Moreover, the remaining settler communities preferred that their own appeals heard by English law lords. Finally, some British officials rightly thought a travelling court would rob it of its mystery and authority, a function of its distance.<sup>52</sup> The British wished to turn an imperial institution into a Commonwealth institution, but this was not possible, since the PC's basis lay in a mixture of history and lingering race patriotism.

The PC's composition was also subject to imperial considerations. The South African and Canadian Chief Justices had been appointed as members of the PC during the

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<sup>49</sup> HH Marshall "The Judicial Committee of the Privy Council: A Waning Jurisdiction" (1964) 18 ICLQ 696.

<sup>50</sup> *Independence*, above n 2, 144.

<sup>51</sup> *Ibid*, 150-162.

<sup>52</sup> *Ibid*, 152 fn93.

1940s, the former as part of the war effort,<sup>53</sup> the latter to encourage Canadian governments to remain within the PC's jurisdiction, but this failed.<sup>54</sup> Lord Jowitt had travelled to Australia and NZ in 1951, and in response to local complaints that the PC never cited Australian and NZ cases, suggested that the chief justices of both countries sit on the PC. However, the NZ government had rejected the idea of NZ judges sitting in rotation,<sup>55</sup> possibly on the basis that it would have to pay for NZ judges to sit in London, and possibly because of domestic staffing issues.<sup>56</sup>

In 1954 Lord Kilmuir LC suggested turning the PC into a peripatetic court, including judges from the colonies—a British attempt to accommodate political independence movements. The same old problems were still present: Australia insisted that its appeals would only be heard by five English law lords.<sup>57</sup> Aware of Australian scrutiny, Lord Reid had urged Lord Kilmuir in 1955 to ensure especially good panels for Australian appeals.<sup>58</sup>

In late 1958, Lord Kilmuir again raised the idea of a peripatetic court. His justification:

The common law constitutes a bond between the countries of the Commonwealth which should be strengthened to bring them together ... (and to ensure the) uniform development of law throughout the Commonwealth ... As new Commonwealth countries achieve independence, political control over them is lost; but the Judicial Committee provides an opportunity to exercise control of a different kind and to guide development indirectly by a jurisdiction which commands universal respect ...<sup>59</sup>

Viscount Simonds set out the arguments against such a court: the PC was poor on constitutional issues; there was the race and representation problem; and sitting at a distance was more likely to inspire respect than a group of old men sitting locally. Many law lords would not have become judges had they known they would have to

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<sup>53</sup> Ibid, 146.

<sup>54</sup> Ibid, 140.

<sup>55</sup> Ibid, 149, fn77.

<sup>56</sup> Jeremy Pope "Justice on the Cheap—Part Two" [1972] NZLJ 432; and Peter Spiller *New Zealand Court of Appeal 1958-1996: A History* (Brookers, Wellington, 2002), 356.

<sup>57</sup> *Independence*, above n 2, 156.

<sup>58</sup> Ibid, 149.

<sup>59</sup> Ibid, 158.

travel. Most of the law lords agreed with Viscount Simonds: in December 1958, six of nine law lords said they would not go on circuit.<sup>60</sup> The idea was dropped.

By the early 1960s, most in Britain were beginning to turn away from the Commonwealth. Yet Lord Gardiner, an advocate of judicial reform who became Lord Chancellor in 1964, again raised the idea of a peripatetic Commonwealth Court of Appeal. This was a response to international politics: decolonisation of the Commonwealth was intensifying, and several countries were talking of withdrawing their reservations from the optional clause creating the International Court of Justice, raising the potential that Commonwealth disputes might be heard by communist countries.<sup>61</sup> The proposal received some support from a small number of British politicians, but it was rejected at the 1965 Commonwealth Conference. It had come too late for most of the Commonwealth to accept it. In the case of NZ, who at least accepted the idea, any new court would have to be of a similar 'quality' to the PC.<sup>62</sup> But for most, there was simply no need to upset the status quo.

Perhaps aware of the hostility directed towards it, the PC in the late 1960s took a more relaxed view of its role. The main case here is *Australian Consolidated Press v Uren*,<sup>63</sup> which was about punitive damages being awarded in a libel action. It had been accepted that from at least 1920 Australian case law that this was possible, but in the controversial *Rookes v Bernard*,<sup>64</sup> the HL had held that punitive damages could only be awarded in highly limited circumstances. The High Court of Australia ('HCA') held it would not follow *Rookes*. Hence, the deeper question was to what extent Australian courts should follow HL decisions.

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<sup>60</sup> Ibid, 159-160.

<sup>61</sup> Swinfen, above n 1, 200.

<sup>62</sup> See the comments of ED Blundell in CN Irvine "The Third Commonwealth and Empire Law Conference" [1965] NZLJ 457, 458: "The new Court must be of equal status and efficiency with the Judicial Committee. Nothing else would interest New Zealand." See also Swinfen, above n 1, 213.

<sup>63</sup> [1969] 1 AC 590 (PC).

<sup>64</sup> [1964] AC 1129 (HL).

The PC held that the HCA was entitled to go its own way.<sup>65</sup> Lord Morris noted that there were “advantages” in the Commonwealth where “the law” was built on a common foundation that its development proceeded along similar lines, but he conceded that:

The gain that uniformity of approach may yield is however far less marked in some branches of the law than in others. In trade between countries and nations the sphere where common acceptance of view is desirable may be wide...But in matters which may considerably be of domestic or internal significance the need for uniformity is not compelling.<sup>66</sup>

In any case, *Uren* was nothing new: it was another manifestation of the imperial-Commonwealth dilemma, in which the centre’s response to a recalcitrant periphery was to allow the maximum amount of local autonomy, while providing the illusion of unity. But it was no longer clear for whom the show of unity was needed. Australia limited most means of appeal to the PC in 1968. Australian states retained the right of appeal until 1986, however, suspicious of the federal government’s power.<sup>67</sup>

NZ lawyers continued to extol the unsullied virtues of the PC.<sup>68</sup> A key enthusiast for the PC during this period was Richard Wild QC,<sup>69</sup> as Solicitor-General and later as Chief Justice. With Wild’s encouragement, in 1968 the NZ and British governments agreed that a NZ judge would sit regularly on the PC. One NZ enthusiast complained the matter of who would pay for the NZ judges had been the reason why NZ judges had not sat earlier on the PC.<sup>70</sup> Thus while the disconnection between NZ and British interests in the economic and military spheres was becoming clearer, the judicial relationship was finally institutionalised.

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<sup>65</sup> *Uren*, above n 63, 644.

<sup>66</sup> *Ibid*, 641.

<sup>67</sup> Swinfen, above n 1, 165.

<sup>68</sup> Hon Mr Justice Haslam “The Judicial Committee—Past Influence and Future Relationships” [1972] NZLJ 542; see also the comments of Wild CJ at 554.

<sup>69</sup> See Appendix 2.

<sup>70</sup> Pope, above n 56.



One 1972 *New Zealand Law Journal* editorial cited approvingly Wild's comments after returning from sitting in the PC about doing "our share in manning the Board."<sup>71</sup> 'Doing our share' meant providing Board members with the local knowledge they so obviously lacked, but also meant enriching the British judges' own experience. Here was a remnant of the idea that NZ still had something to offer to the British. NZ judges would continue to 'do their share' till the establishment of the NZ Supreme Court in 2004.

After the rejection of the idea of a Commonwealth Court, sketchy proposals for a Regional Court of Appeal emerged in both NZ and Australia, often involving Australia and NZ as key members, with Pacific Island states and perhaps Malaysia and Singapore as other constituents.<sup>72</sup> The geopolitical context offers a clue: 'the Asian-Pacific region was decolonising; new nation-states were appearing; regional stability was in question.

Australia's Chief Justice Barwick argued in 1969 that a modified PC could act as a regional court. The need for an external court was greater in multiracial societies. Such a modified court would be a great service in that the law could be put on a more uniform basis; and it would give to local countries a greater sense of belonging. A Regional Court would hold together many of those peoples were going through "this frightfully difficult time of becoming independent, of being burnt up by nationalism." There was a role for "British institutions, a sense of importance of the individual, a sense of justice and fair play and a sense of the rule of law."<sup>73</sup> But Barwick noted Australia would not submit itself to such a court—"we don't want it, but it would be nice if you had it."<sup>74</sup>

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<sup>71</sup> Ibid.

<sup>72</sup> BJ Cameron "Appeals to the Privy Council—New Zealand" (1969-1972) 2 Otago L Rev 172, 178; Haslam, above n 68, 547. Gough Whitlam, for instance, had suggested to British authorities in 1977 an all-Australian version of the PC, but this fell on deaf ears: Hon Justice MD Kirby "CER, Trans-Tasman Courts and Australasia" [1987] NZLJ 304, 306. This is simply to highlight that Australians—often held up by NZers as more progressive, quicker in their republicanism and patriotism—also toyed with the idea of a transnational court.

<sup>73</sup> Rt Hon Sir Garfield Barwick "A Regional Court of Appeal" [1969] NZLJ 315, 321.

<sup>74</sup> Ibid, 323.

Jim Cameron, then secretary for the NZ Ministry of Justice, commented on the idea of a Pacific Court or a Regional Court in 1969, noting that it might provide “a third principal nucleus of development of the common law, comparable with England and America.”<sup>75</sup> But he also dismissed the idea as foundering on Australian unwillingness to submit to such an authority.

In 1974, AM Finlay QC,<sup>76</sup> then NZ’s Attorney-General, authoritatively rejected the proposal for a Pacific Court.<sup>77</sup> Given the weakness of local bar and bench in the Pacific region, such a court would be Australians and NZers sitting on a court for other countries. Further, the Australians would not submit themselves to such a court. Finlay also thought that while NZ judges might contribute, they had little to gain.<sup>78</sup>

Proposals for a Regional Court of Appeal was a response to the two countries’ growing realisation of their shared predicament. Such proposals were a mix of the optimistically sketchy and the fiercely sceptical. They reflected the two settler countries’ view of the Asia-Pacific as ‘theirs’, but also the realisation that their futures were no longer with Britain. Their responses were ‘British’, but now it was NZ and Australia acting as trustees guiding ‘younger’ countries towards peaceful independence. Antipodeans had faith in the stabilising properties of British or imperial law and institutions as instruments of foreign policy, but they too could not tolerate the idea that their own domestic matters might be subject to such institutions. Put differently, while the idea of a vague organic unity was attractive, a hardened national sovereignty was better.

Cameron’s 1969 essay was the first NZ academic article attacking the PC and its role in NZ law. Cameron was harsh about the unthinking reliance of the NZ legal profession on British law and institutions, stating that “the New Zealand legal establishment and many constitutionalists time has not stood still since Queen

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<sup>75</sup> Cameron, above n 72, 178.

<sup>76</sup> See Appendix 2.

<sup>77</sup> AM Finlay “A Pacific Regional Court of Appeal?” [1974] NZLJ 493.

<sup>78</sup> Ibid, 196.

Victoria's jubilee."<sup>79</sup> He paid homage to *Wallis*, whose main message was now the folly of relying on a foreign court lacking local knowledge. The PC had made the "egregious mistake" of assuming that the Treaty was part of domestic law.<sup>80</sup> The *Protest* was now seen through the lens of independence. Stout's comments about Britishness and the necessity for an Imperial Court were ignored.

Cameron bluntly stated the PC was an "anachronism unwarranted by the needs and inappropriate to the status of New Zealand."<sup>81</sup> The PC was not a link to the Commonwealth, since so many members had already left its jurisdiction. Cameron identified Britain's decision to enter Europe as "the shattering of the glass house of illusion."<sup>82</sup> There were now distinct NZ interests; Britain was clearly separate from NZ. Here was a clear sign of the beginning of a nationalist approach: one which viewed history through the lens of an emergent NZ nation and of the nation-state to be.

Finlay also rejected the idea of unity in his 1974 article on the Pacific Court of Appeal. Finlay's article was a veiled attack on the PC, treating its usefulness in the past tense. He noted the PC's declining jurisdiction, and that it no longer acted as a stabilising or unifying body. What hope, then, for a Pacific Court? Was there a community of interest and experience amongst the various countries? In the case of the PC, it had been the unity of the Commonwealth, which Finlay implied had had its day. Further, the idea behind a common court was a shared law to administer, but in the absence of an economic grouping like a common market, the tendency was towards nationhood and diversity.<sup>83</sup> Finlay was led to question unity and the idea of uniformity in the law—a key justification in NZ for retention. Despite this, however, Finlay and the Labour Government confirmed in late 1974 that NZ would maintain the right of appeal, and that it would provide for NZ judges to sit regularly on the PC.<sup>84</sup>

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<sup>79</sup> Cameron, above n 72, 178.

<sup>80</sup> Ibid, 175-176.

<sup>81</sup> Ibid, 173.

<sup>82</sup> Ibid, 184.

<sup>83</sup> Finlay, above n 77, 496.

<sup>84</sup> "Privy Council Presently Secure" [1974] NZLJ 515.

For the majority of the NZ legal profession, arguing a case before or sitting on the PC was still considered the apex of one's legal experience. On the eve of his retirement in 1961, Sir Kenneth Gresson, NZCA President, had written to the British government of his own accord asking to sit on the PC.<sup>85</sup> Gresson sat on the Board in 1962. The appointment of NZCA judges Sir Alexander Turner and Sir Thaddeus McCarthy as members of the PC in late 1968 was "received with pride and satisfaction by the profession" and was recognition of "the quality of the judicial work of our Court of Appeal ... [which] has won it complete respect throughout the Commonwealth."<sup>86</sup> 'We' had reached a level of maturity: here was acceptance by the British in the form of PC membership.

The institutionalisation of having NZ judges on the PC did not enhance the relationship between NZ and Britain. In 1972, Haslam J, an NZCA judge, published an article praising the PC.<sup>87</sup> It was one of the last articles to mention Britishness. It was a highly defensive piece, suggesting that there was already a feeling that abolition of the appeal right to the PC was inevitable. Haslam's paper was a legalistic defence of retention. There was nothing of mutual obligations, or of a connection to the UK. What remained were the old arguments about the benefits to NZers of judicial quality coupled with distance, and the objectivity of the PC.

### **1970-87: A Deepening Nationalism**

In 1976, a Royal Commission was established to inquire into the structure and operation of the courts, and report on what changes were necessary to secure the just and efficient disposal of court business and ensure ready access. In particular, the Royal Commission was asked to look at the general courts' jurisdiction and ask whether new courts and/or divisions should be created.

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<sup>85</sup> Spiller, above n 56, 46.

<sup>86</sup> "The Privy Council" [1968] NZLR 409.

<sup>87</sup> Haslam, above n 68.

The Royal Commission published its Report in 1978, streamlining jurisdiction.<sup>88</sup> The NZCA was now “an independent source of the law ... preserving a unity of spirit and principle with others of the common law family while taking into account ... the particular conditions, circumstances and values of New Zealand.”<sup>89</sup> The question of retention of appeals to the PC fell outside its terms of reference, but the Commission included a section on the arguments for and against retention, because there had been many submissions on the matter.

The Commission concluded that the PC had been of “real value” to the “development of New Zealand jurisprudence”, and should not be lightly abolished. The sole criterion was whether abolition would be good for NZ’s judicial system.<sup>90</sup> There was not the infrastructure in place to justify abolition. There would be no abolition until the number of permanent NZCA judges increased to a minimum of five (there were only four) to deal with the ever-increasing workload. This conclusion followed from the NZ legal profession’s general hostility to abolition. The Committee did state that the PC would eventually be abolished, and that NZ ought to prepare itself by first structuring a stable court system now.

The number of appeals to the PC in the 1980s did not significantly differ from previous decades, nor did the proportion of appeals allowed;<sup>91</sup> but it was during this time that a great deal of attention began to be paid to appeals allowed by the PC. This coincided with a PC of a more conservative bent.

The first NZ case exciting public opinion about the appropriateness of the PC was the controversial 1982 case *Lesa*.<sup>92</sup> This case will be dealt with in more detail in chapter four, but in essence the case concerned Western Samoan ‘overstayers’—those accused of remaining in NZ illegally. It was argued that the effect of a succession of statutes relating to British subjecthood in NZ and Western Samoa was to make Western

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<sup>88</sup> *Report of the Royal Commission on the Courts* [1978] AJHR H.2.

<sup>89</sup> *Ibid*, 83.

<sup>90</sup> *Ibid*, 82.

<sup>91</sup> New Zealand Law Commission *The Structure of the Courts* (NZLC No 7, Wellington, 1989), 275.

<sup>92</sup> *Lesa v Attorney-General* [1982] 1 NZLR 165 (CA and PC).

Samoans born before 1949 NZ citizens—thus Western Samoan ‘overstayers’ could not be accused of being violating immigration law. The NZCA had rejected this argument; but the PC allowed the appeal, potentially bestowing an estimated 100,000 Western Samoans with NZ citizenship.<sup>93</sup> The National Government after ‘discussions’ with the Western Samoan Government passed an act which overruled the PC’s decision. The case led the National Government to suggest abolition, but this did not eventuate.<sup>94</sup>

In the 1983 case *O’Connor v Hart*<sup>95</sup> the NZCA had held that a contract made between a person of unsound mind and another party unaware of this condition could be held invalid if the terms were objectively unfair and unconscionable. The PC held that such a proposition was unsupported by authority, illogical, and

would distinguish the law of New Zealand from the law of Australia ... for no good reason, as well as from the law of England from which the law of Australia and New Zealand and other “common law” countries had stemmed.<sup>96</sup>

This was at odds with *Uren*. Perhaps the difference between *Uren* and *O’Connor* lay in the fact that in the former case, Australian courts could point a long line of ‘indigenous’ authority, whereas in the latter case, NZ courts relied mostly on English cases; but it was hard to say at what point ‘English law’ legitimately became ‘NZ law’.<sup>97</sup> Similarly, in *Rowling v Takaro Properties*,<sup>98</sup> the PC rejected the NZCA’s liberal finding that a government Minister could be held negligent for economic loss. There were no local circumstances which allowed for divergence from ‘English law’.

The NZCA of the early 1980s to mid-1990s was a rather liberal court run by Cooke P, whose judgments were unorthodox by PC standards; the Law Lords under Thatcher

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<sup>93</sup> See the comments of the Hon JK McLay, Minister of Justice, on 27 September 1982, reproduced in “The Reaction to *Lesa*—Two Views” [1982] NZLJ 353, 354. The population of NZ at this time was 3.2 million.

<sup>94</sup> Hon PT Mahon QC “The Courts Under Attack” [1982] NZLJ 342.

<sup>95</sup> [1983] NZLR 280 (CA); [1985] 1 NZLR 159 (PC).

<sup>96</sup> *Ibid*, 174.

<sup>97</sup> “Appeal of “Local Circumstances””, above n 13.

<sup>98</sup> *Takaro Properties v Rowling* [1986] 1 NZLR 51 (CA); *Rowling v Takaro Properties* [1988] 1 All ER 163 (PC).

were known to be mostly 'conservative', in the sense that they tended to adhere to established authority. But what is important about this is that NZCA decisions had been overturned in the past, in similar numbers and proportions; but it was only now that such decisions were thought intrusive. PC decisions which overturned NZCA decisions were now described as evidence that NZ was ready for abolition.

NZ academic articles published from this period onwards were mostly hostile to retention.<sup>99</sup> Some characterised the relationship between the NZCA and the PC in terms of 'imperial' terms, where the PC and a lingering "colonial mindset" acted to frustrate the creation of a "truly NZ judicial culture."<sup>100</sup> The time had come to accept responsibility for NZ's own "legal destiny", or the development of a specifically NZ law.<sup>101</sup> There was also a new development: the issue of what would follow after abolition began to be addressed seriously.<sup>102</sup>

By contrast, academic articles defending the PC tended to be defensive, responding to criticisms of the PC and either retreating into arguments about independence, detachment and the legal quality of the judges, or they defended the status quo for fear of any alternative.<sup>103</sup>

### **1987-2003: Abolition and the Establishment of the New Zealand Supreme Court**

The PC's jurisdiction continued to shrink, although this was uneven and far from inevitable. Malaysia abolished the right of appeal in 1983 by a side wind as part of a wider battle that the Malaysian government was having with the Head of State over executive power.<sup>104</sup> In Singapore, the right of appeal only ended in 1989 in response

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<sup>99</sup> Philip Joseph "Towards Abolition of Privy Council Appeals: The Judicial Committee and the Bill of Rights" (1985) 2 Cant LR 273; Peter Burns "The Judicial Committee of the Privy Council: Constitutional Bulwark or Colonial Remnant?" (1984) 5 Otago LR 172; Kevin Glover "Severing the Ties that Bind? The Development of a Distinctive New Zealand Jurisprudence" (2000) 8 Waikato L Rev 25.

<sup>100</sup> Burns, above n 99, 522.

<sup>101</sup> Sir Robin Cooke "The New Zealand National Legal Identity" (1987) 3 Cant LR 171.

<sup>102</sup> See, for example, "Towards Abolition", above n 99.

<sup>103</sup> WD Baragwanath "The Privy Council" [1983] NZ Rec Law 414; and JF Northey "Privy Council Appeals" [1983] NZLJ 229.

<sup>104</sup> HR Rawlings "The Malaysian Constitutional Crisis of 1983" (1986) 35 ICLQ 237.

to a 1988 PC decision.<sup>105</sup> The PC held that the disbarment of an imprisoned opposition leader was invalid, and was highly critical of Singapore's judiciary.<sup>106</sup> Abolition was sometimes triggered not by a need to assert 'independence', but by the particular political circumstances at the time, and the balance of coalitions of interests.

With the election of the Fourth Labour Government (1984-1990), concrete moves were made to abolish the appeal right. The 1985 *White Paper* had noted in order to determine whether or not a statute limiting a right was demonstrably justifiable in a democratic society, this required an understanding of local social conditions which 'outside courts' like the PC would not have. Only a NZ court could understand the complex weightings of NZ values and how best to balance them. If the BOR Bill were to be passed, the appeal structure system would have to be changed.<sup>107</sup>

Abolition was part of the reforming zeal of the Deputy PM and Minister of Justice, Geoffrey Palmer, who saw his term in Parliament as an opportunity to reform NZ law generally. At the 1987 NZ Law Conference, he announced his intention to abolish appeals to the PC. Palmer stated:

[Whether appeals to the PC should be retained] is partly a question of law but it is also partly a political question involving national identity. ... We have the confidence, the competence and the distinctiveness to rely on ourselves. ... [T]he legal character of New Zealand must recognise our bicultural origins ... it must have regard to our multicultural character ... We are a separate nation ... We are more confidently making our own legal culture—the legal culture of an island nation in the South Pacific peopled by Polynesians and Pakehas.<sup>108</sup>

This led to the newly-formed NZ Law Commission's 1989 Report on court structure,<sup>109</sup> whose terms of reference were to determine the most desirable judicial system were the appeal right to the PC abolished. The report was written, amongst

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<sup>105</sup> Francis Seow *The Media Enthralled: Singapore Revisited* (Lynne Rienner Publishers, London, 1998), 157-8.

<sup>106</sup> *Jeyaretnam v Law Society of Singapore* [1989] AC 608 (PC)

<sup>107</sup> *A Bill of Rights for New Zealand: A White Paper* [1985] AJHR A.6, 59-61.

<sup>108</sup> Geoffrey Palmer "New Zealand's Legal Identity" [1987] NZLR 314, 315.

<sup>109</sup> *1989 Report*, above n 91.



others, by Sir Kenneth Keith,<sup>110</sup> Jim Cameron (who had written the first academic article advocating abolition),<sup>111</sup> Sian Elias QC<sup>112</sup> and Margaret Wilson (who, more than a decade later, would be responsible for the final abolition of the appeal).<sup>113</sup>

The 1989 Report was far more focused on the matter of the appellate function of higher courts. The appellate function was discussed: this was not just about the correction of error, but the clarification and development of 'NZ' law.<sup>114</sup> That there should be abolition was treated by the 1989 Report as a matter of fact: it was only in a final paragraph that it was thought necessary to justify such a stance:

The underlying motive for ending Judicial Committee appeals is that the final New Zealand court responsible for clarifying and developing the law of New Zealand should be composed of senior New Zealand judges who are part of our community and closely familiar with our historical [sic], social and legal history. ... To repeat the point, it is now 30 years since we have accepted in a broad way the proposition that we should have the final court actually sitting in New Zealand with permanent New Zealand members.<sup>115</sup>

Abolition did not eventuate. This was partly because the Fourth Labour Government was ousted from power in the 1990 election, but may have had something to do with the government perception that the NZCA at that time was far too liberal, and required supervision. A former researcher at the NZ Law Commission argued that two cases decided by the NZCA against the government, *Databank Systems Ltd v Commissioner of Inland Revenue*<sup>116</sup> in April 1989 and *Petrocorp Exploration Ltd v Minister of Energy*<sup>117</sup> in August 1990, were instrumental in delaying abolition.<sup>118</sup>

In *Databank*, an NZCA majority gave a ruling which potentially reduced government revenue—so much so that this interpretation was reversed for future cases by

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<sup>110</sup> See Appendix 2.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> 1989 Report, above n 91, 167.

<sup>115</sup> Ibid, 67.

<sup>116</sup> [1989] 1 NZLR 422 (CA); [1990] 3 NZLR 385 (PC).

<sup>117</sup> [1991] 1 NZLR 27 (CA); [1991] 1 NZLR 641 (PC).

<sup>118</sup> Megan Richardson "The Privy Council and New Zealand" (1997) 46 ICLQ 907, 910-911.

amending legislation.<sup>119</sup> The PC had allowed the Government's appeal. In *Petrocorp*, the NZCA held that the Minister's decision to grant a mining licence over a \$1 billion oil field solely to himself was susceptible to judicial appeal. The PC reversed the NZCA's decision on appeal. Both cases were significant because of the vast sums of money involved and the negative impact the decisions had on the government.

In *Invercargill City Council v Hamlin*,<sup>120</sup> the PC upheld an NZCA decision rejecting earlier British authority on the question of house owners and economic loss. A unanimous NZCA had decided that local councils and builders owed a duty to subsequent purchasers of household properties, backing up its claims that such an approach was specifically 'NZ' by reference to a number of government reports on housing. The PC was persuaded. *Hamlin* was celebrated as being the case in which it was recognised that the NZCA was free to develop a jurisprudence of its own, although it also fitted neatly into the 'local circumstances' exception.<sup>121</sup>

More generally, by the 1990s, the NZCA saw itself as taking a more 'independent' line, rather than adhering to British authority. In 1960, 69% of all cases cited by the NZCA were English; by 1990, this had dropped to 35%, and by 2000, 17%.<sup>122</sup> In 1960, the NZCA had delivered judgment on 78 cases; 1990, 396 a year; and by 2000, 458.<sup>123</sup> In short, there were simply more NZ decisions to cite; and many decisions related to local statute law.<sup>124</sup>

Yet this period also coincided with a remarkable increase in the number of cases being appealed to the PC. The previous two decades had roughly had 20-25 cases a decade; in the 1990s there were approximately 70 cases appealed to the PC, mostly

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<sup>119</sup> Goods and Services Tax Amendment Act (No 2) 1989.

<sup>120</sup> [1996] 1 NZLR 513 (PC). See Robyn Martin "Diverging Common Law: *Invercargill* goes to the Privy Council" (1997) 60 MLR 94.

<sup>121</sup> "Appeal of 'Local Circumstances'", above n 13.

<sup>122</sup> Sir Ivor Richardson "Trends in Judgment Writing in the New Zealand Court of Appeal" in Rick Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, 2001) 261, 264.

<sup>123</sup> *Ibid*, 262.

<sup>124</sup> *Ibid*, 264.

commercial.<sup>125</sup> By the mid-1990s, the composition of NZCA changed and became more 'conservative' or cautious, while a now 'liberal' PC delivered a number of decisions which saw a return to deference to the 'local' courts, in contrast to the previous era.<sup>126</sup>

In 1994, the National Government under Jim Bolger asked the Solicitor-General John McGrath<sup>127</sup> to look into alternatives to the PC. Why the National Government wished to abolish the PC has never been satisfactorily explained. Abolition might have been part of Bolger's plan to transform NZ into a republic.<sup>128</sup>

The resulting report made the usual arguments for and against abolition.<sup>129</sup> In April 1996, a Cabinet decision was made to abolish the appeal and a bill was even introduced into Parliament. However, the 1996 election resulted in the National Party entering into a coalition with the centre-right political party NZ First. NZ First's MPs were mostly Maori, and relied strongly on both the 'grey' and Maori vote, both of whom favoured retention. The PC had also delivered a relatively pro-Maori judgment, re-establishing itself as a guardian of Maori interests.<sup>130</sup> Plans to abolish the appeal right were shelved.<sup>131</sup>

In this period, there were three key arguments defending retention. The first was certainty, most ably represented by the 'New Zealand Business Roundtable' ('NZBR'), a highly influential lobby group for the late 1980s and much of the 1990s who espoused neoliberal ideas.<sup>132</sup> The NZBR argued that the NZCA was too liberal in its

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<sup>125</sup> *Report of the Advisory Group: Replacing the Privy Council: A New Supreme Court* (Office of the Attorney-General, Wellington, 2002), 67-79, at:

[http://www.crownlaw.govt.nz/artman/docs/cat\\_index\\_6.asp](http://www.crownlaw.govt.nz/artman/docs/cat_index_6.asp) (last accessed 21 June 2008).

<sup>126</sup> Spiller, above n 56, 365.

<sup>127</sup> See Appendix 2.

<sup>128</sup> See the discussion in chapter 5.

<sup>129</sup> John McGrath *Appeals to the Privy Council: Report of the Solicitor-General to the Cabinet Strategy Committee on Issues of Termination of Court Structure* (Crown Law Office, Wellington 1995).

<sup>130</sup> *Treaty Tribes Coalition v Urban Maori Authorities* [1997] 1 NZLR 513 (PC); and see "The Privy Council and New Zealand", above n 118, 913-915.

<sup>131</sup> "The Privy Council and New Zealand", above n 118, 910.

<sup>132</sup> See the various submissions made by the NZBR in relation to abolition at:

[http://www.nzbr.org.nz/documents/submissions/submissions-2001/submission\\_privy\\_council.pdf](http://www.nzbr.org.nz/documents/submissions/submissions-2001/submission_privy_council.pdf).

extension of duties in commercial law, offending their idea of the judge as administrative machine. By contrast, the PC—or the HL, it made no difference—was well-known for its conservatism and quest for certainty.

The second approach came from Maori. The 1980s had seen legal recognition of the Treaty, partly spurred on by Palmer,<sup>133</sup> and partly by the New Zealand Courts.<sup>134</sup> Paul McHugh and others had begun to excavate NZ native title case law and highlighted the fact that in *Wallis*, the PC had recognised the Treaty as a basis of native title.<sup>135</sup> McHugh's work set in motion a scholarly project which would expose *Wallis* as damaged by its flawed understanding of native title and a hostility to the Treaty.<sup>136</sup> Chief Judge of the Maori Land Court, ET Durie,<sup>137</sup> argued that Maori were not so assured of NZ judicial 'independence', given the NZ courts' role in Maori disenfranchisement. It had been the PC which had attempted to protect native title, Durie said, citing *Wallis*.<sup>138</sup> Here was evidence of an alternative understanding of NZ constitution: a Maori narrative.

By the 1990s, Maori legal argument became more widespread and complex. The most fully thought out document for understanding the Maori view—or, at least, the view of retentionist Maori—on the PC was the submission by the NZ Law Commission's Maori Committee to the 1995 Solicitor-General's Report.<sup>139</sup> Written, amongst others, by Chief Judge ET Durie and Judge Michael Brown,<sup>140</sup> and based on discussions with a number of Maori groups, the Maori Committee argued that abolition could not be

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and [http://www.nzbr.org.nz/documents/submissions/submissions-2003/supreme\\_court\\_bill.pdf](http://www.nzbr.org.nz/documents/submissions/submissions-2003/supreme_court_bill.pdf) (last accessed 21 June 2008).

<sup>133</sup> Tipene O'Regan "The Labour Party and the Treaty" in Margaret Clark (ed) *The Labour Party After 75 Years* (Occasional Publication No 4, Department of Politics, Victoria University of Wellington, 1992) 28.

<sup>134</sup> For instance, *NZ Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

<sup>135</sup> Paul McHugh "Aboriginal Title in New Zealand Courts" (1984) 2 *Cant L Rev* 251; and *The Maori Magna Carta* (Oxford University Press, Auckland, 1991).

<sup>136</sup> "Appeal of "Local Circumstances"" above n 13.

<sup>137</sup> See Appendix 2.

<sup>138</sup> Hon Chief Judge ETJ Durie "Part II and Clause 26 of the Draft New Zealand Bill of Rights" in *A Bill of Rights for New Zealand* (Legal Research Foundation, Auckland, 1985) 171, 188.

<sup>139</sup> *Appeals to the Privy Council: Discussion Paper on Behalf of the Maori Committee to the Law Commission* (1995).

<sup>140</sup> See Appendix 2.

separated from the wider issue of the need to recognise the Treaty as NZ's key constitutional document.

Given the actions of previous NZ courts, many Maori were unwilling to abolish the residual safeguard represented by the PC; it was better than any alternative at that point proposed by Pakeha.<sup>141</sup> The Maori Committee argued that Maori confidence in the judiciary had to be taken into account; Maori consent had to be obtained. This could only happen if there were consideration of alternatives which would provide equal or better protection for Maori. In short, the Committee denied that there was a homogenous nation which by an act of will could decide the matter by fiat: there was a rejection of the trajectory suggested by the nationalist narrative.

The Committee said that arguments based on national sovereignty were out of date given the rise of human rights and international law.<sup>142</sup> The PC had "always" protected indigenous peoples' rights (this was all that remained of the Crown's promise to protect them),<sup>143</sup> although it later acknowledged that whether Maori interests would be taken into account by the PC depended on the "realpolitik of appellate policy making" which changed over time.<sup>144</sup> There was an acute awareness that historically Maori had not been protected by local courts from majority opinion.

Many Maori believed that the PC was a means of access and a symbolic link to the British sovereign. But this need not be read as simply a matter of sentiment. Retention of the PC was indicative of "the extent to which the law and its enforcement will protect Maori values".<sup>145</sup> A recent survey backs this up: Maori are no more monarchist than Pakeha, and perhaps even *more* pro-republican,<sup>146</sup> which suggests

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<sup>141</sup> *Maori Discussion Paper*, above n 139, 7-8. Much argument was aimed at the 1995 *Solicitor-General's Report*, above n 129, and the constraints placed on the Solicitor-General in examining "fiscally neutral" alternatives. These constraints limited the alternatives to the status quo.

<sup>142</sup> *Ibid*, 12.

<sup>143</sup> *Ibid*, 20.

<sup>144</sup> *Ibid*, 18.

<sup>145</sup> *Ibid*, 18.

<sup>146</sup> Nigel Cox and Raymond Miller "Head of State" in Raymond Miller (ed) *New Zealand Government and Politics* (4 ed, Oxford University Press, Melbourne, 2006) 130, 138.

that many Maori arguments against abolition were not about a love of monarchy, but rather about what would follow from abolition.<sup>147</sup>

Critics of the pro-retention Maori view rejected the idea that the PC had actually protected Maori interests, noting that it had been the NZ courts which had first recognised Maori rights and the role of the Treaty.<sup>148</sup> Further, they argued that the personal connection was only symbolic: it was inconceivable that the British sovereign would intervene in domestic NZ affairs now.<sup>149</sup>

But for many Maori, 'the past' was ever present, while for the Pakeha, it was steadily retreating.<sup>150</sup> For some Maori the Crown in its British form remains. In any case, the growing impact of Maori on NZ politics added a complicating factor to the question of abolition. If many Maori insisted that the abolition was linked to the deeply controversial issue of the Treaty's status in NZ law, abolition would become more difficult to achieve.

The last argument might be called 'globalisation'. Here, proponents of retention argued that the PC was an institution appropriate to the globalising times, particularly in the aftermath of the Cold War. Appeals to 'globalisation' were made by business types, who saw national sentiment as atavistic or causing economic inefficiencies;<sup>151</sup> or, as we have seen, by Maori, who saw international law as a means of securing greater protection for themselves. Finally, the argument also appealed to liberal internationalists who saw in the PC a means of realising a global rule of law.<sup>152</sup> Thus

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<sup>147</sup> Andrea Tunks "Mana Tiriti" in Luke Trainor (ed) *Republicanism in New Zealand* (Dunmore Press, Palmerston North, 1996) 113.

<sup>148</sup> See Arihia Burkhardt Macrae "The Declining Relevance of the Privy Council in Maori Claims" (2002) 9 Auck U LR 951.

<sup>149</sup> *Solicitor-General's Report*; above n 129; and see also Richard Cornes "Appealing to History: the New Zealand Supreme Court Debate" (2004) 24 Leg Stud 210.

<sup>150</sup> Oliver MacDonagh *States of Mind: A Study of Anglo-Irish Conflict 1780-1980* (George Allen & Unwin, London, 1983), 10-11.

<sup>151</sup> John Morrow "Neo-Liberalism" in Miller (ed) *New Zealand Government and Politics* (3 ed, Oxford University Press, Melbourne, 2003) 557, 559-560.

<sup>152</sup> See, for instance, Justice David Baragwanath "Putting Away Childish Things: An Argument for Cohesion after the Privy Council" (2003) 3 OUCJLJ 225.

when some impetus was building about the desirability of abolition and the establishment of a national court, various opposing tendencies also emerged.

Variants upon old ideas were also occasionally raised throughout this period, with an initial gusto but little that was concrete. NZ and Australia's Closer Economic Relations agreement ('CER'), a free trade agreement set up in 1982 between the two countries to harmonise their markets, spurred some to suggest the possibility of an Australasian court of appeal.<sup>153</sup> Commentators have returned to this theme as relations between Australian and New Zealand tightened under CER during the 1990s.<sup>154</sup> Talk of an Australasian court is a product of NZ's recurring need to join to something greater, which makes the NZ state stronger, giving it more influence, since any kind of union also requires of the larger association a corresponding duty to NZ.

Proposals for a Pacific Area Court of Appeal were also raised,<sup>155</sup> as the long relationship between NZ and the Pacific Islands became recognised by the NZ government.<sup>156</sup> The Pacific Islands have a long history with NZ, being the object of NZ's imperialistic ambitions and later subject to decolonisation under NZ's aegis. NZ is the world's largest Pacific Island country, in that it has the largest population of Pacific Islanders.

This proposal, along with calls for the provision of overseas judges, briefly emerged again in the debates over the establishment of the NZ Supreme Court in 2001-3, although given very short shrift.<sup>157</sup> Previous arguments about practical and logistical

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<sup>153</sup> "CER, Trans-Tasman Courts", above n 72. See also Hon Justice Michael Kirby and Philip Joseph "Trans-Tasman Relations—Towards 2000 and Beyond" in Philip Joseph (ed) *Essays on the Constitution* (Brooker's Ltd, Wellington 1995) 129.

<sup>154</sup> Brian Galligan "Closer Political Association: Australia and New Zealand" in Arthur Grimes, Lydia Wevers and Ginny Sullivan (eds) *States of Mind: Australia and New Zealand 1901-2001* (Institute of Policy Studies, Wellington, 2002) 295.

<sup>155</sup> Colin Keating "Constitutional Issues—Can Australia and New Zealand Have Their Cake and Eat It?" in (Institute of Policy Studies, Wellington, 2002) 315. *Maori Discussion Paper*, above n 139, 31-33.

<sup>156</sup> See *Pacific Peoples' Constitution Report* (Ministry of Justice, Wellington, 2000), at [http://www.courts.govt.nz/pubs/reports/2000/pacific\\_people/index.html](http://www.courts.govt.nz/pubs/reports/2000/pacific_people/index.html) (last accessed 21 June 2008).

<sup>157</sup> Justice and Electoral Select Committee *Report on the Supreme Court Bill* (16 September 2003), 36-39; 53 at:

[http://www.parliament.nz/NR/rdonlyres/710D1400-725F-47DC-8713-29F0407D9199/47916/DBSCH\\_SCR\\_2552\\_28191.pdf](http://www.parliament.nz/NR/rdonlyres/710D1400-725F-47DC-8713-29F0407D9199/47916/DBSCH_SCR_2552_28191.pdf) (last accessed 21 June 2008).

issues were still valid, but the primary reason for rejection was that both ideas violated the key argument made for abolition: national sovereignty.

In 2000, Attorney-General Margaret Wilson announced the Coalition Government's intention to abolish appeals to the PC. A discussion paper, *Reshaping New Zealand's Appeal Structure*,<sup>158</sup> was issued, emphasising national independence and accessibility. In November 2001, an Advisory Group was established and required to report on the purpose and role of the final appeal court of NZ, how it would reflect Maori concerns, its jurisdiction and composition.

In Britain, moves were made to replace the judicial body of the HL with a British Supreme Court ('UKSC').<sup>159</sup> The decision stemmed from concerns about the separation of powers and judicial independence: in particular, the requirements of article 6(1) of the European Convention of Human Rights and associated caselaw demanding a clearer separation of powers.<sup>160</sup> Such reform also suited New Labour's zeal for constitutional change.<sup>161</sup>

There was open British impatience with the PC as an institution.<sup>162</sup> Sir Thomas Legg,<sup>163</sup> former Permanent Secretary of the Lord Chancellor's Office, gave a paper discussing the establishment of a UKSC. Legg thought the PC should not be retained for the few remaining Commonwealth countries:

This jurisdiction has been on the way out for years ... and it arguably has little place in a modernised British constitution. It seems to me entirely reasonable for the United Kingdom to say ... to the countries concerned that we are willing to

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<sup>158</sup> Office of the Attorney-General *Reshaping New Zealand's Appeal Structure* (December 2000) at [http://www.crownlaw.govt.nz/artman/docs/cat\\_index\\_6.asp](http://www.crownlaw.govt.nz/artman/docs/cat_index_6.asp) (last accessed 21 June 2008).

<sup>159</sup> Department of Constitutional Affairs *Constitutional Reform: A Supreme Court for the United Kingdom* (CP 11/03) July 2003. See generally Roger Masterman "A Supreme Court for the United Kingdom: Two Steps Forward, but One Step Back on Judicial Independence" [2004] PL 48.

<sup>160</sup> *Procola v Luxembourg* (1996) 22 EHRR 193; and *McGonnell v UK* (2000) 30 EHRR 289.

<sup>161</sup> See generally Vernon Bogdanor "Our New Constitution" (2004) 120 LQR 242.

<sup>162</sup> Andrew Le Sueur *What is the Future for the Judicial Committee of the Privy Council?* (Constitution Unit, University College of London, 2001).

<sup>163</sup> See Appendix 2.



continue to decide their appeals as long as they wish ... but we must be the judges of our own court structure.<sup>164</sup>

The actions of the remaining countries under its jurisdiction also had an impact on the PC itself: the proposed reforms in NZ and news of a new Caribbean Court of Appeal meant that there was little reason for the PC's continued existence as a separate judicial body. There may have been some relief that British Law Lords were no longer presiding over West Indies death penalty cases.<sup>165</sup> However, in 2003, the British Government agreed to maintain the PC for as long as necessary.<sup>166</sup>

Those in NZ favouring retention appeared unaware of these developments in Britain.<sup>167</sup> The PC's membership never changed; nor British willingness to provide such a service. The constitutional argument about potential interference was irrelevant in the NZ context; it was the British judges' detachment from NZ and local affairs which was important. Another key argument for retention was that the PC offered a high quality service at little cost. There was no longer any need to cloak self-interest in the rhetoric of mutual obligation.

In April 2002, the (NZ) Advisory Group published its report.<sup>168</sup> There had been 70 submissions: 32 for retention, 32 for abolition, and 6 neutral. The Advisory Group recommended naming the new second tier of appeal the New Zealand Supreme Court ('NZSC') to "aid international recognition of the status of the court".<sup>169</sup> What was important was the international community, and NZ's status within this community.

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<sup>164</sup> Sir Thomas Legg "Establishing a Supreme Court of the United Kingdom" (January 2000), 15-16 [44-45], at <http://www.dca.gov.uk/rights/dca/inforeleased/supcourtuk.htm> (last accessed 21 June 2008).

<sup>165</sup> See generally on the PC and the death penalty, Derek O'Brien "The Death Penalty and the Constitutions of the Commonwealth Caribbean" [2002] PL 678.

<sup>166</sup> *A Supreme Court for the UK*, above n 159, [28].

<sup>167</sup> But note Nigel Cox: "The Abolition or Retention of the Privy Council as the Final Court of Appeal for New Zealand: Conflict between National Identity and Legal Pragmatism" (2002) 20 NZULR 220, 237.

<sup>168</sup> *Report of the Advisory Group: Replacing the Privy Council: A New Supreme Court* (Office of the Attorney-General, Wellington, 2002), at [http://www.crownlaw.govt.nz/artman/docs/cat\\_index\\_6.asp](http://www.crownlaw.govt.nz/artman/docs/cat_index_6.asp) (last accessed 21 June 2008).

<sup>169</sup> *Ibid*, 17.

More important were the issues relating to Maori and the membership of the proposed NZSC. The Advisory Group argued in relation to the court's composition that there should be a requirement of at least one judge being versed in *tikanga Maori* (Maori customs/law). In practice, this meant the appointment of someone of Maori extraction. Although there was support for overseas judges, the Advisory Group after much debate unanimously recommended that no provision be made for them, for both logistical and practical reasons. 'Objectivity' was better found in a more transparent appointment process.

The Supreme Court Bill was then scrutinised by the Justice and Electoral Select Committee. Consisting of a majority of coalition MPs, the Committee returned the Bill with some modifications in September 2003. A majority of the submissions on the Bill were against abolition (170 submissions, or 54%), and even those supporting abolition (125 submissions, or 40%) did so conditionally.<sup>170</sup> Roughly 20% of all submissions insisted on a referendum, although this was rejected by the Committee. Maori submissions claimed that there had been inadequate consultation and that there were more fundamental issues at stake. But the requirement of a judge knowledgeable in *tikanga Maori* and *tikanga Maori* as a ground of appeal were dropped. Once again, the Crown partner was evolving in ways that Maori did not endorse. Maori complaints were answered—or diverted—by the Select Committee's call for an inquiry into NZ's constitutional arrangements, a means of defusing concerns at the government's responses to Maori claims as well to the *Ngati Apa* case (see below).<sup>171</sup>

Finally, a clause declaring that nothing in the Act affected "New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament".<sup>172</sup> It was no longer the influence of the British parliament which had to be guarded against, but that of the local appellate courts.<sup>173</sup>

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<sup>170</sup> *Supreme Court Bill Report*, above n 157, 6.

<sup>171</sup> *Ibid*, 52-3. Note this Inquiry did eventuate, producing a report which took no strong view on the Treaty of Waitangi: *Inquiry to Review New Zealand's Existing Constitutional Arrangements: Report of the Constitutional Arrangements Committee* [2005] AJHR I.24A.

<sup>172</sup> Now Supreme Court Act 2003, s3(2).

<sup>173</sup> It may also have been a response to contemporary assertions of judicial independence: Dame Sian Elias CJ "Sovereignty in the 21<sup>st</sup> Century: Another Spin of the Merry-go-round" (2003) 14 PLR 148.

These debates over the NZSC's nature reflected and addressed domestic issues: a nationalist electorate and an indigenous minority. A broader view of the context is appropriate here. In mid-June 2003, the NZCA had decided *Attorney-General v Ngati Apa*,<sup>174</sup> the most important Maori case since the 1987 *Lands* case. It suggested that, contrary to previous precedent, Maori might have customary title to the NZ foreshore and seabed, causing the coalition government to quickly pass controversial laws 'modifying' the judgment, and inciting Maori protest.<sup>175</sup> In short, the issues seen as most important to an enduring institution were also responses to contemporary domestic issues: Maori discontent and an 'activist' judiciary.

In the final Parliamentary debate, the Labour-Alliance-Greens coalition was forced into the position of arguing that the abolition of the right of appeal and the establishment of the NZSC was a constitutional change of some significance, but at the same time downplaying the change, so as to avoid opponents' claims that this was a 'Trojan horse', the first step to a republic, and their insistence on a referendum. Arguments about independence and national sovereignty were played down; what was emphasised by reformers was the capacity of the proposed NZSC to provide greater access to justice and ensure the development of NZ law. On 14 October 2003, Parliament passed the Supreme Court Act with a slim majority.<sup>176</sup> "History", one commentator stated, "will smile on the establishment of the Supreme Court".<sup>177</sup> Establishment "completed New Zealand's journey to nationhood."<sup>178</sup>

## Conclusion

The nationalist narrative has treated the NZ-PC relationship as one of inevitable decline, but this chapter has suggested that this was not so. The previous narrative, which saw NZ and Britain drawing closer together, was also seen as something

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<sup>174</sup> [2003] 3 NZLR 643 (CA).

<sup>175</sup> See generally Richard Boast "Maori Proprietary Claims to the Foreshore and Seabed After *Ngati Apa*" (2004) 21 NZULR 1.

<sup>176</sup> Andrew Beck "The Supreme Court: Justice for All?" [2003] NZLJ 409.

<sup>177</sup> Philip Joseph "Scorecard on Our Public Jurisprudence" (2005) 3 NZPIL 223, 226.

<sup>178</sup> Philip Joseph *Constitutional and Administrative Law in New Zealand* (3 ed, Brookers, Wellington, 2007), 484.

inevitable. But the relationship is better seen as a product of the interaction of the domestic and international politics of NZ and Britain.

For the British, the PC provided the illusion of unity, while allowing the maximum amount of local autonomy; and to some extent, was seen to reflect the ideal of a unified common law and the beneficence of British law and values. But the history of the PC in the twentieth century can be seen as a series of rather awkward attempts to modify the institution to meet the contemporary political needs of the British, and to satisfy concerns of the 'indigenising' settler communities. As Britain 'shrunk' to a moderately strong nation-state, the PC became seen as of limited use to Britain and NZ.

Much depended on the relationship and history each settler community had with the metropole, as well as the internal structure and history of each settler community. NZ's relationship with the PC has been mostly unproblematic, partly because of its simple constitutional structure, partly because of a dearth of controversial cases to excite controversy until recent times, and partly because the balance of domestic power never favoured abolition.

What stands out most is the role of geopolitical considerations. Most NZ governments were content to allow the PC to serve as NZ's highest court, because it was a means of sustaining a tight link with Britain. As the idea of the self-enclosed nation-state spread globally, and NZ's growing awareness of itself as an Asian-Pacific nation separate from interests of Britain intensified, a national court became more desirable. But there were alternatives available: proposals for a national court, a regional court, and a national court with internationalist input were all connected to how NZ saw its relationship with the world 'outside'.

This process of detachment was further complicated by domestic considerations: for instance, the local impact of certain cases decided by the PC on government and governance; but in particular, by the re-emergence of Maori as a political force. It was

only with the persistence of a government with a long abolitionist history determined to end the PC connection that a national court was established.

## ***Chapter 4: Citizenship and Migration in NZ and the Commonwealth***

### **Introduction**

In line with a nationalist narrative, NZ identity has been seen to follow a basic trajectory from settler colony to a sovereign nation. This has presumed imitation from 'Old British' forms of law to a more independent, indigenous approach. But nationality and citizenship<sup>1</sup> law cannot be understood in terms of merely 'domestic' events: the role of the British Empire-Commonwealth and the international context have been equally important. NZ citizenship and immigration law have long been influenced by British law, and till the latter half of the twentieth century appeared to mirror British law. And what is most salient about British citizenship law was its apparent inclusiveness, and the absence of anything signifying a sense of belonging to a nation, which characterises modern day citizenship.

British citizenship law was embraced by NZers, but its inclusiveness was limited. The lack of an evidently 'British' identity was not seen as a problem: this emptiness was filled in by NZers' growing Britannic, or pan-British, nationalism. Various internal and external interests and events threatened this: in particular, imperial interests, the instability of Britannic nationalism and the feared migration of the 'other'. On the other hand, demographic trends in NZ appeared to bolster the presumed coincidence of British and NZ identity and interests, and was reinforced by programs of assisted migration.

By the latter half of the twentieth century, however, the British and indeed world imperial order was collapsing. An international order of separate nation-states was emerging: the age of the nation-state had arrived.<sup>2</sup> Any presumed coincidence of

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<sup>1</sup> In this chapter, 'nationality' and 'citizenship' are used interchangeably, although technically, 'nationality' emphasizes the international aspect of membership within a political community, and 'citizenship' the domestic: Rieko Karatani *Defining British Citizenship: Empire, Commonwealth and Modern Britain* (Frank Cass Publishers, London, 2003), 18.

<sup>2</sup> Michael Mann "Has Globalisation Ended the Rise and Rise of the Nation-State?" (1997) 4 *Rev Int'l Pol Econ* 472.

interests between the 'Old British'<sup>3</sup> and NZers was ruled out with the eventual adoption of 'national' citizenship and immigration laws. Moreover, migratory and demographic patterns were changing, which threw into question NZ's national identity and encouraged the reformulation of citizenship.

### *Allegiance and Citizenship*

Allegiance and subjecthood lay at the heart of British legal conceptions about membership in the political community before and during the twentieth century.<sup>4</sup> Since *Calvin's Case*,<sup>5</sup> those born and living within the Crown's dominions have been said by virtue of that fact to owe allegiance to the Crown, and in return said to be British subjects. There was a personal relationship between subject and Sovereign; all were equal in their submission to the Sovereign.

Subjecthood can be contrasted with the relatively modern concept of national citizenship. National citizenship is a status derived through membership—and a sense of belonging—within a territorially-bound political community. Subjecthood presumes no such limitations or attachment: what matters is the fact of a personal relationship between the Sovereign and the subject. With subjecthood, rights are privileges, something to be granted, and easily taken away by the Sovereign. By contrast, national citizenship tends to come attached with rights, held against the state. In examining the history of British and NZ nationality and citizenship laws, this distinction needs to be taken into account.

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<sup>3</sup> The term 'Old British' is used to refer to those peoples living in the British Isles, in contrast to those living within 'Greater Britain', which included those from the settler communities of Canada, South Africa, Australia and NZ.

<sup>4</sup> A key book on the history of the legal concept of British subjecthood is Karatani, above n 1; see also Ann Dummett and Andrew Nicol *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (Weidenfield and Nicolson, London, 1990) and Clive Parry *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland* (Stevens, London, 1957).

<sup>5</sup> *Calvin's Case* (1608) 7 Co Rep 1. For an excellent discussion of the case, see Dummett and Nicol, above n 4, chapter 4.

### **The British Nation, the Expansion of Empire and British Subjecthood**

Britain is a multinational state, and what constitutes the 'British nation' is not clear even today. British history helps explain the peculiar nature of British citizenship law. The development of the English (later, British) state, uninterrupted by major political unrest and revolution, ensured that monarchical government and subjecthood have remained part of British legal and political thought even today. These are now layered over, and seen with the narrative of nationhood: 'citizenship' being membership in a territorially bounded political community, the related questions of identity and solidarity being highly salient. Monarchies are concerned with marking the centre; it is only 'modern' national orders which are concerned with peripheries and exclusion.<sup>6</sup>

Britain's development of an empire preserved allegiance as a fundamental principle of government, although it made allegiance more problematic. Laws evolved for 'domestic' purposes in Britain were exported; natives in India, settlers in NZ and the masses in the UK could share the same status: that of 'British subject'. All fell within 'the Monarch's dominions' and so owed allegiance and in turn owed protection. Whether diverse ethno-cultural groups sharing the same legal status felt they 'belonged' to the British 'nation' was irrelevant and anachronistic.

However, in the development of settler communities immigration and naturalisation laws became key instruments. Immigration and naturalisation laws determine who are potential citizens for the polity; nationality and citizenship laws are about which persons 'innately' belong to the community.<sup>7</sup> Two acts, one in 1844, one in 1847 and an act consolidating naturalisation in 1870 provided that colonial legislatures had the power to define who were British subjects via immigration and naturalisation laws, albeit only within their own territories.<sup>8</sup> In the colonies, naturalisation requirements were relaxed to attract migrants, giving the potential to own property, and providing an incentive to stay.<sup>9</sup> Immigration laws were used in the self-governing colonies to

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<sup>6</sup> Pamela Kyle Crossley "The Rulerships of China" (1992) 97 Am Hist Rev 1468, 1478.

<sup>7</sup> Karatani, above n 1, 16-19.

<sup>8</sup> Act of 7 & 8 Vict, c.66 (1844); Act of 10 & 11 Vict, c.83 (1844); and the 1870 Naturalisation Act (UK).

<sup>9</sup> Karatani, above n 1, 53-58.



exclude the unwanted, particularly in the last quarter of the nineteenth century as racial ideologies began to take hold.<sup>10</sup>

### **The Nineteenth and Early Twentieth Centuries: Maori and Better Britishness**

Pakeha (European) population growth in NZ in the first 40 years after European settlement (1840-80) was explosive:<sup>11</sup> in 1840, settlers numbered 2,000; in 1858, 59,000 (51.46% of the total population); and by 1881, 490,000 (91.74%). Of these numbers, those of British birth constituted the largest ethnic group: in 1858, 36,000 (61.34% of the European population); and 1881, 223,000 (45.58%).<sup>12</sup> However, by the 1880s, economic stagnation and the threat of diminution by the impending federation of the Australasian colonies meant the idea of NZ as a 'Britain of the South' underwent a crisis.<sup>13</sup> Pakeha identity and the idea of NZ was subtly transformed. There was a shift from the idea of NZ as a potential Greater Britain (like the US, qualitatively and quantitatively better and independent from Britain) to a Better Britain (like Scotland, qualitatively better, but closely linked to Britain). This peculiar Britannic nationalism was made manifest in the myth that NZ was '98% British', or of 'better stock'; and the demand for racial homogeneity. In this context, the movement of non-British migrants into NZ was seen to threaten homogeneity.

By contrast, since European contact the Maori population had shockingly dropped through war, disease and the loss of land. In 1840, the Maori population was at an estimated 100,000; in 1874, there were 47,000 (13.7% of the population); in 1901, 45,000 (5.6%).<sup>14</sup> Put differently, by 1860, Pakeha already outnumbered Maori; by 1878, Maori were dominated demographically by a ratio of ten to one.<sup>15</sup> Under the

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<sup>10</sup> Dummett and Nicol, above n 4, chapter 6.

<sup>11</sup> See generally James Belich *Making Peoples: A History of the New Zealanders* (Penguin Press, Auckland, 1996), chapters 12-13.

<sup>12</sup> GT Bloomfield *New Zealand: A Handbook of Historical Statistics* (GK Hall, Boston, 1984), 81.

<sup>13</sup> James Belich "Myth, Race and Identity in New Zealand" in Judith Binney (ed) *The Shaping of History: Essays from the New Zealand Journal of History* (Bridget Williams Books Ltd, Wellington, 2001) 356.

<sup>14</sup> Bloomfield, above n 12, 42; 81. However, these numbers need to be treated with some caution: until the census of 1951, only full-blooded Maoris were classified as 'Maori'; after 1951, those who were at least half Maori were classified as 'Maori'.

<sup>15</sup> Ibid, 77.

Treaty of Waitangi ('the Treaty'), Maori were deemed to be British subjects with all the corresponding rights, but this promise of 'subjecthood' was not kept. The 1865 Native Rights Act deemed all Maori to be natural-born subjects, since not all Maori chiefs had signed the Treaty.<sup>16</sup> Full manhood suffrage for those with individualised property was established in 1867, excluding many Maori. However, 4 additional seats were established in the NZ General Assembly for Maori. Maori would participate in Parliament, but this was mostly a rearguard action. But overall, the tragic demographic changes went through by Maori in the nineteenth century gave credence to the idea that NZ would become more British over time.

NZers drew their identity from the Northern hemisphere, but the key fact of Antipodean geography is its proximity to Asia and the Pacific. Gold rushes in NZ had brought hundreds of Chinese migrants in the 1850s and 1860s. Although never more than 1% of the total population during the period 1880-1930, these 'waves' of Chinese were seen as beginning of an 'invasion'. Anti-Chinese sentiment was a favourite electoral ploy: from 1877-1907, there were several laws enacted restricting Chinese migration.<sup>17</sup> The number of Chinese migrants dropped because of the various restrictions (and the end of the gold rush) from a 'high' of 5,000 (0.94% of the population) in 1881 to 3,000 (0.36%) in 1901 and 2,100 (0.19%) in 1916.

Attempts were made to extend these restrictions to Indians. The 1896 Asiatic Restrictions Bill stated it was an attempt to "safeguard the race purity of the people of New Zealand". This was reserved and disallowed by imperial authorities.<sup>18</sup> India was Britain's most valuable asset in the Empire, and the settler communities' actions in attempting to exclude Indians during the period 1890-1920 made governance of India

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<sup>16</sup> Article 2 of the Treaty. See Sir Kenneth Keith "The Treaty of Waitangi in the Courts" (1990) 14 NZULR 37, 52.

<sup>17</sup> See generally Malcolm McKinnon *Immigrants and Citizens: New Zealanders and Asian Migration in Historical Context* (Institute of Policy Studies, Wellington, 1996); and also Brian Moloughney and John Stenhouse "'Drug-Besotten, Sin-Begotten Fiends of Filth': New Zealanders and the Oriental Other, 1850-1920" (1999) 33 NZJH 43.

<sup>18</sup> David Williams "New Zealand Immigration Policies and the Law—A Perspective" (1978) 4 Otago LR 185, 190-191.

difficult. Hence began a search for a suitable means to satisfy domestic prejudice and imperial interest.

At the 1897 Colonial Conference, the British PM Joseph Chamberlain argued that the settler communities had to find less explicit means of exclusion, and suggested following Natal's approach, which required applicants to write out an application in a European language. The British entreaty was that the settler communities should not explicitly discriminate, but do so covertly. NZ adopted this means of exclusion in the 1899 Immigration Restriction Act.

Thus, a local identity emerged not through positive statements about who 'belonged', but through statements about who was to be excluded. Since colonial governments had the power within their jurisdiction to determine who was a British subject, the imperial promise that all subjects were equal within the Sovereign's realms remained illusory. A person considered a British subject in India would not necessarily be recognised in NZ.<sup>19</sup> There was a hierarchy of British subjects within the British Empire: some (white, metropolitan, male Britons) were more 'equal' than others.

These inconsistencies in practice were slow to be discussed in the imperial metropole. It was impractical to codify matters in a continually expanding and contracting periphery. Further, Britain had a large (white) population, in which acquisition of subjecthood by naturalisation was the exception rather than the norm. But various events in the late nineteenth century led to a temporary tightening of relations between Britain and the settler communities.<sup>20</sup> Competition from abroad and social unrest at home necessitated a rethink of how Britain ought to maintain its place in the world, and how it ought to govern its domestic affairs.

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<sup>19</sup> Karatani, above n 1, 57.

<sup>20</sup> See generally RF Holland *Britain and the Commonwealth Alliance, 1918-1939* (Macmillan, Basingstoke, 1981), chapter 1; John Darwin "A Third British Empire? The Dominion Idea in Imperial Politics" in Judith Brown and W Roger Louis (eds) *Oxford History of the British Empire, Vol 4: The Twentieth Century* (Oxford University Press, Oxford, 1999) 64; and Andrew Thompson *Imperial Britain: The Empire in British Politics, c.1880-1914* (Longman, Harlow, 2000).

One answer to this question was the Empire, and the settler communities. This conception emerged from the cauldron of the Boer war, racial ideology and a perception of British decline: Dilke and Seeley's idea of a 'Greater Britain',<sup>21</sup> a more integrated empire, an organic community linked by race and tradition, with the settler communities playing a complimentary role. The settler communities' economies were expanding, while Britain's economy was cyclical, subject to unemployment and subsequent social unrest.<sup>22</sup> The settler communities would provide both protection from external and internal dangers to Britain, and vice-versa. Thus there was a (temporary) identity of interests—ideological, economic and political—between Britain and the settler communities.

#### **The British Nationality and Status of Aliens Act 1914: Britain and New Zealand**

In 1901, a British interdepartmental committee, set up because of the uncertainty over the applicability of the settler communities' naturalisation rules, recommended that all such laws be consolidated and made uniform, so that British subjecthood could be recognised throughout the empire.<sup>23</sup> This led to the eventual establishment of a common code, the British Nationality and Status of Aliens Act 1914 ('1914 BNSAA'). Even in Britain, the 1914 BNSAA took over a decade to be enacted because of the settler communities' concern over how this might affect their autonomy to enact racially discriminatory immigration laws.

The 1914 BNSAA was divided into three parts. Part I defined 'natural-born British subjects' as those born within the Sovereign's dominions or whose father was a natural British subject. Part II dealt with imperial naturalisation, setting out a list of strict requirements. Part III dealt with miscellaneous matters, but also added—at the

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<sup>21</sup> Charles Dilke *Greater Britain: A Record of Travel in English-Speaking Countries, during 1866-7* (Macmillan, London, 1868) and John Seeley *The Expansion of England: Two Lectures* (2 ed, Macmillan, London, 1902).

<sup>22</sup> Keith Williams "'A Way Out of Our Troubles': The Politics of Empire Settlement, 1900-1922" in Stephen Constantine (ed) *Emigrants and Empire: British Settlement in the Dominions between the Wars* (Manchester University Press, Manchester, 1990) 22, 22-23.

<sup>23</sup> *Report of the Interdepartmental Committee Appointed by the Secretary of State for the Home Department to Consider the Doubts and Difficulties which Have Arisen in Connexion with the Interpretation and Administration of the Acts Relating to Naturalisation* Cmd 723 (HMSO, London, 1901).

settler communities' insistence<sup>24</sup>—a proviso that nothing would affect any Dominion law currently in operation.<sup>25</sup> Parts I and III applied to all the settler communities; Part II only applied if adopted by a Dominion legislature, acknowledging that the settler community governments had autonomy over the matters of immigration control and naturalisation.

Almost all the settler communities enacted the 1914 BNSAA with local variations—usually making a distinction between those who specifically belonged to them, and British subjects as a whole.<sup>26</sup> Moreover, because Britain insisted on a uniform status throughout the Empire, this in turn led to a greater reliance by the settler communities on immigration law. The result was an inclusive legal status of theoretically universal application in citizenship law, but severely qualified in practice by Dominion immigration law.

World War One intensified the relationship between Britain and the settler communities. The principle of *jus sanguinis*—citizenship by descent—was strengthened within UK nationality law as an expression of British sentiment in the UK towards the British in the settler communities.<sup>27</sup> Further, the distinction between aliens and British subjects was strengthened under the Aliens Registration Acts of 1914 and 1919. In the metropole, then, there was now a greater sense of who 'belonged' to Britain.

WW1 also increased settler community affections towards Britain, but for NZ, it delayed the adoption of the entire 1914 BNA. NZ politicians had been ready to adopt the 1914 BNSAA, but war intervened: it was specifically not adopted because it required a legal procedure for the revocation of naturalisation. The NZ government had wanted to ensure that it could revoke the status of any naturalised subject without legal challenge. A naturalised subject could never be quite British.

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<sup>24</sup> Randall Hansen *Citizenship and Immigration in Post-war Britain: The Institutional Origins of a Multicultural Nation* (Oxford University Press, Oxford, 2000), 40.

<sup>25</sup> 1914 BNSAA, s26.

<sup>26</sup> Karatani, above n 1, 90. For a detailed discussion of the variations, see generally Parry, above n 4.

<sup>27</sup> Karatani, above n 1, 85-86.

The end of WW1 also saw a rise in the number of Chinese and Indians entering NZ, mainly because the war years prevented transportation. But the ensuing 'rise' (the number of Chinese was 3,300 in 1921) led to a wave of anti-Asiatic prejudice which in turn led to the 1920 Immigration Restriction Amendment Act ('1920 IRAA'), a key statute of NZ's immigration law history.<sup>28</sup>

There were a number of key aspects to the 1920 IRAA. Under section 5(1) anyone not of "British birth and parentage" was prohibited from entering NZ without a permit. Only the Old British could enter NZ without being subject to regulation. Section 5(2) read:

A person shall not be deemed to be of British birth and parentage by reason that he or his parents or either of them is a naturalised British subject, or by reason that he is an aboriginal Native of any dominion other than the Dominion of New Zealand or of any colony or other possession or of any protectorate of His Majesty.

The effect of this key provision was to qualify the meaning of 'British subject' in NZ citizenship law. 'British subjects' who were not of 'British birth and parentage' would not be allowed entry without a permit.<sup>29</sup> It was an attempt to supplement a non-national scheme with the principle of *jus sanguinis*.

Noticeably under section 5(2), 'Aboriginal natives' from the other settler communities were specifically classed as not of British birth and parentage. Finally, the Minister of Customs was granted unlimited discretion in determining who was to be granted a permit.<sup>30</sup>

The Parliamentary debates on the 1920 IRAA showed that the majority of MPs firmly believed in a 'White NZ' policy, many supporting the 'White Australia' policy.<sup>31</sup>

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<sup>28</sup> PS O'Connor "Keeping New Zealand White, 1908-1920" (1968) 2 NZJH 41.

<sup>29</sup> *Annadale v Collector of Customs* [1955] NZLR 168.

<sup>30</sup> Immigration Restriction Amendment Act 1920, s 9(3).

<sup>31</sup> (1920) 187 NZPD 905, per Massey; 909, per Downie Stewart (14 September 1920).

Many insisted on maintaining the purity of the British race.<sup>32</sup> There was some concern about reservation by the Governor-General, but Massey brushed this aside: the Asian 'horde' was coming now.<sup>33</sup>

There was a discussion of Maori and their rights under the Bill: in the original Bill, all 'Aboriginal natives' were excluded from being British subjects. Ngata<sup>34</sup> asked if the exclusion clause was applicable to Maori. Massey<sup>35</sup> replied: "the Maori is a European for our purposes[.]"<sup>36</sup> The bill was amended to exclude Maori from the IRAA's ambit. Ngata approved: he stated that he too wanted only the British to migrate to NZ.<sup>37</sup>

How NZ politicians could make these claims of being 98% British, of being of "pure stock", when a substantial proportion of the NZ population consisted of Maori? Even more remarkable was the apparent Maori acquiescence in this idea. This 'problem' was answered by classifying Maori as British or 'Aryan'.<sup>38</sup> Maori were seen as an Aryan tribe, thus being superior to other indigenous people; crudely, they were the 'best blacks'. For Pakeha, it suggested Maori were not an obstacle to the claim of racial homogeneity. The myth coincided with demographic trends. It appeared Maori were dying out, but Maori were demographically concentrated in a few areas, so they could not be ignored. The myth allayed Pakeha anxieties. To praise Maori was to indirectly praise Pakeha NZers: Maori were the best treated. It also distinguished NZ from the other settler communities.<sup>39</sup> NZers were unique within the British world.

But Maori agency was also important here. By 1900, rising Pakeha numbers and the shrinking Maori population had led Maori to emphasise their common links with Pakeha, through participation in sport and war, and for the first half of the twentieth century, through shared ideas about race.<sup>40</sup> Hence, Ngata could state Maori were the

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<sup>32</sup> Ibid, 922, per Hanan; 923, per McCallum (14 September 1920).

<sup>33</sup> Ibid, 905-7, per Massey (14 September 1920).

<sup>34</sup> See Appendix 2.

<sup>35</sup> Ibid.

<sup>36</sup> (1920) 187 NZPD 907, per Massey (14 September 1920).

<sup>37</sup> Ibid, 931, per Ngata (14 September 1920).

<sup>38</sup> James Bennett "Maori as Honorary Members of the White Tribe" (2001) 29 JICH 32.

<sup>39</sup> "Myth, Race and Identity", above n 13, 363.

<sup>40</sup> Ibid.

equal of Pakeha and superior to Asiatic races. But despite collusion, Maori would continue to be treated as second-class citizens.<sup>41</sup>

The 1920 IRAA also established an informal immigration regime based solely on Ministerial discretion.<sup>42</sup> Under the 1920 IRAA, all non-British Europeans and non-Europeans required entry permits; in practice, these were rarely issued. No reasons for refusal of a permit were given, so there was little for disgruntled applicants or suspicious countries to complain about. Finally, the NZ government confidentially informed shipping companies of who would or would not be given entry permits, thus shifting the responsibility away from NZ itself. This was a covert, effective means of excluding the non-British, whilst at the same time allaying imperial concerns about antagonising other Great Powers.<sup>43</sup> It would continue running, albeit in greatly modified form, until 1986.

There was still eagerness to adopt the 1914 BNSAA and fall into line with the other settler communities, who gradually adopted the Act's provisions: Canada (1914), Australia (1920), and South Africa (1926). In 1923, adoption of the Act was debated in NZ. Parts I and III were adopted; Part II, on naturalisation, was not.

Most MPs thought that imperial citizenship was a good idea, the key benefit being a greater unity in the Empire. This had been proven in WW1, said one MP:

we are proud of the loyalty of the seventy millions of Anglo-Saxon races that stood by their Empire during the Great War. While there were alien races that did give us substantial service ... all the strength of the British Empire is the Anglo-Saxon race, and to that we must stand .... Nationality, and that particular racial feeling which binds nations together, is the only true defence of any country."<sup>44</sup>

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<sup>41</sup> WH Oliver "Social Policy in New Zealand: An Historical Overview" in *Report of the Royal Commission on Social Policy, Vol 1: New Zealand Today* (Government Printer, Wellington, 1988) 3.

<sup>42</sup> Sean Brawley "'No 'White Policy' in NZ': Fact and Fiction in New Zealand's Asian Immigration Record, 1946-1978" (1993) 27 NZJH 16.

<sup>43</sup> Ibid, 20.

<sup>44</sup> (1923) 201 NZPD 446, per Buddo (31 July 1923).



This imperial citizenship was limited only to those of the 'British race'. NZers feared race contamination: they wanted to keep the population 'pure'. Massey, for instance, stated that the great majority of NZers were anxious that the population should be of the "very purest British stock".<sup>45</sup> Massey distinguished NZ from other British communities by pointing to NZ's greater purity.

This strong attachment to Britain can be partly explained by demographics. The population only reached one million in 1908.<sup>46</sup> The population in NZ in 1921 was 1,272,000: of this 309,600 (24.3%) were born overseas, and of that 203,600 (16%) were UK-born.<sup>47</sup> In short, nearly a ¼ of NZ's non-Maori population was born overseas, and of this, two-thirds were British. At the same time, however, in 1901 almost one in five were British-born; by 1951, it would be one in ten.<sup>48</sup> There was decline relative to native-born NZers, which perhaps engendered some anxiety about identity. The British element was remained high amongst the older age groups, who had the most influence over politics: they constituted 55% of those aged 40 and above, and 86% of those aged 60 and above.<sup>49</sup> It was only in 1925 when NZ briefly had its first native-born PM, Francis Bell<sup>50</sup>—who happened to be an ardent imperialist. But the next NZ-born PM would be Sidney Holland<sup>51</sup> in 1949.

The stance of NZ politicians was animated by their Britannic nationalism, a belief in the cultural and racial superiority of the British peoples. This idea underpinned the Dominion Idea, a blend of national and imperial status, conceived by the Old British as a model of development which saw the settler communities as becoming more British, drawing closer together as they became more developed: modernity and

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<sup>45</sup> (1923) 201 NZPD 443, per Massey (31 July 1923).

<sup>46</sup> By contrast, Australia had almost a population of five million: see Australia Department of Immigration and Multicultural Affairs *Immigration: From Federation to Century's End* (Canberra, 2001) at:

<http://www.immi.gov.au/media/publications/statistics/federation/index.htm> (last accessed 21 June 2008).

<sup>47</sup> Stephen Constantine "British Emigration to the Empire-Commonwealth since 1880: From Overseas Settlement to Diaspora?" (2003) 31 JICH 16, 21.

<sup>48</sup> John Gould *The Rake's Progress? The New Zealand Economy Since 1945* (Hodder and Staughton, Auckland, 1982), 11.

<sup>49</sup> Ibid.

<sup>50</sup> See Appendix 2.

<sup>51</sup> Ibid.

Britishness would coincide.<sup>52</sup> This Britannic nationalism in practice occasionally escaped the original intentions of the Old British and conflicted with their broader interests.

In 1928, adoption of the 1914 BNSAA was debated again in NZ. The same government now pressed for adoption of all parts, including Part II, arguing that the 1920 IRAA had been shown to be highly efficient in excluding undesirables. Moreover, NZ was now the only settler community not to have adopted the 1914 BNSAA. NZ politicians could see centrifugal tendencies within the Commonwealth increasing, and did not want to encourage this, as there was real instability internationally.

With the exception of Western Samoa, the implications of adopting the 1914 BNSAA were few. In any case, the 1931 Statute of Westminster made the adoption of an imperial code an anachronism. The 1928 BNSAA was for domestic edification; but what ensured exclusivity was the 1920 IRAA and the state apparatus accompanying it.

### **Assisted Schemes of Migration in the Inter-war Years**

An examination of legislation alone would miss a key structure forming a complement to ideas about citizenship within the Commonwealth: migration. Traditionally Britain had sent capital and labour to the periphery, but this process intensified in the early twentieth century.<sup>53</sup> Those from Britain choosing Empire destinations increased from one-third in the late nineteenth century to over two-thirds by the 1920s.<sup>54</sup> *Laissez-faire* applied to immigration as well: all were relatively free to come and go. But when attitudes to free trade and the state changed, so did attitudes to migration.

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<sup>52</sup> "A Third British Empire?", above n 20, 85-86.

<sup>53</sup> Note Belich's idea of 'recolonisation': James Belich *Paradise Reforged: A History of the New Zealanders from the 1880s to the Year 2000* (Penguin Books, Auckland, 2001), 53-86.

<sup>54</sup> "British Emigration", above n 47, 20.

There was presumed to be not only a neat harmony economically, but also demographically. Britain was perceived as overcrowded;<sup>55</sup> the settler communities empty spaces.<sup>56</sup> Culturally, the settler communities were seen as salvation, not corrupted by industrialisation. They were lands of opportunity, where a healthy imperial race consistent with the tenets of Social Darwinism could be reared. Migration within the Empire was not really emigration at all: there was no 'loss' to Britain because the settler communities were part of Britain.<sup>57</sup>

Australia and NZ were most enthusiastic about state-assisted migration, because given their distance from Britain, they were at a disadvantage in competing with Canada and South Africa.<sup>58</sup> However, this enthusiasm was offset by internal political issues in the respective settler communities: they remained selective in whom they chose.<sup>59</sup>

British ex-servicemen were assisted in migration to the settler communities between 1919 and 1922,<sup>60</sup> as part of the demobilisation of soldiers after the War, and the fear of mass, long-term unemployment. Empire settlement was modestly successful: by 1936, over 400,000 people had been assisted in emigrating to the settler communities. Distribution was quite uneven: 173,000 went to Australia and 45,000 to NZ.<sup>61</sup>

With the onset of the Depression, promotion of migration ended. In the period from 1931 to 1939, only 587 people were the subject of assisted migration.<sup>62</sup> More generally, the Depression reduced the desire to migrate to NZ, either because of a lack of money for transport or because potential migrants were aware that there was no work in NZ. Finally, the newly-formed Labour Party, long hostile to state-assisted

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<sup>55</sup> The population rose from nearly 30 million in 1881 to nearly 45 million in 1931: *ibid*, 19.

<sup>56</sup> *Ibid*, 23.

<sup>57</sup> "Way Out of Our Troubles", above n 22, 25.

<sup>58</sup> "British Emigration", above n 47, 22.

<sup>59</sup> Stephen Constantine "Introduction: Empire Migration and Imperial Harmony" in Stephen Constantine (ed) *Emigrants and Empire: British Settlement in the Dominions between the Wars* (Manchester University Press, Manchester, 1990) 1, 10-11.

<sup>60</sup> On this see Kent Fedorovich "The Assisted Emigration of British Ex-servicemen to the Dominions, 1914-1922" in Stephen Constantine (ed) *Emigrants and Empire: British Settlement in the Dominions between the Wars* (Manchester University Press, Manchester, 1990) 45.

<sup>61</sup> "Empire Migration and Imperial Harmony", above n 59, 16.

<sup>62</sup> Bloomfield, above n 12, 76.

immigration, came to power in 1935.<sup>63</sup> In 1935, NZ experienced negative net migration for the only second time in its history.<sup>64</sup> In short, the idea of being British was reinforced by demographic and migratory patterns, but these patterns were unstable and often contingent.

### ***The 1948 British Nationality and the New Zealand Citizenship Act***

The British Nationality Act 1948 ('1948 BNA') was a response to the unilateral enactment of the Canadian Citizenship Act 1946 ('CCA'). The CCA made British subjecthood dependent on the acquisition of Canadian citizenship, in effect ending the idea of subjecthood, since it interposed a local loyalty between the Crown and subject. Changes were therefore necessary: if the CCA denied someone British subject status, but under UK law that person was considered a British subject, arguably the UK was interfering in Canada's domestic jurisdiction. Moreover, British officials recognised that the other settler communities would follow Canada. A meeting of Commonwealth legal experts was convened in 1947 to work out the essentials of such reform, the product of which was the 1948 BNA.

Some context is necessary to understand why the 1948 BNA took the form it did.<sup>65</sup> The US and USSR had emerged as the two superpowers in WW2, but the British had hoped, through the Commonwealth, to be an alternative 'third force'.<sup>66</sup> Hence, they had to find a means of maintaining influence, and in particular over the 'Old Commonwealth' ('OCW').<sup>67</sup> One means available was an inclusive citizenship: if members saw themselves as part of the Commonwealth, the more influence Britain would have.<sup>68</sup>

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<sup>63</sup> Megan Hutching *Long Journey for Sevenpence: An Oral History of Assisted Immigration to New Zealand from the United Kingdom, 1947-1975* (Victoria University Press, Wellington, 1999), 34.

<sup>64</sup> The first time during the period of another depression, the late 1880s-early 1890s: Statistics New Zealand *New Zealand Official Yearbook 2000* (Statistics New Zealand, Wellington, 2000), 104.

<sup>65</sup> On the BNA 1948 see Kathleen Paul *Whitewashing Britain: Race and Citizenship in the Postwar Era* (Cornell University Press, Ithaca, 1997) and Karatani, above n 1.

<sup>66</sup> John Darwin "Was There a Fourth British Empire?" in Martin Lynn (ed) *The British Empire in the 1950s: Retreat or Revival?* (Palgrave Macmillan, Basingstoke, 2005) 16.

<sup>67</sup> 'Old' here does not refer how long the countries in question had been within the British Empire and Commonwealth, but rather to indicate the length of time since the acquisition of self-government.

<sup>68</sup> Hansen, above n 24, 43-4.

It was only in the postwar period that national self-determination emerged as a key principle of international relations.<sup>69</sup> Previously, it had been qualified by the old international system over which the European colonial powers still had influence.<sup>70</sup> Self-determination transformed citizenship and nationality: citizenship was connected with a sense of belonging to a territorially-bound unit. But at the time of the enactment of the 1948 BNA, it was still possible to cleave to an older approach.

The 1948 BNA followed the Canadian model: Citizens of Independent Commonwealth Countries ('CICCs') and Citizens of the UK and the Colonies ('CUKCs') had Commonwealth citizenship status (British subjecthood by another name)<sup>71</sup> by virtue of their national citizenship. CICCs and CUKCs had a right of entry and abode in the UK because they were also Commonwealth citizens. In short, those classified as Commonwealth citizens under the 1948 BNA had two statuses: a local status and a common status. But there was an ambiguity about whether one status had priority over the other.

A national citizenship was suggested, with a separate citizenship for the colonies; but it was rejected, because the Old British feared that colonial governments would see colonial citizenship status as inferior to UK citizenship: hence the common CUKC category.<sup>72</sup> But it was imperative that the Old British include the former colonies if they wanted to maintain power in world politics. The BNA 1948 did not attempt to create a 'national' citizenship; it was a means of preserving pre-1948 (imperial) arrangements.<sup>73</sup> The corollary of this is that to see adoption as the beginning, or culmination of the independence of former settler communities would be mistaken.

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<sup>69</sup> Karatani, above n 1, 109-113.

<sup>70</sup> James Mayall *Nationalism and International Society* (Cambridge University Press, Cambridge, 1990), 54.

<sup>71</sup> The term 'British subjecthood' was dropped in order to avoid offending former colonies like India and Pakistan, for whom the term had unwelcome connotations.

<sup>72</sup> Hansen, above n 24, 49-52.

<sup>73</sup> Karatani, above n 1, 119.

In the parliamentary debates on NZ adoption of the Act, there was repeated reference to the fact that NZers did not ask for the 1948 BNA; it was forced upon NZ. If 'we' had a choice, we would have preserved the old rules.<sup>74</sup> The British Nationality and NZ Citizenship Act ('1948 BNNZCA') was deliberately named: British nationality first, NZ citizenship second.<sup>75</sup> The 1948 BNA was seen to encourage disunity; it made British subjecthood at best of equal status with local nationality, and suggested a watering down of what it meant to be British.

There was an ambivalent use of the term 'nation'. At times, MPs argued that 'we' were part of the British nation, and the British Empire was 'our' empire.<sup>76</sup> One MP bemoaned that things were better when there was less consciousness of local nationality.<sup>77</sup> Nationalism was seen as malign.<sup>78</sup> And yet at other times, NZers were part of a NZ nation.<sup>79</sup>

Although the BNNZCA followed the UK BNA "almost exactly",<sup>80</sup> there were a number of small variations. For instance, the 1948 BNNZCA had more liberal residence qualifications for Commonwealth citizen registration.<sup>81</sup> Other Commonwealth countries required five years;<sup>82</sup> NZ required only one.<sup>83</sup> This was pointless given intense competition for migrants:<sup>84</sup> but it was about indicating greater loyalty to the Commonwealth. Noticeably, the Minister in charge was given absolute discretion to accept any application for naturalisation.<sup>85</sup>

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<sup>74</sup> (1948) 281 NZPD, 1532-3, per Mason; 1540, per Doidge (17 August 1948).

<sup>75</sup> Ibid, 1520, per Parry (17 August 1948).

<sup>76</sup> Ibid, 1529, per Harker; 1534, per Watts 1536 (17 August 1948).

<sup>77</sup> Ibid, 1533, per Mason (17 August 1948).

<sup>78</sup> Ibid, 1540, per Doidge (17 August 1948).

<sup>79</sup> Ibid, 1538, per Moohan (17 August 1948).

<sup>80</sup> Parry, above n 4, 621.

<sup>81</sup> (1948) 281 NZPD, 1534, per Mason (17 August 1948).

<sup>82</sup> For instance, see Australia's Nationality and Citizenship Act 1948 (Cth), s12(1)(b).

<sup>83</sup> British Nationality and New Zealand Citizenship Act 1948, s 8(1)(a).

<sup>84</sup> Migrant numbers from the OCW did not rise significantly in NZ until the 1960s and 1970s: see Bloomfield, above n 12, 79.

<sup>85</sup> British Nationality and New Zealand Citizenship Act 1948, s29.

NZers consoled themselves with the thought that changes in terminology (from British subject to Commonwealth citizen) was superficial.<sup>86</sup> The 1948 BNA was accepted because Britain was now in a weaker state than it had ever been. Moreover, there were few other citizenship models available to NZ to choose from. The other settler communities also retained many features of the Old British model.<sup>87</sup> Australia, for instance, was also insistent on maintaining their 'Britishness' in spite of the 1948 BNA.<sup>88</sup> In sum, those subscribing to a Britannic narrative of change still had plenty of evidence to confirm their beliefs.

Moreover, the 1948 BNNZCA read alongside contemporary immigration laws suggested that there was little danger of NZ's homogeneity being 'watered-down'. For instance, the 1948 Aliens Act retained the wartime system of the registration of aliens, requiring them to register within 14 days of arrival. 'Aliens' here included all those who were not British or of Western European descent.<sup>89</sup> At the time, its retention was intended to exclude fifth columnists and communists; but this system would run until 1977.

More important was the continuing operation of the 1920 IRAA. The covert system continued to operate successfully in the postwar period. However, the ability of NZ to maintain the informal system to keep out 'undesirables' was slowly being undermined with the increase in rapid, cheap transport. It became difficult to ensure cooperation or confidentiality.<sup>90</sup> Further, NZ was becoming known as a country competing for migrants, attracting scrutiny. More generally, with the entry of the developing world into the international arena there was greater hostility to racially discriminatory policies.

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<sup>86</sup> (1948) 281 NZPD 1524, per Parry; 1527, per Webb (17 August 1948).

<sup>87</sup> See generally Parry above n 4.

<sup>88</sup> Neville Meaney "Britishness and Australia: Some Reflections" (2003) 31 JICH 121, 129.

<sup>89</sup> Aliens Act 1948, s5.

<sup>90</sup> Brawley, above n 42, 20-22.

### **Migration to the Old Commonwealth, 1946-75**

Postwar citizenship statutes are often thought of as signalling the beginnings of 'nationhood', but patterns of migration, and how migration was understood, in the immediate post-war period, suggest that even after WW2 the belief persisted that Britain and NZ would draw closer together: independence would make NZ more British, not less.

Successive British governments in the late 1940s to 1950s all shared the idea of population distribution as a means of preserving influence. The 1949 British *Report of the Royal Commission on Population* argued that it was the predominance of British stock in the settler communities which constituted the main link between the settler communities and the Old British. The Commission argued that if imperial migration stopped, this might affect Britain's place in the world.<sup>91</sup>

Hence, although legislation was being enacted suggesting 'new' national identities, steps were simultaneously being taken to ensure the maintenance of an 'older' imperial identity via population distribution. What makes this more remarkable is that this took place at a time when Britain faced both an acute labour shortage and population decline. The British government encouraged immigration from Ireland and Europe; discriminated against New Commonwealth ('NCW', that is, the former colonies) migrants, many of whom were Commonwealth citizens; and promoted emigration of British citizens to the OCW. Emigration to the OCW increased as a result in the post-war years. In the 1950s, 80% of all British emigrants went to OCW destinations. In the years 1946-49, 590,000 British subjects left the UK for OCW countries; in the 1950s, 1,327,300.<sup>92</sup>

In the aftermath of WW2, a joint committee was set up to examine the state of NZ's population. The 1946 Dominion Population Committee recommended that there be no

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<sup>91</sup> Paul, above n 65, 39-40, citing *Report of the Royal Commission on Population* Cmd 7695 (HMSO, London, 1949), paras 331-332, 337.

<sup>92</sup> "British Emigration", above n 47, 25.



policy of wholesale immigration for the moment.<sup>93</sup> Immigration was not a cure; the real answer was natural increase.<sup>94</sup> However, there were labour shortages affecting the growing needs of the secondary and tertiary industries, which had been stimulated by Labour's import-substitution policies and WW2. Skilled immigrants of British stock were best, but there was concern about the effect of this on "the motherland."<sup>95</sup> Further, several other countries were also competing for British migrants; it would be difficult to attract sufficient migrants for NZ's needs.<sup>96</sup> The official and public response to the Committee's report was non-existent, but the Labour government decided to press ahead with an assisted migration program.<sup>97</sup>

In 1947, the general assisted passages scheme got under way, NZ paying all costs. The scheme was only open to single British immigrants "of European race and colour."<sup>98</sup> Ex-servicemen and women went free; all others had to pay £10 towards their fare. Applicants had to be between 20 and 35; and were required to work for 2 years. These requirements would change over time to meet the persistent issues of supply and demand in the NZ economy in the 28 years that the scheme operated.

There were constant adjustments throughout the 1950s because of rising inflation, change of governments, and a fluctuating economy. For instance, the assistance scheme was widened in 1950. The National Party had been elected: generally it was more receptive to employers and encouraged migration to meet labour needs; the Labour Party was more cautious. Much also depended on the NZ economy. The 1950 expansion of the scheme was only possible because of favourable economic conditions. By 1953, concerns about the scheme's costs, rising inflation and a balance of payments deficit led the quota to be reduced.

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<sup>93</sup> *Report of the Dominion Population Committee* [1946] AJHR I.17, 116.

<sup>94</sup> *Ibid*, 112.

<sup>95</sup> *Ibid*, 117.

<sup>96</sup> *Ibid*, 115, 117-118.

<sup>97</sup> Hutching, above n 63, 44.

<sup>98</sup> *Ibid*, 49.

UK migration to the former settler communities declined by the late 1950s, as demographic competition replaced complementarity.<sup>99</sup> But the industrialisation of the OCW economies meant these countries and the UK were competing for the same people—skilled workers. Many OCW countries had begun to recruit workers from European countries to meet their needs. Moreover, contraception eliminated population pressures, the population growth rate in Britain slowed, and there was a fear of absolute population decline.<sup>100</sup> The long-term benefits of imperial migration and the idealised Commonwealth were called into question.<sup>101</sup> But Britain continued to assist migration to Australia until 1972; Australia continued to provide assistance until 1981.<sup>102</sup>

For NZ, by mid-1960s doubts were voiced about the assisted migrants scheme. A report by the Monetary and Economic Council argued that the demands on the economy created by the new migrants outweighed the benefit of their labour. In 1967 a recession led the National government to drop the target of assisted migrants to 500 per year. For all intents and purposes the scheme was over.<sup>103</sup> Even when the economy bounced back in the early 1970s, the quota of assisted migrants remained the same.

The scheme was finally ended in 1975 with increasing economic difficulties and high rates of unassisted migration. Over 28 years (1947-75), the scheme had assisted 76,673 migrants.<sup>104</sup> It had had a turbulent history, exposing the British inability to provide sufficient manpower. However, this did not have the effect, as with Australia, of accepting large numbers of non-British migrants—calling into question Australia's

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<sup>99</sup> Stephen Constantine "Migrants and Settlers" in Judith Brown and W Roger Louis (eds) *Oxford History of the British Empire, Vol 4: The Twentieth Century* (Oxford University Press, Oxford, 1999) 163, 185-186.

<sup>100</sup> "British Emigration", above n 47, 25.

<sup>101</sup> Paul, above n 65, 58.

<sup>102</sup> Australian Department of Immigration and Multicultural Affairs *Immigration: From Federation to Century's End* (Canberra, 2001), 34, available at: <http://www.immi.gov.au/media/publications/statistics/federation/index.htm> (last accessed 21 June 2008).

<sup>103</sup> Hutching, above n 63, 73.

<sup>104</sup> *Ibid*, 74.

'Britishness'. NZ's relatively small population requirements and economic constraints had meant that Britain's weakness never had a public impact.

### **The Commonwealth Immigrants Act 1962 (UK) and the 1971 Immigration Act (UK)**

In the postwar period, the changes made by the Old British to the 1948 BNA were in response to specific incidents involving non-white Commonwealth citizens.<sup>105</sup> These led to the reduction of the already-meagre citizenship rights attached to Commonwealth citizenship. Since this 'hollowing out' applied equally to all, it had consequences for those in the OCW: no longer could they continue to labour under the illusion that they too belonged to 'Old Britain'.

NCW immigration had increased as a result of cheap transport and full employment in the UK, and the domestic implications of the inclusive nationality policy began to dawn upon British policy-makers. Colour overrode presumptive rights of nationality.<sup>106</sup> Still, immigration law was not revised until the Commonwealth Immigrants Act 1962 ('1962 CIA'), mainly because there was a cross-party consensus on the Commonwealth's importance. Until at least the mid-1950s, the OCW was seen as the foundation of Britain's future.<sup>107</sup> NCW immigration was tolerated for the sake of OCW citizens.

British Governments moved towards restrictionism by the late 1950s. Race riots and racist politics made immigration and nationality national issues; NCW migration had overtaken OCW migration; and there was concern about a potential recession. There were noticeably fewer expressions of commitment to the OCW countries by the Conservatives by the late 1950s.<sup>108</sup> By 1961, the UK made its first application to join the EEC.

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<sup>105</sup> For instance, the unexpected New Commonwealth immigration and the fear of the migration of Kenyan Asians after the independence of Kenya in 1965: see Hansen, above n 24, chapters 5 and 7.

<sup>106</sup> Paul, above n 65, 125.

<sup>107</sup> Hansen, above n 24, 78-79. In 1954, the Conservative Government had rejected the idea of joining the EEC because of the impact on the OCW.

<sup>108</sup> *Ibid.*, 99.

The 1962 CIA subjected all Commonwealth citizens to immigration controls unless they were born in the UK. Even OCW citizens were subject to immigration control, although in practice the 1962 CIA's work voucher scheme favoured OCW applicants, and discriminated against NCW applicants.<sup>109</sup> Here was the beginnings of a division between those who 'belonged' to the UK and those who did not.

The 1962 CIA did not repeal the 1948 BNA and create an exclusive national citizenship. British policy-makers were reluctant to do so because of the costs involved and the concern about the implications for Commonwealth relations. Moreover, OCW countries showed no sign of wanting the British Government to change. Even in the late 1960s, OCW countries expected their citizens to be exempt from or preferentially treated by British immigration control, many complaining in 1965 when the Heath Government tightened up controls on working holiday visas.<sup>110</sup>

The 'failure' of the 1962 CIA to reduce NCW immigration and the public popularity of Enoch Powell's stance pushed the Conservative Party to promise an end to large-scale immigration. The 1971 Immigration Act ('1971 IA') was the result, its key feature the concept of 'patriality'. Patriots were defined as those with parents who were natural British subjects. Only patrials had the right of entry and abode. At a stroke, the transmission of Britishness was now limited to one generation. In NZ, both Labour and National were upset at this curtailment.<sup>111</sup> Even the Old British were beginning to link immigration and citizenship law with nationhood. Britain was becoming a foreign country.

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<sup>109</sup> Karatani, above n 1, 129-132.

<sup>110</sup> Ibid, 153; and Mark McKenna "Ashes of Republicanism, Dust of Empire" (2004) 63 *Meanjin* 175.

<sup>111</sup> Malcolm McKinnon *Independence and Foreign Policy: New Zealand in the World since 1935* (Auckland University Press, Auckland, 1993), 185.

### **New Zealand 1950-2005: Domestic Demographic Change, the Retreat of Empire and the Rise of the Nation-State**

What became important in post-1950s citizenship and immigration law in NZ were not the terms set by the Old British, but the norms of the international community: in particular, non-discrimination and self-determination. Domestic changes and NZ's geopolitical relations with the outside world interacted with these norms, resulting in their uneven application.

Often adherence to international norms was a mask for the retention of old legal frameworks. For instance, the 1961 Immigration Restriction Amendment Act (NZ) repealed the 1920 IRAA requirement of being of "British birth and parent age", replacing it with "New Zealand citizens". On the face of it, only 'NZ citizens' could now enter NZ without a permit. The intention was to remove all racial discrimination from the rules governing immigration into New Zealand. But there was no definition of 'NZ citizens' in the 1961 IRAA; all pivoted on Ministerial discretion. The Old British continued to have the informal freedom to enter NZ, and there was no significant fall in the number of overseas British-born resident in NZ.<sup>112</sup>

Under the 1964 Immigration Act (NZ), the permit system applied to all except NZers, but Ministerial discretion remained.<sup>113</sup> Yet there was clearly felt to be international pressure to conform to a non-discriminatory immigration policy: the Minister in charge defended NZ government policy as being non-discriminatory. However, in determining the number of immigrants, NZ's absorptive capacity and its racial harmony had to be considered. NZ was "free of any real racial tensions": uncontrolled immigration might lead to racial friction.<sup>114</sup> Hence, the NZ government categorised groups according to the need to limit their migration by the proportions already present in NZ: the British (who required almost no scrutiny and could come in freely);

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<sup>112</sup> Brawley, above n 42, 29-30; see also Bloomfield, above n 12, 78-79: in fact the number of British-born in NZ *rose* in the period 1961-1976, from 227,000 to 301,000.

<sup>113</sup> Immigration Act 1964, Part II; also s15(2).

<sup>114</sup> (1964) 338 NZPD 2714, per Tom Shand (16 October 1964).

Western Europeans; Southern and Eastern Europeans; Polynesians and Asians coming last.<sup>115</sup>

The myth of harmonious race relations depicted by the Minister was still prevalent in the late 1950s. But one contemporaneous depiction of NZ society showed that the underlying view was that Maori were not thought superior to Europeans.<sup>116</sup> This myth was used as a shield to protect NZ's racially discriminatory immigration policies against international scrutiny.<sup>117</sup>

Maori were still treated as second-class citizens, but Maori demographics were changing. In 1926, Maori numbered 64,000 (4.5% of the total population); but by 1976, 270,000 (8.6%).<sup>118</sup> Far more important was that whereas in 1945, one quarter of all Maori were rural, by 1975 three quarters were urban.<sup>119</sup> It was now difficult for Pakeha to ignore Maori—let alone the effect of the great dislocation on Maori themselves. A new generation of Maori sought confrontation. Land seizures led to a major march to Parliament and a year-long protest at Bastion Point. The myth of the homogeneity of the NZ population presented by the Britannic narrative was no longer plausible, and indeed, the presence of Maori, with a political agenda quite different from Pakeha, suggested it had never been. Demographic change was undermining this narrative, and giving credence to an 'emerging' Maori understanding of history.

By 1968, both Britain and the US were retreating from Southeast Asia.<sup>120</sup> New Zealand was faced with the prospect of being without a great power to protect it. 'Closer' to 'home', the British government lost interest in the Commonwealth connection: this could be seen in the restriction of Antipodean migrants to Britain and moves to enter the EEC. For NZ, the Asia-Pacific was now 'home'.

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<sup>115</sup> Ibid, 2715, per Tom Shand (16 October 1964).

<sup>116</sup> David Ausubel *The Fern and the Tiki* (Angus and Robertson, London, 1960), 166.

<sup>117</sup> See generally Brawley, above n 42.

<sup>118</sup> *Official Yearbook 2000*, above n 64, 104.

<sup>119</sup> *Paradise Reforged*, above n 53, 471–4.

<sup>120</sup> Michael Howard "The Lonely Antipodes? British Reflections on the Future on Australia and New Zealand" (1972) 62 Round Table 77.

But this 'home' was not the Asia-Pacific of old. British decolonisation was also part of the wider collapse of the "global colonial order", through which the world politically, economically and culturally was organised.<sup>121</sup> Decolonisation by the remaining empires not only meant the proliferation of new nation-states, and the need of NZ to deal with these new entities, but also the growing legitimacy of the political form of the nation-state itself. This form required a territorially-bound political community of citizens loyal only to itself. In 1945, there were 45 member states of the UN; by 1975, 144.<sup>122</sup>

The NZ state's domestic actions now had an impact on its relationship with Asian-Pacific countries.<sup>123</sup> However, this new situation was slow to take hold, mostly because the strong assimilationist ideology still persisted in NZ; but also because foreign trade was only beginning to reorient itself from empire to region. There was still insufficient pressure on NZ internally or externally to change its stance. What changed was the overall economic situation.

In 1974, the NZ government issued its *Review of Immigration Policy*.<sup>124</sup> Old British migrants would be subject to the permit system like all other non-NZers. "British birth," it was said, "should no longer give a free right of entry."<sup>125</sup> The decision to subject the Old British to the permit system may have been a response to the new British immigration laws.<sup>126</sup> There were other reasons. In 1972-73 there was a sudden large surge of British migrants.<sup>127</sup> This increase from Britain had come at a point when NZ's economy had gone into severe decline because of the oil crisis. NZ's absorptive capacity was limited: the population had reached three million in 1973. The

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<sup>121</sup> David Reynolds "Empire, Region, World: The International Context of Australian Foreign Policy since 1939" (2005) 51 *Aus J Pol & His* 346, 346-347; and John Darwin "Decolonisation and the End of Empire" in Robin Winks (ed) *The Oxford History of the British Empire : Vol V, Historiography* (Oxford University Press, Oxford, 1999) 541.

<sup>122</sup> See "United Nations Member States" at <http://www.un.org/Overview/growth.htm> (last accessed 21 June 2008).

<sup>123</sup> W Theo Roy "Immigration Policy and Foreign Policy" in Stephen Levine (ed) *New Zealand Politics: A Reader* (Cheshire Publishing Pty Ltd, Melbourne, 1975) 447.

<sup>124</sup> "Review of Immigration Policy" [1974] *AJHR* G.34.

<sup>125</sup> *Ibid*, 48.

<sup>126</sup> Hutching, above n 63, 74.

<sup>127</sup> Patrick Ongley and David Pearson "Post-1945 International Migration: New Zealand, Australia and Canada Compared" (1995) 29 *Int'l Migr Rev* 765, 766.

interests of NZers came first. Moreover, the Labour government saw NZ's future with the Asia-Pacific region, not Britain.<sup>128</sup>

Subjecting the Old British to the permit system was acknowledged as a "historic development",<sup>129</sup> and numbers from Britain fell sharply: in 1974, there were 31,600 UK migrants; by 1977, only 7,400. But this might have been due to NZ's unattractive economic situation. Britain remained until the 1990s—when it was replaced by Australia—the single most important individual source of migrants for NZ (although migrants from other regions now greatly outnumber those from Britain).<sup>130</sup> In short, there was an assertion of a nationalist understanding of NZ's present and future, which fell in line with internal and external change, but the substance of the assertion was not warranted. This narrative was ideological: it was a response to increasing uncertainty.

One objective of the 1974 immigration policy was to take into account foreign policy, showing that the NZ government felt pressure internationally to conform.<sup>131</sup> This did not mean that other ethnic groups were treated better. Changes in the population's ethnic composition had to be within "the limits of community tolerance" to avoid racial tensions.<sup>132</sup> This excessive cautiousness stemmed from domestic politics: a key feature of the 1975 election was the question of Pacific Island immigration and racial issues generally.<sup>133</sup>

Like Britain, NZ's imperial past had ramifications for its immigration and citizenship regime. For much of the late nineteenth and early-mid twentieth centuries, NZ politicians had harboured imperialist ambitions for the Pacific.<sup>134</sup> A number of small

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<sup>128</sup> Brawley, above n 42, 33.

<sup>129</sup> "Review of Immigration Policy", above n 124, 18.

<sup>130</sup> Ongley and Pearson, above n 127, 782.

<sup>131</sup> "Review of Immigration Policy", above n 124, 27.

<sup>132</sup> Ibid, 28.

<sup>133</sup> Barrie McDonald "The Lesa Case and the Citizenship (Western Samoa) Act 1982" in Andrew Trlin and Paul Spoonley (eds) *New Zealand and International Migration: A Digest and Bibliography Number 1* (Massey University, Palmerston North, 1986) 73, 74.

<sup>134</sup> Bernard Gordon *New Zealand becomes a Pacific Power* (University of Chicago Press, Chicago, 1960).



Pacific Island countries had been annexed or put under the control of NZ: the Cook Islands, Niue, Tokelau, Tonga, and later Western Samoa. NZ involvement in Western Samoa had required that various NZ laws be extended to Western Samoa. After WW2, colonialism had become unacceptable, and NZ begrudgingly agreed to relinquish control.

It was not until the second half of the twentieth century, however, with cheap transport and NZ's industrialisation that those on NZ's 'periphery' came to the 'core'. Various NZ governments' policies of import-substitution led to acute shortages of unskilled labour. Employers knowingly recruited Pacific Islanders who had come to NZ on visitors' permits; the latter simply stayed on after their permits expired (or 'overstayed').<sup>135</sup> This was tolerated by the state in a regime underpinned by Ministerial discretion. In 1961, there were 14,300 Pacific Islanders in NZ (0.6% of NZ's population); 1971, 45,400 (1.6%); and by 1981, 91,000 (2.9%).<sup>136</sup>

In the early 1970s, Pacific Island 'overstaying' was seized upon as a problem. There were crackdowns in the form of 'dawn raids', and overstayers were prosecuted to much domestic and regional consternation. Hence, the 1974 *Review*'s need to address the issue of NZ's 'special responsibility' to the South Pacific.<sup>137</sup> However, Pacific Island migrants continued to arrive. In 1975, National won the election; and soon after, dawn raids and random spot checks were reinstated.<sup>138</sup>

That NZ's imperial past and its present immigration scheme had implications for its citizenship scheme was demonstrated in *Lesa v Attorney-General*.<sup>139</sup> Lesa was a Western Samoan woman charged under the Immigration Act 1964 with the offence of 'overstaying'. She claimed that under the 1928 BNSAA that she was a natural-born British subject, and therefore under the transitional provisions of the 1948 BNA and

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<sup>135</sup> "New Zealand Immigration Policies", above n 18.

<sup>136</sup> *Report of the Royal Commission on Social Policy Vol 1: New Zealand Today* (Government Printer, Wellington, 1988), 104-105.

<sup>137</sup> Brawley, above n 42, 35.

<sup>138</sup> Yvonne Chan "Overstaying—Challenge Followed by Change" (1981) 11 VUWLR 211.

<sup>139</sup> [1982] 1 NZLR 165 (CA and PC).

the 1977 Citizenship Act was a NZ citizen. If *Lesa* was a NZ citizen, she could hardly be prosecuted for overstaying.

The NZCA held that *Lesa* was not a natural-born British subject under the 1928 BNSAA: there was no intention to confer British subjecthood to those born in Western Samoa; international law on mandated territories at the time supported this.

*Lesa* appealed to the PC, her argument based on statutory construction. The purpose of the 1928 BNSAA had been two-fold: to adopt Part II of the 1914 BNSAA, bringing NZ law into conformity with the Imperial system of citizenship; and provide for the naturalisation of persons resident in Western Samoa. Naturalisation under the 1914 BNSAA had required a period of residence in “His Majesty’s Dominions” to qualify; but it also stated a “natural-born British subject” included “Any persons born within His Majesty’s Dominions and allegiance”. The 1928 BNSAA stated the 1914 BNSAA was to apply to Western Samoa. It followed that Western Samoa had to be part of Her Majesty’s dominions to allow persons resident in Western Samoa to qualify for naturalisation, otherwise the 1928 BNSAA would be frustrated.

The PC held that there was no ambiguity about the statute (excluding the legislative and international context): *Lesa* was a natural-born British subject under the 1928 BNSAA, and therefore a NZ citizen. The great irony of *Lesa* was that historically naturalisation had been a key means of keeping ‘undesirables’ out of NZ; here it had operated to make a large number of Western Samoans NZ citizens.

The PC’s decision was unexpected. The PC had bestowed an estimated 100,000 Western Samoans (two thirds of a population of 160,000) with NZ citizenship.<sup>140</sup> The NZ Parliament moved quickly to reverse *Lesa*, both major political parties agreeing that the decision could not stand, as it ‘threatened’ NZ with a loss of control over immigration. A Protocol to the 1962 Treaty of Friendship between Samoa and NZ was negotiated, and as a result, the Citizenship (Western Samoa) Act 1982 was passed

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<sup>140</sup> See the comments of Hon JK McLay, Minister of Justice, on 27 September 1982, reproduced in “The Reaction to *Lesa*—Two Views” [1982] NZLJ 353, 354.

within three months of *Lesā*. The Act essentially declared that all Western Samoans living within NZ at the time to be NZ citizens, but removed NZ citizenship from those Western Samoans living outside NZ.

Critics of *Lesā* said that the PC had narrowly decided the case, ignoring the historical context.<sup>141</sup> There was little intention to bestow Samoans with British subjecthood status, but this would also ignore the imperial dreams that NZ had had for Western Samoa or the tacit encouragement NZ governments had given to Pacific migrants in the past quarter of a century. Moreover, the NZ Parliament's actions seemed inordinately hasty.

The 'push and pull' factors drawing Pacific Islanders to NZ remained. Levels of Pacific Island migration fluctuated, but numbers remained high because of family reunion admissions.<sup>142</sup> In 1991, there were 166,000 Pacific Islanders (4.8% of the population), and by 2001, 232,000 (6.1%).<sup>143</sup> Pacific peoples are now the third biggest ethnic group in NZ; one in 16 NZers are of Pacific ethnicity. Half or 115,000 of those Pacific peoples are Samoan.<sup>144</sup>

Reactions to *Lesā* showed that the vision of the NZ polity that the citizenship and immigration regime was not the homogenous white NZ polity 'imagined' by many NZers. It was not British, as the 1977 Citizenship Act would show, but neither was it 'civic', based on loyalty to state institutions without reference to ethnicity.

The 1977 Citizenship Act was lauded by those who noted its enactment as a real change in NZ's citizenship regime. They focused particularly on the end of the distinction between British subjects and aliens and the abolition of the aliens

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<sup>141</sup> EJ Haughey "The Privy Council Was Wrong" [1982] NZLJ 317. But see also Rupert Glover "The Privy Council Was Right" [1982] NZLJ 314; Rupert Glover "The Western Samoa Bill—Background and Unanswered Questions" [1982] NZLJ 355 and FM Brookfield "New Zealand Citizenship and Western Samoa: A Legacy of the Mandate" (1983) 5 Otago LR 367.

<sup>142</sup> Ongley and Pearson, above n 127, 782.

<sup>143</sup> *Royal Commission Social Policy Report*, 104-105; Statistics New Zealand "Census Snapshot: Pacific Peoples" at <http://www.stats.govt.nz/products-and-services/Articles/census-snpst-pac-ppls-Jun02.htm> (last accessed 21 June 2008).

<sup>144</sup> "Census Snapshot: Pacific Peoples", above n 143.

registration system.<sup>145</sup> Everyone was now ostensibly subject to the same rules. Parliamentary debates made much of the Citizenship Bill's break from the past. Members of both parties saw the Bill as central to NZ nationhood.<sup>146</sup>

A major issue was the oath of allegiance. Previously, British subjects did not take the oath since all owed allegiance to 'the Queen'. However, the Queen's constitutional relationship to NZ had changed: she was now 'the Queen of NZ'. Hence, even British subjects should have to take the oath, for they only owed allegiance to the Queen of Britain. However, officials advised that this was impractical to implement. One opposition MP argued that if British subjects and Commonwealth citizens were not required to take the oath, it would downgrade "the whole status of ... New Zealand's importance as an individual sovereign state." The oath should be compulsory for all applicants "in order to build up a sense of nationalism ... and a sense that being a New Zealander is something special and precious".<sup>147</sup> But Ministerial discretion was maintained;<sup>148</sup> official advice was followed.

More important, however, was the narrowing of the definition of those who were 'NZers' to those who were born in NZ or those whose parents were born in NZ.<sup>149</sup> In effect, the 1977 Act had adopted a 'local' definition of 'patriality'. This had the effect of excluding the Old British, but taking into account NZ's relative homogeneity, it also excluded most non-Europeans. Since 1945, non-British migration averaged less than 2,500 annually.<sup>150</sup> For example, the number of Chinese in NZ over this period rose only slightly: in 1961, there were 8,500 (0.35% of the population); and by 1976, only 14,900 (0.47%). It was difficult to become a member of this (nation-)state unless one was born within the polity. The Act also preserved Ministerial discretion: the potential for discrimination remained.<sup>151</sup>

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<sup>145</sup> KJ Keith "Citizenship Act 1977" (1978) 8 NZULR 80 and KE Dawkins "New Zealand Citizenship Redefined" (1977-1980) 4 Otago LR 201.

<sup>146</sup> (1977) 415 NZPD 4377, per Highet (9 November 1977).

<sup>147</sup> Ibid, 4386, per Prebble (9 November 1977).

<sup>148</sup> Citizenship Act 1977, s 11.

<sup>149</sup> Ibid, s 7.

<sup>150</sup> Ongley and Pearson, above n 127, 782.

<sup>151</sup> Citizenship Act 1977, ss 8-9.

The immigration regime had not changed: it was still discretionary. For instance, under the occupational migration category, applicants qualified by having a particular skill on the 'occupational priority list' and an offer from a NZ employer. An employer had to show that there was no one in NZ capable of meeting the requirements of the job. Applicants from non-traditional source countries were only accepted if an employer could show that no one from traditional source countries was available. In practice, this was almost impossible to show; thus employers were not encouraged to recruit from other countries.<sup>152</sup>

'NZers' may have been asserting their difference from Old Britain, but they were also following a settler community trend, treating aliens and Old British alike in terms of residency requirements.<sup>153</sup> NZ followed Australia and Canada in liberalising its immigration and citizenship policies, shifting from racially discriminatory and assimilationist policies to race-neutral admissions criteria and multiculturalism.<sup>154</sup> This was also a matter of international competition: NZ had to compete for the same skilled migrants. The settler communities were themselves undergoing the process of 'indigenisation'—although this was called 'maturity', or denied entirely on the basis that they had long been 'independent'.

As Old British influence fell, demographics changed, and economic necessity became an imperative, the mix of national and imperial status seemed inappropriate. There was a compelling alternative: the nation-state.<sup>155</sup> But a key premise of the nation-state idea—a homogenous polity—was now lacking; it had never existed. Talk of being '98% British' now reminded NZers of their past, of now-impossible shared loyalties, but also of the historical marginalisation of Maori, which reconnected NZ to the other settler colonies. In what sense were NZers—particularly Pakeha NZers—different at all? This question was given additional impetus by Treaty politics and the 1980s emphasis on biculturalism which tended to fix Maori and Pakeha identities. For

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<sup>152</sup> *Review of Immigration Policy August 1986* [1986] AJHR G.42, 15.

<sup>153</sup> Dawkins, above n 145, 206.

<sup>154</sup> Ongley and Pearson, above n 127, 782.

<sup>155</sup> "Rise and Rise of the Nation-State?" above n 2.

Pakeha, the question became one of distinguishing themselves from Maori, rather than examining themselves as a group. Biculturalism also excluded non-European groups from the discussion.<sup>156</sup>

The Pacific Islands immigration 'problem' led to the introduction of a new Immigration Bill in 1983 by the then National government. The key features of the Bill were the clarification and rationalisation of procedures. But there were also less acceptable features: for instance, non-citizens were required to carry evidence of their right to be resident, the absence of which was presumptive evidence that they had committed an offence. The Bill was withdrawn before the 1984 election, but not before causing great friction with NZ's Pacific neighbours.<sup>157</sup> Here was one sign of a world organised by nation-state, rather than by imperial reach.

The 1987 Immigration Act ('1987 IA'), which set out formal machinery for the implementation of any immigration policy, ostensibly meant that racial discrimination ended. It was later supplemented by the introduction of a formal points system in 1991.

But the belated 'acceptance' of multiculturalism in the key document of this period, the 1986 *Review of Immigration Policy*, seemed to some rather sinister. The 1987 *Review* stated:

New Zealand is a country of immigration. The Maori people established themselves as the *tangata whenua* [people of the land] after historic voyages of migration ... Immigration has moulded our national characteristics as a Pacific country and given our community richness and cultural diversity ... Immigration has been and remains an essential element in this nation's development.<sup>158</sup>

The 'multicultural' character of NZ was now a justification for liberalising immigration policy. Even more important than the controversies over Pacific Island migrants was the growing demographic presence of Maori. In 1976 Maori numbered

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<sup>156</sup> Katherine Smits "Multicultural Identity in a Bicultural Context" in Raymond Miller (ed) *New Zealand Government and Politics* (4 ed, Oxford University Press, Auckland, 2006) 25, 30-1.

<sup>157</sup> McDonald, above n 133, 74.

<sup>158</sup> *1986 Immigration Policy Review*, above n 152, 9.

270,000 (8.6%), most of whom were now urban.<sup>159</sup> By 2001, this had increased to 526,000 (13.8%), or one in seven NZers—although this rise in figures may be due to changes in a classificatory system which treated ‘Pakeha’ as a residual category.<sup>160</sup> The proportion of Maori within the population may continue to rise.<sup>161</sup>

Some commentators have seen the belated adoption of multiculturalism as a means of countering the discourse of biculturalism proposed by Maori: if ‘we’ are all immigrants, then no one can claim special privileges.<sup>162</sup> In the past, domestic policy towards the various ethnic groups in NZ was used to justify an exclusionary immigration policy; now a liberal immigration policy was being used to downgrade claims by these same groups. But this overstates the matter: there has never been an official policy of multiculturalism. The dominant position remains assimilation: “cultural pluralism in this country tends to be cast not as a social good, but as a constraining factor or a potential problem to be managed.”<sup>163</sup> Thus changes in immigration policy could be read both as confirming the trajectory implied by the nationalist narrative; but it could also be seen as confirming the claims of a Maori narrative which viewed ostensibly ‘liberal’ change as embodying continuity—the continuing oppression of Maori claims.

Still, the neoliberal thinking behind the 1987 IA and the fear of international competition finally ended the reliance on traditional sources, immigrants now coming

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<sup>159</sup> *Official Yearbook 2000*, above n 64, 104.

<sup>160</sup> Statistics New Zealand “Census Snapshot: Maori” at <http://www.stats.govt.nz/products-and-services/Articles/census-snpst-maori-Apr02.htm> (last accessed 21 June 2008). In earlier censuses, people were only allowed to choose one ethnic group; but from the 1996 census onwards, people were able to choose as many ethnic groups as they wished.

<sup>161</sup> It should be noted that the ethnic group classification system employed by the Department of Statistics may inflate Maori and other ethnic populations at the expense of the Pakeha population. For instance, there is a hierarchy for ethnic identity, where those classifying themselves as Maori (or any other ethnic group) are treated as Maori first, regardless of how they themselves might see themselves, so that ‘Pakeha’ becomes a residual category: see Ian Pool “‘Political Arithmetick’ and Constitutional Concerns: How New Zealand Society Will Change” in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 221, 226-7.

<sup>162</sup> Richard Bedford, Elsie Ho and Jacqueline Lidgard “Immigration in History: A Systems Perspective on International Migration to and from New Zealand” in Deborah Bell and Ian Pool (eds) *The Building Blocks of National Identity: Population in New Zealand’s History* (University of Waikato, Hamilton, 1998) 49.

<sup>163</sup> Smits, above n 156, 27.

from more than 120 countries.<sup>164</sup> This and the 1991 points system placed emphasis on general skills, reflecting a belief in the power of the market and a distrust of state planning.<sup>165</sup> The approach was new, although the ultimate aim of such policies were to strengthen the NZ state's economy. But this 'liberality' was later cut away by various political parties who pressured governments to require of new migrants high English skills. Such English tests uncomfortably echoed past restrictions on non-European applicants.

However, the 1987 IA also brought unintended consequences. At the moment the state required its subjects to transfer their loyalties to a new 'nation', the presence of 'others' became too prominent to be ignored. By the end of the twentieth century, Asia was the key source region for new NZ citizens.<sup>166</sup> These immigrants have become a source of population substitution to offset losses as native NZers migrated overseas, particularly to Australia.<sup>167</sup> Historically, population movement has been from Australia to NZ, but since the 1960s, this trend has been reversed, with more NZers heading to Australia.<sup>168</sup> There are now one in ten NZers in Australia, and NZ has the highest proportion of its population living abroad of all OECD countries.<sup>169</sup> But as 'native' NZers leave, and more immigrants from non-traditional sources arrive, the question of who 'NZers' are and what their history is becomes more problematic.

## Conclusion

An examination of subject and citizenship law in NZ, and institutions associated with it, suggests that there was no revolutionary break from a British-centred framework; 'independence' was a hazy affair, with various acts and statements of obscure effect

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<sup>164</sup> Kate McMillan "Immigration Policy" in Raymond Miller (ed) *New Zealand Government and Politics* (4 ed, Oxford University Press, Auckland, 2006) 639, 642.

<sup>165</sup> Rainer Winkelmann "Immigration Policies and Their Impact: The Case of New Zealand and Australia" in Slobodan Djajić (ed) *International Migration: Trends, Policies and Economic Impact* (Routledge, London, 2001) 1, 12-13.

<sup>166</sup> Jacqueline Lidgard and Richard Bedford "New Zealand's International Migration System at the end of the 20<sup>th</sup> Century: Review and Prospect" (1999) 25 NZ Pop'n Rev 41, 53.

<sup>167</sup> Winkelmann, above n 165, 17.

<sup>168</sup> Frank Holmes *An ANZAC Union?* (IPS Policy Paper No 14, Wellington, 2002), 2.

<sup>169</sup> Jacques Poot "The Quest for People: Population and Economic Development" in James Rowe (ed) *Economic Development in New Zealand* (Ashgate, Aldershot, 2005) 31, 41.



and significance. NZers broadly adhered to British forms of law, but this did not preclude their agency. Old British and settler community interests momentarily coincided: the British had opted for a highly inclusive form of 'subjecthood' for imperial purposes; but NZers, like the other settler communities, modified this to accommodate domestic politics, adopting a much narrower definition of Britishness. This more exclusive definition was bolstered by demographics, assisted migration and strict law immigration laws. In such a context, a narrative in which NZers would remain British seemed persuasive.

In the postwar period, Old British and settler community interests only gradually began to diverge. The norms of the international community began to take hold, leading in two contradictory directions: there were pressures towards both greater inclusiveness and exclusiveness. There was pressure to end ethnic discrimination, and there was a desire to create a national citizenship regime, to be thought uniquely 'national', but actually conforming to an international model of what was considered 'standard'.

The influx of NCW immigrants led to a narrowing of what it meant to be 'British' in nationality and immigration law, excluding the settler communities. In the case of NZ, 'exclusion' from Britain, pressure to conform to international norms, geopolitical concerns, and domestic demographic change (especially Maori urbanisation) have converged to intensify the issue of identity and solidarity: who belongs, and why? The present response is the identification of a NZ 'nation' of equal and identical citizens, a modular form taken from current international practice. Now constitutional history is read to see this form and accompanying laws as inevitable. This form, however, is problematic: it has an unknown scope and history and seems to occlude the issue of how Maori and minorities ought to be understood.

## Chapter 5: The Crown in New Zealand Law

### Introduction

'The Crown' has long served as the lynchpin of NZ's constitution. Discussions about 'the Crown' in its various aspects suggest a peaceful trajectory from colonial institution to local symbol. Bagehot's *the English Constitution*<sup>1</sup> made a distinction between the dignified and efficient parts of the constitution, identifying the monarchy as dignified and Cabinet as efficient. This distinction relied on a belief in evolutionary change: 'tradition' would inevitably be replaced by 'modernity'.<sup>2</sup> Similarly, pan-British discussions about Imperial or Commonwealth constitutional law have tended to focus on various signposts granting or affirming increasing degrees of freedom for the settler communities and peaceful relations between 'periphery' and metropole:<sup>3</sup> there was a movement from something 'traditional' to something 'modern' (i.e., the nation-state).

The nationalist narrative of NZ constitutional history is a clear illustration of this, emphasising the inevitable decline of metropolitan control, localisation and independence, mostly through various 'signposts'. So for instance, one aspect of the Crown, the office of the Governor-General, has often been identified with Britain, an external constraint; and the Governor-General's increasing impotence as evidence of NZ's growing independence.<sup>4</sup> But where this has not happened, the response has been critical: the Governor-General ought to be under 'local' control.

But the 'evolution' of the Crown in NZ was never so neat. It is better to see the hesitant 'trend' towards greater 'localisation' as the by-product of the interactions between NZ domestic politics, NZ's bilateral relationship with Britain, British politics,

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<sup>1</sup> Walter Bagehot *The English Constitution* [1868] (Cambridge University Press, Cambridge, 2001).

<sup>2</sup> David Spring "Walter Bagehot and Deference" (1976) 81 *Am Hist Rev* 524, 527.

<sup>3</sup> See, for instance, Kenneth Wheare *The Statute of Westminster and Dominion Status* (5 ed, Oxford University Press, Oxford, 1953) and Sir William Dale *The Modern Commonwealth* (Butterworths, London, 1983)

<sup>4</sup> RQ Quentin-Baxter "The Governor-General's Constitutional Discretions: An Essay Towards a Re-Definition" (1980) 10 *VUWLR* 289, 300.

and the ever-changing international system. Any 'trend' towards greater 'autonomy' was highly uneven, contingent and sometimes unintended. Moreover, the Whiggish narrative outlined above which treats the history of the Crown as one of the peaceful division of an Imperial Crown into local Crowns ignores the long history of Crown-Maori relations, which can be described as one of ongoing disenfranchisement, conflict, negotiation and accommodation.

### **The British History of the Crown**

The long-term domestic stability and historical continuity of British government has meant that various aspects of the Crown remain entangled, changes having been accommodated politically rather than legally.<sup>5</sup> Where once the Crown stood for the personal monarch, it now also stands for abstract executive government, and/or the state; and while 'democracy' was accommodated by Parliament's seizure of the Crown's executive power, the personal monarch remained to placate rival political elites and later to provide continuity, so that even today in British and settler community political practice executive power is spoken of as exercised by Ministers on behalf of 'the Crown'.

The 'British' Crown has always had an imperial aspect: as the English conquered and absorbed the other territories of the British Isles, the inhabitants became subjects of the English Crown, which in time became the 'British' Crown. Later, Crown rule was adapted to the oceanic expansion of the British Empire. Where land overseas was conquered or ceded, the previous law remained until the Crown altered it; and where land was taken in a 'savage' or 'uninhabited' country, 'Englishmen' carried their law with them.<sup>6</sup> Rule remained personal; and the lines between the 'domestic' and the 'international' have often been blurred. This was most obviously so in the colonial encounter between the British and indigenous people.

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<sup>5</sup> Martin Loughlin "The State, the Crown and the Law" in Maurice Sunkin and Sebastian Payne (eds) *The Nature of the Crown* (Oxford University Press, Oxford, 1999) 33, 34.

<sup>6</sup> See generally Paul McHugh *Aboriginal Societies and the Common Law* (Oxford University Press, Oxford, 2004).

### Maori and the Evolving 'Crown' in the Nineteenth Century

A Maori perspective acts as a counterpoint to the Britannic and nationalist narratives, which portray 'the Crown', particularly in its Governor-General aspect, as evolving from something tyrannical to something relatively benign. The history of Crown-Maori relations, on the other hand, can be seen as the continuing attempts by Maori to maintain their autonomy, and 'the Crown's' attempts to reject, contain and suppress these attempts.<sup>7</sup>

Concerns about growing conflict and instability between colonists and Maori, and the British government's need to allay humanitarian interest groups and justify the imposition of control over NZ led to the Treaty of Waitangi ('the Treaty'). This was signed in 1840 by representatives of the British government and several—but not all—Maori chiefs. The Treaty was consistent with similar treaties and British practice at the time: ostensibly it was aimed at achieving rule by agreement and cession rather than conquest, while granting indigenous inhabitants basic rights.<sup>8</sup>

We noted in an earlier chapter that the Treaty consisted of a preamble and three articles; and there was an English version, and a Maori version, which were not at crucial points direct translations. There are two important matters. The first is that there were serious discrepancies between the English and Maori versions: in the English version of Article One, Maori ceded 'sovereignty', while in the Maori version, 'merely' 'governance'. In the English version of Article Two, Maori retained only possession, while in the Maori version, Maori retained something like 'sovereignty'. That there was a distinction made in the Maori text between *kawananatanga* (governance over a 'protectorate') in Article One and "*rangatiratanga*" (chieftainship) in Article Two showed that Maori probably did not think they were ceding ultimate authority to title; but the English text presumed total submission. As Pocock notes,

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<sup>7</sup> See generally Ranginui Walker *Ka Whawhai Tonu Matou: Struggle without End* (Rev ed, Penguin Books, Auckland, 2004); Richard Hill *State Authority, Indigenous Autonomy: Crown-Maori Relations in New Zealand/Aotearoa 1900-1950* (Victoria University Press, Wellington, 2004); Paul McHugh *Aboriginal Societies and the Common Law* (Oxford University Press, Oxford, 2004).

<sup>8</sup> Sir Kenneth Keith "The Treaty of Waitangi in the Courts" (1990) 14 NZULR 37, 40.

What was at issue was not merely the creation of a Lockean sovereignty with authority to regulate the transfer of lands, but that of a pre-emptive sovereignty with authority to make itself the source of legal title to land.<sup>9</sup>

The second matter is that the Treaty was between Maori signatories and the Queen—not ‘the Crown’. By this time in Britain, Ministers rather than the monarch exercised Crown power, but historical accounts show that British officials and missionaries involved in the drafting and signing of the Treaty emphasised that the Treaty would be a personal pact between Maori and the British Queen.<sup>10</sup> Lieutenant-Governor Hobson (1840-42)<sup>11</sup> described the Treaty as “act of love towards [Maori] on the part of the Queen.”<sup>12</sup> The personal monarch coincided with Maori political conceptions of leadership, based on primogeniture, continuing face-to-face relationships, and the pursuit of *mana*, which could be increased by honouring the guarantees agreed to at the beginning of the Maori-Crown relationship.<sup>13</sup> This was not necessarily an act of British duplicity: one of the themes of Bagehot’s 1868 *The English Constitution* was that the ‘dignified’ and ‘efficient’ parts of the constitution—for instance, the monarchy and cabinet government—coexisted, and were not necessarily as separate as they are today.

The signing of the Treaty guaranteed at most nominal sovereignty, but in practice the settlers had little choice but to allow Maori institutions to continue. As the settler population grew, however, the desire for land increased, and so did Maori suspicion over British and settler intentions. Government was complicated in the early years of the colony by tensions between the Governor—the functional Executive authority in the colony—the settler community, and Maori. The early Governors until the

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<sup>9</sup> JGA Pocock “Law, Sovereignty and History in a Divided Culture: the Case of New Zealand and the Treaty of Waitangi” in *The Discovery of Islands: Essays in British History* (Cambridge University Press, Cambridge, 2005) 226, 237.

<sup>10</sup> Claudia Orange *The Treaty of Waitangi* (Allen & Unwin New Zealand Limited, Wellington, 1987), 56.

<sup>11</sup> See Appendix 2. Dates are references to the period in which the individual served as Governor or Governor-General of NZ.

<sup>12</sup> Janine Hayward *In Search of a Treaty Partner: Who, or What is ‘the Crown’?* (PhD Thesis, Victoria University of Wellington, 1995), 119.

<sup>13</sup> *Ibid*, 118.

appointment of George Grey (1845-53)<sup>14</sup> were hampered by the British government's parsimonious attitude towards colonial finance and so were unable to meet the expectations of Maori or the settlers.<sup>15</sup>

Moreover, the first few NZ Governors struggled with settler colonists until the 1860s because under the various Constitution Acts and Royal Instructions the Governor was given sole control over native affairs. Since land was central to the politics of settlement, and Maori owned most fertile land, the Governor and the growing settler population inevitably came into conflict. The Governor's duty was to protect the natives, and provide civil order: pressure for land threatened both. Maori remained a potential military threat, outnumbering Pakeha until 1858, and even then Maori were superior in military tactics.<sup>16</sup>

The 1839 *Durham Report* recommended that 'responsible government'—that is, self-government—be granted to the Canadian settler colonies, and settler politicians were enthusiastic for something similar in NZ. But Grey was wary of responsible government, mostly because he feared the impact on Maori and their society, and on the order of the colony itself. Thus he had suspended the first 1846 constitution granting responsible government. Even in the early 1850s, there were still only 28,000 settlers and perhaps 100,000 Maori.<sup>17</sup> It was easy for the settlers to fall into a stance in which the Governor was portrayed as autocratic, denying them the 'right' of responsible government.<sup>18</sup> Meanwhile, Maori concerns were soothed by British officials' insistence on the personal nature of the Treaty, thus encouraging Maori to believe that they enjoyed a special relationship with the Queen.<sup>19</sup>

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<sup>14</sup> See Appendix 2.

<sup>15</sup> Gavin McLean *The Governors: New Zealand's Governors and Governors-General* (University of Otago Press, Dunedin, 2006), 29-30; 34-7.

<sup>16</sup> James Belich *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Auckland University Press, Auckland, 1986).

<sup>17</sup> *The Governors*, above n 15, 46.

<sup>18</sup> *Ibid*, 34.

<sup>19</sup> Orange, above n 10, 132.

The transfer of 'responsible government' to the settler colonists in 1852-56—although with the crucial retention of imperial control over native affairs—was done to minimise costs to the British taxpayer.<sup>20</sup> A modicum of 'independence' was 'achieved'—but not entirely through the active efforts of the settlers. More importantly, this shift in the identity of the Crown came as a shock to Maori and led some Maori tribes to appoint a King in 1858, having seen how Pakeha unity provided strength. This became known as the Kingitanga movement: a Western form of political authority adopted by Maori to meet the Pakeha challenge.

However, the Kingitanga movement had a limited power base mostly in the Waikato area. More importantly, Governor Gore Browne (1855-60)<sup>21</sup> saw the election of the Maori King as a symbol of disloyalty to the Queen, and as an obstruction to further annexation of Maori land.<sup>22</sup> A period of low-key wars ensued, initiated by Gore Browne and later Governor Grey, who brought imperial and colonial forces in to smash the Kingitanga movement. The 'NZ Wars' intensified; and by the end of the 1860s the NZ Wars were over, and the Kingitanga movement was broken as a serious challenge to British and colonial authority.

The Kingitanga movement retreated to 'King country', having reached an 'accommodation' with the settler government, but as settler numbers increased, so did the pressure for more land. Further, the escalating costs of the NZ Wars led the British to cede control of native affairs to the settler government. By 1870, the British had withdrawn completely. This effectively meant an intensification of pressure on Maori and their land by 'the Crown'.

As Pakeha outnumbered Maori, and Pakeha control spread over NZ, Maori adopted a new means of resistance: the Kotahitanga movement, a federalist coalition of tribes which formed in the 1880s and culminated in the establishment of a Maori Parliament

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<sup>20</sup> Martti Koskenniemi *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press, Cambridge, 2004), 112.

<sup>21</sup> See Appendix 2.

<sup>22</sup> RJ Walker "The Treaty of Waitangi as the Focus of Maori Protest" in IH Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 263, 271.

in 1892. This was short-lived, however, because of the NZ Liberal government's unwillingness to recognise any rival to the sovereignty of the Crown.<sup>23</sup> Moreover, Maori were drawn away from the Parliament by Crown attempts to channel Maori discontent into other political associations.

In the late nineteenth century, the Treaty and the role of 'the Crown' in the relationship between Pakeha and Maori was held to be irrelevant. As Pakeha dominance became established, the awkward notion of native rights was dealt with by the Native Land Court. Further, the NZ Supreme Court in *Wi Parata v Bishop of Wellington*<sup>24</sup> treated the Treaty as a legal nullity insofar as it purported to cede sovereignty, Prendergast CJ argued, because there was no body of people capable of ceding sovereignty. Subsequent cases took this ruling as definitive.<sup>25</sup> No longer was the Crown subject to native consent: in NZ law there was only 'the Crown'. By mid-twentieth century, native title in NZ law was presumed to have been extinguished generally.<sup>26</sup>

This paralleled a shift in international law away from seeing such treaties as evidence of native sovereignty, and instead focusing on the fact of occupation. Treaties with 'natives' were seen as legally unimportant, only useful in 'demonstrating' European benevolence and the apparent lack of opposition to European rule. This was partly an acknowledgement of European empires' failure to 'tame' the 'uncivilised' indigenous peoples, but later it was because competition between the Great Powers intensified, and what mattered was effective control; humanitarian ideals and the civilising mission fell away.<sup>27</sup> The overall effect was to delegitimise indigenous peoples and native treaties in international law.

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<sup>23</sup> See generally Lindsay Cox *Kotahitanga: The Search for Maori Political Unity* (Oxford University Press, Auckland, 1993).

<sup>24</sup> [1877] 3 NZ Jur (NS) SC 72.

<sup>25</sup> See generally Paul McHugh *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991).

<sup>26</sup> *Re Ninety-Mile Beach* [1962] NZLR 461 (CA).

<sup>27</sup> *Civiliser of Nations*, above n 20, 148-155.



### **1880-1950: A Shift in the Roles of the Governor-General**

By the 1870s, the Governor already had little real power. The purpose of the Governor in Crown colonies was to protect imperial interests, but the British government saw that office-holders had only intensified Britain's entanglement in NZ's wretched affairs. With the withdrawal of British troops by 1867, and the transfer of control over native affairs, effective government passed from the Governor to settler politicians.

Moreover, party politics were beginning to emerge in NZ in the late nineteenth century, particularly after the 1875 abolition of provincial government reduced one source of division. The Governor remained relatively important in terms of choosing a government, but the office no longer had any potential to govern. During the late nineteenth and early twentieth centuries, those holding the office of Governor (and from 1907 onwards, Governor-General) did on occasion exercise their powers to reserve or disallow certain local acts (such as legislative restrictions on Asian migrants) which had the potential to impact upon British relations with other Great Powers.

In the latter half of the nineteenth century, the British monarch took on a more explicit imperial and ceremonial role as her political role declined. This was because of the vast expansion of the British Empire (particularly in the British settler communities), increasing competition overseas, and domestic pressures (with the rise of the working and middle classes challenging the rule of the aristocratic elite).<sup>28</sup> Queen Victoria and later monarchs served as a symbol of continuity and stability, providing something for those within Britain and Greater Britain to identify with. By the turn of the century, the imperial Crown was at its heyday. This would be mirrored at the settler community level.

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<sup>28</sup> David Cannadine "The Context, Performance and Meaning of Ritual: The British Monarchy and the 'Invention of Tradition', c. 1820-1977" in Eric Hobsbawm and Terence Ranger (eds) *The Invention of Tradition* (Cambridge University Press, Cambridge, 1983) 101.

Before 1914, dynastic states constituted the majority of the members of the world system,<sup>29</sup> emerging states seeking recognition choosing monarchs as a badge of respectability. The rising Great Power the USA was self-consciously republican, but it was not yet considered a model for the settler communities: Britain was still thought to be the strongest power within the world system. NZers maintained a Britannic nationalism’—“an aggressive sense of cultural superiority as the representatives of a global civilisation then at the height of its prestige.”<sup>30</sup> There was little sense that NZ would one day be an independent nation-state separate from Britain.

This Britannic nationalism and the desire to emulate and replicate British institutions manifested itself in the office of the Governor-General. Vice-regal posts had become attractive to the aristocracy as land-based wealth and other means of securing status declined in Britain. From the end of the nineteenth century till the mid-1950s, appointees to the office of NZ Governor-General were unambiguously ‘British’ and either from the aristocracy or the military. NZers and Britons adhered to ‘ornamentalism’, the imperial version of Bagehot’s dignified constitution: a belief in a layered, ceremonial society with a royal or aristocratic head at its apex.<sup>31</sup>

The office-holders during this period were mostly imperialists themselves. Many furthered the imperial (or British) cause with NZ politicians as willing collaborators: Baron Islington (1910-12),<sup>32</sup> encouraged NZ PM Ward to advocate imperial federation; Viscount Jellicoe (1920-24)<sup>33</sup> aided PM Massey to formulate NZ naval policy;<sup>34</sup> and Viscount Galway (1935-41)<sup>35</sup> persuaded PM Savage to follow the British line of opposing Edward VIII’s marriage.<sup>36</sup>

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<sup>29</sup> Benedict Anderson *Imagined Communities* (2 ed, Verso, London, 1991), 22.

<sup>30</sup> John Darwin “A Third British Empire? The Dominion Idea in Imperial Politics” in Judith Brown and W Roger Louis (eds) *Oxford History of the British Empire, Vol 4: The Twentieth Century* (Oxford University Press, Oxford, 1999) 64, 72.

<sup>31</sup> David Cannadine *Ornamentalism: How the British Saw Their Empire* (Penguin Books, London, 2001).

<sup>32</sup> See Appendix 2.

<sup>33</sup> *Ibid.*

<sup>34</sup> *The Governors*, above n 15, 201-2.

<sup>35</sup> See Appendix 2.

<sup>36</sup> *The Governors*, above n 15, 234-5.

The Balfour Declaration and the 1931 Statute of Westminster ('SOW') have been seen as landmarks in Britannic and nationalist narratives, even though the Declaration consisted of well-worn phrases long in use,<sup>37</sup> and simply formalised already-established convention. The Declaration in essence stated that the Dominions were equal in status, although not in function; and that they were 'freely associated' within the Commonwealth, but that all acknowledged allegiance to the Crown. It was a momentary compromise, placating Canadian, Irish and South African desires for greater independence but also Antipodean conservatism. It also met British interests: balancing the need to transfer responsibility for local issues arising from the settler communities' growing regional interests and the need to maintain unity.<sup>38</sup>

The Declaration and later the SOW are purported to have affected the Crown in Commonwealth law in a number of ways. First, the Crown was said to be the sole remaining link between the settler communities and the UK. For the British, Crown unity meant that in times of war the settler communities would act in concert with the British. But this was only an assertion: previous practice had already made this assumption questionable;<sup>39</sup> moreover, if members were 'freely associated' they could also *disassociate*.

The Governor-General's role in the settler communities was also redefined in 1926. This had ostensibly come about because of the 1925 'King-Byng' crisis. Canadian PM Mackenzie King had been refused a dissolution of Parliament by the Governor-General, Lord Byng, who had thought the opposition leader could form a government. King had resigned but the opposition was unable to form a government. Because of the Declaration, the Governor-General became the equivalent of the monarch in

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<sup>37</sup> Robert Holland "Britain, Commonwealth and the End of Empire" in Vernon Bogdanor (ed) *The British Constitution in the Twentieth Century* (Oxford University Press, Oxford, 2003) 631, 639.

<sup>38</sup> "Britain, Commonwealth and the End of Empire", 639. But contrast Latham's 1937 article in which Latham denied that law could provide any basis for political unity: RTE Latham "The Law and the Commonwealth" in WK Hancock *Survey of British Commonwealth Affairs, Vol I: Problems of Nationality 1918-1936* (Oxford University Press, London, 1937) 510, 521.

<sup>39</sup> See, for instance, the 1923 Chanak crisis, where the settler communities, save NZ, refused to respond to British calls for military action to stop the spread of Turks into the Greek interior; or the Locarno Treaties, which most of the settler communities were against, because they feared being sucked into another European war: see generally Robert Holland *Britain and the Commonwealth Alliance 1918-1939* (Macmillan, London 1981), esp chapters 1-3.

Britain, and lost the role of being the representative of the British government. In theory, then, this meant greater independence for the settler communities: the Governor-General was not serving two 'masters'. In effect, the office was at the mercy of local governments—the Governor-General became a “rubber stamp”.<sup>40</sup>

But to focus on the Declaration and the SOW would be to ignore that various practices had emerged over the 1920s which suggested that talk of Crown unity was already superficial, such as the separate negotiation and signing of treaties by the settler communities. More importantly, like much of Commonwealth 'law', talk of the 'indivisibility of the Crown' obscured as much as it clarified: relations between the settler communities and Britain had always been bilateral in nature rather than multilateral. That is, much depended on the historical relationships between settler community and metropole, the circumstances at the time, and domestic politics in the countries involved.

In terms of domestic settler community politics, there was the problem of constitutional legitimacy: all settler communities depended on acts of the Imperial Parliament, and all their governments were cast in monarchical form. Canada and South Africa had relatively large non-British populations, whose support local politicians could not be certain of. This lack of consensus on the nature of the state made the monarchy the only possible focus of loyalty until at least the end of WW2.<sup>41</sup> Put differently, the formal enactments did not have the 'localising' effects imputed to them.

More specifically to NZ, domestic politics had long been the province of politicians strongly loyal to Britain, and would continue to be until at least the 1950s. Perhaps being so far away from the metropole intensified their loyalty to Britain, so NZ politicians refused to change their ways. Nor was there any anti-monarchical minority population for opposition politicians to appeal to: Maori lacked effective political

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<sup>40</sup> JR Mallory “Canada” in David Butler and DA Low (eds) *Sovereigns and Surrogates: Constitutional Heads of State in the Commonwealth* (Macmillan Academic and Professional Ltd, Basingstoke, 1991) 41, 42.

<sup>41</sup> “A Third British Empire?”, above n 30, 77.

representation and besides, perceived themselves as in a relationship with 'the Crown' through the Treaty.

Other factors also explain why NZers seemed so willing to retain 'old' forms. For instance, one reason NZ long delayed appointing a 'native' to the office—one common marker of 'independence'—was that governments deliberately chose to appoint Governors (later Governors-General) 'on the cheap'. A Governor was expected to have independent means to supplement the low salary offered by the NZ government.<sup>42</sup> Requests for salary increases were often rebuffed, as this would have required Parliamentary consent, potentially attracting criticism. Thus the official salary set in 1873 remained unchanged until 1957, and NZ governments continued to supplement holders' salaries by raising allowances and perks, masking the actual cost to the NZ taxpayer.<sup>43</sup>

There was also the international context to take into account. In the 1930s with the international economic crisis and worsening interstate relations, questions of constitutional reform were laid aside. The response to growing international insecurity on the part of the settler communities was oscillation between emphasizing the imperial link and the necessity of imperial cooperation, and assertions of self-sufficiency.<sup>44</sup> NZ, in foreign policy at least, tended to favour imperial cooperation because of Japan's rise in the Pacific.<sup>45</sup> The economic crisis also discouraged the establishment of those attributes of sovereignty, like overseas embassies.

It was not the formal constitutional changes which made the office of the Governor-General seem less of a threat but rather the domestic political context in which the Governor-General operated. First, the Legislative Council (the upper house of Parliament) ceded control to the House of Representatives in the late nineteenth century; and second, party government and discipline had been consolidated by the

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<sup>42</sup> Angus Ross "New Zealand Governors-General in the Inter-War Years" in GA Wood and PS O'Connor (eds) *WP Morrell: A Tribute* (University of Otago Press, Dunedin, 1973) 203, 208.

<sup>43</sup> *The Governors*, above n 15, 206.

<sup>44</sup> *Britain and the Commonwealth Alliance*, above n 39, 174-5.

<sup>45</sup> W David McIntyre "Imperialism and Nationalism" in Geoffrey Rice (ed) *The Oxford History of New Zealand* (2 ed, Oxford University Press, Auckland, 1992) 337, 346.

mid-1930s. Both developments reduced the potential for constitutional crises, and thus the need for vice-regal involvement in NZ politics.<sup>46</sup>

Thus, even though in the 1920s the Governor-General in imperial constitutional theory was transformed, old practices were preserved in NZ. So, for instance, while in 1926, the Governor-General's role as the official channel of information between Britain and the settler communities ended generally, it was maintained in NZ until 1941.<sup>47</sup> Similarly, while after 1930 it was accepted Commonwealth practice that Governor-Generals could be appointed by local ministers, this did not happen in NZ until the 1960s. The 'archaic' nature of the office stemmed not so much from a lack of nationalism but rather from a mixture of external circumstances and domestic developments which made the office marginal: there was no need to modify the office because it was not regarded as a threat.

In the interwar years, the British had insisted that republicanism and membership in the Commonwealth was incompatible: there had to be allegiance to the Crown. This was an attempt to contain Irish nationalism, but also to guarantee the final compliance of the settler communities generally, particularly in wartime: it was, in short, a response to the unsettled international situation.<sup>48</sup> After WW2, Britain had refused to allow Eire and Burma to remain within the Commonwealth because of their republican status. But India was not so easily dismissed, given the dramatic new world system of two new superpowers. Both Britain and the settler communities agreed that India had to be included were Britain to maintain her Great Power status. Economically, India was Britain's largest creditor; geopolitically, Britain did not want to see India turn to communism or against the West. There was a fortunate coincidence of interests: Nehru also wished for India to join the Commonwealth.<sup>49</sup>

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<sup>46</sup> *The Governors*, above n 15, 12.

<sup>47</sup> *Ibid*, 188.

<sup>48</sup> John Darwin *Britain and Decolonisation: The Retreat from Empire in the Post War World* (Palgrave Macmillan, Basingstoke, 1988), 150.

<sup>49</sup> *Ibid*, 152.

The stumbling block being India's republican status. For what previously linked all Commonwealth members together on paper was their allegiance to a common Crown: to allow in a republic would end this. The settler communities were noticeably discomfited: few wanted any change impairing their arrangements with Britain, and not just the Antipodean settler communities.<sup>50</sup> Peter Fraser,<sup>51</sup> the NZ PM, worried that the change might fatally weaken the Commonwealth.<sup>52</sup> Fraser was devoted to royalty, being the senior Commonwealth leader. Moreover, there was NZ's security arrangements to be considered. NZ had quickly grown disenchanted with the new UN; the US appeared unwilling to enter into a collective security arrangement;<sup>53</sup> and by 1948 the Cold War had begun. The international environment had become noticeably more hostile. In 1949, Fraser argued the destiny of New Zealand was "wholly and completely bound up" in the British Commonwealth.<sup>54</sup> Domestically, there was still strong imperial sentiment, and Fraser's Labour Government was declining in popularity after 14 years in power. The two parties battled over who was more loyalist.<sup>55</sup> Ironically, Fraser's insistence on conscription, necessary to meet Commonwealth commitments, was one reason why Labour lost the election.<sup>56</sup>

In the 1949 London Declaration, India recognised the King as Head of the Commonwealth, but no more. Later, as an afterthought, in 1953, it was decided that the Royal title would be locally variable, although all members agreed to include the phrase "Head of the Commonwealth" in relevant legislation. In the Britannic narrative, the entry of India, and later other former 'non-white' colonies signified the beginning of a new 'multiracial' Commonwealth based on sovereign equality. But the main point here is that the key formal link—allegiance to the common Crown, and an apparent symbol of 'Britishness'—which had held the 'old' Commonwealth members together

<sup>50</sup> W David McIntyre *British Decolonization, 1946-1997* (Macmillan Press, Basingstoke, 1988), 116.

<sup>51</sup> See Appendix 2.

<sup>52</sup> WD McIntyre "Peter Fraser's Commonwealth: New Zealand and the Origins of the New Commonwealth" New Zealand Institute of International Affairs *New Zealand in World Affairs, Vol I: 1945-1952* (New Zealand Institute of International Affairs, Wellington, 1977) 39.

<sup>53</sup> *Ibid*, 87.

<sup>54</sup> Bruce Brown *New Zealand Foreign Policy in Retrospect* (New Zealand Institute of International Affairs, Wellington, 1970), 10.

<sup>55</sup> Harshan Kumarasingham "The 'New' Commonwealth 1947-1949: A New Zealand Perspective on India Joining the Commonwealth" (2006) 95 Round Table 441, 449.

<sup>56</sup> Keith Sinclair *A History of NZ* (4 ed, Penguin, Auckland, 1991), 287.

was dissolved to further British interests and to respond to the transformed international environment.

### **1900-50: Maori and the Crown**

The period 1891-1912 saw the advent of party politics in NZ.<sup>57</sup> Maori had the experience of watching the power of the state shifting back and forth between rival groups, and it was hard to see how their *tinio rangatiratanga* and land could be protected without constant authority. The systematic alienation of Maori land by 'the Crown' (the Crown-in-Parliament) continued to be controlled by the political parties of the day, who sought to use Maori land to fuel economic growth and stave off settler discontent. The annexation of Maori land for settler purposes was achieved through purchase, legislation and the Native Land Court. This dispossession was rapid: after the 1860s NZ Wars, Maori still held the major portion of the North Island, 16 million hectares to the Crown's 10 million; but by 1936 the Maori share had dropped to 5 million. In the same period, the Maori population rose from 40,000 in 1900 to 82,000 in 1936.<sup>58</sup>

Maori insistence on *tinio rangatiratanga* continued, but was stymied by the Crown's unstinting insistence on assimilation.<sup>59</sup> The Maori quest for autonomy involved constant reorganisation and attempts to embody *rangatiratanga*. This was partly a response to the Crown's more subtle strategies. Maori 'resistance' took various forms. For instance, the Young Maori Party's most prominent members took the four Maori seats in Parliament and sought to promote Maori autonomy or ameliorate harsh policies, adapting Crown policies and institutions to their own ends. The Crown's usual tactic was to adopt a pose of being willing to listen, agreeing to examine Maori grievances; but the proposed solutions mostly involved incorporation and further integration rather than any recognition of Maori autonomy.

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<sup>57</sup> David Hamer *The NZ Liberals: the Years of Power* (Auckland University Press, Auckland, 1988).

<sup>58</sup> Ranginui Walker "Maori People since 1950" in Geoffrey Rice (ed) *The Oxford History of New Zealand* (2 ed, Oxford University Press, Auckland, 1992) 498, 499-500.

<sup>59</sup> See generally Hill, above n 7.



Maori continued to see 'the Crown' as the personal monarch and as the other treaty partner. Four Maori deputations were made to Queen Victoria and King George between 1882 and 1924. In 1882 and 1884, a Maori chief and later the Maori King travelled to Britain to petition the Queen on various breaches of the Treaty by the local NZ government. Both petitions were rejected: these were matters for the NZ government to determine.<sup>60</sup> In 1914 the Maori King Te Rata<sup>61</sup> led another deputation, but was only given an audience with King George V provided he would not raise politically contentious matters.<sup>62</sup> Finally, in 1924, Ratana,<sup>63</sup> a charismatic Maori leader who eventually formed a parliamentary alliance with Labour, also attempted to meet the King but was rejected.<sup>64</sup>

Maori could treat the Governor-General with great respect as the representative of the monarch, although much depended on the individual appointee. In the twentieth century, for instance, Baron Bledisloe (1930-35)<sup>65</sup> played a pivotal role in improving Pakeha-Maori relations. Maori had respected Bledisloe greatly as he encouraged Maori to maintain their identity—although this was because he thought national pride underpinned imperial cooperation rather than being inconsistent with it.<sup>66</sup> Bledisloe began the process of reconciliation with the Maori King as well. But Bledisloe's greatest contribution to NZ was his purchase and restoration of the then run-down site upon which the Treaty had been signed; initiating the practice of Governor-Generals visiting Waitangi on the anniversary of the Treaty's signing.

British responses to Maori, however, were mostly dismissive. On the one hand, the British capitulated to NZ colonial governments in ensuring that Maori deputations were rejected. On the other hand, a favourable hearing of a Maori case in British courts might unintentionally provide succour for many years: so, for instance, the

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<sup>60</sup> Orange, above n 10, 205-216.

<sup>61</sup> See Appendix 2.

<sup>62</sup> Orange, above n 10, 228.

<sup>63</sup> See Appendix 2.

<sup>64</sup> Orange, above n 10, 232.

<sup>65</sup> See Appendix 2.

<sup>66</sup> *The Governors*, above n 15, 220-4.

Privy Council in *Wallis v Attorney-General*<sup>67</sup> touched a sensitive nerve by reminding the NZ courts that the Treaty could provide an independent basis for legal claims.

Legally, Maori expectations that ‘the Crown’—British or otherwise—would one day acknowledge its Treaty obligations were kept alive by the doctrine of the indivisible Crown. For the first half of the twentieth century, the apparently indivisible Crown presented in theory a basis for claims for violations of the Treaty. The British had insisted upon the Crown’s indivisibility throughout the 1920s and 1930s to ensure cooperation in wartime: but it is doubtful any thought was given to the implications of this for the settler communities. Such decisions formed the basis of a Maori narrative of NZ constitutional history which saw no end in sight for a British Crown.

The case of *Hoani Te Heu Heu v Aotea District Maori Land Board*<sup>68</sup> suggested that the Crown had already become localised. The Maori tribe Ngati Tuwharetoa had its property administered by statute-appointed agents (Aotea). Aotea had entered into some unwise contractual arrangements which then fell through. Despite doubts about Aotea’s legal liability, the NZ Parliament passed an act in 1935 enjoining Aotea—and thus Ngati Tuwharetoa—to repay the debts of one particular investor. Ngati Tuwharetoa’s chief, Hoani Te Heuheu alleged that the 1935 act was contrary to the Treaty, since the Crown-in-Parliament effectively created a charge against their land without the tribe’s consent. The case was rejected by the PC which held that it could not question a statute; the Treaty had not been incorporated into domestic law, and therefore it had no legal effect. Put differently, the Crown in its domestic person was kept separate from the Crown in its international persona.

### **1950-2000: The Hesitant Localisation of the New Zealand Crown**

The second half of the twentieth century is a story of the hesitant localisation of the Crown in NZ. At first glance, the change in the nature of the ‘imperial’ or ‘Commonwealth’ Crown meant little for NZ. NZ continued to support Britain

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<sup>67</sup> [1903] NZPCC 23.

<sup>68</sup> [1941] AC 308. For more on the hostility of NZ governments to the action, see Alex Frame “Hoani Te Heuheu’s Case in London 1940-41: An Explosive Story” (2006) 22 NZULR 148.

militarily. NZ's Pacific security anxieties were alleviated by the 1951 ANZUS defence agreement. But with decolonisation and British encouragement, 'new' countries entered the Commonwealth over next two decades. In 1948, the Commonwealth numbered eight; by 1969, 30.<sup>69</sup> In 1971, only ten countries recognised the Queen as Head of State and there were 17 republics; by 1991 this figure was respectively 16 and 27.<sup>70</sup> This also meant the end of the 'Britishness' and intimacy which had previously characterised the association. By the early 1960s, loyalty to the Queen as a common factor was played down and 'multiracialism' was played up.<sup>71</sup> Decolonisation, colonial and racial problems dominated Commonwealth meetings: Britain, and later NZ, became subject to ostracism. In this way, the trajectory of the Britannic narrative seemed less and less persuasive. But as this aspect of the imperial Crown ended, it lingered on in the person of the Monarch.

The royal tour of Elizabeth II in 1953-54 throughout NZ was very much like royal tours in other settler communities.<sup>72</sup> An estimated two-thirds of all NZers saw the Queen in person (in Australia it was three-fourths).<sup>73</sup> Local elites scrambled to be associated with the Queen's person as a means of enhancing status. Maori, particularly the Maori King, wished to meet the Queen to express their loyalty and win acceptance as NZers, but the National Government feared Maori protests, and tried to prevent this. The Government had wished to present Maori as a slightly exotic element, or as evidence of NZ having the most harmonious race relations in the world. The Queen's visit was an opportunity for the Queen and her other realms to see NZ: thus there were displays of British loyalty (the waving of the Union Jack), and attempts to present NZ as a land of agricultural prosperity and a nation of hardy men and family-oriented women.

<sup>69</sup> *New Zealand Foreign Policy*, above n 54, 41.

<sup>70</sup> WD McIntyre "From Singapore to Harare: New Zealand and the Commonwealth" in Bruce Brown (ed) *New Zealand in World Affairs, Vol 3: 1972-1990* (Victoria University Press, Wellington, 1999) 85, 87.

<sup>71</sup> Krishnan Srinivasan *The Rise, Decline and Future of the British Commonwealth* (Palgrave Macmillan, Basingstoke, 2005), 121-2.

<sup>72</sup> Jock Phillips *Royal Summer: The Visit of Queen Elizabeth II and Prince Philip to New Zealand 1953-54* (Daphne Brasell Associate Publishers, Wellington, 1993); and see, for instance, Phillip Buckner "The Last Great Royal Tour: Queen Elizabeth's 1959 Tour to Canada" in Phillip Buckner (ed) *Canada and the End of Empire* (UBC Press, Vancouver, 2005) 66.

<sup>73</sup> *Royal Summer*, above n 72, 8.

But the Queen's visit also revealed that the popular perception of the Crown monarch did not coincide with local legal arrangements. NZ's constitutional order did not rely on the Queen herself, but rather her representative, the Governor-General. During the preparations for the first visit to NZ by a British sovereign in late 1953, it was discovered that under the New Zealand Constitution Act 1852 the Queen had no right to exercise the powers of the sovereign: all power was vested in the Governor-General instead. The Royal Powers Act 1953 was quickly enacted, declaring that any power conferred on the Governor-General could be exercised by the Queen.<sup>74</sup> Although NZ might have been said to have replicated the Westminster legal order, this was not always so. Nor was NZ alone in this: in late 1953 Australia had to pass a similar statute for the Queen's Australian tour.<sup>75</sup>

The main point here is that at least at this point the monarch was still seen as 'NZ's' monarch as well. 'The Crown' may have become divisible in theory with the 'new' Commonwealth, but this had not filtered down to the populace: this divisibility was masked by talk of unity within the person of the monarch.

The great success of the 1953-54 Royal Tour and the fanciful idea of a new 'Elizabethan age' was short-lived.<sup>76</sup> The British were beginning to draw back from a broad use of the monarch in Commonwealth affairs. For instance, British officials in the late 1950s encouraged certain African colonies to become republics rather than remain 'loyal' to the Queen, in order to spare the Queen further embarrassment.<sup>77</sup> More generally, British officials were beginning to question to what extent a 'British' institution should be used to accommodate 'foreign' policy. The balance between the need to adapt to the needs of the Commonwealth and the fear of undermining the monarchy's value as a specifically British institution slowly tipped towards the latter

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<sup>74</sup> Section 2(1) Royal Powers Act (NZ).

<sup>75</sup> Royal Powers Act 1953 (Cth).

<sup>76</sup> Brian Harrison *The Transformation of British Politics, 1860-1995* (Oxford University Press, Oxford, 1996), 320-321.

<sup>77</sup> Phillip Murphy "The African Queen? Republicanism and Defensive Decolonisation in British Tropical Africa, 1958-64" (2003) 14 20<sup>th</sup> Cent Brit His 243.

in the 1960s.<sup>78</sup> Put differently, the considerations of a 'British Isles' territorially-based nationalism began to take priority over declining imperial interests.

Other events illustrated the contraction of the monarchy. In the 1960s, the relative economic decline of Britain led to a search for indigenous factors to explain why this was happening. Many on the British Left took an exceptionalist turn, arguing that economic failure was a result of a deferential, hierarchical culture and outmoded institutions remaining from Britain's unique, incomplete bourgeois revolution, preventing the modernisation of the British state and economy.<sup>79</sup> This critique, centering on an imperial culture and an anachronistic monarchy, intensified with the advent of Thatcher and later the Falklands War.<sup>80</sup> However, the persuasiveness of such claims depended on Britain's continued economic decline. By the beginning of the 21<sup>st</sup> century, Britain's economy had improved relative to its Continental neighbours, which suggested that the monarchy was not the obstacle critics had said it was, and that the previous period of decline was caused by other contingent factors—if there had been decline at all.

This new 'British Isles' understanding coexisted with the old understandings, which were repeated overseas. The Queen's longevity reinforced this illusion of continuity. Only the eruption of new events and the British response which revealed the old ideas to be moribund. In 1987, for instance, there was a coup in Fiji in which the democratically-elected government was overthrown. The Fijian Governor-General agreed to dissolve Parliament and recognise the new government. The Queen had refused to meet the deposed, but lawfully elected Fijian Prime Minister. The Fijian crisis illustrated (were it not already obvious) that the Queen could not be relied upon to defend the constitutional order of her 'overseas realms'.<sup>81</sup>

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<sup>78</sup> Phillip Murphy "Breaking the Bad News: Plans for the Announcement to the Empire of the Death of Elizabeth II and the Proclamation of Her Successor, 1952-67" (2006) 34 JICH 139.

<sup>79</sup> See for an overview Stephen Howe "Internal Decolonisation? British Politics since Thatcher as Post-colonial Trauma" (2003) 14 20<sup>th</sup> Cent Brit His 286. See also Tom Nairn *The Break-Up of Britain* (New Left Books, London, 1977).

<sup>80</sup> See, for instance, David Marquand *The Unprincipled Society* (Cape, London, 1988).

<sup>81</sup> FM Brookfield "Republican New Zealand: Legal Aspects and Consequences" [1995] NZ L Rev 310, 313.

Localisation in NZ continued unevenly. Even where settler communities did act on the impulse to appoint a 'native-born' Governor-General, as in Australia in 1931, this did not establish a 'trend'. For the next two Australian Governors-General were both British aristocrats;<sup>82</sup> and after an interlude of an Australian appointee in 1947,<sup>83</sup> three British appointees followed.<sup>84</sup> Only in 1965 that a convention of appointing a native-born Australian became accepted;<sup>85</sup> for Canada, 1952.<sup>86</sup> The 'lateness' of native-born appointments in these two countries was due to WW2: a non-British appointee would not be politically popular in wartime.

But there was also the matter of local politics, and a Britannic nationalism which lingered on far longer than many thought. The person of the Queen and the concept of the Crown could be used to legitimate or cloak changes which might otherwise be seen as contrary to previous practice. For instance, the various acts which are seen to constitute NZ's independence are never so clear in detail. The Seal of New Zealand Act 1977, which created a new public seal for NZ, was passed while the Queen was touring NZ, and was preceded by speeches insisting that there was "no disagreement ... in our belief in the Crown as the cornerstone of the Commonwealth, and as the living embodiment in the person of the Sovereign of the ties that bind us. ...". At the same time, the new public seal was seen as "a strengthening and a confirmation of the personal link between the Sovereign, as Queen of New Zealand, and this realm."<sup>87</sup> The nationalist narrative ignores these details.

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<sup>82</sup> Alexander Hore Ruthven, 1<sup>st</sup> Baron Gowrie (1936-45) and Prince Henry William Frederick Albert, Duke of Gloucester (1945-7). See generally the Australian Governor-General's website: [www.gg.gov.au/html/homepage.html](http://www.gg.gov.au/html/homepage.html) (last accessed 21 June 2008).

<sup>83</sup> Sir William John McKell (1947-53).

<sup>84</sup> Field Marshal Sir William Joseph Slim (1953-60), William Morrison (1960-61) and William Sidney (1961-65).

<sup>85</sup> Richard Casey (1965-69): see his biography at the Australian Governor-General's website: <http://www.adb.online.anu.edu.au/biogs/A130426b.htm> (last accessed 21 June 2008).

<sup>86</sup> Vincent Massey (1952-59): see his biography at the Canadian Governor-General's website: [http://www.gg.ca/gg/fgg/bios/01/massey\\_e.asp](http://www.gg.ca/gg/fgg/bios/01/massey_e.asp) (last accessed 21 June 2008).

<sup>87</sup> (1977) NZPD 4813 (28 February), per Rt Hon RD Muldoon.

There is debate<sup>88</sup> over who was the first 'NZ' Governor-General: Bernard Freyberg (1946-52),<sup>89</sup> Arthur Porritt (1967-72),<sup>90</sup> or Denis Blundell (1972-77).<sup>91</sup> Both Freyberg and Porritt had been brought up in NZ but spent most of their working life overseas. Both, then, had connections to NZ but in their working lives a connection to Britain: the former as a general and the latter as the royal physician. More recently, Blundell, a former Supreme Court judge has been seen as the first native-born 'resident' NZ Governor-General. But the deeper point is that the requirements for who counts as a 'NZer' have tightened over time. It was no longer enough to simply have a connection to NZ: only a NZer with a long history of residence in NZ was acceptable. But it is worth noting that Blundell professed a strong attachment to Britain, hoping that a member of the royal family could be appointed after him.<sup>92</sup>

Financial troubles would continue to plague NZ office-holders until the late 1980s. Governor-Generals had been forced to rely on their own finances, obtain loans or even sell off official transport; and the inflationary 1970s meant that the Governor-General's salary was continually losing parity with comparable positions. Requests for salary increases were still met by a patchwork of supplementary concessions and allowances for fear of opposition criticism. As concessions were made, this had unintended consequences: for instance, once the NZ Treasury agreed to pay for staff, it became more attractive to employ locals, who were cheaper, and so gradually the Governor-General's British staff were slowly replaced by NZers.<sup>93</sup> Localisation took place, but sometimes it was not intended.

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<sup>88</sup> See the differing accounts in CC Aikman and JL Robson "Introduction" in JL Robson (ed) *New Zealand: The Development of Its Laws and Constitution* (2 ed, London, Stevens & Sons, 1967) 1, 17 fn19; Anthony Wood "New Zealand" in David Butler and DA Low (eds) *Sovereigns and Surrogates: Constitutional Heads of State in the Commonwealth* (Macmillan Academic and Professional Ltd, Basingstoke, 1991) 108; and Philip Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001), 147.

<sup>89</sup> See Appendix 2.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> Sir Denis Blundell "Some Reflections upon the Office of Governor-General in New Zealand" (1980) 10 VUWLR 197, 205.

<sup>93</sup> *The Governors*, above n 15, 257.

However, now that the Governor-General was a NZer appointed by the NZ Parliament the business of government seemed a self-enclosed circle. Discomfort about the closed nature of NZ politics increased when in 1977, PM Muldoon controversially appointed as Governor-General, with little consultation, the former PM and his own political party leader, Sir Keith Holyoake (1977-80).<sup>94</sup> The resulting protest by both Labour and some within National led to a shortened term for Holyoake and the drafting of new rules requiring consultation with the opposition before appointment.<sup>95</sup>

In 1983, the 1917 Letters Patent issued by the British government constituting the office of the NZ Governor-General was repealed and replaced. The decision to draft a new Letters Patent had gained impetus from the 'Whitlam-Kerr crisis' in 1975 in which the Australian PM Gough Whitlam had been controversially dismissed by the Governor-General Sir John Kerr. However, NZ party politics and a wariness of triggering further constitutional reform delayed its passage.<sup>96</sup> In essence the 1983 Letters Patent removed various moribund provisions, further localising the office of the Governor-General.<sup>97</sup> Thereafter followed various statutes updating the (NZ) Crown's new status and ensuring consistency with the new Letters Patent.<sup>98</sup>

The decline of the Governor-General's power and status was associated under the nationalist narrative with NZ's 'independence'. It was thus something to strive towards; but once the formal trappings of the office had been localised some were left wondering what role the Governor-General ought to have.<sup>99</sup> Patriation did not mean 'liberalisation', but rather the formalisation of control by the 'local' government. Moreover, the party system appeared to be breaking down: there was evidence of

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<sup>94</sup> See Appendix 2.

<sup>95</sup> See Barry Gustafson *My Way: A Biography of Robert Muldoon* (Auckland University Press, Auckland, 2001).

<sup>96</sup> *The Governors*, above n 15, 288-90.

<sup>97</sup> Joseph, above n 88, 161-3.

<sup>98</sup> The Royal Powers Act 1983, the Administrator's Powers Act 1983 and the Acts Interpretation Act 1983, all later repealed by the Constitution Act 1986.

<sup>99</sup> "Constitutional Discretions", above n 4; and Anthony Wood "New Zealand" in David Butler and DA Low (eds) *Sovereigns and Surrogates: Constitutional Heads of State in the Commonwealth* (Macmillan Academic and Professional Ltd, Basingstoke, 1991) 108.



declining numbers voting for the main parties, greater voter volatility and a growing dissatisfaction with the political system.<sup>100</sup>

Commentators fixed upon two roles: the Governor-General's ceremonial role, as something approximating a symbol of the nation, and the office's constitutional role, as a final constitutional bulwark. After labouring under the teleology that the Governor-General was something to be viewed with suspicion, the Governor-General was now something to be valued. Quentin-Baxter put it in these terms: "[I]n 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."<sup>101</sup>

The 1993 adoption of a new electoral system of proportional representation was likely to produce minority and coalition governments.<sup>102</sup> The greater uncertainty of who was to advise the Crown meant that the office of the Governor-General as a politically neutral arbiter once again became important. Thus almost all those appointed to the office since the adoption of the Mixed Member Proportional Representation system (MMP) have been former judges.<sup>103</sup>

### **1950-2000: The Maori Renaissance and the Construction of the Neo-Liberal State**

In 1945, one quarter of all Maori were rural; by 1975, three quarters were urban.<sup>104</sup> This new urban Maori population provided the basis for a Maori renaissance; a rethinking of how Maori ought to confront Pakeha domination, and drawing upon the

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<sup>100</sup> Peter Aimer "The Changing Party System" in Hyam Gold (ed) *New Zealand Politics in Perspective* (2 ed, Longman Paul, Auckland, 1987) 260; and Peter Aimer "The Future of the Party System" in Raymond Miller (ed) *New Zealand Politics in Transition* (Oxford University Press, Auckland, 1997) 186.

<sup>101</sup> "Constitutional Discretions", above n 4, 313.

<sup>102</sup> See generally Alan Simpson (ed) *The Constitutional Implications of MMP* (Dunmore Press, Palmerston North, 1998).

<sup>103</sup> Michael Hardie Boys (1996-2001), former NZCA justice; Dame Silvia Cartwright (2001-6), former High Court justice; and Anand Satyanand (2006-8), former District Court judge and Ombudsman. Biographies are available at <http://www.gg.govt.nz/> (last accessed 21 June 2008).

<sup>104</sup> "Maori People since 1950", above n 58, 500.

experience and approaches of other indigenous peoples.<sup>105</sup> One sign of this could be seen in the rise of protests on Waitangi Day (the day commemorating the signing of the Treaty and ostensibly the beginning of a 'partnership' between Maori and Pakeha).

In the 1970s, NZ Governor-Generals came to dread the Waitangi 'celebrations' as they and the celebrations became the focal point of Maori protest.<sup>106</sup> Governor-Generals were often put in a dilemma: as representative of the Sovereign, they were expected to meet their subjects. Maori elders would deliberately issue an invitation; and the NZ government would order the Governor-General not to attend. On occasion, the Governor-General attended against the wishes of the government.

The Waitangi Tribunal was established in 1975 as result of more Maori protests. Its statutory objective was to deal with Maori grievances, although the Tribunal's jurisdiction was limited to post-1975 violations of the Treaty, and it could only make recommendations to the government. More importantly, the Tribunal's empowering statute (the Treaty of Waitangi Act 1975) identified 'the Crown' as the entity against which claims could be made, although 'the Crown' was nowhere defined within the Act. By the early 1980s the Tribunal began to establish itself as an important institution in NZ politics, couching its findings in terms of the treaty partners, Maori and 'the Crown'. NZ politicians responded by using the language of the Crown, shifting between the Crown as government of the day and Crown as something which represented the perpetual succession of governments.<sup>107</sup> This depended on audience and circumstance: the Crown as government of the day was often used to allay Pakeha fears; the Crown as the perpetual succession of governments for Maori.<sup>108</sup>

Many Maori made a distinction between the government of the day which exercises the power of the Crown and 'the Crown' as something which stands above and beyond the government of the day. This may be seen in a remark by Sir James Henare:

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<sup>105</sup> See generally *Aboriginal Societies and the Common Law*, above n 6, chapters 7-8.

<sup>106</sup> *The Governors*, above n 15, 307.

<sup>107</sup> See generally *In Search of a Treaty Partner*, above n 12.

<sup>108</sup> *Ibid*, 98-99.

It's a very moot point whether the Maori people do love Governments in New Zealand because of what they have done in the past ... The Maori people really have no great love for governments but they do for the Crown.<sup>109</sup>

'The Crown' here is something independent of day-to-day government, separate from local rule keeping government honest.<sup>110</sup> But in the nationalist narrative, the Crown's manifold changes have all been towards greater localisation: the 'unification' of nation and state.

In the twentieth century, the vast expansion and growing complexity of the state and its objectives led to a shift in vocabulary from the more personal 'King/Queen' to the more abstract 'Crown'.<sup>111</sup> It was no longer thought appropriate to describe government, legislative and executive power in terms of a person.

The doctrine of the indivisible Crown was formally acknowledged. In 1982, two cases were taken by Canadian Indian tribes before the British courts in response to the Canadian federal government's moves to patriate the Canadian constitution. In *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*,<sup>112</sup> the UK Court of Appeal held that 'the Crown' was now separate and divisible: any treaty obligations 'the Crown' owed to Canadian Indians had passed to the Crown in right of Canada. The 1931 SOW was identified as being crucial to the Crown's divisibility.<sup>113</sup> In *Manuel v Attorney-General*,<sup>114</sup> the British courts rejected the claim made by Canadian Indian tribes that the Canada Act 1982 (UK) was invalid because it had not been passed with their consent. In effect, the British courts disavowed any responsibility of the British state for past actions taken by a 'Crown' thought previously indivisible. The NZ courts also recognised the

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<sup>109</sup> Quoted in Andrew Stockley "Parliament, Crown and Treaty: Inextricably Linked?" (1996) 17 NZULR 193, 214 [1987].

<sup>110</sup> Janine Hayward "Republicanism and the Treaty of Waitangi" in Robert Patman and Chris Rudd (eds) *Sovereignty under Siege? Globalization and New Zealand* (Ashgate Publishing Ltd, Aldershot, 2005) 157, 162; but see Andrea Tunks "Mana Tiriti" in Luke Trainor (ed) *Republicanism in New Zealand* (Dunmore Press, Palmerston North, 1996) 113.

<sup>111</sup> Loughlin, above n 5, 36.

<sup>112</sup> [1982] 1 QB 892 (CA).

<sup>113</sup> Ibid, 917, per Lord Denning MR.

<sup>114</sup> [1982] 3 All ER 786; [1982] 3 All ER 822 (CA).

divisibility of the Crown in a controversial 1976 case,<sup>115</sup> and later during the 1988 *Spycatcher* litigation.<sup>116</sup> Thus while for one group of people British recognition of the divisible Crown doctrine signified acknowledgement of their 'independence', to another group it marked the end of another potential avenue of redress.

In the last quarter of the twentieth century 'the Crown' in its domestic persona underwent a number of transformations. The reasons for this are complex and are dealt with in more detail in other chapters,<sup>117</sup> but a primary causal factor was the impact of the application of economic theories to government.<sup>118</sup> This necessitated a vast reorganisation and disaggregation of executive government to increase 'efficiency' and accountability. Often described as a 'retreat' from the state, it was more the imposition of a different kind of control upon executive government, notably through public finance, best labelled with the ambiguous term 'governance'.<sup>119</sup> And although such reforms were aimed at increasing control and accountability, the impact upon the various aspects of the Crown was often unintended.

Public sector reform in the late 1980s also led to the perennial issue of the financing of the Governor-General being finally resolved, although this was not without ambiguity. In 1990 control of administration was transferred to the Department of the Prime Minister and Cabinet, although the office itself remained constitutionally separate.<sup>120</sup>

More importantly, the Crown's nature shifted again, and once more without the consent of Maori. In the late 1980s, many responsibilities were devolved to local government under the Local Government Act 1991 and the Resource Management Act 1991. But many Maori did not view local government but rather the national

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<sup>115</sup> *Re Ashman* [1985] (1976) NZLR 224.

<sup>116</sup> *Attorney-General (UK) v Wellington Newspapers Ltd* [1988] 1 NZLR 129 (CA).

<sup>117</sup> See chapters 2 and 7.

<sup>118</sup> See generally Michael Taggart "The Nature and Functions of the State" in Peter Cane and Mark Tushnet (eds) *The Oxford Handbook of Legal Studies* (Oxford University Press, Oxford, 2003) 101.

<sup>119</sup> Janet McLean "New Public Management New Zealand Style" in Paul Craig and Adam Tomkins (eds) *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford University Press, Oxford, 2006) 124.

<sup>120</sup> *The Governors*, above n 15, 313-4.

government as the treaty partner. Devolution would hamper the ability of 'the Crown' to meet its treaty obligations.<sup>121</sup> But for the most part, Maori protests were ignored.<sup>122</sup>

The reorganisation of executive government also involved the corporatisation of various state departments, with the intention of future privatisation. As part of this process, state assets—and in particular, land—were to be transferred or vested in these new 'State Owned Enterprises' ('SOEs') under the State-Owned Enterprises Act 1986. A clause was inserted in the SOE Act to meet the concerns of Maori, stating that the Crown was not to act in a manner inconsistent with the principles of the Treaty. In the landmark case of *New Zealand Maori Council v Attorney-General* (hereafter, the *Lands* case),<sup>123</sup> several Maori groups sought orders to prevent the transfer of land from the Crown to SOEs, fearing that once land was transferred it would be impossible to return to Maori. The NZCA held that without establishing a system to consider whether such transfer violated the principles of the Treaty or affected Maori claims before the Waitangi Tribunal any Crown transfer of land would be unlawful. The effect of the *Lands* case was to halt all transfers of land to SOEs until a system of protection was established, but the more profound effect was to raise the status of the Treaty and identify 'the Crown' as the institution against which all Maori claims could be made.

Thus, the transformation of 'the Crown' was not all one-sided in favour of executive government. Many Maori cases, beginning with the *Lands* case, took place against a context in which NZ government was transformed under the influence of the New Public Management practice of creating private rights regimes as a means of regulation. As the government created such regimes (privatisation, corporatisation), Maori used the opportunity to claim rights over former 'public goods'.<sup>124</sup> Similarly, as the state relinquished some of its roles, such as targeted health services, various Maori

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<sup>121</sup> Janine Hayward "The Treaty of Waitangi, Maori and the Evolving Crown" (1998) 49 Pol Sci 153, 160-2.

<sup>122</sup> *Ibid.*, 171.

<sup>123</sup> [1987] 1 NZLR 641 (CA).

<sup>124</sup> "New Public Management", above n 119, 143.

groups moved into the gap.<sup>125</sup> In some respects, then, the retreat of ‘the Crown’ has given Maori more agency. More generally, it can be seen that Maori fortunes have often linked with changes in the nature of the Crown.

### **A New Zealand Republic?**

“Decolonisation effectively universalised the European State as the only form of government that would provide equal status in the organised international community.”<sup>126</sup> This conception of the nation-state was decidedly republican. By the 1980s, less than one-tenth of the world lived under a monarchical political system: there was more pressure to conform to a republican standard.<sup>127</sup> As the center of attention shifted from Europe to the Asia-Pacific region, a common republican argument raised in Australia and NZ was the need to fit in with its neighbours.

At an ideological level, it made less sense in the late twentieth century to adhere to the ‘rule’ of a monarch. All states now claim themselves to be democracies because we are in a modern age where everything is, or ought to be, a product of demystified and rational human will, the work of ‘the people’ themselves. We are ‘democracies’—ruled by ourselves for ourselves—because we transparently ought to be.<sup>128</sup> The presence of a monarch, based so much on locality, tradition, and pomp, seems inconsistent with this rule of the people. This has intensified with the end of the Cold War, signalling the end of any viable alternative to constitutional representative democracy. At the same time, however, this has increased the desire for expressions of authenticity, particularly in the form of nationalism.<sup>129</sup>

In Britain, the monarchy has continued to accommodate itself to the times. It is now considered a thoroughly British institution, its European and imperial past mostly ignored. Despite the frequently voiced hopes encouraged by New Labour’s

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<sup>125</sup> Lindsey Te Ata o Tu MacDonald and Paul Muldoon “Globalization, Neo-liberalism and the Struggle for Indigenous Citizenship” (2006) 41 *Aus J Pol Sci* 209.

<sup>126</sup> *Civiliser of Nations*, above n 20, 175.

<sup>127</sup> Harrison, above n 76, 319.

<sup>128</sup> John Dunn *Western Political Theory in the Face of the Future* (Rev ed, Cambridge University Press, Cambridge 1993), 12.

<sup>129</sup> Martti Koskeniemi “The Future of Statehood” (1991) 32 *Harv Int’l LJ* 397.

‘programme’ of constitutional reform, the royalty continues. This may be an unintended consequence of New Labour’s reliance on the idea of choice: if the monarchy survives, it is because ‘the people’ have ‘chosen’ to allow it to continue.<sup>130</sup> The monarchy in Britain remains a remarkably malleable symbol; but in line with most countries in the world, the monarch as Head of State is now a highly local figure.

Republicanism has had a mixed reception in the settler communities. Canada has never been overtly republican, perhaps because of a need to distinguish themselves from the US. South Africa early on became a republic, because of the strength of its Afrikaner population. Australia has a tradition of republicanism, often thought to stem from the Irish who migrated there.<sup>131</sup> But republicanism only began to gain popular momentum with the outrage felt by many over the 1975 Whitlam-Kerr crisis. Even then, it was not until 1993 that Australian PM Paul Keating (an Irish Catholic) attempted to establish a republic by 2000—which ultimately failed.<sup>132</sup>

There has been until recently little desire for a republic in NZ.<sup>133</sup> In NZ, present-day republicanism might be equated to ‘anti-monarchism’, since most debate centres not on the establishment of a republic of citizens, but rather the abolition of the monarchy and the concept of the Crown.<sup>134</sup> Very little time is spent on discussing what a republic might mean for law and politics. A republic is usually defined as a state based on popular sovereignty, in which all public officers are chosen directly or indirectly by the people.<sup>135</sup> On this basis NZ is not a republic, since in legal terms NZ’s sovereignty stemmed from the UK Parliament (although from 1986 onwards it may be said to be self-legitimizing) and NZ’s ultimate Head of State is the (British)

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<sup>130</sup> Glen Newey “About as Useful as a String Condom” 25(2) LRB (23 January 2003).

<sup>131</sup> Mark McKenna “Ashes of Republicanism, Dust of Empire” (2004) 63 *Meanjin* 175, 181. But note Mark Francis “Review Article: Histories of Australian Republicanism” (2001) 22 *Hist’y Pol Thought* 351.

<sup>132</sup> For two contrasting views, see Hon Michael Kirby “The Australian Referendum on a Republic—Ten Lessons” (2000) 46 *Aus J Pols Hist* 510; and George Williams “Why Australia Kept the Queen” (2000) 63 *Sask L Rev* 477.

<sup>133</sup> Luke Trainor “Introduction” in Luke Trainor (ed) *Republicanism in New Zealand* (Dunmore Press, Palmerston North, 1996) 7.

<sup>134</sup> For a monarchist’s view, see Noel Cox “Republican Sentiment in the Realms of the Queen: the New Zealand Perspective” (2001-2) 29 *Manit LJ* 120.

<sup>135</sup> George Winterton “A New Zealand Republic” in Alan Simpson (ed) *The Constitutional Implications of MMP* (Dunmore Press, Palmerston North, 1998) 204, 204.

Queen. But this was hardly the complex republicanism with a relatively ancient lineage described by JGA Pocock or Quentin Skinner, which grappled with the problems of virtue, corruption and the preservation of a community through time.<sup>136</sup> It was rather a response to changed circumstances in which Britain was no longer regarded as ‘home’ or the centre of a world system: it is a manifestation of the desire to be like other states: national and republican.

Still, it came as a surprise when in 1994, NZ PM Jim Bolger suggested the abolition of the monarchy. Why Bolger made this proposal is still unclear, given that Bolger was the leader of the main NZ conservative party (the National Party). Some pointed to Bolger’s Irish background; others to the free-market ideology which the National Party had embraced by the early 1990s. Some Maori wondered if this was not an underhand attempt to evade the obligations of the Treaty, as Treaty claims had begun to make the Pakeha electorate uneasy by the mid-1990s.<sup>137</sup> But interest in establishing a NZ republic probably took its inspiration from the republican campaign ‘across the pond’ in the early 1990s onwards.

The arguments for and against a republic are well-known and rather staid.<sup>138</sup> For republicans, it is absurd that NZ should still have a ‘foreign’ head of state; it is inconsistent with NZ independence and its national identity, which is not British; a hereditary head of state is inconsistent with NZ values like egalitarianism; there is the cost of supporting the foreign Queen on her tours in NZ; the NZ constitution ought to stand on firmer grounds than it presently does; and any obligations of the Treaty will pass to the NZ state. Against this, anti-republicans argued that NZ already has independence, a national identity, and an egalitarian culture ‘in spite’ of having a foreign head of state; a local head of state will cost just as much or even more; the

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<sup>136</sup> See JGA Pocock *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton University Press, Princeton, 1975); Quentin Skinner *Liberty Before Liberalism* (Cambridge University Press, Cambridge, 1998); and more recently Adam Tomkins *Our Republican Constitution* (Hart Publishing, Oxford, 2005).

<sup>137</sup> Andrea Tunks “Mana Tiriti” in Luke Trainor (ed) *Republicanism in New Zealand* (Dunmore Press, Palmerston North, 1996) 113, 119.

<sup>138</sup> Nigel Cox and Raymond Miller “Head of State” in Raymond Miller (ed) *New Zealand Government and Politics* (4 ed, Oxford University Press, Melbourne, 2006) 130, 134-6.



constitution is fine as it is; and the shift to a republic would entail a constitutional crisis, since the Treaty is between Maori and the Crown.

More simply, the republican argument has been about self-determination, a recognition of a self-evident national independence and a desire to fit with a desired nation-state model. The anti-republican argument is less easy to characterise, its constituents being a mixture of pro-British supporters, conservatives and Maori of varying political affiliations all linked by the idea of the Crown as Queen.

Bolger's suggestion gained little support from either the other political parties, left and centrist, or from the populace as a whole. The National Government shelved the proposal, fearing the loss of its traditional constituency. Something of the ambivalence towards the republican issue in NZ can be seen from Bolger's justification for the proposal:

The big reason will be that we want to be independent New Zealanders. This will not happen because of any lack of affection or love for our Queen in London, but because the tide of history is moving in one direction.<sup>139</sup>

But here was the nationalist narrative in action: being a republic was simply a historical 'trend' which NZ ought to follow.

Bolger assumed that a simple referendum of the people plus an act abolishing the Crown would suffice, but before a vote could be organised, there had to be a theory of who belonged to an already-existing nation.<sup>140</sup> Bolger's presumed that Maori and Pakeha were already one nation: they were all 'NZers'. It is fair to say Maori are not yet a nation,<sup>141</sup> being divided by tribe, custom and will,<sup>142</sup> but what has united them is the Treaty and their identity as partner of the Crown. Maori claims on 'the Crown' are

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<sup>139</sup> Jim Bolger, quoted in Stockley, above n 109, 193.

<sup>140</sup> Martti Koskenniemi "National Self-Determination Today: Problems of Legal Theory and Practice" (1994) 43 ICLQ 241, 263.

<sup>141</sup> See MH Durie "Mana Maori Motuhake: The State of the Maori Nation" in Raymond Miller (ed) *New Zealand: Government and Politics* (Oxford University Press, Melbourne, 2003) 488.

<sup>142</sup> Andrew Sharp "Blood, Custom, and Consent: Three Kinds of Maori Groups and the Challenges They Present to Governments" (2002) 52 UTLJ 9.

not merely legal claims, but in a sense pre-political, constitutive of the state itself: both 'partners' are constituted by the Treaty.<sup>143</sup> A republic, and its legal counterpart, an entrenched constitution, tend to efface diversity and so are perceived as a threat to Maori assertions of their essential difference.<sup>144</sup>

By the beginning of the twenty-first century, the teleology supplied by the nationalist narrative seemed to be intensifying. Thus Philip Joseph could say in relation to the establishment of a republic in 2007: "The question is "when", not "if"."<sup>145</sup> But at the same time, any attempt to remove the Treaty or the Crown was seen as an attack on Maori identity. It was no longer possible to simply remove the Crown and begin 'anew' without triggering the issue of how best to organise and regulate the relationship between Pakeha and Maori. More generally, a republic was seen as an unnecessary change: one of the criticisms of the establishment of the NZ Supreme Court was that it was a 'Trojan horse' for a republic.<sup>146</sup>

## Conclusion

There is a tendency to think of the Crown's development as evolutionary, but this is wrong. Rather, what has happened is that older conceptions of the Crown have been overlaid with newer ones, the former never quite being erased by the latter. For Britain, the Crown has shifted from being the person of the Monarch to something more abstract and impersonal, first to meet the exigencies of local rule; later to accommodate the fact of British empire; and finally to meet the requirements of a territorially-bound nation-state. The concept of the Crown has changed to ensure its legitimacy, but older claims to legitimacy still linger.

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<sup>143</sup> "Law, Sovereignty and History", above n 9; and Janet McLean "Divergent Legal Conceptions of the State: Implications for Global Administrative Law" (2005) 68 L & Contemp'y Probs 167.

<sup>144</sup> See James Tully *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, Cambridge, 1995), 62-70.

<sup>145</sup> Philip Joseph *Constitutional and Administrative Law in New Zealand* (3 ed, Brookers, Wellington, 2007), 145.

<sup>146</sup> See the parliamentary debates over the establishment of the NZSC: see, for instance, [2003] 611 NZPD 8989, per Hon Georgina Te Heu Heu.

These changes have been interpreted in NZ in different ways by different narratives. A previous Britannic narrative saw the (British) Crown as always there, the lynchpin of both international and domestic orders. A later narrative is equally Whiggish, telling a story of the Crown's slow localisation and increasing marginalisation, gradually being supplanted by 'the people' of NZ. This narrative is strongly domestic, emphasising the agency of the 'locals', imputing change to local action or the lack of change to events or actors 'outside'; and ignoring the extent to which the impetus for change may come either from the 'outside' or as an unintended result of events domestic or international. This history is also teleological: there is a direction to this change, the end-point being a republic, a Crown-less nation-state of homogenous citizens. This signifies the end of external constraint and total autonomy.

Another narrative, a Maori one, is almost Tory. Here, Maori fortunes and misfortunes are linked to transformations in the nature of the Crown. This stands in opposition to the nationalist narrative because it insists on the Crown's centrality, and because time does not move 'forward'. Many changes in the Crown are not seen as steps to 'freedom', but the continuation of constraint, continued Maori dispossession. The ideal end-point of a Crown-less nation-state of homogenous citizens is seen as not as a movement towards freedom but rather further restraint.

## *Chapter 6: Some Constitutional Issues at Mid-Twentieth Century*

### **Introduction**

With the adoption of the Statute of Westminster in 1947, NZ ostensibly had complete legal sovereignty. The early post-war period—the 1950s-60s—is usually treated as a period of relative peace and stability, and it is often assumed that there was relative satisfaction with NZ's constitutional arrangements. This was true, but there were also attempts made to enact a bill of rights and a written constitution. These attempts have been noted, but it is difficult for the nationalist narrative, or any kind of Whig narrative, to explain why such attempts were made, and to a lesser extent, why such attempts failed to excite interest.

The aim of this chapter is to set out some of the understandings of NZ's constitutional arrangements at mid-century—particularly as they related to rights, and to provide a contrast with later understandings, which treated NZ's constitutional arrangements as inadequate. Although NZ had acquired legal independence, this did not signify a 'break' with previous understandings of NZ's constitution. There was still a desire to identify NZ's constitution with the British constitution, but this did not mean there was complacency about NZ's constitution. Indeed, it was NZ's newly-acquired 'independence' and the abolition of the Legislative Council which triggered discussions about a bill of rights and a written constitution. Ultimately, parliamentary sovereignty and the principle of representation made it difficult to envision to certain kinds of constitutional change, but there was also the absence of alternative models, and of an international dimension which could provide a basis for argument in favour of reform. NZers continued to presume that the model of constitutional government they ought to follow should be British.

### **The 1952 Report of the Constitutional Reform Committee**

The first call for a bill of rights was linked with the abolition of the second house of Parliament—the Legislative Council ('the Council'). This requires some background. As early as 1941, the relatively-new National Party (then the

Opposition) had been advocating the Council's abolition: it was a useful means of attacking the then-reigning Labour government. The Council was for much of its history functionally useless.<sup>1</sup> Established by the 1852 Constitution Act, appointments to the Council were lifetime appointments. It could introduce new bills and require the amendment of bills introduced in the General Assembly. However, it had been rendered toothless when the Liberal Party passed legislation in 1891 amending the period of membership from life to a seven year period.<sup>2</sup> Thereafter it had become a bastion of party patronage. By the 1930s, the Council was a rubber-stamp: no new bills were introduced by Council members and no bills were rejected by the Council.<sup>3</sup>

The National Party leader, Sidney Holland,<sup>4</sup> introduced a private member's bill intent on abolition in 1947, as a means of embarrassing the Labour government. The complicated twists and turns which followed were the result of the manoeuvres of both established political parties, both of whom saw little point to the Council, but did not wish to be seen as the ultimate author of its abolition. Holland withdrew the bill after the Labour Government's insisted that the 1931 Statute of Westminster ('SOW') had to be ratified first, which would give the NZ Parliament the power to amend the 1852 Constitution: the Council was established under section 32, a 'reserved' provision of the 1852 Act. The need to amend the 1852 Constitution Act was debatable, but PM Peter Fraser<sup>5</sup> seized the opportunity to adopt the SOW.<sup>6</sup> The Labour Government passed two separate acts in 1947, marking the beginning of the NZ Parliament's legal 'independence'—the NZ Parliament's apparent 'sovereignty' to make and unmake whatever laws it wished, without external constraint.<sup>7</sup> However, this was treated at the time with some

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<sup>1</sup> See generally WK Jackson *The New Zealand Legislative Council: A Study of the Establishment, Failure and Abolition of an Upper House* (University of Otago Press, Dunedin, 1972).

<sup>2</sup> Legislative Council Act 1891.

<sup>3</sup> JF Northey "An Experiment in Unicameralism" [1958] PL 265, 267.

<sup>4</sup> See Appendix 2.

<sup>5</sup> Ibid.

<sup>6</sup> Angus Ross "New Zealand and the Statute of Westminster" in Norman Hillmer and Philip Wigley (eds) *The First British Commonwealth: Essays in Honour of Nicholas Mansergh* (Frank Cass and Co Ltd, London, 1980) 136.

<sup>7</sup> The Statute of Westminster Adoption Act 1947 (NZ) and the New Zealand Constitution Amendment (Request and Consent) Act 1947 (NZ). A third statute—the New Zealand Constitution Amendment Act 1947 (UK) was then passed by the UK Parliament in 1947, repealing the 1857 Constitution Amendment Act and granting the NZ Parliament the power to repeal any part of the 1852 Constitution.

ambivalence: it was suggested that despite NZ gaining the full power to make law, there was still a link between Britain and NZ.<sup>8</sup> This was because of the dominance of Diceyan thinking in NZ: it was difficult to conceive of a Parliament being able to voluntarily limit itself. This insistence that NZ and Britain were still linked had the effect of mollifying the strong imperial sentiment which still existed amongst NZers, and perhaps contributed to the belief that there was still a British path to follow.

In late 1947, special committees were set up in both houses of Parliament to examine the possibility of abolishing the upper house—another move by Labour to avoid embarrassment.<sup>9</sup> Although the Council recommended its own retention, no agreement was reached between the two houses. The proposal to abolish the Council “as presently constituted” remained on the National Party’s electoral manifesto.

In 1950, the National Party became the government. The Legislative Council was ‘swamped’ with 25 new members appointed by the National Party, who dutifully pushed through a bill abolishing the Council, and in spite of a discomfited public which expressed little support and a hostile media.<sup>10</sup> Why members of the National Party had agreed to the Council’s abolition varied: some saw the Council as redundant; others saw abolition as a prerequisite to the creation of a new, improved second chamber; most saw abolition as a political move rather than as something ‘constitutional’.<sup>11</sup>

The Legislative Council was abolished on the understanding by many National Party members that abolition would be followed by a reconstitution of a second chamber (hence the qualification, “as presently constituted”)—although PM Holland had refused to state what form this reconstruction would take. But after abolition, there was no sign of reconstruction, causing some anxiety.<sup>12</sup> It is worth

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<sup>8</sup> Peter Oliver *The Constitution of Independence: the Development of Constitutional Theory in Australia, Canada and New Zealand* (Oxford University Press, Oxford, 2005), chapter 8.

<sup>9</sup> Joint Constitutional Reform Committee *Statements Prepared for the Joint Constitutional Reform Committee* (Legislative Department, Wellington, 1948).

<sup>10</sup> Jackson, above n 1, 194.

<sup>11</sup> Ibid, 186.

<sup>12</sup> Ibid, chapter 17.

noting that the ‘British’ way of organising a constitution—a bicameral parliamentary political system with an unwritten constitution, an informal set of arrangements based on consensus, convention and custom—was still considered highly desirable. The attractiveness of the British constitution was based on Britain’s global status and relative domestic peace, which was still perceived internationally as impressive in spite of WW2. It was seen to have provided greater long-term domestic stability than any other Western country’s constitutional arrangements and was widely admired, not just by the settler communities but by Europeans and Americans.<sup>13</sup>

After securing the Council’s abolition, PM Holland announced the formation of a select committee, the Constitutional Reform Committee (‘CRC’) to examine alternatives to the Council. Labour refused to take part, and so the CRC consisted only of National Party members. In 1952, the CRC delivered its *Report*. It had heard thirty-four submissions, twenty-seven of which had come from lawyers. Despite this, the committee found most of the submissions unhelpful, since little was proffered in terms of practical solutions.<sup>14</sup>

The CRC was almost unanimous in deciding that a new upper house (a ‘Senate’) should be created, with the key power of delay. The Senate’s composition would be based on nomination rather than election, but members serving for an electoral term. But the *Report* is more important because it indicated how NZ politicians (and the legal profession) at the time understood rights and NZ’s constitutional arrangements.

At various points in the *Report*, the CRC talked of the need for ‘checks and balances’ within the constitution, and an upper house as one means of securing this. Historically, the NZ Parliament was considered a colonial legislature with delegated authority, ultimately subject to the Imperial Parliament. The basis for an upper house was to ‘check’ the colonial legislature, ensuring it did not overstep its limited authority. With the adoption of the 1947 Statute of Westminster, however, what remained was simply a Parliament with absolute power. Indeed, the CRC

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<sup>13</sup> Anthony King *The British Constitution* (Oxford University Press, Oxford, 2007), 64.

<sup>14</sup> *Report of the Constitutional Reform Committee* [1952] NZPD I.18, 4, 10.

stated, in NZ there was “now no Constitution in any real sense of that term”.<sup>15</sup> This was contrasted with Britain, which still had a ‘constitution’, the CRC said, although it was also unwritten and flexible.<sup>16</sup>

Much of the discussion took place within a Diceyan framework.<sup>17</sup> Dicey, the most influential legal scholar of British constitutional law for most of the twentieth century, saw the British constitution as being built on Parliamentary sovereignty, the rule of law, and convention. Parliamentary sovereignty meant that Parliament in theory could pass any law it wanted without fear of competition, but this seeming absolutism was to be kept in check by a separation of powers (Parliament was a self-correcting mechanism consisting of carefully balanced parts and reflecting a balance within society) and an ethical class which practised self-restraint.<sup>18</sup> The arguments of the proponents of the Senate could be seen in this light. There was the need for an institutional check on Parliament in light of the assumption of legal independence. This was because NZ lacked the ethical class noted above—and perhaps was threatened by the emergence of a workers’ party; and because of the apparent weakening of the separation of powers—thus the talk about the need for institutional checks and balances, and the silence on rights. This suggested that the (ideal) ‘English’ constitution outlined by Dicey was in danger of collapse.

It is also worth noting that little reference was made to the US. Where this was done, the US was treated as ‘just’ another country: it was not the symbol of what it was to be ‘modern’; it was not seen as an exemplar, something which ought to be followed. The frame of reference was rather the Commonwealth.<sup>19</sup>

However, the CRC conceded the time had already passed when restrictions could be placed on Parliament. Sovereignty had passed to the NZ Parliament: Parliament

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<sup>15</sup> Ibid, 17.

<sup>16</sup> Ibid, 17-18.

<sup>17</sup> AV Dicey *Introduction to the Law of the Constitution* (8 ed, Liberty Fund, Indianapolis, 1982 [1915]).

<sup>18</sup> Martin Loughlin *Public Law and Political Theory* (Oxford University Press, Oxford, 1992), 140-152.

<sup>19</sup> 1952 *Committee Report*, above n 14, 13-14.



could not be expected to fetter its “newly-found” freedom and authority.<sup>20</sup> From this concession all other conclusions in the CRC’s *Report* followed. The CRC admitted at several points that to recommend an upper house which could trammel the lower house was impractical: no government would entertain such a proposal.<sup>21</sup> For instance, different terms of office for the two houses might lead to a situation where the members of an ousted party reigned in the upper house, while members of the victorious party had a majority in the lower house. This was a situation which no government could be expected to tolerate. It would lead to a situation where there was no effective use of the absolute sovereignty of Parliament. Power had to be set in one location, not several.

Thus, it was better to justify the establishment of the proposed Senate as a supplement to the existing legislative process. The CRC recommended that the Senate be allowed to delay legislation for a period of up to two months; that senators be elected by nomination; and could use their position and expertise in the legislative process. Senators were to be members of the main select committees dealing with legislation. In short, the CRC conceived of the Senate’s role as non-adversarial, almost administrative in nature.

The CRC discussed the matter of a written constitution in two appendices. Having had one upper chamber abolished so easily, some advocates of reestablishment had argued any new chamber ought to be entrenched. They argued for a ‘written’ constitution, in which modification or abolition of it was only possible via a special amendment procedure. For the CRC, however, a constitution could only be created in a certain number of ways: imposed from above by the Imperial Parliament; by a contractual agreement of ‘constituent members’ who mutually consented to being bound together; and by the NZ Parliament, imposing upon itself a set of rules in an act of ‘self-denial’.

Imposition by the UK Parliament was rejected. A ‘contractual approach’ to the creation of a constitution was treated with some seriousness, but ultimately rejected. The CRC seemed curiously ignorant of US theories of constitutional

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<sup>20</sup> Ibid, 19.

<sup>21</sup> Ibid, 19; 27; 31.

creation, conflating the Lockean idea of a constitution as a compact with the idea of federalism. The CRC thought that for such a constitution to be created, a number of states within NZ would first need to be formed. From this set of states a compact could be negotiated—the constitution. This was not practicable, the CRC said. It would require from Parliament a complete surrender of its authority, which was unlikely to happen. Moreover, a federal-style system had existed in NZ for a brief period (1852-75), but in light of complaints that there was already ‘too much government’ in NZ, the creation of more legislatures would almost certainly be rejected.<sup>22</sup>

The CRC did not comment on the implications of a ‘contractual’ approach either—for instance, how such an approach might influence the concept of ‘rights’. Presumably, it would follow from a contractual approach that Parliament would only have such legitimacy as the people gave it; and the people retained to themselves a certain set of rights. None of this was discussed. The CRC members were solely concerned with their orders of reference—finding a new form for a second chamber.<sup>23</sup>

The rejection of the contractual approach also stemmed from the way that the CRC members saw representation. Throughout the *Report*, the CRC noted that while NZers were the fount of all sovereignty, it was not something they could wield themselves in any meaningful manner. The CRC had earlier stated in a Diceyan, or Burkean passage:

Agency presupposes specific, defined or limited authority; but a Member of Parliament has an authority that is far wider and very different from that. Service presupposed a power vested in a master to direct and control the actions of his servant, but no Member of Parliament is under any duty to obey the orders of any of his constituents.<sup>24</sup>

Indeed, the CRC referred rather sceptically to “the ‘so-called “sovereign” people””.<sup>25</sup> There was no room for rights. It was only through a parliamentary exercise of sovereignty that rights and liberties could be protected. Again, it was

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<sup>22</sup> Ibid, 38.

<sup>23</sup> Ibid, 4.

<sup>24</sup> Ibid, 16. See Dicey, above n 17, 27-29.

<sup>25</sup> 1952 *Committee Report*, above n 14, 5.

envisaged that any dissatisfaction in government could be dealt with through the vote; 'the people' were not seen to have any role in the working of government.

Implicitly, representation was acknowledged to be imperfect. The CRC talked of the possibility of minorities being at the mercy of a majority, but no mention was made of Maori.<sup>26</sup> There were vague references to the rights and duties of the citizen, but these were throwaway lines. In short, the CRC's view was that remedies for abuse of 'the people's' delegated authority to rule were limited to recourse to the ballot box.

Such a view was unsurprising, given widely-held views of representation at the time. The ascent of disciplined political parties in the first half of the twentieth century discouraged 'constitutional' reform in NZ (and in Britain): political parties thought of themselves as the best means through which 'the people' could speak.<sup>27</sup> It is worth noting that in NZ the National Party had been formed in 1936; and only won its first election in 1949; the Labour Party although established in 1916, won its first election in 1935. The ascent of political parties was also the manifestation of a more general phenomenon in the West: the consolidation of 'organised modernity', which saw the quest for the expansion of autonomy or freedom as best served through collective forms rather than by individual action.<sup>28</sup> An institution which split 'the people's' voice was potentially harmful.

Indeed, the principle of representation was so important that it was thought necessary to 'entrench' essential elements of it when passing the Electoral Act 1956. Section 189 of the 1956 Act provided that six provisions relating to parliamentary terms, the age and means of voting, and the Representation Commission were amendable only by a 75% majority of the House of Representatives, or by a simple majority in a referendum. Politicians were unanimous in entrenching these provisions—that is, making these provisions subject to a more stringent amendment procedure and thus making them more

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<sup>26</sup> Ibid, 14.

<sup>27</sup> Vernon Bogdanor "The Political Constitution" in *Politics and the Constitution: Essays on British Government* (Dartmouth Publishing, Aldershot, 1996) 3, 9.

<sup>28</sup> Peter Wagner *A Sociology of Modernity: Liberty and Discipline* (Routledge, London, 1994), chapters 7-9.

difficult to change. They acknowledged that entrenchment was not 'legally' effective since the doctrine of parliamentary sovereignty suggested that no present Parliament could bind any future Parliament. Thus section 189 was not itself entrenched, to avoid embarrassment were this clause challenged in court.<sup>29</sup> But parliamentarians thought the attempt at entrenchment would indicate the importance of representation, and create a moral obligation on future parliaments not to alter 'the rules of the game'.<sup>30</sup>

Having rejected a contractual approach, the CRC looked at the option of a written, 'rigid' constitution enacted by the NZ Parliament. Once again, the key stumbling block to entrenchment was parliamentary sovereignty, and the doctrine of implied repeal. Still, having conceded the impossibility of entrenchment, the CRC argued that entrenchment might have some moral or practical value—it would provide a signal to any government who wished to repeal it that some fundamental constitutional matters required special protection.<sup>31</sup> Once again, however, little thought was given to rights, and the entrenchment of some statement of rights. Even though ostensibly the ultimate goal of a second chamber was to protect 'the people', the idea that this might be done through a direct statement of rights was never raised.

The *CRC Report* was unanimous in calling for the re-establishment of an upper house based on nomination, but nothing was done. There were a number of reasons for this. The problem of entrenchment was insurmountable; there was no persuasive basis on which to organise a second chamber or determine acceptable functions for it; and practically, because the National Party lost the 1957 election. The Labour Party was unsympathetic to bills of rights and the Legislative Council. Traditionally the Labour Party was more willing to use the state to achieve its goals: a re-established second chamber might obstruct effective state action. The Legislative Council was only seen as beneficial by Labour when it was in power because it was a means of patronage; once out of power, the Legislative Council

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<sup>29</sup> KJ Scott *The New Zealand Constitution* (Clarendon Press, Oxford, 1962), 7.

<sup>30</sup> See the debate in (1956) 310 NZPD 2839-2852 (26 October 1956).

<sup>31</sup> *1952 Committee Report*, above n 14, 42.

was irrelevant.<sup>32</sup> Finally, neither political party considered constitutional reform as urgent.

Still, concern about rights and the direction of the NZ state had been increasing since the 1951 waterfront strikes at the height of the early Cold War.<sup>33</sup> The National Government declared a state of emergency and issued various regulations making it impossible to strike. The swift, brutal action with which the National Government dealt with the trade unionists—branded ‘communists’—led to its victory in the snap election of 1951, but it also led to the formation of the Civil Liberties Union.<sup>34</sup>

Moreover, various changes were taking place both domestically and internationally. Under the long reign (1935–49) of the Labour Government, and later, WW2, the state had grown. The mobilisation of citizens for war, social welfare, housing, education, and pensions involved a vast extension of state control. Nor did this development end in 1945. Rationing, restricted imports and artificial pricing continued after WW2; and in 1949 the Labour Government had passed the Economic Stabilisation Act, which made economic stabilisation a permanent obligation for NZ governments. The administrative state—a development taking place in many Western countries—had arrived.

The National Party had campaigned in 1949 on a platform of more freedom. It would make the pound go further, deal with militant unions and promote private enterprise.<sup>35</sup> Yet, once in power, National governments of the 1950s found it difficult to change matters. Rising inflation and a crisis on the sterling which lasted throughout the 1950s meant much of the economy was beyond the control of any NZ government. National itself was forced to resort to many of the economic controls that it had attacked to ensure stability.

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<sup>32</sup> Jackson, above n 1, 192.

<sup>33</sup> James Belich *Paradise Reforged: A History of the New Zealanders from the 1880s to the Year 2000* (Penguin Books, Auckland, 2001), 305; and Keith Sinclair *A History of NZ* (4 ed, Penguin, Auckland, 1991), 286–288.

<sup>34</sup> Jackson, above n 1, 201.

<sup>35</sup> Sinclair, above n 33, 287.

Control of Parliament itself in the 1950s oscillated between Labour and National, much of this hinging on how the economy was perceived by the public. The Labour Government's 1958 budget, which became known as the 'black budget' as a result of the large number of taxes proposed on basic goods, was an attempt by the Labour Government to deal with the overheating economy. The resulting unpopularity led to the Labour Party's loss at the 1959 election.

### **The 1961 Constitutional Society's Suggested Constitution**

It was the National Party's traditional constituency of businesspeople, imperial enthusiasts and conservatives, who were the main source of discontent and kept the issue alive. Continued pressure at National Party conferences had forced Holland to keep the issue of a reconstituted second chamber open, and indeed had led Holland to pass the 1956 Electoral Act, and attempt entrenchment. But this was not considered enough.<sup>36</sup>

In 1960, the National Party had pledged to pass a bill of rights similar to that of the 1960 Canadian Bill of Rights (an ordinary statute). This was as a result of lobbying by the 'Constitutional society for the promotion of economic freedom and justice in NZ' ('the Constitutional Society').<sup>37</sup> National had agreed to do so because it was determined to regain power in the 1960 election, and could not afford to ignore pressure groups such as the Constitutional Society. Moreover, Holland, architect of the Legislative Council's abolition, had been replaced as National Party leader by Keith Holyoake, who had always been in favour of bicameralism.<sup>38</sup>

The Constitutional Society had been formed as a response to the perceived lack of constitutional safeguards present in NZ, although at the outset a key objective was to ensure "the development of an economy based on freedom of the individual, private ownership, and competitive enterprise."<sup>39</sup> According to one member, the Constitutional Society had 4,600 fee-paying members.<sup>40</sup> Its members were a motley collection of disenchanted National Party supporters who ostensibly

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<sup>36</sup> Jackson, above n 1, 202.

<sup>37</sup> There is a useful discussion of the Society in *ibid*, 202-10.

<sup>38</sup> *Ibid*, 205-7.

<sup>39</sup> *Ibid*, 202.

<sup>40</sup> *Report of Public Petitions M-Z Committee on the Petition of J Scott Davidson and Others Together with Written Submissions made to the Committee* [1961] NZPD I.2A.

wished to re-establish bicameral government or enact a written constitution to entrench a second chamber and halt the spread of the administrative state. Prominent members included a former Speaker of the Legislative Council and other members; the president of the Federated Farmers (a group of wealthy farmers who had formed a 'union' to protect farmers' interests); and Alan Brassington, lawyer and lecturer in constitutional history.

The Constitutional Society launched a petition calling for the adoption of a written constitution in September 1960. The petitioners were quickly able to get the signatures of 11,125 people.<sup>41</sup> A 'suggested constitution' was drafted.<sup>42</sup> The Constitutional Society presented the petition and made submissions on the Draft to the Public Petitions Committee in 1961. According to one commentator, the Constitutional Society was almost alone in wanting a written constitution, and the paucity of submissions bear this out.<sup>43</sup> There were only six submissions: four members of the Constitutional Society made submissions in favour of their petition; two Victoria University academics opposed it.

In the 'foreword' to the suggested constitution, the Constitutional Society stated a written constitution, incorporating and protecting a second chamber, was necessary.<sup>44</sup> There was presently nothing to restrain Parliament from infringing the rights of the people. The "traditional British rights" of the NZ people had been materially weakened over the past twenty-five years. This was a result of the severing of the link with "British tradition" by the ratification of the Statute of Westminster in 1947; the 1950 abolition of the Legislative Council, a traditional bulwark against ill-conceived legislation, only made matters worse. It meant that NZ's Parliament was for all intents and purposes, legally untrammelled. A written

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<sup>41</sup> Ibid, 24.

<sup>42</sup> The Constitutional Society for the Promotion of Economic Freedom and Justice in New Zealand *Suggested Constitution for New Zealand* (1961), i. The suggested constitution is reproduced in the *1961 Committee Report*, above n 40, 4-23.

<sup>43</sup> JF Northey "The NZ Constitution" in JF Northey (ed) *The AG Davis Essays in Law* (Butterworths, London, 1965) 149, 173. A parallel debate took place in NZ's key legal periodical, the *New Zealand Law Journal*, but the lack of interest and discussion was "disappointing", mostly focusing on the impossible legal obstacle of entrenchment and favouring the re-establishment of a second chamber: "A Written Constitution and a Second Chamber" (1960) 36 NZLJ 385; and thereafter, "Correspondence" (1961) 37 NZLJ 33-5; 57-8; 75-6; 92; "A Written Constitution and a Second Chamber" (1960) 37 NZLJ 145.

<sup>44</sup> *1961 Committee Report*, above n 40, 38.

constitution was needed to guarantee the “heritage of liberty which our countrymen, largely of British descent, have been taught to expect.”<sup>45</sup>

In short, the suggested constitution was a conservative response to the Legislative Council’s abolition. What the Constitutional Society was trying to do was reach for a rather radical solution in order to return NZ’s constitutional arrangements to what they had previously been: as close as possible to the British constitution. Scott had stated proudly in his 1962 book on NZ constitutional law, “Probably no two Constitutions are more similar than those of the United Kingdom and New Zealand”,<sup>46</sup> but for the Constitutional Society, the NZ constitution was not similar enough.

The suggested constitution was a comprehensive document, in which the protection of rights had a small role. The draft was envisioned as the supreme law of NZ (Part I). Article 1 declared that NZ was a sovereign state and “voluntary member of the British Commonwealth of Nations”, the citizens of NZ owing allegiance to Queen Elizabeth and her successors. In Part II, basic ‘procedural’ rights, such as the right to personal liberty and the right to a fair trial, were protected. There was a right to property (article 14) and also a right against discrimination (article 15). The judiciary (dealt with in Part V) had the power to invalidate laws inconsistent with the constitution (articles 2, 32(2)(b) and 37).

Parts III and IV concerned the executive power. Part V dealt with Parliament: here provision was made for an indirectly appointed Senate with a limited power to delay or reject legislation (article 27) and a clause for resolving disagreements between the two houses (article 35). Part VI dealt with the judiciary. Part VII dealt with ‘national finance’, including a right to monetary stability in NZ, with a corresponding duty on the NZ Government to ensure monetary stability and stable prices (articles 17 and 45). Finally, the constitution could be amended by a simple majority of all eligible voters at a referendum (article 48).

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<sup>45</sup> Ibid, 4.

<sup>46</sup> Scott, above n 29, ‘Preface’.



Nigel Wilson QC for the Constitutional Society argued that a written constitution was necessary to ensure that parliamentary elections and the independence of the judiciary would not be abolished; and to halt the creep of executive action by ensuring a clear separation of powers.<sup>47</sup> Moreover, a written constitution was necessary as soon as NZ had become independent.<sup>48</sup> He insisted that it was not contrary to British tradition to codify constitutional rules or rights at common law. Indeed, his criticism was that NZ had departed from the traditions of 'the Mother Country' by abolishing the second chamber: a written constitution would help protect those rights which British peoples had come to expect.<sup>49</sup> Finally, Wilson dismissed the idea that a written constitution would politicise the judiciary.

Two members of the Constitutional Society, Brassington and John Thomas Paul (a former Legislative Council member), both advocated the reestablishment of a second chamber. Paul saw the abolition of the Council as a mistake, arguing abolition had only been achieved through subterfuge, since members had accepted it only on the understanding that a new, improved chamber would be created. Moreover, NZ was now the only white sovereign state in the Commonwealth to have a single chamber Parliament.<sup>50</sup>

Brassington saw the importance of the second chamber lying in the stability and mediating influence it would have. His fear was that Parliament and its power would too quickly be arbitrarily in the hands of the unwise, the inexperienced and the hasty. A second chamber could protect the rights and liberties of NZers. It could prevent the potential abolition of the Governor-General, links to the Crown, or the appeal to the Privy Council.<sup>51</sup> A written constitution was mostly to ensure that the second chamber, once re-established, could not be so easily abolished a second time.

Perhaps the most interesting matter about the proponents' arguments was how little they were made in terms of protecting individual rights. As noted, Wilson

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<sup>47</sup> *1961 Committee Report*, above n 40, 24-5.

<sup>48</sup> *Ibid*, 31.

<sup>49</sup> *Ibid*, 26-7.

<sup>50</sup> *Ibid*, 49-50.

<sup>51</sup> *Ibid*, 35.

defended the suggested constitution in terms of how it could protect elections, the independence of the judiciary and as a means of halting the blurring of the present separation of powers. Brassington did so in terms of the potential danger to various important institutions. What was important was the proper balance between the branches of government; rights were downplayed. Again, the influence of Dicey showed.

The clauses on monetary stability had been added at the insistence of the Constitutional Society's various branches.<sup>52</sup> These appealed to those concerned about the 'increasing' bureaucratisation and regulation of NZ and the 'stifling' of free enterprise.<sup>53</sup> Rapid inflation in the past decade had led to hardship, and while both major parties had pledged to maintain a stable internal price level, both parties had failed to honour their pledges.<sup>54</sup> The provisions were a means of binding the state.

Opponents of the suggested constitution made a number of arguments, which, in contrast to the proponents, mostly focused on rights. There was criticism of the role of the judiciary envisioned by the Constitutional Society's draft: it was undemocratic; it would make judges virtual legislators.<sup>55</sup> But this was not the key criticism. Proponents spent little time defending the potential role of the judiciary. Perhaps this was not so unusual: for instance, in Scott's 1962 text on NZ constitutional law, there was only a brief section devoted to the courts—11 pages in 188 pages of text. Scott (a political scientist) had a very narrow conception of the judicial role: he saw the courts as objectively administering 'the law', rejecting any significant role for discretion or interpretation.<sup>56</sup>

The key criticism was that rights could not be reduced to abstract principles; to enact a bill of rights was to invite uncertainty because all general principles had to be given concrete form. DP Paterson, lecturer in constitutional law at Victoria University, argued that rights had developed "over many years, by many

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<sup>52</sup> Ibid, 43.

<sup>53</sup> Ibid, 44-49.

<sup>54</sup> Robert Chapman "From Labour to National" in Geoffrey Rice (ed) *The Oxford History of New Zealand* (2 ed, Oxford University Press, Auckland, 1992) 351, 381.

<sup>55</sup> *1961 Committee Report*, above n 40, 52-53.

<sup>56</sup> Scott, above n 29, 158-159.

Parliaments and many courts as a careful and thoughtful evolution and reaction to the particular requirements of NZ conditions.”<sup>57</sup> It was a common law view of rights, which saw them as incrementally built up over time, and grounded in the life of the people.

Further, members of Victoria University’s Political Science Department objected to the generalisation of rights because it would encourage those reading it to assume they had absolute rights, whereas what they actually had were qualified rights. It followed that:

if rights are stated without qualification, they are either meaningless or they encourage license. If we are to have effective government there must be limitations on our rights ... If limitations are introduced, however, there really is no point in stating the rights in the first place. Why state the rights as if they were absolute and then go on to state the exceptions? There seems to be little substance left...<sup>58</sup>

The two submissions opposing the petition had little to say about economic rights. The Political Science Department stated simply that it was a matter of debate as to which rights ought to be included in a bill of rights or constitution. Arguably, then, hostility to rights stemmed not so much around the impossibility of generalising rights, but rather the belief that any definition was the province of Parliament.

The submissions opposing the petition had little to say about a second chamber. Ten years of experience with unicameralism suggested that such a state of affairs was not so bad.<sup>59</sup> Fears of oppressive governments had not been realised; so why change? The Political Science Department argued that unicameralism in NZ was beneficial: it meant the people knew “who to blame.” This responsibility would tend to be diluted by a second chamber.<sup>60</sup> Unicameralism simplified matters, and it was something NZ should be proud of: a pared-down, streamlined form of democracy. NZ’s contemporary constitutional arrangements could be seen as a ‘better’ version than Britain’s.

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<sup>57</sup> *1961 Committee Report*, above n 40, 52

<sup>58</sup> *Ibid*, 61.

<sup>59</sup> JF Northey “An Experiment in Unicameralism” [1958] PL 265.

<sup>60</sup> *1961 Committee Report*, above n 40, 63.

Finally, little was said about entrenchment. Paterson argued Parliament and its successors were always trying to respond to changing social conditions, and to shackle it would be a mistake.<sup>61</sup>

In short, those opposing the suggested constitution did so because of their faith in Parliament and parliamentary processes. The only legitimate avenue for deliberate legal change was through Parliament. ‘The people’ were the source of all power, but they lacked the skills, the knowledge or the wisdom that politicians apparently had. The role of the franchise, which manifested public opinion, was seen as fundamental: it was the basis of democracy and Parliamentary sovereignty in NZ.

The issue was not how to trammel the much-proclaimed absolute sovereignty of Parliament, but rather how best to ensure that power was efficiently used. If there were to be changes, they ought to be to the machinery itself. The Political Science Department made a list of recommendations to improve democracy in NZ: all of which involved parliamentary reform—changes in the number of MPs, the length of the Parliamentary term, the amendment of parliamentary procedure, and an increase in parliamentary administration.<sup>62</sup> Indeed, the key constitutional innovation in this period was the introduction of the Ombudsman in 1962, a parliamentary officer entrusted with investigating complaints about administrative acts and decisions of government.<sup>63</sup>

Put in context, this faith in Parliament, political parties and the ‘downgrading’ of individual rights was unsurprising. This was a period in which the state was ubiquitous in many spheres: health, housing, education, employment and business.<sup>64</sup> There was a real confidence in most developed Western countries that the state could achieve greater levels of inclusion, equality, and growth. These levels were all seen as stable and set to continue in the future.

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<sup>61</sup> Ibid, 58.

<sup>62</sup> Ibid, 63-4.

<sup>63</sup> Larry Hill *The Model Ombudsman: Institutionalising New Zealand's Democratic Experiment* (Princeton University Press, Princeton, 1977).

<sup>64</sup> Belich, above n 33, 313-6.

At a more general level, the focus on Parliament over courts, and careful planning over spontaneity, could be seen as a manifestation of ‘organised modernity’, a view of how states ought to configure themselves accepted broadly by most developed Western states. Conversely, action which did not take place through conventionalised, routinised channels was thought to undermine this project. Thus, the addition of a statutory regime of generalisable individual rights was seen as threatening.<sup>65</sup>

That rights—as a set of specific prohibitions in generalised form contained in a document—were mentioned at all may be due to the historical juncture of the Cold War and the struggle for ideological supremacy between the US and the Soviet Union. Arguably the ‘rights revolution’ in the US was only beginning to get underway in the 1950s. Rights, conceived of as universal—as ‘human rights’ and focusing on freedom of association, speech, criminal procedure and freedom against discrimination—were a response to the experience of Nazi Germany and later the Cold War.<sup>66</sup> Put differently, alternative configurations in relation to the protection of rights were only beginning to emerge at this time. ‘Rights’, understood today as universal, embodied in a single entrenched document and considered applicable everywhere, are a relatively recent creation.

The most damning response came from the Public Petitions Committee itself, which simply stated that it had no recommendation to make.<sup>67</sup> The Constitutional Society’s petition had failed because the constitutional changes which had already been made were seen not as an aberration to traditional arrangements, but rather as a means of ‘streamlining’ them. Changes already made were not inconsistent with British ideals but rather ensured an even better version. The abolition of the Legislative Council practically signified very little, since it had long ceased to have any real function in NZ politics. More prosaically, the suggested constitution was the work of outsiders, a private petition rather than being the work of insiders or those currently in Parliament. Further the emphasis on the importance of

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<sup>65</sup> Wagner, above n 28, chapters 7-9.

<sup>66</sup> Richard Primus *The American Language of Rights* (Cambridge University Press, Cambridge, 1999), chapter 7; Mary Dudziak *Cold War Rights* (Princeton University Press, Princeton, 2000); and Jonathan O’Neill “*Marbury v Madison* at 200: Revisionist Scholarship and the Legitimacy of American Judicial Review” (2002) 65 MLR 792.

<sup>67</sup> *1961 Committee Report*, above n 40, 3.

Parliament and formalised collective action meant there was little patience for general statements of rights. Finally, there was little pressure internationally: the idea of judicially enforceable rights in a written document was only beginning to be implemented elsewhere.

### **The 1963 Bill of Rights**

In 1963, as part of the National Party's constitutional policy, which included the "enlargement of personal liberties" and the extension of NZ's "property-owning democracy,"<sup>68</sup> a Draft Bill of Rights ('the 1963 Draft'), written along the same lines as the 1960 Canadian Bill of Rights and the Universal Declaration of Rights ('UDHR'), was put before Parliament by Ralph Hanan, Minister of Justice. There was no longer any attempt by the National Party to legislate for either a second chamber of Parliament, or an entrenched constitution. What remained was a simple bill which purported on occasion to affect the interpretation of other statutes. That the National Party even set up another select committee to examine the 1963 Draft was due to yet another petition from the Constitutional Society.<sup>69</sup>

The 1963 Draft consisted of a Preamble and a mere four clauses. The Preamble made note of the "supremacy of God", the "dignity and worth of the human person, whatever his racial origins may be". The Preamble went on to emphasise that "the NZ nation is founded upon the principle that all its citizens of whatever race are one people."<sup>70</sup>

Clause 2 "recognised and affirmed" that certain rights "exist and continue to exist". These rights were set out in subclause 1, and included the rights to life, liberty, and equality before the law, freedom of speech, thought and assembly, the right against discrimination on various bases and the right of the individual to own property. Subclause 2 of clause 2 was a limitations provision, making rights recognised in subclause 1 subject to matters like public safety, order and morals. All rights were also subject to the duties that all individuals owed to others. Clause 3 required that

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<sup>68</sup> Geoffrey Palmer "A Bill of Rights for New Zealand?" in KJ Keith (ed) *Essays on Human Rights* (Sweet & Maxwell (NZ) Ltd, Wellington, 1968) 106, 108.

<sup>69</sup> Jackson, above n 1, 208.

<sup>70</sup> The draft 1963 Bill of Rights is reproduced in *Evidence Presented to the Constitutional Reform Committee 1964 on the New Zealand Bill of Rights* [1964] AJHR I.12, 4-6.

all laws be interpreted so not to abridge the rights in clause 2(1) of the Draft, and emphasised that enactments should be construed so as not to encroach upon certain ‘procedural’ rights, like the right to a fair hearing, or the right not to be arbitrarily detained. This clause was subject to the Acts Interpretation Act 1924 section 5(j), which stated that statutes, wherever necessary, should be deemed remedial, and ought to be given a broad interpretation to ensure the attainment of the object of the Act. Clause 4 stated that nothing in the Draft would limit or affect any rights or freedoms not mentioned in the Draft.

In October 1964, the Constitutional Reform Committee (‘CRC’) was asked by the House of Representatives to report on the 1963 Draft. There were a total of ten submissions dealing with the 1963 Draft, a majority of six submissions opposing the Draft. This time there were only two positive submissions: one from the Constitutional Society, and the other from Sir Guy Powles (a lawyer and diplomat who had just become NZ’s first Ombudsman). There was two submissions which were ambiguous or neutral in their attitude. Of the six submissions made by lawyers, four opposed the Draft.

The 1963 Draft was given a much harsher response.<sup>71</sup> Why this should have been was perhaps due to a deepening confidence and trust in Parliament’s powers to remedy any ills in society. Again, it was the sense that the issue of greater self-autonomy—‘freedom’—was better solved through collective action, consensus and convention than by individual endeavour.

Those in favour of the 1963 Draft were rather weak. Brassington, again for the Constitutional Society, reiterated his belief that the safeguards of liberty existing in Great Britain were lacking in NZ. While the Draft was no substitute for a written constitution and a bicameral legislature, at least it had educational value and could provide a measure to judge government.<sup>72</sup> Sir Guy Powles made a similar argument: at least the “declaratory” Draft would ensure that citizens were well

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<sup>71</sup> CN Irvine “The New Zealand Bill of Rights” [1963] NZLJ 489.

<sup>72</sup> 1964 *Committee Evidence*, above n 70, 20.

informed.<sup>73</sup> If Brassington and Powles saw the 1963 Draft as having any impact at all, then, it was on public opinion.

It was now considered trite law by almost all those making submissions that Parliament could not bind its successors.<sup>74</sup> The impossibility of entrenchment was simply political and legal fact in NZ. This meant the 1963 Draft was to be an ordinary statute, and could not affect future enactments. It was difficult to see how the Draft would actually impact on legislation. Thus the Draft was treated functionally useless, superfluous, leaving the average citizen bewildered.

Again, the main criticism of the 1963 Draft, as with the 1961 suggested constitution, was the matter of rights and how best to give effect to them without causing undue uncertainty. To those objecting to the 1963 Draft, 'liberty' was gained by granting to the people certainty in the law. An interpretive bill of rights was pointless, and gave the people nothing, because vagueness made the people less free. Campbell argued that the 'uncertainty' of the 1963 Draft made it difficult for citizens to rely on the law, which might lead to unexpected civil and criminal liability.<sup>75</sup> But this fear of uncertainty seemed overstated, for theoretically the doctrine of parliamentary sovereignty suggested that rights could be modified or removed at any time. But this kind of uncertainty was preferable to the uncertainty that would be caused by an unentrenched Bill of Rights.

It was thought that NZ's constitutional arrangements were just fine as they were: changes would only upset this state of affairs. One committee member said the 1963 Draft was not needed because NZ's legal system already adequately protected the rights and liberties of its citizens.<sup>76</sup> The Solicitor-General HRC Wild insisted that "it has ... been the common law and the Courts rather than the formal charters of rights of earlier times that have protected the basic freedoms of the common man."<sup>77</sup> NZ unlike the US, Canada and Australia was not federal, and so

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<sup>73</sup> Ibid, 50.

<sup>74</sup> Ibid, 13; 31; 50.

<sup>75</sup> Ibid, 40.

<sup>76</sup> (1965) 342 NZPD 1136 (8 July 1965).

<sup>77</sup> 1964 Committee Evidence, above n 70, 33.



in this sense was far more like ‘England’ and could follow “English methods in preserving the fundamental freedoms”—that is, via the common law.<sup>78</sup>

The generality of the 1963 Draft would only appeal, said Campbell, “to the least intelligent, the least sophisticated, and the least educated.”<sup>79</sup> Only those trained in the law—or at least, had some form of education—might fully comprehend the common law’s subtle justice. The idea that the 1963 Draft had educational value seemed weak and pointless to some commentators, since on their view the public had little role in government anyway.

Implicitly, then, there was a belief that Parliament would protect NZers’ liberties, with the common law supplementing this. As one submission noted, “Rights and freedoms have from the earliest days been the central concern of Parliament.”<sup>80</sup> If there was legislation offensive to civil liberties, one should turn to Parliament to repeal it rather than to an ineffective bill of rights.<sup>81</sup> Framed in Diceyan legal discourse—although this language was not explicitly used—all this illustrated the prioritising of one pillar of the Diceyan British constitution over another: parliamentary sovereignty over the rule of law.

Perhaps it is not surprising there was little change. Sociological conditions suggested a continuation with orthodoxy rather than change. Most of the legal profession became lawyers through apprenticeship: it was not till the mid-1960s that an undergraduate law degree became a requirement for practice; and ‘indigenous’ academic scholarship was only beginning.<sup>82</sup> Those with post-graduate degrees usually obtained them from England, not North America. The idea that constitutional arrangements might be organised in alternative ways was not so pervasive at this point.

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<sup>78</sup> Ibid, 53.

<sup>79</sup> Ibid, 41.

<sup>80</sup> Ibid, 27.

<sup>81</sup> Ibid, 29.

<sup>82</sup> Georgina Murray “New Zealand Lawyers: From Colonial GPs to the Servants of Capital” in Richard Abel and Phillip Lewis (eds) *Lawyers in Society, Volume 1: The Common Law World* (University of California, Berkeley, 1988) 318, 325; and Thomas Gibbons “The Explosion of New Zealand Legal Scholarship in the 1960s” (2004) 12 Waikato LR 45.

However, there were new developments. The first was a growing awareness of international law, mostly because the 1963 Draft was ‘based on’ the UDHR. But there was a firm rejection of international law as a legal standard for rights. The NZ Law Society felt it necessary to state that the UDHR was a “demonstration of an article of faith without legal significance.”<sup>83</sup> Two lawyers thought the UDHR had at least educational value—but this was an argument used to reject the 1963 Draft: it was not necessary to have the Draft for educative purposes because we already had the UDHR.<sup>84</sup> ID Campbell’s response was far more antagonistic:

If banners are wanted, the Universal Declaration of Human Rights is ready at hand. It is already being waved more vociferously by those who are unwilling or unable to carry the burden of implementing its provisions.<sup>85</sup>

Colin Aikman,<sup>86</sup> making submissions for the Wellington District Law Society, took a more measured view. Aikman himself had been a participant in the actual framing of the UDHR. It was never intended that the UDHR be capable of creating legal rights and obligations. Evidence of this could be seen in the work that was then being done on what was to become the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Here were two instruments which were couched in legal language, and purposely drafted for domestic legislative implementation.<sup>87</sup>

In sum, there was a wide-ranging view that international law had little force domestically, and perhaps, ought not to have force. Few saw the UDHR or international law in general as imposing obligations on states, or being a threat to state sovereignty. This was not surprising. No mention had been made of international law in Scott’s 1962 text. The 1954 and 1967 editions of Robson’s *New Zealand: The Development of Its Laws and Constitution*<sup>88</sup> briefly mentioned international law, but it was treated as regulating inter-state relations. It was not deemed to have any impact on a state’s relations with its own citizens. Moreover,

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<sup>83</sup> 1964 Committee Evidence, above n 70, 7.

<sup>84</sup> Ibid, 33.

<sup>85</sup> Ibid, 40.

<sup>86</sup> See Appendix 2.

<sup>87</sup> 1964 Committee Evidence, above n 70, 8.

<sup>88</sup> JL Robson (ed) *New Zealand: The Development of Its Laws and Constitution* (1<sup>st</sup> ed, 1954; 2<sup>nd</sup> ed, 1967, Stevens & Sons, London).

NZ, although a strong advocate of international law and organisations, also believed firmly in the sovereignty of the state in domestic affairs. NZ's discriminatory immigration laws, for instance, were off-limits; any criticism would constitute interference in NZ's domestic jurisdiction.<sup>89</sup> The UN itself was at the time embroiled in the politics of decolonisation and the Cold War, rendering it incapable of action.<sup>90</sup>

The second development was a new focus on equality, particularly as it related to race. This could be seen in the preamble to the 1963 Draft, which insisted on the irrelevance of "racial origins" and NZ being founded on the notion of being "one people" regardless of race. The Solicitor-General HRC Wild, for instance, was concerned that the operation of the equality provision, particularly as it related to Maori, might impact on national development.<sup>91</sup>

NZ was undergoing a major demographic transformation: the urbanisation of Maori, in which the majority of the Maori population would shift from rural areas to the towns and cities.<sup>92</sup> The increased contact between Pakeha and Maori was beginning to cause friction.<sup>93</sup> This coincided, and partly gave impetus to, the last attempt to intensify the policy of assimilation, turning Maori into "Brown Britons". But this assimilation policy saw no role for Maori; the state would lead the way.<sup>94</sup>

Internationally, the norms of non-discrimination and equality were only beginning to have an impact. For instance, *Brown v Board of Education*,<sup>95</sup> which began the process of desegregation in the US, had only been decided in 1954; the very public campaign against racial discrimination in Birmingham, Alabama took place in 1962-63; the Civil Rights Act was passed in 1964 and the Voting Act in 1965. The US government's approach to civil rights was publicised internationally as part of

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<sup>89</sup> John Battersby "New Zealand, Jurisdiction and Apartheid, 1945-57" (1996) 24 JICH 101.

<sup>90</sup> Richard Thompson "Race, Kinship and Policy: Africa and New Zealand" in Malcolm McKinnon (ed) *New Zealand in World Affairs, Vol II: 1957-1972* (New Zealand Institute of International Affairs, Wellington, 1991) 95, 99.

<sup>91</sup> *1964 Committee Evidence*, above n 70, 52.

<sup>92</sup> Ranginui Walker "Maori People since 1950" in Geoffrey Rice (ed) *The Oxford History of New Zealand* (2 ed, Oxford University Press, Auckland, 1992) 498, 500; and Belich, above n 33, 471-4.

<sup>93</sup> Richard Hill *State Authority, Indigenous Autonomy: Crown-Maori Relations in New Zealand/Aotearoa 1900-1950* (Victoria University Press, Wellington, 2004), 262.

<sup>94</sup> Belich, above n 33, 477.

<sup>95</sup> 347 US 483 (1954).

its ideological struggle against communism: protecting the rights of all its citizens was seen as one way of distinguishing Western democracy from socialism.<sup>96</sup> But it is not clear that this yet had any impact on the NZ state's understanding of its relationship with Maori.

In NZ, the idea of equality was still narrowly formulated to mean procedural equality before the law. One could not claim to have any privileges before the law, no matter what one's status: equality and non-discrimination involved 'merely' the impartial application of the law. Action on behalf of minority groups would be thought discriminatory to the majority.

Hence the NZ Law Society expressed "reservations" about the limits of the principle of discrimination.<sup>97</sup> Similarly, the submission of two law lecturers from Victoria University queried what possible meaning 'equality' in the 1963 draft could have. For them, equality had three possible meanings: procedural equality—the impartial application of the law; the idea that all law applied equally to everyone (e.g., the idea that everyone should pay income tax at the same rate, regardless of income, age etc); and finally, equality without discrimination. The first meaning was already something the law did, so it was superfluous; the second meaning made all law ridiculous; and the third ignored the fact that many laws discriminated for necessary and desirable reasons.

The NZ Maori Council's ('the Maori Council') submission reproduced some of the correspondence between itself and Ralph Hanan, showing how race relations were beginning to intrude on matters like constitutional reform.<sup>98</sup> After a written reply from Hanan about the inadvisability of writing the Treaty of Waitangi ('the Treaty') into a statute, the Maori Council insisted it still wanted recognition of the Treaty in the 1963 Draft—preferably, some acknowledgment of the Treaty as the basis for the relationship between the government and Maori. Further, the Maori Council said, the Draft should include some reference to the status and role of minority groups in NZ.

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<sup>96</sup> See generally Duziak and Primus, above n 66.

<sup>97</sup> *1964 Committee Evidence*, above n 70, 7.

<sup>98</sup> *Ibid*, 16-7.

Hanan replied that “the conclusion had been reached” that the inclusion of any reference to the Treaty would be inappropriate. The Treaty was made between the representatives of the British Crown and the Maori, and would not now be—“as a matter of law”—sufficiently all-inclusive to apply to NZ.<sup>99</sup> A large number of people now present in NZ were not party to that ‘contract’. Hanan simply did not want to give the Treaty any real status in law; nor did he want to assert that Maori were deserving of any special rights.

The belief that equality meant only equal treatment before the law lay at the basis of another submission by HS Roberts. For Maori voters, NZ had been divided up into four separate electorates which were translated in Parliament into the form of four Maori seats. Roberts argued that the increasing Maori population would make this issue more pressing, and might eventually result in a greater number of Maori seats.<sup>100</sup> This could only lead to racial conflict. So long as this system of separate representation was kept, Maori would believe that they were inferior, not worthy of democracy, and that an injustice was being done to them. His answer was to abolish the separate seats.

Robert’s notion of equality was a principle in which everyone was equal in their submission to Parliament and the law. A separate system of representation implied that Maori were different from ‘NZers’, and had to be abolished. From one point of view, Roberts’ argument was an attempt at further colonisation through assimilation. And this was at a time when concerted Maori parliamentary power had essentially ended—in contrast to the previous half century in which respected Maori leaders had had representation and some influence in Parliament.<sup>101</sup>

However, the Maori Council had come to the conclusion that the best way to ensure the position of Maori was to call for some form of recognition of their status as Maori. Separate representation may have been one aspect of ensuring this. However, even the Maori Council was wary of suggesting any distinctions based

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<sup>99</sup> Ibid, 17.

<sup>100</sup> Ibid, 18-9.

<sup>101</sup> Belich, above n 33, 477.

on race, insisting that it was not seeking special privileges for Maori, just recognition.<sup>102</sup>

The CRC's response to the submissions was brief: it recommended that the 1963 Draft Bill of Rights not proceed. It has been suggested that in fact the National Government simply put the draft forward to please its constituents (which presumably included the Constitutional Society), and that it had never had any interest in the Bill of Rights at all—hence its introduction near end of the parliamentary term. It was intended quietly to lapse.<sup>103</sup>

The Constitutional Society also launched another petition before the 1963 election, praying for the reestablishment of a second chamber, and upon reestablishment, a meeting of both chambers to deliberate upon a written constitution. The CRC produced a report in 1964 on the Society's second petition, rejecting it.<sup>104</sup> The CRC consisted of ten MPs, four from Labour and six from National. The CRC was patient, considering twenty-two submissions and allowing the Constitutional Society to rebut submissions. Although the decision was not unanimous, a majority of CRC members voted to reject the petition. One opposition MP who had sat on the CRC noted the "unusual degree of accord" between members on this matter.<sup>105</sup>

A second chamber had two intended purposes: as a safeguard against the abuse of power and to improve the overall efficiency of the legislature. The CRC dismissed both claims. To the extent any newly constituted second chamber was elected it would similarly be subject to party solidarity; and second chambers had a poor record as safeguards of democracy. And rather than reconstitute a second chamber it would be better to reform the lower house. Given the CRC's rejection of the

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<sup>102</sup> 1964 *Committee Evidence*, above n 70, 17.

<sup>103</sup> Paul Rishworth "The Birth and Rebirth of the Bill of Rights" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brooker's, Wellington, 1995) 1, 32 fn46.

<sup>104</sup> *Report of the Constitutional Reform Committee On the Petition of JB Donald and Others and on the New Zealand Bill of Rights* [1964] AJHR I.14.

<sup>105</sup> (1965) 342 NZPD 1141, per Dr Finlay (8 July 1965).

proposal to re-establish the second house, the proposal for a written constitution was irrelevant.<sup>106</sup>

The acting Prime Minister, John Marshall, summed up the general sentiment in his comments on the *1964 Committee Report*:

I think it is apparent from the course of the debate, from the findings of the select committee, and from expressions of public opinion, that there is no widespread public support for an Upper House in New Zealand today, and in these circumstances it is unlikely that an Upper House will be re-established in New Zealand in the foreseeable future.<sup>107</sup>

This marked the end of a fifteen-year push for a second chamber, a bill of rights, a codified constitution and indeed the Constitutional Society itself. In 1965, JF Northey wrote in an essay on the state of NZ's constitution commenting that:

NZers took only a small part in the development of self-government; in 1947 they showed no awareness of having finally achieved this goal. It would be unrealistic to expect them to devote time and energy to uprooting the remaining vestiges of colonialism or to making innovations that have the appearance of being necessary.<sup>108</sup>

## Conclusion

In spite of apparent domestic stability, and the acquisition of legal independence, the mid-twentieth century saw some proposals to reform NZ's constitutional arrangements. The nationalist, Whig-like narrative has presumed a peaceful complacency with NZ's constitutional 'independence', but this was incorrect. The proposals were unusual in that they were the work of traditional, conservative elements of NZ society dissatisfied with independence. Looked at carefully, the proposals were motivated by a desire to return NZ's constitutional arrangements to 'the way they were'—or perhaps, 'the way things ought to be'. The acquisition of legal sovereignty, coupled with the abolition of the Legislative Council and the absence of an elite capable of self-restraint made some conservatives push for the re-establishment of a second chamber, a written constitution and even a bill of rights.

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<sup>106</sup> *1964 Committee Report*, above n 104, 5.

<sup>107</sup> (1965) 342 NZPD 1149, per Hon JR Marshall (8 July 1965).

<sup>108</sup> "The NZ Constitution", above n 43, 179.

The proposals failed for a number of reasons. Domestically, there was little desire for 'radical' constitutional change, and the changes which had already taken place seemed to fit within already-existing models of what was acceptable. Moreover, the proposals for reform failed because to some extent they clashed with the prevailing models of what was acceptable. Western governments generally strived for a state configuration which emphasised collective agency over individual rights as a means of expanding 'freedom'. Rights as something held by individuals and against the state threatened this project of collective action. Finally, the world was not yet seen as 'international': it was only at the end of this period that international opinion about how states treated their citizens was beginning to intrude upon domestic state action.



## *Chapter 7: Constitutional Issues in the Late Twentieth Century*

### **Introduction**

We saw in the previous chapter considerable confidence in NZ's constitutional arrangements. But by the beginning of the twenty-first century, this had changed dramatically. The electoral system had changed; an 'interpretive' bill of rights was enacted and has gained teeth; the Treaty of Waitangi is now a source of great controversy; and there are persistent calls for further re-evaluations of NZ's constitutional arrangements.

It is often thought that the desire for a revision of NZ's constitution came from two sources: the challenge posed by Maori; and the shocks of the 1970s and 1980s, and in particular from the 'reign' of Robert Muldoon's government. The challenge posed by Maori claims will not be dealt with in detail here, other than to note that this clearly was a source of major anxiety about NZ's constitutional arrangements. In relation to the latter reason, however, it has been argued that the 'unconstitutional' actions of the Muldoon government woke NZers from their complacency about their constitutional arrangements, which were outdated and did not provide sufficient safeguards for the exercise of executive power. In short, the impetus for change is seen as essentially domestic.

The argument of this chapter is that there is a third, equally important reason creating the desire for constitutional reform: the collapse of the British framework and the exposure of NZ to the 'outside world' and to a range of alternative arrangements led to a questioning of NZ's constitution and its legitimacy. What was seen in the latter half of the twentieth century was the dissolution of previously stable collective representations and the creation of new ones—in particular, the idea of the 'NZ nation' from which matters British were mostly excluded. This in turn required the reconfiguration of the NZ state in order to maintain legitimacy. On this view, the impetus for change is both international *and* domestic: the 'outside' world changed, but the changing norms of this outside world were internalised domestically. This was not simply a matter of adopting international law into domestic law. NZ's constitutional arrangements began to be

viewed, albeit mostly by NZ elites, through a different framework, which both diagnosed particular flaws previously thought not to be in issue and prescribed particular kinds of remedies. Put differently, the nationalist narrative is incomplete: it presumes too much agency of NZers, and their uniqueness, when what is more salient is what they share in common with other Western nations.

### **Anxieties about Government: Shifts in the 1970s**

The confidence with which many NZers viewed NZ's constitutional arrangements had declined by the late 1970s. There was a strong reaction to state intervention into various spheres of life, causing social and economic upheaval in the late 1970s and 1980s.<sup>1</sup> These included 'dawn raids' on 'overstaying' migrants in the mid-1970s; the unconstitutional suspension of statute by the National Government in 1975;<sup>2</sup> the intrusive and excessive use of regulations to govern prices and wages and economic life in general; and the retrospective overruling of court decisions in order to ensure that a particular pet project of the government went forward. These actions were made even less palatable by the antagonistic leadership style of Sir Robert Muldoon.<sup>3</sup>

The cause of many of these events was the dire economic situation under which NZ laboured for the 1970s and much of the 1980s, covered in more detail in chapter 2. In essence, state intervention in the economy reinforced the belief that state action ought to be limited in scope. Moreover, there were strong signs in NZ of dissatisfaction with established political parties: voter volatility, the emergence of third parties, and a slowly declining voter turnout.<sup>4</sup> The previous 'culture' of consensus was to blame.<sup>5</sup>

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<sup>1</sup> See generally Alan McRobie "The Politics of Volatility, 1972-1991" in Geoffrey Rice (ed) *The Oxford History of New Zealand* (2 ed, Oxford University Press, Auckland, 1992) 385.

<sup>2</sup> *Fitzgerald v Muldoon* [1977] 2 NZLR 615.

<sup>3</sup> See Appendix 2.

<sup>4</sup> Robert Chapman "Political Culture: The Purposes of Party and the Current Challenge" in Hyam Gold (ed) *New Zealand Politics in Perspective* (Longman Paul, Auckland, 1989) 14.

<sup>5</sup> WH Oliver "An Uneasy Retrospect" in Ian Wards (ed) *Thirteen Facets: Essays to Celebrate the Silver Jubilee of Queen Elizabeth the Second, 1952-1977* (EC Keating Government Printer, Wellington, 1978) 41, 44.

The Maori population had mostly urbanised in the 1970s,<sup>6</sup> leading not to greater assimilation but rather to a new period of highly publicised Maori protest.<sup>7</sup> Moreover, with the urban shift, glaring inequalities between Maori and Pakeha gave lie to the idea that there was 'harmony' between the races.<sup>8</sup>

In 1978, the election manifestos of both the Social Credit Party and the Values Party contained proposals for a bill of rights.<sup>9</sup> In the same year, Kenneth Keith<sup>10</sup> wrote a retrospective of constitutional change in NZ, in which he identified a reluctance to engage in explicit major constitutional reform as a key characteristic of NZ's constitutional history.<sup>11</sup> Keith noted changes: externally, NZ was now quite separate from Britain; and there was a growing interdependence with the outside world. Domestically, economic problems had led to more government intervention, which had made people aware of the shortcomings of NZ's constitutional arrangements. Keith argued a reliance on customary restraints, good sense and tolerance was questionable. "We are at a constitutional turning point .... Formal constraints should perhaps be more seriously considered than they were in the 1950s and 1960s."<sup>12</sup>

In 1979, Sir Owen Woodhouse, soon-to-be President of the NZ Court of Appeal ('NZCA'), argued that power was too concentrated within the executive. Woodhouse argued the then-existing constitutional arrangements were only "justified by the inertia of tradition."<sup>13</sup> He opined that we needed "indigenous

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<sup>6</sup> James Belich *Paradise Reforged: A History of the New Zealanders from the 1880s to the Year 2000* (Penguin Books, Auckland, 2001), 471-4.

<sup>7</sup> See Andrew Sharp "The Problem of Maori Affairs, 1984-1989" in Martin Holland and Jonathan Boston (eds) *The Fourth Labour Government: Politics and Policy in New Zealand* (2 ed, Oxford University Press, Auckland, 1990) 251, 251; and Andrew Sharp *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand since the 1970s* (2 ed, Oxford University Press, Auckland, 1997).

<sup>8</sup> "Uneasy Retrospect", above n 5, 53.

<sup>9</sup> Geoffrey Palmer *Unbridled Power? An Interpretation of New Zealand's Constitution and Government* (Oxford University Press, Wellington, 1979), 140. There have now been four editions, but all references here are to the first edition unless otherwise stated.

<sup>10</sup> See Appendix 2.

<sup>11</sup> KJ Keith "Constitutional Change" in Ian Wards (ed) *Thirteen Facets: Essays to Celebrate the Silver Jubilee of Queen Elizabeth the Second, 1952-1977* (EC Keating Government Printer, Wellington, 1978) 1, 5.

<sup>12</sup> *Ibid*, 36.

<sup>13</sup> Sir Owen Woodhouse *Government under the Law* (Price Milburn and Company Ltd, Wellington, 1979), 12.

solutions” to meet national aspirations: for him, this meant the enactment of a written constitution.

In a series of cases and extra-judicial articles in the early 1980s,<sup>14</sup> Cooke J (later President of the NZCA) questioned parliamentary sovereignty, suggesting that “some common law rights go so deep that even Parliament could not override them.”<sup>15</sup> The courts, Cooke argued, could choose not to recognise something passed by Parliament as ‘law’ should that enactment strike at the democratic underpinnings of the (uncodified) constitution. Cooke was not alone in this: English judges would question parliamentary sovereignty as well, in part because of the expansion of judicial review, but also because the doctrine no longer seemed so persuasive in light of ‘international developments’ and Britain’s intensifying relationship with Europe and European law.<sup>16</sup> More generally, this was a manifestation of the growing belief that there were limits to what the state could do.

The most influential criticism of NZ’s constitutional arrangements was Geoffrey Palmer’s book *Unbridled Power*, later a staple text for political science and law students at NZ universities.<sup>17</sup> Now a law professor and Labour Party MP, Palmer argued that the Executive, through Parliament, had too much power and too few checks. Palmer began by stating that much of NZ’s constitutional arrangements could only be explained by history—*British* history. But we could now change these arrangements:

The time for relating our rules for the conduct of government to those of the British has passed. The machinery under which the [sic] New Zealand democracy works, or does not work, must now be evaluated under New Zealand conditions.<sup>18</sup>

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<sup>14</sup> See *L v M* [1979] 2 NZLR 519 (CA); *Brader v Minister of Transport* [1981] 1 NZLR 73 (CA); *New Zealand Drivers’ Association v New Zealand Road Carriers* [1982] 1 NZLR 374 (CA); and *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA). See also Rt Hon Sir Robin Cooke “Fundamentals” [1988] NZLJ 158.

<sup>15</sup> *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398 (CA).

<sup>16</sup> Lord Woolf “*Droit Public—English Style*” [1995] PL 57; and Sir John Laws “*Law and Democracy*” [1995] PL 72.

<sup>17</sup> Contemporaneous reviews were broadly in agreement with Palmer’s ‘diagnosis’: see BV Harris “*Review*” (1979) 4 Otago LR 388; and DL Round “*Review*” (1980) 9 NZULR 209.

<sup>18</sup> *Unbridled Power*, above n 9, 1.

Palmer gave a brief outline of NZ's constitutional history, treating it as a whittling away of imperial control. His first criticism of NZ's constitution was that it was outdated: it told citizens very little about NZ government. Even if NZ's constitution could be made more legible, it still suffered from a concentration of powers and inefficient processes of law-making.

*Unbridled Power* emphasised practical reforms over overt 'theory'—although this did not mean there was no theory at all. The key principle underlying Palmer's approach was the separation of powers: a division of powers would limit the possibility of arbitrarily exercised power. There was a fearsome concentration of power in the executive branch of government. The reality of party discipline meant that laws were passed fairly quickly and without dissent, since the executive controlled the legislature. NZ's Parliament was unicameral and small, so there were few means of delay, giving people no time to think through proposed legislation. Thus laws were passed too easily, and often with little scrutiny. Further, the two party system led to polarisation of debate, rather than reasoned enquiry.

There were checks: public opinion, courts, Parliament, pressure groups and other institutions, but Palmer thought these were insufficient. There was widespread disenchantment with the political process in NZ. And yet government was spreading, penetrating all spheres of life. There was "little serious political debate" on this, but the time had come to ask "whether we have not gone too far and created a juggernaut which is out of control."<sup>19</sup> He contrasted 'the NZ way', which saw government as a friend, with 'the US way', which treated government as a necessary evil.

The most radical chapters were on electoral reform and the potential for an entrenched constitution or bill of rights. Palmer was enthusiastic about a bill of rights (and to a lesser extent, a written constitution) because some matters were fundamental in society and should be withdrawn from political controversy;<sup>20</sup> and because it would prevent the political process from being the final arbiter on

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<sup>19</sup> Ibid, 6.

<sup>20</sup> Ibid, 131.

rights.<sup>21</sup> Thus Palmer was also happy to insist that more power and trust be placed in the courts, something other commentators would also encourage.<sup>22</sup> Palmer's discussion of the philosophical basis for such rights was shallow. Rights were useful simply because government action was occasionally arbitrary, ill-thought through, or the work of ignorant majorities.

Palmer's suggested electoral reforms were aimed more at increasing the efficiency of government and encouraging a sense of legitimacy in the democratic process by strengthening the principle of representation. The contemporary 'first past the post' ('FPTP') voting system caused a number of problems for NZ government. Palmer noted how FPTP distorted voters' interests: it led to a situation where a party could receive a minority of votes, but a majority of seats. This distortion of voters' interests favoured the established parties, and also excluded third parties; a two-party Parliament also had the run-on effect of encouraging polarisation of debate and an oversimplification of issues, rather than rational enquiry. In short, the result of FPTP was that voters' interests were not being fairly represented in Parliament; and it discouraged rational debate. This in turn led to badly thought-out laws which might endanger civil liberties.

Palmer proposed proportional representation as a remedy. It would encourage political participation by minorities and Maori, and the growth of independent parties; and by introducing a greater variety of people into Parliament and breaking up the monopoly of established political parties, it would encourage greater cooperation, deliberation and thus better law. More generally, a system of proportional representation would re-legitimise the political process.

There was a brief mention of republicanism in *Unbridled Power*, but no mention of the Treaty of Waitangi ('the Treaty') or Maori at all. In short, calls for a bill of rights and a written constitution were not yet linked to the issue of Maori sovereignty. Discussion of the Treaty's status had not yet reached a level which would force NZers to reconsider how it fit in NZ's constitutional arrangements.

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<sup>21</sup> Ibid, 136.

<sup>22</sup> See KJ Keith "The Courts and the Constitution" (1985) 15 VUWLR 29.

In the early 1980s, Robert Quentin-Baxter<sup>23</sup> wrote two important articles about constitutional change: one on the office of the Governor-General and one more generally on constitutional development.<sup>24</sup> The initial impetus for discussion in both articles came from domestic Maori protests, although little mention was made of this ‘problem’ after raising it. More prominent was NZ’s ‘recent’ separateness from Britain, which required revision or development of NZ’s constitutional arrangements:

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....if we wish to remain independent, we must learn to stand upon our own ground.<sup>25</sup>

It was the waning relationship between Britain and NZ that triggered this feeling that our constitution was inadequate. This newly-felt independence, coupled with domestic conflict and loss of cohesion, gave rise to a sense of precariousness: “we live more dangerously than the British, because ... our unreasoned confidence in the adequacy of the Westminster model has been unshakeable.”<sup>26</sup> Again, it was the sense that there was no elite in NZ capable of self-restraint in the use of parliamentary sovereignty. But there was also a more salient development: the emergence of an international dimension.

In both articles, Quentin-Baxter noted calls to enact a written constitution as a means of dealing with this situation, but he preferred a modification of existing institutions rather than any major overhaul; and greater observance being paid to international law. Noticeably, the International Covenant on Civil and Political Rights (‘ICCPR’) was only ratified by NZ in 1978.<sup>27</sup> NZ had always conceived of itself as a good international citizen, but adoption of international instruments was rather haphazard, accepted because other Commonwealth countries were

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<sup>23</sup> See Appendix 2.

<sup>24</sup> RQ Quentin-Baxter “The Governor-General’s Constitutional Discretions: An Essay Towards a Re-Definition” (1980) 10 VUWLR 289; and “Themes of Constitutional Development: the Need for a Favourable Climate of Discussion” (1985) 15 VUWLR 12.

<sup>25</sup> “Themes”, above n 24, 13.

<sup>26</sup> Ibid, 19.

<sup>27</sup> See “Reservations, declarations, notifications and objections relating to the International Covenant on Civil and Political Rights thereto”: CCPR/C/2/Rev.4 (24 August 1994) at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.2.Rev.4.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.2.Rev.4.En?Opendocument) (last accessed 21 June 2008).

considering it, and because politicians were unaware of the effect it might have domestically.<sup>28</sup> NZ did not adopt the First Optional Protocol to the ICCPR—which gave a right of individual petition—until 1989.<sup>29</sup>

Quentin-Baxter explained why adherence to international law was so important:

It is because New Zealand is a sovereign state that the question of constitutional development assumes special importance. ... We have ... no need to be defensive ... 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.<sup>30</sup>

Put differently, a key reason for reviewing NZ's constitutional arrangements was not simply because of domestic troubles but because of a changed geopolitical environment. At an international level there had been a general retreat from empire: Britain and the US had withdrawn from Southeast Asia, leaving NZ bereft of reliable security arrangements. The subsequent proliferation of more nation-states introduced a new complexity into NZ's relations with the world.

Standing and influence in world affairs now depended on a country's conduct.<sup>31</sup> With the end of empire, and the proliferation of new states, 'we' could no longer 'stand with Britain': it was now the international community's opinion which mattered. Moreover, the international dimension provided NZers with a new standard or model, which could compete with the British one. NZ's constitution had to be aligned with international standards. Liberal NZers were still smarting from the international opprobrium caused by the National Government's persistence in maintaining sporting contacts with South Africa. The National Government's actions were seen to be violating an international standard of racial

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<sup>28</sup> Malcolm Templeton "New Zealand and the Development of International Law" in Bruce Brown (ed) *New Zealand in World Affairs, Vol 3: 1972-1990* (Victoria University Press, Wellington, 1999) 62, 64-7.

<sup>29</sup> "Reservations, declarations", above n 27.

<sup>30</sup> "Themes", above n 24, 25.

<sup>31</sup> *Ibid*, 24.



equality, and had led to an all-African boycott of the 1976 Montreal Olympic Games; and in 1983 to NZ's near-expulsion from the Commonwealth.<sup>32</sup>

In short, there was unease amongst the legal profession about the state of NZ's constitution: that these arrangements—crude, informal, incremental and 'borrowed' or insufficiently indigenous—were unsatisfactory under the domestic gaze and that of the international community. This unease, and the forms which responses took, also stemmed from the increasing professionalisation of legal education. Many of those involved in the push for reform of NZ's constitutional arrangements had postgraduate degrees in law, and often from North American universities;<sup>33</sup> and some were also experienced international lawyers.<sup>34</sup> Thus there was an awareness of alternative responses to what was seen as the failure of NZ's constitutional arrangements to 'deliver'. The model preferred, and NZ's constitutional arrangements compared with, was a North American one: a limited state, of republican status with an entrenched bill of rights and constitution. Its value was reinforced by the sense that this model had contributed to the success of the world's 'premier' democracy.<sup>35</sup>

NZers were not alone in questioning their constitutional arrangements. In 1970s and 1980s Britain, many became increasingly concerned about the 'direction' of government and the role of constitutional arrangements in Britain's economic and international decline.<sup>36</sup> With the rise of Margaret Thatcher and the Tories in the 1980s, proposals for constitutional reform on the 'left' increased.<sup>37</sup> For some, Britain's archaic constitutional arrangements were to blame for Britain's decline.<sup>38</sup>

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<sup>32</sup> David McIntyre "From Singapore to Harare: New Zealand and the Commonwealth" in Bruce Brown (ed) *New Zealand in World Affairs, Vol 3: 1972-1990* (Victoria University Press, Wellington, 1999) 85, 92-5.

<sup>33</sup> For example: Geoffrey Palmer (University of Chicago), Kenneth Keith, BV Harris, and David Williams (Harvard), Philip Joseph (University of British Columbia).

<sup>34</sup> Both Kenneth Keith and Robert Quentin-Baxter had worked in NZ's external affairs department and later at the UN. Robert Quentin-Baxter served on the International Law Commission and Sir Kenneth Keith is presently a judge on the ICJ. Palmer also has long been a strong adherent of international law: see his "International law in the Foreign Policy of a Small State" (1986) 16 *VUWLR* 1.

<sup>35</sup> See chapter 1.

<sup>36</sup> Anthony King *The British Constitution* (Oxford University Press, Oxford, 2007), particularly chapter 4.

<sup>37</sup> Vernon Bogdanor "Mrs Thatcher and the Constitution" in *Politics and the Constitution: Essays on British Government* (Dartmouth Publishing, Aldershot, 1996) 21.

<sup>38</sup> See, for example, David Marquand *The Unprincipled Society* (Cape, London, 1988).

Put differently, Britain's decline affected perceptions of its constitution. The model which NZers had once looked to was slowly falling into decline and being supplanted by something which seemed more 'universal' and thus more attractive. The idea that NZ might 'follow' Britain was being rejected.

Similar developments were taking place in the settlement colonies as well. In Australia, there were a number of proposals for a bill of rights from the 1970s onwards.<sup>39</sup> Further, the dismissal of the Whitlam government by the Governor-General Sir John Kerr in 1975 triggered an as-yet unfinished public debate on whether Australia should become a republic. In Canada, dissatisfaction with contemporary arrangements could be seen in the intensification of the Quebecois secessionist movement.<sup>40</sup> Along with patriation of the Canadian Constitution, a federal bill of rights was seen as a means of unifying the Canadian nation around commonly-held values. It was under these circumstances that a nationalist narrative could emerge and seem persuasive.

At its most general, these shifts were a manifestation of a more general trend of dissatisfaction with 'organised modernity': the idea that (individual) freedom was best served through collective arrangements; and its replacement by 'extended liberal modernity', which for the most part signified a rejection and dismantling of collective arrangements, celebrated pluralism and the individual and saw the erosion of previous boundaries.<sup>41</sup> This dissatisfaction took place in most Western democracies from the 1960s onwards. In the economic sphere, there was a gradual rejection of government intervention in the economy despite a long postwar period of consensus. In the political sphere, this dissatisfaction manifested itself through a slow disengagement from established politics and by hostility towards constitutional arrangements previously seen as legitimate; and more generally in a new distrust of the state. NZ was not that different from those with whom she shared a common past—although this commonality was soon to be downplayed.

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<sup>39</sup> Hilary Charlesworth *Writing in Rights: Australia and the Protection of Human Rights* (University of New South Wales Press, Randwick (NSW), 2002).

<sup>40</sup> Peter Russell *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (3 ed, University of Toronto Press, Toronto, 2004); and Peter Oliver *The Constitution of Independence: the Development of Constitutional Theory in Australia, Canada and New Zealand* (Oxford University Press, Oxford, 2005).

<sup>41</sup> Peter Wagner *A Sociology of Modernity: Liberty and Discipline* (Routledge, London, 1994).

The suggested responses to the unsatisfactory nature of previously acceptable constitutional arrangements were also similar to those overseas: a renewed interest in the separation of powers and the role of the courts; the re-characterisation of the state as artificial and oppressive; a change in the electoral system to one of proportional representation; the institutionalisation of a bill of rights; a focus on indigenous people's rights; and in the settler communities the 'patriation' of their respective constitutions. Unspoken conventions and consensus of the past were treated as inadequate and a more formalised, juridified regime was desired. In short, what NZ was going through and experiencing 'nationally' was informed and shaped by international developments.

#### **The Fourth Labour Government and Constitutional Reform**

By 1984, the National Government was rupturing, after various scandals and various public disagreements. Muldoon called a snap election, which his party promptly lost. NZ at the time was facing a financial crisis. The incoming Labour government had not yet been called to Parliament, but there was a constitutional convention that an outgoing government would take the advice of the incoming one. Muldoon refused to follow Labour's advice, causing a 'constitutional crisis' as there were no apparent laws which could resolve the issue.<sup>42</sup> The matter ended when Muldoon was put upon by his own colleagues to follow the convention, but the paucity of controls on how NZ was governed was laid bare by Muldoon's actions.

Labour's election was seen as a 'turning point'. PM Muldoon symbolised the last of the war generation: Muldoon was in his late 50s and harboured great affection for Britain. By contrast, the average age of the Fourth Labour Cabinet was in the 40s: this was a generation which had grown up in the 1950s-60s when Britain began to decline.<sup>43</sup>

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<sup>42</sup> Geoffrey Palmer *New Zealand's Constitution in Crisis: Reforming Our Political System* (John McIndoe, Dunedin, 1992), 45-6.

<sup>43</sup> Philippa Mein Smith *A Concise History of New Zealand* (Cambridge University Press, Melbourne, 2005), 208.

The financial crisis, coupled with the constitutional crisis, allowed Labour to push through its radical state reforms very quickly. Most of the reforms were justified by the theories of public choice and new institutional economics, theories first conceived of and applied overseas, and exported to NZ.<sup>44</sup> There was a shift to venerating the private sphere.<sup>45</sup> Freed of the bureaucratic forms of the state, history and ideological distortions, private orders would flourish.<sup>46</sup> The state lost a great deal of its legitimacy to act: the idea of the 'public good' or acting collectively lost much of its meaning. What remained was the market, interest groups and individuals with 'self-evident' rights.

All this formed part of the 'background' to the campaign for a bill of rights in NZ. The distrust of the state expressed in economic discourse had a clear parallel in the language of constitutionalism. Both discourses evinced a strong belief in the role of law to implement envisioned reforms and the role of the courts to police these new regimes.<sup>47</sup> Both had overseas antecedents, and both had domestic advocates now in positions of power. Both discourses undercut the legitimacy of state involvement, and insisted on a redistribution of the state's functions elsewhere, prioritising the authenticity of the private sphere. But this 'privatisation' of public functions did not necessarily mean the reduction of state power; it only meant the debate about how political power ought to be used was removed from public discussion.

### **The 1985 *White Paper***

With the constitutional and financial crisis behind it, the Labour government under Palmer's direction as Minister of Justice, issued a discussion document outlining a draft bill of rights ('BOR') intended as NZ's supreme law.<sup>48</sup> Palmer as part of the Labour Party Policy Council had had it included in its election manifesto as early

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<sup>44</sup> Doris Janiewski and Paul Morris *New Rights New Zealand: Myths, Moralities and Markets* (Auckland University Press, Auckland, 2005).

<sup>45</sup> Michael Taggart "The Nature and Functions of the State" in Peter Cane and Mark Tushnet (eds) *The Oxford Handbook of Legal Studies* (Oxford University Press, Oxford, 2003) 101 and David Kennedy "The 'Rule of Law', Political Choices and Development Common Sense" in David Trubek and Alvaro Santos (eds) *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, Cambridge, 2006) 95, 138.

<sup>46</sup> Martii Koskenniemi "The Wonderful Artificiality of States" (1994) 88 Am Soc'y Int'l L Proc 22, 26.

<sup>47</sup> "The 'Rule of Law'", above n 45, 138.

<sup>48</sup> *A Bill of Rights for New Zealand: A White Paper* [1985] AJHR A.6.

as 1981.<sup>49</sup> Now Palmer had the opportunity to implement the reforms he had envisioned in the 1970s.

The *White Paper* was tabled in April 1985 and referred to the Justice and Law Reform Committee ('JLRC') in October 1985. The *White Paper* contained a draft BOR, divided into six parts. Part I was devoted to general provisions: the BOR was declared to be NZ's supreme law (article 1), but all were rights subject to reasonable limitations demonstrably justifiable in a democratic society (article 3). Part II dealt with the Treaty: rights under the Treaty were recognised and affirmed; the Treaty was to be regarded as always speaking, and courts were to give effect to its spirit and true intent (article 4). Parts III, IV and V dealt with civil rights, non-discrimination and minority rights and legal process rights. Part VI dealt with application, enforcement and entrenchment: legislation was to be interpreted to be consistent with the BOR (article 23); remedies (article 25); interpretations of the Treaty could be requested from the Waitangi Tribunal (article 26); and there was an amendment process—the BOR could be amended with a vote of 75% of the House of Representatives or a simple majority in a referendum (article 28). A general equality provision was omitted because of concern for its potentially broad scope; its subject matter was later transferred to the Human Rights Act 1993 and given form in highly particular provisions.<sup>50</sup>

The *White Paper* explained why it was necessary to enact an entrenched BOR. The main reason was to curb the power of the state. NZ had a unitary legal system and a strong unicameral parliament, controlled by the executive. The power of the state over people's lives was extensive and growing, the situation being likened to Stuart times.<sup>51</sup> This was coupled with very few safeguards to protect fundamental freedoms—the courts, conventions and public opinion. A constrained state, then, would help re-legitimate the state, given its recent excesses.

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<sup>49</sup> W Paerau Warbrick *Labour's Bill of Rights: The Labour Government's Attempt at a Bill of Rights in the 1980s* (MA thesis, University of Otago, 1998), iii.

<sup>50</sup> Paul Rishworth "The Birth and Rebirth of the Bill of Rights" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brooker's, Wellington, 1995) 1, 16-7.

<sup>51</sup> *White Paper*, above n 48, 27.

Linked to this were two subsidiary reasons: first, whilst there might not be any foreseeable threat to individuals' rights, a BOR would be a safeguard against their erosion; and second, a BOR would ensure greater accountability. Accountability was both a justification and a defence for the draft BOR.<sup>52</sup> The *White Paper* argued that there had been growing dissatisfaction with the accountability of government: elections were too blunt an instrument. But accountability also shielded the draft BOR against criticisms that it would impede Parliament, because it set in place only procedural safeguards which the judiciary would police.

The *White Paper* insisted the rights requiring protection were "freedoms about which there is no real dispute (although their exact extent might of course be argued). They are truly fundamental."<sup>53</sup> They were "value free".<sup>54</sup> As with Labour's economic reforms, here was an attempt to carve out an inviolate zone of privacy, treating politics as something hostile and harmful. In line with this too, there was no mention of economic or social rights: NZ had ratified the International Covenant on Economic, Social and Cultural Rights, but no attempt was made to implement this. Indeed, Palmer insisted on excluding this on the basis that this was beyond the state's capacity.<sup>55</sup>

Thus one aim of the draft was to revitalize the state's legitimacy by stating very clearly the limits of state action. A second major reason for enacting a draft BOR was the need to recognize the Treaty. To enact the draft BOR without including the Treaty would make it an incomplete document, or simply 'Pakeha law'. More legalistically, to exclude the Treaty suggested that it was a subordinate piece of law. Moreover, it was also a means of ensuring that future legislation would be consistent with the Treaty. The *White Paper* did note that it was up to Maori to decide whether the Treaty should be included, although there was little discussion of how Maori consent would be best expressed, and its relationship to any expression of Pakeha consent.

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<sup>52</sup> Ibid, 28-30.

<sup>53</sup> Ibid, 29.

<sup>54</sup> Ibid, 28.

<sup>55</sup> *Crisis*, above n 42, 57.

The inclusion of the Treaty in the BOR might have seemed at odds with Palmer's concern about the state's capacity to implement its promises, but it was a means of securing the Maori vote and shoring up state legitimacy.<sup>56</sup> In the late 1970s the Labour Party's traditional dominance of the four electoral seats allocated to Maori voters was threatened by a newly-formed Maori political party, Mana Motuhake.<sup>57</sup> And certainly, the Treaty was not central to the genesis of the BOR. Palmer had not connected the BOR to the Treaty in his *Unbridled Power*. Earlier drafts had made no mention of the Treaty; provisions on the Treaty were only inserted later.<sup>58</sup>

Pakeha politicians were slowly becoming cognisant of the highly political significance of the Treaty. This perhaps had begun with the establishment of the Waitangi Tribunal in 1975, which deal with Maori claims, but this had not slowed down political debate.<sup>59</sup> A national *hui* (meeting) involving more than one thousand Maori dignitaries had been held in September 1984 at Ngaruawahia on the status of the Treaty. There a number of matters were discussed, including Labour's proposal to pass a BOR. The *hui* was suspicious of a BOR because members believed Maori already had one—the Treaty.<sup>60</sup>

The inclusion of the Treaty was also an attempt to take into account 'our' own special characteristics, values and institutions.<sup>61</sup> The *White Paper* hazily noted the Treaty was "part of the essential inheritance of the Pakeha New Zealander".<sup>62</sup> Including the Treaty would "give legitimacy to the presence of the Pakeha, not as a conqueror or interloper, but as a New Zealander, part of a new *tangata whenua* [people of the land]".<sup>63</sup> In short, the inclusion of the Treaty had a twofold purpose: it was not merely an attempt to attract Maori political support, but also an attempt to create a new sense of unity between Maori and Pakeha—'NZers'—which had in

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<sup>56</sup> Warbrick, above n 49, 27-39.

<sup>57</sup> McRobie, above n 1, 399.

<sup>58</sup> Jane Kelsey *A Question of Honour? Labour and the Treaty 1984-1989* (Allen & Unwin New Zealand, Wellington, 1990), esp 51-56.

<sup>59</sup> "Maori Affairs", above n 7.

<sup>60</sup> The recommendations of the National Hui on the Treaty of Waitangi held at Ngaruawahia, September 1984, are set out in an appendix in Stephen Levine and Raj Vasil *Maori Political Perspectives* (Hutchinson Group (NZ) Ltd, Auckland, 1985), 183-185.

<sup>61</sup> *White Paper*, above n 48, 35.

<sup>62</sup> *Ibid*, 36.

<sup>63</sup> *Ibid*, 37.

recent years been sorely lacking. This 'unity' was Janus-faced, since it could also be a means of papering over Maori concerns.

A subsidiary reason for the draft BOR was the need to recognize NZ's international obligations. In the 1980s, the adoption of various treaties continued. By the late 1970s and early 1980s, international law came to be seen as having almost quasi-constitutional status in NZ, particularly in the absence of a codified constitution. Judges and lawyers alike were beginning to see the potential of international law within the domestic sphere.<sup>64</sup>

Associated with international law was the 'example of others': the experience of common law countries of the issue of constitutional arrangements in recent times.<sup>65</sup> Scattered amongst the *White Paper's* justifications were comparisons to the international community and the adoption of bills of rights elsewhere.<sup>66</sup> In particular, the *White Paper* and the draft BOR showed the influence of the Canadian Charter of Rights.<sup>67</sup> In 1982, the Trudeau-led federal government had enacted the Charter after much debate, the aim there being to answer the Quebecois separatist movement and find a focal point for unity.<sup>68</sup>

The *White Paper* itself noted that the "actions taken elsewhere are the more significant for New Zealand for the reason that our constitutional arrangements are much simpler".<sup>69</sup> 'Our' simplicity was now a vice rather than a virtue. The centralisation of government power in NZ, as elsewhere, 'demanded' something be done; there was the sense that NZ was 'behind' other countries in responding. Linked to this sense of comparison was an argument about education and national identity. The *White Paper* quoted Cooke on the benefits of a BOR:

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<sup>64</sup> *Van Gorkom v Attorney-General* [1977] 1 NZLR 535; and *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA).

<sup>65</sup> *White Paper*, above n 48, 32-33.

<sup>66</sup> *Ibid*, 21; 25; 32-33.

<sup>67</sup> *Ibid*, 65. "Birth and Rebirth", above n 50, 13.

<sup>68</sup> See generally Michael Mandel *The Charter of Rights and the Legalisation of Politics in Canada* (Wall and Thompson, Toronto, 1989).

<sup>69</sup> *White Paper*, above n 48, 32.



An instantly available, familiar, easily remembered and quoted constitution can play a major part in building up a sense of national identity. If Magna Carta means anything in the South Pacific in the twentieth century, it is not much .... In New Zealand we badly need something that can grip the imagination.<sup>70</sup>

It had to be a BOR for 'New Zealanders'.<sup>71</sup> Palmer<sup>72</sup> and Cooke<sup>73</sup> along with others<sup>74</sup> were gesturing towards the idea of an indigenous NZ law, as opposed to one derivative of British law. Indeed, it was argued that change had already taken place, manifest in various 'NZ' statutes. Although this sense of 'nationhood' was presented as something which had occurred 'naturally', this rationale became specifically linked to the need for deliberate or willed change. Law had to reflect what already 'was': an argument we have already seen employed in previous chapters.

In terms of application, the *White Paper* was forthright. A BOR *would* involve a shift in power to the judiciary, but that was the point: to reduce the imbalance of power in NZ's constitutional arrangements.<sup>75</sup> But the *White Paper* insisted that the judiciary would use its newfound power conservatively. Historical experience had shown this; more importantly, the draft BOR was mostly procedural, and so would not obstruct Parliament.

Finally, there was the matter of entrenchment. Parliamentary sovereignty suggested that no Parliament could bind a future one, thus rendering a BOR vulnerable to repeal. However, the *White Paper* argued that a 'manner and form' approach would suffice to circumvent this. Parliament could pass a statute specifying that it could only be amended by a special procedure: this would not violate parliamentary sovereignty, because the procedure would only redefine the Parliament required to amend the new enactment. But the main point here is that constraining the state was now thought beneficial. Previously, the idea of a limited

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<sup>70</sup> Ibid, 63, citing Sir Robin Cooke "Bill of Rights: Safeguard against Unbridled Power" (1984) 112 Council Brief 4, 26.

<sup>71</sup> *White Paper*, above n 48, 32.

<sup>72</sup> Geoffrey Palmer "New Zealand's Legal Identity" [1987] NZLJ 314

<sup>73</sup> Sir Robin Cooke "The New Zealand National Legal Identity" (1987) 3 Cant LR 171.

<sup>74</sup> Philip Joseph "Towards Abolition of Privy Council Appeals: The Judicial Committee and the Bill of Rights" (1985) 2 Cant L Rev 273; and BJ Cameron "Legal Change over Fifty Years (1987) 3 Cant L Rev 198.

<sup>75</sup> *White Paper*, above n 48, 40-1.

state was treated with hostility; now, it was beginning to be considered the 'standard' approach to state form.

The format of the *White Paper* was open-ended. The authors insisted that it was a discussion document, and that the government was not committed to any particular provision of the draft BOR.<sup>76</sup> The aim of the *White Paper* was ideally to excite public discussion and through this form a general consensus. With this general consensus, the draft BOR would have sufficient legitimacy to be treated as supreme law.

The desire for a BOR and deliberate constitutional change, then, was triggered by and an attempt to respond to recent domestic events which had threatened the legitimacy of the state. But hovering alongside these matters was the need to 'catch up' and emulate the actions of those elsewhere, to adopt those developments regarded as 'modern'. To be 'modern' was to have a state which voluntarily limited itself, which removed itself from matters previously thought legitimately subject to state action. To be modern meant having a state which represented a nation—a 'people', with a text which unified them.

Curiously, by contrast with the draft BOR, the Constitution Act 1986 was passed with little publicity. This was a result of a number of factors. The immediate focus stemmed from Muldoon's breach of constitutional convention. Palmer seized the opportunity, and established a committee charged with the duty of drawing together and codifying the laws making up NZ's constitution, as well as the immediate rectification of the law regarding outgoing and incoming governments. Similar kinds of debates had been taking place in both Canada and in Australia.<sup>77</sup> NZ was 'following' a trend of the settler communities.

The resulting report was a conservative document, recommending the enactment of an ordinary statute reflecting the current constitutional arrangements.<sup>78</sup> The

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<sup>76</sup> Ibid, 58.

<sup>77</sup> IL Dickinson "Updating the New Zealand Constitution" [1987] PL 193, 194. The Australia Act, severing ties with Britain, was also enacted in 1986. See *Constitution of Independence*, above n 40, chapters 8, 11-13.

<sup>78</sup> Department of Justice *Reports of an Officials' Committee on Constitutional Reform* (Government Printer, Wellington, 1986).

Constitution Act 1986 set out in very simple form the functions and privileges of the executive, legislature and judiciary and a number of other institutions, and severed the link between NZ and Britain by asserting that from the point of enactment UK statutes would no longer have effect in NZ.<sup>79</sup> This was taken to have already happened: the Act merely confirmed NZ's already independent status.<sup>80</sup> It was treated as a technical reform, with no intention of changing the balance of powers within NZ's constitutional arrangements, perhaps because the debate about the draft BOR was underway, and the officials were wary of being embroiled in further controversy. It was not intended as a means of constraining the state; no attempt was made at entrenchment although it was considered. Moreover, enactment was considered urgent to fill in the gap in the law relating to succession. Palmer deliberately kept 'politics' out of the process of enacting the statute.<sup>81</sup> And because it was treated as technical—as 'tidying up'—there was thought no need to gain public-wide consensus, unlike the draft BOR. Thus, once again, by a sidewind, NZ affirmed its constitutional independence from Britain.

### **The *Interim Report* and Submissions**

The *Interim Report*,<sup>82</sup> tabled in July 1987, set out the JLRC's views on progress till that point and summarising the various submissions received. The JLRC was composed of three Labour MPs and three National MPs. Members were dismayed at the level of knowledge displayed of the issues at hand. "It would be fair to say that the concept of a Bill of Rights has not yet gripped the imagination of the wider public of New Zealand",<sup>83</sup> the JLRC opined, noting that in one survey only 6% of the legal profession considered themselves to have an adequate knowledge of the draft.<sup>84</sup>

Of 431 submissions, 243 (56% of the total) opposed the draft outright; 84 (19%) specifically opposed the clause relating to the right to life; 35 (8%) supported the

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<sup>79</sup> Constitution Act 1986, ss 15, 21 and 26.

<sup>80</sup> *Officials' Committee Reports*, above n 78, 27-30.

<sup>81</sup> *Crisis*, above n 42, 48.

<sup>82</sup> *Interim Report of the Justice and Law Reform Select Committee: Inquiry into the White Paper—A Bill of Rights for New Zealand* [1987] AJHR I.8A.

<sup>83</sup> *Ibid*, 4.

<sup>84</sup> *Ibid*, 4.

draft outright; 56 (13%) gave qualified support; and 12-13 (3%) made no decision.<sup>85</sup>

Those in favour of the BOR mostly repeated what the *White Paper* had already said: NZ's constitutional arrangements were fragile and there was a lack of safeguards; rights were in danger of being eroded; NZ needed a national document; the need to meet international obligations. But such submissions tended to come from lawyers and were in the great minority. Moreover, those in favour of a BOR was divided on the details.<sup>86</sup>

Of more interest are the reasons given by those opposing the draft. Generally speaking, the submissions were looked on with contempt or embarrassment.<sup>87</sup> It is likely that many of the draft BOR submissions were part of coordinated Christian group activity, strongly influenced by American fundamentalist approaches.<sup>88</sup> In March 1985 the Homosexual Law Reform Bill had been introduced, aiming to repeal laws making homosexuality a crime. Christian groups, influenced by American religious movements, made a coordinated attempt to ensure that the Bill (later law) would not pass. This activity was contemporaneous with the introduction of the draft BOR, and may explain many of the hostile submissions: in particular, the submissions considering the right to life.<sup>89</sup> In short, the 'opening up' of NZ to the world worked both ways: liberal ideas were adopted, but conservative approaches to matters could also be applied.

Many submissions were hostile to the BOR because of its potential impact: it would not solve the problem of access to justice (23 submissions), would lead to greater uncertainty (over 25 submissions) and increase litigation (15 submissions).<sup>90</sup> Some argued that the introduction of a BOR would be premature

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<sup>85</sup> *Interim Report*, above n 82, 8.

<sup>86</sup> *Ibid*, 14-22. See also Jerome Elkind and Antony Shaw *A Standard for Justice: A Critical Commentary on the Proposed Bill of Rights for New Zealand* (Oxford University Press, Auckland, 1986).

<sup>87</sup> *Crisis*, above n 42, 56.

<sup>88</sup> On the spread of American conservatism in NZ during the 1980s, see Janiewski and Morris, above n 44.

<sup>89</sup> *Interim Report*, above n 82, 11.

<sup>90</sup> *Ibid*, 9-12. An article which catches all of these objections (despite being ill-tempered) is Guy Chapman "The Bill of Wrongs: the Argument against the Proposed Bill of Rights" [1985] NZLJ 227.

(25 submissions),<sup>91</sup> or that it would freeze development.<sup>92</sup> Alternatively, a large number of submissions argued that the re-establishment of a second chamber would answer the concerns of the *White Paper* (39 submissions)—shades of the past.<sup>93</sup> But a significant number (27 submissions) also denied that a BOR was even required: it was premature or it was not even necessary, because the current system was working and the current arrangements were adequate.<sup>94</sup> Similarly, few critics of the draft even mentioned international law—to the point where at least one proponent accused an opponent of simply ignoring international developments altogether.<sup>95</sup>

However, the main reason for opposing the draft BOR was the shift in power to the judiciary.<sup>96</sup> Roughly one-third of all submissions stated this as a reason for opposing the draft.<sup>97</sup> Parliament ‘made’ law, not the judiciary, so the transfer of power would be undemocratic. Second, the judges were an unrepresentative group, being mostly white and conservative, and would be unlikely to find in favour of particular minorities such as Maori, women, or ethnic minorities. Finally, a BOR would result in the politicisation of the judiciary.

The ‘official’ supporters such as Palmer, Kenneth Keith and David Williams (all of whom had had a role in drafting the BOR) downplayed any notion that the BOR was ‘undemocratic’, focusing on how a BOR would improve democracy. Proponents pointed to the narrowness of the draft: there was no right to private property or equality. Most of the rights were ‘procedural’ rather than ‘substantive’, allaying fears that a BOR might excessively restrict Parliament’s law-making powers. Finally, proponents argued the draft BOR was ‘democratic’ in that it ensured minority protection, or equal access to the political process.<sup>98</sup> References

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<sup>91</sup> *Interim Report*, above n 82, 12.

<sup>92</sup> *Ibid*, 13.

<sup>93</sup> *Ibid*, 11.

<sup>94</sup> *Ibid*, 12.

<sup>95</sup> J Elkind “International Obligations and the Bill of Rights” [1986] NZLJ 205.

<sup>96</sup> See, for instance, Chapman, above n 90; Jane Kelsey “Judges and the Bill of Rights” (1986) 3 *Cant LR* 155.

<sup>97</sup> *Interim Report*, above n 82, 8.

<sup>98</sup> KJ Keith “Judicial Review versus Democracy” in *A Bill of Rights for New Zealand?* (Legal Research Foundation Seminar, University of Auckland, 1985) 47.

to US process-based jurisprudence abounded.<sup>99</sup> The draft BOR was also justified on the basis of NZ's growing multicultural composition or the need to protect minorities.<sup>100</sup> NZ was no longer a homogenous society, which meant that it could no longer be so easily assumed that Parliament could speak for everyone.

42 submissions were against the Treaty's inclusion; a much smaller number were in favour of inclusion.<sup>101</sup> Many were for exclusion on the basis that the Treaty was discriminatory and inappropriate; but also because it was better dealt with outside the BOR, being the constitutional foundation of the NZ state. The JLRC was unwilling to exclude the Treaty at this point because of the need to find some means of ensuring the BOR was 'inclusive', and noted that further consultation specifically with Maori was necessary before moving any further. But the JLRC did acknowledge that were the Treaty to be included, much more thought was needed on how the Treaty would interact with the other provisions, and whether or not it could be amendable.

There were some academic contributions on the inclusion of the Treaty,<sup>102</sup> but it was not until the late 1980s—the *Lands* case<sup>103</sup> may serve as a milestone—that the legal profession as a whole became aware of the role of the Treaty in NZ law.<sup>104</sup> Given the imprimatur of the NZCA, the legal profession in particular came to see that the Treaty could have a major impact on NZ law.

Most Maori were against the inclusion of the Treaty. Offence was taken at the arrogance that the Treaty might be reduced to entrenched law at all. First, the Treaty was *tapu* (sacred). Second, there was concern that in 'reducing' the Treaty to statute form, it might be amended or even repealed, irreparably damaging its *mana*, and Maori 'rights'. Third, there was the concern that the Treaty might be subsumed by the BOR. How would justifiable limits to Treaty 'rights' be

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<sup>99</sup> See John Hart Ely *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge, 1980).

<sup>100</sup> *White Paper*, above n 48, 5; and KJ Keith "The Bill of Rights: A Reply to a Criticism" [1985] NZLJ 370, 371-372.

<sup>101</sup> *Interim Report*, above n 82, 31-2.

<sup>102</sup> See the essays in *A Bill of Rights for New Zealand?* (Legal Research Foundation Seminar, University of Auckland, 1985); and John Tamihere "The Treaty of Waitangi and the Bill of Rights: A Plea for Recognition" [1987] NZLJ 151.

<sup>103</sup> *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

<sup>104</sup> JD Sutton "The Treaty of Waitangi Today" (1981) 11 VUWLR 17.

determined? Given the history of NZ courts in dealing with the Treaty,<sup>105</sup> many Maori were wary of the general courts having jurisdiction to interpret the Treaty.

Discussing the Treaty was left mostly to Maori commentators. Maori academics did contribute to a set of seminars on the BOR,<sup>106</sup> but noticeably, of the presentations made by Maori in the seminars, two were hostile to inclusion,<sup>107</sup> and one was modestly enthusiastic.<sup>108</sup> It was unclear to what extent Pakeha commentators were aware of the breadth of the claims being made by Maori, both under and beyond the Treaty. Certainly, Maori commentators bristled at the idea that Maori issues fell under the protection of 'minorities'.<sup>109</sup> Chief Judge Durie commented:

Too often ... Maori rights are not identified, or they are subjugated to our current courtship with multiculturalism. At least Pacific cultures should understand the prior right of the *tangata whenua* [people of the land] ....<sup>110</sup>

Many Pakeha commentators' idea of the Treaty was something which left Parliament's sovereignty intact, since Parliament could choose what it recognised. But for many Maori, the BOR was more a starting point from which to criticise the status quo. An entrenched BOR with the Treaty included would only be the beginning to recognition of Maori customary rights:

We can no longer ignore Maori demands in the hope that they will simply go away or maintain ignorance of world-wide recognition of the rights of indigenous people. Those who say we do not need a Bill of Rights can say so from the standpoint of a people whose rights have never been seriously threatened.<sup>111</sup>

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<sup>105</sup> See chapters 3 and 5.

<sup>106</sup> *A Bill of Rights?*, above n 102.

<sup>107</sup> Ripeka Evans "Is the Treaty of Waitangi a Bill of Rights?" in *A Bill of Rights for New Zealand?* (Legal Research Foundation Seminar, University of Auckland, 1985) 197; and Shane Jones "The Bill of Rights and Te Tiriti O Waitangi" in *A Bill of Rights for New Zealand* (Legal Research Foundation Seminar, University of Auckland, 1985) 207.

<sup>108</sup> Chief Judge Edward Durie "Part II and Clause 26 of the Draft Zealand Bill of Rights" in *A Bill of Rights for New Zealand?* (Legal Research Foundation Seminar, University of Auckland, 1985) 171.

<sup>109</sup> Evans, above n 107, 199; and "Part II", above n 108, 175.

<sup>110</sup> "Part II", above n 108, 188.

<sup>111</sup> *Ibid*, 174.

Evans commented: “it is a blessing for non-Maori Aotearoa [NZ] that we have not upturned society yet.”<sup>112</sup>

Much time was spent arguing about how to entrench the BOR, given the problematic doctrine of parliamentary sovereignty.<sup>113</sup> A Diceyan approach to constitutional law still persisted, making it difficult to see how any law could be entrenched, since Parliament was ostensibly ‘sovereign’. However, Joseph was critical: was the ‘manner and form’ argument really appropriate to the entrenchment of a BOR at all?<sup>114</sup> Sharp argued that only consent could successfully legitimise the draft BOR, a document which could have a profound effect on public discourse.<sup>115</sup> Noticeably, few commentators, leaving aside Maori, thought that it was necessary to have the BOR legitimised by Maori via a separate referendum or procedure, as Cooke would suggest a decade later in examining the abolition of the Crown.<sup>116</sup>

Despite the majority of submissions opposing the draft BOR, the JLRC was adamant in going ahead. First, a large number of submissions were solely related to one issue like abortion; second, many submissions were the result of a lack of understanding about how the BOR would work or how present-day government worked.<sup>117</sup> The JLRC reiterated the justifications for enacting a BOR: the need to educate NZers; and more importantly, to protect NZers’ rights which were vulnerable because of the lack of checks on the executive: “In this regard New Zealand is somewhat conspicuous in the western world”.<sup>118</sup>

The JLRC suggested a number of alternatives in response to submissions. Among them was a version involving substantial amendments, with the addition of rights

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<sup>112</sup> Evans, above n 107, 201.

<sup>113</sup> BV Harris “The Law-Making Powers of the New Zealand General Assembly: Time to Think about Change” (1984) 5 Otago LR 565; and Elkind and Shaw, above n 86, 142-153;

<sup>114</sup> Philip Joseph “The Challenge of a Bill of Rights: A Commentary” [1986] NZLR 416, 418.

<sup>115</sup> Andrew Sharp “An Historical and Philosophical Perspective on the Proposal for a Bill of Rights for New Zealand in *A Bill of Rights for New Zealand?* (Legal Research Foundation Seminar, University of Auckland, 1985) 1, 25-34.

<sup>116</sup> Rt Hon Sir Robin Cooke “The Suggested Revolution against the Crown” in Philip Joseph (ed) *Essays on the Constitution* (Brooker’s, Wellington, 1995) 28.

<sup>117</sup> *Interim Report*, above n 82, 22.

<sup>118</sup> *Ibid*, 23.



to property<sup>119</sup> and/or social and economic rights: this was rejected by the JRLC as going against the idea of the BOR as something protecting procedural and not substantive rights.<sup>120</sup> Another option was the enactment of a judicially non-enforceable BOR which could serve as a guide to interpretation: this was dismissed as being ineffective in controlling executive conduct, although something like it would eventually be adopted.

In short, objections to a BOR had not changed substantially from the 1950s and 1960s: the fear of uncertainty; a greater trust in Parliament over the courts; the impossibility of overcoming parliamentary sovereignty; and an apathetic public who saw no benefit in constitutional reform. Many of the commentators and submissions ignored the concerns of Palmer and the *White Paper*: the fear of the state, the need to meet international obligations, or the need for a unifying document. An entrenched BOR could not be enacted with a strong expression of public consensus because only elites had proposed it, and because there was no unified 'nation' prepared to accept it.

### **The *Final Report* and the Enactment of the New Zealand Bill of Rights Act 1990**

The *Final Report*, tabled in October 1988, was brief.<sup>121</sup> The JLRC made clear its disappointment about the lack of interest and knowledge of NZers about basic constitutional matters. NZers were not ready for a full-fledged BOR. The *Final Report* recommended not an entrenched BOR, but instead an ordinary, non-entrenched Bill of Rights ('BORA') be passed. This statute would be an aid to interpretation.

There were two other recommendations: the first was that all reference to the Treaty be omitted; and there was a plea for the inclusion of social and economic rights. If the BORA were not supreme law, then the Treaty did not belong there; and since the BORA was to be unentrenched, there was no harm in including

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<sup>119</sup> At least 53 submissions (12%) argued for the inclusion of a right to property: *ibid*, 76.

<sup>120</sup> *Ibid*, 78-79.

<sup>121</sup> *Final Report of the Justice and Law Reform Select Committee: Inquiry into the White Paper—A Bill of Rights for New Zealand* [1988] AJHR I.8C.

social and economic rights. Both envisioned the BORA as a statement of intent rather than something enforceable.

A comparison with the Constitutional Society's 1960 suggested constitution is appropriate here. For the 1990 BORA, the inclusion of social and economic rights was rejected, somewhat in contrast to the 1960 constitution. The idea that a bill of rights should explicitly include anything relating to the economy was now thought inappropriate (even though monetary and fiscal policy was undergoing a similar kind of 'constitutionalisation'—that is, the removal of certain matters from political debate).<sup>122</sup> The 1960 suggested constitution was an attempt to return NZ to a British framework; the 1990 BORA was an attempt to fit NZ within an international framework.

In any case, the NZ Bill of Rights Bill was introduced in October 1989. It was to be unentrenched. The supremacy and entrenchment clauses of the 1985 draft were omitted, and article 23 of the 1985 draft became clause 6 of the new draft—the courts were directed to interpret the law in accordance with the rights and freedoms laid out in the draft BORA. Another clause was added to ensure that affirmative action legislation would pass muster under the draft BORA. All mention of the Treaty and social and economic rights was omitted. In short, the draft BORA was conceived of as an aid to interpretation.

There were a mere 76 submissions on the 1989 draft submissions. 23 (30%) supported the proposed bill; 22 (29%) opposed it; 25 (33%) gave no explicit support but suggested amendments; and 6 (8%) neither supported nor opposed the bill.<sup>123</sup> The low submission rate was a consequence of the radically shortened period of submission time allowed (three months) as well as a lack of publicity. Moreover, the BORA was a slimmed down, 'ordinary' statute. The BORA promoted had none of the features which made the 1985 draft controversial. The Treaty was also omitted, perhaps wisely: by 1989, the Treaty *was* controversial, as the debates in the House of Representatives over the BORA would show.

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<sup>122</sup> See chapter 2.

<sup>123</sup> "Birth and Rebirth", above n 50, 21.

By the time the final draft BORA was debated before Parliament, Palmer was Prime Minister. By late 1989, Labour was failing in the polls, and a decision was made to pass a BORA with or without bipartisan support.<sup>124</sup> As Palmer himself noted, there had never been much enthusiasm for the idea of a BOR even within the Labour Caucus.<sup>125</sup> But Palmer had decided something would be passed, entrenched or not.

The final draft had had two changes made: a provision was inserted to reiterate that the courts could not repeal or revoke any enactment by reason that it was inconsistent with the BORA (now section 4 of the BORA); and the remedies provision was removed.

This draft BORA, despite being unentrenched, was still beneficial, according to Palmer: it was an aid in interpretation; and it had educative value.<sup>126</sup> Most importantly, it could act as a set of standards against which both citizens and government officials could measure government conduct and legislation. Palmer emphasised that this was a ‘parliamentary’ BORA: he placed less emphasis on the role of the courts, and more on the draft BORA’s pre-enactment function.<sup>127</sup> Section 7 required the Attorney-General to bring to the attention of Parliament any bill or provisions inconsistent with BORA rights. This would make up for the lack of entrenchment: it was hoped that this procedure would prevent inconsistent bills from even reaching Parliament.<sup>128</sup>

The opposition made two key arguments: the draft BORA was a watered-down version of a ‘real’ BOR;<sup>129</sup> and the new draft BORA was but a ‘Trojan horse’ to a more dangerous entrenched BOR<sup>130</sup>—Palmer had hoped that the BORA would

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<sup>124</sup> Ibid, 23. See also Belich, above n 6, 406.

<sup>125</sup> *Crisis*, above n 42, 52.

<sup>126</sup> [1990] 510 NZPD 3760-1, per Rt Hon Geoffrey Palmer (21 August 1990).

<sup>127</sup> [1989] 502 NZPD 13039, per Rt Hon Geoffrey Palmer (10 October 1989); [1990] 510 NZPD 3760 per Rt Hon Geoffrey Palmer (21 August 1990).

<sup>128</sup> Grant Huscroft “The Attorney-General, the Bill of Rights and the Public Interest” in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brooker’s, Wellington, 1995) 133, 137.

<sup>129</sup> [1989] 502 NZPD 13043, per Doug Graham (10 October 1989); [1990] 510 NZPD 3452 per Warren Kyd (14 August 1990).

<sup>130</sup> [1990] 509 NZPD 2800, per Paul East (17 July 1990); [1990] 510 NZPD 3453-55, per Warren Kyd (14 August 1990).

pave the way for a stronger version in time.<sup>131</sup> Pointed comments were also made about the Treaty's omission.<sup>132</sup> The *Lands* case was cited as illustrating the new constitutional significance of the Treaty.<sup>133</sup>

By the late 1980s, it was no longer possible to ignore the political problem of Maori (or, perhaps, the 'Pakeha problem'). The economic reforms had left many Maori even worse off than before. The questions raised by Maori protests struck at the very legitimacy of the NZ constitution; and Pakeha were beginning to acknowledge this crisis of legitimacy.<sup>134</sup> Whereas in 1985, "racial concerns and problems" were scarcely a public worry, by 1989 it had become the third most pressing issue for NZers.<sup>135</sup> This situation was rather ironic, since one of the aims of the Fourth Labour Government was to distance itself and withdraw the state from the political sphere as much as possible—for instance, by removing 'Maori issues' from political debate by giving the Waitangi Tribunal more power to deal with Maori land claims.<sup>136</sup> The attempted juridification of the Treaty was another means by which this could have happened.

But there were a series of ironies about the Fourth Labour Government and its relationship to politics. One was that many of the reforms were probably highly objectionable to much of the electorate, but the lack of controls on the NZ state was what allowed many of the reforms to be passed so quickly. A strong state was needed to implement the various reforms intended to imitate the private sphere (the privatisation of various state industries, or the transformation of various state departments into policy creation and delivery). Another irony was that while one major argument to justify enacting a BOR was to provide a national symbol, the theories underlying the Labour Government reforms denied the possibility of collective or public consensus. Finally, while one key justification for legal change was independence and asserting a sense of being different, the legal reforms

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<sup>131</sup> [1989] 502 NZPD 13041, per Rt Hon Geoffrey Palmer (10 October 1989).

<sup>132</sup> [1990] 509 NZPD 2803, per RJS Munro (17 July 1990); [1990] 510 NZPD 3458 per Paul East (14 August 1990).

<sup>133</sup> [1989] 502 NZPD 13046, per Hon JB Bolger (10 October 1989).

<sup>134</sup> FM Brookfield "The New Zealand Constitution: the Search for Legitimacy" in I Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives on the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 41.

<sup>135</sup> "Maori Affairs", above n 7, 255.

<sup>136</sup> *Ibid*, 251.

implemented often followed a standard template advocated and adopted by many other Western countries.

The BORA was finally passed with 36 MPs voting for it, 28 MPs voting against it. Judging from the parliamentary debates it is questionable whether anyone could have foreseen its development over the next two decades.

### **The 1990s: The End of the Cold War and Liberal Triumphalism**

Perhaps the most important event of the 1990s was not domestic, but international: the end of the Cold War. It seemed that liberal democracy had triumphed, marking the beginning of an era of 'deformalisation': a shift from an exceptional situation to one of normality.<sup>137</sup> The Cold War was seen to have 'frozen' the world into a society of wary nation-states, limiting the scope of law. With the end of the Cold War, it was hoped that this would lead to a breakdown of economic barriers, ('globalisation'),<sup>138</sup> the end of the (artificial) nation-state<sup>139</sup> and the reorganization of international society according to law—that is, the organization of inter-state relations according to law.<sup>140</sup>

The persuasiveness of international human rights law increased during the 1990s. International organisations began to proliferate, as did bodies of specialised practices, norms and experts to interpret these.<sup>141</sup> Here, it seemed, was the beginnings of a cosmopolitan vision. There was a shift from a view of human rights instruments as something conservative (which preserved existing rights) to something dynamic (which required active protection and elaboration). But more importantly, this international order presumed a liberal constitutional nation-state

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<sup>137</sup> Francis Fukuyama *The End of History and the Last Man* (Penguin, London, 1992); Martti Koskeniemi "The Wonderful Artificiality of States" (1994) 88 Am Soc'y Int'l L Proc 22.

<sup>138</sup> John Gray *False Dawn? The Delusions of Global Capitalism* (2 ed, Granta Books, London, 2002).

<sup>139</sup> See for instance, Phillip Bobbitt *The Shield of Achilles: War, Peace and the Course of History* (Anchor Books, New York, 2003) and Michael Mann "Can the New Imperialism Triumph in the Age of Nation-States?" (2004) 43 Hist & Theory 226.

<sup>140</sup> Phillipe Sands *Lawless World: America and the Making and Breaking of Global Rules* (Allen Lane, London, 2005). On empire, see Andrew Bacevich *American Empire: The Realities and Consequences of US Diplomacy* (Harvard University Press, Cambridge, 2002).

<sup>141</sup> Jose Alvarez "International Organisations: Then and Now" (2006) 100 AJIL 324; and Martti Koskeniemi "The Fate of International Law: Between Technique and Politics" (2007) 70 MLR 1.

as the ideal political form, and propped up states which adhered to this ideal.<sup>142</sup> Put differently, constraining a state could also enable it. If the state were reconfigured so that it fit with an internationally accepted standard, it would receive acceptance from the international community and be perceived as ‘trustworthy’ by global financiers. Domestically, the reconfigured limited state could similarly have its legitimacy boosted: a limited state was seen to provide certainty.

It was hoped that this reorganisation would also take place at a domestic level: the organization of each state according to liberal constitutional ideals.<sup>143</sup> In the absence of persuasive alternatives, it seemed there was little choice: one followed in order to become ‘modern’ or otherwise be seen to be ‘backward’. Many Central and Eastern European countries adopted codified constitutions or bills of rights.<sup>144</sup> In common law countries, there was the rise of the legal constitutionalists, who preferred law over ‘politics’, the courts over Parliament, and the individual over the state.<sup>145</sup> In both Britain and Australia, there was also more talk of enacting a codified constitution or at least a bill of rights.<sup>146</sup>

In NZ talk at a government level of further constitutional change remained low-key after the end of the Fourth Labour Government. However, the idea of a codified constitution remained an object of desire, particularly amongst scholars. Philip Joseph opened a chapter of his 1992 textbook with the question: “Why has New Zealand resisted a formal Constitution when virtually every state has one?”<sup>147</sup> A codified constitution was now the ‘default setting’: an uncoded one was the exception.

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<sup>142</sup> Joel Migdal “Why Do So Many States Remain Intact?” in *State in Society: Studying How States and Societies Transform and Constitute One Another* (Cambridge University Press, Cambridge, 2001) 135, 138–42.

<sup>143</sup> Bruce Ackerman “The Rise of World Constitutionalism” (1997) 83 *Virg L Rev* 771; and Geoffrey Hawthorn “Liberalism since the Cold War: An Enemy to Itself?” (1999) 25 *Rev Int’l Studies* 145.

<sup>144</sup> Stephen Gardbaum “The New Commonwealth Model of Constitutionalism” (2001) 49 *Am J Comp L* 707.

<sup>145</sup> Christopher McCrudden “A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights” (2000) 20 *OJLS* 499; and Adam Tomkins *Our Republican Constitution* (Hart Publishing, Oxford, 2005), chapter 1.

<sup>146</sup> King, above n 36. See, for instance, *A Constitution for the United Kingdom* (Institute for Public Policy Research, London, 1991).

<sup>147</sup> Philip Joseph *Constitutional and Administrative Law in New Zealand* (Law Book Company, Sydney, 1992), 96.

Shortly after retiring from Parliament, Palmer wrote a retrospective of his time in NZ politics.<sup>148</sup> NZ's constitution remained in 'crisis': "the rules under which government is conducted [were] defective."<sup>149</sup> One noticeable aspect of *Constitution in Crisis* was the explicit nationalism. Palmer argued that NZ constitutional law had clung to British traditions, which were incapable of sustaining the aspirations of NZers.<sup>150</sup> NZ's 'uniqueness' now lay in its backward status. Palmer stated: "We do not have a constitution in the way that Australia, Canada and the United States do. We used to pride ourselves on our unique lack of structure. Now it is more of an embarrassment."<sup>151</sup> Later: "New Zealanders must be amongst the most constitutionally underdeveloped people in the developed world."<sup>152</sup> Palmer lamented:

There was never a particular point in time when the New Zealand constitution was created ... [The constitutions of the US and Australia] were consciously and carefully created at a point in history. When a constitution is created in that fashion its nature and content are vigorously thought about and debated. It is a process which has never occurred in New Zealand ... Our constitution looks primitive and underdeveloped.<sup>153</sup>

Here was an explicit comparison, the natural corollary of nationalism: there is envisaged a world of competing nation-states, of which NZ was one. Recall here Billig's 'banal nationalism'—claiming to be a nation requires one to fit a common, universal pattern.<sup>154</sup> Every nation must take on the conventional symbols of nationhood—and one of these may now be a codified constitution.<sup>155</sup>

'Our' constitutional arrangements were outdated; what we needed was something new and 'modern', because we are modern. This insistence on being unique signalled to Palmer and others an imperative to transform NZ's constitution so that it corresponded more closely to those suggested by like-minded reformers in Britain and the Commonwealth: a consciously-established set of constitutional arrangements based on limited government, liberal democratic values and

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<sup>148</sup> *Crisis*, above n 42.

<sup>149</sup> *Ibid*, 11.

<sup>150</sup> *Ibid*, 77.

<sup>151</sup> *Ibid*, 3.

<sup>152</sup> *Ibid*, 56.

<sup>153</sup> *Ibid*, 4-5.

<sup>154</sup> Michael Billig *Banal Nationalism* (Sage Publications, London, 1995), 85.

<sup>155</sup> See Ackerman, above n 154, 778.

entrenched rights.<sup>156</sup> ‘Uniqueness’ could only be understood by adopting a standardised form. Here was ‘globalisation’, which did not mean the end of the nation-state form but rather its widespread adoption; an intensified nationalism became the norm.<sup>157</sup>

Academic discussions about NZ’s constitutional arrangements proliferated, particularly in the aftermath of the Cold War, Treaty settlements and the enactment of the BORA. The most important domestic factor here was the Treaty, and Maori claims to sovereignty, which had not only seeped into the public consciousness but also had begun to penetrate legal discussion. Increasing recognition of indigenous peoples’ claims was part of a trend across Commonwealth jurisdictions.<sup>158</sup> Prominent ‘liberal’ judges such as Cooke P and Thomas J referred to the Treaty as “the most important document in New Zealand’s history”,<sup>159</sup> or its “fundamental constitutional document”.<sup>160</sup> Commentators suggested its incorporation or at least an accommodation of it in their draft constitutions for NZ.<sup>161</sup> More prosaically, the Treaty was incorporated into a vast volume of domestic legislation;<sup>162</sup> the *Cabinet Office Manual* required all legislation to be vetted for compliance with Treaty principles.<sup>163</sup> The Treaty, in short, was being ‘constitutionalised’ although its status still remains ambiguous.<sup>164</sup> One reason for this constitutionalisation was the desire to locate NZ’s constitutional legitimacy “in an indigenous grundnorm.”<sup>165</sup> Continuity with a British past was being replaced by a desire for continuity with a ‘local’ origin.

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<sup>156</sup> See King, above n 36, particularly 80-86.

<sup>157</sup> Michael Mann “Nation-States in Europe and Other Continents: Diversifying, Developing, Not Dying” (1993) *Daedalus* 115.

<sup>158</sup> James Tully *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, Cambridge, 1995); and Paul McHugh *Aboriginal Societies and the Common Law* (Oxford University Press, Oxford, 2004).

<sup>159</sup> Sir Robin Cooke “Introduction” (1990) 14 NZULR 1.

<sup>160</sup> *New Zealand Maori Council v Attorney-General* [1996] NZLR 140, 184-5 per Thomas J; *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* [2000] 1 NZLR 285, 343 per Thomas J (CA).

<sup>161</sup> Geoffrey and Matthew Palmer *Bridled Power: New Zealand Government under MMP* (3 ed, Oxford University Press, Auckland, 1997) and FM Brookfield *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 1999), chapter 7.

<sup>162</sup> See, for instance, s8 of the Resource Management Act 1991. On this, see Sir Kenneth Keith “The Treaty of Waitangi in the Courts” (1990) 14 NZULR 37, 48.

<sup>163</sup> *Cabinet Office Manual* (Cabinet Office, Wellington, 1996) para 5.26, quoted in Philip Joseph “Constitutional Review Now” [1998] NZULR 85, 108.

<sup>164</sup> Catherine Callaghan ““Constitutionalisation” of Treaties by the Courts: The Treaty of Waitangi and the Treaty of Rome Compared” (1999) 18 NZULR 334.

<sup>165</sup> *Ibid*, 335.



Domestically, international law was taken far more seriously. The New Zealand Law Commission published a report to address the relative lack of awareness about the extent to which international law had penetrated the NZ legal system.<sup>166</sup> In *Tavita v Minister of Immigration*,<sup>167</sup> it was held that Ministers could not ignore international instruments which NZ had adopted but not incorporated, Cooke P noting that this would otherwise imply that NZ's adherence to the international instruments had been "at least partly window-dressing."<sup>168</sup>

Palmer's hope that the BORA would act as a 'parliamentary' BOR did not immediately eventuate. By 1995, there had only been six reports on consistency under section 7;<sup>169</sup> although this increased to twenty-four by 2002—a relatively large number compared with the Canadian experience.<sup>170</sup> But far more attention was given to the courts and their interpretation of the BORA. In early cases on the BORA the NZCA under Cooke P signalled that it would give the Act a purposive (i.e., broad) interpretation.<sup>171</sup> In *Ministry of Transport v Noort*, Cooke P stated:

The [BORA] requires development of the law where necessary ... Internationally there is now general recognition that some human rights are fundamental and anterior to any municipal law ... [I]t is asking no more than we in New Zealand try to live up to international standards or targets and to keep pace with civilisation.<sup>172</sup>

NZ had to 'catch up' to meet changing international standards. In another case, Cooke noted:

The world is shrinking. Most countries of the common law world now require judges to apply constitutional or statutory statements of rights. Their background is the international covenants ... The decisions of our courts on human rights is not final.<sup>173</sup>

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<sup>166</sup> New Zealand Law Commission *A New Zealand Guide to International Law and Its Sources* (R34, NZLC, Wellington, 1996).

<sup>167</sup> *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).

<sup>168</sup> *Ibid*, 266 per Cooke P. But see *Puli'uvea v Removal Review Authority* [1996] 3 NZLR 538 (CA).

<sup>169</sup> "The Attorney-General", above n 128, 141.

<sup>170</sup> Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003), 202.

<sup>171</sup> *R v Butcher* [1992] 2 NZLR 257, 264-7.

<sup>172</sup> *Ministry of Transport v Noort* [1992] 3 NZLR 260 per Cooke P at 270-1; see also Richardson J at 277; Hardie Boys J at 286.

<sup>173</sup> *R v Barlow* (1992) 14 CRNZ 9, 9, per Cooke P (CA).

‘The world’ was watching us: the world’s interconnectedness required a new kind of interpretation.

Perhaps the domestic heyday of this liberal triumphalism was *Baigent’s* case.<sup>174</sup> Recall that the BORA when re-drafted to act as a ‘mere’ guide to interpretation had had the remedies provision removed. In *Baigent* the question was whether or not in the absence of such a clause the Court could provide a remedy for a violation of a right protected under the BORA. A majority of the Court held a remedy was available. Of importance were the words of Hardie Boys J, for the majority:

The New Zealand Bill of Rights Act, unless it is to be no more than an empty statement, is a commitment by the Crown that those who in the three branches of the government exercise its functions, powers and duties will observe the rights that the Bill affirms. It is I consider implicit in that commitment .... that the Courts are not only to observe the Bill in discharge of their own duties but are able to grant appropriate and effective remedies where rights have been infringed. I see no reason to think that this should depend on the terms of a written constitution. Enjoyment of the basic human rights is the entitlement of every citizen, and their protection the obligation of every civilised state. They are inherent in and essential to the structure of society. They do not depend on the legal or constitutional form in which they are declared.<sup>175</sup>

The key criticism of *Baigent* was obvious: since Parliament had not provided a remedies clause in the BORA, the court had no justification for introducing one.<sup>176</sup> But more interesting is the argument of Hardie Boys J, and supported by Cooke, that rights were inherent in and essential to society, and thus the form in which these rights were ‘declared’ was relevant. Rishworth similarly noted: “[A] nation’s citizens have rights anterior to its constitution, whether that constitution be ‘unwritten’ or entrenched. I doubt that many lawyers and theorists would dispute

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<sup>174</sup> *Simpson v Attorney-General [Baigent]* [1994] 3 NZLR 667 (CA).

<sup>175</sup> *Ibid*, 702 per Hardie Boys J.

<sup>176</sup> John Smillie “The Allure of ‘Rights Talk’: *Baigent’s* Case in the Court of Appeal” (1994) 8 Otago LR 188; and James Allan “Speaking with the Tongues of Angels: The Bill of Rights, *Simpson* and the Court of Appeal” (1994) 1 BOR Bull’n 2.

that proposition.”<sup>177</sup> Here was a sign of how far ‘rights’ had come: rights were now assumed to have an independent existence; they were in some sense ‘natural’ or the product of a presumed international consensus. It was now only a matter of how they were to be given effect. But the main point here is that this now ‘obvious’ conclusion was far from obvious at the time of the BORA’s inception or its enactment. It was not an inevitable conclusion at all.

After retirement from the NZCA, Lord Cooke (as he became) extra-murally continued to talk about the idea of a fundamental, transnational common law and limits on the sovereignty of Parliament.<sup>178</sup> In this he had NZ adherents in Thomas J and later Elias CJ.<sup>179</sup> The NZCA would later go further, suggesting that in certain circumstances, a declaration of inconsistency might be appropriate,<sup>180</sup> although the NZCA, and now the new NZ Supreme Court (‘NZSC’), have yet to follow through on its suggestion. But by this time, constitutional innovation based on the BORA had taken on a momentum of its own.

The most significant constitutional change in the 1990s, other than the slow encroachment of ‘Treaty politics’, was the switch to an electoral system of proportional representation. While in power Palmer had established a Royal Commission to examine the electoral system, and in 1986 it reported back recommending a mixed-member proportional (‘MMP’) voting system, on the basis that it would be fairer to all parties and would encourage minority (particularly Maori) representation.<sup>181</sup>

The Fourth Labour Government had promised to have a referendum on the matter but later refused to do so, its members fearing the consequences. Under pressure the 1990 National Government also promised to hold an ‘indicative’ referendum.

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<sup>177</sup> “Birth and Rebirth”, above n 50, 3. See also Paul Rishworth “Common Law Rights and Navigation Lights: Judicial Review and the New Zealand Bill of Rights” (2004) 15 PLR 103. And now, of course, *Thorburn v Sunderland City Council* [2003] QB 151.

<sup>178</sup> See, for instance, Rt Hon Lord Cooke “The Myth of Sovereignty” (2005) 3 NZJPIL 39.

<sup>179</sup> Justice EW Thomas “The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium” (2000) 31 VUWLR 5; and Rt Hon Dame Sian Elias “Sovereignty in the 21<sup>st</sup> Century: Another Spin on the Merry-Go-Round” (2003) 14 PLR 148.

<sup>180</sup> *Moonen v Film and Literature Board* [2000] 2 NZLR 9 (CA) and *R v Pora* [2001] 2 NZLR 37 (CA).

<sup>181</sup> Royal Commission on the Electoral System *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (Wellington, Government Printers, 1986).

The results were overwhelming: 85% voted in favour of a change; and of that number 71% voted in favour of MMP. This was later ‘ratified’ in a binding referendum in 1993 with 54% voting in favour of the new electoral system, and made law through enactment.<sup>182</sup>

Locally, while MMP was conceived of as another attempt to ‘bridle’ state power, the actual vote for MMP was more a response to the radical reforms passed during the period 1984-93. The reforms, mostly economic, had been implemented in spite of misgivings by an unprepared electorate, causing widespread social disruption.<sup>183</sup> The vote for MMP was the public’s answer to Parliament’s lack of accountability to the electorate and a means of reinvigorating trust in political leaders and institutions—although whether this has succeeded is debatable.<sup>184</sup> In one sense, the aim of proportional representation was to recognise the choice of each individual voter, and perhaps break the hold of organised political parties, but one unintended consequence was a strengthening of party discipline. Declining trust in collective agency—political parties—is a phenomenon seen across the Western world.<sup>185</sup>

### **Constitutional ‘Futures’?**

Constitutional reform continued in the twenty-first century, the most notable change being the establishment of the NZSC in 2004. It was ‘sold’ on the basis that it was a sign of independence and would ensure greater local ‘access’, which an overseas court could not offer. Constitutional reforms were tailored to domestic concerns to shore up legitimacy.

What is more important here is how the NZ constitution has been perceived. Even in this short period, there were two events in which the state of the NZ constitution were discussed in detail: a conference on ‘building the constitution’ in 2000 and the 2005 inquiry to review NZ’s existing constitutional arrangements. In these events, and commentary on these events, we can see how the constitution is now understood, and why it has been thought reform is needed: no longer is it a matter

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<sup>182</sup> Stephen Levine “Parliamentary Democracy in New Zealand” (2004) 57 *Parl’y Affairs* 646, 648.

<sup>183</sup> Anthony Geddis and Caroline Morris “‘All Is Changed, Changed Utterly?’—The Causes and Consequences of New Zealand’s Adoption of MMP” (2004) 32 *Fed L Rev* 451, 454.

<sup>184</sup> *Ibid.*

<sup>185</sup> *Ibid.*, 454; and Peter Mair “Ruling the Void? The Hollowing of Western Democracy” (Nov-Dec 2006) *NLR* 25; and King, above n 36, chapter 10.

of curbing ‘unbridled’ executive power, but rather of responding to Maori criticisms of the constitution’s legitimacy, and the sense that the constitution ought to correspond to the ‘NZ people’.

In 2000, a two-day conference was held by the (NZ) Institute of Policy Studies entitled ‘Building the Constitution’.<sup>186</sup> The aim was to stimulate debate, get people to talk about the constitution and to listen to those with opposing views, given the deep changes in NZ society over the past 30 years.<sup>187</sup>

Colin James, a well-known political commentator and the conference organiser, took the view that the present-day constitution was essentially “British, a legacy of empire and British colonisation”.<sup>188</sup> He asserted that constitutional change would continue, and that there was a “tide” carrying us towards change.<sup>189</sup> James argued that there was a need to ensure “the people feel they own the constitution—that it is seen as legitimate.”<sup>190</sup> Few openly shared his confidence, most preferring to talk hypothetically about what could be reformed given the right circumstances, and there was a small minority who cautioned against any serious change.<sup>191</sup> The papers were marked by caution, although there was clearly a lack of ease about the adequacy of constitutional arrangements.

The main themes of the conference were identity, republicanism, rights, and the desire for a written constitution,<sup>192</sup> but the fundamental issue was clearly the thorough disagreement on the Treaty: was it ‘inside’, ‘outside’ or ‘above’ the present day constitution? Almost all aspects of constitutional reform would eventually touch upon Maori or Treaty issues: for instance, Ladley argued ‘soft’ republicanism (replacing a head of state with a president) would ultimately end up

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<sup>186</sup> Many of the talks were published in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000).

<sup>187</sup> Colin James in “Introduction” in *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 1, 1.

<sup>188</sup> *Ibid*, 4.

<sup>189</sup> Colin James “The Political History and Framework since 1980” in *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 160, 160.

<sup>190</sup> “Introduction”, above n 187, 3.

<sup>191</sup> James Allan, Alex Frame and Jack Hodder in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) at 391, 426 and 434 respectively.

<sup>192</sup> Collin James “Thematic Summary” in *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 14.

foundering on issues of ‘full’ republicanism (the Crown’s abolition).<sup>193</sup> For most Maori participants, the Treaty was central to any discussion of constitutional change, although this ran along a continuum from requiring ‘mere’ incorporation of the Treaty to the restructuring of government to allow Maori to exercise governance separately from Pakeha.<sup>194</sup> There was some urgency in dealing with the Treaty, however, and a warning of potential civil strife.<sup>195</sup>

Pakeha commentators remained ambivalent: most were willing to acknowledge Maori arguments and accord Maori special status, but many seemed to hesitate on details. It was not clear from some contributions to what extent some Pakeha understood Maori concerns. For instance, in the discussions of the ‘history’ of the NZ constitution told by Pakeha lawyers, Maori and ‘Pakeha’ events were treated separately: there was the Treaty, and there was the story of increasing responsible government.<sup>196</sup> For one liberal participant, the 2000 Conference was a “spectacular failure” in failing to come to any common understanding.<sup>197</sup> But talk of enacting a codified constitution continued,<sup>198</sup> much of this linked to the matter of national identity.<sup>199</sup> Scholars still hankered after a set of arrangements based on historical continuity: only now it had to be one detached from Britain, and found in the ‘NZ nation’.

One key change was that there was far less uncertainty about entrenchment. As Rishworth noted, “New Zealanders should have the kind of constitution that a majority of New Zealanders want, and if that means constitutional limits are

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<sup>193</sup> Andrew Ladley “Who Should Be Head of State?” in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 267.

<sup>194</sup> See the contributions by Sir Douglas Graham, Moana Jackson and Mason Durie in *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) at 193, 196 and 414 respectively.

<sup>195</sup> Caren Wickliffe “Multiculturalism and the Constitution—Lessons from Another Country: Fiji” in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 244.

<sup>196</sup> See the contributions by Sir Geoffrey Palmer and Philip Joseph in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) at 168 and 182 respectively.

<sup>197</sup> Philip Joseph *Constitutional Law and Administrative Law in New Zealand* (2 ed, Brooker’s, Wellington, 2001), 128.

<sup>198</sup> Sir Geoffrey Palmer “The Hazards of Making Constitutions: some Reflections on Comparative Constitutional Law” (2002) 33 VUWLR 631; BV Harris “The Constitutional Future of New Zealand” [2004] NZ L Rev 269.

<sup>199</sup> Harris, above n 198.

imposed, so be it.”<sup>200</sup> Limits to parliamentary sovereignty were no longer implausible, because people had become more familiar with the issues, and had seen other countries deal with entrenchment successfully. Further, there was a sense in which a ‘we’ could emancipate ourselves from whatever limits have been imposed simply by an act of will. Nothing could stand up to the ‘NZ people’, should they choose to speak. Put differently, the emergence of this (imagined?) ‘NZ nation’ provided a potential means of overcoming the conceptual obstruction of parliamentary sovereignty.

The ‘status’ of the NZ constitution was now the subject of annual reports: there was some anxiety about its ‘direction’.<sup>201</sup> Again, NZ elites were not alone in wanting further constitutional reform. In Britain, for instance, there is still talk of enacting a codifying constitution, even after the years of almost continuous reform under the Blair government (1997-2007).<sup>202</sup> The Brown government’s initiative is partly based on the idea that with increasing multiculturalism, intensifying European integration and the devolution reforms, a sense of ‘Britishness’ is being lost.<sup>203</sup> A codified constitution is seen as a means of re-legitimising the British state.

In late 2004, an ad hoc select committee, the Constitutional Arrangements Committee (‘CAC’) was created to review NZ’s constitution.<sup>204</sup> Its establishment stemmed from a number of incidents over 2004: National’s call in early 2004 for ‘one law for all NZers’, an attack on the growing prominence of Maori issues in NZ politics; the furore over the Foreshore and Seabed Act 2004, which reversed the NZCA’s decision dealing with Maori customary rights to the foreshore and seabed;<sup>205</sup> and the creation of the NZ Supreme Court. An inquiry was seen as a

<sup>200</sup> Paul Rishworth “The Rights Debate: Can We, Should We, Adopt a Written Constitution including a Bill of Rights?” in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000), 397, 400.

<sup>201</sup> See the yearly ‘Constitutional Law’ essays by Philip Joseph in the *New Zealand Recent Law Review*; see also Philip Joseph “Scorecard on Our Public Jurisprudence” (2005) 3 NZJPIL 223.

<sup>202</sup> Vernon Bogdanor, Tarunabh Khaitan and Stefan Vogenauer “Should Britain Have a Written Constitution?” (2007) 78 Pol Q 499; and King, above n 36.

<sup>203</sup> Ministry of Justice *The Governance of Britain* Cmd 7170 (TSO, London, 2007); and Chris Bryant (ed) *Towards a New Constitutional Settlement* (Smith Institute, London, 2007).

<sup>204</sup> See *Inquiry to Review New Zealand’s Existing Constitutional Arrangements: Report of the Constitutional Arrangements Committee* [2005] AJHR I.24A (‘CAC Report’). A useful discussion on the CAC Report is provided in Phillip Joseph “Constitutional Law” [2006] NZ L Rev 131-138.

<sup>205</sup> *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

means of removing the issues—in particular the exact role of the Treaty in the NZ constitution—from immediate politics.

The CAC, consisted mostly of members from the ruling centre-left coalition (the main opposition party, National, refusing to participate). It had rather modest terms of reference, perhaps because the anxieties sparking its establishment had died down. It was to describe NZ's constitutional development since 1840, the key elements of the NZ constitution, and the processes by which NZ could follow were constitutional reforms to be undertaken in the future.

The CAC identified salient issues as being the relationships between the branches of government, the role of the Treaty in NZ's constitutional arrangements, the move to a republic, the role of international law and constitutional evolution. All of these were linked to the key problem of political legitimacy. A constitution, codified or not, was of no use unless people believed in it: a constitution would not endure if there was no 'buy-in' by the society it regulated.<sup>206</sup> There was no longer any mention of the concentration of executive power.

But the CAC argued that the NZ constitution was not in crisis: public dissatisfaction with constitutional arrangements was "chronic", but not "acute".<sup>207</sup> However, there was a lack of consensus about what was wrong with the constitution, making any reform risky.<sup>208</sup> Thus the CAC thought that the benefits of discussing any particular reform were outweighed by the cost of potentially upsetting the status quo. All these issues, the CAC stated, involved questions of "national identity", and could not be rushed.<sup>209</sup>

Thus the CAC recommendations were cautious and restrained: there should be basic principles established for any discussion of constitutional change; a need for greater public understanding about the NZ constitution, perhaps through the introduction of civics in schools; and greater Maori consultation. Finally, the CAC

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<sup>206</sup> *CAC Report*, above n 204, 7.

<sup>207</sup> *Ibid*, 7-8.

<sup>208</sup> *Ibid*, 1.

<sup>209</sup> *Ibid*, 16-17.



avoided a discussion of the exact role of the Treaty in NZ's constitutional arrangements, despite a majority of public submissions focusing on this.

The *CAC Report* was shelved,<sup>210</sup> but it suggested that there was disquiet—on the part of whom, it was not clear—about the state of NZ's constitution, and its very legitimacy; but there was no consensus about how to 'move forward'. There was no longer a need to restrain executive power; but there remained a belief the present-day constitutional arrangements were untidy, unsystematic and "inaccessible" to a 'people'. In this sense, the *CAC Report* showed how much constitutional discourse had changed and had not changed in two decades.

### Conclusion

In a previous chapter, we saw that NZ's constitutional arrangements at mid-century were treated as an essentially resolved matter, and only came to be treated as problematic as they departed from what was thought to be the 'standard' British model of what a good constitution ought to be. In the 1970s, however, these arrangements fell into question, for various reasons. It has been the argument of this chapter that this was at least partly because of 'external' factors.

Much of the dissatisfaction with the contemporary arrangements stemmed from 'domestic' economic troubles and government action, but the form which this dilemma was seen to take, in terms of the constitution of the state, and the subsequent responses to this, show clearly the influence and the penetration of ideas and models from 'the outside'. NZers came to internalise changes in what was considered 'modern' internationally. They began to compare themselves with a new model of what was considered 'modern'. This was not, as the nationalist narrative might suggest, something unique: nationalism is centred around imitation; comparing oneself to some ideal model.

As Britain moved to Europe, cutting ties with its past, and NZ's population became more heterogeneous, historical continuity no longer sufficed to legitimate NZ's constitutional arrangements. Now NZers faced a dilemma of choice: how to

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<sup>210</sup> Ibid, 137.

organise themselves in order to respond to both domestic and international events? This dilemma was exacerbated, but not only caused by, Maori claims to justice. Sociologically, there was a 'disembedding' and 're-embedding' of individuals, the dissolution of some collective representations (NZ as a 'better Britain; the 'interventionist' state) but also the creation of new ones (simply 'the NZ nation'; the 'market' state).

An alternative state form was found in the liberal constitutional nation-state. This required several things: an explicit separation of state and economy; a 'nation' and a state which represented that collective entity; a document providing for the protection of universal rights held by all individuals; a codified constitution. But while elites began to embrace this, the general public did not: there was no consensus on this.

Nationalism and a sense of anxiety about the state of 'our' constitutional arrangements intensified in the wake of the collapse of another empire: the end of the Cold War. There followed a period in which it was thought liberal ideals could finally be realised: international law, human rights and a nation-state came to be seen as universal standards which all civilised nations should strive to implement, particularly in the absence of any compelling alternatives. But this was all haphazard: there was little inevitability about the efficacy of the BORA, moves towards a codified constitution or a republic.

### *Conclusion: Contextualising the 'Inevitable'*

Life, more like a very long novel ... falls into discrete but interlocking narratives, and narratives break into scenes. That's how we hold on to "what happens", how we process it, extracting and ordering the essentials and ridding ourselves of the copiousness of impression and sensation. Memory, if we didn't contain it, would destroy us. So everything must be simplified, and in that sense falsified.<sup>1</sup>

The aim of this thesis has been to argue that the present nationalist narrative of NZ's constitutional history is incomplete, like the previous 'Britannic', or pan-British, Whig narrative. These narratives remove events from rich contexts and focus solely on 'the legal'. A subsidiary aim has been to ask why this nationalist narrative emerged; and why the Britannic narrative fell from favour.

A final aim has been to provide a more nuanced history—although certainly not a comprehensive one—of the untidy, unpredictable construction of a liberal constitutional nation-state in NZ. The shift from colony to a nation-state, portrayed in the nationalist narrative as emancipation or 'independence', is better seen as a 'disembedding' and a 're-embedding': a shift from one set of interdependencies to another. NZ's constitution has changed to meet the exigencies of changing internal and external environments. This can be seen by contextualising events: by placing them in international, British and domestic contexts.

Put in context, three points emerge from NZ constitutional history. First, the NZ nation-state as it exists today, and indeed the nation-state form itself, was not inevitable; its emergence was far more contingent than has been presumed. Second, the legal institutions, rules and norms currently being advocated or established in NZ do not merely enable NZers' actions but also constrain them, just as in the past British institutions were not merely constraints but also enablements. And third, what has remained constant is the fundamental nature of the modern state: managing political conflict, providing security to those within its borders, responding to the changing internal and external environments, and maintaining

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<sup>1</sup> CK Stead *The Secret History of Modernism* (Harvill Press, London, 2001), 18.

itself. In line with this, changes in various aspects of NZ's constitution may be seen better as means of propping up state legitimacy.

Chapter one concerned the history of writing about NZ's constitution. There have been three narratives explaining how NZ's constitutional arrangements have changed over time. The first narrative was a British-centred 'Whig' view which saw the trajectory of the NZ state moving from colonial to independent status, the ultimate destination being a state modelled on classic British arrangements. The emphasis was on continuity with the British constitution, giving legitimacy to present-day arrangements in NZ. All past and present developments were read through this narrative. Such a narrative was persuasive for much of the twentieth century because the NZ state was located in a world where Britain was the great power among the various global powers; and more specifically in a 'Greater British world' where the settler communities emulated or exemplified the particular characteristics of the British.

The second narrative is more recent: it is 'NZ-centred', emphasising not an increasing closeness to and continuity with British arrangements, but rather distance and discontinuity. What was now important was progress towards a liberal constitutional nation-state: the separation of state and economy; the establishment of a local, national supreme court; a localised Crown, or republican status; and a statement of rights and/or a codified constitution as a means of identifying, organising and unifying a people—a 'nation'. This has become the dominant narrative of NZ's constitutional 'development' because of the end of British influence, empire as a global political formation and the emergence of an international community consisting of separate nation-states. This nation-based narrative is seen now as almost universal: all states now must be seen to represent their respective 'nations'.

The final narrative is one written mostly by Maori, arguing that many of the events and signposts highlighted by the previous two narratives ignore or mask a long history of Maori oppression and Maori agency in claiming justice. This narrative gained in strength in the last quarter of the twentieth century with the demographic

increase and urbanisation of Maori within the NZ population, which led to increased contact between Pakeha and Maori.

The argument of this chapter has been that all three narratives are myopic; all three have been advanced as a means of endorsing or justifying a particular vision of the NZ state. Moreover, an underlying argument has been that the persuasiveness of each narrative—in particular, the Britannic and nationalist narratives—stems not from their inherent correctness, but rather from the surrounding domestic and international contexts. This is also suggested by the material in the other five chapters.

These narratives of NZ's constitutional development are important for the rest of the thesis. All three, but in particular the Britannic and nationalist narratives, have informed and to some extent driven constitutional change or the desire for change. Finally, these narratives, with their implied trajectories and definitions of 'progress' have also served as foils in this thesis to suggest a more nuanced understanding of how NZ's constitutional arrangements have developed over time.

Chapter two dealt with the history of NZ economy. Most constitutional histories have ignored the economy, because 'the law' is seen as a separate matter. But NZ politics have been premised on the promise of domestic stability and state involvement in the economy from the beginning: state-regulated land sales; state-funded migration and public works; the Sterling Bloc and later Sterling Area; imperial and later Commonwealth preference. State and economy were tightly intertwined.

Ensuring domestic stability meant maintaining a connection to the British economy, which was for the first half of the twentieth century one of the most important economies in the world. The maintenance of this connection, and using it to manage NZ's relationship with the international economy, has been a fundamental factor in NZ politics from the beginning. This connection collapsed with Britain's economic decline and Britain's decision to enter the EEC. NZ was pushed into a period of major instability, intensified by a wider international economic crisis. The resulting state intervention, coupled with an international

trend towards 'liberalisation', triggered a rethink of the relationship between state and economy, and a search for international and regional arrangements to re-establish economic security.

The main point of this chapter has been to show that the myopic focus of both Britannic and nationalist narratives on legal signposts and the presumption of increasing autonomy has obscured the ways in which economic arrangements and developments have often shaped legal change or modified the impact of legal change. Moreover, economic arrangements have not just been a constraint on the NZ state's sphere of action, but have also enabled it to meet its duty of providing security. Changes in the relationship between state and economy are themselves, then, often 'constitutional' because these can determine the limits of domestic politics. Finally, the unsettling path of the NZ economy has been a reason for the emergence of the Britannic, and later nationalist, narratives: such narratives comforted and explained away contingency.

Chapter three examined the relationship between NZ and the Judicial Committee of the Privy Council ('PC'). In earlier years, NZers saw little wrong with an arrangement in which the 'highest court in the land' was located in Britain: this only pointed to the strength of the connection between NZ and Britain in a period when Britain's global prestige was at its heyday. In NZ, this view of the PC persisted till at least the 1960s.

However, a more recent narrative of the NZ-PC relationship, a nationalist one, has treated it as one of domination and subordination: here, the PC obstructed the development of an indigenous local law. On this view, the relationship was one from which NZers had to escape. Attention was now drawn to differences in approaches between NZ's Court of Appeal and the PC, and other countries' moves to abolish the right of appeal.

This narrative only emerged in the 1970s, and the previous narrative rejected, with the decline of Britain and the emergence of an international community consisting of separate nation-states. A court which sat at the apex of the NZ legal system but located outside the boundaries of the NZ state seemed offensive to self-styled

‘NZers’. The main objective became the abolition of the ‘anachronistic’ right of appeal, achieved in 2003 with the establishment of the ‘national’ NZ Supreme Court.

The main argument of this chapter is that by treating this relationship as something with a purpose or a destination, both narratives have often ignored or obscured the ways in which events have pointed to other understandings. For instance, both the Britannic and nationalist narratives have ignored the way in which important cases and institutional arrangements often disempowered Maori. Further, to focus on legal developments also ignores the geopolitical pressures to which the PC was subject. NZers have pondered transforming NZ’s highest court into something imperial, transnational or regional. These were alternatives proffered, but the ‘national’ option had primacy because it was the one most consistent with the idea of having an independent nation-state.

Finally, the history of the NZ-PC relationship suggests the trajectories implied by these two key narratives were not inevitable. Read in context, calls for change have often been in response to highly specific or contingent circumstances and have often had far more limited objectives—never anything so grand as ‘independence’ or the realisation of nationhood. Moreover, that there were other alternatives open should remind us that the arrangements finally chosen may constrain as well as enable.

Chapter four examined the history of NZ subjecthood and citizenship law. There has been little discussion of how the NZ state defined those under its control, but an overview of this area shows NZers happily employed British subjecthood law in the late nineteenth century and for much of the twentieth century with little objection: it allowed NZers to maintain the cultural belief that they were British. This view was also propped up by the migration patterns (natural and state-organised) of the ‘Old British’.

British subjecthood was extraordinarily broad because the Old British were anxious to maintain their empire. However, this inclusiveness was modified through local immigration law. NZers saw themselves as part of Greater Britain,

but this was defined by race and locality. Thus white NZers and Maori were said to be Greater Britons; other races were excluded through various hidden means.

In more recent times NZ citizenship and immigration law has been portrayed as becoming increasingly liberal, but this is not quite correct: it is just that different kinds of people are now being excluded. The collapse of empire, new waves of migration, the intensifying principle of self-determination, and domestic demographic change made an inclusive approach to citizenship unattractive. This movement has not been inevitable: the definition of a NZ citizen based on descent was only put into law in 1978. But Britain, NZ and the other settler communities slowly edged towards a more exclusive, narrow conception of citizenship based on blood and belonging in line with international trends.

Again, context matters: one argument of this chapter has been that although in the past NZers were content to maintain the view that they were 'British', this did not mean a slavish adherence to Britain: NZers used local laws to narrow and frustrate the desire of the Old British to create an empire-wide form of 'citizenship'. A second argument has been that a focus on law alone ignores the ways in which the regime of British subjecthood was propped up by various beliefs about culture, geopolitical issues and migration patterns; this also implies that the present regime is subject to a similar set of conditions.

But the main argument of this chapter has been to stress how the present conception of citizenship, defining who belongs exclusively to one nation-state, is a relatively new development. The present state of affairs is not inevitable, but rather the product of various contingencies. Nor has this development necessarily been a liberal one. The new rules of citizenship might more closely 'reflect' what NZers want but they have also narrowed the set of individuals who can claim the protection of the NZ nation-state: they can be seen as both constraints and 'enablements'.

Chapter five discussed the history of the Crown in NZ. Previously, the presence of the Crown in NZ was not problematic and lay at the centre of NZ's constitutional arrangements. The various manifestations of the Crown—the monarch, the



Governor-General, the state apparatus—intermingled with each other. It mirrored the situation in Britain, and so was not seen as problematic. NZers—both Pakeha and Maori—were content to accept this state of affairs.

However, by the end of the twentieth century the previous arrangements were seen as less acceptable. The Crown became localized and far more impersonal; to have a head of state located outside the NZ state seemed absurd; and there were moves towards establishing a republic. This was both ‘predicted’ but also encouraged by the nationalist narrative. NZ’s present-day arrangements are seen as insufficiently reflecting the ‘NZ nation’.

Once again, however, this narrative, along with the previous Britannic narrative, ignored the Maori experience of living under ‘the Crown’. Maori calls for greater self-rule were ignored or obscured by both narratives because they were irrelevant to the ultimate objectives posited: autonomy and sovereignty in a British, and later national, framework. For many Maori, however, ‘the Crown’ in its many manifestations remained ‘British’. The Crown remained personal because the Treaty was seen as a pact between monarch and Maori: talk of republicanism threatened that pact. Thus Maori and nationalist narratives look set for further conflict. Further, the problems thrown up by localisation and republicanism remind us that the previous understandings of the Crown at least had the benefit of leaving these highly controversial questions in abeyance. Again, arrangements can constrain and enable: the trajectory of NZ constitutional development is not simply one of increasing autonomy.

Finally, the nationalist narrative tends to obscure the way in which the international context made the new developments both persuasive and desirable. As the international community increasingly consisted of nations represented by states, NZ’s constitutional arrangements came to be seen by NZers as ‘backward’ and in need of reform. Put differently, the transformation of the NZ state into a liberal constitutional mould was not a matter good in itself but drew its legitimacy from what NZers thought the ‘outside world’ would find acceptable. The state was being reconfigured to legitimise its control over the NZ population.

Chapters six and seven have been about some—certainly not all—of the arguments raised in the latter half of the twentieth century concerning NZ’s constitutional arrangements, particularly as they have related to rights. In chapter six, it was argued that the adoption of the Statute of Westminster and the subsequent abolition of the Legislative Council triggered anxiety amongst many NZ conservatives, who desired to have a constitution modelled as much as possible along traditional British lines. Thus they advocated a partial return to a British model, but with the innovation of a bill of rights and an entrenched constitution. However, their concerns were outweighed by a majority belief that a unicameral Parliament was a ‘better’, streamlined form of British government; and because such suggested reforms challenged NZ’s newly-acquired sovereignty and orthodoxy. This was in contrast to a bill of rights and a codified constitution, which would limit sovereignty, and offend the idea of collective agency over individual agency.

The main point of this chapter was to show the dominance of British thinking about NZ’s constitutional arrangements, and the relative absence of any alternatives. Although a nationalist narrative could explain the failure of the proposed bill of rights and of a proposed second chamber, it is more difficult to explain why the proposals were suggested in the first place: a greater attention to context can help. What NZers compared themselves to was not a model accepted by an international community of nation-states, but rather a British one. This did not mean slavish acceptance: indeed it was because contemporary changes had undermined a British ideal that reforms were advocated. However, most willed constitutional change failed because domestically or internationally there seemed no urgency to change; and because NZers lacked a sense of the alternatives.

Chapter seven dealt with more recent matters (and thus is more speculative): the adoption of an interpretative bill of rights and an increasing anxiety about NZ’s general constitutional arrangements. The immediate trigger for the NZBORA was domestic: the ‘reign’ of Robert Muldoon and Maori protest. This, however, was understood through, and responses informed by, broader contexts. NZ’s constitutional arrangements were criticised on the basis that they were outdated: they concentrated power instead of separating it; what was needed was something

both 'national' and yet internationally accepted. No longer was a set of arrangements which had maintained continuity with Britain satisfactory for 'modern' conditions. Reform was made more urgent by contemporary political, geopolitical and economic events.

With the end of the Cold War the NZBORA was given a new lease of life: it was now 'inevitable' that rights were universalised, and given effect no matter the form. International law began to penetrate the domestic legal system, and Maori claims for justice cut away at the legitimacy of contemporary constitutional arrangements. There was a growing belief that NZ's constitutional arrangements needed to be re-legitimised: to be made 'national', ironically in the form of an internationally-accepted model. The trajectory suggested by the nationalist narrative gained in persuasiveness with the end of the Cold War.

The main point of this chapter has been to describe the subsequent rise and apparent triumph of the nationalist narrative, but also to point to how contingency has been obscured. The transformation of NZ's constitutional arrangements into something more liberal was not inevitable. What drove and shaped the transformation was not just legal doctrine and domestic events, but also geopolitical and cultural change: the end of empire as a global formation and the proliferation of nation-states. Again, the international context helps to explain the form that NZ's constitutional arrangements took and how they were understood. While in principle the end of empire and 'independence' meant the emancipation from imposed limits, in practice this freedom was limited by the resources available: here, the now-apparently hegemonic liberal constitutional nation-state, with a written constitution, entrenched bill of rights, and a free market. If matters were slow to change, it was because adherence to this model remained mostly confined to the elites rather than to 'the people'.

This thesis has mostly been about Pakeha—'NZers' mostly meaning 'Pakeha'—and Pakeha understandings of the state and the past, and only to a far lesser extent about the struggles of Maori. This does not suggest Maori played no role in the changes in how NZ's constitutional arrangements have been understood: indeed, the Treaty is now the central issue of the NZ constitution: its past, present and

future. Rather, this thesis has highlighted that Pakeha themselves have been undergoing a crisis of their own about NZ's constitutional arrangements which coincided with, and was made more intense by, Maori claims to justice, but which to some extent had an origin and course of its own.

The argument of this thesis then, is that the recent nationalist narrative of NZ constitutional history is an attempt to mollify "a culture terrified by the fragility of the contemporary",<sup>2</sup> and the need to re-legitimise the arrangements of the NZ state. This condition of uncertainty has been created not just by claims to sovereignty by Maori, but also by the end of empire, the end of the British connection, and the universalisation of the nation-state form. Who are 'NZers' if 'we' are not British? We now apparently have a choice, although this has mostly taken the form of the apparently 'nation'. If 'NZers' are unsure who 'we' are or what 'we' will be, then perhaps the answer lies in who 'we' were. Relatively recent moves to rethink NZ history, general and constitutional, are a response to this heightened sense of agency. The nationalist narrative sees history as confirming the always-existing nation, an ever-closer relationship between nation and state, because this is the path taken by other 'modern' states, and which ought to be taken by NZ. It is a narrative insisting on change for the better, while also asserting what is is as it should be.

But attempts to ground an authentic NZ nation by excavation of the past have been met with a parallel history of Maori disempowerment and disenfranchisement made clear by Maori narratives. 'Identity' requires the identification of an object to which one is similar, or an object with which one can establish continuity;<sup>3</sup> but the search for such a self in NZ's past is rendered problematic by the long history of Maori subjugation, and links to a British culture once keenly desired by both Pakeha and Maori. Both Pakeha and Maori understandings of the problems of NZ's constitutional arrangements stem from NZ's origins in empire; but for

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<sup>2</sup> WH Oliver "The Future Behind Us: The Waitangi Tribunal's Retrospective Utopia" in Andrew Sharp and Paul McHugh (eds) *Histories Power and Loss: Uses of the Past—A New Zealand Commentary* (Bridget Williams Books, Wellington, 2001) 9, 24.

<sup>3</sup> Peter Wagner *Theorizing Modernity: Inescapability and Attainability in Social Theory* (SAGE Publications, London, 2001), 62-63.

Pakeha the desire has been to escape empire's inheritance; for Maori, empire has never ended.

A codified constitution is becoming an increasingly popular response to this dilemma: it asserts a new origin, an original authority ('the people'); but insists on the self-containment and the exclusion of this authority from subsequent legal discourse. The relationship between text and people is not so straightforward, however, since the constitution is only ever the agent of a greater entity, 'the people', which in principle cannot be bound by the text.<sup>4</sup> But at present it is seen as an adequate answer to this dilemma of identity. It proclaims consensus and masks conflict.<sup>5</sup> Willed constitutional change is to a great extent a desire to be emancipated from the past: it is an attempt to end 'history' and begin anew. In the terms of this thesis, it is another futile attempt to decontextualise (and re-contextualise) the state. But as CK Stead suggested, all narratives, even one which seeks to assert a new origin, are simplifications and therefore falsifications.

Even if there is a new codified constitution, then, it is likely that there will be more excavation of the history of how NZers have understood their constitutional arrangements, with the concomitant danger of readings portraying 'us' as already present in the past, ignoring the very different conditions under which 'we' formed a political association, as a consequence of our desire to shore up the uncertain present. The thrust of this thesis has been that by ignoring contingency, by ignoring that matters might have been different, by presuming total freedom and ignoring the conditions under which we acted and act, we ignore rich resources from which we can draw from in making decisions about who we are and who we wish to be.

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<sup>4</sup> Jeremy Elkins "Constitutional Enactment" (2005) 33 Pol Theory 280, 296.

<sup>5</sup> JAG Griffith "The Political Constitution" (1979) 42 MLR 1, 2.

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*New Zealand Maori Council v Attorney-General* [1996] NZLR 140 (CA)

*O'Connor v Hart* [1983] NZLR 280 (CA); [1985] 1 NZLR 159 (PC)

*Petrocorp Exploration Ltd v Minister of Energy* [1991] 1 NZLR 27 (CA); [1991] 1 NZLR 641 (PC)

*Protest of Bench and Bar* (1903) NZPCC (1840-1938) 730

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*R v Butcher* [1992] 2 NZLR 257 (CA)

*R v Pora* [2001] 2 NZLR 37 (CA)

*Re Ashman* [1985] (1976) NZLR 224

*Re Ninety-Mile Beach* [1962] NZLR 461(CA)

*Rowling v Takaro Properties* [1988] 1 All ER 163 (PC)

*Simpson v Attorney-General [Baigent]* [1994] 3 NZLR 667 (CA)

*Smith v Wellington Woolen Manufacturing Co Ltd* [1956] NZLR 491 (CA)

*Nireaha Tamaki v Baker* (1900-1) [1840-1932] NZPCC 371 (PC)

*Takaro Properties v Rowling* [1986] 1 NZLR 51 (CA)

*Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA)

*Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA)

*Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA)

*Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* [2000] 1 NZLR 285 (CA)

*The Queen v Symonds* (1847) NZPCC 387 (SC)

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*Rookes v Bernard* [1964] AC 1129 (HL)

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*Procola v Luxembourg* (1996) 22 EHRR 193

*McGonnell v UK* (2000) 30 EHRR 289

## *Appendix 1: Timeline*

### **Timeline**

Adapted from: <http://library.christchurch.org.nz/Reference/NZPoliticsTimeline/>  
(last accessed 21 June 2008)

### **European Beginnings: 1642-1852**

1642

- Abel Tasman is the first European to discover New Zealand.

1769

- Captain Cook hoists the Union Jack at Mercury Bay and takes possession of the land for King George III of Britain.

1832

- James Busby appointed British Resident in New Zealand. Arrives at the Bay of Islands in 1833.

1835

- James Busby sponsors a meeting at Waitangi, where 34 chiefs sign a 'Declaration of the Independence of New Zealand' and form a 'Confederation of the United Tribes of Aotearoa'. Declaration later recognised by the British Crown.

1840

- Captain William Hobson arrives at Waitangi to negotiate treaty between British Crown and Māori. Treaty of Waitangi signed on February 6.
- British sovereignty proclaimed over the North and South Islands, and Stewart Island in May and June.

1841

- New Zealand declared a British Crown colony, with Hobson as Governor of the Crown Colony.

1846

- First New Zealand Constitution Act passed.

1848

- New Zealand divided into two provinces, called New Munster and New Ulster.
- Sir George Grey appointed Governor-in-Chief over the islands of New Zealand.

1852

- Second constitution act establishes provinces (six at first) with own elected provincial council and superintendent, but subject to the national Parliament.
- The New Zealand Parliament to consist of two Houses: the House of Representatives (elected members, to be elected every five years); and the Legislative Council (appointed members).

### **First Parliaments 1853-1871**

1853

- First election for the New Zealand parliament.
- Males over the age of 21 who were British subjects and held, rented or leased property of a certain value or over able to vote.
- 37 Members of Parliament (Members of the House of Representatives) elected.
- Limited numbers of Māori vote, as most did not qualify under individual property rights (most Māori land held in common).

1854

- First General Assembly in Auckland.

1856

- Appointment of the first ministry under responsible government.



1858

- Te Wherowhero installed as first Māori King, using the name Potatau I.

1863

- New Zealand Settlements Act passed to allow confiscation of land from Māori after the New Zealand Wars.

1865

- Native Land Court established.

1867

- Four Māori seats established in Parliament (supposed to be a temporary measure).
- Universal suffrage (the right to vote regardless of wealth or property) given to Māori males over 21 years old. (First Māori election held 1868).

1871

- Universal Suffrage 1873-1893.

1876

- Provincial governments abolished and replaced by local government through county and borough councils.

1879

- All males over the age of 21 years given the right to vote to elect members of parliament.
- Term for parliament reduced to three years.

1881

- First general election held under universal male suffrage.

1890

- First election on one-man, one-vote basis (voters no longer able to vote in more than one electorate even if property owned in other electorates).
- 74 MPs elected.

1891

- John Ballance becomes premier of New Zealand's first Liberal government.

1892

- First Kotahitanga Māori parliament meets.

1893

- Electoral Act introduces major changes in New Zealand politics.
- Women given the right to vote to elect members of parliament (first country in the world).
- Richard John Seddon becomes Prime Minister.

#### **Development of Party Politics 1894-1916**

1894

- Mahuta Tawhiao Potatu Te Wherowhero becomes Māori King.

1896

- National population measured in census at 743,214.
- All voting rights based on residential qualifications, rather than property.

1899

- New Zealanders now able to become members of an organised national political party.

1900

- Number of MPs increased to 80 (remain at this number until 1967).

1907

- New Zealand becomes a self-governing dominion.

1908

- New Zealand population reaches 1 million.
- William Massey announces the establishment of the Reform Party.

1912

- William Massey becomes prime minister of the first Reform government.

1914-18

- World War I.

1916

- Formation of New Zealand Labour Party.

### **Between the Wars 1918-1939**

1919

- Women allowed to stand for election to the House of Representatives, but not for appointment to the Legislative Council.
- Immigration Restriction Act passed, allowing officials to reject immigrants who did not have British birth or parentage, and supporting an unofficial 'White New Zealand' policy.

1927

- United Party formed from remnants of Liberal Party.

1928

- New Government formed after general election by United Party, led by Sir Joseph Ward, supported by Labour and independent members.

1930

- Sir Joseph Ward dies and is succeeded as leader of the United Party by George Forbes.
- Labour withdraws from coalition.

1931

- Coalition of Reform and United parties led by George Forbes wins general election.

1933

- Legislation passed to establish Reserve Bank.

1935

- First Labour Government, with Michael Joseph Savage as Prime Minister.

1936

- National Party formed from Reform and United coalition MPs.
- Labour and Ratana form alliance.

1938

- Elections for Māori seats use secret ballot for first time.
- Beginnings of two-party politics in New Zealand, with Labour and National winning more than 96% of the votes cast.
- Social Security Act passed, revising pensions structure and establishing a national health service.

1939-45

- World War II.

1940

- Death of Michael Joseph Savage, succeeded as PM by Peter Fraser.
- Sidney Holland becomes Leader of the Opposition.

1943

- Labour-Ratana alliance wins all four Māori seats.

### **Two-party Politics 1945-1966**

1945

- New Zealand signs United Nations charter.
- 'Country quota' abolished.

1947

- New Zealand adopts the Statute of Westminster (1931) and becomes an independent state.

1948

- Māori electoral roll compiled for 1949 election.
- Part-Māori given choice of registering on either European or Māori rolls.

1949

- National Party, led by Sid Holland, wins election to become the first National government.

1950

- Legislative Council abolished, with the House of Representatives the only House, or parliamentary body in the New Zealand Parliament.

1951

- Snap election won by National.
- Pacific Security Treaty signed by United States, Australia and New Zealand (ANZUS).

1952

- Population of New Zealand passes 2 million.

1953

- Social Credit Political League founded to press for monetary reform.

1954

- New Zealand signs South East Asia Collective Defence Treaty (SEATO).
- Social Credit party wins 11% of the vote in the general election but no seats in parliament.
- Māori electorate seats redrawn for first time since 1867.

1956

- Electoral Act introduces reforms aimed at simplifying electoral process.
- Compulsory registration for Māori voters.

1957

- National loses election to Labour; Walter Nash leads second Labour government.

1960

- National government elected, with Keith Holyoake as Prime Minister.

1966

- Te Arikinui Te Atairangikaahu becomes first Māori Queen.
- Social Credit Party wins first seat in parliament.

### **Growth of Multi-party Politics 1967-1984**

1967

- Introduction of decimal currency system.
- Lord Arthur Porritt becomes first New Zealand-born Governor-General.
- Māori allowed to stand for European seats, and vice versa.

1969

- National wins fourth election in a row.
- Number of MPs increased to 84.

1972

- Labour government led by Norman Kirk elected.
- Values Party formed (world's first national Green party).

1973.

- New Zealand population reaches 3 million.
- Waitangi Day made the national holiday, but renamed New Zealand Day.

1974

- Death of Prime Minister Norman Kirk.

1975

- Waitangi Tribunal established.
- Electoral Amendment Act introduces more reforms to electoral system.
- Māori allowed to choose whether to be on the Māori roll or the general roll.  
Right to vote given to permanent residents of any nationality, although only NZ citizens could be elected to parliament.
- Robert Muldoon, leader of the National Party, elected Prime Minister, with two Māori MPs in general seats.

1976

- New Zealand Day changed back to Waitangi Day.
- Pacific Island 'overstayers' deported from New Zealand.

1977

- Bastion Point land protest.
- *Citizenship* Act defines New Zealand citizenship.

1978

- National wins election based on number of seats won, but receives fewer votes overall than Labour.
- Social Credit wins first parliamentary seat in by-election.

1980

- Social Credit wins second seat in by-election.
- Matiu Rata (ex Labour) forms Mana Motuhake o Aotearoa party.

1981

- Springbok Tour of New Zealand results in nation-wide anti-tour protests.
- National re-elected, although Labour wins more votes overall again.

1982

- Wage, price and rent freeze imposed (until 1984).
- CER (Closer Economic Relations) agreement signed between Australia and New Zealand.
- Social Credit League changes its name to Social Credit Party.

1983

- New Zealand Party founded by Robert Jones.

1984

- Labour wins snap general election under leadership of David Lange.
- New Zealand Party wins over 12% of votes, but does not win a seat.

### **Political Reform 1985-1995**

1985

- New Zealand introduces anti-nuclear policy.
- Royal Commission on the Electoral System established.

1986

- Jim Bolger becomes leader of the National Party.
- New Zealand Party merges with National.
- Royal Commission into the Electoral System recommends referendum on change from *First Past the Post (FFP)* to *Mixed Member Proportional (MMP)*, but the report is shelved for several years.



1987

- Labour re-elected as government.

1989

- Jim Anderton founds New Labour Party.
- David Lange resigns as Prime Minister and is replaced by Geoffrey Palmer.
- Christian Heritage Party (later Christian Heritage New Zealand) launched.

1990

- Values Party merges with other 'Green' groups to form the Green Party of Aotearoa.
- New Zealand Bill of Rights Act passed, protecting the democratic, civil and legal rights of the individual.
- Mike Moore replaces Geoffrey Palmer as Prime Minister.
- National Party wins election and Jim Bolger becomes Prime Minister.

1991

- Alliance Party formed, consisting of New Labour, Mana Motuhake, Democratic (formerly Social Credit) and the Green Party.

1992

- Indicative referendum rejects FFP (First Past the Post) system for MMP (mixed Member Proportional), but second referendum required for legislation to proceed.

1993

- Winston Peters forms New Zealand First Party.
- Citizens Initiated Referenda Act passed, allowing a referendum to be held on a subject if sufficient support is gained in a petition.
- National Party wins election, with Alliance and New Zealand First winning two seats each.

- Referendum results support introduction of MMP (Mixed Member Proportional) system.
- Human Rights Act bans discrimination on 13 different grounds, including race, sex and age, and establishes the office of the Race Relations Conciliator.

1994

- Roger Douglas (ex Labour) and Derek Quigley (ex National) found The Association of Consumers and Taxpayers.

1995

- Supporters of The Association of Consumers and Taxpayers form the ACT New Zealand political party with Richard Prebble as leader.
- Christian Heritage and United New Zealand parties founded.
- 60 general electorates and 5 Māori electorates set for first MMP election.

#### **Government under MMP 1996-2006**

1996

- First General Election under MMP, with the total number of seats in parliament increased to 120, with 6 parties represented.
- New Zealand First wins all 5 Māori seats.
- Coalition government formed by National, led by Jim Bolger, and New Zealand First, led by Winston Peters.

1997

- Jenny Shipley replaces Jim Bolger as leader of the National Party and becomes New Zealand's first woman Prime Minister.
- Green Party leaves the Alliance.

1998

- New Zealand First, led by Winston Peters, breaks up the coalition, leaving National as a minority government.

1999

- Helen Clark becomes New Zealand's first elected woman Prime Minister, heading a coalition government made up of members of parliament from the Labour, Alliance and Green parties.
- Labour wins back all Māori seats (now 6 in number).
- 7 parties now represented in parliament.
- United New Zealand and Future New Zealand combine to form United Future New Zealand under the leadership of Peter Dunne.
- Jenny Shipley replaced by Bill English as leader of the National Party.

2002

- Jim Anderton leaves Alliance and founds Progressive Coalition.
- After an early election Labour, led by Helen Clark, forms minority government with the Progressive Coalition party and supported by United Future New Zealand.
- Māori seats increased to 7.

2003

- New Zealand population reaches 4 million.
- Don Brash replaces Bill English as leader of the National Party.

2005

- At the September elections, the Labour-Progressive government is supported by New Zealand First and United Future, both with their leader as a minister outside Cabinet.

## *Appendix 2: Biographies of Important Personages*

Many of the biographies here are taken from either the *Dictionary of New Zealand Biography* (online at [www.dnzb.govt.nz/](http://www.dnzb.govt.nz/)) or Gavin McLean's *The Governors: New Zealand's Governors and Governors-General* (University of Otago Press, Dunedin, 2006).

*Colin Campbell Aikman* (1919-2002): LLM (VUW), PhD (Lond) 1948. Legal Advisor to NZ Ministry of Foreign Affairs and Trade; Professor of Jurisprudence and Constitutional Law at Victoria University of Wellington (1955-1966). Director of NZ Institute of International Affairs (1980-1985).

*RH Algie* (1888-1978): Professor of law and politician (National). See Hugh Templeton "Algie, Ronald Macmillan, 1888-1978" *Dictionary of New Zealand Biography* [www.dnzb.govt.nz/](http://www.dnzb.govt.nz/) (updated 22 June 2007).

*HD Bamford*: Lawyer and sometimes lecturer in law.

*Francis Bell* (1851-1936): lawyer, politician, briefly NZ PM. WJ Gardner "Bell, Francis Henry Dillon 1851-1936" *Dictionary of New Zealand Biography* [www.dnzb.govt.nz/](http://www.dnzb.govt.nz/) (updated 22 June 2007).

*Viscount Charles Bledisloe* (1867-1958): British lawyer, politician, NZ Governor-General. See *The Governors*, 216-225.

*Denis Blundell* (1907-84): President of NZ Law Society; High Commissioner to Britain; NZ Governor-General (1972-1977). See *The Governors*, 291-297.

*Michael Brown*: presently Chief Judge of Maori Land Court.

*Thomas Gore Browne* (1807-87): Lieutenant-Colonel; Governor of various colonies; Governor of NZ (1855-1860). See *The Governors*, 52-62.

*JB Callan Jr* (1882-1951): Part-time law lecturer and later Dean of Law Faculty, University of Otago (1913-34); Judge of NZ Supreme Court (1935-51).

*BJ Cameron*: LLM (NZU). Chief Legal Advisor, Department of Justice, Secretary of the Ministry of Justice (retired).

*Mai Chen*: New Zealand legal academic; currently a partner at New Zealand's premier public law firm, Chen & Palmer.

*Rt Hon Sir Robin Cooke* (1926-2006): PhD (Cantab). Judge of New Zealand Supreme Court (1972-76); Judge of New Zealand Court of Appeal (1972-76); President of Court of Appeal (1986-96); Lord of Appeal (1997-2001).

*Edward Taihakurei Durie*: Chief Judge of the Maori Land Court and Chairperson of the Waitangi Tribunal (1980-2000); Justice of the NZ High Court (1998-).

*Dame Sian Elias* (1949-): Judge of NZ High Court (1995-); Chief Justice (1999-); Currently Chief Justice of the NZSC (2004-).

*Allan Finlay* (-1978): lawyer and politician (Labour). Attorney-General and Minister of Justice (1972-1975).

*Robert FitzRoy* (1805-65). Governor of NZ (1843-45). See *The Governors*, 30-38.

*Peter Fraser* (1884-1950): politician (Labour). PM (1940-49). See Tim Beaglehole "Fraser, Peter 1884-1950" *Dictionary of New Zealand Biography* [www.dnzb.govt.nz/](http://www.dnzb.govt.nz/) (updated 22 June 2007).

*Bernard Freyberg* (1889-1963): commanded the NZ Division in WW2; NZ Governor-General (1946-52). See *The Governors*, 247-354.

*Viscount Galway* (1882-1943): aristocrat; NZ Governor-General (1935-41). See *The Governors*, 227-238.

*Sir George Grey* (1812-98): soldier; Governor of NZ (1845-53; 1860-8); later NZ politician (1874-95). See *The Governors*, 38-44; 62-69.

*James Hight* (1870-1958): University professor, historian and economist (Canterbury College, later Canterbury University). See Neville Phillips "Hight, Sir James" AH McLintock (ed) *An Encyclopedia of New Zealand*, available at *Te Ara: The Encyclopedia of New Zealand* at: <http://www.teara.govt.nz/1966/H/HightSirJames/HightSirJames/en> (updated 18 September 2007).

*Captain William Hobson* (1793-1842): soldier; Lieutenant-Governor of NZ (1840-42). See *The Governors*, 25-30.

*Sidney Holland* (1893-1961): politician, leader of the National Party and NZ PM (1949-57). See Barry Gustafson "Holland, Sidney George 1893-1961" *Dictionary of New Zealand Biography* [www.dnzb.govt.nz/](http://www.dnzb.govt.nz/) (updated 22 June 2007).

*Keith Holyoake* (1904-83): politician; National Party leader and later NZ PM (1960-72); Governor-General (1977-80). See GA Wood "Holyoake, Keith Jacka 1904-1983" *Dictionary of New Zealand Biography* [www.dnzb.govt.nz/](http://www.dnzb.govt.nz/) (updated 22 June 2007).

*Baron Islington* (1866-1936): British Conservative-Liberal MP (1892-1900); NZ Governor-General (1910-12). See *The Governors*, 164-172.

*Philip Joseph*: LLB(Hons) (Cantuar), LLB (Br Col), LLD (Cantuar), Professor of Law, Canterbury University.

*Sir Thomas Legg* (1935-): Lord Chancellor's Office (1962-98); Permanent Secretary (1989-98).

*Viscount Jellicoe* (1859-1935): British First Sea Lord, Chief of Naval Staff (1916-17); NZ Governor-General (1920-24). See *The Governors*, 196-208.

*Rt Hon Sir Kenneth James Keith* (1935-): LLM (Harvard). New Zealand Department of External Affairs (1960-62), Professor of law, Victoria University of Wellington (1962-64; 1966-91), UN Secretariat, NY (1968-70), President of the New Zealand Law Commission (1991-96); Judge of the NZCA (1996-) and later the NZSC (2004-6). Presently Judge on the ICJ (2005-).

*John McGrath*: Solicitor-General (1989-2000); NZCA Judge (2000-5); NZSC Judge (2005-).

*Paul McHugh*: currently Reader in Law, Cambridge.

*Alexander Hare McLintock* (1903-68): MA (Otago), 1928; PhD (Lond), 1936. Lecturer in History (1940-46) and English (1946-52), University of Otago. Parliamentary historian (1952-68).

*William Massey* (1856-1925): politician (United) and Prime Minister of NZ. See Barry Gustafson "Massey, William Ferguson 1856-1925" *Dictionary of New Zealand Biography* [www.dnzb.govt.nz/](http://www.dnzb.govt.nz/) (updated 22 June 2007).

*Rt Hon Sir Robert Muldoon* (1921-92): National MP; Minister of Finance (1967-72; 1975-84); Deputy Prime Minister (1972); New Zealand Prime Minister (1975-84).

*Apiriana Ngata* (1874-1950): Ngati Porou, Maori politician (Liberal and Reform) and scholar. See MPK Sorrenson "Ngata, Apirana Turupa, 1874-1950" *Dictionary of New Zealand Biography* [www.dnzb.govt.nz/](http://www.dnzb.govt.nz/) (updated 22 June 2007).

*Claudia Orange*: PhD. Lecturer in History, University of Auckland; General Editor of the *Dictionary of New Zealand Biography*; currently Director, History and Pacific Cultures at Te Papa, Tongarewa, the Museum of New Zealand.

*Rt Hon Sir Geoffrey Palmer* (1942-): LLB (Victoria University of Wellington); JD (Chicago). Lecturer in political science, Victoria University (1968-69), Professor of law, University of Iowa (1969-73; 1992-95), Professor of law, Victoria

University (1974-79; 1991-). Labour MP for Christchurch Central (1979-90), Minister of Justice and Attorney-General (1984-89), Deputy Prime Minister of New Zealand (1984-90) and briefly Prime Minister (1989-90). Author of the leading texts Mai Chen and Geoffrey Palmer *Public Law in New Zealand* (Oxford University Press, Auckland, 1993). Presently President of the New Zealand Law Commission.

*Arthur Porritt* (1900-94): royal physician to King George VI and Queen Elizabeth II; NZ Governor-General (1967-72). See *The Governors*, 277-285.

*Robert Quentin Quentin-Baxter* (1922-84): LLB (Canterbury). Ministry of Foreign Affairs (1949-68); NZ government representative on the UN Human Rights Commission (1966-69); three terms on the International Law Commission (1972-84). Professor of Law, Victoria University of Wellington (1968-84).

*Tahupotiki Wiremu Ratana* (1873-1939): Ngati Apa and Nga Rauru; religious and political leader. See Angela Ballara, "Ratana, Tahupotiki Wiremu 1873-1939" *Dictionary of New Zealand Biography* [www.dnzb.govt.nz/](http://www.dnzb.govt.nz/) (updated 22 June 2007).

*John L Robson* (1909-93): LLB, 1931; LLM (Canterbury) 1932; PhD (Lond), 1939. Assistant Secretary, Deputy Secretary, Secretary of Justice (1960-70), Department of Justice (1951-70).

*Keith Scott* (1912-61): Professor of Political Science, University of New Zealand.

*Keith Sinclair* (1922-93): Professor of History at Auckland University. Author of several books outlining the development of NZ.

*Te Rata Mahuta Potatau Te Wherowhero* (1877/1880-1933): Ngati Mahuta; Maori King. See Angela Ballara, "Te Rata Mahuta Potatau Te Wherowhero 1877/1880-1933" *Dictionary of New Zealand Biography* [www.dnzb.govt.nz/](http://www.dnzb.govt.nz/) (updated 22 June 2007).

*Sir Richard Wild* (1912-78): Chief Justice of NZ (1966-78).



*Margaret Wilson*: academic and politician (Labour); former Dean of Law at the University of Waikato; Minister of Justice, Attorney-General (1998-2005).