# LAWYERS AND THE MAKING OF CONSTITUTIONS: MAKING CONSTITUTIONS IN THE SOUTH PACIFIC: ARCHITECTS AND EXCAVATORS

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## *I CONCERNING DEFINITIONS*

In the Hamlyn Lectures for 2000, Anthony King chose as his title a provocative question – "Does the United Kingdom Still Have a Constitution?".[1] The answer, it seems, depends on the definition of "Constitution" adopted by the respondent. If the 1733 definition of the Tory politician and autocratic parliamentarian, Lord Bolingbroke (1678-1751) were taken as the starting point, we could be led towards a negative answer. Bolingbroke proposed that:[2]

> By Constitution we mean, whenever we speak with Propriety and Exactness, that Assemblage of Laws, Institutions and Customs, derived from certain fix'd Principles of Reason...that compose the general System, according to which the Community hath agreed to be govern'd.

The Hamlyn Lecturer pointed out that it might be difficult to establish that the United Kingdom exhibited a coherent and principled "assemblage" to which the community had "agreed", so as to satisfy Bolingbroke's definition. The "fix'd Principles of Reason" might be particularly difficult to identify in the hotchpotch of rules and arrangements which had developed in relation to government in the United Kingdom. Troubling too would

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1 Anthony King "Does the United Kingdom Still Have a Constitution?" in *The Hamlyn Lectures 2000* (Sweet and Maxwell, London, 2001).

2 Viscount Bolingbroke "Dissertation on Parties" (1733) in Henry Saint-John *Works* (1809 ed) iii, 157. Quoted in King, above, 80.

be the overlapping and conflicting doctrines of the European relationship, and the *ad hoc* manner of their evolution.

On the other hand, Anthony King's own working definition would certainly allow us to discover a "Constitution" in the United Kingdom:[3]

> A Constitution is the set of the most important rules that regulate the relations among the different parts of the government of a given country and also the relations between the parts of the government and the people of the country.

You will see that this definition is a lean and positivist beast. Gone are the requirements for internal coherence and conformity with "reason", so too the consent of the people. The "rules" of this definition could, it seems, be of the most arbitrary and incoherent kind and be obeyed mainly or entirely from fear of oppression. King would still find a "Constitution" - though he would doubtless view it as a very bad one.

The two approaches have implications for the role of legal scholarship, which Professor Simmonds has recently and helpfully considered and described in this way:[4]

> On the one hand was a tradition that viewed law as the gradual working out of principles that trace the structure of a pre-existing, if inchoate, body of rights. This tradition could ascribe an important role to the doctrinal writer, whose task was (so far as possible) to present each individual rule as one fragment of the broader system of right ... On the other hand was a Hobbesian tradition, emphasising the groundedness of law in authority, and problematising or rejecting the role of the non-authoritative doctrinal writer.

The approaches point towards two different conceptions of the task of constitution-making. One begins with what I have elsewhere called "the architectural metaphor".[5]

On that view, Constitutions are "designed" by political leaders and philosophers whose objective is the betterment of society by the formulation of fundamental rules judged to be beneficial. The result succeeds or fails in accordance with the vision and wisdom of the designer. At the Conference which some of us attended in the Legislative Council Chamber across the road, two years ago, I suggested an alternative metaphor - not because I rejected the undoubted utility of rational law-making, but to balance the

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3 King, above, 1.

4 Nigel E Simmonds "Protestant Jurisprudence and Modern Doctrinal Scholarship" (2001) 60 CLJ 271, 284.

5 Alex Frame "Beware the Architectural Metaphor" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 427. The volume collects the Papers presented at the "Building the Constitution" Conference held on 7-8 April in the Legislative Council Chamber of Parliament Buildings in Wellington.

dangers that "architects" may lose touch with that reservoir of support and determination in the hearts of the people without which law becomes an alien imposition likely to be abandoned when circumstances permit:[6]

> While I do not discount the value of rational law-making, I would place equal importance on another metaphor - that of scholars lovingly excavating and uncovering the institutions and values of our peoples with a view to adapting and renewing the best of these for our present and joint needs.

Architects sit at their drawing-boards and attempt to create principles, structures, and processes informed by reason. Excavators try to discover the customary ways underlying a particular society, and to bring these to prominence and coherence. Of course, in the real world, these are two poles in between which there is a practical continuum. Even the most inspired architect is likely to pay some attention to the social context, and the most reverential excavator will give thought to the possibility of useful innovation. Nevertheless, attention to the poles may assist us in finding the right balance between these approaches.

## *II OF ARCHITECTS*

On the evening of Monday, 22 August 1892, an "enthusiastic meeting of Wellington Citizens" gathered in the Columbia Skating Rink - the Vivian Street site, which was Wellington's great indoor gathering place before the building of the Town Hall - to congratulate Sir George Grey on his eightieth birthday. Flags flew, the Garrison Band blared, and leading politicians such as soon-to-be Premier Richard Seddon, Downie Stewart, and HD Bell attended. The Great Man himself spoke at length to the Meeting and his words were recorded for posterity, by the *New Zealand Herald*'s reporter.[7]

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6 Frame, above, 431.

7 (24 August 1892) *New Zealand Herald*, Auckland. Over 2000 attended and the warmth of the well-wishers is unmistakable. The *Evening Post* carried a briefer report, noting that "Sir George detailed how the Constitution Act of the Colony was framed by himself in a tent on the bank of the Wanganui River ..." (23 August 1892) *The Evening Post*, Wellington. The *New Zealand Times* of 23 August 1892 reports Sir George verbatim in language close to that of the *New Zealand Herald*, with this further quotation:

> He did not know why, now he was 80 years of age, he need be ashamed that he had taken those pains, undergone solitude, lived alone with nature and his Maker, free from all worldly thoughts as what the effect would be in preparing that despatch. The despatch was sent Home, and was adopted without difficulty by Parliament with one change, that relating to the Legislative Council. That Constitution became the model of the Canadian Constitution.

(23 August 1892) *The New Zealand Times*, Auckland. This was not the only occasion on which Sir George Grey expanded on his role in the making of the 1852 Constitution. Alexander McLintock

> Now, I don't mind telling you how the New Zealand Constitution was planned ... Having been charged by the British Parliament with the duty of drawing up this plan, I felt that I had a sacred duty to New Zealand to perform of the most portentous kind, and I resolved that, uninfluenced by any other person's views, undisturbed by the Press, undisturbed in any way, I would go out in the wilderness as it were, and fearlessly brave all its novelties ... And I set off to Wanganui accompanied by about six or seven natives, crossed the river, and went to the foot of Mount Ruapehu, and spent some time there alone ... living in a little bit of a tent, having very little food, and in every way undisturbed, I wrote the document which was sent home and secured that Constitution for New Zealand. (Cheers). I proposed to go on to Auckland with it but by ill fate was induced to determine to ascend the Ruapehu ... I went to the top of the Mountain. Seeing me there, the natives became alarmed, and, as they were afraid the taipo would attack them for violating the tapu, I had to go back with the letter to Wellington, and it was from this town that the documents were despatched. Now that is the true history. I never made it public, I do not know why ...

Here is the Architect *par excellence* at work – wild places and mountain tops are favoured places for the activity. It seems that only Maori had any say in the project - and they only marginally! I am afraid that we learn also from the somewhat grating tone of the remarks why Sir George Grey could on occasion irritate rather than enlist the sympathies of some of his fellow citizens.

The "despatch" to which Grey refers as the seminal document, seems to be that of 30 August 1851,[8] sent from "Government House, Wellington" to Sir George's immediate

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mentions two others in his *Crown Colony Government in New Zealand* (Government Printer, Wellington, 1958) 331-332. McLintock is critical of Grey's more extravagant claims, but does concede, at 332, that, "it is incontestable that Grey, in a long series of dispatches, did impart to the constitution a great deal of its character".

8 "Papers Relative to the Proposed Constitution of New Zealand" (30 August 1851) in *British Parliamentary Papers: Papers Relating to New Zealand: Vol 8,* 18. Although I have not been able to document Sir George Grey's journey to Wanganui and Ruapehu (which must presumably have occurred in the winter of 1851 and before August 30th), one clue that connects the despatch with such a journey is found in paras 19 and 20 where Sir George writes with obvious first-hand knowledge:

> [I]t may be stated that the centre of (the North) island is occupied by a mountain range covered with perpetual snow, having as one of its peaks a volcano of boiling water. The snows which cover this range form perpetual springs from which rivers of cold and pure water are thrown off in all directions to the coast ... The central mountain range throws off also spurs or ridges of very difficult mountainous country in various directions to the coast ...

More conclusive is a pamphlet in the Turnbull Library "The Constitution of New Zealand: Despatch from Sir George Grey to the Rt Hon Earl Grey" (ATL, Pam 1891). The Turnbull Library

superior in London, Earl Grey, and containing several interesting observations and recommendations on the measure which the London Parliament was to enact to replace the aborted 1846 Act, which Grey had on his own authority declined to apply in New Zealand in what must surely be one of the most extraordinary acts of disobedience by a civil servant to a Statute of the Imperial Parliament duly assented to by Queen Victoria. The 1846 Act and the Royal Instructions that accompanied it would have confined recognition of Maori claims to land to those areas *actually occupied*, treating everything beyond as "waste lands of the Crown". Sir George Grey's commendable stand was taken principally on the basis that this conflicted with the understandings in and behind the Treaty of Waitangi and would have, in any case, been impossible to enforce without a war against Maori, which he believed to be both unjust and unwinnable.

It is difficult not to admire the clear thinking and writing of our great jurist, Sir John Salmond. Two surprises lie in wait, however, for the student of Salmond's law designing roles in the South Pacific - in the Cook Islands and Samoa.[9] The first is that Sir John appears never to have set foot in either territory, and to have made only the most general inquiries concerning local traditions and conditions before preparing his comprehensive codes in 1914 and 1920 respectively - incidentally, working in this very building where we confer to honour the great contribution of Sir Ivor Richardson to our law. The second surprise, must, however be that important elements of the conceptual foundations of those codes survive today, long after the power to revoke or modify those elements has passed to independent legislatures to which indigenous advice is available. There could be two explanations for this longevity of Salmond's foundations. First, that Salmond was right in his assumption that good legal principles can be deduced in the abstract and successfully applied to heterogeneous social circumstances, in the same way that the laws of physics are efficacious. The principles survive because they are the best possible. A second explanation might be that just about any principles - no matter how foreign or even dysfunctional at inception - are better than none, and can in time acquire the patina

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copy is inscribed by Sir George Grey to "G Didsbury with Sir G Grey's regards". The "despatch" printed in the pamphlet is that of 30 August 1851 and the "preface" states that:

> The result of that despatch was the enactment by the British Parliament of … (the New Zealand Constitution Act 1852) … The objects specially contemplated in drafting that constitution had been to do away with various restrictions upon freedom of election and legislation, which at that date had prevailed. To do away with the necessity for any special rank, or money, or property qualifications, to enable a person to enter a legislative body … To establish Provinces with the most ample powers of local self-government …

9 The circumstances are more fully dealt with in Chapter 13 of my book, Alex Frame *Salmond: Southern Jurist* (Victoria University Press, Wellington, 1995).

of customary usage.[10] Would-be reformers seeking to return to "authentic" custom now seem themselves to be interfering with ancient ways. The principles - revolutionary at their inception - survive because they have *become* customary and are now protected by conservative inertia.

I should say immediately that I favour the second explanation over the first. Here is the reconciling bridge between the Architects and the Excavators - given time and stability, they can end up in the same place. The question squarely raised by the foregoing is: under what circumstances will design, even novel design, come in time to claim that place in the hearts of the people reserved for custom and from which grows the determination to defend institutions and principles against enemies internal and external? Conversely, under what circumstances will design prove to be no more than sky-geometry which may be shown by time to compound its ineffectiveness with cruelty - by dangling an illusion before those who almost invariably suffer the most from constitutional failure - the poor and the powerless? Sergei Kovalov told a meeting of *Human Rights Watch* in New York, in 1996:[11]

> I can count on my fingers all the lawyers in the former Soviet Union who had the courage to speak out for the rule of law ... Scientists did better because they were able to preserve their academic independence.

The Soviet Union had a Constitution - chockfull of "rights" and the "rule of law". It failed because it never became the object of that reservoir of support and determination in the hearts of the people (or even of its lawyers) which rulers of all kinds fear, and which no amount of force can in the end overcome.

## *III OF EXCAVATORS*

Our constitution in New Zealand has two features, which make it particularly suitable for the excavating method of development. First, the vital role of what Dicey called "conventions of the constitution" - rules which determine events notwithstanding that the Courts play no part in their enforcement. As Dicey's description implies, these rules depend upon acceptance for their efficacy and cannot be understood without knowledge of the historical circumstances in which they arose and are maintained. A second feature favouring an historical approach to constitutional development is the continuing vitality of the common law, as declared by the Courts as a component of our legal system.

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10 See for example, the way in which the Missionary-inspired *Pomare Code* proclaimed in Tahiti on 13 May 1819 has come to be seen as indigenous, as described by Professor Bruno Saura in "Customary Rules in French Polynesia" in Paul De Deckker and Jean-Yves Faberon (eds) *Custom and the Law* (Asia Pacific Press, Canberra, 2001) 81.

11 Sergei Kovalov "On the New Russia" (April 10 1996) *New York Review of Books* 10.

Statute and the common law were the two sources of our legal system. In origin, the common law was simply the declaration of custom as it was found to be when filtered in accordance with some evidentiary rules applied by the Courts.[12] It is not surprising, therefore, to find Judges trained in our common law system well accustomed to the excavating method, and conscious also of the dynamic nature of custom and social values. In a remarkable speech in 1994, Sir Ivor Richardson expressed that awareness in this way:[13]

> Any survey of democracies shows that different societies give different emphases to different values and that the emphases may change over time. For example, as between individuality and community; national identity and pluralism; the collective will and minorities; diversity and unity; individual autonomy and social cohesion; competition and cooperation; change and stability; conformity and tolerance; independence and security; civil rights and economic wellbeing; fairness and efficiency; rights and responsibilities; just deserts and social justice. It is not a matter of selecting one and rejecting the other. Rather it is a matter of arriving at the balance for that society on that particular continuum. And that balance will itself change in response to changing social values and needs.

A second example of the subtle way in which our Constitution changes, may be noted. Careful watchers of the most helpful and influential short statement of our constitutional principles - the Introduction to the *Cabinet Manual* - may have noticed an interesting change between the 1996 and 2001 editions. In 1996, the section titled "Other Sources of the Constitution" made no reference to the Treaty of Waitangi, although the strong effect of that document on "legal polity" was helpfully referred to in a section discussing the ways in which "individuals and communities … participate directly in political and governmental processes important to them". The 2001 edition, however, has moved that discussion of the political effect of the Treaty to the "Other Sources of the Constitution" section. This re-classification of the Treaty of Waitangi is both appropriate and significant - if I may say so, it is a good example of the excavating method. New Zealand attitudes to the Treaty have changed, and it has become clear in a way that was not previously evident, that all branches and all levels of government, and significant sections of our people, view the Treaty as a founding constitutional document.[14] In the

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12 See Sir John W Salmond *Jurisprudence* (7 ed, Sweet & Maxwell, London, 1924) 207. Salmond notes that the original nature of common law became submerged, as the activity of the Courts produced a body of case law. In another example of constitutional law following constitutional fact, the common law *became* that body of case law (see Salmond, above, 225-226).

13 Rt Hon Sir Ivor Richardson "The Courts and the Public" (1995) NZLJ 11, 12. The speech was first delivered to the Australian Institute of Judicial Administration in November 1994.

14 *Cabinet Manual* (Cabinet Office, Wellington, 1996 and 2001). See the introductory note, titled "On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of

face of that, the formal legal doctrine under which Treaties, including that of Waitangi, are not directly a source of law in New Zealand gives way to constitutional fact.[15] It was Sir John Salmond, writing exactly one hundred years ago, who reminded us that:[16]

> The constitution as a matter of fact is logically prior to the constitution as a matter of law. In other words, constitutional practice is logically prior to constitutional law. There may be a state and a constitution without any law, but there can be no law without a state and a constitution. No constitution, therefore, can have its source and basis in the law. It has of necessity an extra-legal origin, for there can be no talk of law, until some form of constitution has already obtained *de facto* establishment by way of actual usage and operation. When it is once established, but not before, the law can, and will, take notice of it. Constitutional facts will be reflected with more or less accuracy in courts of justice as constitutional law ...

The Cabinet Manual has properly noted a change in constitutional fact. Excavators are at work! The possibility that legal doctrine as expounded by the Courts may need time to take account of that change and weave it into the fabric of the law was anticipated in Salmond's analysis.

Two distinguished members of the Law Faculty of Victoria University, Professors Aikman and Quentin-Baxter, played leading advisory roles in the preparation and drafting of the Constitutions of the Cook Islands and Niue in the mid 1960's and 70's respectively, as those territories moved to their current status of associated statehood. Having been engaged over a long period in advising on the interpretation, and on some occasions, amendment, of those founding instruments, I have come to admire their elegance and integrity. Although these constitutions had a degree of design forced upon them by circumstance, they were much more reflective than Sir John Salmond's codes of what the American anthropologist Clifford Geertz would call "local knowledge", and went to considerable trouble to incorporate local institutions - for example, in the case of

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Government". The document derives its influence both from the eminence of its author, the Rt Hon Sir Kenneth Keith, and from the authority and strategic position of its primary audience, government itself. For a helpful discussion of the status of the Manual, see Elizabeth McLeay, "What is the Constitutional Status of the New Zealand Cabinet Office Manual" (1999) 10 Public L R 11-17. For the point made in the text, compare page 4 of the 1996 *Cabinet Office Manual* with page 2 of the 2001 *Manual*.

15 I refer of course to the doctrine most bindingly articulated in relation to the Treaty of Waitangi by the Privy Council in *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC).

The doctrine has been acknowledged by the New Zealand Court of Appeal as an insuperable barrier to direct enforcement by the Courts of the Treaty of Waitangi, see *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) and the observation of the then Cooke P at 655.

16 Sir John W Salmond *Jurisprudence* (7 ed, Sweet & Maxwell, London, 1924) 154.

the Cook Islands, the House of Ariki, and the traditional villages, in the case of Niue. In 1991, I was engaged as Special Counsel to advise the Constitutional Review Committee of the Niue Assembly on proposals to amend the Niue Constitution enacted in 1974. Working in Alofi, I asked to see any previous materials held there relevant to the preparation of the 1974 Constitution. In a cardboard box brought to me, I found some fading typewritten pages containing what appeared to be a transcript of comments by Professor Quentin-Baxter to the Niue Assembly on 21 January 1976 on the occasion of a meeting to review the operation of the Constitution which had entered into force on 19 October 1974. The presentation, which dealt with specific concerns and questions raised by the Niuean legislators, began with these words:

> You could think of the Constitution as being a little like the land and the sea of your own island. The land and the sea, the trees and the sunshine, sometimes a little rain, are what make up the basis of your lives. They are what you build upon. And yet, the land and the sea are nothing unless there are men and women here to thank God for them, to cherish their own culture and traditions and to move forward into the future. It is the life of the people that gives a meaning to the land. So too with the Constitution, it should be a solid basis for your lives, as reliable and as firm as the coral rock of the island itself and yet, without life and without the desire to work it, without men and women considering new questions, living in the spirit of the Constitution, it is only words on a piece of paper.

The comment, finely tuned to its Niuean audience, also captures the vital link between constitution and culture, which I have tried to emphasise in this paper.

## *IV A REPORT ON EXPERIENCE - ADVISING IN THE COOK ISLANDS*

In this section, I must admit to being a small-time excavator. It has been a privilege to have been asked by successive Solicitors-General of the Cook Islands under successive Governments to advise from time-to-time, over a twenty year period, on issues arising under or in relation to the *Constitution of the Cook Islands*. Some sixty-five legal opinions and other papers tendered to or through the Crown Law Office in response to these requests are indexed and bound in two volumes held in the Crown Law Office in Rarotonga. They are of course confidential to the Cook Islands Law Officers unless that status is waived by the Officers.

The present Solicitor-General of the Cook Islands, Janet Maki, has very kindly consented to release in this Paper of the opinion of 2 July 1999, relating to the powers and functions of the Queen's Representative in a post-election situation, on the basis that the opinion was by arrangement made available in July 1999 to the leaders of all political parties to have won seats in the 1999 elections and is, therefore, already a semi-public document. Secondly, Solicitor-General Maki took the view that the opinion related to general issues of public law, which were properly a matter of public interest. The

opinion provides a useful illustration of some of the central issues arising from so-called "Westminster model", supreme-law, written constitutions in the Pacific.[17]

His Excellency Sir Apenera Short KBE,
Queen's Representative,
Rarotonga,
COOK ISLANDS

Friday 2 July 1999

Dear Sir Apenera,

I had been asked by the Solicitor-General, Ms Janet Maki, whose Office has the responsibility for advising Your Excellency on legal matters,[18] to prepare a Paper which might be of some assistance to Your Excellency in exercising the functions and powers provided in the Constitution in relation to post-election situations where it might not be immediately clear whether the Ministry which had enjoyed the confidence of a majority of the outgoing Parliament could continue in office after the election, and in due course submit itself to the will of the majority in the Parliament to be formed.

1 Interpretation of the Powers in the Constitution

1.1. The Constitution of the Cook Islands is a written constitution, and it is declared to be the "supreme law" of the Cook Islands.[19] No other law or practice, of whatever origin, which is contrary to or inconsistent with the Constitution, can be given effect to by Cook Islands Courts. Some other parts of the Commonwealth have similar constitutions, and principles have emerged as to the approach which is properly taken to their interpretation. These may be

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17 The expression "Westminster model" is a curious one. The explicit status as supreme law, and the codified form of the post-war Commonwealth constitutions, not to mention the presence of "fundamental freedoms", distinguishes them fundamentally from the traditional London pattern. My former colleague, Professor Ralph Carnegie of the University of the West Indies has observed in this connection:

> [t]hat psychological comfort still has a part to play in constitutional design is no doubt too obvious for any warning to be needed against denying its value ... when we speak of our Westminster model Constitutions, we are not being lawyers or even political scientists. We are at best being poets. Ralph Carnegie "Floreat the Westminster Model? A Commonwealth Caribbean Perspective" in *Meeting of Law Officers of Small Commonwealth Jurisdictions - 5-9 December 1988* (Commonwealth Secretariat, London, 1998).

The designation can be expected to persist, however, see for example Lord Dilhorne's description of the term as "felicitous" in *Hinds v The Queen* [1976] 1 All ER 353 (HL).

18 *Crown Law Office Act* 1980 (CI), s 10

19 *Cook Islands Constitution Act* 1964 (NZ), s 4.

summarised by saying that the Constitution is to be viewed as being in a class of its own and not necessarily subject to technical rules of statutory construction, but is rather to be given a broad and generous interpretation. One distinguished Judge has said that:[20]

> Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language.

1.2. These words remind us that the core concepts of responsible government, parliamentary supremacy, and constitutional monarchy, which lie at the heart of the Cook Islands Constitution, have a long history of development within the Commonwealth - one which was certainly present to the minds of those leaders and advisers who shaped the Cook Islands document. A careful and cautious reference to the "traditions and usages" which lie behind the Constitution will therefore be appropriate to reaching an understanding of the language of the Constitution and to giving it proper effect.

1.3. However, the Cook Islands Court of Appeal has underlined the dangers of importing the principles and practices of other systems into the Cook Islands context. The Court has stated that the drafters of the Cook Islands Constitution:[21]

> have attempted to spell out in some detail the powers, principles and procedures which in other systems, such as those of New Zealand and the United Kingdom, are left to practice ... It should not be assumed that the traditional models have been carried over without change. As the Privy Council warned we should guard against forcing the new constitutional language into a traditional pattern if it does not fit.

1.4. The conclusion must therefore be that the constitutional conventions which supply the framework for the formation and operation of government in the United Kingdom and in New Zealand - where there are no single, "written", supreme law, constitutions of the Cook Islands type - must be approached with caution in the Cook Islands. There may be room for allowing such conventions to fill out or colour the rules of the Constitution where these may be incomplete or unclear, but not to modify or qualify rules in the Constitution which are on their face clear and complete.[22]

## 2 The Cook Islands Court of Appeal's 1983 Explanation of the Constitutional Rules for the Formation of Government

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20 *Minister of Home Affairs v Fisher* [1980] AC 319, 329 (HL) Lord Diplock.

21 *Reference by the Queen's Representative* [1985] LRC (Const) 56, 71-72.

22 The same conclusion has been expressed to the present writer by the well-known Pacific constitutional adviser, Dr Colin Aikman, with respect to the Samoan Constitution.

2.1. The most authoritative interpretation of the intent and meaning of Articles 13 and 14 of the Constitution is to be found in the 1983 judgment of the Cook Islands Court of Appeal in Reference by the Queen's Representative [1985] LRC (Const.) 56. That Court consisted of Sir Graham Speight CJ, the late Dillon J., and perhaps the most eminent present-day New Zealand constitutional authority, Keith J., as Sir Kenneth Keith of the New Zealand Court of Appeal then was.

2.2. Referring to Article 14 (1) of the Constitution as it then was, the Court said:[23]

> The Queen's Representative has a discretion to terminate the appointment of the Prime Minister who was in office at the time of the election ("the holdover Prime Minister"). The draftsmen have not stated grounds for the exercise of this power ...

2.3. The Court of Appeal made two clear findings. First, that when Parliament is in session, only an actual expression of its will expressed in a vote, or in "some other unequivocal act", will satisfy the requirement in Article 13 (2) (a) that the Queen's Representative appoint as Prime Minister "a person who commands the confidence of a majority of the members of Parliament". This interpretation was said by the Court to be in keeping with the tenor of the "South Pacific model" which was seen as giving to Parliament "the central role in selecting the Prime Minister". However, when the Court came to discuss the other two situations covered in Article 13 (2) (b) and (c) - when Parliament is not in session or is dissolved - it recognised that, by definition, there would be no existing Parliament:

In the nature of things there can be no contemporaneous Parliamentary approval of the Prime Minister appointed at these times.

2.4. Referring to Article 13 (2) (b), and the power of the Queen's Representative to appoint as Prime Minister a member of Parliament who in his opinion, "acting in his discretion, is likely to command the confidence of a majority of the members of Parliament", the Court of Appeal said that:[24]

> These phrases and the timing clearly indicate that the Queen's Representative in these cases will have to make his own best estimate. The party situation may make his task simple. If it does not, he will have to draw on his own good sense and political sensitivity and that of the other main actors ... There can however be no guarantee that

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23 *Reference by the Queen's Representative*, above, 65. The expression "holdover Prime Minister" thus has the stamp of judicial support and will be used throughout this Paper. The original form of Article 14(1) simply gave discretion to terminate the appointment of the "holdover" Premier in the gap between the election and the meeting of Parliament. By effect of the *Constitution Amendment (No 15) Act* 1993, the present formula, requiring the Head of State to form the view that the Prime Minister is "unlikely to command a majority ..." was added.

24 *Reference by the Queen's Representative*, above, 63.

> his judgment will turn out to be the correct one, and, even if correct to begin with, alignments may change before Parliament first meets.

2.5. The second major finding of the Court of Appeal in 1983 was that Article 14 (2) of the Constitution (since repealed), which at that time automatically terminated the appointment of the "holdover Prime Minister" seven days after the meeting of the new Parliament after an election, also applied to a Prime Minister who had been appointed after the election under Article 13 (2) (b) as being "likely to command a majority".

2.6. The significance of the 1983 decision continues to be the identification by the Court of Appeal of the "central role for Parliament" in the selection of the Prime Minister in the "South Pacific model" of Constitution. The Court of Appeal said:[25]

> ... according to the Constitution it is the Parliament that in reality chooses the Prime Minister. The power of the Queen's Representative is a temporary and limited one. If he makes an appointment after the election and before the Parliament meets or if he leaves the holdover Prime Minister in office, Parliament must confirm that decision or in effect choose a new Prime Minister.

That observation by the Court also makes it clear that one option available to the Queen's Representative is to leave the holdover Prime Minister in office pending the first session of the new Parliament. In that circumstance, no occasion arises for the exercise of the Article 13(2)(b) power: the holdover Prime Minister meets the new Parliament and submits to its vote under Article 13(2)(a).

3 The Discretions of the Queen's Representative After an Election

3.1. Article 14 (1) provides that the Queen's Representative may terminate the appointment of the holdover Prime Minister:

> if it appears to the Queen's Representative, acting in his discretion, that the Prime Minister is unlikely to command the confidence of a majority of the members of Parliament.

3.2. The "unlikely to command" test was inserted in 1993 by an amendment to the Constitution. At the same time, the original Article 14 (2), which had been held by the Court of Appeal to require the Prime Minister to resign or to lose office by operation of law seven days after the meeting of the post-election Parliament, was repealed.

3.3. That repeal has taken away the mandatory termination of the Prime Minister's appointment seven days into the first post-election session of Parliament. However, it is suggested that the position of the holdover Prime Minister will be tested as soon as Parliament

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25 *Reference by the Queen's Representative,* above, 72.

meets, either by a motion of confidence moved by the Prime Minister, or by a motion of no-confidence moved by an opponent.

3.4. It is most important to stress that the Queen's Representative is entitled to exercise the post-election discretions independently. Indeed, in a 1986 case,[26] the Supreme Court of Malaysia had to consider circumstances in which pressure had been put on the Head of State in the exercise of functions similar to those in the Cook Islands Constitution. A number of interesting points emerge from the Court's judgment. First, the manner in which the power conferred on the Head of State was exercised was not open to judicial review except on the ground that it exceeded the constitutional provisions themselves. Secondly, and in reference to the attempts to pressure the Head of State, the Court stated that:[27]

> the Head of State must be allowed to make his judgment quietly, independently, and in a dignified manner, as intended by the Constitution.

3.5. Indeed, in the Mustapha case, the Court found that the cumulative effect of the pressure on the Head of State was such as to invalidate the appointment which it produced. The significance of the decision would therefore appear to be that the Queen's Representative's discretions require him to make his judgment on material which he considers relevant, and that he is entitled to make his decision independently and without pressure.

4 Applying the "unlikely to command" Test

4.1.When might the occasion arise for the termination of the appointment of the "holdover Prime Minister" under the discretion vested in the Queen's Representative where he forms the view that the Prime Minister "is unlikely to command the confidence of a majority of the members of Parliament"? Three questions would appear to arise:

(1) On what information may the Queen's Representative form his view?

(2) What standard is set by the "unlikely to command the confidence" test?

(3) Which "members of Parliament" should his Excellency have in mind in applying the test?

4.2. *Question 1 - On what information?* The approach of the Cook Islands Court of Appeal in 1983 to the Article 14 (1) and Article 13 (2) (b) discretions was that the Queen's Representative would have to make "his own best estimate", and that His Excellency would need in both circumstances to draw on information available from public statements, and also on information gathered from his own inquiries made of the key players.

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26 *Mustapha v Mohammad and Another* [1987] LRC (Const) 16.

27 *Mustapha,* above, 126.

4.3. The New Zealand Governor-General, Sir Michael Hardie Boys, formerly a judge of the New Zealand Court of Appeal, has recently made two interesting speeches on his understanding of his functions and powers under the conventions and principles concerning the formation of Government in New Zealand. In April 1996, His Excellency gave a widely reported speech the aim of which was:[28]

> to ensure, so far as possible, that the principles and processes for moving from the election to the formation and appointment of a new Government were clear, and understood by a sufficient number, so that the focus of public attention could be where it belonged - on the political actors who would be required to negotiate and work together to reach a political resolution.

4.4. The vital point underlined is that responsibility lies with politicians to resolve the situation, and to send clear public signals to enable the Head of State, acting in a non-political role, to play the formal constitutional role. The role of the Head of State should normally be one of ratifying the arrangements reached and declared by the political leaders.

4.5. Sir Michael went on to list what His Excellency described as a "few simple points":[29]

> The formation of a Government is a political decision and must be arrived at by politicians. My task as Governor-General is to ascertain where the support of the House lies. In an unclear situation, that might require me to communicate with the leaders of all of the parties represented in Parliament.
>
> Once political parties have reached an adequate accommodation, and a Government is able to be formed or confirmed, the parties could be expected to make that clear by appropriate public announcements of their intentions. At that point it might be necessary for me to talk with some party leaders. I would then expect to have sufficient information to be able to appoint a new Prime Minister, if that were required.
>
> Throughout this period of negotiation, the incumbent Prime Minister remains in office, governing in accordance with the caretaker convention (under which the incumbent Government remains the lawful executive authority, but constrains its actions until the political situation is resolved and a successor is appointed.)

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28 The summary of the 1996 speech by Governor-General Hardie Boys was provided in a second speech, given on 3 December 1998, at the Institute of Policy Studies Seminar in Wellington. The 1998 speech was titled Rt Hon Sir Michael Hardie Boys "The Constitutional Challenges of MMP: A Magical Demystification Tour" (Speech presented to the Institute of Policy Studies Seminar, Government House, Wellington, 1998) 2.

29 "Magical Demystification Tour", above, 2- 3.

The "caretaker" issue needs to be approached carefully for reasons given at the beginning of this Paper, and will be addressed below.

4.6. *Question 2 - What does "unlikely" mean?* It is suggested that "unlikely" does not mean merely "possible". In a post-election period it might be "possible" that, if election petitions have certain outcomes, and if reported discontent within parties is later reflected in changes in party membership, or allegiances change for whatever reasons, the holdover Prime Minister might not receive the support of a majority in the Parliament to be. But it is submitted that these mere possibilities will not suffice to trigger Article 14 (1), and that to exercise the discretion against the holdover Prime Minister, the Queen's Representative needs to conclude that, on all the properly available information, a mere "possibility" has escalated to "probability". It need not move to "certainty", but it must seem to the Queen's Representative that there are good reasons for believing that possibilities will be realised in such a way that the hold-over Prime Minister will not command majority support in the Parliament to be formed.

4.7. *Question 3 - Which "Members of Parliament" should be in mind?*It is submitted that the logic imposed by the primacy of the role of Parliament in the selection of the Prime Minister - as affirmed by the Court of Appeal in 1983 - points clearly in the direction of the members of the Parliament-to-be as the reference point for the 14 (1) discretion. The Queen's Representative has already had to estimate what members might do - now, he also might have broadly to estimate the composition of the Parliament to be. His Excellency, as head of the Executive branch of government, will not wish to anticipate the result of particular election petitions before the Judicial branch, but as these are progressively determined, a picture will begin to emerge. In the meantime, the Queen's Representative's 14(1) "radar" remains switched on, ready to assess any circumstances which indicate that it is "unlikely" that the holdover Prime Minister will command majority support in the Parliament-to-be.

4.8. It is suggested that a possible approach by His Excellency will be to put the seats subject to election petition to one side until they are progressively decided (within the meaning of Article 29(2) of the Constitution). For the moment the petitions signify only possibilities, not the probabilities which, it was argued in paragraph 4.6 above, are required for the operation of Article 14(1), and Article 13 (2) (b). His Excellency might however be entitled to bear in mind that, historically, election petitions go both ways - some are successful and some not. Without prejudging any particular petition - which would be inappropriate - the Queen's Representative might provisionally regard them collectively as neutral for the purpose of assessing probabilities. All that the Queen's Representative can do is to note that there could be some changes from the initial election results.

4.9. The manner in which seats under election petition are to be treated is particularly sensitive because it would be unfortunate if it came to be thought that the discretion of the Queen's Representative in the post-election situation could be manipulated by the tactical filing of election petitions.

4.10. A further factor that will no doubt be present to the mind of the Queen's Representative in considering the possible exercise of the Article 14 (1) discretion, is that his Excellency must never be without responsible advisers.[30] Therefore, if His Excellency were to terminate the appointment of a holdover Prime Minister, he immediately faces appointing an alternative under Article 13 (2) (b), for which the test is that the appointee must be "likely to command the confidence of a majority of the members of Parliament". Again, and in accordance with the discussion in paragraph 4.6., the Queen's Representative will be concerned not with mere possibilities, but with probabilities.

5 The "Caretaker Principles"

5.1. The Cook Islands Constitution does not explicitly contain any such concept as that of "caretaker Government", under which a Ministry which is for the time being unable to demonstrate the support of a majority of the Members of Parliament would regard itself as being constrained to avoid or postpone some actions which would be open to a more fully-mandated Government. However, my inquiries reveal that there are circumstances in which Governments in the Cook Islands have regarded themselves, in practice if not in law, as restrained from taking particularly significant policy measures until a clear mandate is confirmed by Parliamentary vote.

5.2. Although this does not mean that the full range or extent of the caretaker principles as understood in New Zealand can be imported into the Cook Islands Constitution - for reasons explained in paragraph 1 of this Paper - it does suggest that an embryonic practice relating to "caretaker government" may be developing in the Cook Islands, and may be expected to grow and, in time, crystallise into a form which may be stated as principles. The New Zealand practice, for example, is explained in that country's "Cabinet Office Manual" as follows:[31]

> A basic principle of New Zealand's system of responsible government is that the government must have the confidence of the House of Representatives to stay in office. On occasion, however, it may be necessary for a government which does not clearly have that support to remain in office on an interim basis until the situation is clarified. During such periods the incumbent government is still the lawful executive authority, with all the powers and responsibilities that go with executive office. That government is required to stay in office until a successor is able to be appointed. But in recognition of the fact that government may no longer have the confidence of the House, governments have traditionally constrained their actions until the political

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30 See Robert Quentin Quentin Baxter "The Governor-General's Constitutional Discretions: An Essay Towards a Re-Definition" (1980) 10 VUWLR 289, 308.

31 *Cabinet Office Manual* (Cabinet Office, Wellington, 1996) 20-21.

> situation is resolved, in accordance with what is known as the convention on caretaker government.

5.3. Some observers have argued that a "holdover" Ministry - in the period following the election and before Parliament meets - is in such a "caretaker" situation, and have specifically urged that the Prime Minister ought not to offer, or the Queen's Representative to accept, advice under Article 13 (3) as to the appointment of Ministers to replace those who have lost their seats at the election.

5.4. I have formed the view that this argument goes too far. It ignores the Court of Appeal's warning in 1983 against allowing "convention" to modify the clear words of the Constitution. Article 13 (3) unambiguously vests the power to advise the appointment of Ministers in the Prime Minister. The Queen's Representative is given no discretion in the matter. Furthermore, the specific device which is employed in the Constitution to guard against advice to the Queen's Representative from a Prime Minister lacking Parliamentary support is found in Article 37(3), which allows the Queen's Representative not to act on the Prime Minister's advice to dissolve Parliament:

> unless the Queen's Representative is satisfied, acting in his discretion, that in tendering that advice the Prime Minister commands the confidence of a majority of the members of Parliament.

5.5. In the absence of any indication that the power to advise appointment of Ministers is limited, there would appear to be no constitutional restriction on the power other than the rules of law specifying the number of, and qualifications for, Ministers. Indeed, were the Queen's Representative to decline to appoint a Minister on the advice of the Prime Minister, it seems that the appointment would take effect by operation of law after 14 days in accordance with Article 5 (2) of the Constitution.

5.6. Finally, I do not consider that the result of the above argument is unreasonable. It is difficult to see why the holdover Prime Minister should not be entitled to a "full deck" of Ministers to carry the various portfolios over the hold-over period. Given the time which might elapse before the summoning of the post-election Parliament, it would seem proper that the affairs of the Cook Islands should receive the attention of the number of Ministers deemed by the Constitution to be necessary for the efficient conduct of the nation's business.

## 6 Some Concluding Observations

6.1. It has been suggested, following the lead of the Cook Islands Court of Appeal, that the Cook Islands Constitution contains rules for the formation of Government which pivot on the central role for Parliament. Out of necessity, the holdover Prime Minister or, if required, the Article 13(2)(b) Prime Minister, are fully empowered Heads of Government under the Constitution, but they are temporary tenants of the office until the all-important decision of the

new Parliament. Therefore, it is of great importance that Parliament be called as soon as possible, within the requirements of Article 29 of the Constitution. It would be appropriate for the Queen's Representative to seek assurances from the holdover, or Article 13(2)(b), Prime Ministers that advice will be tendered as soon as the Constitution allows for the calling of Parliament.

6.2. Finally, it is perhaps worth quoting the words with which the New Zealand Governor-General ended his address, quoted above, in December 1998. His Excellency quoted Gladstone, the nineteenth century British Prime Minister, who wrote that the "unwritten" British Constitution:

> Presumes more boldly than any other, the good sense and good faith of those who work it.

As has been suggested above, the Cook Islands Constitution has codified many of the rules to which Mr Gladstone was referring. However, in the maintenance and formation of Government in between an election and the meeting of Parliament, Gladstone's observation has a relevance for the modern Cook Islands.

With respectful Greetings to Your Excellency,

yours sincerely,

(Alex Frame)

## *V A CONCLUSION*

The kind of legal activity of which I have tried to provide a concrete and practical example in the preceding section certainly lacks the grandeur and glamour of constitution-making of the architectural type. It also lacks the authority of judicial pronouncement, being liable at all points to subsequent (and for the provider, embarrassing) contradiction by the Courts whose function it is authoritatively to declare the law. Nevertheless, the formulation of first-level legal advice can provide guidance to the practical operation of the Constitution and a stabilising influence in uncertain times, whilst avoiding both the costs and divisiveness of resort to the Courts. The tendering of formal legal advice to those responsible for carrying out constitutional roles normally takes place out of the public view: it may nevertheless justly be considered as a constitution-shaping activity.