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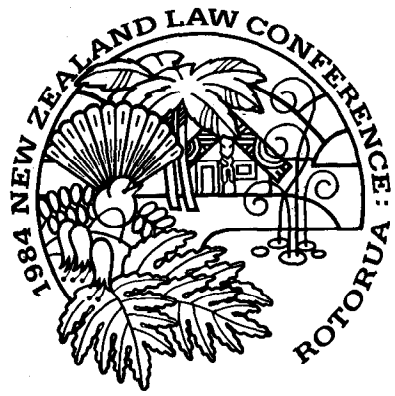


Law Conference Opening Address

By His Excellency the Governor-General, The Hon Sir David Stuart Beattie, GCMG, GCVO, QC

Your Conference Organising Committee has set out to make this the friendly Conference, and I am sure it will be.

Perhaps I should re-assure some of our overseas visitors who are unfamiliar with Maori culture and custom and who may have seen or heard the welcoming challenge outside, that according to Maoridom they have been made most welcome and in a truly friendly way.

That friendly atmosphere will, I am also sure, provide a conducive background to your exchange of ideas on contemporary issues relating to the law and the profession.

Your committee has drawn up a programme that continues the New Zealand Law Conference tradition begun in 1928 of giving a forum for an examination of the problems facing, and about to face, legal practitioners in particular and society in general. If anything, that programme emphasises the need to be prepared for change and the sometimes frightening rapidity with which change takes place.

Mankind, in all areas of endeavour, has always in the past undergone continuous change and development. It can be said with certainty that this will always be so. There is a Maori proverb which begins, "Te Ao Hurihuri" (The World Moves On).

Science continues to answer our call to provide the means to get things done quicker, better – cheaper. Each scientific step forward tends to have a snowballing effect so that the following change comes more rapidly and with it a more pressing need for preparedness. As the legal historian, Sir Leon Radzinowicz put it:

> Affluence and education may remove some pressures, enable us to understand ourselves better, but they bring new temptations, new scepticisms, new conflicts. The battleground may shift, but the battle goes on.

The benefits of modern technology are readily accepted, used and profited from in all spheres of society. This technology has spread food, home ownership, comfort, education and leisure beyond any precedent. But with every advance comes the need for guidelines, rules and laws to ensure equality and fairness for all – to ensure one's profit is not made from another's loss. As Lord Radcliffe has said:

> We take so much for granted in modern society and by so doing, we impose such heavy strains on our good sense. We steam ahead, carefree navigators, as if the conduct of democratic society was an easy art.

He emphasises that laws and the constitutional process for making them may well not be the most important aspect of social activity, but he submits they have a unique power of illuminating dramatically the structure which the individual can count upon for the building and development of his own life. Lord Radcliffe observed that a firm confidence in the stability of that structure is more than never needed for our bewildered populations.

I find it particularly gratifying and most fitting that we should come together at the opening of this Conference in the recreation centre's "whareruununga" or meeting house.

The New Zealand Law Society, in choosing this venue, has demonstrated one change that is taking place – a changing attitude in our society, a growing wish by New Zealanders to recognise the minorities in their midst and to embrace their traditions and their cultures. But with that wish to recognise and embrace comes the increased responsibility to protect the rights of those minorities. It is a necessary attitude in a healthy democratic society.

Perhaps upon no other segment of the community does the onus fall more heavily than on the legal profession and I am pleased to see from the programme that this Conference will "zero in" on this issue because in a just and defensible society, while acknowledging majority opinion, we should also have regard to the wishes of minorities. I believe New Zealanders are becoming more conscious that the law encompasses all sections of the community – that while it rules with authority it is developing with them.

Our lawmakers too, society's often comparatively well-to-do, with the benefit of education, profession and social status, are accepting that the

laws they make will not work without the assistance and blessing of the community at large. This is evidenced by the growing practice in recent times for Parliament to invite interested parties to make submissions on new legislation at the select committee stage and usually to welcome news media presence at the hearings. Something of a public philosophy emerges from this system of communication.

Too often in the past, history tells us, particularly in Maori-Pakeha relations, people of experience have assumed they had all the answers and knew what was best when, in fact, they did not. However, that is not to be taken as meaning the inexperienced have all the answers. The recent release of a study in the area of penal rehabilitation bears sad witness to that.

The military-training type sentence of corrective training for young offenders, introduced in 1981 in answer to public pressure to reduce re-offending, has been proved in a Justice Department evaluation to be no more effective in its main aim than the sentence it replaced. The result came as no surprise to those whose knowledge and experience told them it would not and could not work. As one commentator observed: "It was a reach-back to the 'eye-for-an-eye' principle." . . . Which brings me back to what I consider is the underlying thread of your Conference – "CHANGE". The approach of those who called for the short, sharp shock had not changed. They followed a principle that many consider has long been ineffective as a deterrent.

In this particular case, while it must be acknowledged that there is a place for a sentence of this nature in the penal system, changes to the corrective training sentence are planned which, it is hoped, will make it much more successful in achieving its aims.

A brighter aspect of the problem of penal reform is the growing number of those prepared to try something new (both the experts and those from within the community) towards changing attitudes, to try to increase the success rate. Auckland Justice Department psychiatrist Dr Frank Whittington has admitted orthodox methods applied to sufferers of Maori sickness left a lot to be desired, so he tried "tohunga", or faith healer treatment, and it works. He says breaches of tapu, – they are sacred or forbidden areas – could make a Maori appear to be mentally ill to the culturally ignorant, but to the tohunga it was a spiritual problem needing spiritual help.

The recognition of minority group's customs and the adaptation of those customs has shown promising results. I refer here to the new "matua whangai" or extended family programme to help young Maoris at risk and the involvement of the community and marae in sentencing.

One of our District Court Judges recently told a seminar he found off-beat sentences the most effective against re-offending in some cases. That same Judge also admitted frustration at seeing offending so often a family affair, with whole families appearing in the Children's Court and progressing through the system to appear in the District Court. And that is where another change, for many and varied reasons, has taken, and is taking place, *the family*. The family could be likened to the atom of a whole society and the family's members to the atom's neutrons and protons. Stable atoms make up a stable society.

But when one or more of the neutrons or protons run wild or out of control, the family atom undergoes a change. And when too many atoms of society experience such an alteration, then that society as a whole begins to steer in new directions, adopt new attitudes, accept new principles. Using that simple analogy, it is but a short step to conclude that changes for the better in our society must start with the community's protons and neutrons. They must be encouraged to become familiar with all the aspects of our legal system, – to trust it, to help improve it, to take part in its operations where they can, and to promote it in the many areas of its activities.

So, if there is one change I would commend this Conference to be conscious of during its deliberations and discussions, it is that of *the community's* awakening awareness that it has a vital and tremendous contribution to make to this country's legal system.

The New Zealand Law Society, by its very nature, has a responsibility, even a *duty*, to be a guiding influence on, not only the lawmakers, but also on that growing sense of responsibility and good intent within the community as a whole. And then the things which before seemed to us matters of debate and speculation suddenly come to be taken for granted, and the theory of one generation is the premiss of the next. Let us adjust to and lead in the new imperatives of a changing society!

I have much pleasure in declaring this Conference – Open. □

Law Conference Report

This issue of the *New Zealand Law Journal* contains a number of articles relating to the 19th Law Conference held at Rotorua, 24-28 April 1984. The complete papers have been printed and copies can be obtained from the Organising Committee. The keynote address of Sir Shridath Ramphal at the opening session is published for the benefit of those who will not otherwise have access to the papers.

Those giving the papers did not read them but spoke to them. Sometimes, as in the case of Lord Scarman and Mr Nariman they used their printed papers simply as an introduction to what they really wanted to say. In this issue there is published a slightly edited verbatim report of the session that was led by Lord Scarman on Human Rights and a Bill of Rights. The introductions to the supporting papers by Mr Geoffrey Palmer MP and Mr Neroni Slade at this session are also printed, together with the comments from the floor.

It is proposed in the next issue of the *New Zealand Law Journal* to publish the sessions on the Rights of Minorities, on Bio-ethics, the panel discussion on the themes of the Conference and the concluding address by the Chief Justice, Sir Ronald Davison. □

Challenges Beyond the Law

By Sir Shridath S Ramphal, Commonwealth Secretary-General.

An address given at the opening of the 1984 New Zealand Law Conference at Rotorua, on 25 April, 1984.

Heaven gives its glimpses only to those not in a position to look too close
— Robert Frost.

When Robert Frost wrote those evocative lines he was referring to the sight of flowers caught from a passing train – a moment here, then gone again. I feel a little like that about Rotorua. Here for just a day in this place of very special charm at once vital and serene, and filled with the haunting spirit of immemorial times; a glimpse worth all the journeying, enriched by the companionship of New Zealand lawyers.

Yet it was with some trepidation that I accepted the President's invitation to introduce your discussion on the challenges that lie ahead for the legal profession. As someone once said: "All predictions are difficult – especially about the future". However, not only have I now spent nearly ten years away from the law's daily round, but futurology, so much in vogue, has not been my particular indulgence. However the warmth of Bruce Slane's urgings, and my own admiration of and respect for New Zealand's legal traditions made the opportunity to be with you quite irresistible. Hints of trout in Lake Taupo – like many an impressive but irrelevant citation – were otiose, but did the case no harm.

New Zealand in the Commonwealth

New Zealand has gained a special place in our legal Commonwealth. It has contributed vicariously, but to great effect, to the development of many aspects of legal systems throughout the common law world. As the reports of so many far-flung Commonwealth law reform agencies testify, your endeavours here are closely watched, and your innovations quickly borrowed – seen, as they are, as enlightened responses to contemporary concerns.

My own Caribbean has been at the forefront of those who have embraced some of your reforms in the area of family law, and there is a lively interest abroad in the workings of your accident compensation scheme – a topic discussed by you here in 1969 in a debate whose hallmark, I am told, was compassion and concern for the victim, even at the expense of foregoing lucrative aspects of legal practice. Law in the Commonwealth remains in need of a legal profession in New Zealand that itself remains *avant garde.*

Legal Custodians

The proud boast of the common law has been "no wrong without a remedy", a claim, therefore, of ready adaptability to new and changing circumstances and of responsiveness to the challenges they bring. Yet it has become typical to portray lawyers as running the risk, if not of choking on the knot they have made of the status quo, at least of being among the last to discern the need for change and the relevance imperative of their response to it. The lawyer is depicted, with more than a grain of truth, as being rooted in a past which he associates with a status he fears is passing.

The truth is, by training, and eventually by conviction, we do see ourselves more as custodians than as activists, more as keepers than as developers. And there are times which give a special value to that instinct for continuity. But there are other times which demand of lawyers other virtues: changing times; times which call for new ideas, new approaches, new measures; times which demand new perspectives of human relationships; times of transition between eras. In such times, were lawyers to be custodians merely we would find ourselves in the rearguard of our generation, clinging out of habit to concepts and systems that may have served their time with excellence but which have simply become inadequate responses to new needs that emerge from new realities. It is my premise that we are in such times; it is my proposition that they call for a role from lawyers more creative than that of keeper of the seals.

As you gather in Rotorua, I wonder whether you do so with confidence that our profession, even in New Zealand, is playing that creative role or at least stands ready and willing to do so? I must tell you, in all conscience that I doubt whether in the Commonwealth in general its common lawyers are responding with adequacy to the challenges at hand. Those challenges arise, of course, in a variety of forms. Some of them will be more obvious to you as lawyers practising in a domestic jurisdiction than others which impinge on those of us whose work straddles jurisdictions.

Slumbering sentinels

In the former category are the challenges presented particularly to industrialised societies – But, of course, ultimately to all of us – By the new world of science and technology. In a book published last year in Australia by Professor C G Weeramantry of Monash University these particular challenges were

brought together in a timely way, raising disturbing questions about law and human rights in the wake of technological change. The book is called *The Slumbering Sentinels*, and I should like to read a short passage to you from the preface. I wish, however, that I could show you its cover (if I could do so without being in contempt – or falling foul of the Law Society's Auckland branch) for it depicts bench and bar alike in varying postures of slumber against a backdrop of a computer read-out.

This is the passage that I believe has relevance for all of us – A passage I read recently as well to Canadian lawyers meeting at Cambridge:

> Science and technology have burgeoned in the post-war years into instruments of power, control and manipulation. But the legal means of controlling them have not kept pace. Outmoded and outmanoeuvred by the headlong progress of technology, the legal principles that should control it are unresponsive and irrelevant. Legal structures and concepts and people who work the system are proving unequal to the task of protection, in the midst of a set of problems without precedent in the law. Assumptions long regarded as fundamental no longer hold true. Values once held unquestionable no longer command acceptance.
>
> Procedures once adequate no longer yield results. Lawyers are out of their depths, their concepts out of touch, their techniques ineffectual.
>
> Sociologists, philosophers, economists, environmentalists, ecologists and politicians have sensed some of these dangers and prepared for them. Lawyers have been slow to do so, hampered by outdated concepts and methods.

In his foreword to the book, the chairman of the Australian Law Reform Commission, Justice Kirby, reminds us of Bronowski's warning:

> The world today is made, it is powered, by science; and for any man to abdicate an interest in science is to walk with open eyes towards slavery. . . .
>
> This book seeks to open the eyes of a generation so dazzled by technological innovations, that it is often blinded to the social and human dangers that need to be seen.

Are we as lawyers not among those that are blinded? Is Weeramantry not right when he says that while other professionals have sensed the dangers and prepared for them "lawyers have been slow to do so, hampered by outdated concepts and methods"? How many lawyers, for example, see a role for ourselves in shaping the response or our societies to the complex and somewhat threatening challenges posed by science's probings in the area of genetic engineering? How many of you will join the Attorney-General in seeing practical relevance in tomorrow morning's forward looking session on "Bio-ethics" and Russell Scott's excellent paper? And yet legal considerations, not just legalities and illegalities, but fundamental legal concepts, need to be blended with the medical, religious and ethical considerations that are all involved in society's response. If we believe we are irrelevant in shaping social responses to such basic issues we may find ourselves irrelevant over a much wider area. We cannot be sentinels and allow ourselves the luxury of slumbering on the watch.

And there are challenges, too, that arise from other aspects of technological advance, particulary in the area of communications. Ease of transport, and the proliferation of company structures that they facilitate, have combined to produce a dramatic increase in international white-collar crime – fraud on a scale which could quite literally imperil the economic base of many a small country. Yet few legal systems have even begun to confront this development of crime involving multiple jurisdictions; and in the absence of a creative response a pristine sovereignty actually facilitates crime.

Good internationalism

A major problem is inadequate measures for judicial assistance in criminal matters between jurisdictions. In fact, there is a disturbing trend for domestic law enforcement agencies, for a variety of reasons, not all of them rooted in good internationalism, to adopt a "hands-off" posture when it becomes apparent that a substantial foreign element is involved. Thinking rooted in another era is in fact part of the problem. The limits on extra-territorial legislative, judicial and executive competence, for example, impose severe restrictions on effective co-operation between countries. The twin concepts of jurisdiction and sovereignty sometimes rise up like medieval buttresses in the path of legal progress, all too often with lawyers themselves acting out the role of ancient keepers.

Such attitudes are first moulded in our universities and law schools and it is to them at least in part that we must look for a new generation of lawyers who will fashion a jurisprudence of relevance to the end years of the century. I would like to say something later about those end years and their wider challenges but allow me a passing word about legal education.

Social crises

As I have had occasion to recall before – to Commonwealth lawyers in Hong Kong – the President of Harvard University, Derek Bok, himself a former professor of the law school, has recently challenged American law schools with uncritically upholding "A grossly inequitable and inefficient" legal system – of concentrating

> on training practitioners for successful careers while failing to acquaint them with the larger problems that have aroused such concern within the society.

In Canada, the recent Arthurs' report on "Law and learning" has argued not only

> That Law in Canada is made, administered and evaluated in what often amounts to a scientific vacuum [But] that Judges, lawyers and law teachers fail to exhibit the collective intellectual capacity to comprehend, evaluate or change today's complex legal system.

If the United States and Canada are in such trouble, few Commonwealth jurisdictions can afford to be smug – Certainly not the Commonwealth's new developing countries.

Sharing the future

Lawyers do not cease to be members of their societies once they qualify; they, in fact, should become more responsible members. The wider social order must be a part of every

caring lawyer's jurisdiction and its challenges for the future a part of his (or her) concerns. It is a temptation, of course, for each generation to decline to carry the future on the back of the present. But that is not a valid stance for lawyers who are not being asked to make sacrifices for a future which others alone will enjoy, but to work to ensure that there is a future which they can share in prosperity with others.

Nor is that future postponable – Though it may seem so, especially to those of us for whom the present is congenial. In fact it is often nearer at hand than it appears. The next century always seems a century away: Never in our time. Even "2001" conjures up images of very distant tomorrows.

Yet we are less than 16 years away from the 21st century. We simply cannot avoid thinking seriously about it. How can you address the challenges that lie ahead for the legal profession in New Zealand unless you reflect, for example, on the world of 2000 – The global setting for New Zealand in the 21st century, the wider human environment, the planetary environment, which must be a major element, perhaps the principal determinant, of what life will be like for New Zealand for New Zealanders, by then. Unless you take in that wider perspective you will end up with a blinkered view of the challenges that lie ahead for lawyers beyond the strict parameters of law – and even within them.

And that, in essence, is my point: a plea for you to reject a view of the legal order only within narrow domestic walls and the complacency such a view too readily encourages; a plea more particularly for common lawyers not to be among the last to recognise that the duty of care we owe to our neighbour now imposes new imperatives as the concept of neighbour is itself being transformed in our interdependent world. That closely-knit, interlinked, interdependent world is a reality, however much the instincts of yesterday recall us to old nationalisms and summon up the adversary habits of crude sovereignty. It matters to New Zealand, it matters to you, what the Japanese ratio of engineers to lawyers is at any time. That external reality is a part of the challence of the future for you.

Could it be that in many common law jurisdictions there is a crisis made the more acute by our failure to perceive it as such? Have the Costigan reports in Australia, the Stewart Commission here in New Zealand and (preserving the New Zealand connection via Austin Mitchell) and notice served on solicitors in the UK that their conveyancing monopoly is to end, (do all these) not put us on notice that we may be upholding what Derek Bok called "a flawed system" – centurions guarding anomalies, and passing on the calling to future generations? Are we being fair to them? Are not too many of our brightest students in any event being encouraged to pursue law to the detriment of other, arguably more productive, professions?

With less than half as many people, the Japanese produce 30 percent more engineering graduates each year than the United States; it has an overall total of 15,000 lawyers; the US produces 35,000 lawyers every year. The Japanese say: "Engineers make the pie grow larger; lawyers only decide how to carve it up." What do we say? More important still, what do our societies say?

And if things can be as bad as this in the older developed countries, imagine the situation in developing countries where the stresses are exacerbated by the profession also being seen as unsupportive, or even obstructive, in the overriding and often desperate national quest for economic and social development – countries where the lawyers' accustomed role becomes anomolous to the point of indecency; but which they still guard with righteous zeal.

And that really is the heart of the matter. We tend to dwell smugly in our legal cocoons, convinced of our supreme importance of a society which we forget is noticing us less and less. We need to get out of that shell and remind ourselves of what others assuredly know: That there are more things 'twixt heaven and earth than our legal world dreams of – realities that inevitably bear upon the judgment of a legal order that ignores them.

A new intellectual framework

Your reflections this week cannot altogether ignore such challenges. As you postulate an ordered society for New Zealand, for example, you must recognise the danger of a breakdown of law and order worldwide and acknowledge the need for a more ordered world, for a new intellectual framework for the internationalism of our time; you must be mindful of the process of unravelling now taking place in so many areas of human co-operation in which we the world had made progress, and be aware of the dangers that loom for New Zealand as part of that world if together we fail to meet these challenges.

If we can only stand back from our particular professions and our separate societies and look upon that wider human society of which each of us is a part, we will see that the present – whatever our achievements at home – is a disquieting signpost for the future. It is a time of anguish and danger across a wide front of human affairs; and as at all such times, contradictions abound.

While the world economy is in the throes of its gravest crisis since the thirties, threatening the weakest with collapse and even the relatively strong with massive dislocation, a military culture encourages us to frolic on the margins of apocalypse. Nearly 40 years after the United Nations was established to ensure peace through internationalism, the alliances of East and West are engaged in renewed contest for primacy that has lost all sense of proportion. While poverty threatens human security, the world's resources are sequestered in the name of national security, but on so massive a scale that survival itself is threatened.

And paradoxes also abound. In the nuclear age, we have reached the threshold of absolute power only to find that across it lies oblivion. The ultimate sanction is to destroy not just the enemy's world, but one's own as well. The technological revolution promises to relieve us of work, only to threaten us with a crisis of leisure. A part of the price the world pays for under-development is global population increase of a million people every five days, and the prospect of a planet of over 6 billion by 2001. The developing world had 65 percent of the world's population in 1950. It will have 80 percent by 2000. Our global society faces the danger of being overwhelmed by the problems of income disparity and endemic poverty; yet complacency becalms the rich, and inertia threatens the poor.

Eliminating poverty does not mean that the world will be free of conflict. The rich tribes are quite capable of sustained belligerence and, as the history of post-war conflict

demonstrates, the poor need little prompting to convert their tribal passions into war. But eliminating absolute poverty and providing a better chance for sustained development will greatly diminish sources of international and regional tension and temptations for proxy wars, not to mention, of course, the alleviation of human suffering.

There is a symbiotic relationship between development and peace which world recession and a cold war environment should now raise to a state of global alert. Morality and self-interest, principle and prudence combine to dictate that reducing human disparities is at least one element of securing the future – of reaching the 21st century.

Mobilising global resources

Can we reverse these trends in time? Can we break those major structural bottlenecks that are choking human progress in the last quarter of the 20th century? Can we roll back the arms race, make international arms control effective, strengthen the United Nations and make the security council more valid as an instrument of peace and security? Can we effectively mobilise global resources against world hunger, take the key first steps towards establishing a new and more equitable international economic order, provide credible machinery for realising human rights world-wide? Will we enter the new century still burdened by the debris of the old and not ready to ease the pain of the transition? What kind of world will it be in 2000?

The answer clearly is the kind of world we make it – by what we do or fail to do in the next 17 years. As we look to the future even lawyers have to ask: "what can we do to help the world to get to the 21st century, and to shape the kind of world that it will be?" More simply, you must ask: "what can New Zealand do to make the future less characterised by arbitrariness, uncertainty and disorder; less tarnished by gross human disparities and the degradation of humanity itself; more peaceful, just and habitable; more insulated against the corruption of absolute power."

If to all this you protest that I am urging you to wander into pastures beyond a lawyer's domain, I ask in return, by what superior law are its gates locked against you? And I remind you that common lawyers are heirs to a noble tradition of intellectual inventiveness responsive to changing needs.

Great intellectual challenges are at hand. For common lawyers perhaps the greatest of all is that we do not allow the springs of legal improvisation to dry up, springs that served earlier generations bountifully in times of great transition. The extent to which the international system will be made more equitable and our world more safe and habitable are essentially matters for political decision. But there is a role for lawyers both in helping our political leaders to such decisions and in their implementation.

Rotorua and multi-racial living

Perhaps here in the almost primaeval beauty and calm of Rotorua, it is even harder to resist the temptation of isolationism; and yet Rotorua itself is so much a reminder of the real world. The people of this region come from different racial, cultural and religious backgrounds. When we speak of the modern multi-racial community, it is of communities like Rotorua that we speak. If people here can live and work in harmony together there is hope for multi-racial societies everywhere and for our very pluralistic world society. Those among you who are in fact already taking up the challenge of making New Zealand an even better example of multi-racial living, serve a wider cause. Rotorua, in fact should help us to see the world more clearly and to understand its challenges. The Maori concept of Tatou – Tatou has much to teach us all.

And therein surely lies hope. It has been the hallmark of man's humanity that, over the eons of his existence, he has steadily extended the horizons of his social consciousness, fashioning and adapting his institutions to reflect and support those advances. His focus of loyalty has moved over time from family to tribe and from tribe to nation; identification with a larger group each time bringing with it a sense of concern and caring for all within the group.

The nation state, democratic government, enlarging social security through progressive taxation are all refinements of this long evolution in human history and lawyers have played vital roles throughout them. It is a process which must continue and will continue across the limits of national frontiers; and that a creative role for lawyers will remain.

Interpendence is not new. What is new is the intensity and variety of the economic, political and strategic relationships that have emerged in the post-war era and the unavoidable recognition of the elements of mutual interest in them. What is new, is that we have lost the option of ignoring our interdependent state – of ignoring the reality that we have become one world.

Vision for the future

It is time then that we cease to misread the signs of our own humanity: mistaking the tracings of the past for the patterns of the future, conjuring belief out of hope, applying to the future narrow perspectives of the present rather than the larger vision its dynamics demand.

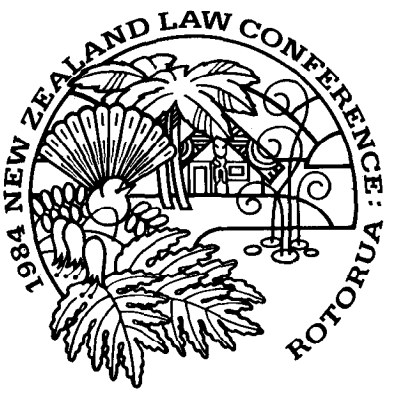
Certainly the world's people know that the human race is able to do better; in universities around the world, on farms and in factories, among scientists and business people, in professions, including the legal profession, and among those on the threshold of political life – Many of whom are lawyers, among the young in all the continents, within all societies of East or West, or North or South – People are conscious that there must be higher purposes and nobler pursuits to which societies can aim. Here in New Zealand, as in all countries, they are looking for a vision of the future that they can share in good conscience with the rest of the human race. They – you – are not powerless.

The capacity of people to determine the future of our world is unlimited. As Arnold Toynbee wrote exhorting his generation to action and against surrender to a darkening fate 40 years ago:

> The divine spark of creative power is instinct in ourselves; and if we have the grace to kindle it into flame, then the stars in their courses cannot defeat our efforts to attain the goal of human endeavour."

That creative spark once burned brightly among common lawyers. May your 1984 conference in Rotorua confirm – as I feel sure it will – that it burns brightly still among the lawyers of New Zealand. □

Britain and the Protection of Human Rights



By Lord Scarman, Lord of Appeal in Ordinary

Mr Chairman, distinguished guests, fellow lawyers of all branches of the profession, ladies and gentlemen. It is a very great pleasure to be with you here on my very first visit to New Zealand. I have visited less civilised countries like Australia but I have never before had the excitement and the profound pleasure of coming to your country. I think of course it is highly embarrassing of you to throw me into the midst of what I understand is quite a political football in New Zealand at the moment. I am completely unqualified to play that game of football in New Zealand — first I am your guest and secondly, believe it or not, I am a Judge and therefore I shall allow that game to proceed with merely a certain amount of ribald comment from the side lines.

One personal word and then we will get onto our subject. Our Chairman referred to that very strange appointment in 1961 of myself to the Probate Divorce and Admiralty Division. It is in fact a glorious example of the persistence of the amateur tradition in all that matters in my country. I had never drawn a will. I had never sunk a ship and when I was asked in Middle Temple Lane when the appointment was announced, by an old, but mischievous, friend of mine "My dear Leslie, what on earth do you know about adultery?" My unwitting answer which has earned me a lot of conjugal trouble was "My dear Eric, I am going home to find out".

The United Kingdom situation

Now to a domestically less poignant subject although I think in terms of society a very much more important one. That is to say a Bill of Rights, and particularly for me a Bill of Rights in the United Kingdom context. My paper was no more than a brief situation report of the United Kingdom situation as I see it today. And in my talk to you this morning I shall not go over the ground covered by that paper. I shall assume it is the sub-structure, the infra-structure of what I am going to say. I shall therefore be spelling out the implications of that paper in, of course, the United Kingdom context.

I think before I do so, I'd better in a sentence indicate what is the situation as I see it upon which I reported briefly in the paper. The situation can be put in this way. We have in the United Kingdom an old established, very old established now, historically very successful constitutional system, but that system is showing signs of bursting at its seams. Some of the bolts and nuts that hold it together are not quite as proof against modern pressures as they ought to be. Its situation therefore, which the evidence of current events indicate quite clearly, has now to be overhauled so that it may be adjusted to the circumstances, the pressures and the values of British society at the end of the twentieth century.

Now that is how I see the situation but I think in fairness to you I should put to myself this question. Do others in the United Kingdom see the situation in the same way? Because unless they do it is of no importance that I see it that way. And the answer to that question is that people who should know, people in very high and powerful positions in the United Kingdom see it precisely in the same way.

I begin with no lesser figure than the Lord Chancellor, Lord Hailsham. He is on public record more than once as saying that in his view the United Kingdom now needs a written constitution and a Bill of Rights. Lord Denning when in 1974 I first raised this question and made it one of public discussion in the United Kingdom, said to me "You're barking up the wrong tree, the Judges can do all that is necessary manipulating the common law (and how well he knew how to do that) manipulating the common law so as to adjust it to the needs of modern man". But Lord Denning has, as some of us know, that supreme quality of survival which is flexibility. He has changed his mind. And he told me and has told others now in London publicly that he thinks the United Kingdom now needs a Bill of Rights.

Then there is a body, a very reputable and a very brave body, of whom many of you will not have heard. It is the Standing Committee established in Northern Ireland for the review and scrutiny of human rights in that strife torn province of the United Kingdom. It consists of Northern Irish lawyers and politicians. They came out with a report a year or so ago which is the best official discussion of the Bill of Rights in a United Kingdom context that has yet been produced. They said it has been suggested to us that because of the strife and divisions in Northern Ireland we should have a Bill of Rights even though the rest of the United Kingdom does not. We reject that proposition totally they said. The evidence that we have received is that the whole of the United Kingdom including Northern Ireland requires a Bill of Rights and that Bill of Rights should be based upon the text of the European Convention on Human Rights and Fundamental Freedoms.

But finally in a sense the piece de resistance is the House of Lords itself. The House of Lords has twice passed

through all its stages a Bill to introduce into the municipal law of the United Kingdom a Bill of Rights based upon the European Convention. Each time by a substantial majority. Of course when that Bill reached the House of Commons it suited neither of the two major political parties to have any truck with anything which misguidedly they thought limited the sovereignty of the House of Commons. And so it got no further. But that is some indication I hope of the strength of opinion of informed and sometimes learned opinion which is building up in the United Kingdom in favour of the proposition that we now need a Bill of Rights and in order to get it it should be founded upon the European Convention even though of course one could have some criticisms of some of the drafting of that convention which was in fact drafted as long ago as 1950.

The European Convention on Human Rights

And so it won't surprise you to hear me say that the Bill of Rights controversy has taken in the United Kingdom the shape which could be summed up in this question. Shall we incorporate into the United Kingdom into the municipal law of all parts of United Kingdom – because remember there are three law districts in the United Kingdom – the European Convention on Human Rights and Fundamental Freedom.

I am going to suggest to you that there is a legal case for introducing now a Bill of Rights into the United Kingdom and there is also a political case; and although I shall spend more time naturally on the legal case, I shall also deal with the political case because I don't think it will surprise you to hear it coming from me. I don't think that Judges should be frightened of appearing in the political arena as long as they are careful to conduct themselves in that arena by addressing legal problems. Legal problems do have political overtones and Judges must not run away from it. Similarly many political problems have legal overtones and neither Judges nor politicians must run away from that and neither must regard either of those situations as exclusively his province. Judges are in the political arena because they act in public and give public judgments which may of course be criticised and they are bound to have coming across their desk as they sit on the Bench questions which do raise political controversy but which are capable of a legal answer and which may or may not in the case which reaches the Court, require a legal answer. So much by way of digression.

The legal case

I now turn to the legal case for a Bill of Rights. Perhaps before I do so I should give you an indication of what my conclusion is. I think the legal case for a Bill of Rights is stronger than the legal case against it. I think that the political case in the United Kingdom for a Bill of Rights is now really unanswerable – although many seek to answer it – and I think the combination of the two cases demonstrates an existing need for a Bill of Rights.

Now I turn to the legal case. First of all I should, I think, explain to you very briefly the structure of the European Convention because with us the whole debate is whether the European Convention should be introduced into our law or not. The European Convention is of course in many of its articles very comparable, indeed very like, the International Covenant on Civil and Political Rights which is of course a United Nations document and which I think New Zealand has signed and ratified. But the European Convention goes very much further than the International Covenant. It was a Convention formulated by the Council of Europe, of which the United Kingdom is a member, and it created institutional machinery for enforcing the rights and freedoms deterred in the convention. And it is this institutional character of the European Convention that has proved so immensely important.

As you will know from Mr Nariman's excellent paper on the situation in India, at the end of it he points out the depressing catalogue of international conventions all of them formulated in the most beautiful language and almost all of them having very little or no effect at all. Not so the European Convention. It has institutional machinery which is in existence and active. That machinery consists of a commission known as the Commission of Human Rights and a Court known as the European Court of Human Rights. The other factor about the Convention which it is necessary to know is that in Article 1 of the Convention there is an obligation upon all signatory states to ensure that all persons – notice that, all persons, not limited to citizens – all persons present within the jurisdiction of the state shall have the protection of the Convention. That is the international obligation imposed upon signatories of the Convention.

The United Kingdom was one of the first to sign and I think one of the first to ratify the Convention. If our legal system had been different and more like that of our continental neighbours, the act of ratification would have introduced it into our law. Indeed, I think, that if America had been a party to the Convention that would have been the effect of ratification. But not so in the United Kingdom. International law is one thing, the municipal law is another and in the old days may the twain never meet. But of course in the United Kingdom the twain have met and because they have met in the usual British way, unexpected – no preparation was made for it – a good deal of confusion has entered our law in consequence.

Option for individual complaints

One further factor about the Convention. The Convention contains an option which a signatory state may take up. That is an option to allow persons aggrieved within its jurisdiction by an infringement or alleged infringement of his human rights to take his case to Strasbourg, where the institutions of the Convention are situate. He can only do so after he has exhausted his remedies in the United Kingdom. But having exhausted them he may take the United Kingdom to the European Commission and if the European Commission thinks he has prima facie, a true bill, the European Commission can put the matter to the Court.

This is extremely important because the United Kingdom has taken up the option and believe me citizens have not been slow to use it. I haven't got time to give you all the cases, or even a reference to all the cases, but let me just rapidly indicate to you the wide range of rights and freedoms which it has been alleged, often with success, are not properly protected in the United Kingdom. The rights of prisoners, cruel treatment for instance of the IRA suspects, held to be a breach of the Convention. The rights of immigrants

and ethnic minorities: the denial by the British Government of a haven in the United Kingdom of the Asian people expelled from East Africa, particularly Uganda. When Amin was in power they were expelled. India, to its great credit took a lot of them. The United Kingdom to its great discredit, did not. They took the United Kingdom to the European Commission and fortunately the United Kingdom, as so often, belatedly, did the right thing and reached a settlement. The right not to join a trade union – the two railway employees, dismissed by British Rail because they wouldn't join the trade union and the trade union insisted that they be dismissed. They went to Strasbourg and ended up with substantial compensation to be paid by the Government for having a law which did not ensure them the right to work notwithstanding their refusal to join the trade union. The rights of women have more than once – I won't waste time on it now because I realise time is on its way – the rights of women in United Kingdom have been under scrutiny. The rights of the press have been vindicated in the famous Thalidomide case, the case in which the *Sunday Times* was found guilty in contempt of Court by the House of Lords and the European Court of Human Rights in effect overruled the House of Lords.

So you begin to see the impact that the Convention has had on United Kingdom law. The confusion that is created because all this impact comes from a source which is not within the law but outside it and a source which the Judges cannot directly consider. And so the European Convention has exposed the gaps in our law protecting human rights. It has indicated by its very existence the need that we should do something more than just allow it to haunt us, to haunt government, to haunt Parliament, to haunt the Courts from outside the legal system.

Guide-lines for judges

Well, I am near the end of my time and I will be therefore very short. The legal need is there. The Judges can handle the problem perfectly well. There's no difficulty. There's nothing new about Judges in the United Kingdom being the defenders of the oppressed and of the individual and of the minorities. That's been their common law function since the beginning of the common law. What the European Convention does is to give them guide-lines, which of course will be in statutory form and therefore endorsed by Parliament along which Judges can exercise a traditional common law function.

The political case

The political case I will be very rapid about indeed. It is simply this. The United Kingdom is now a plural society. We woke up to that fact – many of us didn't appreciate it – in 1981 under the catalyst of the riots of that year. But we now know it and in typical British way we now recognise it, accept it and are doing our best to handle it. But if you are going to protect people who will never have political power, at any rate in the foreseeable future (not only individuals but minority groups with their own treasured and properly treasured social customs, religion and ways of life), if they are going to be protected it won't be done in Parliament – they will never muster a majority. It's got to be done by the Courts and the Courts can only do it if they've got the proper guide-lines.

And where can they go for the guide-lines? They won't find them in the common law. The common law just says you can do what you like unless it is stopped by law. You want more positive guidance than that. You've got to be told, as the Convention for instance tells you, that the basic human rights are there for everyone, without any sort of discrimination.

There are four points made politically against the Bill of Rights to the United Kingdom. I will take them immensely quickly. First of all it is said that it is not needed. I hope I've demonstrated to you that it is. Secondly they say that it is transferring power from Parliament to the Judges. That is nonsense. It is merely equipping the Judges with a modern tool to do and perform adequately a very ancient responsibility – protecting the weak. They say there is a new and unusual subject matter. Nonsense, for the reasons I have just indicated. They say, well, it is going to create problems for the executive. Of course it is, that is the point of the whole exercise.

In the Privy Council I sit in judgment. I'm very proud to do so. As an Appeal Judge from a large number of countries all of which have Bills of Right incorporated in their Constitutions. And who drafted the Constitution? Surprise, surprise – the British Colonial Office. They are perfectly content, indeed very, very satisfied, with their written Constitutions and with their incorporated Bill of Rights. Of course with them the Bill of Rights is entrenched. I haven't got time to go into that subject but perhaps we can take it up in discussion. It works with them. If it works with them why should not it work with us who gave it to them.

A written constitution?

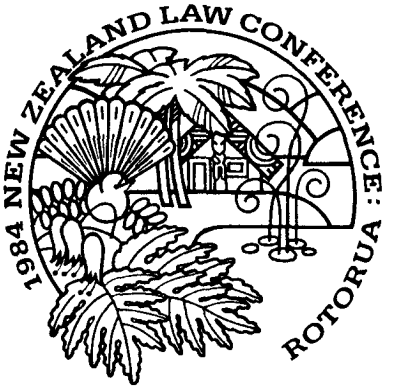
Finally, one point which I haven't got time to argue. Of course the Bill of Rights is most usually found incorporated in a written Constitution. I doubt if a written Constitution is on the cards in the United Kingdom. It could be if we had devolution but as you know devolution has sunk for the moment below the horizon. But the Bill of Rights can be extremely useful even with a unitary Constitution and even unentrenched. And my last word to you is this. Magna Carta is unentrenched, but it is still part of English law. □

Supremacy of the US Constitution

A second unique feature of our government is a Constitution supreme over the legislature. In England, statutes, Magna Carta, and later declarations of rights had for centuries limited the power of the king, but they did not limit the power of Parliament. Although commonly referred to as a constitution, they were never the "supreme law of the land" in the way in which our Constitution is, much to the regret of statesmen like Pitt the elder. Parliament could change this English "Constitution"; Congress cannot change ours. Ours can only be changed by amendments ratified by three-fourths of the states. It was one of the great achievements of our Constitution that it ended legislative omnipotence here and placed all departments and agencies of government under one supreme law.

– Justice Hugo Black

The Separation of Powers in 1984



By Geoffrey Palmer MP

Mr Chairman, distinguished guests, ladies and gentlemen. As Lord Scarman has observed, there are in this topic both political and legal issues, and I appear before you as a politician who is often criticised by his colleagues for seeing political problems in legal terms and I think it is important to remember the limits which legal analysis has in solving political problems. But having entered that caveat let me say that for a long time we, in New Zealand, have looked to the United Kingdom as the source of our Constitutional Law. But the simple verities of Dicey in parliamentary sovereignty do not seem so secure to us as once they did, and when we have an eminent Law Lord from the United Kingdom suggesting that the time has come there for a reassessment of the safeguards offered by the system, I think it must certainly force New Zealanders to look about them and to examine their own condition.

Lord Scarman's paper gives an interesting account of British Parliamentary democracy and draws attention to some of its weaknesses. In the New Zealand context I believe it is important to reflect on the differences between our situation and that of the British. Some of the checks against the abuse of power which exist in Britain are singularly lacking in our own parliamentary system. In particular I think we should focus on Lord Scarman's observation that the House of Commons is not sovereign. He says the one thing the House of Commons cannot do is to destroy the system.

The New Zealand situation

The New Zealand House of Representatives suffers from no such pusillanimity. There is no second chamber here. The House of Representatives can assuredly destroy the system if it wishes. It might be argued of course that the entrenched provisions of the Electoral Act, one of which relates to the duration of the House of Representatives, may act as a brake, but section 189, the entrenching provision, itself is not entrenched. So whatever inhibition that provision imposes, and it does impose some, it can hardly be compared to the consent of the House of Lords.

Another feature of our Parliament which makes it different from many others to which we often compare it, relates to its size. The ability of the executive to dominate is much more easily accomplished in a small parliament. Currently the New Zealand Parliament has 92 members; 20 are Cabinet Ministers, 4 are Under-Secretaries. Excluding the Speaker there are therefore only 46 government members in all in the New Zealand Parliament and certainly it can be argued that the majority of one which the Government has over all opposition members is fragile and causes a restraining influence to be exercised on the executive by government members threatening to cross the floor. But it can be argued I believe with even greater force that the majority of the executive and its place people enjoy in the government caucus makes executive domination more easily achieved. In larger parliaments such domination is much more difficult to achieve simply because of the large numbers of government back-benchers.

Indeed the small numbers make government by caucus a reality in New Zealand in ways which are simply impossible in larger parliaments. It can be strongly argued that developing caucus domination has reduced some of the vitality of the New Zealand Parliament even at a time when the vigor of its select committees have been increasing. An elaborate system of caucus committees which public servants attend on request, has tended to subvert some aspects of the parliamentary process particularly the integrity of select committees. Such things do not happen at Westminster because they are just impractical. In parliaments which are larger than New Zealand's it's easier to admit to the plurality of opinions and it is easier to foster the institution of the independent back-bencher who is not all the time looking over his or her shoulder at the prospect of advancement to Minister.

I should add a word about public opinion also in New Zealand as a restraint because it mirrors, I believe, the problems of our Parliament. New Zealand is too small to be able to rely on a body of detached, disinterested and authoritative opinion on a number of topics being available in a public debate in the way that it is in the United Kingdom and I think such situations make our situation more difficult. So any reassessment of the New Zealand mechanisms must start with an analysis of the health of our Parliament and whether the mechanisms it has to hold the executive accountable are satisfactory. I am of the clear opinion that they are not.

There are many respects in which our Parliament is deficient in holding the executive to account. I think this gradual erosion of power of Parliament has been going on for very many years but a few of the symptoms can be rehearsed. Poor and ineffective ways of reviewing delegated legislation which hopefully is soon to be remedied; little in the way of scrutiny of government administration; lack of an established timetable which means that Parliament goes on for months at a time without meeting; little scrutiny of some important aspects of economic policy particularly government borrowing; a set of Standing Order which gives

Government too much power to control the proceedings and the fact that many of the decisions about Parliament itself are made by a Legislative Department with a Minister at its head which is a method of executive control quite unknown in any other Westminster-style Parliament.

We've also had the decline of the doctrine of ministerial responsibility in a failure I think to accept the conventions upon which the protection of that doctrine depends. Put another way, there are no Lord Carringtons in New Zealand. The last Minister resigned here in 1934. And I am not, by that remark, suggesting that in the United Kingdom the doctrine of ministerial responsibility operates with rigour and clarity, I'm simply asserting that it amounts to a great deal more in that Parliament at Westminster than it does here.

The necessary conclusion from an examination of the New Zealand Parliament is that the first priority here is to change the way our Parliament works. Indeed the United Kingdom Parliament I think works a good deal better especially the recent changes to the select committee system.

I think there is very little doubt about the sovereignty of the New Zealand Parliament. The South Pacific version of Dicey is even more potent than the original. One House has the power to make or unmake any law whatsoever. We've taken Dicey further than the British, although there have been one or two slight suggestions from the Court of Appeal that perhaps the power of the New Zealand Parliament is not completely unbridled. We have not become part of the European Community neither can our citizens take their cases to Strasbourg under the European Convention on Human Rights. We now stand alone in the Commonwealth. No longer do we emulate the British, if we ever did.

The next section of my paper deals with the separation of powers and since that somewhat arcane subject is difficult to follow I will omit it for present purposes and simply state the conclusion. The absence of a written Constitution, a Bill of Rights, an Upper House, a Federal System or any of the other usual institutions of modern constitutional democracy simply demonstrates the conceptual sterility of the New Zealand tradition, and it is because of our sterile constitutional tradition that we must make efforts to change it.

If you accept my analysis that the power of the executive is at the heart of the problem you arrive at the conclusion that a redistribution of powers between the three branches of government should be undertaken. It is one thing to state that. It is quite another to arrive at some agreement about the details of the redistribution and in that respect I must say I found the problems of constitutional reform to resemble those confronting the reformers of personal injury law. It was possible to establish that the common law of negligence and damages suffered from well advertised defects, it was quite another to secure agreement of a substantial body of opinion around a set of reforms.

The first issue that needs to be confronted is whether we need a written Constitution. A written Constitution is not the same as a Bill of Rights, obviously. A written Constitution would set out the structure of our Government. We have the options of having a written Constitution without a Bill of Rights; a Bill of Rights by itself; or a written Constitution with a Bill of Rights. My view is that we ought not to adopt a written Constitution because it is a very difficult process to do that; and the source of our discontents I don't believe lies in that direction. I don't see very much point in defining with clarity the roles and functions of the Queen, the Governor-General, the functions of Parliament, the questions of Cabinet – all those things would need to be dealt with in a written Constitution. But I think a Bill of Rights alone would offer great advantages. It would simply state in broad terms a number of rights and liberties and I believe that from the New Zealand context it would be good to base a Bill of Rights in New Zealand on the International Covenant on Civil and Political Rights.

Regarding entrenchment, it would probably have to be adopted by referendum and I do believe it needs to be entrenched. We have ratified the International Covenant. We also made a declaration which allows other countries to call attention to any failure on New Zealand's part in fulfilling her obligations under the Covenant and in this way New Zealand has increased her accountability to the world community. But we haven't ratified the optional protocol to the Covenant which permits individuals to make complaints directly about violations. Why we haven't done this has not been satisfactorily explained and whatever other steps we take I believe we should ratify that without delay.

Human Rights reports

Nevertheless we are required to report periodically and we did so only last year to the Human Rights Committee on how we are getting on meeting our obligations. A very interesting document has been published by the New Zealand Government which sets out the proceedings when that inquiry took place in Geneva. Mr Beeby, an Assistant Secretary in the Ministry of Foreign Affairs represented us. The most pointed question asked was what guarantee is there in the absence of such a law that the rights will in fact be protected. He said:

> while it is believed that New Zealand law at present does ensure the protection of the Rights spelt out in the Covenant I have, of course, to acknowledge that in the formal legal sense there is no guarantee that the law will not be changed, that Parliament will not invade the rights that New Zealand is internationally bound to observe.

In other words, New Zealanders can rely only at the moment on public opinion, tradition and conscience. There can be an argument made I think on the basis of our obligations under the Covenant that we are really obliged to adopt this as part of our Municipal Law in order to meet our international obligations. But I don't want to develop that point in any detail. In political terms the argument simply comes down to the level we ought to be prepared to put our money where our mouth is. If we have agreed as a matter of international law that we should be bound by the standards in the Covenant why should we not be bound as a matter of domestic law.

We prepare long reports to the United Nations arguing that our law complies with the standards but we are not prepared to have those propositions tested in our own Courts. We are not prepared to allow our own citizens to hold us to the same standards that we profess willingness to be held to by the

international community. And such an approach is likely to become increasingly difficult to defend in the international arena. I think if we are serious about guaranteeing the standards in the Covenant there must be restraint on the power of Parliament to enact legislation which may be in breach and whether the legislation is, as Lord Scarman put it in another context, conceived in fear or prejudice or simply without adequate thought which is more common I think, the result should be the same. Either we hold ourselves to the standard or we do not because if we persist in what is an internationally eccentric way of meeting our obligations we run risks. We need to have effective means of ensuring that we do not get into international hot water concerning our obligations and allowing the issues to be dealt with in our own Courts would certainly assist us in that aim because I think we in New Zealand must recognise what Lord Scarman calls in his paper the severe pressure being exerted by the growing legalisation of the international community.

So in summary I think a Bill of Rights in New Zealand would indicate that New Zealand no longer leaves the protection of fundamental freedoms to politicians alone; that it would ensure fundamental values are protected; restrain the abuse of power by the executive in Parliament; it would provide an important source of education about the importance of fundamental freedoms in a democratic society; it would allow a remedy to individuals who had suffered under a law which breaches the Rights.

The most common argument against a Bill of Rights of course is that it would give unelected Judges wider powers than they have now and it will be power of a political character. There are a number of arguments in reply to this. First the new power is only that which the public agrees by referendum to give the Judges. The power would not be open-ended; it is limited or would be limited to that contained in the Bill of Rights and indeed the guarantees can be made quite specific as they have been in the recently adopted Canadian Charter on Rights and Liberties. Furthermore Judges must give reasons for their decisions and the reasons are subject to appeal – or the decisions are – and it is hard to see how party political considerations would enter into the appointment of Judges simply because they are construing a Bill of Rights. Why, for example, would politicians be determined to subvert the Bill of Rights anyway?

One of the greatest values I think though, and this should be emphasised greatly, one of the greatest values of such a document is that it will tell politicians themselves that there are some subjects that are off limits. The whole government machine would have to ensure that its proposals were compatible with the Bill of Rights, and that would be one of its greatest values. It would prevent a number of proposals ever being put forward.

I think the time has come when we can entrust Judges with greater power than they have now. I regard the Judiciary as the least dangerous branch of our Government. I have never tried to minimise the risks of adopting a Bill of Rights. It will create some uncertainty in the law; it will cause some extra work for the Courts; it will give Judges an ability to make decisions which presently are left finally to politicians; and Judges are not elected and thereby not accountable. But those difficulties in my view are outweighed by the advantages. This is a pluralistic society with significant minorities and some aspects of the difficulties of the Maori community for example might be better handled through a Bill of Rights than by existing procedures. We do need a commitment in New Zealand I believe to democratic rights and freedoms.

Conclusions

I just summarise the somewhat diffuse conclusions that I have reached. It is usually better in subjects like Constitutional Reform not to be too explicit in stating downright conclusions. The statement of principles in an effort to convey a mood often achieves more. But contrary to that I will state bluntly what I have been arguing for.

First, New Zealand's Parliamentary democracy has many differences compared with that of the United Kingdom and in particular a 92-member unicameral legislature makes it easier for the executive to dominate, and the size of New Zealand also effects the efficacy of public opinion as a restraint on government action. Secondly, the New Zealand Parliament is in serious need of reform. It needs to reassert itself against the executive and Parliamentary reform is the most urgent priority on the agenda of Constitutional reform. New Zealand's constitutional tradition tends to be sterile, much of the sterility flows from blanket application of Dicey indoctrine and we should look more at the separation of powers and at international developments.

There should be a redistribution of power between the executive, legislative and judicial branches of our Government. Reform of Parliament in adopting a Bill of Rights would be the major measures to accomplish that aim.

Probably we should not adopt a written Constitution at this stage.

A New Zealand Bill of Rights should, in my view at least, be entrenched, based on the International Covenant on Civil and Political Rights and adopted by referendum.

There are strong reasons connected with our international obligations why New Zealand should adopt a Bill of Rights. New Zealand should anyway ratify the optional protocol to the International Covenant on Civil and Political Rights because this would allow New Zealanders to make individual complaints under the Covenant. The Canadians have adopted a Charter of Rights and Freedoms from which New Zealand can learn much. Developments in Australia where the Australian Government is also committed to the introduction of a Bill of Rights, should be carefully watched.

There are risks in adopting a Bill of Rights but the risks are outweighed by the advantages. The controversial element of the change involves giving greater powers to the Judges but since the creation of the administrative division of the High Court in New Zealand at least, I think, Judges have shown themselves quite capable of handling reviews of government decisions with care and on neutral principles. Although I realise I may incur Mr Dugdale's wrath at that statement.

Last, New Zealand has become a pluralistic society with significant minorities whose interests must be protected; and in that context I do believe we need a commitment to a New Zealand set of democratic Rights and Freedoms through a Bill of Rights. □

A Constitution in practice

By Neroni Slade of the Commonwealth Secretariat

Mr Chairman, I am a guest and a Commonwealth Public Servant and my contribution should be accepted as such. Ladies and gentlemen, the topic that has been assigned to me requires consideration of some aspects of the practice and the provision of a written Constitution for a newly independent state in the context of the question whether New Zealand could benefit from having a written Constitution. For reasons of familiarity I have chosen my own country, Western Samoa, though I also comment on the South Pacific constitutional situation generally.

Parallels

It is not easy at first glance to find parallels between a newly independent state such as Western Samoa and New Zealand, partly because of the different and contrasting situations of history, culture and economics and partly because of the quite different factors which dictated the Constitutional regimes that now exist in the two countries. For instant in the case of Western Samoa the Constitution was very much the vehicle to political change and independence. The country had an early experience of a constituent document in the form of the Samoa Act 1921 and its various Amendments. A New Zealand statute which to New Zealand was ordinary law but which to Samoa comprised fundamental law since it was beyond its legislative competence.

Then again a major part of the argument in favour of a largely written Constitution for Western Samoa had to do with the fact that a western type of government was being adopted in a non-western society and provision had to be made for the inevitable conflict between conventions appropriate to a modern system of government and those sanctioned by traditional culture. Additionally like other Pacific countries, it is a function of the Western Samoan Constitution to preserve those forms of traditional leadership which contribute to the effective government and a stable society. For the Pacific then as a whole the Constitution represents the meeting of the old and the new and the need to adjust to the changes and the stresses of the type addressed by Lord Scarman in the lead paper.

There were therefore particular reasons calling for a Constitution when Western Samoa, the first Pacific state to do so, moved to independence in 1962. But this in fact was the pattern in the Pacific generally where constitutional discussions had dominated the process of de-colonisation and it is perhaps important here to note the rather impressive record of constitution-making in the South Pacific, with a total of nine independent states and the two that have chosen free association status, all having adopted written constitutions essentially of the same mould and with provisions guaranteeing fundamental human rights.

It is important also to recall that New Zealand had a direct and crucial role in the constitutional plans and development of Western Samoa, the Cook Islands and Niue. Significantly also New Zealand Judges and lawyers at the very highest levels are having direct experience of these written Constitutions in their work in the Pacific as Trial and Appellate Judges, as Magistrates, as Advocates, Advisers and Law Reformers.

The Constitution has been of significant influence in the post-independence years in the Pacific States where the Constitution has played a key role especially in government activity and in contemporary political developments, in the holding of parliamentary elections, the resignation of governments on issues of confidence, the role of the Governor-General, or in Samoa the Head of State, and so on. The Constitution continues to be important not only because it registers the fact of independence and is a symbol of it but it also provides a framework for the exercise of public power and the conduct of political activity.

The Pacific context

In the Pacific context there are also other factors which give significance to the Constitution. For example the Constitution was the focus of considerable public and political attention in the period leading up to independence. It provided the basis for negotiations between the metropolitan countries and the leaders of the administrative states on the pace and the terms of independence and for a great many countries it represented the first real exercise in national politics. There was also the need to raise and to debate with the public a large number of issues — questions of citizenship, land and custom. Plebiscites for instance were held in Western Samoa and in Tuvalu to obtain the public view on the form of independence.

Whether there is a need for a written Constitution or for constitutional change in New Zealand I am not qualified to assess. Like you I have been very interested in the views expressed by Dr Palmer on this. Any Constitution is no doubt the product of history and a creature of time. Obviously in New Zealand there are basic issues to be faced and no doubt the New Zealand public should

be allowed to express its viewpoint.

In the Samoan situation the Constitution was a planned process that evolved over a period of years and was eventually adopted after two Constitution Conventions in 1954 and 1960 and after the plebiscite of 1961. This experience of public debate and consultation was largely followed in the South Pacific with the result that on the whole constitution-making in the region has been a highly democratic activity.

The New Zealand situation

I cannot speak with certainty on the evidence in New Zealand and where the desire of the public, indeed of the Government, lies, but I think I should perhaps mention a couple of instances I have come across. Mention should be made for instance of the remarkable absence of comment and submissions from the New Zealand public on the Constitutional Provisions Bill that was recently before Parliament. It will be recalled that the subject of the Bill was the new Letters Patent constituting the Office of the Governor-General in New Zealand, and concerned matters that lie at the very heart of New Zealand's Constitutional arrangements. However not one single submission was apparently received from either the public, the universities or the Law Society. It also seems that the abolition of the Legislative Council in 1950 excited little interest amongst the public again including the legal profession.

Now the reference to the Constitutional Provisions Bill in terms of my own topic is useful also in recalling the fact that much more of the New Zealand Constitution is in writing than is perhaps generally given credit for. It is of course a Constitution that does not guarantee fundamental rights. On the other hand in addition to the cornerstones of Magna Carta, Petition of Right and the Bill of Rights which still have force of law, other provisions already exist to enhance the rights of individuals. The Ombudsman Act, of which your country led outside Scandinavia, so early in 1962, the Race Relations Act of 1971, the Human Rights Commission Act and more recently the Official Information Act. Furthermore it would seem that New Zealand already has written laws covering the range of subjects that are covered for instance in the Western Samoan Constitution about the Head of State, the Executive, Parliament, the Judiciary, public service and public financing.

A written constitution?

Whether there should be a document for New Zealand is a question I cannot presume to answer. It can be claimed and probably with a great deal of justification that it is not the document or its form that matters but the spirit of the existing arrangement and the restraint and the fair play by which they are exercised. And no doubt the condition of this country and its people is for all the world to observe. There are naturally opposing viewpoints. Some believe that a written Constitution with a Bill of Rights will result in a legal revolution that will put at stake the legal heritage of the country. Mr Brassington in his writings over the years consistently drew attention to the need for rules. He like others was worried that with the supremacy of Parliament it means that any aspect of the constitutional arrangement can be amended at any time by a simple majority, and of course a principle reason for seeking constitutional protection under a Bill of Rights is the apprehension of what has been called the elected dictatorship and the uncontrolled power of the sovereign legislature to do anything. In this respect a Bill of Rights will set minimum standards and is likely to check legislative excesses.

In a way the real test of the effectiveness of any Constitution and the protection it offers individuals is how the Judiciary as the protective authority discharges its own role. The declaration by the New Zealand Chief Justice in the *Fitzgerald case* in 1976, that there was a breach of the section of the Bill of Rights and the exercise of a pretended regal power of suspending laws or their execution, was significant. And it can be said in such instances that the Courts provide the real bulwark against the arbitrary exercise of power. But as Lord Scarman has said, and it has been pointed out by other New Zealanders, the guarantee that Courts and statutory bodies give in particular cases is limited and subject to the will of Parliament and I believe this happened in this country in 1982. For instance when Parliament overruled three major decisions of the Courts and statutory bodies.

Limits to governmental power

In Western Samoa the Constitution sets the limits to governmental power primarily by the fundamental rights provisions and also by the declaration in Article 2 of our Constitution that the Constitution shall be the supreme law of Western Samoa, that any law which is inconsistent with it to the extent of the inconsistency shall be void. The Supreme Court is given primary responsibility in Western Samoa to interpret the Constitution and to enforce fundamental rights. There has been insufficient experience in Samoa and I rather think in the Pacific also, in time and in terms of the constitutional issues that have been raised to give us some measurable guide of the approach and attitudes of the Courts. A part of the problem is that the Pacific lawyers who have been trained in the common law system have a tendency to treat the Constitution as if it were an ordinary statute, which of course it is not.

Nevertheless some indication is available from a recent Samoan case of *Saipa'ia Olomalu* which raised the very fundamental question of whether the voting system which in our country is very substantially restricted to chiefs, is in breach of the non-discriminatory provisions of the Constitution. I shan't go into the details of the case, but simply say that it is possible to perceive in that case a readiness on the part of the Chief Justice in the Supreme Court to take what I would call an activist approach in favour of fundamental rights, against a narrower and far more restrained approach taken by the Court of Appeal which upheld the constitutionality of a system which largely reflects the making of the Constitution and the customs of the country.

Entrenchment

The main point I want to make clear Mr Chairman, is that the manner in which a Constitutional Court justifies its review is critical to the legitimacy of that review in that particular case and in time to its legitimacy to exercise the function of review at all. Now there is a belief of course that the entrenchment of fundamental rights would transform the system of government through the adoption of a Bill of Rights as a higher law placed ahead of the legislative supremacy of Parliament. Whether the Courts will behave differently if New Zealand

were to have a written Constitution with entrenched rights is difficult to anticipate. Conceivable the entrenchment might encourage the Courts to take a stronger stand on the protection of fundamental rights though even on the rare occasions when constitutional cases do arise in New Zealand as in the *Fitzgerald case* the Courts have not been impotent without it.

Again to go back to my own jurisdiction our Court of Appeal in Samoa has set a precedent and has shown an example in restraint and as all three Judges of the Court were drawn from New Zealand although one is not of the New Zealand Judiciary. It is not unreasonable to suppose that their approach and attitude to constitutional issues are representative and not idiosyncratic.

While the paper which I have prepared does not advocate a particular position or viewpoint, it does suggest that there are important reasons for New Zealand not to disregard totally what is happening elsewhere and perhaps take stock of its own constitutional situation. Like the United Kingdom, New Zealand is the only country in the Commonwealth that is lacking in any fundamental law or fundamental rights. However for the reasons that have been referred to by both Lord Scarman and Dr Palmer, the United Kingdom has now accepted obligations that are judicially enforced, which includes the right of private petition through the European Court at Strasbourg. Meantime the British position is becoming ever more isolated not only from Europe but I dare say also from the Commonwealth and it seems to me that if the United Kingdom is isolated then New Zealand is even more isolated. Having abolished the Upper House in 1950 the New Zealand constitutional position is already fundamentally different from that of the United Kingdom. The adoption of the Canadian Charter of Rights has been referred to and I simply note that it is an experience that cannot be ignored in New Zealand.

At the same time the range and complexities of the issues that confront New Zealand cannot be minimised. While it is perhaps natural for the lawyer to feel that he who asserts bears the onus to establish the case, my own respectful submission is that those who advocate constitutional change in New Zealand as well as those who think it to be unnecessary, have a common interest in establishing as clearly as possible not only the actual performance of the present constitutional arrangements but also any improved performance of which it may be capable; and in doing so the question of isolation must be faced. □

At Butterworths 70th Anniversary Reception
Mr Justice Eichelbaum, Daryl Williams (Australia), Peter Penlington QC (Canterbury).

Discussion on a Bill of Rights

Chairman, Mr R E Wylie of Christchurch

Chairman: Contributions from the floor, from delegates or their accompanying persons may be made either by way of comment or by way of question or, indeed, both. Time is of necessity limited and I would ask you to limit your comments, make them as short as possible. . . . And only one further matter that I feel it appropriate to mention. Quite obviously the topics which are being discussed today while essentially of a legal nature also verge on the political. I don't want to inhibit discussion but I ask you all please to remember that we are here as lawyers discussing legal principles and legal implications and I would appreciate the discussion being confined as much as possible to those considerations. I call now for contributions from the floor.

Dr David Mummery (Auckland): We are certainly indebted to the speakers this morning. It appears that we have in this country something approximating a presidential system and what I am saying, I would say irrespective of party, as I tell my students. Just very briefly, I am concerned about the lack of control and I am not sure that a Bill of Rights, though it may be very useful in itself, will provide the kind of check which we need *in toto* and that the speed with which things tend to happen is of the kind that is not necessarily always to be checked by a Bill of Rights. And I want to throw in very briefly and in particularly in line with Lord Scarman's reference to the House of Lords, something that is not a very popular subject in this country. That is the need, I believe, for a reconsideration of the question of a second chamber which will control legislation or at least will act as a check on legislation; on the question of removal of Judges – an important subject though rarely coming up into issue; and the appointment of Commissions of Inquiry which is a very important factor in the House of Lords in England where they do control Commissions and express objections if a Commission of Inquiry is going to be making investigations into criminal matters that should be dealt with by the Courts. So I want to throw that in. I think it is not something that is to be dismissed lightly and something we all should give consideration. It involves difficult questions of how you elect, how you provide for the second chamber, but I believe those problems can be overcome.

Mr John O'Neill (Otago): As a believer in God I firmly hold to those inherent rights that go with the rights of the family, the rights of the human person, the rights of parents in the bringing up of their children and all those things that really spell out what true individual freedom is all about. So, in being of that mind I believe in higher law and I extol the efforts to crystallise those thoughts into charters or conventions as the Germans tried to do after the last war with their basic law. But unfortunately the European Court has fallen down tremendously in upholding those very basic fundamental freedoms. Last year the Irish nation passed by referendum an Amendment to their Constitution to protect the unborn child and I would like to ask the members of the panel whether it is possible that Ireland, as a member of the European Economic Community – I don't know whether that has also connotations with the jurisdiction of the Court in Strasbourg and the European Convention – whether in fact what they feared and the reason they passed that change to their Constitution might be undone by the European Convention. In other words they were wanting to prevent the sort of thing that happened in America where the Supreme Court in the *Rowe v Wade case* distilled a right to privacy which had not previously been identified. So, having regard to the *Mrs Gillick case* in England, the lady who was wanting to protect her daughters from the efforts of people who wanted to give contraception to other people's children, Mr Paton who was trying to protect the life of his unborn child and who failed in the Courts in England and failed also in Strasbourg, and having regard to the parents from Scandinavia who appealed to the European Court to protect their children from the abominable sex education programmes that were going on in their country and appealed unsuccessfully, I am afraid that at the present time if we tried to spell out a Bill of Rights in New Zealand we might well install and reconsolidate the abuses that are presently going on in those fields that I have referred to, and are extreme abuses of fundamental human rights.

Chairman: Thank you Mr O'Neill. Would you care to comment Lord Scarman?

Lord Scarman: Yes. I think it is important to remember that the European Court of Human Rights is mortal law not the higher law. It is concerned with humanity, human rights, not God. And I think that is important. Of course I can't speculate as to why there was this change in the Irish Constitution and I certainly wouldn't do so. I think if you look at the European Convention you will see there were perfectly sound legal reasons, reasons associated with the

interpretation of the Convention why Mr Paton failed. One of the difficulties is a well known legal difficulty – is an unborn child a person entitled to the protection of the law. Is he or she a person? And these are vexing problems and I certainly wouldn't criticise the European Court of Human Rights for the decision that it reached. No doubt it might have reached another decision but then there would have been equal difficulties. This is a poser for any jurisdiction, national or international. One final question I should clear up. There is a great distinction between the European Court of Human Rights which is established by the Council of Europe to apply, interpret and enforce the European Convention, and the European Court of Justice which is the Supreme Court of the Common Market and sits in Luxembourg and administers the Treaty of Rome and the other basic Constitutional laws of the Common Market. There is however a link. It is a very important link for the United Kingdom. The European Court of Justice, that is the Common Market Court, has declared judicially that whenever a question touching upon human rights comes before it in the course of its Common Market jurisdiction it will apply the jurisprudence of the European Convention and that, as my paper makes out, by reason of the European Communities Act of 1972, and Act of the British Parliament, is part of English Law. So you see the European Convention has crept in by the back door while the stalwarts were busy bolting the front door.

Miss Ruth Richardson: My name is Ruth Richardson, my other origin is politics. I am a government backbencher who pleads not guilty to domination by the executive. I attach the highest priority to establishing more appropriate codes for parliamentary behaviour and the way in which we legislate and consequently I am a keen advocate of the case for reform of Parliament's Standing Orders to improve the opportunity for Parliament itself to have a life of its own and exercise its own initiative and to demand greater accountability by the executive. What I do seek to be persuaded about is this. That with the extensive range of domestic law promoting human rights, and we have had a very good summary of those from Mr Slade who has referred to the Ombudsman's legislation, our Human Rights legislation, the Official Information Act and may I as a member of the numerically superior minority, women, also refer to the Matrimonial Property Act, I seek to be persuaded that against that background of our domestic law I ask what will a Bill of Rights do were we to make that part of our domestic law. Will it do any of the following four things, and I seek the reaction of the panel. These four things to which I attach priority. Will a Bill of Rights actually advance the cause of minorities in a fashion that is not currently available to those minorities? Second, will a Bill of Rights have the promised salutary effect on the behaviour of the executive and the caucus? How will a Bill of Rights secure the most urgent reform which is the way in which Parliament functions? And lastly, will a Bill of Rights reduce the domination of the parties which is exercised in my experience and opinion, at the expense of the power of Parliament?

Chairman: Thank you Miss Richardson. Not being anxious to get into political debate I hesitate, but nevertheless I will ask Dr Palmer to reply to that one.

Dr Palmer: I do very much enjoy debating with Ruth Richardson on these issues. First of all I think that a Bill of Rights will advance minorities. I think that is one of its principal justifications. The great civil rights movement of the United States which advanced the cause of the blacks in that country very considerably was a battle that was deliberately fought through the Courts and particularly the Supreme Court of the United States. I think great progress was made in that way using the American Bill of Rights, which is more open-ended than I would wish to see here, and I would think that it is possible to make a very strong case that minorities whose interests are easy to overlook in Parliament for the reasons that Ruth Richardson mentions, particularly party domination, that those minorities would, I believe, be better off than they are now. And we have in this country significant minorities as I tried to indicate.

Whether it will have a salutary effect on the executive of course requires some speculation, but certainly the proposal is put forward in the expectation that it will have a salutary effect on the executive, although as I tried to indicate in my paper, I do regard parliamentary reform as a prime matter of importance and more important than a Bill of Rights. But you have a choice because Dr Mummery's contribution highlighted this. You could have a second chamber. We very nearly did, if it hadn't been for the First World War we would have had a second chamber elected on the basis of proportional representation which probably could have worked, but my own view is that it is too late for that. Obviously constitutional reform is like a smorgasbord, you could have a second chamber. You may get some benefit from that. I think it is politically extremely difficult at this stage in our history to have that.

But a Bill of Rights, at least the way I think of it, is designed to give you some of those protections to act as a brake. And the reason why I say it will act as a brake is because when I was in Canada recently I found that the Canadian Government was reviewing the whole of its statute law in light of its recently adopted Charter of Rights and Freedoms, to see what provisions in their statute law did not comply. That will in the end be a great deal better than litigation because it will mean that the machinery of government will have to ensure that its own proposals are compatible with the fundamental guarantees that are in a Bill of Rights. I think that that is a very salutary effect on the whole machinery of government, on all the public servants who make proposals, on all the politicians from whatever hue or stripe they come. It really means that you have a basic set of guidelines, a set of principles, that everyone is bound by and that is a very important element, I think, in protecting the values that we seek to protect.

The third question I didn't get but the fourth, will it reduce the domination of the parties. I do not believe there is a parliament in the Westminster system that is more dominated by party than the New Zealand one and I think that is a function of size. The problems we have with ministerial responsibility are a problem of size. In a small parliament it is not possible to retire gracefully to the backbenches unnoticed. It is simply not possible. The problems of size affect so much

the problems that we have in our constitutional system that I am sometimes persuaded that that ought to be the sort of analysis that we do of everything because the domination of the parties in the New Zealand Parliament is a function of the size of the New Zealand Parliament. The larger the parliament the harder it is to dominate even in countries that are used to strong executive government like the United Kingdom. It was very interesting for me to find last year when I was in Britain that Mrs Thatcher had suffered 40 defeats in the House of Lords in the course of her first administration. Not on important matter, true, but nevertheless those sorts of defeats act as a check on the executive. I think a Bill of Rights will act as a check on the executive but to what extent and how much will have to be worked out in the end I suppose only by the interstices of litigation.

Senator Gareth Evans: My name is Gareth Evans and I am, for my sins, Attorney-General of Australia. My comment and associated question is directed I guess primarily to Geoffrey Palmer but I would welcome any comment that Lord Scarman, in particular, might want to make. It is this. I've been a rather noisy advocate for the concept of the Bill of Rights for the last decade or so and hope now at last to be in a position where I can put my money where my mouth has been. One of the objections or categories of opposition to the Bill of Rights that I have found most necessary to meet over that period of time, which is in many ways the most difficult to meet, is the objection of the sceptics. Those who say, and I am assuming for this purpose that there will be an element of judicial enforcability in any serious Bill of Rights that is proposed, those who say that with all the best will in the world and with the best traditional technical equipment in the world, the Judges simply can't be trusted to get it right in the sense of interpreting the Bill of Rights and the rather strange concepts and values it represents for traditional Anglo-Saxon legal tradition. They can't really be trusted to get it right in terms of the intentions of the begetters of the document in question. I have to be very careful about the way in which I express these things with Sir Harry Gibbs on one side and Sir Ronald Davison and God know how many other Judges on the other side of me.

But I think the argument you will be familiar with is simply that Bills of Right need a judicial approach which is rather different from that which is appropriate to apply to the construction of a Dog Act or a Fencing Act and we simply can't be guaranteed in the initial period of baptism anyway that the Bill of Rights will be so construed. That certainly tended to be the experience for many years of the Canadian Court which made a dreadful muddle, it has to be acknowledged, of a number of key provisions of the original legislative Charter of Rights.

Against that background it leads me specifically to raise the question again bearing in mind specifically what Geoff Palmer said, about the utility or desirability of entrenching the Bill of Rights in the first instance. May there not be some real utility in not entrenching the Bill of Rights, in not making it unamendable for an initial period of time which will enable everybody to come to grips with the concepts and terminology and the art of judicial construction? May there not be some utility in allowing a period of time in which the legislature can come along, as it were, with a bucket and pan cleaning up such messes as the Judiciary with the best will in the world are likely to leave behind them when it comes to construing some of these clauses? That involves rather heroic assumptions of course about goodwill and sound motivation on the part of the legislature, but balancing the difficulties and dangers that one has to confront on both sides of the divide may there not, I repeat, be something to be said for not entrenching the Bill of Rights in the first instance, but just simply having it as an ordinary legislative enactment albeit one with a lot more status than most and as such one that the political parties in office are likely to be much more careful about overturning? Is there not a case for not entrenching a Bill of Rights?

Chairman: I think I might deal with that matter in two ways. First I might perhaps ask Mr Slade if he would like to comment on his experience and indeed he did to a limited degree in his paper, on the way in which he has found constitutional matters being dealt with by the Judiciary not only in his own country but perhaps from his experience with the Commonwealth Secretariat in other countries within his ambit. I'm not sure that I shouldn't also allow Lord Scarman the right to defend himself and those with him who share his kind of function as to the implied suggestion that perhaps Judges do mess up dealing with matters of this sort. And then perhaps I will come to Dr Palmer. First, Mr Slade.

Mr Neroni Slade:
Well, I will be very brief. I am afraid – as I reported – we really have had only one significant experience of the Courts coming to grips with these sort of issues – the entrenchment of Rights. But there is a curious thing in my country. Because of the social structure that exists there with the chiefly system which is translated into the political representation we have a House very heavily dominated by the chiefly ranks. But from time to time there are incursions by ordinary people. For instance the case I was speaking about in my contribution those who wished to vote. But these people are not allowed under the present system which restricts the voting to the chiefly ranks. The curious effect, and again we don't know what the implications would be, is that human beings as they are, the chiefs could actually being Members of Parliament, 45 chiefs out of the House of 47, could actually amend the law in the way required by the Constitution. Because of their heavy domination in numbers they could actually change fundamental rights and without the ordinary citizen having much say in it. But for the moment, Mr Chairman, I think I have reported on the very valuable help that the Courts are giving to the ordinary citizen, but I am afraid the experience of the Pacific is rather limited in this respect.

Chairman: Thank you. Could I ask you Lord Scarman whether you feel there are any difficulties in the way the Judiciary are dealing with these matters?

Lord Scarman: Well of course this sort of point, which I regard as a smear, is frequently raised in the United Kingdom. If it is based, as it rarely is, upon a study of what the Judges have done and what the others have done – other sources of power have done – in relation to human rights, well the judicial decisions

come out pretty well. Just let me ask a question. Look at the history of England. Who has been on the side of the subject, of the liberty of the person, the King or the Judges? What is *habeas corpus* all about? It is the Judges looking at the acts of the executive to see if the detention of the person was justified. Nobody in the United Kingdom thinks the Judges have shown themselves timid in the use of *habeas corpus*. Everyone knows that the executive has shown itself amazingly oppressive when dealing with the liberty of such unpopular persons as immigrants and so forth. So the record is all right. Of course the real smear is the Judges, a lot of middle class so-and-sos coming from privileged homes having had privileged educations, what do they know of the world? You would be surprised how much they know about the world. And Judges of a certain age in our country have had the cathartic experience of living and working with their fellow citizens in time of war. Come off it if you are attacking the Judges as a body of men. If you've got an argument on judicial decisions develop it in the Law Quarterly.

Chairman: And just finally on Mr Evans question, to Dr Palmer on the question of whether it is wise to have an entrenched Bill of Rights, and in about six words please.

Dr Palmer: My own view is that the Canadian experience with their Bill of Rights in the 60's, which was not entrenched and which as Senator Evans pointed out only led to one significant judicial decision, the *Drybones case*, illustrates that actually an unentrenched Bill of Rights doesn't provide you with the protections that a Bill of Rights is supposed to provide you with. That is why I favour entrenchment. It can be argued I suppose, very strongly, that the closer one associates with politicians, as I have been doing, the more one respects the Judges with whom one is not associating, and those who do associate with the Judges at very close levels sometimes have more criticisms to make of them than those who are more remote from them.

But nevertheless I think it's important to remember what the Canadians did because the Canadians have in their new Canadian Charter of Rights, which is entrenched, this provision – Parliament or the legislature of a Province may expressly declare in an Act of Parliament or the legislature as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in the Charter. Now that does not apply to all provisions in the Charter but it was a concession at a very late stage to the long tradition of parliamentary sovereignty which gave the legislature in particular cases power to declare that something that it had passed was to operate notwithstanding the provision in the Bill of Rights. That might be the sort of attempt to escape from the rigour of the principle that Senator Evans is looking for. I don't favour that myself. My own view is that if you are

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Ian Temby (Australia), Joan Dolan (Auckland), Barbara Baragwanath and David Baragwanath QC (Auckland).

going to have it you have it in its pristine form.

Mrs Nadja Tollemache: I am from the Auckland Law School. My question arises out of the previous question and the answers we have just had to that. One of the chief fears that has been expressed in the debate about both the Bill of Rights and the possible Constitution is that the Judiciary will become politicised. But nowhere in the debate has it been pointed out that there are two models that we ought to look at. One is to give the ability to test for constitutionality to all the Courts. The other model, which might have some advantage in view of the point made by Dr Palmer about the size of our country, is to reserve constitutional challenge to a specially constituted Constitutional Court as is done in a number of countries. I would very much appreciate the view of all three of our distinguished speakers on which of those models they think would be most appropriate for New Zealand.

Lord Scarman: I agree with the speaker that there are more ways than one of dealing with constitutional issues if the Constitution makes them, as I think it should make them, judicial questions. Germany, for instance, operates a very successful Constitutional Court and other countries do. I think it would be contrary to the British tradition to introduce a Constitutional Court because we take the view, which I think is a common law view basically, that there is a universal background of one law, one system of law and not a whole number of separate laws which have to be administered in separate fields of activity. That there is, so to speak, a common jurisprudence touching private and public law and the Judges, that is to say particularly of course, the Judges of the High Court, the Court of Appeal and the House of Lords, must be prepared to deal with all the questions that arise within that law.

I can see an argument, it is all machinery really, for saying well let's have a constitutional division or an administrative division or what have you. I doubt that we would ever agree to a Constitutional Court although the questioner might like to know that had devolution come one of the effects of the Scotland Act would have been to bring the Privy Council into a Constitutional Court role within the United Kingdom. It would have had the role of dealing with challenges to Scottish legislation if the challenger was saying that that legislation was ultra vires the Scotland Act, ie, if it went beyond the constitutional limits of the Scotish legislature which is an interesting little matter which you can ponder about.

Mr Slade: The Constitution of course, it is a document for the people. I think one which has to be interpreted by the daily routines of problems and of existence and certain constitutional instincts ought to be bred in people. It is a document of both first and last resort and on that basis alone I do personally share the view that it ought really to be part of the ordinary Court system, and not a special Court set up.

Dr Palmer: I am very, very clearly of the opinion that there should not be a special Constitutional Court. For one reason I think it is impractical. Many of the issues arise in ordinary litigation and different sorts of litigation. For example, in Canada a lot of the cases in the Criminal Courts are raising constitutional issues relating to search and seizure. They need to be dealt with in the context of the cases as they arise in the Courts where they arise. If those cases have to be sent off to some special Court for determination of one issue relating to them I believe it would be impractical and undesirable. I also believe the difficulties of selection of Judges would be greatly magnified if there was a special Constitutional Court. It seems to me clear that problems of appointment are fewer if there is no special Court to which that Judge is being appointed in a constitutional capacity. I think that these things are best worked out in ordinary litigation when issues arise and are argued in the context of that litigation.

Mr Bill Hodge (Auckland Faculty of Law): My first two points have just been nobly settled so I will pass over them very, very quickly. The first point, returning to Lord Scarman's original speech, is the alien Court in Strasbourg. I would comment that the Court should not be in Strasbourg, or in London or even solely in Wellington. It should be right down to the District and two JP's sitting on a traffic case if you want to reach the grass roots of New Zealanders. The second point is the same thing. Lord Scarman referred to the big cases. It should be for the big cases and the small cases. It should be for the New Zealander who is falsely imprisoned by the traffic officer when there is no cause to look for blood alcohol, etc.

Now my final question really is an extension of the first two points and that is what Geoff Palmer called the sterility of the New Zealand constitutional make-up at present. To really proceed into the nuts and bolts of the Bill of Rights it seems to me that that sterility should be reversed at either the constitutional parts or the people must be excited. They must be aroused and that this Bill of Rights should be conceived and fertilised — I hate to proceed with the imagery of yesterday and have a, what was it called, an *in vitro* fertilisation by an artificial insemination donor — but it seems to me it should emanate from the people of New Zealand by the political give-and-take and debate of this country, and that to adopt a teenage child from Europe, it seems to me, would not have the desired result. So that my query is, and I will make this as a statement but it is really a question. Shouldn't the Bill of Rights, should it not be by and for the people of New Zealand and not for the international lawyers of New Zealand?

Any other contributions? Yes Mr McKay.

Mr I McKay (Wellington): Lord Scarman, in his paper made reference to the two great safeguards of human rights as being the Judiciary, the Courts and Parliament. In regard to Parliament he stressed the tremendous importance in the United Kingdom of the House of Lords. He also made reference to the principle of the sovereignty of Parliament. Now in New Zealand, of course, we have no second chamber. The sovereignty of Parliament in New Zealand becomes the sovereignty of the executive and that is a horse of a very different colour.

In that context it may be relevant to refer to a point made at the Commonwealth Law Conference in Hong Kong last year by, I am pleased to say, my illustrious namesake, Lord McKay of the Court of Session of Scotland. The point that he made in a paper dealing with the Judiciary as a control on executive government or

government power was simply this. That the sovereignty of Parliament as a principle which has never been part of the law of Scotland. Now that is not a matter of no significance to New Zealand. It is a matter of the greatest of significance. It is well established in Scottish law, has been reaffirmed by the House of Lords, I understand, within the last 50 years and if Scotland and the Scottish Parliament did not have sovereignty then it did not have the power in 1707 to confer sovereignty on the new Parliament of the United Kingdom. So whatever the position may have been of the English Parliament which existed before 1707, the United Kingdom Parliament which was created in that year cannot have any greater powers than those who created it were able themselves to confer on it.

Our Parliament of course inherited the powers of the United Kingdom Parliament so that the Scottish law, Scottish principle, that was inherited by the United Kingdom in 1707 by the simple principle that nobody gives what he hasn't got became part of the law of New Zealand. Now let me say at once I accept everything that Don Dugdale said about the dangers of the Judiciary exercising less than discretion and promoting a clash with Parliament. I think in these areas it is of the utmost importance that the Judiciary do exercise discretion if there is not to be a parliamentary back-lash as he put it. But for my part, looking at our unicameral system, looking at trends and looking to the future, although I can think of no case in my experience where a Judge might have been tempted to say this Act of Parliament goes beyond the powers of Parliament, I derive some comfort from knowing that at least there may be some residual safeguard there if we ever need it.

Dr Palmer: I wanted to take up a point that Dr Hodge made because I believe it was very important. I have endeavoured to present this case in a detached legal way today. Obviously if a change of this character is ever going to occur it has to have widespread, almost universal public support and understanding; and if we are ever going to get to the point of having it, it will not be at forums as elevated as these for the debates to carry on but it will have to be something that is debated by ordinary people. And I have to tell you that in the years that I have been trying to make speeches about these issues I find it very difficult to get the issues across. They are difficult issues conceptually. They require a lot of education to be able to grasp and it is a very difficult thing to popularise, extremely difficult. But if it is going to happen there does have to be widespread public understanding and that can only be got by conducting, it seems to me, seminars round the whole country by a parliamentary select committee debating on what sort of things you are going to put in the Bill of Rights and whether the International Covenants are enough and how they should be framed. There must be a long public debate because changes of this sort will not be effective unless they are understood and I think that is the greatest challenge facing the whole theory of this change and a very difficult one to handle.

Judge Skelton (Christchurch): Mr Dugdale would call me a hewer of wood and a carrier of water. I like to think I am a protector of wood and a dispenser of water, but Parliament took that away from me. So, Mr Slade referred to it. I think he said he thought there were three times in 1982 when Parliament overruled the Court or at least legislated against them. I am not sure he is right altogether about that but certainly I am sure that in one case he is absolutely right. And my question is would it be intended in a Bill of Rights to entrench a provision that when the Crown is a litigant it is bound by the Courts decision?

Mr Slade: Whether the Crown when a litigant is bound by the decision — yes. I think so. I think to some extent it is a declaration by the executive of faith and trust in a document which the executive expects the rest of the citizens to live by, and to conduct their affairs by.

Dr Palmer: I think that that analysis is basically correct in that the Canadian Charter of Rights and Freedoms talks at the beginning about the rule of law. I suggest that it is a breach of the rule of law to commence litigation, find that it develops unsatisfactory results, not conclude it but find a remedy through legislative means. It seems clear to me that that sort of thing should be prohibited, and prohibited by a Bill of Rights.

Chairman: Anything else ladies and gentlemen. Well if not I have asked Lord Scarman, and he has very kindly agreed, to try to sum up for us the discussion that has gone on this morning and if I may I will now call on you, Lord Scarman, to address from perhaps where you sit for perhaps five minutes or so.

Lord Scarman: Well, I wouldn't dream of seeking to sum up the discussion because I think that would take too long. I just want to leave a few ideas with you culled from the discussion and from the response of members of the panel to the discussion.

[Unfortunately the concluding remarks of Lord Scarman were not recorded on the tape. Ed.]

At Butterworths 70th Anniversary Reception Joan Blair (Hamilton), and Bill Morrison (Butterworths).

LAWASIA'S activities

A Law Conference luncheon address by Raul Goco of the Philippines, President of LAWASIA

Mr Goco was introduced by the Chairman for the luncheon Mr Justice Tompkins who has been a member of the LAWASIA Council for many years and was Convenor of the LAWASIA Standing Committee of the New Zealand Law Society.

Thank you David. David has been involved with LAWASIA for a number of years. Unfortunately, last year when I most expected him to be with us in LAWASIA he did not show up. The Conference venue was in Manila. Well as far as I could understand the reason why he did not show up was because shortly before the Conference he was appointed to the Judiciary and he did not get permission from the Chief Justice, and I am now counselled to talk to the Chief Justice so that he can get permission for the next Conference in New Delhi in 1985.

New Zealand involvement

I see a lot of familiar faces here and I know that New Zealand has always involved with LAWASIA. In fact today's event demonstrates your acknowledgment of the importance of LAWASIA and the esteem you have for it. To be sure many of you have been associated with LAWASIA. I have seen many I know and I will mention your names later. Your familiarity with LAWASIA is something that even I, in my capacity as President, cannot match. In the years I have been attending LAWASIA meetings I have noticed the dominant presence of New Zealand lawyers.

I recall in 1975 when the general conference of LAWASIA was held in Tokyo, Japan, we in the Philippines played host to about 30 or so New Zealand participants at that conference when they made a brief stop-over in Manila en route to Tokyo. That group was led by my good friend, now Justice David Tomkins, and his wife, Felicity. The integrated Bar of the Philippines of which I am a Governor, arranged a reception for them and I recall that there was a big downpour in Manila flooding the city – the same downpour now – but which fortunately stopped and subsided when the New Zealanders arrived.

Again last year at the 8th Conference of LAWASIA held in Manila a big delegation came from New Zealand. As I said, some of them are here. Unlike others who backed out from that Conference afraid of what might possibly happen because the Conference was held immediately after the 21 August assassination of Senator Acquino, one of the most popular political leaders in the country. The New Zealanders arrived undaunted and confident that nothing untoward would happen to them in Manila. They were the liveliest group at that Conference and I remember at the reception hosted by our Prime Minister when the Master of Ceremonies asked for audience participation in the form of country songs, the New Zealanders were the first to oblige. I was there and remember that.

Personal acquaintances

I have been very impressed with New Zealanders and I have become acquainted with many of you through the years. Bruce Slane here, the President of the Law Society, is one, and his wife, Pen. Bruce has become an instant celebrity in Manila because he was one of the debaters in that TV programme we had. It was a debate on whether or not to do away with the death penalty. Bruce was there and that debate was shown on TV national hook-up in Manila and shown and re-shown several times upon insistent request of the public. So I must say that you became an instant celebrity there. Of course Fali Nariman who is Vice-President was also there and he was also a debater.

I see Justice Casey and Stella here, they were also with us in Manila, and Pat Downey. I see Bernard Avery, who of course lives in Papua, New Guinea, and I notice he has gained a little weight since he got married. He is here with his lovely wife, who lately I met only last January – he wasn't at the Conference but he came to Manila for a grand vacation and I met him upon a reference given to me.

I refer to none other than Justice Peter Hillyer. He came over to Manila. He was there with his lovely family on a grand vacation. However he agreed to interrupt his vacation with a visit to our Supreme Court to observe the proceedings there. Fortunately there was a hearing of the Session Hall of the Supreme Court. We unobtrusively entered the hall and sat at the rear portion but the Chief Justice spotted us – the Chief Justice of the Supreme Court – and pretty soon a bailiff was there asking for the name of my visitor. Then the Chief Justice interrupted the Session by announcing the presence of Justice Hillyer. Justice Hillyer and myself had no intention of watching the entire proceedings as we had a luncheon engagement but the bailiff ushered us to special seats. Thus we got stuck and had to wait till the end of the proceedings. After the hearing we were about to leave, but then the bailiff again came and told us that we have to join the Justices for lunch. That was Justice Hillyer's baptism of judicial hospitality coming from no less than the Chief Justice of the Supreme Court of the Philippines.

First visit

I have travelled to many places but this is the first time I have ever come and visited your beautiful land. Thus when the invitation came I welcomed it. I wanted to see your country and wanted to validate what I've heard that in this country the sheep far outnumber the human population. It did not take me long to confirm this. I would like to express my appreciation to Gerald Bailey, your Chairman, and Bruce Slane for this invitation.

Earlier I was also invited by David Tomkins to visit a place he has which is not on the map – Kuritau – but unfortunately I could not make it. I remember that Bruce Slane and Gerald invited me last year but the invitation was addressed to the President of LAWASIA. I turned it down stating that I cannot accept the invitation as I was not yet President of LAWASIA and I didn't want to assume that that honoured position would go to me. However when I was elected President, as Fali will be next year, the invitation was reiterated and this time I accepted it.

As I have said it is not for me to talk about LAWASIA to you for I am sure many of you are already acquainted with the objectives of LAWASIA. New Zealand was a Charter Member of LAWASIA. I see in our LAWASIA directory quite a number of New Zealand registered individual members, about 100, I just checked now, and firm members, about 10, I just checked also.

Current activities

Let me instead acquaint you with some of our current activities and what is in store for us in the future. As in any organisation committee work plays an important part. In LAWASIA we have several committees and interest groups among which are human rights, energy law, law and drugs. LAWASIA commercial law activities have been carried out by the committee on intellectual property based in Tokyo, industrial conservation and arbitration based in Bangkok, banking and finance located in Hong Kong, we have also our judicial section.

Human rights

Our Human Rights Standing Committee, which is headed by no less than Fali Nariman, and, by the way, co-chaired before by Pat Downey – Pat is still around – was established in 1979 when LAWASIA held its Sixth Conference at Colombo, Sri Lanka. The main objective of this committee is to spread the gospel on human rights, to bring to Asians full consciousness of human rights. We know, particularly in Asia, that there have been many breaches and reported violations of human rights. These breaches include discrimination based on race, colour, sex, language, religion, political opinion and degrading treatment or punishment. Discrimination in the obligations of the law, arbitrary arrest, lack of due process, restrictions on freedom of expression and peaceful assembly.

Unfortunately there exists no governmental or inter-governmental structure on human rights which can attend to these reported violations. LAWASIA's Human Rights Standing Committee therefore fills in the gap created by the absence of a governmental agency on human rights. As a non-governmental organisation LAWASIA has formulated and circulated throughout the region its basic principles on human rights. It has also come up with standards concerning the independence of the Judiciary and the freedom of lawyers as well as procedures in regard to entertaining complaints on human rights. The committee has likewise formulated guidelines to be followed by observers in trials with human rights' elements.

I suppose you have heard of a situational thing concerning the trial of three priests, a murder case in the Philippines. One is an Australian, Catholic priest, Father Gore, the other one is an Irish priest, Father Bryan, I think. The other one is a Philippino priest. There has been international interest in this case and LAWASIA has an observer there following the day-to-day proceedings of that trial. LAWASIA's done much in the sense that I, personally, as President of LAWASIA, have written to our Chief Justice to have the Judge attending to this case concentrate his attention to this case so that there will be prompt and speedy disposition of the case. I wrote also to the Attorney-General, and the Secretary of the Minister of Justice of the Philippines so that the Prosecutor will be given only this case to attend and do away with other cases meanwhile so that it can be given prompt disposition. We are confident that this case will soon come to an end. And we are confident also of an acquittal of the three priests.

The committee, moreover the Committee on Human Rights, has initiated meetings with other non-governmental organisations likewise concerned with human rights. The committee is primarily, I am referring to the Standing Committee on Human Rights, is primarily interested in the promotional educational aspects of human rights as it believes that knowledge and awareness of human rights can serve as an effective deterrent to violation or infringement.

I understand that you have a Human Rights Commission here established by law in 1979 and my good friend Pat was Commissioner and I met him again just this morning. What LAWASIA aims also is that we formulate a Human Rights Charter in Asia with a provision for the formation of a Commission and Human Rights Court. Asia, for your information, is the only hold-out vis-a-vis, regional inter-governmental human rights structure. All the other regions in the world have established regional arrangements on human rights.

Energy law

We have also the LAWASIA Energy Section, some of you might be interested here. The region, our region, faces a potential energy crisis in the 1980's of similar dimension to that suffered in the past decade despite the improved outlook for international oil prices. The problem for the coming decade will be in mobilising the massive physical and capital resources needed to meet the pressing energy needs of the expanding economies in the region. This is the broad conclusion of a major regional energy survey conducted by the Asian Development Bank based in Manila.

Thus LAWASIA's energy section is timely in the sense that there is a rapidly growing recognition and appreciation of the great importance of energy issues and its many ramifications in the region. The region has resources which if co-ordinated and integrated in line with a unified and harmonious plan would enable the region to develop into a strong economic block which would significantly contribute to a more effective common response to the energy problems faced by the region.

The current Chairman of this committee lives in Singapore and in November there will be a conference or a meeting of this energy section.

Drug addiction

We have also a Committee on Law and Drugs. This committee is important in that it develops and recommends programmes on what is now considered as a menace to our society – drug addiction. One of the chief concerns of a nation is to promote the welfare of their young citizens and it is a known fact that many countries in our region have experienced and are now experiencing the evil effects of drugs which attack the very fabric of society and disable those expected to help a country in the future.

Decolonisation

Do I still have the time? One minute. So, let me just wind up. The objectives of law and of government are to attain peace and progress, protect individual rights and promote the national well being. All nations share a common aspiration, the creation of an ideal society. The people of Asia share one unifying element in that they are now free from restraint whereas they were before for many decades bound by foreign powers. It is perhaps because of this that there is among Asians a deep seated consciousness of the need for cohesion. Differences in national laws and local customs will not deter or frustrate this idea of co-operation. In fact it is because of diversity of national laws that there is now a keen awareness to study and learn national laws for possible application whenever they are found relevant and suitable in another country.

What do we do in LAWASIA? The expansion of LAWASIA's activities depends on building up its membership among the individual lawyers of the region. It is their support and personal participation which makes LAWASIA grow. The region in which we live faces great problems in achieving the development of its vast population to a higher standard of living and bringing about peaceful co-operation between the many countries and varied civilisations which compose it.

New Zealand and Asia

I have been hearing about certain differences here in that while geographically you are in Asia there is a sense of affinity with Europe. I don't think you could possibly move your country from the geographical area in which it is. It is in Asia.

The law of each country and international law is an essential part of the framework for such progress and lawyers are uniquely placed to make a great contribution to their own countries and to the region as a whole. LAWASIA seeks to provide an association in which the lawyers of the region can come together on the basis of their common profession putting aside political and national rivalries and co-operating for the advancement of the whole region.

Well I was just given one more minute so I went into the "concluding remark" part of my speech. But anyway I think that I was able to make my point that New Zealand is, was and always has been a part of LAWASIA. I am encouraged by the long listing in our directory of New Zealand members. I look forward to a redoubling of that listing in our next directory and I look forward to seeing you who are here, at the next Conference of LAWASIA which will be held in 1985 in New Delhi hosted by our Vice-President, Fali Nariman. At that time I will bow out as President and he will take over from me as President. Thank you very much for the opportunity given to me this afternoon. Thank you. □

Judicial appointment

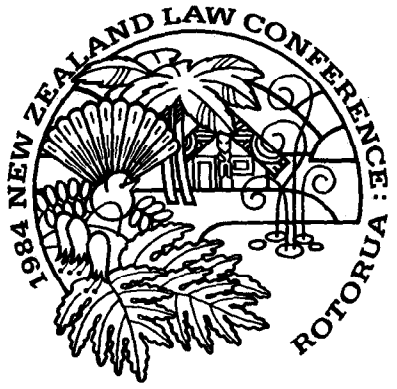
The appointment of Mr J S Henry, QC of Auckland as a Judge of the High Court was announced on 12 April 1984. He was sworn in on 11 May 1984. The appointment is temporary in the first instance but will be made permanent as soon as a vacancy arises. He will sit in Auckland

The new Judge was educated at King's College, Auckland, and graduated in law from Auckland University College in 1955. He then became a partner in the firm of Wilson, Henry, Martin and Co. He remained with that firm until 1980 when he commenced practice as a barrister on his own account. He was appointed a Queen's Counsel in the same year.

He was a member of the Council of the Auckland District Law Society for some ten years, and President between 1979 and 1980. He served as vice-president of the New Zealand Law Society in 1980 and has been a member of the Rules Committee and of the Contracts and Commercial Law Reform Committee. He has also been a member of the New Zealand Council of Law Reporting.

Mr Justice Henry, who is 51, is married and has three children. He is a former President of the Auckland Medico-Legal Society and is a Fellow of the International Academy of Trial Lawyers. □

It's 1984 after all!



By Sir Shridath S Ramphal, Commonwealth Secretary-General.

Lunchtime address to the International Commission of Jurists (New Zealand Section) and the Commonwealth Lawyers Association, Rotorua, 27 April 1984.

Just occasionally joys, like sorrows, come not single file but in battalions. Here in Rotorua for just a day less than two days ago; here now again: a double measure of delight for which I am indebted to the New Zealand section of the ICJ and the Commonwealth Lawyers Association.

The International Commission of Jurists has been close to my heart – and not just my lawyer's, but my internationalist heart – for most of my professional life. I have been privileged to be a member of the Commission itself for nearly 20 years. It remains one of the world's most worthwhile non-governmental organisations. Add to that an invitation to lunch with the New Zealand section from my old friend and colleague in the Commission, Sir Guy Powles – and the trip back to Rotorua was inevitable.

Sir Guy's record as the Commonwealth's first Ombudsman is widely respected far beyond these shores. His achievements as the holder of that office are in part responsible for its having become a Commonwealth institution enshrined in many constitutions, functioning to provide practical protection to citizens against arbitrary administrative action. Sir Guy's achievements have been New Zealand's achievements also, and the Commonwealth is indebted to both.

And I salute also the Commonwealth endeavours of our co-host, Laurie Southwick, whose conviction and determination has brought the Commonwealth Lawyers Association into being. Now we look to him as the Association's President to build up membership and forge a dynamic association, capitalising on the many points at which members of the profession in Commonwealth jurisdictions can share experience – the better to discharge their professional duties to their publics and to promote the Rule of Law. I wish the new Association well.

It is in commitment to the Rule of Law that both the ICJ and the CLA are founded. A similar commitment lies at the heart of the Commonwealth association itself. In the Declaration of Commonwealth Principles Commonwealth leaders have expressed their determination to "strive to promote in each of our countries those representative institutions and guarantees for personal freedom under the law that are our common heritage". How are we all doing?

Orwell's fearful fantasy

When I spoke to the Law Conference on Wednesday, I urged the legal profession to face up to the challenges that the year 2000 will bring, to consider what kind of world it will be for New Zealand and New Zealanders in the 21st century only 16 years away. In talking to you I want to share some reflections of my own about our time and its trends; about today and the tomorrows that must pass before this century ends.

That today is 1984 – the time of which George Orwell wrote 36 years ago, twice as long ago as we now are from the next century. Orwell's "1984" was a fearful prospect. If there is even some small resemblance between his fantasy and our reality, between his "1984" and ours, most of you will agree that we need to ask ourselves – as "International Jurists", as "Commonwealth Lawyers" – some critical questions about the rule of law worldwide.

As the New Year began, Western commentators were virtually unanimous in the sense of relief with which they greeted George Orwell's year. It had not happened. The terrible world that Orwell had portrayed for Western Europe in 1984 had not, after all, materialised.

Orwell, of course, had made it clear that "1984" was not so much a prophecy as a warning that humanity could come to this; a warning, as V S Pritchett saw it, of the "moral corruption of absolute power". Seen in that light – a warning of totalitarian trends, of the dominance of power in our every day lives – was relief as 1984 dawned justified? Does the real 1984 have nothing of an Orwellian ring for people the world over?

The liberal tradition

Let me say straightaway that Western societies have sustained the liberal tradition within their own societies. Life in Western Europe, life here in New Zealand, if not life in Orwell's "Oceania". Imperfections, of course, there are. Science and technology, for example, while offering massive opportunities of enlarging human happiness, have burgeoned into instruments of power, control and manipulation worthy of Orwell's "1984". On the whole, however, there is good reason for satisfaction – even if not for complacency – that the structures of freedom in the West – within Western societies – have remained so far intact.

But for large parts of the world beyond Western societies the issue is not marginal. For very many, "1984" is not wholly a fantasy. "Big Brother" is actually watching. It is so in East European countries; it is so in some parts of the developing world. For peoples of these countries "the moral corruption of absolute power" has made "1984" a present nightmare.

But we need to look even farther. What else is it but "1984" when Amnesty International and the ICJ catalogue a worldwide list of "prisoners of conscience" and call

attention to the reality of torture under many names. What else is it but "1984" for the black people of South Africa degraded, almost dehumanised, under the evil of "apartheid". What else but "1984" when a swollen tide of refugees remind us that human misery cannot be quarantined. What else but "1984" when media manipulation and the cult of the personality only cease to startle because they have become our common way of life?

It seems as if, somewhere, it is always "1984"; not so much a time as a place. Notwithstanding his preoccupation with Oceania, with Western Europe, Orwell had foreseen that "danger lies also in the acceptance of a totalitarian outlook by intellectuals of all colours". He was wrong only in confining the danger to intellectuals.

A global reality

But as I read the commentaries of complacency in the New Year my concern was not only with these trends within national societies. The world is not the sum total of its several parts; and no one seemed to ask whether it was "1984" worldwide. Nurtured as we are on the doctrine of the nation state, and the concept of sovereignty which sustains it, we invariably fail to see the world as a whole. And yet its separate states and their separate people are so interlinked and interdependent as to have lost some of their separateness; to have become, in fact, a global village – or, if you do not like that analogy – to have become a global community, a kind of global state.

For that global state, all is not well. 1984 is no time for satisfaction. Just reflect dispassionately: is not our global reality essentially Orwellian: a hierarchial international community run by a small super-power directorate, with an "Inner Party" of major countries dedicated to permanent superiority through an apparatus of economic, political, military and sometimes even cultural domination, and with the poorest states relegated to something comparable, in international terms, to the lowly position of Orwell's "proles"? Internationalism is in decline, crude power is ascendant, international morality is in retreat, a new militarism advances. "The moral corruption of absolute power", a global totalitarianism, is extending its sway over our international community.

The big powers

The Soviets have traditionally made no bones about helping only their ideological friends – and helping them mainly with arms. They have seldom responded to human needs because they are human needs – and, therefore, mutual needs as well. They talk much about "solidarity" with the Third World, but disclaiming a colonialist past, they opt out of real assistance to poor countries as if development was about reparations rather than human welfare.

The United States to whom human needs were once important, seems now to have abandoned all pretence of higher motivation. How developing countries vote in the United Nations, what causes they espouse, what friends they keep, how their leaders speak, what ideologies they preach, what economic doctrines they practice; all are closely monitored. The surveillance is constant and comprehensive: and no longer covert.

The "conformity rating" determines levels of aid, of trade, of financial flows, of technology transfers. And now, grotesquely, it determines even the policy prescriptions of key multilateral institutions which they more and more openly control and politicise – even as they crudely turn the screw on those they do not. In our "global state" there is no doubt; nor is there any pretence: "Big Brother is watching". It should occasion no surprise if, in time, those under scrutiny turn out to be a wider category than developing countries. Already, friends must choose carefully when and how to "dissent".

But from an internationalist viewpoint, "Big Brother" is not only the super-power directorate but also the very mentality of dominion which accepts that some should be mightily powerful and others pitifully weak, some excessively rich and others wretchedly poor. And this mentality is not confined to the super powers. Quite recently *The Times* criticised the Queen's Christmas broadcast to the Commonwealth on the ground, among others, that Her Majesty had deplored "the gap" between rich and poor in the world. For *The Times* such gross and shameful disparities were no more than "natural economic diversity".

In Orwell's 1984, human equality, remember, was "no longer an ideal to be striven after but a danger to be averted". Is that not the underlying attitude of those who would deny an equitable role in the international system to the hundred and more new countries which have emerged in the post-war era? Can the world's major and better off nations have any basis for genuine satisfaction if, while avoiding the worst of "1984" in their own countries, they have contrived, benefited from and now perpetuate a global system which secures it abroad?

The arms race

And thinking still of our global state, let us remember that in the quest for absolute dominance of the human race one of the problems Oceania's ruling Party faced was "how to kill several hundred million people in a few seconds without giving warning beforehand". Global dominance was to be achieved by "the discovery of some new and unanswerable weapon". In the real 1984 we call it more simply "the arms race".

In Orwell's 1984 a state of perpetual war had as its inner logic eating up the surplus of consumer goods, preserving an atmosphere of controlled want and keeping the masses subdued and helpless. In the real 1984, at the height of the worst recession and the highest level of unemployment the West has seen in 50 years, over $1 million is poured prodigally every minute of every day into the black hole of the arms race, denying the possibility of prosperity to the whole world, while an ever rising stockpile of holocaust material keeps it in thrall.

In one particularly frightening way our 1984 has already exceeded Orwell's. Big Brother is now watching us from space. Of those satellites whose purposes we broadly know, eight out of ten are for military uses: for spying – or even worse; there are some whose purposes, perhaps whose existence, are wholly unknown to all but a very few. Satellite reconnaisance is said to have identified a group of Iranian mullahs leading the revolt against the Shah – to have identified them by their beards!

And "Big Brother" is not only watching,he is listening too. Through geo-stationary satellites both super-powers can listen in on telephone conversations almost anywhere in the world. We tend not to worry when the

watching and the listening is done by a "friendly" super-power – as recently with the outrageous abuse by Libya of its embassy status in London; but we do well to remember that the other is watching and listening also. How far is it from observation and monitoring to control?

But it is much worse than that. The arms race is on in space, increasing the fearsome possibility of a further, almost infinitely extensible, dimension of the threat of nuclear cataclysm. The sword of Damocles hangs over humnanity – literally from space. The reality is frightening. Yet we still mostly look on with the eyes of innocents marvelling at the wizardry of our Science.

Whatever our achievements at home – 1984 is a disquieting signpost. Our world's directorate of power may not yet be ready to proclaim that "War is Peace", that "Freedom is Slavery", that "Ignorance is Strength". But what else is the message of the arms race? What other conclusion can be drawn when the prosperity of the rich countries shares an environment which enslaves millions in abject poverty; when the powerful persist in a political perspective of the world which acknowledges interdependence but rejects its basic implication of limits to power.

Vogue language

It is significant that in "Newspeak", the official language of Orwell's 1984, along with such words as "honour", "justice", "morality" and "democracy", that had ceased to exist, so too had "internationalism". How much in vogue is it today? We witness, do we not, the gravest decline in internationalism (and the international morality which should underwrite it) since the Charter was signed at San Francisco in 1945?

Just a week ago we had the pleasure of having the UN Secretary-General to lunch in Marlborough House. In assuring him that he could count member states of the Commonwealth among the friends of the United Nations and the Commonwealth collectively as being in its service, I told him how much I worried over the dangerous trends within the international community, including trends which disparage internationalism and even the United Nations system itself.

I said that with the specialised agencies now coming under fierce, if selective, attack we may not be far from the time when the friends of the Charter will need to stand up and be counted; that we would all do well to remember Pastor Neimoeller's reflection that since, not being one of them, he did not speak out when the Nazis came for the Jews, then for the Communists, and then for the trade unionists, there was in fact no one left to speak out when eventually they came for him.

Moral authority

George Orwell's "Nineteen Eighty-Four" almost had another title. Right up to the moment of publication he had favoured instead: "The Last Man in Europe", a title, perhaps, more obviously relevant to his central message. It is 1984; and Europe perhaps more than any other region can ensure that there are no "last men" – in Europe or anywhere else; but only a Europe that recognises its own strength and, above all, its moral authority. And within and beyond Europe the smaller industrialised countries – the middle countries, like New Zealand, that sometimes get squeezed even by the embraces of friendship – may have a special role to play.

"Independence within alliance" may not be the easiest concept; but it may be the critical challenge to be taken up by a coalition of these middle countries – of West and East, perhaps even of North and South: a coalition for mutual survival, like all political coalitions; a coalition for peace, for more sensible economic arrangements, for preserving earth's habitat; a coalition, in short, for a new internationalism that can take us to the 21st century and over its threshold; a coalition in which countries like New Zealand have a creative role to play.

As George Orwell lay dying in University College Hospital in the early days of 1950 – with "1984" only nine months old as a publication, but already a best-seller on both sides of the Atlantic – he received many visitors from the world of letters. Among the last to see him was Stephen Spender. He chided Spender that he was wrong to attempt to reply to Communist critics; and concluded:

> There are certain people, like vegetarians and communists, whom one cannot answer. You just have to go on saying your say regardless of them, and then the extraordinary thing is that they may start listening.

Few of you are vegetarians and none, so far as I know, are Communists; but if you allow me to include lawyers in that assorted list, as perhaps Orwell would have done, you have my explanation, and excuse, for having spoken on so serious a note and imposed so long upon your time and patience. □

At Butterworths 70th Anniversary Reception
Ian Johnstone (Australia), and Christopher Corry (Wellington).

The 1984 Law Conference — A not too personal diary

By Tony Ferrers of Auckland

Tuesday

The Indian Summer has continued today. The sky has been blue, the sun gold. It is still very pleasantly warm. We skimmed through the countryside having left the children and the cat behind. We arrived at conference headquarters at midday. It looked a picture and the organisers were busy at the registration centre. Even at this early stage old friends from student days were turning up — Bruce for one.

As the opening was not until mid-afternoon we drove to the hotel. The room was not ready as departure time was not until midday. Lunch instead. After lunch the room was ready. Just enough time to change from travelling clothes to something more formal for the opening. Joyce had an appropriate hat in pink.

There was a bus to take us to the opening at the Sports and Recreation Centre but the driver did not seem to be in any hurry to depart. He seemed to delight in holding a High Court Judge and a bus full of lawyers until he was ready to go. The formal opening was conducted by the Governor-General who spoke appropriately maintaining the theme that 1984 is a time of change. I thought the Mayor spoke particularly well. Did you know that Rotorua derives much more income from visitors than either farming or forestry?

The Centre had been made into a marae for the purposes of the Conference. There was the end of a meeting house as a facade on the stage specially carved. The carving was done at the New Zealand Maori Arts and Crafts Institute in Rotorua. A fine piece of work. Elders of the Te Arawa tribe spoke with typical eloquence and panache and without notes in contrast to the pakeha speakers who delivered their speeches from notes and with the minimum of gesture.

The evening reception in the same Sports Centre was not until 8.30. Time to return to the hotel for a rest and a change of clothes. The Centre in the afternoon looked rather barn-like. What would it be like for the reception in the evening? Well, it became a crowded barn. Delegates and their wives engaged in hearty noise and conversation. In a way it was a special kind of legal booze barn with hot air to match. I wonder if the days to follow might be in the same mould.

Perhaps the nicest part of the day was dinner in the room. Lovely grilled flounder.

Wednesday

Another beautiful sunny day. The morning belonged to Sonny Ramphal or Sir Shridath Ramphal QC to give him his proper title. We were back again in the Sports and Recreation Centre. This time I noted a wonderful flower arrangement banked up outside the entrance. The Commonwealth Secretary-General is a man who treads the international stage and enjoys a worldwide prospective.

Enjoyed his address on two levels. The first was the eloquent and beautiful flow of language. The second was the content of his address. He saw 1984 as a year of change as indeed every year is. Watch out for technology. Can the lawyer cope? Jurisdiction and sovereignty are aids to international white collar crime. Education is out of date. We are smug in legal cocoons. A plea for a wider outlook beyond domestic boundaries as we near the 21st century. We approach the margins of apocalypse. What can New Zealand and New Zealand lawyers do to help the world to reach the 21st century? It is a challenge to our intellectual inventiveness. We need a larger vision for the future and should throw off our narrow views of the past. A vision which can be shared with the rest of the human race. Indeed an address of greatness.

The following speakers fell within the shadow of Sonny Ramphal. Bernard Teague spoke fluently of the necessity to strive for excellence; to improve quality; to prepare for the mid-life crisis.

The last morning speaker was Don Dugdale, "known to every Judge and practitioner" as his introducer stated. Don spoke in his usual colourful way and allowed himself full flow. He battled the Government, the Consumer's Institute, wigs and gowns (useless appendages). This will make front page stuff for the newspapers.

And so to lunch at Tudor Towers. Senator Gareth Evans — Attorney-General for Australia — pitched his speech in suitable vein ideal for a lunch. I fancy he is a young man having fun and enjoying himself as part of the Australian Government.

After lunch the session on the future for the conveyancer. Gordon Lewis led this. His parable of the do-it-yourself appendectomy in the papers gave high expectations for this session. While his address was not as hilarious as his story, it was lightened by a number of anecdotes. Much down-to-earth common sense in coping with the future with the departure of the conveyancing scale and the conveyancing monopoly. Graham Cowley picked up this theme. There are new opportunities opening out. Let us grab them. Let us get back our tax work we have lost to the accountants. Be prepared to go into the periphery of clients' affairs. Judith Potter likened the family solicitor to the GP doctor. When in trouble get advice from the specialist. The family solicitor is an expert in client communication. But he must keep up with the developments in the law.

Evening at the legal review. Written by Dave Smith, Lyn of Tawa et al.

Eighteen sketches with a legal "sometimes" flavour ranging from "Marcia McLay" to "Legal Aids". Pity about all the four-letter words but this seems an inevitable concomitant of 1984 entertainment, whatever the medium.

Thursday

Breakfast by room service again. It saves getting up early. I am off to computers and Joyce to bioethics.

She told me later that everybody from the Attorney-General down seemed to suffering from gynaecological bewilderment. Looks like there are going to be a lot of cars with GB on them.

David Andrews in his clipped English way told us that the computer will lead to efficiency and thence profitability. But understand the computer's limitations. There is a danger in overkill. An over supply of management information. In-house comparisons can be unwise without all factors being taken into account. Changes there must be despite the epigram:

> Reform, reform! Don't talk to me of reform! Things are bad enough as they are.

John Miller alarmed everybody that in ten years or so there should be fifth generation computers available. These will produce expert systems to make lawyers redundant. Can we absorb this new technology? Is he over-optimistic? Is he over-pessimistic? Richard Craddock told us that some technologists can, if pressed, speak understandable English. What a comfort in these years of change!

Had a look at some of the displays in the afternoon. All the goodies were on display from Butterworths, Wang, the Post Office, etc, etc. Had to have a sleep for a late night coming up at Aorangi. Nice priming at Butterworths Cocktail party to celebrate 70 years.

Great company; great night. Rotorua kept disappearing and reappearing as the clouds passed by. Just as well there were buses running!

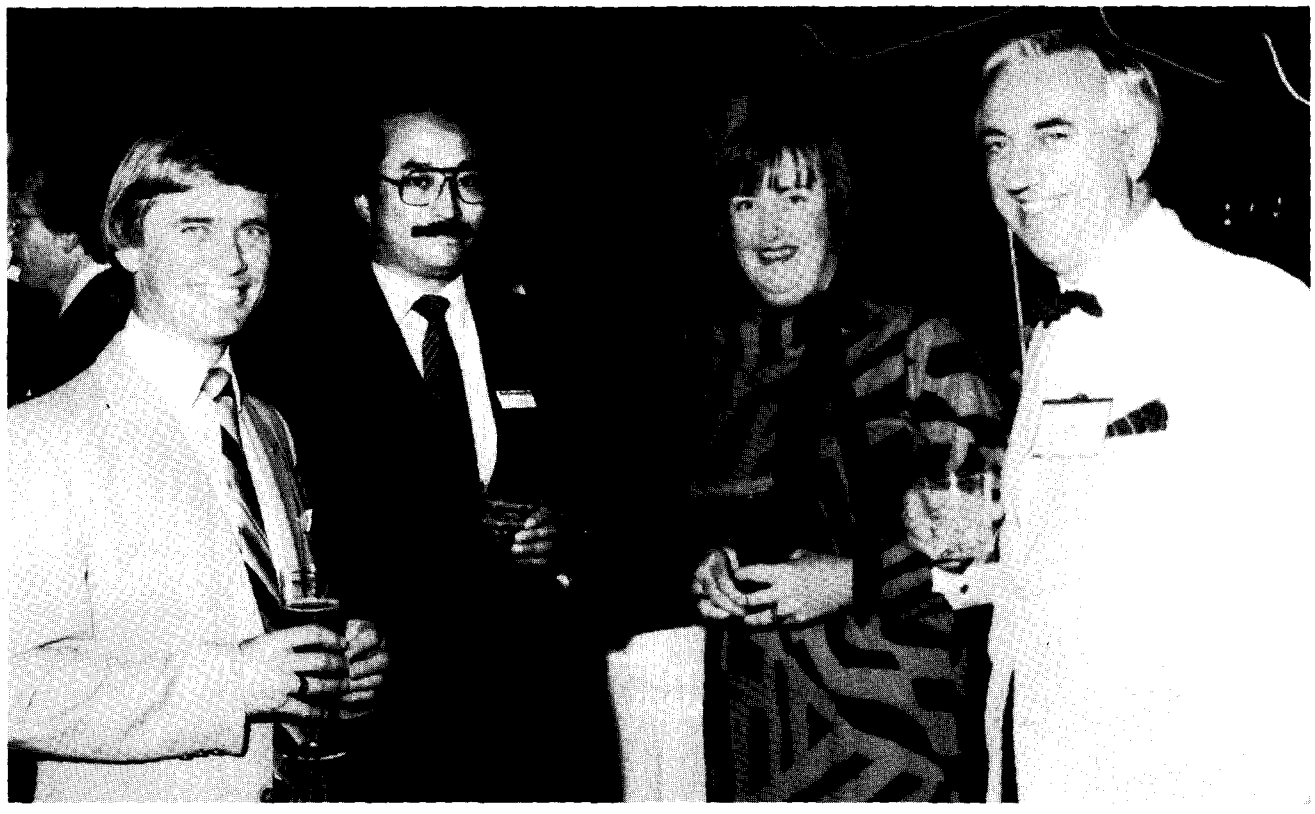
Friday

Lord Scarman spoke. His pithy address was clear and concise. A lucid exposition of the British situation. The UK should have a Bill of Rights. The Lord Chancellor and Lord Denning apparently both support this. A modern tool to protect the weak. Geoff Palmer says New Zealand does not have all the checks against abuse of power which the UK has. Yet it is now being forcefully argued a Bill of Rights is needed there. *A fortiori*. . . .

Another sleep necessary as a prelude to the Ball. A great night at the Ball with good music for a middle-aged lawyer. A myriad of whirling, twirling colours. Reds and golds and blues and greens. A staccato contrast with the male black and white. Billy T James and his group filled in when the main orchestra took its rest. Plenty of Henkel Trocken. Even Lord Scarman on entry was handed a glass and a bottle. "That's the way us Kiwis do it, M'Lord." This was the Sports and Recreation Centre in festive array. The booze barn for lawyers had gone.

Saturday

Wind-up session and valedictories. The Chief Justice spoke fittingly. A panel of the week's speakers reviewed the week. Too tired to take notes. Wind-up lunch. The lunch was accompanied by music from the Lex Pistols – eight musical lawyers playing Dixieland music. A fitting conclusion to the Conference was the Conga led by the President of the Court of Appeal to "When the Saints Go Marching In". The friendly Conference. A happy Conference. We'll all be different and changed come 1987 when we get together again in Christchurch. Good job we're not going home until tomorrow. We need the rest! □



At Butterworths 70th Anniversary Reception
Bill Morrison (Butterworths), Mark Law (Butterworths), Joyce Ferrers and Tony Ferrers (Auckland).

The Human Rights Commission as a law determining agency

By J B Elkind, Faculty of Law, University of Auckland

This article was originally written in 1983 but was held over as a matter of editorial discretion at the time. The author has written on this topic earlier in [1978] NZLJ 189 and 209. He made submissions to the Human Rights Commission on behalf of those making representations in respect of the South Africa Trust Scholarship, the Springbok Rugby Tour, the Children's Homes of the Department of Social Welfare, and the Education Amendment Act 1977 relating to private foreign students' fees. Copies of the Reports referred to are available, free, from the Human Rights Commission at Auckland, Wellington or Christchurch. Last year Dr Elkind was awarded the Prix Francis Lieber by the Institut de Droit International as was noted in [1983] NZLJ 262. An article by Dr Elkind on the human rights issues involved in the Springbok Tour has been accepted for publication in the British Yearbook of International Law *under the title "New Zealand, the Springboks and International Law".*

Introduction

One of the less understood facets of the Human Rights Commission is its role in interpreting New Zealand's international legal obligations. Like many things about the Commission, this role has become increasingly controversial. The recommendations of the Commission are not binding on the Government. Nonetheless the thesis of this article is that the Human Rights Commission is a law-determining agency with respect to international obligations in the field of human rights.

The Long Title and s 5

In studying this proposition, it is necessary first to examine the purpose of the Act and some of the functions of the Commission. The Act is described, in its long title as:

> An Act to Establish a Human Rights Commission and to Promote the Advancement of Human Rights in New Zealand in General Accordance with the United Nations International Covenants on Human Rights.

Section 5(1)(c) of the Human Rights Commission Act 1979 says that it is one of the general functions of the Commission:

> to receive and invite representations from members of the public on any matter affecting human rights.

Section 5(1)(d) says that it is the duty of the Commission:

> To make public statements in relation to any matter affecting human rights, including statements promoting an understanding of, and compliance with the Act.

Section 5(1)(e) says that it is the duty of the Commission:

> Notwithstanding anything in s 92(2) of this Act, to work towards, and to report to the Prime Minister from time to time under s 6 of this Act on the progress being made toward, –
>
> . . .
>
> (ii) The elimination of discriminatory laws and practices, being laws and practices which infringe the spirit and intention of this Act.

We may observe that since the Human Rights Commission Act prohibits discrimination on the ground of "sex, marital status or religious or ethical belief" as well as "race, colour or national or ethnic origin", any law or practice which amounts to or fosters discrimination of that nature infringes the spirit and intention of the Act.

But we have also noted that the long title refers to international obligations – United Nations Covenants on Human Rights. These Covenants are the International Covenant on Economic, Social and Cultural Rights[1] and the International Covenant on Civil and Political Rights.[2] These treaties may also be taken as representing the spirit and intention of the Act. Herein lies the Commission's first law-determining duty. Where a law or practice:

> (i) violates the spirit and intention of the Human Rights Commission Act, ie, the United Nations Covenants on Human Rights and;
>
> (ii) is discriminatory,

it is the duty of the Human Rights Commission to work toward its repeal and to report to the Prime Minister on progress being made in that direction.

Section 6

Section 6 also relates to functions of the Human Rights Commission. Subsection (1)(a) provides that the Commission shall have the function of reporting to the Prime Minister from time to time upon –

> Any matter affecting human rights, including the desirability of legislative, administrative or other action to give better protection to

human rights and to ensure better compliance with standards laid down in international instruments on human rights.

Presumably recommended legislative action can include the repeal of legislation which violates standards laid down in international instruments on human rights.

Section 6(1)(a) therefore involves another international law-determining function. It would seem to encompass, not only legally binding treaties such as the Covenants, but also such non-binding international *instruments* as the Universal Declaration of Human Rights and other United Nations Declarations and Resolutions. Recommendations under such instruments can only be phrased in terms of the desirability of action to give them effect. On the other hand, where an international instrument is a treaty representing an obligation under international law undertaken by New Zealand, then the Commission's recommendation with regard to that instrument may not be binding under the Human Rights Commission Act, but the treaty is binding on New Zealand under international law. A law which is contrary to a treaty obligation is a violation of international law and it is consistent with the Commission's function to say so.

The Commission's role as a law-determining agency would seem to be an obvious corollary of its statutory functions. It has the power to hear representations from members of the public some of which may allege a breach of New Zealand's international legal obligations and to make recommendations to ensure better compliance with these obligations. Logically, it cannot make such recommendations without first ensuring itself that such submissions have merit. Otherwise it would have to confine itself to merely passing on the submissions without comment.

Yet the Government not only denies that the Commission is a law-determining agency (without really saying what it is) but considers the assertion to be a "somewhat startling constitutional principle".[3] This article will assess the validity of these conflicting contentions.

Actions of the Commission

The Commission has, on a number of occasions, considered the Covenants and other treaties binding upon New Zealand in the exercise of its functions under ss 5 and 6.

The first case arose in 1979. It concerned the recipient of a South Africa Trust Scholarship, a Ms Mabel Kawanzaruwa. She had been awarded a scholarship to study in New Zealand. The Minister of Immigration stated that the permit to enter New Zealand of any recipient of the scholarship would be subject to a condition that, while present in New Zealand, such a recipient could not take part in any political activity. The New Zealand University Students' Association and the Auckland University Law Students' Association complained to the Human Rights Commission that the condition violated Art 19 of the Universal Declaration of Human Rights and the same Article of the Covenant on Civil and Political Rights both of which protect freedom of expression. The Human Rights Commission determined that the condition was a prima facie violation of the two instruments and invited the Minister to make submissions whereupon the condition was withdrawn. Said the Commission:

> This case underlines several significant features of the Human Rights Commission Act:
>
> (a) It has implications for the principles of human rights as a local issue since any person in New Zealand can make representations to the Human Rights Commission on any matter affecting human rights. In this sense the Human Rights Commission can be seen as a forum for the "concerned citizen" in all matters affecting human rights.
>
> (b) It emphasises New Zealand's obligations under ratified instruments such as the International Covenant on Civil and Political Rights. These can be seen as creating legal obligations on the State to comply with the various Articles, both in policy and legislation. Such an obligation is binding in international law. It is the responsibility of the Human Rights Commission to consider alleged breaches and when it is satisfied that breaches have occurred to seek redress.
>
> (c) It focuses attention on the wide and extensive role and function of the Human Rights Commission on any matter affecting human rights. The function of investigating alleged breaches of international instruments which New Zealand has ratified is particularly important. Furthermore, in cases where it is considered appropriate the Commission can also recommend changes in legislation and administrative practices to the Prime Minister.[4]

In 1981, the Commission was called upon to make a public statement on the lawfulness of birching as a punishment. In its statement of 2 February 1981, the Commission noted New Zealand's obligation under the International Covenant on Civil and Political Rights to see that no one is subjected to degrading punishment.[5] It noted a decision by the European Commission of Human Rights which had been upheld by the European Court of Human Rights to the effect that birching was a violation of a similar provision in the European Convention on Human Rights and concluded:

> It is the Human Rights Commission's view, for the same reasons as have been given in decisions of the European Commission of Human Rights and the European Court of Human Rights, that if birching as a judicial punishment were legislated for in New Zealand then such a sentence would constitute degrading punishment under the Covenant. Such a penalty would have implications for New Zealand in international law.

Perhaps the best known of the Commission's reports concerning New Zealand's international legal obligations was its Report and Recommendation to the Prime Minister on Representations Regarding the Proposed Springbok Rugby Tour of New Zealand of 25 June 1981. It concerned the representations of eleven Auckland citizens[6] claiming that the Gleneagles Agreement and the International Convention on the Elimination of all Forms of Racial Discrimination[7] required the New Zealand Government to "prevent and prohibit" the Tour if necessary by withholding entry permits from the South African team members and officials.

The Commission held that the Gleneagles Agreement was not a

treaty but rather "a policy statement of great significance". But it also found that there was nothing in it which prevented the withholding of permits. The Convention, on the other hand, was clearly a treaty containing binding legal obligations for New Zealand and the Commission found that Arts 2 and 3 of the Convention required the New Zealand Government to prevent and prohibit the Tour.

The Government rejected the Commission's Report, the Prime Minister arrogantly referring to the Commissioners in rather personal terms. It should be noted that the Report was not merely a personal whim of the Commissioners but was based on extensive written and oral submissions of law by the applicants. The New Zealand Rugby Union was invited to give its views but declined to do so.

In 1979, the Commission was called upon to examine the treatment of children and young persons in homes established by the Department of Social Welfare. After long and careful study, it issued its Report on 17 March 1983. In its Report, the Commission, no doubt reacting to its experience with the Springbok Tour Report, expressed considerable caution about its role as a law-determining agency.

> The Human Rights Commission is not established in the nature of a Court nor can it act as a Commission of Inquiry. It does not possess the abilities of such bodies. It is not a body possessing the power and function to conduct proceedings of an adversarial nature, and it does not bring down judicial rulings. Furthermore the Commission is not a Court of International Law which has the capacity to rule substantively on the interpretation of principles of international law. Its general powers and functions can be seen however as being akin to those of an inquisitorial body established to investigate, question and report.[8]

So saying, it then went on to find that:

> some practices and procedures [in the Children and Young Persons Homes] are of such a nature that they raise serious and substantial questions regarding this country's better compliance with the standards set out in Articles of the United Nations Covenants on Human Rights, as ratified.

The provisions it referred to were the International Covenant on Civil and Political Rights, Arts 7, 9, 10 and 27 and the International Covenant on Economic, Social and Cultural Rights, Arts 12 and 13.

The most recent Report was a Report made to the Prime Minister on Representations Made on the Education Amendment Act 1979 relating to private foreign students' fees. Applicants claimed that these fees discriminated against students on the basis of nationality and that they were therefore in violation of Arts 2 and 13 of the International Covenant on Economic, Social and Cultural Rights and Arts 3 and 4 of the UNESCO Convention Against Discrimination in Education 1962.[9]

The Commission received written submissions from the applicants and the Department of Education and heard oral submissions by the applicants. In its Report, the Commission was even more cautious about its role as a law-determining agency. The Report confined itself to setting out passages of the applicants' submissions. The Commission found many of the applicants' arguments with regard to the Economic and Social Covenant, to be persuasive. As to the UNESCO Convention, the Commission expressed the opinion that the applicants' submissions had prima facie merit. It noted that New Zealand's first report to the United Nations Committee concerned with the enforcement of that Covenant on the degree of fulfilment under the Covenant was due and urged that, in the preparation of that report "close examination of the Education Amendment Act should be made".

New Zealand's Obligations

The Covenant on Civil and Political Rights establishes a Human Rights Committee composed of 18 experts with special competence in the field of human rights.[10] States Parties may declare that they recognise the competence of the Committee to receive complaints by other States.[11] In addition, there is an Optional Protocol[12] whereby a State Party can recognise the competence of the Human Rights Committee to hear complaints emanating from individuals alleging violations of the Covenant by that State Party.[13] The Committee is empowered to consider such communications in the light of written information made available to it by the individual and by the State Party concerned and to forward its views to them. New Zealand is not a Party to the Optional Protocol. But the Covenant provides that the main responsibility for enforcement shall be left to States through the operation of their municipal law.

This does not mean that it is the Government which is the sole judge of its obligations under the Covenant. Article 2 of the International Covenant on Civil and Political Rights contains a statement about the obligations of the Parties and this statement is of assistance when we canvass the functions of the New Zealand Human Rights Commission.

The relevant paragraphs are paras 2 and 3. They provide:

> 2 Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant.
>
> 3 Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights and freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of a judicial remedy;
>
> (c) to ensure that the competent authorities shall enforce such remedies when granted.

These two Articles require that individuals whose rights and freedoms are violated shall not only have an effective remedy, but also that the right to such a remedy shall be ascertained by judicial, administrative, legislative or other competent authorities.

The duty to develop a judicial

remedy may be open to progressive implementation. The duty is to "develop the possibilities" of such a remedy. But the duty to provide some effective remedy is immediate. It is not to be subjected to the delays of progressive implementation.

In a commentary on Art 2(3), Professor Oscar Schachter, a former Director of the General Legal Division, Office of Legal Affairs of the United Nations says that:

> if it is impossible for aggrieved individuals to obtain an objective determination of their rights under the Covenant (and not simply under national law) . . . it is clear that the obligations of Article 2 are not satisfied.[14]

According to Schachter, Art 2(2) adds "a conditional obligation as to means but an obligation nonetheless".[15] Paragraph (3) entails a specific obligation to provide an effective remedy.

> It is not enough for a party to say that it respects and ensures rights (the obligation of result); it must also carry out the obligation to use the specified means required by Article 2 through its domestic legal system.[16]

He did not feel that the express obligations in a legal instrument could be easily dismissed with a sweeping assertion that the obligations were adequately fulfilled by other means.[17] Thus, Art 2(3)(a) and (b) require that there be some independent authority to which an individual can go when he or she feels that rights under the Covenant are being violated. That authority must have the power of authoritatively determining whether such allegations are valid. In short, the Covenant on Civil and Political Rights requires that an official law-determining agency be established and that its findings be effectively implemented.

Despite the Government's reception of Human Rights Commission Reports concerning other international instruments, we should not yet assume that the Government is not acting in good faith. There is evidence of the importance which the Government attaches to its obligations under the Covenants.[18] Nor is it permissible to assume that the body which was established under an Act which has, as its aim, to promote human rights in "general accordance with the United Nations Covenants on Human Rights" is anything other than a law-determining agency in fulfilment of its obligations under the Covenant. There is, in law, a presumption that Parliament does not intend to legislate contrary to international law.[19]

The Individual's Remedy

To the extent that New Zealand statute law and English common law are consistent with the Covenants, a person whose rights are violated may well have an effective judicial remedy. But when New Zealand statute law comes into conflict with the Covenants, an effective remedy involves significant constitutional difficulties. There is no judicial or administrative authority capable of reviewing and invalidating statutes which violate the Covenant. Nor is there a legislative authority. Parliament can review legislation in accordance with its general legislative functions. But there is no Committee of Parliament that has the right to determine the rights of individual claimants.

The United Kingdom, with a constitutional structure similar to New Zealand, faces the same sort of constitutional problem. Commenting on that problem, the eminent constitutional lawyer, Dr F A Mann finds it paradoxical in no less than three respects:

> Firstly, Britain has assumed international obligations, but prima facie done nothing to secure their implementation, and even where their terms are at present being observed nothing has been done to prevent future inconsistent legislation coming into force and superseding the present law by virtue of the rule *lex posterior derogat priori*. Nor can it be asserted that as a result of a non-legal, non-binding convention Parliament would in fact refrain from interference with such rules of constitutional significance as the common law has developed.[20]

Dr Mann concluded:

> This is not to say that in Law the Covenants fail to impose effective legal duties upon Contracting States. Their disregard constitutes a breach of treaty. States in general and the United Kingdom in particular would do well to review their legal systems with a view to eradicating or avoiding such breaches. Thus in England it is a matter for serious reflection that the country has undertaken "to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy. . .".[21]

There are a number of options open to the New Zealand Government in fulfilling its duties under the Covenant on Civil and Political Rights:

a It could incorporate the Covenant into New Zealand law and entrench it, thereby giving the Courts the power of judicial review over inconsistent statutes. This would probably be the most effective way of providing an effective judicial remedy for persons whose rights are violated by statute law.[22]

b It could ratify the Optional Protocol. But this is not a domestic remedy. And, in view of the fact that the Human Rights Committee established under the Covenant may only "forward its views", the Protocol does not, of itself, provide an effective remedy as required by Art 2(3) of the Covenant.

c As suggested by the former Chief New Zealand Human Rights Commissioner, Mr Patrick Downey,[23] it could participate in the establishment of a regional (South Pacific) committee or commission to review complaints of violations. This would allow rights under the Covenant to be considered in a Pacific regional context. But that would not be a domestic solution either. Furthermore, it would fulfil the obligations of the Covenant only if the findings were binding in the internal law of member states.

The New Zealand Government has not so far followed any of those options. The course which it did follow was the enactment of the Human Rights Commission Act and the creation of the Human Rights Commission.

Thus, the Covenant on Civil and Political Rights created a legal duty on the part of the Government to establish an official law-determining agency and the Human Rights Commission is the agency which it established. The fact that not all of the Commissioners have been lawyers does not make it any the less a law-determining agency. We may assume that the Government intended to do what it did. All of the Commissioners have been experienced in the field of human rights. The Covenants involve

human rights and fundamental freedoms. Perhaps the Government decided that, in establishing a Commission to inquire into such matters, it should appoint persons with broad experience in human affairs in addition to those with a formal legal background.

The non-binding nature of the Commission's reports

The fact that the Reports of the Human Rights Commission are not binding on the Government does not render it any the less an official law-determining agency. A law-determining agency is a body with authority to interpret the law.

In International law, there are many bodies with authority to interpret the law but with no authority to issue binding orders. The reason for this is that representatives of States may be willing to trust the interpretation of the law to individuals, but they are reluctant to give individuals the power to "order" a *State* to do something. When an international law-determining agency is given the power to issue an Order, it is usually because States have consented to submit to its authority. Thus, the International Court of Justice may issue Orders, but these are only binding on the parties to and in respect of a particular case.[24] The Jurisdiction of the Court is entirely dependent on the consent of the parties to a case.[25]

The International Court of Justice has the power to give Advisory Opinions at the request of United Nations organs or certain specified international organisations. Such opinions state what the law is and States are bound by the law. But Advisory Opinions, even of so august a body as the International Court of Justice, are not binding.[26]

Other international bodies which may decide and interpret the law but which may not issue binding orders are Conciliation Commissions,[27] the United Nations General Assembly itself and even, as we have seen, the Human Rights Committee to which individuals may submit petitions under the Optional Protocol to the Covenant on Civil and Political Rights.

Admittedly the Human Rights Commission Act falls far short of the duty to develop a judicial remedy. We must therefore assume that the present powers of the Commission are only an intermediate stage in the process.[28]

But the Covenant does impose an immediate duty to provide an effective remedy. The Human Rights Commission Act is an adequate step in the fulfilment of New Zealand's duties only if:

a The Human Rights Commission is treated as an official law-determining agency; and

b The Government undertakes to be bound at least by its Reports on compliance with the Covenant on Civil and Political Rights; and

c It foreshadows further development, such as giving the Commission authority to issue binding orders dealing with legislation or the creation of a full judicial authority.

Because we assume that the Government is acting in good faith, the conclusion follows inevitably that these conditions will be fulfilled – that there will be further development toward a judicial remedy and that the Human Rights Commission is, as present, a law-determining agency. The appointment of a High Court Judge as the new Chief Human Rights Commissioner would appear to be at least a tentative acceptance by the Government that the Human Rights Commission has some law-determining role to play.

There may well be a case for treating the Covenant differently from other international obligations which do not specifically posit the right of the individual to an effective remedy. But that is not what the Act does. It gives the Commission a law-determining function with respect to all international instruments on human rights. As we have seen there are quite a number of human rights treaties imposing legal obligations on New Zealand. The Act treats them all in the same way. So we must assume that the Human Rights Commission is a law-determining agency with respect to all of them.

Having established the Commission in its present form and appointed the Commissioners, the Government cannot be heard to complain that the decisions of the Commission are not sufficiently authoritative. In each of the cases discussed above, the Commission arrived at its decision only after reading and hearing extensive submissions of international law. Both the Springbok Tour submissions and the Education Amendment Act submissions will be published so that those who wish to can assess the Government's response to the Reports in the light of the submissions on which they were based.

When the Commission makes a determination that interprets New Zealand's obligations under international law and declares that a statute is in violation of the Covenants or some other Human Rights treaty, the Government ignores that determination only at the peril of being seen to violate its legal obligations – being seen to behave in a lawless manner. □

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1 Annex to General Assembly Resolution 2200 (XXXI) of 16 December 1966 (entered into force on 3 January 1976. New Zealand ratification 28 December 1979).

2 Ibid (Entered into force 23 March 1976. New Zealand ratification 28 December 1979).

3 This criticism appears on p 2 of the Department of Education's Submissions on the Education Amendment Act 1979. In supporting its submissions, the Education Department points to "rather cautious" statements in *Hansard* indicating that the Commission's role was primarily to be one of promotion of human rights. It felt that it was permissible to refer to *Hansard* on the ground that its submissions were not submissions before a Court of law "which do not permit the use of *Hansard*". This advances the "rather startling" notion that the prohibition on the use of *Hansard* is a rule of evidence rather than one of statutory interpretation.

4 Report of the Human Rights Commission in the matter of Mabel Kawanzarua see [1979] NZLJ 365, 368-369.

5 Art 7.

6 Those making the representations were: Mr B Ashby, Mrs Jill Amos, Rev Selwyn Dawson, Dr A M Finlay, Sir Edmund Hillary, Dr P Hohepa, Mr Harold Innes, Professor J F Northey, Mr P Soljak, Professor M P K Sorrenson, Dr Ranginui Walker.

7 GA Res 2106 (XX), GAOR 20th Sess, Supp 14 (21 December 1965), 66 UNTS 9464. Entered into force 7 January 1969. New Zealand ratification 22 November 1969.

8 P 4.

9 429 UNTS 93 (1962). New Zealand ratification deposited 12 February 1963. Entered into force for New Zealand on 12 May 1963.

10 Art 28.

11 Art 41.

12 Annex to GA Res 2200 (XXI) of 16 December 1966.

Continued on p 208

THEMES OF CONSTITUTIONAL DEVELOPMENT :

The need for a favourable climate of discussion

By Professor R Q Quentin-Baxter of Victoria University of Wellington.

This article is an edited version of a public lecture given by Professor Quentin-Baxter on 12 April 1984 as the first in a series on constitutional issues being given at Victoria University. As the introductory lecture it covers a broad spectrum of issues. It also emphasises the need that New Zealand has to see its forms of constitutional development in the wider context of the country's international responsibilities. Professor Quentin-Baxter refers to the report made by New Zealand in 1983 to the UN Human Rights Committee. Copies of this report and of the examination of it by the Committee are available free from the Ministry of Foreign Affairs which has published it as Information Bulletin No 6.

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

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

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

Thirdly, there is the matter to which I first referred. The development of the New Zealand constitution is important for us precisely because we have become in the full sense responsible for our destiny as a nation. We have grown up in the shelter and the comradeship of Great Britain and the Commonwealth; but now, if we would wish to remain independent, we must learn to stand upon our own ground. Despite the ties of law and language and culture, we have now a separate heartbeat from the United Kingdom; and the forces that frame our destiny are not primarily those of western Europe. We have far greater affinities – but less sense of identity – with the people of Australia; and we need to find a new balance between these two cardinal points of external reference.

We need to make the most of ourselves, and of the awakened Maori consciousness, with its eloquent and insistent plea for recognition and respect and partnership. We need to see the outside world – with all its problems and divisions – as an

environment in which we can prosper, if we will only be ourselves. When our government gives a circumstantial account to the United Nations of the observance of human rights in New Zealand, it is an exercise in objective self-appraisal. The duty we owe to the international community as one of its more fortunate members is the same duty we owe to ourselves. For New Zealand – as for the United Kingdom and for others – our international obligations in the field of human rights are a guide-line and an incentive to constitutional self-improvement at home.

United Kingdom situation

As New Zealand is apt to rely in all matters upon the United Kingdom's example, it is worth emphasising that responsible legal opinion in that country is no longer content with the existing situation. Fifteen years ago, the present Lord Chancellor, Lord Hailsham, then a front-bench member of the Parliamentary opposition in the United Kingdom, said that Parliament had become "virtually an elective dictatorship. The party system", he added, "makes the supremacy of a government like the present, automatic and unquestioned".

Later, in office, Lord Hailsham expressed a much more reserve opinion – as did Lord Gardiner, when holding office as Lord Chancellor in a Labour Government. Ultimately, both of these eminent lawyer-politicians have declared themselves in favour of a break with tradition; and Lord Justice Scarman, in his 1973 Hamlyn lectures, has made an extended and cogent plea for a new Bill of Rights; but legal and political opinion remains deeply divided, and the controversy has not aroused great public involvement.

There are special elements of drama in the British situation. As a party to the European Convention on Human Rights, the United Kingdom is bound by regional arrangements that enunciate human rights, and provide supervisory and judicial machinery to ensure compliance with Convention requirements. The jurisdiction of the European Court of Human Rights can be invoked by a private petitioner in the United Kingdom; and the Court's judgments decide whether, in any given case, the member state concerned is complying with its obligations under the convention.

In substance, therefore, the United Kingdom Parliament, as well as the Courts and the executive government, are bound by the European Court's decisions. Yet the whole weight of legal and constitutional tradition shrinks from reflecting in English law a situation that places a Judicial authority above Parliament. In terms of inherited constitutional doctrine, such a change appears to be revolutionary; for the English constitution rests ultimately on the existing, time-honoured, "unwritten" relationship between Parliament and the Courts. It is as if an irresistible force had quietly – very quietly – come up against an immovable object.

Commonwealth countries

In the cases of other Commonwealth countries, [than Great Britain] it is, now well-established that, subject to any special requirements of the particular constitution, the plenary powers of Parliament extend to re-defining its own legislative authority, and to changing its own composition. New Zealand's sovereign Parliament has done both; and the abolition, 30 years ago, of its own upper house has not caused any question of invalidity to be raised in the Courts.

It would seem that in New Zealand there is a constitutional convention, which no government in power has ever been tempted to break, against the use of a Parliamentary majority to fetter the discretion of a different majority in a subsequent Parliament. If "entrenching" legislation of this kind were ever to be passed without violating the constitution, it would appear that the pre-condition must be virtual unanimity in Parliament, and near-unanimity in the country at large.

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

Constitutional rules

Constitutional conventions temper the rigour of the law, at the expense of absolute precision in its application. There have been cases, both in the United Kingdom and in New Zealand, in which governments have used parliamentary majorities to pass legislation prolonging the life of the existing Parliament; and in dire emergency the discretion is valuable. We can, however, be reasonably confident that the government which now used this power in a partisan or high-handed manner would, in New Zealand, court rejection when it did meet the electors, and disorder if that meeting was long delayed.

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

The Westminster constitution has proved over the centuries its capacity to meet new situations, evolving in ways that reflect the genius of the people for self-government, rather than the deliberate planning of experts. Even now, it has not been shown that there is great advantage in the attempts that have been made to embody in a formal constitution the rules governing the selection of a

Prime Minister, and the extent of his right to remain in office or to seek a premature dissolution of Parliament.

More than one government has found it disconcerting that constitutional laws which were intended to codify existing practice have produced a different result. That is almost inevitable, because convention leaves some latitude for "the good sense and political sensitivity of the main actors called upon to take part" – the words are Lord Radcliffe's, delivering the opinion of the Judicial Committee of the Privy Council in the leading case on this subject; but, once embodied in a constitution, "it is in the end the wording of the constitution itself that is to be applied" by the Courts.

Administrators

It would be wrong to suppose that we are now speaking only of the rarified matters that are likely to reach the highest Courts, and to involve the highest office-holders in the state. Every public servant who makes, in the ordinary course of duty, a decision involving an exercise of discretion – for example, about the application of the criteria governing the priorities for tenure of a state house – is expected to act impartially and objectively, but also with "good sense and political sensitivity": in other words, within the applicable rules, he must weigh up, as best he can, both the human situation and the tenor of government policy.

Against a background of Ministerial responsibility to Parliament, administrators must make decisions which in sheer volume, complexity and cost would overload any Court system; and, in general, they make those decisions better than any Court system, because the administrators are not tightly bound by "the artificial reason and judgment of the law".

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

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

Ministerial responsibility

The older pattern of relationships between ministers and public servants has lost much of its coherence. One minister stresses the privacy of the advice which it is his responsibility to adopt or reject. Another minister distances himself from his department, noting that, on a particular matter, the department's view was allowed to prevail; but now he is asking the same question again, and will reconsider his position when he has the department's response. Cabinet and Parliamentary committees cut in upon the private line between a minister and his department. A party leader in opposition is sufficiently uncertain of the prevailing *mores* to announce that, in government, his party will require the resignation of any permanent head who is unable to go along with its policies. Probably in New Zealand we have already gone too far ever to reinstate the simple doctrine that a minister and his department are one.

The dilution of ministerial responsibility is of key significance to the issue that I have been discussing. It is one thing to establish tribunals and other quasi-judicial authorities in order to strengthen and systematise the administrative processes for which ministers take responsibility. It is quite another thing to use these tribunals and authorities as a more pliable alternative to control by the ordinary Courts.

The members of administrative tribunals and similar authorities are appointed for short terms – often three years – and have no security of tenure. Their decisions, if binding, relieve ministers of responsibility for the course followed, and offer them the luxury of publicly dissenting from an unpopular decision. There may also be public pressure not to reappoint the current members of such a tribunal, when their terms expire. Yet the very justification for the tribunal may be the need to remove decisions that vitally affect individuals from direct political control and public prejudice.

The constitutional conventions that underpin our democracy should be safe in the care of public opinion and the ballot box; but this control is too broad to ensure, on its own, that individuals and minorities receive justice. Canada has very recently acted upon that view, by establishing its own Charter of Rights.

The burden of national sovereignty

Now I must widen the frame of reference, so that we may consider New Zealand's place in the world. History and geography have given these islands and their inhabitants a separate national identity. Until 20 or 30 years ago, we could bear this responsibility lightly, because New Zealand's relationship with the United Kingdom was congenial, comprehensive and not in the least cramping.

As a founding member of the League of Nations, this country had achieved in 1920 an international personality, and a voice – used sparingly – in world affairs. In the years between the wars, there were corresponding changes in the constitutional status of the "old dominions", culminating in the passage of the Statute of Westminster 1931. Canada and Australia were the instigators of these constitutional changes – New Zealand would not have been content with less than they, but did not share their need for equality of status with the United Kingdom.

In many ways New Zealanders were sturdily provincial. While the "home boats" continued to carry all

our exports to England, we needed no other market. Internal self-government, and a fair share of influence in Commonwealth and regional affairs, including questions of trade, covered most of the situations in which we wished to speak with a distintively New Zealand voice. In other, larger concerns we were not disfranchised; for we knew ourselves to be British subjects as well as New Zealand citizens.

London was our capital of the heart, the place of residence of our Sovereign, the well-spring of our culture, the seat of our highest Court, and the destination of most New Zealanders who felt a personal or professional need for the life and opportunities of a metropolis. Some of our people continued to find careers in the British armed forces or colonial service. Our media, fed by the international news agencies, told New Zealanders how British representatives had spoken or voted at international meetings, seldom stopping to enquire whether New Zealand was also represented.

Of this seemingly secure environment, hardly a shred remains. After several centuries of world responsibility, the United Kingdom has returned to Europe. Freedom of trans-frontier movement is now shared by Britain, not with Commonwealth countries, but with its partners in the European Economic Community. The bonds of the community are more rigid than the old ties of Commonwealth: some elements of sovereign discretion have passed from London and other capitals to the headquarters of the community; and decisions of competent community organs leave their mark upon the common law.

New Zealand trade flows to Britain in diminishing quantities, under the arrangements permitted by the European Economic Community. We have responded to the change in trading patterns, learning rapidly to beome self-reliant in everything that concerns diversification of export produce and overseas markets, and finding a measure of security in an agreement for closer economic relations with Australia.

The international environment

It has not, however, yet been fully realised that the massive changes in our international environment render constitutional development both more necessary and more difficult to achieve. No country can arrange its international environment to suit its own preferences; and no country can prosper if it fails to meet the challenge of that environment.

Both in the United Kingdom and in New Zealand, the need to make these adjustments entails a psychological strain. For the United Kingdom, independence and interdependence are now like two aspects of a reversing figure: the European regional organisations to which it belongs obey the collective will of the member states; but they impose that will on the individual member states. For New Zealand, the easy blend of dependence and independence that marked the old relationship with the United Kingdom has gone for ever; and that kind of loose linkage would be hard to achieve in a bilateral relationship between New Zealand and Australia.

For the United Kingdom, the choice has been made: for New Zealand, there are elements of choice still to be exercised. Several months ago, the former Deputy Prime Minister of Australia, Mr Anthony, touched on this matter in remarks made at the time of his retirement from public life. His reported conclusion – no doubt tempered by his earlier, private soundings during a recent visit to this country – was that "political union, if it ever came, was still many years off".

The truth is that we were far too long an "old dominion", enjoying a nominal parity with the young giant across the Tasman, free to mingle and not to merge. The right to mingle is now more important to us than ever before; for New Zealanders, who once were able to make their homes and careers in the United Kingdom or other parts of the Commonwealth, now have an open door only to Australia. Without making too much of the parallel, there is some resemblance between the way in which South Pacific Island countries look to New Zealand, and the way in which New Zealand looks to Australia. The smaller country needs the stimulus of interaction with the larger, and yet fears the draw-off in people and talent and national vitality.

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

A new Bill of Rights

In the continuing British debate regarding a new Bill of Rights, the constitutional and international aspects are never separated. It is generally agreed that such a Bill should follow the standards established by the European Convention on Human Rights, which also meets the requirements of the corresponding United Nations treaty – the International Covenant on Civil and Political Rights. This is, of course, partly a matter of convenience, so that compliance with the international obligation is more easily established, but it is also a recognition that the content and drafting of a domestic Bill of Rights could be an extremely contentious matter, if there were not an international standard to invoke. As to the method of establishing the Bill in domestic law, Lord Justice Scarman has drawn attention to ss 2 and 3 of the European Communities Act 1972, which acknowledge the existence of a source of law, and a Court, not controlled by the British Parliament. This precedent, by which the sovereignty of Parliament yields to the obligations contained in a treaty – but without any final surrender – could, as Lord Justice Scarman observes, have been similarly applied in relation to international obligations in the field of human rights.

Although New Zealand cannot become a party to the European Convention, it is bound by the International Covenants on Human Rights adopted by the United Nations General Assembly in 1966. In 1983 the New Zealand Government submitted to the Committee

established by the International Covenant on Civil and Political Rights a first comprehensive report upon New Zealand's compliance with that instrument.

This provides another excellent example of interaction between constitutional measures and international standards. Every state that becomes party to a treaty of this kind accepts that it is answerable internationally for what is done in its own country to carry out the requirements of the treaty; and, in the course of answering, it has the necessary incentive to look closely at its own performance. The only disappointing aspect of New Zealand's reporting is, once again, that the steps taken in pursuance of an international obligation create hardly a ripple of domestic interest, because the action takes place outside the range of New Zealand's news gathering.

It is because New Zealand is a sovereign state that the question of constitutional development assumes special importance. Membership of the international community creates a tension which can be invigorating or totally destructive. We have, in principle, no need to be defensive: in most respects, our record will stand up to international inspection. But when we do become defensive, enquiring endlessly why our case should be examined when others have more of which to be ashamed, we put ourselves at risk.

It is then only one further step to the point at which people appeal to organised international opinion against conditions in their own country, and those who believe that they are upholding United Nations principles are denounced for disloyalty in doing so. Ignorance, rather than bad intention, is the root cause of these situations. The best cure may be to import relevant international standards into our own laws and procedures, so that they do not have the character of an unexplained, foreign interference in our domestic affairs.

The importance and the emptiness of rules

Lawyers deal in laws, and laws are only rules. Rules are observed because people believe in them, or because they are so much a part of our experience that we take them for granted, or because the practical inconvenience of not observing them is too great. In discussing the advantages of a "written" constitution, or a Bill of Rights binding Parliament, one must avoid the fallacy that some new pledge, taken by majority vote, can cure dissension and disaffection within our own society. A proposal for a Bill of Rights, which has the favour of one main political party and the disfavour of another, is already moribund. Unity cannot be imposed – and that is especially true in our society; for we are among the minority of states that places no reliance on a military or para-military force to guarantee internal order.

Therefore we cannot hedge our bets. We are committed to government by consent of the governed; and that consent is based upon reason and habit. To satisfy reason, we have to provide better means for people to evaluate the actions and processes of government; and we have to be able to show that these actions and processes embody a sense of fairness. To satisfy habit, we must ensure that change is evolutionary – that our institutions are true to their own spirit, even while they are changing.

Each of these changes has been in its time a cause for alarm – the greatest of the liberal constitutionalists of the eighteenth century believed that universal male suffrage would bring ruin in its train, and the same idea in relation to women lasted more than a century longer.

The agency of change is a spirit of discontent moving through society. Though free and regular elections are an essential means of channelling such discontent, no important constitutional change ever depends upon a majority vote in an election or referendum. The extensions of the franchise required the protest of the disfranchised. The advent of the welfare state, and the growth of taxation, were responses to a rising tide of insistence that freedoms in a democratic society could not be limited to their negative side: a share in social and economic opportunity was also an essential ingredient.

Even the United Kingdom's entry into the European Economic Community – perhaps the most momentous constitutional change in England since the Norman conquest – was decided neither by the electorate nor by the government of the day: after much canvassing, the issue was determined by a free vote of the House of Commons. In Canada the new Charter of Rights is the product of a bargain between federal and provicial leaders. Constitutional development is never a simple matter of choices: it is more a matter of instinctive adaptation to a changing environment; and the role of intelligence is not to frustrate instinct.

Maori discontent manifestations

Bearing these things in mind, and remembering that constitutions are as devoid of function as an empty seashell unless there is life within them, I think we can be grateful for the manifestation of Maori discontent that has attached itself to the annual celebration of our national day at Waitangi. It brings together so many of the elements in the composite situation that we have been considering.

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

Protest is the yeast working in our society or in world society, provided in either case that the protest is made within a framework of superior loyalties. If the proviso is disregarded, and the protest amounts to outright rejection, it can only be a step on the road to anarchy. Every day's news stories tell us about societies that are travelling that road, with no goal in sight except an equality of devastation and squalor. Often the excuses amount to special pleading: why should we observe the rules when others do not? Why should we mind what African countries feel about sporting contacts with South Africa, when all kinds of excesses have

occurred elsewhere in Africa? Why should we not denounce the observance of Waitangi Day, when the provisions of the treaty have not been observed?

There is no human achievement that is proof against this form of attack, because progress is always uneven and imperfect. The Judges of the seventeenth century helped to ensure the sovereignty of a Parliament in which only wealth and rank were represented. Neither the principle of the rule of law, nor all the safeguards of fair trial, prevented eighteenth and nineteenth century Judges from passing savage sentences on men who stole loaves of bread to feed their starving families.

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

Debt to the world

The international order does not yet have this constitutional strength. Double standards are all too often the order of the day; but that is not a sufficient reason for any New Zealander to complain. If there were more fairness in the world, something of our privileged position might be lost. Fortunately for us, such world order as we have is based upon rights of sovereignty, and therefore supports the title of our three million people to remain unmolested in these magnificent islands. In return, we owe the world some ground-rent; and, if our attitudes are sensitive and sincere, our standing in the international community will be good.

Our Maori people are equally well-placed to obtain justice and recognition within their own country. After the land wars of the nineteenth century, and the physical and cultural decline of the Maori people extending into the present century, the ceremony at the Treaty House loses nothing by sharing centre stage with a large and vigorous contingent of a people revitalised, holding their language and their culture and standing upon ancestral rights.

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

Continued from p 202

13 Optional Protocol, Art 1.

14 "The Obligation of the Parties to Give Effect to the Covenant on Civil and Political Rights", 73 American Journal of International Law 462, 464 (1979).

15 Ibid at 462.

16 Ibid.

17 Ibid at 463.

18 In an introduction to the Report of the Ministry of Foreign Affairs for the year ending 31 March 1977, the Minister of Foreign Affairs, the Rt Hon Brian Talboys, commented that: "[The Government] has given full weight to moral issues – to its belief in fundamental human rights, racial equality, a natural desire to give a helping hand to those who are less fortunate and underlying all other elements the liberty of the individual."
In an address to the United Nations General Assembly, the Prime Minister, the Rt Hon R D Muldoon commented on the standards of compliance with such United Nations principles as self-determination, sovereign equality and the promotion of human rights. He said: "It is chastening to think how far we have to go before we can say we have reached the goals which, by our membership [in the United Nations] we have set for ourselves." *Auckland Star*, 8 October 1980).

19 See *Solomon v Customs and Excise Commissioners* [1967] 2 QB 116, 173.

20 "Britain's Bill of Rights" (1978) 94 LQR 512, 516.

21 Ibid at 552.

22 We are not suggesting here that entrenchment is appropriate for other international instruments.

23 *New Zealand International Review*, Vol V, No 4 (July-August 1980) pp 20-22.

24 Statute of the International Court of Justice, Art 59.

25 Ibid, Art 36.

26 On the Advisory Jurisdiction of the ICJ see Keith, *The Extent of the Advisory Jurisdiction of the International Court of Justice* (Leyden, A W Sijthoff, 1971).

27 Schwarzenberger, *Manual of International Law* (London, Stevens and Sons, 5 ed 1967) p 241.

28 Although the present author has, to date, heard of no plans to take any further steps.

Parliamentary Bridle

The powers of the courts in exercising federal jurisdiction to determine what documents shall be available for inspection and admission in evidence before them is, in my opinion, part of the judicial power of the Commonwealth vested in these Courts. It is not open to parliament to limit this power. It may regulate its exercise provided such regulation does not impair the power. It cannot usurp the power. For instance it is not open to parliament, in my view, to make the inspection and admission of documents before the Courts exercising federal jurisdiction dependent solely on the discretion of the Attorney-General.

– per Ellicott J
in *Haj-Ismail v Minister for Immigration* (1983) Australian Administrative Law Service 451.