THE HARKNESS HENRY LECTURE

THE CROWN, THE PARLIAMENT AND THE GOVERNMENT

BY JOHN MCGRATH QC[1]

E ngä mana, e ngä waka, e ngä iwi o te motu - tëna koutou.
E ngä rangatira o Te Whare Wänanga nei - tëna koutou.
Tëna koutou ngä tini aituä, haere, haere, haere ki te po.
Ko Taupiri te mäunga ko Waikato te awa me ngä taniwha rau o roto - tënei te mihi atu.
Na reira, tëna koutou, tëna koutou, tëna koutou katoa.

I. INTRODUCTION

Canadian judges have summarised the principles of a constitution in an equation: constitutional convention plus constitutional law equals the total constitution of a country.[2] Generally the components of this equation remain unchanged for long periods, but that has not been the case in New Zealand over the past decade. In that time we have been in the midst of a constitutional drama. Tonight, I wish to look at some of the experiences in government New Zealand has recently faced and the different perspectives that we are starting to perceive in this new constitutional era. I believe those experiences provide important insights into the nature of the arrangements that form our constitution. Discussion of them is useful also in appreciating our constitution's underlying values of democracy and effective government. In the course of a discussion of contemporary events, I hope to throw light on what Sir Ivor Jennings has described as the "understandings and habits of mind" by which the constitution functions.[3]

I start by referring to the principal actors in our drama. First, there is the Governor-General who is the Sovereign's representative in New Zealand but whose office is now well and truly patriated and to be regarded as a New

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1 Solicitor-General of New Zealand. Sir Kenneth Keith, Sir John Jeffries, Marie Shroff, John Martin, Ellen France, Grant Liddell, Claudia Geiringer and Rebecca Kitteridge were all good enough to read drafts and offer suggestions. The author also acknowledges the research assistance of Tania Warburton. However, the views expressed are those of the author.

2 *Re Resolution to Amend the Constitution* [1981] 1 SCR 753, 883-884 (SCC majority judgment).

3 Jennings, Sir Ivor *The Law and the Constitution* (5th ed, 1959) 16.

Zealand institution.[4] The Governor-General has legal power to appoint and dismiss Ministers and appoint other high officers who serve the Crown, such as judges. By convention, the Governor-General acts on the advice of the second set of actors, the Prime Minister and Ministers who appear to have the support of the House of Representatives. They govern the country, but whenever the continuation of their support in the House falls into question the Governor-General may become involved. So may the third set of actors, who are leaders of parties and factions in the Parliament other than those supporting the Prime Minister. The role they play will depend on the reliability at any time of the support for the Ministers who hold office. Meanwhile, they are understudies.

Then there are those with lesser parts. The Cabinet Secretary and Solicitor-General are advisers on constitutional matters with the duty to act independently. They are available to the Governor-General and to Ministers who are, of course, free to seek other advice.[5] Ultimately at the crucial times they are responsible for and deliver their own lines. The wider public service is in the wings facilitating continuity. There is audience participation on these occasions, in particular by those with constitutional expertise who usefully express their opinions. Their role is fostered by an alert and aware media. Finally, there is the producer in the form of the whole electorate, which gives directions from time to time, albeit not always with clarity.

II. Mix of Law and Convention

The context, of course, is New Zealand's largely unwritten constitution. By that I mean that New Zealand, unusually among modern polities, lacks a supreme document constituting the institutions of the state and specifying their functions and powers. As the equation indicates, our constitution comprises, first, rules of constitutional law expressed in statutes, being the law made by Parliament, and in the common law, being the law articulated by the courts. Secondly, it comprises what Dicey called "conventions, understandings, habits or practices".[6] These rules of constitutional morality he termed "conventions of the constitution". The distinction between them and the rules of constitutional law was that conventional rules were not

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4 The Office is constituted by Letters Patent (SR1983/225). As to patriation, see Joseph, P A *Constitutional and Administrative Law in New Zealand* (1993) 154-158; Wood, "New Zealand" in Butler, D and Low, D A (eds) *Sovereigns and Surrogates* (1991) 108-143.

5 Scott, K J *New Zealand Constitution* (1962) 82, refers to the Governor-General's ability to seek advice from others.

6 Dicey, A V *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) 23-24.

enforced by the courts. This basic distinction that Dicey identified remains a feature of our constitution today.

Important elements of our constitution expressed in statute were modernised by the Constitution Act 1986.[7] In this Act the institutional legal framework of the constitution is set out. For example, the Governor-General's power to assent to Bills passed by the House of Representatives is expressed in a provision that a Bill passed by the House becomes law when that assent is given.[8] The purpose of conventions is to apply the cladding of constitutional values to the basic legal framework. In particular, they ensure that legal powers are exercised consistently with democratic principles. Conventions do so by stipulating how such powers should be exercised. Thus, the legal power to assent is subject to a conventional duty to do so. The Royal assent thereby gives legal force to the will of the democratically elected House of Representatives. Unlike the law of the constitution, the conventions are largely unwritten. Most are simply "binding usages built up over time".[9] This allows ample scope for argument over questions of both existence and content of the rules that have the status of conventions and whether they have been breached, varied or even abandoned.

One important difference between rules of constitutional convention and those of constitutional law is the manner of determining their existence. Laws come into being in recognised ways. The very manner of creation signals that a rule is one of law. But there is no authoritative signal that a convention has come into existence. Nor is there any definite method of recognising a change to a convention or whether a convention has been abandoned.[10]

Marshall says conventions may be established in three ways.[11] First, a series of precedents may have become recognised as giving rise to a binding rule of behaviour.[12] The convention that the Governor-General assents to Bills passed by the House of Representatives is perhaps the classic instance. Secondly, an agreement may be reached by parties concerned that those with a particular legal power will use it in a certain way. In this instance there is no custom and the convention may spring up quickly. The Balfour Declaration of 1926 recorded an agreement that the United Kingdom should not legislate

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7 As to the genesis of this Act, see the reports of the Officials Committee *Constitutional Reform* (Department of Justice, February 1986).

8 Constitution Act 1986, s 16.

9 Joseph, supra note 4, at 243.

10 Munro "Law and Conventions Distinguished" (1975) 91 LQR 218.

11 Marshall, G *Constitutional Conventions* (1986) 8-9.

12 Joseph, supra note 4, at 243-244, discusses these views.

for Commonwealth countries without their consent. The Statute of Westminster (UK) gave substantial legal expression to that convention in 1931, but it is to be regarded as having conventional status prior to the engagement.[13] Thirdly, Marshall speaks of a convention being formed simply on the basis of an acknowledged principle of government that justifies it. While less determinate, this means of creation highlights the importance of constitutional values and, in particular, democratic principle in conventions. Commentators generally agree that this is a crucial element. Conventions ensure that the exercise of the legal powers is for constitutional ends. The stronger the apparent relevance of democratic principle in the context, the more ready observers will be to see instances of application which demonstrate that those exercising constitutional legal powers have regarded themselves as bound by convention.

In the New Zealand context, these elements can be seen in the development in 1993 of the already existing convention of caretaker government as a guiding principle for Ministers in periods following general elections. The 1993 election was the last conducted under the First Past the Post (the FPP) system.[14] It was uncertain which political interests would comprise the government. In New Zealand, the election night count of votes is informal and a period will elapse before an official count clarifies the state of the parties in the new House. Under the FPP system, the outcome was usually apparent on election night. In this context, a convention was recognised that a Ministry defeated at an election would remain in office until formal results were declared and a new Ministry was ready to take office. In the interval, only routine government administration would be conducted.[15] One advantage seen in this unhurried transfer of power is that the party leader or the party can choose a Cabinet without undue haste.[16]

The general election of 1993 produced a situation in which it was uncertain on election night whether the National Party Government would have a majority in the new House. On the election night count on 6 November 1993 it appeared that the election might produce a Parliament without a single party majority. This was premature! Seat distribution according to the 1993 election night count was: National 49 seats, Labour 46 seats, Alliance 2 seats, New Zealand First 2 seats (total 99 seats).

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13 Statute of Westminster 1931 (UK), s 4.

14 The term “First Past the Post” is not to be understood literally; it refers to a relative majority system. See Wade, Sir William *Constitutional Fundamentals* (Hamlyn Lectures, 1989) 10.

15 The convention is described in these terms in Scott, supra note 5, at 106.

16 *Constitutional Reform*, supra note 7, at 18.

However, in 1993, as under the current legislation, the electoral night count was and is provisional. Under the 1956 Act, a period was allowed following an election during which special votes (exercised out of the electorate or overseas) were forwarded to the Returning Officer. A final recount was undertaken with the Returning Officers required to announce the result by a set date. Within three days a judicial recount could be requested which generally commenced immediately. In 1993, the system was entirely electorate based. The result only became clear on 17 November 1993 when the final seat distribution was: National 50 seats, Labour 45 seats, Alliance 2 seats, NZ First 2 seats (total 99 seats).

The advice given to the Prime Minister on the day following the election was that, pending clarification of the result, his government should function in a caretaker capacity. The advice did not reflect any legal obligation but was an application of an established New Zealand convention to new facts. What guided the advice to the Prime Minister was democratic principle.[17] The mandate which the government had enjoyed since the 1990 election was, of course, spent. The will of the electorate had been freshly expressed but, as yet, its meaning was not clear. Only when clarity emerged, as it did after two weeks, could the government legitimately, as opposed to lawfully, resume the exercise of government power. The Prime Minister and the Cabinet accepted that advice and acted on it, thereby demonstrating their intention to be bound. On one view they simply adapted the convention, applying it to situations of uncertain electoral results. However, in my view, they varied the convention in a manner that has proved important under the new electoral system.

When the Cabinet Office Manual was revised in 1996, a new section on conduct of government during periods of caretaker government was included. This was based on the 1993 experience and decisions. The Manual expressly recognises that, during periods of caretaker government, some decisions going beyond routine administration may have to be made. Accordingly, when the identity of the incoming government has not emerged, the Manual suggests consultation with other Parliamentary interests as a means of ensuring that such decisions comply with democratic principle.[18]

When in 1996 formation of the government took place some eight-and-a-half weeks after the election, New Zealand endured its longest period of caretaker

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17 Advice was given by the Cabinet Secretary and Solicitor-General. The Prime Minister no doubt also conferred with others and had regard to public discussion.

18 *Cabinet Office Manual* (Cabinet Office, Wellington, 1996) [hereafter referred to as "COM"] paras 2.49 to 2.51. Guidance about the caretaker convention is given in Cabinet Office Circular CO 99/5.

government. It has been unkindly suggested that the hiatus during negotiations over a coalition provides a period in which the bureaucracy, personified by Sir Humphrey Appleby, governs.[19] The reality is that there is a period of governmental languor during which decision-making is minimal but when stress, in particular between Ministers and public servants, is high. Caretaker government is a necessary condition in the post election period but only for as long as it takes to clarify who is to have the mandate of the House to govern. In my opinion, the convention starts to apply only once the previous mandate has expired, a point usually marked by election day. Governments may exercise some discretion in making decisions in the pre-election period.[20] They do so, however, as a matter of choice. Until the electorate votes again, according to democratic principle, the government retains the electorate's mandate.

Finally, on the caretaker convention, it is to be borne in mind that the restraint is one of convention not law. If Ministers take decisions outside the scope of the convention, they will not, I believe, on that account be restrained by the courts. They will, however, need to satisfy the electorate that the circumstances warranted the exercise of their powers or suffer the political consequences.

III. MMP: CATALYST FOR CHANGE

At this point, I provide a summary of the changes in electoral representation which have been the catalyst for wider constitutional change. Until 1993 New Zealand general elections were conducted on the FPP electoral system. In 1993, in conjunction with the general election of that year, a proposal was carried at a national referendum for the introduction of the Mixed Member Proportional (MMP) system of voting in place of the existing FPP relative majority system. In direct consequence, provisions for the MMP electoral system, set out in the Electoral Act 1993, came into force.[21] Under the MMP system, each elector may separately vote for both a local constituency member and a party. Half of the 120 seats in the House of Representatives are allocated to the successful candidates in constituencies who are still elected on an FPP basis. Of the remaining 60 seats, five were in Mäori roll constituencies. The remaining 55 were allocated among candidates on party lists, the seats being distributed according to a system reflecting the proportionate vote received by those parties qualifying for list seats. The broad purpose of the 1993 Act is to achieve the distribution of seats in the

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19 Brazier, R *Constitutional Practice* (2nd ed, 1995) 39.

20 See *COM*, supra note 18, at para 2.42, and CO 99/5.

21 Under s 2(2) of the Electoral Act 1993.

new House of Representatives according to the proportionate vote received by each party across the whole electorate.

On 16 December 1996 the first administration in New Zealand to take office with the mandate of a Parliament elected under the MMP electoral system was sworn into office by the Governor-General. In political terms, that mandate had been expressed by the announced agreement of the Parliamentary representatives of the New Zealand National Party and the New Zealand First Party. Those representatives respectively occupied 44 seats and 17 seats in the 120 member Parliament. The two Parliamentary parties had signed a written Coalition Agreement expressing the terms of their political accommodation.

MMP has not altered the basic principles of our constitution. The key principles remain that, first, the Governor-General acts on advice of Ministers who enjoy the confidence of the legislature, to which, secondly, Ministers are collectively and individually responsible. Both those principles have had to be considered in the course of events of the last three years.

I will discuss particular experiences in our institutions of government over the last three years, principally focusing on the constitutional impact on the Crown, the Parliament and the government under the new electoral system. I do so from the perspective of a public servant who is a law officer of the Crown and who has been an adviser on questions of constitutional law and practice to each of the principal constitutional actors.[22]

1. Mrs Kopu's "Resignation"

On 16 July 1997 an Alliance list Member of Parliament, Mrs Alamein Kopu MP, resigned from the Alliance Party. That day she wrote to the Speaker advising that she intended "to serve the Mäori people as an independent Mäori Member of Parliament". As a list member Mrs Kopu owed her place in Parliament to her position on the Alliance party list at the previous election. She had not personally won a consitutency seat. Herein lay the controversy over her decision to become an independent Member of Parliament.

This interesting political incident resulted in the Privileges Committee of the House being required to rule on whether Mrs Kopu remained a Member of Parliament or whether the effect of her political action was to resign her seat allowing the Alliance to draw a new Member being the next candidate on the

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[22] I have discussed the role of the Solicitor-General of New Zealand in "Principles for Sharing Law Officer Power" (1998) 18 NZULR 197.

Party List on which it had gone to the polls in 1996. The Privileges Committee resolved this issue in favour of Mrs Kopu's continuing membership. The matter did not raise a question of direct importance to the position of the Coalition Government at the time but it did raise an issue of principle that surfaced again when tensions developed in the Coalition the following year.

It is convenient now to examine the constitutional issues raised by Mrs Kopu's departure from the Alliance Party. Here, I had the privilege of a ringside seat. I had been invited to appear as counsel before the Privileges Committee of the House to advise it on legal and constitutional issues arising.[23] In legal terms, the key provision was s 55(1)(f) of the Electoral Act 1993, which relevantly provided:

> The seat of any Member of Parliament shall become vacant - ...
> (f) If he or she resigns his or her seat by writing under his or her hand addressed and delivered to the Speaker of the House, or to the Governor-General if there is no Speaker or the Speaker is absent from New Zealand, or if the resigning Member is the Speaker.

Mrs Kopu had not in express terms resigned her seat. She had rather, in writing, resigned from the Alliance Party and notified the Speaker accordingly. Evidence was, however, given that she had in 1995, prior to selection as an Alliance list candidate, given a pledge that she would resign her seat should she vote against or obstruct Alliance policies or leave the party after her election. The Alliance argued before the Privileges Committee that the statutory provision as to when a vacancy was created by resignation was to be interpreted in light of the principle of proportionality, in terms of which, counsel said, it was the purpose of the Electoral Act that the numbers of each political party in the House should be proportional to the votes cast in favour of that party at the general election. On that basis, it was argued that Mrs Kopu's letter of resignation from the Alliance, read in the context of the earlier written commitment she had given to resign from Parliament should she leave the Alliance, constituted her resignation "by writing". It was further argued that, when these documents were delivered to the Speaker by the Alliance Party Leader, Mrs Kopu's resignation had been delivered within the terms of the statutory provision. As an alternative argument, the Alliance said that it had relied on a contractual commitment from Mrs Kopu who was either directly bound in contract to resign, or at least estopped from subsequently asserting before the Committee her right to remain an MP.

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[23] I appeared with Claudia Geiringer, Crown Counsel.

Following its taking of evidence, the Privileges Committee called on me to advise my view of the Alliance's contentions. There were, I concluded, two obstacles to the Alliance's standpoint. First, there was force in the argument that Mrs Kopu's pledge to resign her Parliamentary seat, given prior to her selection as a candidate but later reaffirmed, was a clear commitment to vacate should she oppose Alliance policy or leave the party once in the House of Representatives. To classify the commitment as a resignation to be effective on occurrence of a future event might perhaps be arguable. But it was not possible to say that the various actions or documents amounted to a resignation in the form required by s 55(1)(f). In particular, the only document addressed by Mrs Kopu to the Speaker specifically expressed her intention to continue in Parliament. Moreover, the Act had said what was to be a resignation and required a definite rather than a contingent action.

As to the principles of statutory interpretation, a core purpose of the Act was certainly to introduce a proportional representation system to the legislature. However, the Act's principle of proportionality was subject to exceptions, in specified circumstances, for example, to set thresholds for representation and in order to accommodate the need for constituency representation.[24] I suggested that there was also a countervailing principle of the independence of an elected Member of Parliament which had not been displaced by the 1993 Act. The Act was to be interpreted as accommodating both principles on the basis that, while proportionality dominated the process of appointment, the statutory scheme thereafter strongly reflected the value of independence.

The argument that Mrs Kopu had resigned raised the question of the status of a Member of the House, specifically, an issue concerning a Member's qualification to sit and vote in the House. As such, there was precedent for the view that the question was one of privilege, to be decided exclusively by the House. In *Bradlaugh v Gossett*,[25] it was held that the House of Commons was not subject to that part of the statute law which concerns its own internal proceedings. There was legal as well as Parliamentary precedent, therefore, for ruling that the question was one of privilege which ought to be considered

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[24] Disproportionate representation can arise in circumstances where a party wins more constituency seats than its proportion of the Party vote. Similarly, if the seat of a constituency MP is vacant, a by-election result may change the proportions of representation in the House.

[25] (1884) 12 QBD 271.

by the Privileges Committee of the House. The Speaker so ruled.[26] The Privileges Committee was asked to investigate and did so.

Nevertheless there is scope for the view that as a matter of principle the right of a person to act as a Member of Parliament raises an issue that the courts rather than Parliament should resolve. The interpretation of statutes and their application to particular facts is pre-eminently the function of the courts in our constitutional structure. Whether an elected legislator remains qualified to sit in a legislative house is also inherently a question which calls for an independent decision according to law. It should not be thought that *Bradlaugh v Gossett* will forever be the final word on the boundary between Parliamentary privilege as a jurisdiction exclusively administered by the House of Representatives and the jurisdiction claimed by the courts, when an issue concerning a member's qualification to sit arises. Courts in other jurisdictions, albeit in the context of a written constitution, regularly decide questions concerning the status of legislators.[27] I suggest that there is scope for movement in New Zealand in this area of constitutional common law. The principle of *Bradlaugh v Gossett* is most important in the context of internal deliberative workings of the House, including the maintenance of its internal discipline. In cases of significant legal difficulty which address the right to membership, the House is in any event likely to wish to follow the precedent of 1897 when it enlisted the assistance of the court, passing special legislation to do so.[28]

Indeed, in Mrs Kopu's case, the Privileges Committee itself accepted that the alternative argument which asserted that there was a contractual obligation on Mrs Kopu to resign was outside the scope of Parliamentary privilege and should be left to the courts. This argument raised the legal principle which had been articulated recently in the decision of the High Court in *Peters v Collinge*.[29] In that case, Fisher J had considered the effect of what was said to be a contract which purported to preclude a person seeking selection as a

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26 *Report of the Privileges Committee on the question of privilege referred on 22 July 1997 relating to the status of Manu Alamein Kopu as a Member of Parliament* (1997) AJHR 1.15B, Appendix A, 8.

27 See *Egan v Willis and anor* (1998) 158 ALR 527; (1998) 73 ALJR 75, a decision of the High Court of Australia; and *Kalauni v Jackson & Ors*, a decision of the Court of Appeal of Niue (reported in Angelo, A H *Niue Laws 1996-1997* 156). The judgment in *Kalauni* refers to *Powell v McCormack* (1969) 395 US 486, a decision of the United States Supreme Court which reinstated a United States Congressman after the House of Representatives had voted to exclude him.

28 The resulting Court of Appeal decision is *Re "The Awarua Seat Inquiry Act, 1897"* (1898) 16 NZLR 353.

29 [1993] 2 NZLR 554.

candidate from exercising electoral rights if not finally selected as a candidate for the National Party. The judge concluded that for the Court to enforce an agreement not to exercise the right to stand for Parliament would be contrary to public policy. It followed, I suggested, that it would be contrary to public policy for the courts to recognise the enforceability of a contract which included a contingent obligation to resign membership of the House.

There was also support for application of this approach in the judgment of the Court of Appeal in the Mäori fish settlement case *Te Runanga o Wharekauri Rekohu Inc v Attorney-General*.[30] In that case, the Court discussed the nature of a "Deed of Settlement" of fishing claims which was entered into between the government and Mäori negotiators which it was contemplated would be the subject of legislation. The Court held that the deed did not have legal effect, being "a compact of a political kind, ... its subject matter so linked with contemplated Parliamentary activity as to be inappropriate for contractual rights". The terms of the deed could not interfere with the introduction of a Bill in the House of Representatives. The scope of that principle, as I saw it, extended to attempts to use the law to enforce compacts of a political kind that would impact on the right of a Member of Parliament to continue to hold office. In summary, I did not consider that the Committee should decide the matter, but did indicate my view that the argument of the Alliance would be unsuccessful if the same issue were taken to court.

The Privileges Committee in its Report to the House expressed its agreement with my advice on the interpretation question and, of course, Mrs Kopu remains a Member of Parliament to this day. But the events demonstrate the tension between the longstanding Burkean principle of the independence of Members of Parliament, which supports Mrs Kopu's right to leave her political grouping, and the principle of proportionality under the MMP electoral system, whereby parties earn the right to representation in the House to the full proportionate extent of their list vote at the election.

MMP has altered the relationships between Members of Parliament, political parties and the electorate in a manner not previously apparent. Under the traditional Westminster FPP model, all members were in a direct relationship with the electorate. The parties played no formal institutional role. Indeed, the constituency model pre-dated the emergence of political parties which in theory remained irrelevant to the electoral process.[31] It was in this context that the Burkean ideal of an independent Member accountable to his or her conscience originally developed. During the twentieth century, the advent of

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30 [1993] 2 NZLR 301.

31 *Report of the Royal Commission on the Electoral System: "Towards a Better Democracy"* (Government Print, Wellington, 1986) para 2.4.

strong political parties threatened, but did not destroy, Burke's legacy.[32] Not until 1993 was the growing de facto power of parties recognised by New Zealand's electoral law. On introduction of the MMP system, a tri-partite relationship was constituted between the electorate, party list candidates, and the political parties themselves.

The view I reached in advising the Privileges Committee was that, despite such statutory recognition of political parties, specific legislation was required to displace the constitutional independence of a Member of Parliament, including the Member's right to resign from her party but remain in the House. Here, presently, there are no conventions nor realistically is there any prospect of them arising. Other jurisdictions have fashioned and implemented new approaches to this constitutional issue.[33] It remains to be seen whether New Zealand's legislature will do so.

2. Appointment of Governments: Role of the Governor-General

One area where it is well recognised that constitutional convention provides only limited guidance to the correct exercise of legal powers concerns the Governor-General's power to appoint the Prime Minister following a general election. Where it is unclear where the support of the new House of Representatives will lie, the Governor-General retains a discretion as to whom to appoint. Inherently, general elections under the MMP system are more likely to produce uncertainty, immediately following the election, as to which party or parties will be able to form the government.

In this area, we now have the considerable benefit of a series of public contributions by His Excellency, the Rt Hon Sir Michael Hardie Boys, the present Governor-General of New Zealand. These include his valuable 1997 Harkness Henry lecture.[34] I propose simply to summarise what I perceive to be the main themes of His Excellency's approach and to point to differences that seem to be emerging between New Zealand practice and that of other countries in this traditionally sensitive area.

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32 *Amalgamated Society of Railways Servants v Osborne* [1909] 1 Ch 163, 186-187, per Fletcher Moulton LJ (CA) and [1910] AC 87, 114-115, per Lord Shaw (HL).

33 In South Africa the constitution's anti-defection clause obliges legislators to vacate their seats if they cease to be members of the parties that nominate them. The clause was upheld by the Constitutional Court of South Africa when challenged in *re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744, 829-831.

34 "Continuity and Change: The 1996 General Election and the Role of the Governor-General" (1997) 5 Waikato Law Review 1.

Sir Michael emphasises that it is the task of elected politicians to reach the political accommodations that enable governments to be formed. How they do so is for them but the outcome of their processes should, as soon as it is clear, be made known to the electorate. The Governor-General in some instances may need to take steps to communicate directly with the political leaders to clarify where support lies but, in general, that will not be necessary. Ideally, only when the politicians have discharged their duty and made clear to the public the alignment of the forces in Parliament should the Governor-General act and appoint or reappoint the government as necessary.

Two things are notable about this approach. First, the emphasis is on facilitation of a political contest as the means of determining whom the Governor-General should appoint as Prime Minister. The process is open to the extent that the Governor-General seeks to act on the parties' public statements of their position. It is democratic in that the Governor-General acts as a proxy for the Parliament. Because he or she acts on public statements of the political position, the responsibility for miscalculations will generally be seen to be that of the relevant parliamentary leaders. The second factor is that the playing field for the contest is level. There is no suggestion that the Governor-General accords preference to a particular faction at the outset of the contest by inviting its leader to see if she or he can form a government. Under our electoral system, being the head of the largest party in the new House of itself warrants no preferred treatment until it is demonstrated that the leader is able to secure the support of a majority.[35] The position of a Prime Minister, holding office in a caretaker capacity following a general election, and who is not immediately able to demonstrate majority support in the new House, is the same.

This is not to say that the New Zealand approach will not encounter difficulty. The risks in any Vice Regal assessment of public statements about future political intentions are vividly illustrated by the action of Governor-General Byng of Canada who refused a request for dissolution from the Liberal Prime Minister, Mr Mackenzie King, accepted Mr King's resignation and, appointed the Conservative Leader, Mr Meighan, in his place. Mr Meighan was defeated after only three days in office and, on his advice, Parliament was dissolved.[36] After the resulting election, Mr King again became Prime Minister. The Governor-General was recalled. But there are

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35 Ibid, 9.

36 Forsey, "The Royal Power of Dissolution of Parliament in the British Commonwealth" in *Evatt and Forsey on the Reserve Powers* (1990) chs 5 and 6; Quentin Baxter "The Governor-General's Constitutional Discretions: An Essay Towards a Re-Definition" (1980) 10 VUWLR 293.

also risks in being cautious.[37] The new approach signals a willingness by His Excellency as far as possible to adhere to democratic principle and correlatively to diminish the scope of broad gubernatorial discretion. This valid goal may lead to giving less weight to the views of Ministers in office as caretakers following an election.

3. Coalition Break-up: A Political or Constitutional Event?

In August 1998 the Coalition Government broke up over the issue of the sale of the government's shares in the Wellington International Airport Company. On 12 August, New Zealand First members walked out of a pivotal Cabinet meeting called to decide the issue. National members of the Cabinet remained and agreed in principle to proceed with the sale. To decide the matter in their partner's absence was said by the leader of New Zealand First to be contrary to the terms of the Coalition Agreement. In any event, the Coalition did not survive the split. The leader of New Zealand First, who was the Deputy Prime Minister, was dismissed on 14 August by the Governor-General acting on the advice of the Prime Minister. By 19 August, New Zealand First as a Parliamentary party itself had split into factions. National was able to obtain sufficient support from some former New Zealand First Members and others to enable a National-led coalition to remain in office. Some of that support (most notably that of the ACT New Zealand Party) was from members remaining outside the government. The continuing coalition was therefore a minority government.

I now look at the events that led to the break up of the coalition government that had taken office in 1996. In their agreement, the two parties addressed the coalition's relationship with the key institutions of government. They said that constitutional requirements, in particular the Constitution Act 1986, would "require the retention of existing Executive structures subject to amendment as set out in this agreement".[38] The Ministry would comprise 20 Ministers inside as well as six outside the Cabinet, and the sharing between the parties of those positions was specified.[39] Ministers were to comply with the Cabinet Office Manual provisions and "accept the conventions of Cabinet responsibility".[40] General provisions for Cabinet procedures included a

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37 I have in mind the Tasmanian situation following the 1989 election when the Governor permitted a Premier to stay in office for over a month even though there were public statements indicating that a minority Labour Government, supported by independent members, would have a majority. See Castles, "Tasmania's Constitutional Crisis 1989" (1990) 12 Adel LR 292.

38 *The Coalition Agreement* (1996) cl 7.1.

39 Ibid, cl 7.3(a).

40 Ibid, cl 7.3(d).

provision that the "quorum of Cabinet to be at least one half of each Coalition partner's appointees to inside Cabinet Ministerial positions".[41] By that, the parties presumably meant that the Cabinet would not transact business in the absence of the specified form of combined presence.

Provision was also made in relation to the resolution of what were called fundamental disputes.[42] The stipulated purpose of the coalition was the political one of "provid(ing) sound and stable government for New Zealand for a three year term".[43]

The coalition agreement provisions in respect of a quorum for meetings of the Cabinet differed from those expressed in the Cabinet Office Manual. This provided, then as now, for a quorum of half the full membership of the Cabinet plus one.[44] The nature and relative constitutional status between these documents accordingly comes into question. When the Cabinet had proceeded to take its decision to sell part of its shareholding in the Wellington Airport Company it had a quorum in terms of the Cabinet Office Manual's provisions but not in terms of what the Coalition Agreement had provided. That was on account of the walk-out by New Zealand First Ministers. What were the implications of this in terms of government? Was it a constitutional or merely a political question that arose? The answer requires consideration of the legal and constitutional effect of the events.

If we start with the relevant statutory provisions we do not get far in answering this question. The Constitution Act specifies who may hold office as Ministers and as members of the Executive Council.[45] It also provides that any member of the Executive Council may exercise the functions, duties or powers of any Minister.[46] The Act does not, however, lay down any procedural requirements for governmental decision-making. Indeed, the Constitution Act does not mention the term "Cabinet" at all, although the term has been mentioned in our legislation since at least the passing of the first Ombudsmen Act in 1962. Nevertheless it remains true to say that the Cabinet is "a body existing by constitutional convention rather than law".[47] No principle of constitutional law was accordingly breached by the fact that

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41 Ibid, cl 7.3(d)(x).

42 Ibid, cl 13.

43 Ibid, cl 2.1.

44 *COM*, supra note 18, para 3.25 (which also empowers the chair to vary the requirement "if necessary").

45 Constitution Act 1986, s 6.

46 Constitution Act 1986, s 7.

47 *CREEDNZ v Governor-General* [1981] 1 NZLR 172, 177 (per Cooke J).

the decision was taken by the Ministers who remained in the Cabinet room when New Zealand First Ministers walked out.

What about constitutional convention? Clearly the decision to sell the Crown's shares in the Wellington Airport Company raised issues about compliance with the Coalition Agreement. Did this political event disturb the conventions upon which Cabinet government rests? Wheare has said that "[a] convention is a binding rule ... of behaviour, accepted as obligatory by those concerned in the working of the constitution".[48] Conventional obligations are of moral and not legal force. Recognising this does not diminish their importance which is that, in the working of the constitution, they often provide definitive guidance for the proper and principled exercise of legal power. In law, Cabinet may be no more than a group of members of the Executive Council but, by convention, it is the central decision-making body of the government. Cabinet is also the body finally determining the government's policy, including what matters it will submit to the House of Representatives.

The conventions that support Cabinet government are, first, that Ministers collectively are responsible to Parliament and, secondly, that the Governor-General acts on the advice of Ministers who enjoy the confidence of Parliament.[49] In deciding, albeit conditionally, to sell the government's shares after their colleagues left the Cabinet room, the National Ministers exercised rights of the Crown as the owner of the shares. The only criticism that could be advanced in terms of convention would be if it could be said that the Ministers had lost the support of the House at the time they acted. But there was no indication that this was the case. Any rejection of the administration would be a subsequent matter for the House, which as it happened, was sitting at the time. Incidents of robust difference within government may lead to but do not in themselves demonstrate a loss of parliamentary support.

But what of the provisions in relation to quorum in the Coalition Agreement? In my view, a pact such as the Coalition Agreement, however it is expressed, must be regarded as a political arrangement, so that any failure to observe its terms is a matter of *political* rather than *constitutional* consequence. From a legal perspective, I consider that the courts would, if an issue between parties to such an agreement came before them, regard the agreement as unenforceable, whether the case was argued in terms of the law of contract or otherwise. That seems to have been the expressed intention of the parties to

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48 Sir Kenneth Wheare, cited in Marshall, supra note 11, at 7.

49 *Letters Patent Constituting the Office of Governor-General of New Zealand* (1983) cl 7.

the Coalition Agreement.[50] However, even if it were not, surely the courts would have refused to enforce the collection of mutual political promises as to how the government would be conducted during the term of Parliament? To do otherwise would take the courts outside their proper role. Such questions are entirely political and not legal.

Would the position have been different had the text of the Cabinet Office Manual been amended by the Cabinet to reflect the Coalition Agreement provisions? While the Coalition Agreement is clearly a political pact, it is not so easy to categorise the Cabinet Office Manual. The Manual is, its preface states, "an authoritative guide to central government decision-making ... (and) a primary source of information for those outside government on constitutional and procedural matters".[51] It includes an introductory essay on the foundation of the current form of government.[52] It describes the functions of the Governor-General, in particular, in relation to the Executive Council, and of the Prime Minister and Ministers of the Crown. Powers and procedures of Cabinet and Cabinet Committees including preparation of proposals for legislation and regulation are discussed. It stipulates standards of government administration to the extent of outlining relevant conventions and practices seen as in accordance with them. The Manual's authority derives from the Cabinet's decision, taken at the outset of each new administration, to adopt the Manual's procedures.

In brief, the Manual describes the underlying structures, principles and values of government. Much of its guidance concerns administrative practices to be followed by Ministers and public servants in the government's decision-making process.

The description of principles includes the discussion of constitutional conventions of government. However, the Cabinet Office Manual does not itself purport to be a final articulation of conventions which form part of our unwritten constitution. It is descriptive rather than prescriptive. Some constitutional writers distinguish usages from conventions.[53] A usage is not a rule but merely a governmental practice that is ordinarily followed, although it cannot be regarded as obligatory in the sense of a convention. Much of the content of the Manual would be regarded as reflecting usages in relation to

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50 *The Coalition Agreement* cl 14 provided that: "The parties agree that this agreement shall not be justiciable in the Courts of New Zealand".

51 *COM*, supra note 18, at xiii.

52 Keith, Rt Hon Sir Kenneth "On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government" in *COM*, supra note 18, 3-8.

53 For example, Hogg, P W *Constitutional Law of Canada* (4th ed, 1997) 23.

government practices - matters of administration rather than constitutional substance.

Some observers see the breakdown of the coalition in terms of the superior constitutional status of the Manual over the Coalition Agreement. I regard that view as flawed. It was certainly the case that, when the Cabinet took its decision to sell the shares, the numbers met the quorum requirements of the Manual and not those of the Coalition Agreement. But, in my opinion, no breach of the constitution would have taken place had the Manual's provision for a quorum matched that of the Coalition Agreement. A provision in the Manual for a quorum no doubt expresses a sound principle, but to assert that it has constitutional significance is to label as constitutional a matter of administrative significance. That it is the Cabinet Office Manual that expressed the administrative requirement does not alter the position.

The Cabinet is an informal body which regulates its own procedure. It is free to vary its existing procedures and may do so to implement terms of a coalition agreement. The Prime Minister also can vary the Cabinet's procedures. All must do so within the limits of constitutional law and convention or risk the respective legal or political sanctions for breach. And the Manual is an important tool in maintaining order and continuity in government process. That role would not be facilitated by constant tinkering with its provisions.

Had the Coalition Agreement stipulated amendments to the Cabinet Office Manual in relation to matters of constitutional convention, such, on their adoption by the Cabinet, would have taken effect as Ministerial administrative directives. But, for reasons already given, caution would be required before it could be said that new conventions were being initiated by such a process. A usage may develop into a convention, but constitutional writers would generally regard that status as reached only after there has been usage for a period of time. The furtherance of democratic or other constitutional principle is also required. As the Cabinet Office Manual is merely descriptive of constitutional conventions, amendment of its terms does not necessarily alter existing conventions in any way.

IV. Enforcing Conventions

Conventions ensure that the legal powers of our constitution are exercised in accordance with democratic principles. But, not being obligations of a legal kind, the orthodox view is that they are not enforceable other than at the hands of the constitutional actors themselves. This may appear extraordinary given the constitutional importance of both the Governor-General's and the executive government's compliance with conventional rules. Moreover, there

is strong public acceptance of the constitutional principle that executive government should be accountable to the courts for acting within its legal powers. Nevertheless, the courts do not equate rules of constitutional convention with those of law and do not enforce conventions.[54]

The principal reason for this attitude is theoretical. Conventions are the product of neither statute nor judge-made rules. To speak of constitutional precedents is to use that term in a different sense than that used by lawyers with reference to the common law. Constitutional precedents are no more than series of events from which insights into the working of the constitution may be derived. The issues arising appear to offer little scope for adjudication against legal standards.

Arguments that a convention may crystalise into law through evolutionary development were rejected by the Supreme Court of Canada in *Re Resolution to Amend the Constitution*.[55] The reason given was that the legal system did not contemplate sanctions for breach of conventional rules which were often in conflict with legal rules which it was the court's duty to enforce.[56]
It does seem apparent that there are effective sanctions available for errant constitutional behaviour in most instances. If a government clung to the office, despite the obtaining by opposition forces of a majority, the remedy would be dismissal of the Ministry by the Governor-General. If a Governor-General declined to assent to legislation, removal from office would generally be an available remedy. In other words, sanctions are available at the hands of the principal actors.

That a breach of convention can carry a significant political sanction is well illustrated by events in New Zealand immediately following the 1984 election. The National government had been defeated. At the time, New Zealand was experiencing a foreign exchange crisis. The incoming government was pressing for a devaluation of the New Zealand dollar, a proposal resisted for some days by the defeated Prime Minister (who was also Minister of Finance). That resistance was widely criticised as being in breach of the

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54 See *Madzimbamuto v Lardner-Burke & Anor* [1969] 1 AC 645, where the Privy Council rejected the argument that the United Kingdom legislature could not legislate within the area of competence of Southern Rhodesia in the face of a convention that required the Southern Rhodesian legislature's consent.

55 [1981] 1 SCR 753. The case concerned a proposed resolution of both legislative Houses in Canada inviting the United Kingdom Parliament to patriate the British North American Act. It was argued that convention required that the Provinces consent before the resolution was transmitted to the Westminster Parliament.

56 Supra note 55, at 880-881.

caretaker government convention. The outgoing Attorney-General publicly acknowledged that the criticism was justified.[57] The political embarrassment to the caretaker Cabinet was obvious. It seems plain that the incident contributed to the subsequent early change in the position of leader of the National Party.

The 1984 breach of convention had a further consequence. The events threw doubt on whether it would have been possible for the Governor-General to appoint the leader of the successful Labour Party immediately to office to deal with the crisis had it continued. This issue concerned whether the incoming Prime Minister's status as a Member of Parliament continued during the period between dissolution of the old Parliament and confirmation of the final results of election of its successor.[58] The matter was put beyond doubt by section 6 of the Constitution Act 1986 which permits candidates at a general election to be appointed Ministers, vacating that office if they do not become a Member of Parliament within 40 days.

This legal outcome may be regarded as an indication that the political consequences of breach of a convention will, at times, include legislation clarifying and thus reinforcing the power of the principal actors to apply constitutional values. Such consequences are not uncommon.[59]

Professor Hogg argues that the effect of a court-granted remedy for a breach of convention would be the judicial transformation of a conventional rule into a legal one.[60] Nevertheless the courts in ways other than direct enforcement can and do give recognition and impact to constitutional conventions. In *Attorney-General v Jonathan Cape Ltd*,[61] a conventional duty of Cabinet secrecy was drawn on by the Court as one source which helped to identify a legal duty of confidence which duty was enforceable. Similarly, the statutory recognition of certain constitutional conventions in the Official Information Act 1982 indicates the likelihood at some time that a court will be called on to discuss their content and, perhaps, their importance in the particular context.[62]

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57 Attorney-General J K McLay's press statement, 17 July 1984: reproduced in Palmer, Sir G and Palmer, M *Bridled Power* (1997) 34.

58 See the discussion in *Constitutional Reform*, supra note 7, at 13-20.

59 See, for example, Munro, supra note 10, at 220, citing the Parliament Act 1911 (UK).

60 Hogg, supra note 53, at 26.

61 [1976] 1 QB 752. The *Crossman Diaries* case.

62 See s 9(2)(f).

In the *Canadian Reference* case,[63] a majority of the Supreme Court was prepared to recognise and indicate the existence of a constitutional convention even although it could not be enforced. The Court had separately addressed the legal question of whether a convention could crystallise into law and held that it could not. To go on to address whether a convention existed was, in the Court's view, an appropriate exercise of the judicial function, given that fundamental issues of legitimacy and constitutionality arose. The Court recognised that a convention did exist, requiring that there be Provincial consent to the federal Parliament's initiatives for promotion of amendment by the United Kingdom legislature of Canadian constitutional legislation. The Court also held that sufficient consent was not at the time available. The Court emphasised that it could not enforce the convention. The decision nevertheless strongly influenced the subsequent constitutional debate in favour of the Provinces' political position, and has been heavily criticised. Hogg argues:

> In my view, the Court, which is not an elected body, and which is not politically accountable for its actions, should have confined itself to answering the legal question, and should not have gone beyond the legal question to exert any further influence over the negotiations.[64]

The Canadian judgment may, however, indicate that in appropriate circumstances the court will regard issues arising in the context of a constitutional convention as justiciable.[65] It may be that this will be unlikely where the factors governing a decision or position involve a high degree of political judgment. But that matters have a high degree of political significance does not necessarily mean that the issues to be decided are not justiciable in terms of accepted standards.[66] The Canadian case reminds us that the courts ultimately will judge for themselves whether such standards are available, deferring to gubernatorial and political judgments when they are not, but asserting their constitutional role to the extent that they are.[67]

V. CONCLUSION

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63 Supra note 55.

64 Hogg, supra note 53, at 22-23.

65 But see *Te Waka iti Ika o Te Arawa v Graham & Ors* CA 277/96, 27 November 1996.

66 For example, a Court will not decline to make a declaration as to the meaning of a statute simply because the issue is politically sensitive and controversial. See *Electoral Commission v Tate* [1999] 3 NZLR 174 (CA).

67 See Keith, "The Courts and the Conventions of the Constitution" (1967) 16 ICLQ 549.

Until 1993, people went to the polls knowing that they were choosing which of two major parties would form the government. In law, there was a series of individual constituency contests, but the party process made the reality a general election rather than a series of constituency elections. Since 1993, the reality of a general election is also the legal truth. But now the election is but a first step in the drama of government formation. The people speak and the politicians then translate their message into allocation of governing power.

The role of the Governor-General as guardian of the constitution who ultimately finds the true successor by ascertaining the will of Parliament continues in New Zealand with innovations marked by adherence to democratic principle. But it cannot be said that the political and conventional nature of the process will not in future give rise to legal questions. The courts can be expected to refrain from intervention where they would usurp the role of democratic institutions or where public opinion is the best referee. But there may be occasions in the area of convention, as well as law, in which issues arise that put in doubt the adequacy of the constitutional framework within which democracy operates. If this transpires, New Zealand can expect to see the judiciary become a significant actor in our constitutional drama.