

# SOVEREIGNTY AT THE BEGINNING OF THE 21ST CENTURY : FUNDAMENTAL OR OUTMODED?

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Exactly ninety-eight years ago today, fifteen young New Zealanders played a game of rugby against fifteen members of colleges of what I understand is known here as “the other place”. One wit said that the game was an even one because six tries were scored in the first half and seven in the second. I need not tell you that all the tries were scored by the one side or which side it was.

What I should tell you is what those young New Zealanders knew and thought. In the words of a marvellous New Zealand novelist, Lloyd Jones, in *The Book of Fame*:

Space was our medium:  
our play stuff  
we championed the long view  
the vista  
the English settled for the courtyard

The English saw a thing  
we saw the space inbetween  
...  
The English saw an obstacle  
we saw an opportunity ...

The formality of doorways caused the English to stumble into one  
another and compare ties  
while we sailed through the proud figureheads we were  
...  
there were the trails of a life spent in a valley and the distance  
travelled between obscurity and fame.<sup>1</sup>

I begin with that game and that journey towards fame, which our honorand tonight would remind me later included fatigue and the irresistible attraction of defeat, for a number of reasons.

The first, just mentioned, is personal to Sir David and me and goes back to our first meeting on 4 May 1970.

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\* Judge of the Supreme Court of New Zealand. This paper is based on the text of the Sir David Williams lecture given at the University of Cambridge on 7 November 2003. I am very grateful for comments on earlier drafts by Ilias Bantekas, Roger Clark, Jocelyn Keith, David Mullan, Sir Geoffrey Palmer, Paul Rishworth and Sir David Williams, and for research assistance from my clerk, Tim Smith. This version also benefits from my final discussions with Sir William Wade on the evening of the lecture and at lunch the next day.

<sup>1</sup> (2000), pp. 75, 76.

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The second reason is to make three points about the law applied in those games. The "laws of rugby", as they are called, are privately made – these days by the International Rugby Board – and are not made under official authority.<sup>2</sup> They are international. And they are administered by privately appointed referees, not judges appointed by the Queen following procedures discussed by Sir Sydney Kentridge in last year's lecture,<sup>3</sup> and having protected tenure.

The third and principal reason is to suggest the central and critical significance of differences in ways of thinking; "the thought is what counts".<sup>4</sup> Einstein and Matisse also caused a stir in 1905 and an artist, speaking to a reporter from *Le Figaro* on his new cubist manifesto, discussed the way the New Zealanders conquered space.<sup>5</sup>

How then should we think of sovereignty at the beginning of the twenty-first century? How do ideas of space, of courtyards and vistas, of obstacles and opportunities, help us in thinking about sovereignty?

I shall address sovereignty, particularly parliamentary sovereignty, within national constitutions, notably those of the United Kingdom and New Zealand; sovereignty in international law; and the impact of that body of law on national law and on parliamentary sovereignty. The areas are vast. I realise that I risk being superficial, but, given the professional interests Sir David and I share, I do, like those young men, want to champion the long view, the vista.

### *Parliamentary Sovereignty*

The doctrine of parliamentary sovereignty, it was famously said by R.F.V. Heuston,<sup>6</sup> is almost entirely the work of Oxford men.

On parliamentary sovereignty, I emphasise developments in the four decades since he wrote that essay. This is familiar material and there is an element of presumption in an outsider adding to the extensive commentary.<sup>7</sup> But perhaps distance brings some perspective, as may appear from the movement of the discussion from England to the

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<sup>2</sup> Professor Roy Goode in an excellent essay sets out the range of ways in which international transactions may be regulated, "Reflections on the Harmonization of Commercial Law" in R. Cranston and R. Goode (eds) *Commercial and Consumer Law : National and International Dimensions* (Oxford 1993) ch.1. The variables include private or public regulation; unilateral, bilateral, regional or universal rules; binding, recommendatory or model laws; rules or authoritative professional opinion.

<sup>3</sup> Sir Sydney Kentridge "The Highest Court : Selecting the Judges" [2003] C.L.J. 55.

<sup>4</sup> Lloyd Jones, *The Book of Fame*, p. 167.

<sup>5</sup> Lloyd Jones, *The Book of Fame*, p. 154.

<sup>6</sup> "Sovereignty" in *Essays in Constitutional Law* (2d ed. London 1964), p. 1.

<sup>7</sup> Professor A.W. Bradley continues to provide excellent description and analysis, e.g. "The Sovereignty of Parliament – Form or Substance?" in J. Jowell and D. Oliver (eds.), *The Changing Constitution* (4<sup>th</sup> ed. Oxford 2000), p. 23.

United Kingdom, the Empire and Commonwealth, Europe and the wider world community.

I begin with a statement of the orthodox Oxford position. It is hard to go beyond Albert Venn Dicey writing only 120 years ago:

The principle of Parliamentary sovereignty means neither more nor less that this, namely, that Parliament ... has, under the *English* constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of *England* as having a right to override or set aside the legislation of Parliament.<sup>8</sup>

As I move from England to the Scottish element of the British constitution, I recall that Dicey was much vexed over the impact of his proposition on his strongly Unionist views of the Irish question.<sup>9</sup> The argument has of course long been made in the North that the Act of Union restrained the powers of the Parliament at Westminster. Fifty years ago, in the case challenging the use of the numeral II in the title of Queen Elizabeth, the Lord President, Lord Cooper, agreed with the Lord Advocate's concession that Parliament could not repeal or alter such of the provisions of that Act as were stated to be "fundamental and unalterable for all time coming". "The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional Law."<sup>10</sup> Professor Heuston declared that the remarks in the judgment, of which it might be said that had they not been made by Lord Cooper they would not have been believed, may be disregarded as completely contrary to the whole tenor of *English* authorities on the point.<sup>11</sup> But the Court was after all concerned with the constitution of the United Kingdom.<sup>12</sup> Why should a fundamental document such as the Act of Union not be considered as having some restraining effect? Such a question has been asked in New Zealand about the Treaty of Waitangi of 1840 signed on behalf of

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<sup>8</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10<sup>th</sup> ed. 1959), pp. 39-40 (the emphasis added to the text is reflected in the preface to the first edition where Dicey speaks only of the constitution, constitutional law and government of England). Sir Richard Wild C.J. put this passage at the centre of his judgment in *Fitzgerald v Muldoon* [1976] 2 N.Z.L.R. 615, 622, in holding that the Prime Minister had acted unlawfully in suspending without Parliamentary sanction the operation of a statutory superannuation scheme.

<sup>9</sup> *Ibid.*, p. 68 note 1, and A.V. Dicey and R.S. Raite, *Thoughts on the Union Between England and Scotland* (London 1920) pp. 242-244, 252-254 and also 99-100. For a fresh view, the thesis of which is indicated in its title, see Rivka Weill, "Dicey was not a Diceyan" [2003] C.L.J. 474.

<sup>10</sup> *MacCormick v Lord Advocate* 1953 S.C. 396, 411. Lords Carmont and Russell agreed (414 and 417). Lord Cooper referred to the Dicey and Raite book (note 9 above) in the course of argument in *MacCormick* (406) and, in his judgment, he quoted from "The modified views expressed by Dicey" there (411-412). Fifty years on consider one Hamlyn lecturer's prediction of a major Anglo-Scottish collision over constitutional matters (Anthony King, *Does the United Kingdom still have a constitution?* (London 2001), pp. 85-90), and the wider context of devolution, the subject of valuable publications by the Constitution Unit, most recently Alan Trench (ed.), *Has Devolution made a Difference? The State of the Nations 2004* (Exeter 2004).

<sup>11</sup> Note 6 above at p. 10.

<sup>12</sup> There is the seeming paradox that the Scottish Court accepted that the practice relating to the numbering of the Kings and Queens had referred to the Kings and Queens of England since the Norman Conquest: consider the numerals attaching to the Edwards and James (1953 S.C. at p.413).

Queen Victoria and by Maori chiefs, by means of which New Zealand came under British "kawanatanga" ("governorship") according to the Maori text (which was the text signed by the great majority of the Maori signatories) or "sovereignty" in the English text. I do not go down that route tonight,<sup>13</sup> except to note one feature of the Supreme Court Act 2003 which replaces the Privy Council with what New Zealand Parliament refers to as a new court of final appeal<sup>14</sup> within New Zealand comprising New Zealand judges. Parliament included a provision stating that nothing in that Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament (s.3(2)). It is interesting to see that re-emergence of Dicey's duality<sup>15</sup> and to compare it with the statement had made only seventeen years earlier in s.16 of the Constitution Act that Parliament "continues to have full power to make law for New Zealand". Those contrasting provisions do not appear to be constitutive or restrictive enactments. The 1986 one takes a descriptive form. In the regular course of things it could take no other and it was composed in that way to leave untouched questions about the extent of Parliament's powers since the limits arising from the imperial connection were finally removed in 1947.<sup>16</sup> That of 2003 with its inbuilt tension or even contradiction can claim to be no more than a savings provision. As Sir John Salmond said, no statute can confer this power on parliament for this would be to assume and act on the very power that is to be conferred.<sup>17</sup>

Rather than take those matters further, I move beyond the United Kingdom to the Empire or rather to its dismantling. Heuston mentions the centrifugal forces at work after the adoption of the Statute of Westminster in 1931. They were at work somewhat earlier if we think of 1776 or, less dramatically, of the Durham report of 1839.<sup>18</sup> He was inclined to think that a failure of the Imperial Parliament to recite the consent of a Dominion when purporting to legislate for it would mean that the legislation was invalid.<sup>19</sup> In that he was adhering to what he referred to as the "new" doctrine of parliamentary sovereignty under

<sup>13</sup> For some discussion see Sian Elias Q.C. "The Treaty of Waitangi and Separation of Powers in New Zealand" in B.D. Gray and R.B. McClintock eds *Courts and Policy : Checking the Balance* (1995), p. 206; Rt.Hon. Justice E.W. Thomas "The relationship of Parliament and the courts – a tentative thought or two for the new millennium" (2000) 31 V.U.W.L.R. 5; and "The Treaty of Waitangi in the Courts" (1990) 14 N.Z.U.L.R. 37, 45-46 (referring in note 28 to a particular exchange between the executive and the courts in 1989-90).

<sup>14</sup> On finality consider the increasing occasions for review of national court decisions by international courts and tribunals. This is familiar in Europe, but consider e.g. *Le Grand* in the International Court of Justice and United States courts and the role of the Human Rights Committee in respect of New Zealand court decisions, e.g. *Herbert Potter v New Zealand*, decision of 29 July 1997, Report of the Human Rights Committee UNGAOR/A/52/40 vol. II p.294.

<sup>15</sup> Professor Heuston, note 6 above, at p. 2 refers to "the curiously tortuous chapter [13] in which Dicey attempted to prove that the doctrines of parliamentary sovereignty and the Rule of Law are not actually contradictory".

<sup>16</sup> See the Officials Committee *Constitutional Reform* (1986).

<sup>17</sup> *Jurisprudence* (7<sup>th</sup> ed. 1924) 170; see also H.W.R. Wade: the common law rule relating to parliamentary sovereignty is above and beyond the reach of statute; "The Basis of Legal Sovereignty" [1955] C.L.J. 172, 186-189. For a recent valuable discussion see that of the Chief Justice, Dame Sian Elias "Sovereignty in the 21<sup>st</sup> Century : Another spin of the Merry-go-round" (2003) 14 P.L.R. 148.

<sup>18</sup> *The Report and Despatches of the Earl of Durham, Her Majesty's High Commissioner and Governor-General of British North America* (1839) and for the United States see 22 Geo. 3 ch. 46 (1782) authorising the King to conclude a peace or truce with the colonies and plantations in North America and to repeal Acts applying to them.

<sup>19</sup> Note 6 above, pp. 27-28.

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which Parliament could rewrite the rules which defined its composition (the “who”) and the procedure to be followed in making law (the “how”) – but not restrain its area of power as a sovereign legislature (the “what”). But “practical politics”, international law and much legislative and other practice, as well as some Court decisions, show that the geographic area of the law making power of the once mighty Imperial Parliament has been drastically reduced.<sup>20</sup> That is also to be seen, although to a much lesser degree, in other parts of the Commonwealth, for instance as territories for which New Zealand was responsible become independent or become states in free association with it.<sup>21</sup> I might also mention that in 1986 the New Zealand Parliament repealed, so far as they were part of the law of New Zealand, the remaining Imperial constitutional statutes including the 1852 Constitution Act and its amendments and the legislation adopting the Statute of Westminster. A little later a Westminster statute removed the colonial constitutional remnants from the law of the United Kingdom.<sup>22</sup>

Another factor bearing on law within the Empire is or was the court system. A century ago, there were of course two top courts – the Appellate Committee of the House of Lords for the United Kingdom and the Judicial Committee of the Privy Council for the remainder. At the beginning of the second decade of the 20<sup>th</sup> century, in the context of strong local criticism of decisions of the Privy Council, the Prime Ministers of Australia and New Zealand proposed that there should be a single Imperial Court which would include Dominion Judges, particularly when cases from that Dominion were being heard.<sup>23</sup> There should also be provision for the publication of dissenting opinions, as happened in other appellate courts. There was support on the final issue – although that action was not in fact taken until the 1960s under pressure from Australian judges<sup>24</sup> – but the idea of a single Imperial Court received a polite rebuff. It is remarkable that efforts were made as late as the 1950s and 1960s to revive it.<sup>25</sup> While Dominion Judges did sit in the Privy Council in the early 20th century, a New Zealand Judge appears not to have sat on a New Zealand case until the 1970s.<sup>26</sup>

<sup>20</sup> Compare e.g. the manner and form provision of the Statute of Westminster s.4 with the denial of legislative power in the Indian Independence Act 1947 s.6(4) and e.g. *Manuel v Attorney-General* [1983] Ch 77 (CA).

<sup>21</sup> Compare e.g. the Western Samoa Act 1961 s.4 in which the New Zealand Parliament simply denied to itself any legislative power with the Cook Islands Constitution which originally restricted the New Zealand Parliament's lawmaking powers over the Cook Islands to cases where the Cook Islands Parliament 'requested and consented it' (art 46); in 1981 the Cook Islands Parliament altered the Constitution to remove even this limited power: Constitution Amendment (No 9) 1981.

<sup>22</sup> Statute Law (Repeals) Act 1989, c43.

<sup>23</sup> “Imperial Conference 1911 : Summary of Proceedings” [Cd 5745; \[1911\] I.A.J.H.R. A4 and Cd 5746-1](#). See also the argument in 1904 by the Chief Justice, Sir Robert Stout, for a final Court of Appeal in New Zealand “Appellate Tribunals for the Colonies” (1904) *Commonwealth Law Review* 3.

<sup>24</sup> Judicial Committee (Dissenting Opinions) Order in Council 1966 and Robert Stevens, *The English Judges : Their Role in the Changing Constitution* (2002), p. 43.

<sup>25</sup> See R. Stevens *The Independence of the Judiciary : the view from the Lord Chancellor's Office* (1993), pp. 30-39 and “Public Law in New Zealand” (2003) 1 N.Z.J. P.I.L. 3, 15-16.

<sup>26</sup> *Police v Duffield* [1974] 1 N.Z.L.R. 419 on which Wild C.J. sat.

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The power of the Imperial Parliament was always in practice limited in area and subject matter and over time those limits became a matter of legal restraint as the legislative powers of the colonies and dominions extended; so too the power of the executive in Westminster became limited as colonies obtained responsible government and moved towards independence; and there was never a single Imperial judiciary to enforce and apply Imperial law in a consistent and uniform way. I leave with you the question whether those major limits on the powers exercisable in London over the Empire and Commonwealth were ever sufficiently recognised in the English writings on parliamentary sovereignty.<sup>27</sup>

Following a chronological as much as a geographic approach, I next mention a matter discussed with distinction in the first of these lectures by Justice Sandra Day O'Connor,<sup>28</sup> the impact of European law and institutions on the British constitution. Because much has been said on this topic since at least the 1960s, I make only three references - to the judgment of Lord Bridge in the second *Factortame* case in 1990,<sup>29</sup> to a debate in the House of Lords on 5 June 1996<sup>30</sup> and to Sir William Wade's article, "Sovereignty – Revolution or Evolution?" published in October of that year.<sup>31</sup> With related commentaries,<sup>32</sup> they demonstrate the value of different ways of thinking and speaking by people in different positions within public life.

Lord Bridge, it has always seemed to me, was declaring, even if somewhat obscurely, but with the understatement befitting a senior judge, a constitutional revolution, and not simply some rule of statutory construction. In the critical passage in his judgment, he said this:

Some public comments on the decision of the [European] Court of Justice, affirming the jurisdiction of the courts of the member states to override national legislation if necessary to enable interim relief to be granted in protection of rights under Community law, have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament. But such comments are based on a misconception. If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the EEC Treaty it was certainly well established in the jurisprudence of the Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty

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<sup>27</sup> Compare K.C. Wheare *The Statute of Westminster and Dominion Status* (5 ed. 1953); *British Coal Corporation v The King* [1935] AC 500 (J.C.); and Jeffrey Goldsworthy *The Sovereignty of Parliament - History and Philosophy* (2001).

<sup>28</sup> "Altered States : Federation and Devolution at the 'Real' Turn of the Millennium" [2001] C. L.J. 493.

<sup>29</sup> *R v Secretary of State for Transport, ex parte Factortame Ltd (No. 2)* [1991] 1 A.C. 603, 658-659.

<sup>30</sup> *Hansard*, London, 5 June 1996, cols 1254-1313. Is anything to be made of the change of the heading of the initial print of *Hansard* from "The Judiciary : Public Controversy" to that in the final version, "Judiciary, Legislature and the Executive"?

<sup>31</sup> (1996) 112 L.Q.R. 568.

<sup>32</sup> Particularly by Sir Neil MacCormick e.g. his *Questioning Sovereignty : law, state, and nation in the European Community* (1999).

Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the 1972 Act it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.

The 1996 House of Lords debate, initiated by Lord Irvine of Lairg before the Labour Party victory at the polls, is significant not so much for understatement but for non-statement, for what was not said, by those who participated in the debate. True, several Law Lords repeated the orthodox view, for instance in the words of Lord Reid who said that it was not beyond the power of Parliament to do things against strong moral, political and other reasons. "If Parliament chose to do any of them, the courts would not hold the Act of Parliament invalid".<sup>33</sup> Lord Wilberforce was one who had no doubt about the supremacy of Parliament. "It is written in stone." In addition to referring to Lord Reid's statement he mentioned another to the same effect by Lord Wright in the famous or notorious wartime case, *Liversidge v Anderson*.<sup>34</sup>

It was an historian, Lord Beloff, coming late in the debate, who emphasised the silence. Nothing that he had proposed to say, he declared, had been said. The serious issue to which he was surprised no noble and learned Lord had yet referred was the role of the two bodies of European law and of the two European Courts.

After all, it is the cases which have involved the intervention of European courts that have been the most important in restricting the sovereignty of our Parliament.

He was surprised that, although many references had been made to Lord Denning, not much attention had been paid to the fact that he was one of the few senior members of the judiciary who pointed out early on that the whole British judicial and legal system would now be seriously altered in ways which had perhaps not been foreseen when the country acceded to the Treaty of Rome. On an issue fundamental to our constitutional way of being the Law Lords had, on the whole, been very reticent.<sup>35</sup>

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<sup>33</sup> *Madzimbamuto v Lardner-Burke* [1969] 1 A.C. 645, 723.

<sup>34</sup> [1942] A.C. 206, 260-261.

<sup>35</sup> Note 15 above, cols 1298-1299. He had earlier said that "to find self-restraint among the judges of the two European courts is as improbable as to find alcoholic self-restraint among the practitioners of association football" and concluded by saying that "when we consider matters which should preoccupy us and which, in the light of history, are likely to seem characteristic of the age in which we live, their echo in your Lordship's House is rather muffled".

The criticism has considerable force – although I would except Lord Bridge (speaking in a judgment and not in a debate) from it – and, as Sir William Wade has suggested,<sup>36</sup> the criticism might also be directed at Ministers in the lead up to the 1972 legislation and the later referendum. That brings me to his 1996 contribution to the debate, a contribution which may be related back to his path-breaking article of 1955. I am persuaded by his later conclusion that the Judges when faced with the novel situation presented by the entry of the United Kingdom into the European Community in 1972 adopted or declared a new rule of recognition or ultimate legal principle about the validity and effect of Acts of Parliament. Practical politics required that change on Britain's creation of new ties with Europe. Perhaps the professor can speak with greater clarity and plainness than the judge or the politician. Certainly he did in this case, as have others who have disagreed with the conclusion that a "revolution" has occurred.<sup>37</sup> However the 1972 decisions are to be seen, it is undoubtedly the case that a major substantive limit on the area of the power of Parliament arises from the United Kingdom being in Europe.<sup>38</sup>

I have so far considered three possible limits on the areas of Parliament's powers. I now come to the questions whether Parliament can redefine itself and whether it can require new procedures to be followed if certain laws are to be enacted? The so-called "new" doctrine of the 1950s and later says that Parliament can do that,<sup>39</sup> but that view has been strongly challenged.<sup>40</sup> I mention the matter only to indicate the need for caution and the value of developing relevant conventions. On caution, consider a statute, passed in the last days of a disputatious Parliament by a narrow majority, requiring a 75% vote of any later Parliament or a referendum of the electorate if any of the statutes passed during that Parliament was to be repealed or amended. Such a requirement that legislation require the support of more than half the members of the New Zealand House of Representatives, the House has said, can be introduced into New Zealand legislation only if it is adopted by the same majority.<sup>41</sup>

On developing conventions, since 1956 certain basic elements of the New Zealand electoral system can be amended only with a 75% majority of Parliament or a

<sup>36</sup> "What has happened to the Sovereignty of Parliament" (1991) 107 L.Q.R. 1, 3 and note 16 above, 573-574; on the state of knowledge of members of Parliament (the subject of the fourth sentence of the passage from Lord Bridge quoted above) see Danny Nicol, *EC Membership and the Judicialization of British Politics* (2001) interestingly reviewed by Chloe Wallace in (2003) 66 Mod. L. Rev. 167 and discussed by Ian Loveland (who supervised Nicol's research) in [1995] Public Law 205, 206. Of the mass of recent writing I suggest that Ferdinand Mount's *The British Constitution Today* (1992) stands out and calls for greater attention by lawyers.

<sup>37</sup> See, among others, Sir John Laws "Law and Democracy" [1995] Public Law 72, 88-89.

<sup>38</sup> Anthony King in his third Hamlyn lecture, "The United Kingdom Constitution Amended", note 8 above, pp. 54-55, lists "Europe" as the first of a number of constitutional changes, cumulatively of immense significance, which in his view crept up on the country, unannounced; see also pp. 80 and 95. See more broadly Robert Cooper *The Post-Modern State and the World Order* (2000).

<sup>39</sup> E.g. Heuston, note 4 above, especially pp.6-7.

<sup>40</sup> E.g. Wade "The Basis of Legal Sovereignty" [1955] C.L.J. 177.

<sup>41</sup> Standing Orders of the New Zealand House of Representatives, S.O. 261; see also *Cabinet Manual* (2001) p.6.

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referendum.<sup>42</sup> That requirement has been consistently followed; and notwithstanding the fact that the requirement is not itself protected from repeal or amendment by a regular statute the Attorney-General, in the midst of the vigorous debate which led to the introduction of a proportional electoral system in 1993, declared that that requirement could itself be altered only by one of those special procedures.<sup>43</sup>

My fifth matter – the sovereignty of parliament in the wider context of the international community - relates back to private law making, through custom and more formal statements, and forward to the discussion of sovereignty in international law. As much writing about international commerce, finance and communications makes plain, those critical parts of the world economy are governed in large measure by private law formulated, to take just one example, in the standard terms of the International Chamber of Commerce.<sup>44</sup> Over the centuries some of those practices and standard terms have become part of the common law, for instance, through the law merchant (consider Lord Mansfield),<sup>45</sup> or incorporated in legislation as in some of the later nineteenth century commercial statutes,<sup>46</sup> or codified and developed in treaties or model laws such as those prepared by UNCITRAL<sup>47</sup> or stated authoritatively by bodies such as UNIDROIT.<sup>48</sup>

Parliaments are of course free to legislate when the matter is governed only by custom or privately promulgated rules (although if the custom has developed into a rule of customary international law, any legislation must, as a matter of international law, conform with that rule), but, as the continuing existence of many of those rules – like those made by the International Rugby Board – shows, such matters are frequently seen as not being the State's business.<sup>49</sup>

### *Sovereignty and International Law*

The references to treaties and customary international law bring me to the sixth matter relevant to Parliamentary sovereignty – the role of international law; and to my second major area of concern, sovereignty in international law and the impact of international

<sup>42</sup> Electoral Act 1993, s.268 and Constitution Act 1986, s.17; the original provision was s.189 of the Electoral Act 1956.

<sup>43</sup> Hon. Paul East (3 August 1993) 537 N.Z.P.D. 17140-141. See also Report of the Royal Commission on the Electoral System, *Towards a Better Democracy* (1986), pp. 287-292.

<sup>44</sup> E.g. Goode, note 2 above.

<sup>45</sup> C.H.S.Fifoot *Lord Mansfield* (1936).

<sup>46</sup> E.g. Sale of Goods Act 1893 (U.K.); Bills of Exchange Act 1882 (U.K.).

<sup>47</sup> E.g. United Nations Convention for the International Sale of Goods 1980; UNCITRAL Model Law on International Commercial Arbitration 1985.

<sup>48</sup> E.g. UNIDROIT Principles of International Contracts.

<sup>49</sup> Private lawmaking or contracting out (a process facilitating it) is not of course an unmitigated good. Robert Cooper has recently described the unique circumstances of Afghanistan under the Taliban: "What was left of the state was dominated by an extreme Islamist regime that contracted out different state functions to different bodies : finance to drug barons, health and welfare to the United Nations and various NGOs, and defence to Osama bin Laden." *The Breaking of Nations : Order and Chaos in the Twenty-First Century* (2003), p. 68.

law on national law. In this area too facts are critical. As T H Huxley once declared, many a beautiful hypothesis has been slain by an ugly fact.<sup>50</sup> Much recent writing has emphasised the growing integration of economies, financial systems and information systems and their impact on law and legal institutions and on the role of the state.<sup>51</sup>

Ten years ago, the French Ambassador to the European Union, Jean-Marie Guehenno, published a book *La Fin de la Démocratie*. The chapter headings give a sense of his argument. They include “The End of the Nation”, “The End of Politics”, “An Empire without an Emperor”, “Religions without God”, “Imperial Violence” and “The Imperial Age”. When two years later the book was translated into English, *The End of Democracy* had become *The End of the Nation State*.<sup>52</sup>

This is what the Ambassador, now Assistant Secretary-General of the United Nations for Peacekeeping Operations, said about the nation:

Too remote to manage the problems of our daily life, the nation nevertheless remains too constrained to confront the global problems that affect us. Whether it is a question of the traditional functions of sovereignty, like defence or justice, or of economic competencies, the nation appears increasingly like a straitjacket, poorly adapted to the growing integration of the world.<sup>53</sup>

He had earlier made the point that the state was poorly equipped to collect taxes, because of the mobility of investment and talent, and hardly more effective in managing spending.<sup>54</sup> After calling attention to the huge problems with defence policy and then he turned to the legal system:

No juridical system can claim to be immune from international influences, as the increasing importance of the law elaborated in Brussels in a regulation of the different countries of the European Union clearly shows.

This constraint is not only the consequence of an institutional construction resulting from a political will. It reflects the evolution of economies and the need to conform to international norms, which define themselves on a supranational level: a country that isolates itself within particular juridical norms, believing that it will protect its industry from incursions from abroad, deals its industries a fatal blow, for it seals its cutting edge industries within a market too restricted to allow for the amortisation of

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<sup>50</sup> *Biogenesis and Abiogenesis* in *Collected Essays* vol. viii. Huxley was a proponent of Darwinism.

<sup>51</sup> See e.g. the masterly study by Paul Kennedy *Preparing for the Twenty-First Century* (1993).

<sup>52</sup> Guehenno *The End of the Nation State* (1995).

<sup>53</sup> Guehenno, note 52 above, pp. 12-13.

<sup>54</sup> Guehenno, note 52 above, pp. 10-11.

research expenditures and the development necessary to maintain competitiveness.<sup>55</sup>

Let me mention some facts supporting the sense of the rapidly developing technology. The UNDP, in one of its valuable Human Development Reports, under a heading “The Shrinking World”, gives some of the facts and figures supporting that heading and other expressions such as “the global village” and “the world without borders”. The cost of maritime transport, it says, has dropped over the last seventy years to about one third of what it was and the cost of air travel per mile flown has dropped about the same, in just thirty years. The cost of international telephone calls has dropped much more, to about 1/50<sup>th</sup> since 1940. There has been an amazing increase, matching those figures, in the use of those technologies. Two New Zealand figures also make the point. The number of people flying in and out of New Zealand over the last forty years has increased from about 50,000 per year to well over 4,000,000. In 1950 New Zealanders, in the course of the whole year, made 5,793 outward telephone calls, or just sixteen a day: the Post Office carefully recorded each and every one. When the information was last publicly available about fifteen years ago the *daily* figure had reached nearly 100,000 and that figure takes no account of faxes and e-mail. The UNDP says that the use of the Internet is doubling every year and telecommunications are increasing at 20% a year. The huge information flows across the globe have transformed the way in which business is done.<sup>56</sup>

But we should pause. Some things, the UNDP reminds us, are not that different from the decade with which I began. Very helpfully it recalls that for seventeen industrial countries for which there are data exports in 1913 as a share of GDP were 12.9%, not much below the level in 1993 of 14.5%. Capital transfers as a share of those industrialised countries’ GDP are still smaller than they were in the 1890s, and earlier eras of globalisation saw far greater movement of people around the globe.

We did not need 11 September to tell us that the great technological and ideological changes over recent decades are not entirely benign in their effects. To take one example, some have estimated that the world illegal drug business – a transnational game that is far more powerful than some states – generates revenues in excess of the total public aid for development, an estimated \$100 billion.<sup>57</sup>

A leading British and European diplomat, Robert Cooper, arguing that interference in the internal affairs of another country is not an aberration in foreign policy, makes the point in these terms:

The difficulty is that as borders become more open – itself a consequence of a foreign policy that has brought a long period of peace – the impact of

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<sup>55</sup> Guehenno, note 48 above, p. 15.

<sup>56</sup> UNDP *Human Development Report* (1997) p. 83.

<sup>57</sup> Guehenno, note 50 above, p. 3. For a further discussion of organised crime and the declining authority of states, see Strange, *The Retreat of the State : The Diffusion of Power – the World Economy* (1996).

developments abroad increases. Foreign competition, the illegal trade in drugs, illegal immigration and ... opportunities for international terrorism multiply. These challenges on the home front have their origin in problems abroad: wars and failed states captured by corrupt or criminal interests. All require foreign policy solutions. In war, foreigners arrive in violent and obvious ways; in peace, their arrival is less dramatic and their presence less obtrusive, but the effects can be just as far-reaching.<sup>58</sup>

The title to his book *The Breaking of Nations : Order and Chaos in the Twenty-First Century*, suggests his broader thesis.

For some decades those developments have led the international community to adopt an extensive array of treaties designed to combat the evils, most recently last Friday by the United Nations General Assembly adopting a convention against corruption.<sup>59</sup>

The international facts of a century ago were reflected by international law making, even if on a lesser scale than at present. In 1899 and 1907 the Hague Peace Conferences were held, the first major international law making conferences not designed to deal with the aftermath of major warfare.<sup>60</sup> It was time of great optimism, reflected in the first inaugural lecture in law ever given at Victoria University College in Wellington, New Zealand, almost one hundred years ago, by John Salmond. He chose not jurisprudence nor torts nor contracts but international law as his subject.<sup>61</sup> At about that time, as well, the first moves were made towards the establishment of international labour law to add to the already extensive bodies of treaties governing and protecting trade, communications (the telegraph, including submarine cables, and the post), intellectual property, railways, waterways, wild animals in Africa, North Sea fisheries and the victims of warfare, regulating sanitary matters and the sugar trade, providing for the gramme and the metre as the international weights and measures, fixing Greenwich as the meridian, and prohibiting the slave trade.<sup>62</sup> The availability of other methods of regulating international transactions appears from the fact that much of maritime law at that time was not the subject of extensive multilateral treaties law but was in large part left to custom, standard contracts and forms, customary international law and national law.<sup>63</sup>

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<sup>58</sup> Robert Cooper *The Breaking of Nations : Order and Chaos in the Twenty-First Century* (2003).

<sup>59</sup> United Nations Convention against Corruption, New York, 31 October 2003.

<sup>60</sup> E.G. Arthur Eyffinger *The 1899 Hague Peace Conference : 'The Parliament of Man, the Federation of the World'* (1999).

<sup>61</sup> J. Salmond "If Germany Came to New Zealand" reported in *The New Zealand Mail* (1 August 1906) reprinted in (1999) 30 V.U.W.L.R. 489.

<sup>62</sup> *The Index of British Treaties 1101-1968* (1970) edited by Clive Parry and Charity Hopkins shows that the United Kingdom had concluded about 3000 treaties by 1905; *The Multilateral Treaty Calendar 1648-1995* by C.L. Witkor lists 6048 multilateral treaties in total and about 520 up to 1905; and Manley O. Hudson in his *International Legislation*, vol.1, xix to xxxvi lists 257 multipartite treaties for the 50 years from 1864-1914.

<sup>63</sup> E.g. D.P. O'Connell *The International Law of the Sea* (1983).

Under our constitutions, the orthodox view then and is now that Parliament, both here and in New Zealand, can override treaty obligations along with other obligations under international law – with at least the qualification, however it is to be seen, for the United Kingdom in respect of Europe.<sup>64</sup>

But the position in international law is flatly to the contrary. International law prevails over national law. As declared in the Vienna Convention on the Law of Treaties, a party to a treaty may not invoke the provisions of its internal law as a justification for failing to enforce a treaty.<sup>65</sup> The International Law Commission has made it crystal clear in its draft articles of 2001 on state responsibility that that proposition is not confined to treaty obligations. It applies to obligations under general international law as well.<sup>66</sup> That position is routinely taken by states. Again to go back a century, the United Kingdom took exactly that position in a dispute with the United States over American legislation which gave American vessels a preference, in breach of the Panama Canal treaties, in using the Canal. On the urging of President Woodrow Wilson, Congress repealed the offending legislation.<sup>67</sup>

Governments and Parliaments in our tradition are very conscious of that overriding international obligation. So too, perhaps increasingly, are our courts, as I shall discuss. But before I consider the roles of parliaments and courts looking outwards, a word about sovereignty in international law. Can we sensibly think of states being sovereign in relation to one another? Does not the standard meaning of sovereignty incorporate within it supremacy, of ruling over or from above? How does that fit with the coexistence and cooperation of 191 or more states in the world community?

As Professor J.L. Brierly, Chichele Professor of International Law and Diplomacy at the University of Oxford, warned us seventy-five years ago, we must be careful to ensure that words are our servants and not our masters. This is not simply a matter of semantics. Writing between the World Wars, he said :

Since Hegel, the belief in the state as a superperson has remained until our own time as practically unshaken with disastrous effects not only on the clearness of our thought on political affairs, but [also] on action.<sup>68</sup>

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<sup>64</sup> See pp. \_\_\_\_ above.

<sup>65</sup> Article 27 of the 1969 Vienna Convention on the Law of Treaties, 1155 UNTS, p.331.

<sup>66</sup> Draft articles 3 and 32, Report of the International Law Commission 2001 (G.A.O.R., A/55/10); see also the authorities supporting those propositions in the commentaries to the two drafts, also reproduced in James Crawford, *The International Law Commission's articles on State Responsibility : Introduction Text and Commentaries* (2002), pp. 86-90 and 207-208.

<sup>67</sup> Clive Parry (ed) *A British Digest of International Law* vol. 2b (1967), pp. 321-338.

<sup>68</sup> "The Basis of Obligation in International Law" in Sir Hersch Lauterpacht and C.H.M. Waldock eds *The Basis of Obligation in International Law and Other papers by the late James Leslie Brierly* (1958?) pp. 1, 29. This is the original English text of Brierly's Hague lectures, "Le fondement du caractère obligatoire du droit international" (1928) 23 *Hague Recueil* 467; see also Eli Lauterpacht "Sovereignty – Myth or Reality" (1997) *International Affairs*.

He condemns political theory as generally treating the State – unlike the individual – as if it existed in a vacuum. After a lengthy meticulous study, he reaches a conclusion which I find compelling:

So long ... as political theory clings to sovereignty, and therefore holds that the state consists in the subjection of a nation to a sovereign lying outside the law, the coordination of international with national law cannot be effected. For sovereignty misrepresents the true character of international law in three ways: it leaves no basis for its validity, since there is no sovereign in the international community; it makes its own content depend upon what the state has drawn into the circle of its own functions, because it denies any direct connexion between the international community and the international interests which have somehow to be evaluated, and claims that they can be provided for only indirectly, and through the state; and since only states can be subjects of international law, it makes of the international community nothing but an association of sovereigns. But the system that we can see in operation around us actually contradicts all these three conclusions, and shows us that international law has the same foundation, the same content, and the same subjects as national law. It differs only in being effective for a larger community, and in being less developed in its organization.<sup>69</sup>

His conclusion is reflected in the Charter of the United Nations which, contrary to an assertion commonly made, does not include State sovereignty within its purposes and principles. Rather its first principle is that the organisation is based on the principle of sovereign *equality* of all its members. That principle was elaborated in the Friendly Relations Declaration adopted by consensus by the United Nations General Assembly on the 25<sup>th</sup> anniversary of the United Nations at the end of 1970:

All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.

In particular, sovereign equality includes the following elements:

- (a) States are juridically equal;
- (b) each state enjoys the rights inherent in full sovereignty;
- (c) each state has the duty to respect the personality of other States;
- (d) the territorial integrity and political independence of the State are inviolable;

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<sup>69</sup> *Ibid.* at pp.62-63.

- (e) each state has the right freely to choose and develop its political, social, economic and cultural systems;
- (f) each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.<sup>70</sup>

That text incorporates real tensions. It is a text prepared through a testing political-legal diplomatic process which required wording acceptable to all United Nations members. What, for instance, are “the rights inherent in full sovereignty”, given the emphasis on duties, international obligations and equality? That emphasis shows, as John H Jackson has explained in his Lauterpacht lectures, that attention is now better given to the allocation of power rather than the arid details about sovereignty or its disappearance.<sup>71</sup>

I leave these questions and return to the role of national parliaments and courts. Again, we should pay greater attention than often happens to the facts – among them the legislation responding to the great array of international obligations which have to be brought within our legal system. Over twenty years ago, a Senior Lecturer in Law at the University of Adelaide, now the Whewell Professor of International Law at this University, prepared an outstanding paper on “The International Law Standard in the Statutes of Australia and the United Kingdom”. In it he made passing reference to Canada and New Zealand.<sup>72</sup> He provides a valuable indication of the extent of the impact of treaties on national law and the range of techniques used by legislatures to give effect to treaties in national law. The Australian, British and Canadian Yearbooks of International Law continue to provide valuable additional material on the many statutes enacted year by year in those jurisdictions concerning matters of international law. New Zealand surveys of the Statute Book have concluded that about 200 of the approximately 600 public statutes appear to raise issues concerning New Zealand’s international rights and obligations. In alphabetical terms, the list begins with the Abolition of the Death Penalty Act 1989 and ends with the Weights and Measures Act 1987.<sup>73</sup>

But we are in need of further studies along the lines of that done by James Crawford all those years ago. So too are we in need of more scholarly studies of the steps that have been taken in a number of countries, through Parliament and more broadly, to exercise control or influence over the executive’s prerogative of treaty making.<sup>74</sup> The relative absence of such studies probably matches the relative neglect of legislation to be found

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<sup>70</sup> G.A. Resn 2625 (XXV).

<sup>71</sup> “Sovereignty – Modern : a New Approach to an Outdated Concept” (2003) 97 A.J.I.L. 782.

<sup>72</sup> James Crawford (1979) 73 A.J.I.L. 638.

<sup>73</sup> See e.g. the categories of treaties reproduced from a New Zealand Law Commission Report in “Freedom of Information and International Law” in Jack Beatson and Yvonne Cripps (eds) *Freedom of Expression and Freedom of Information : Essays in Honour of Sir David Williams* (2000), pp. 361-362. Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (2001) Appendix 3 provides a catalogue of legislation expressly implementing or reflecting international obligations.

<sup>74</sup> See e.g. Bracegirdle “Domestic procedures for international treaty actions : Description of New Zealand procedures” (2003) 14 P.L.R. 28, also Reisenfeld and Abbott (eds) *Parliamentary Participation in the Making and Operation of Treaties : A Comparative Study* (1994).

generally in academic writing on the law. Cases and courts still get the lion's share of attention, but should they?

I should nevertheless say something about the place of international law in national courts, first to emphasise from a judicial perspective the range of roles it can and does play in national legal systems, second to provide further evidence of practical restraints on national legislative absolutism, third to suggest the value of thinking differently, and finally to stress the need for all parts of our profession to see things steadily and to see them whole.<sup>75</sup> I make the points summarily. Much more can be and has been said about each.<sup>76</sup>

The first is that it is 'well established that while the making of a treaty is an Executive act, the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. The stipulations of a treaty duly ratified by the Executive do not, by virtue of the treaty alone, have the force of law.'<sup>77</sup>

Second, a treaty may have a national constitutional role. For instance, the Chicago Convention on International Civil Aviation recognises that States have sovereignty over the airspace above their territory and territorial sea. Those provisions 'incorporate principles of customary international law [which] are reflected in fundamental constitutional arrangements and leave States parties free to exercise their authority recognised by international law'.<sup>78</sup>

Third, treaties may be evidence or declaratory of customary international law which is part of national law without distinct legislative incorporation. One recurring instance is the use by Courts of the provisions of the Vienna Convention on the Law of Treaties relating to good faith compliance with treaties and their interpretation. Treaties and proposals for treaties have also been among the material drawn on in decisions about foreign state immunity and high sea freedoms.<sup>79</sup>

Fourth, treaties may be relevant to the determination of the common law, as in a recent major defamation case in New Zealand,<sup>80</sup> but not in a recent privacy case in the House of Lords.<sup>81</sup>

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<sup>75</sup> Compare Matthew Arnold, "To a Friend [Sophocles]".

<sup>76</sup> "The Impact of International Law on New Zealand Law" (1998) 6 Waikato L.Rev. 1, 20-31, on which I draw in this part of the article, provides further detail and references.

<sup>77</sup> *New Zealand Airline Pilots' Association v Attorney General* [1997] 3 N.Z.L.R. 269, 280-281, citing the Privy Council in *Attorney-General for Canada v Attorney General for Ontario* [1937] A.C. 326, 347.

<sup>78</sup> *Ibid.*, at pp. 284-285.

<sup>79</sup> On the former see *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 N.Z.L.R. 426 and on the latter see *Sellers v Maritime Safety Inspector* [1999] 2 N.Z.L.R. 44.

<sup>80</sup> *Lange v Atkinson* [2000] 3 N.Z.L.R. 385.

<sup>81</sup> *Wainwright v Home Office* [2003] 3 W.L.R. 1137.



Fifth and finally, courts may interpret legislation by reference to international law and treaties. Over a long period in the United Kingdom and in New Zealand, the Courts have stated and applied the presumption or principle of statutory interpretation that, so far as its wording allows, legislation should be read in a way which is consistent with the country's international obligations.<sup>82</sup>

Much will turn on the drafting of the legislation and of the treaty. And here as elsewhere, much will depend on the attitudes, education and knowledge of the Bench and the Bar. Professional culture may indeed have a greater significance than technical aspects of the treaty and legislation.<sup>83</sup> For instance, is a finding that the legislation is ambiguous a prerequisite to access to the treaty? The answer to that question may be reflected in the very structure of the judgments interpreting the legislation. The House of Lords not long ago required a showing of ambiguity.<sup>84</sup> New Zealand courts on the other hand have not required that. In this you may see a difference in national as well as legal culture.

Two sharply contrasting judgments given in 1982 relating to Western Samoa – one given by the Privy Council presided over by Lord Diplock, the other by the Western Samoan Court of Appeal, consisting of New Zealand judges and presided over by Sir Robin Cooke – may be seen as illustrating the significance of culture and approach.<sup>85</sup>

In the former case the Privy Council, reversing the New Zealand Court of Appeal and overruling an earlier decision of that Court,<sup>86</sup> held that persons born in Western Samoa between the enactment of the British Nationality and Status of Aliens (in New Zealand) Act 1928 and its repeal and replacement by the British Nationality and New Zealand Citizenship Act 1948 were natural born British subjects in terms of New Zealand law and became New Zealand citizens under the 1948 Act when that status was first established. For the great bulk of that time Western Samoa was a mandated territory under article 22 of the Covenant of the League of Nations. In terms of that provision it had “ceased to be under the sovereignty” of Germany and in application of “the principle that the well-being and development of such peoples form a sacred trust of civilisation” it was to be under the “tutelage” of New Zealand as Mandatory. That tutelage was subject to scrutiny by the League. Western Samoa did not come under British or New Zealand sovereignty. It moved to trusteeship status under the United Nations in 1946 and became independent in 1962.

After setting out the procedural history of the case and a related case, Lord Diplock mentioned that a formidable argument based on the terms of the 1928 Act had

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<sup>82</sup> *R v Keyn* (1876) 2 Ex. D. 63, 85; *Mortensen v Peters* (1906) 8 F. (J) 93; *R v Dodd* (1874) 2 N.Z.C.A. 598; *New Zealand Airline Pilots Association v Attorney-General* [1997] 3 N.Z.L.R. 269.

<sup>83</sup> E.g. R. Higgins *Problems and process : international law and how we use it* (1994) ch. 12.

<sup>84</sup> E.g. *R v Secretary of State for the Home Department, Ex parte Brind* [1991] 1 AC 696.

<sup>85</sup> *Lesa v Attorney-General* [1982] 1 N.Z.L.R. 165 and *Saipa'ia Olomalu v Attorney-General* (1982) reported in (1984) 14 V.U.W.L.R. 275 (I was a member of the Samoan Court).

<sup>86</sup> *Levave v Immigration Department* [1979] 2 N.Z.L.R. 74 (CA) relating to an Act of 1923 replaced by the 1928 Act in issue in the *Lesa* case.

unfortunately not been brought to the attention of the Court of Appeal and had emerged for the first time in the closing stages of plaintiff's counsel's opening address. "Their Lordships will accordingly go straight to the Act of 1928 and first consider its construction independently of the Act of 1923 which it repealed." That focus on the particular wording and in particular on the proposition that the Act was to apply to Western Samoa in the same manner in all respects as if it were part of New Zealand led the Privy Council inexorably to the conclusion that in the present context Western Samoa was part of His Majesty's dominions and within His allegiance and that birth there conferred natural born British subject status. It was only in the last substantive paragraph of the judgment that the Privy Council moved away from the legislation and referred to the "strongest argument" to the contrary - certain resolutions about nationality in mandated territories adopted by the Council of the League of Nations shortly before the enactment of the 1923 Act. Those resolutions (which the Privy Council did not set out) provided:

- (i) that the status of native inhabitants is distinct from that of nationals of the Mandatory power;
- (ii) that native inhabitants are not invested with the nationality of the Mandatory Power by means of the protection extended to them;
- (iii) that it was not inconsistent with (i) and (ii) that individual inhabitants should voluntarily obtain naturalisation from the Mandatory Power under its own law; and
- (iv) that it was desirable that native inhabitants who received the protection of the Mandatory Power should be designated by a descriptive title specifying their status under the Mandate.

Consistently with those resolutions (particularly the third) and in accordance with Imperial legislation agreed to by the representatives of the United Kingdom and the Dominions at Imperial Conferences, the 1923 and 1928 Acts provided for voluntary naturalisation. The dispute was whether the Acts had any wider effect.

The Privy Council agreed with the Court of Appeal that, although the resolutions did not impose obligations binding on New Zealand under international law (although resolutions (i) and (ii) could be seen as authoritatively declaring the position under the Covenant and Mandates and interpreting existing obligations),<sup>87</sup> they would be relevant in resolving any ambiguity in the meaning of the legislation. But the Privy Council was unable, for the reasons it had already stated, to find any ambiguity or lack of clarity in that language.

The New Zealand Court by contrast had thought that the legislative provisions so far as they related to Western Samoa could "not be sensibly considered without a reference to the general background of the relations between that territory and New Zealand up to the

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<sup>87</sup> See article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties.

time of the passing of the [1923] Act". It began with the German renunciation of right and title to Western Samoa in the Treaty of Versailles and traced the various international, imperial and national measures that were taken to set up the mandate, recording two propositions that were not disputed by counsel for the person claiming citizenship : the mandate did not cause the inhabitants of the territory to become British subjects and they could not be naturalised under the law in force before 1923. The Court then set out the League resolutions mentioned above, and commented that

In the absence of unequivocal language it is not to be supposed that the New Zealand Parliament would intend to legislate in a manner inconsistent with moral, if not legal, obligations in this sphere ...<sup>88</sup>

The difference between the two courts can be put in terms of the emphasis each placed on particular legislative words and their "unambiguous meaning", on the one side, and, on the other, their context (not just the Mandatory system but also the Imperial one given the exclusive control exercised at that time by the Imperial Parliament over the general grant of British subject status and the still subordinate position of Dominion legislatures) and purpose (relevantly here "to make special provisions for the naturalization of persons resident in Western Samoa" in accordance in fact with agreements reached at the Imperial conferences). While the Privy Council went "straight" to the 1928 Act, the New Zealand Judges looked at it, like its 1923 predecessor, in its broader contexts.<sup>89</sup> While not denying that they were confined *by* the words of the statute they did not see themselves as confined *to* them.<sup>90</sup>

At least in part as a result of adopting that different approach, the New Zealand Judges were able to give what many - including the two governments - considered was a more accurate account of the relationship between the mandated territory and the mandatory power than that given by the Privy Council which on the basis of an incomplete reference to one provision of the Mandate (and no other part of the international and imperial background) saw no difficulty in a mandated territory being in essence under the sovereignty of the Mandatory power.<sup>91</sup> The more comprehensive contextual approach of

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<sup>88</sup> [1979] 2 N.Z.L.R. at 79.

<sup>89</sup> See the surprising comment by the Privy Council that the 1923 resolution appeared to be inconsistent with the provision in article 2 of the Mandate "that Western Samoa was to be governed as an integral part of the Dominion of New Zealand", [1982] 1 N.Z.L.R. at 176. I say surprising since when the article is read as a whole and in context the resolution appears to present no inconsistency at all; and the Council of the League might not be expected to act inconsistently with its own constitution and the mandates which it had agreed to.

<sup>90</sup> E.g. Frankfurter "Some Reflections on the Reading of Statutes" (1947) 47 *Columb. L. Rev.* 527, 543.

<sup>91</sup> The Governments of New Zealand and Western Samoa found the Privy Council decision unacceptable, and within a month negotiated an agreement which substantially reversed its general effect; see the Protocol of 21 August 1982, A.J.H.R. A56, and the Citizenship (Western Samoa) Act 1982.

The Privy Council judgment and the governmental and legislative responses were the subject of extensive commentary. For James Crawford "the real difficulty with the decision is that it undermines the assumptions of all parties concerned over a long period of time, assumptions which formed the basis of transactions such as the establishment of the independent State of Western Samoa and the administration (from 1959 onwards) of its separate citizenship legislation"

the New Zealand judges might be thought more appropriate where constitutional and international elements are central.<sup>92</sup>

The structure of the judgment of the Western Samoan Court of Appeal is similar to that of the New Zealand Court of Appeal in the citizenship case. The question was whether provisions of the Western Samoan Electoral Act which limited the suffrage and candidacy to matai (chiefs) were unconstitutional, as the Chief Justice had held, because they breached constitutional guarantees of equality before the law and equal protection under the law. After setting out the constitutional and statutory provisions and noting that the suffrage had been restricted to the matai when Western Samoa was still administered by New Zealand, the judgment reproduced substantial passages from the 1961 report of the United Nations Plebiscite Commissioner which summarised discussions of the limited suffrage which had occurred in 1954 and 1959. Those extracts made clear the strong wish of those involved to maintain that system notwithstanding strong recommendations to the contrary from the United Nations.<sup>93</sup> The Court then summarised the Chief Justice's judgment, commenting on some of the reasoning and noting that he had given weight to United States decisions on the guarantee of equal protection of the laws.

Under the heading *Comparisons with other Constitutions*, the Court said that there was no close analogy with the United States. But help could be gained from the Universal Declaration of Human Rights and the constitutions of other countries in the region which had obtained their independence since 1945. The Declaration provided for universal suffrage separately from the guarantees of equality. The omission of an explicit suffrage provision in the constitution must be seen as significant given that it was a United Nations Visiting Mission in 1959 which recommended that the Constitution should have added to it human rights provisions on the lines of the Declaration and the constitutions of other newly independent states. The omission of a universal suffrage provision must be seen as deliberate. It was also significant that eight Pacific Island constitutions all provided separately for both equality and universal suffrage.

The next passage in the judgment, headed *The Meaning of the Constitution*, begins by recalling the Court's agreement that the Constitution should be interpreted in the spirit counselled by Lord Wilberforce in *Minister of Home Affairs v Fisher* [1980] A.C. 319, 329:

He speaks of a constitutional instrument such as this as *sui generis*; in relation to human rights of "a generous interpretation avoiding what has been called the austerity of tabulated legalism"; of respect for traditions and usages which have given meaning to the language; and of an approach with an open mind. This involves, we think, still giving primary attention to the words used, but

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(1982) 53 B.Y.I.L. 268; see also Alison Quentin-Baxter "The independence of Western Samoa – some conceptual issues" (1987) 17 V.U.W.L.R. 345, 363-368 and 371-372.

<sup>92</sup> That broader approach is also to be seen in Lord Hoffmann's discussion of constitutional interpretation for the Privy Council in a recent Mauritius case, *Matadeen v Pointu* [1999] 1 A.C. 98.

<sup>93</sup> Judge Lauterpacht called attention to this disagreement in his separate opinion in the International Court of Justice in the *South West Africa – Voting Procedure* case 1955 I.C.J. Reps p.67, at p.117.

being on guard against any tendency to interpret them in a mechanical or pedantic way. In this spirit we turn to the provisions of the Constitution now relevant.

The Court began with the preamble, including its reference to Samoan custom and tradition; it then noted that the rights of particular political value listed in the bill of rights part did not include the right to vote. It was a well settled principle of interpretation, the Court continued, that momentous constitutional changes are not brought about by a side wind. Against that background, universal suffrage would have been introduced and entrenched by plain and specific terms. It would never have been left to general language such as that in the equality guarantee. Further, the pattern of the electoral provisions in the Constitution supported that interpretation, as did the debates and decisions of the Constitutional Convention which the Court used to confirm the conclusion it had already reached on the meaning of the Constitution.<sup>94</sup>

### *Cardiff Arms Park and its Challenge*

I should end where I began, with that remarkable young group of New Zealanders who were left to figure out things for themselves and with the game, near the end of the tour at Cardiff Arms Park. At full time the scoreboard read Wales 3, New Zealand 0. I have two reasons for mentioning that result.

Again the first is personal, for Sir David would never talk to me again unless I did mention it.

The second more general reason relates back to the earlier discussion of ways of thinking and of space. I should put it into context by mentioning the Test matches with Ireland and England. In the first the New Zealanders saw the paddock as an ever-changing pattern of lines, the Irish saw it as a kind of steeple chase, covered with low barriers and walls which so far as they were concerned were to smash into. They believed in luck. They were like children taking it in turn to kick a pebble down a bumpy road.<sup>95</sup>

The story of the English match was much the same. They had not thought of the blind side where the New Zealanders scored four identical tries. “You would think they’d know by now” was the comment after the second.<sup>96</sup>

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<sup>94</sup> There was reason for the caution in the use of debates. By 1982, New Zealand judges had not adopted a clear position on the use of Hansard; compare Cooke J in *Marac Life Assurance Ltd v CIR* [1986] 1 N.Z.L.R. 694, 701-702; and in constitutional cases the Australian practice of the time was not to consider the convention debates e.g. Gregory Craven “Convention Debates” in Tony Blackshield, Michael Coper and George Williams eds *The Oxford Companion to the High Court of Australia* (2001), p.150. The debates of the Convention would be given a much more prominent position now.

<sup>95</sup> Lloyd Jones, note 1 above, pp. 89-90.

<sup>96</sup> *Ibid.* at p. 98.

But back to the Welsh. They had learned. The New Zealanders had stopped being original. Wherever they looked they saw a mirror image of themselves. The Welsh won.<sup>97</sup>

The lesson of all this? Beware of slogans. Look past the familiar words and formulas. Look for new spaces and new linkages.<sup>98</sup> And ask yourself - is your reference to sovereignty, whether of Parliament or of the State, correct? Is it helpful? Do you understand what it means in the proposed context?<sup>99</sup> Careful questioning of words may mean greater clarity of thought and lead to a new way of thinking to add to the established ways.<sup>100</sup>




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<sup>97</sup> *Ibid.* at pp. 115-119.

<sup>98</sup> Compare Professor Philip Allott's expression of hope in the preface to his *The Health of Nations : Society and Law Beyond the State* (2002), pp. xii-xiii., and his emphasis on interdisciplinary study.

<sup>99</sup> See e.g. Gummow and Kirby JJ in *Commonwealth v. Mewett* (1997) 191 C.L.R. 471, 541 quoting Joseph Story writing 170 years ago : the terms "sovereign" and "sovereignty" are used in different senses leading "to a confusion of ideas, and sometimes to very mischievous and unfounded conclusions".

<sup>100</sup> The art of walking upright here is the act of using both feet.

One is for holding on.

One is for letting go.

Glen Colquhoun, "The Trick of Standing Upright Here" in *The Art of Walking Upright* (1999), p. 32.