

FOUNDATIONS OF THE CONSTITUTION

BY P.A. JOSEPH, LL.B. (Hons)(Cantuar) LL.M. (Br.Col.)

*Barrister and Solicitor of the High Court,
Senior Lecturer in Law, University of Canterbury*

The New Zealand Parliament enjoys absolute powers of law-making.¹ Whence the source of these powers? Do they derive from Imperial enactment? Or are the foundations of our legal order “indigenous”, despite the devolution of New Zealand’s constitutional authority and powers? Did Parliament’s redefinition of its legislative powers in 1973 sever New Zealand’s legal continuity? Or was the New Zealand Constitution Amendment Act 1973 legally authorised by constituent powers granted under United Kingdom enactment? Such questions about the ultimate foundations of the legal system lie on the periphery of constitutional law and jurisprudence.

This article retraces the steps by which New Zealand acquired full plenary and constituent powers, and examines New Zealand’s transition from an independent Commonwealth country to a fully autochthonous state. Devolution of legal authority from Britain began in 1852, and ended when the Constitution Act 1986 passed into law on 13 December 1986. Although declaratory rather than the source of New Zealand’s state instruments and authority, this Act gave full expression to our national sovereignty, and brought to a close 135 years of piecemeal legal development.

I OVERVIEW

For most legal positivists, parliamentary power in Britain has its source in political or historical fact. Legislative supremacy was conceived in high drama from a three-way struggle between the King, Parliament and the courts, culminating in the Glorious Revolution. “Sovereignty [in the United Kingdom] is a political fact” wrote H.W.R. Wade, “for which no purely legal authority can be constituted.”² Sir John Salmond pioneered theories of an ultimate rule of law, the origin of which is “historical only, not legal”. No purely legal explanation could avail; there was no prior, superior authority (or sovereign) whence the English Parliament could derive supreme legislative power.

Australia, Canada and New Zealand have different histories. The legitimating quality underpinning their constitutions is, prima facie, legal continuity: the constitution “is” because it derives, with unbroken lineage, from an historically prior and superior authority. These countries were granted colonial legislatures under authority of Imperial statute,³ and subsequent amendments to their constitutions were valid because they were made in the manner and form prescribed. These countries experienced none of the political trauma which

¹ Compare Cooke P.’s equivocations about inalienable common law rights, collated in *Taylor v. New Zealand Poultry Board* [1984] 1 N.Z.L.R. 394, at 398. Compare also Sir Owen Woodhouse’s 1979 *Beaglehole Memorial Lecture*, “Government under the Law”.

² H.W.R. Wade, “The Basis of Legal Sovereignty” [1955] C.L.R. 172, at 196. Approved by Lord Denning M.R. in *Blackburn v. Attorney-General* [1971] 2 All E.R. 1380, at 1383. See F.M. Brookfield, “Parliamentary Supremacy and Constitutional Entrenchment” (1984) 5 O.L.R. 603.

³ See particularly the New Zealand Constitution Act 1852 (Imp.), now superseded by the Constitution Act 1986.

causes a state to proclaim a new existence. Their histories differ from those of other former Crown dependencies whose nationhood was forged on the anvil of revolution. These former Crown territories proclaimed their national sovereignty by denying their colonial past and pronouncing their constitutions had force of law by authority of the people.

New Zealand, then, need look no further than her colonial heritage for constitutional legitimacy. Yet there are unsettling implications in forever looking back to a colonial past. To insist New Zealand must remain legally derived from (and historically subordinate to) the United Kingdom is a time-bound view which manifestly contradicts popular perception. The Scandinavian theorist, Alf Ross, encountered similar problems with his theory of self-referring rules, postulating basic constitutional change as extra-legal, as “a factual social-psychological change in the dominant political ideology”.⁴ He later abandoned his theory (though maintaining his logical objection to self-referring rules) as it failed to explain constitutional change in a way which rationally expressed the popular understanding of it as intra-legal, and not revolutionary. No legal theory can divorce popular understanding and reasonable expectation, and provide a coherent explanation of law and legal change. Lawyers must accommodate their concepts to the facts of political life.⁵

New Zealand’s legal inheritance is from the Houses at Westminster, but it would be wrong to suppose New Zealanders perceive their country as a cast Westminster offspring. Most would view New Zealand’s legal “root” as *autochthonous*,⁶ whether self-seeded without legal antecedent, or constitutionally transposed in accordance with the legal system’s rule of recognition and the succession of rules. At some stage, a state must cease to be the offspring and derivative of an Imperial predecessor and exist as a complete and self-contained entity, as a “law-constitutive fact” itself. Britain’s entry into the European Economic Communities was a signal event which severed emotional ties, and changed New Zealand’s self-perception. Concomitant change in the facts of constitutional life has (to use the popular term) *patriated* the constitution. The symbolic purpose of the Constitution Act 1986 was the due recognition of our national sovereignty. Section 26 repealed the original Constitution Act of 1852 (the Imperial statute implanting Westminster parliamentary government), and revoked the Statute of Westminster 1931 (U.K.) (preserving the paramount authority of the United Kingdom Parliament to legislate at New Zealand’s request). Observed below are further post-War developments aligning New Zealand’s institutions and laws with its national sovereignty.

Steadfast attention to legal devolution obfuscates a shift in paramount power. When this occurs, ultimate constitutional meaning requires re-interpretation of the national existence and culture.⁷ The mantle of legal continuity may prove confounding, but it is no bar to a “new” order transcending an “old”

⁴ *On Law and Justice* (1958), p.83. See also “On Self-Reference and a Puzzle in Constitutional Law” (1969) 78 *Mind* 1 (discussed by Brookfield, *op.cit.*, at 624 *et seq.*).

⁵ “[L]egal theory does not always march alongside political reality . . . legal theory must give way to practical politics”: *Blackburn v. Attorney-General* [1971] 2 All E.R. 1380, at 1382 per Lord Denning M.R.

⁶ Discussed below.

⁷ See P.A. Joseph and G.R. Walker, “A Theory of Constitutional Change” (1987) 7 *Oxford J. Leg.Stud.* 155 for the significance of “interpretive community” in constitutional matters.

and relegating its earlier history to a prior stage of development. Unbroken lineage from an historically superior authority is no obstacle if judges and officials (and ultimately the people) accept the constitution "for itself", if for no other reason. For Kelsen, the *grundnorm* (or ultimate principle) underlying a constitutional order is simply that the constitution ought to be obeyed.⁸ For him, a shift in paramount power would lead to the old basic norm, recognising the historically superior authority, being displaced by one transposing a local legal root. Displacement of the old norm need not entail revolution or violence or outward antipathy to an Imperial predecessor, nor annul or render inoperative former (legal) conditions of law-making.⁹ On this analysis, New Zealand's historical and legal roots may have acquired different locus. The New Zealand constitution remains *historically* the offspring of the Westminster Parliament, but its legal root may have been transposed in accordance with the legal system's rule of recognition.

We return below to the co-existence of New Zealand's legal and historical roots. Legal devolution provides the background and context for their separation — one remaining in locus at Westminster, the other exporting to Wellington.

II LEGAL DEVOLUTION

Acquisition of New Zealand in sovereignty imported *imperium*, the right of government and "the sovereign power to make laws and to enforce them".¹⁰ Britain promulgated two early constitutions for establishing colonial government. The Charter of 1840, granted by Letters Patent of 16 November 1840, established non-representative government under control of a colonial Governor who took his instructions from the Colonial Office. A second constitution was provided by Imperial statute in 1846.¹¹ This granted the colonists' demand for representative institutions, but Governor-in-Chief Captain (later Sir George) Grey was instrumental in postponing their operation. The old Legislative Council constituted under the 1840 Charter was revived in their stead. With further petitioning on the colonists' behalf for local self-government, the British Parliament passed the New Zealand Constitution Act 1852.¹² Although the few surviving provisions of this statute were repealed on 1 January 1987,¹³ the 1852 Act remains the fons et origo of New Zealand parliamentary government.

Section 32 established the General Assembly (now "Parliament")¹⁴ which, by section 53, was empowered "to make laws for the peace, order, and good government of New Zealand, provided that no such laws be repugnant to the law of England". This, until 1973, was New Zealand's primary grant of

⁸ *Pure Theory of Law* (2nd ed., transl.) p.201; *General Theory of Law and State*, p.115.

⁹ See *China Ocean Shipping Co. v. South Australia* (1979) 145 C.L.R. 172, and *Southern Centre of Theosophy Inc. v. South Australia* (1979) 145 C.L.R. 246 (cited by Brookfield, op.cit., at 617, note 85). Compare Murphy J.'s dissents in *Bisticic v. Rokov* (1976) 135 C.L.R. 552, and *Robinson v. Western Australian Museum* (1977) 138 C.L.R. 283.

¹⁰ *Oyekan v. Adele* [1957] 2 All E.R. 785, at 788 per Lord Denning M.R.

¹¹ 9 & 10 Vict., c.103.

¹² 15 & 16 Vict., c.72. For analysis of New Zealand's legal devolution and continuity, see F.M. Brookfield, op.cit.; B.V. Harris, "The Law-making Powers of the New Zealand General Assembly: Time to Think about Change" (1984) 5 O.L.R. 565.

¹³ Constitution Act 1986, s.26.

¹⁴ See the Acts Interpretation Amendment Act 1986.

legislative power.¹⁵ It was not, initially, an unlimited grant. Section 53 imposed a repugnancy limitation of uncertain scope. Some believed that it withheld from the General Assembly any power to amend the Constitution Act itself.¹⁶ This Act was considered part of the “law of England” and subject to the repugnancy proviso. Yet section 68 of the 1852 Act expressly empowered the General Assembly “by any Act or Acts, to alter from time to time any provisions of this [i.e. the 1852] Act”. Repugnancy was in terms excluded (albeit section 68 preserved Colonial Office control by obliging the Governor to reserve any constitution amendment bill for the Royal Assent). A second head of confusion arose over exactly what “law of England” circumscribed colonial legislative power. The Colonial Laws Validity Act 1865 (Imp.)¹⁷ eventually removed the uncertainty by providing that colonial statutes were void if repugnant to Imperial statutes, orders or regulations extending to the colony or colonies generally, and not if merely repugnant to the common law or inconsistent with the Governor’s Instructions.¹⁸

Section 5 of the Colonial Laws Validity Act deemed representative colonial legislatures to “have had, full power to make laws respecting the constitution, powers, and procedure of such Legislature: provided that such laws shall have been passed in [the requisite] manner and form”. This section did not confer full constituent powers, as Professor Berriedale Keith maintained.¹⁹ New constituent powers were conferred under the New Zealand Constitution Amendment Act 1857 (Imp.).²⁰ This repealed section 68 of the 1852 Act and empowered the General Assembly to alter or repeal all but 21 sections. Obligatory reservation was retained only for section 19, obtaining to the powers of the provinces. In 1862, power was granted to alter one further section of the Act, while abolition of the provinces in 1875²¹ rendered inoperative five of the remaining 20 entrenched sections. Contrary to Keith’s opinion, section 5 of the 1865 statute did not impliedly repeal the requirement of Imperial legislation for amendment or repeal of the remaining 15 sections, and authorise repugnancy with respect to them.²²

New Zealand acquired full constituent powers from a sidewind. In 1947, National Opposition leader, Sidney Holland, introduced a private member’s bill to abolish the Legislative Council. His bill could not legally have succeeded as section 32 of the Constitution Act, establishing a bicameral legislature, was entrenched under the 1857 Amendment Act and beyond reach of the New Zealand Parliament. Holland’s bill was defeated on second reading, but on the condition that the Government introduce legislation for removing the constitutional impediment. Thereupon, the Statute of Westminster Adoption Act 1947 adopted the Statute of Westminster 1931²³ into New Zealand law.

¹⁵ See s.2 of the New Zealand Constitution Amendment Act 1973 (discussed below).

¹⁶ For example, K.J.Scott, *The New Zealand Constitution* (1967), p.5; J.F.Northey, “The New Zealand Constitution” in *A.G.Davis Essays in Law* (1965, J.F.Northey ed.), pp.149 and 152; B.V.Harris, *op.cit.*, at 566.

¹⁷ 28 & 29 Vict., c.63.

¹⁸ Sections 2-4.

¹⁹ *Responsible Government in the Dominions* (2nd ed., 1928), p.354. See also R.O.McGechan, *New Zealand and the Statute of Westminster* (1944, J.C.Beaglehole ed.), p.100.

²⁰ 20 & 21 Vict., c.56.

²¹ Abolition of the Provinces Act 1875.

²² Compare *Attorney-General for New South Wales v. Trethowan* [1932] A.C. 526.

²³ 22 & 23 Geo.V., c.4. The Statute of Westminster 1931 is set out in the Schedule to the Statute of Westminster Adoption Act 1947.

Section 10 of the Imperial statute exempted the operation of sections 2–6 as part of New Zealand law, until adopted by the General Assembly. The adoption did not, however, by virtue of section 8 of the 1931 statute, enlarge New Zealand's powers of constitutional amendment.²⁴ The object was to make available the section 4 “request and consent” procedure for obtaining separate United Kingdom grant. Next, the General Assembly enacted the New Zealand Constitution Amendment (Request and Consent) Act 1947 for United Kingdom legislation in terms of the draft bill set out in the Schedule to the Act. The United Kingdom duly obliged by passing the New Zealand Constitution (Amendment) Act 1947 (U.K.), enacting that:

It shall be lawful for the Parliament of New Zealand by any Act or Acts of that Parliament to alter, suspend, or repeal, at any time, all or any provisions of the New Zealand Constitution Act 1852; and the New Zealand Constitution (Amendment) Act 1857 is hereby repealed.

The Legislative Council Abolition Act 1950 completed what Holland's private member's bill set in train. The New Zealand Constitution (Amendment) Act 1947 which facilitated Holland's purpose was itself repealed in 1986,²⁵ though the grant of full constituent powers was preserved by the continuation of Parliament's powers under section 15 of the Constitution Act 1986.

The Statute of Westminster 1931 gave legal definition to dominion autonomy. Section 2 revoked the operation of the Colonial Laws Validity Act 1865 and declared that no future dominion statute shall be void by reason of repugnancy to English law. Section 3 “declared and enacted” full powers of extraterritorial legislation, while section 4 gave legal force to the convention that no United Kingdom statute would extend to a dominion otherwise than at the request and with the consent of the dominion.²⁶ Sections 5 and 6 furthered dominion autonomy in matters of merchant shipping and Courts of Admiralty.

The New Zealand Parliament was thence free to exploit, without restriction, its power to legislate for peace, order and good government. As of 1947, the General Assembly was a sovereign legislature. *The Queen v. Burah*²⁷ and *R. v. Rief*²⁸ established that the “peace, order and good government” grant authorised the “utmost discretion of enactment”²⁹ equal to that enjoyed by the Mother of Parliaments. The only apparent fetters on the General Assembly were the Crown's original powers of reservation and disallowance of bills under the 1852 Act. Although not repealed until 1973,³⁰ these powers had long been negated by constitutional convention securing responsible government.

²⁴ Section 8 read: “8. *Saving for Constitution Acts of Australia and New Zealand* — Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia or the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act.”

²⁵ Constitution Act 1986, s.26.

²⁶ New Zealand request and consent was to be made and given only by Act of the New Zealand Parliament: Statute of Westminster Adoption Act 1947, s.3(1).

²⁷ (1878) 3 App.Cas.889 (P.C.).

²⁸ (1885) 10 App.Cas. 675 (P.C.).

²⁹ *Ibid.*, at 678. See also *Hodge v. R.* (1883) 9 App.Cas. 117, at 132; *Attorney-General for Ontario v. Attorney-General for Canada* [1912] A.C. 571, at 581. But see *Building Construction Employees and Builders' Labourers Federation v. Minister for Industrial Relations* (1986) 7 N.S.W.L.R. 372 (N.S.W.C.A.), per Street C.J.

³⁰ New Zealand Constitution Amendment Act 1973, s.3.

In hindsight, 1947 was a watershed in New Zealand constitutional law. New Zealand in 1931 had declined the legal freedom offered by the Statute of Westminster, and for years harboured sentiments of Empire and Imperial unity. When she adopted the statute and sought full legal autonomy, she was a reluctant beneficiary, faced with a constitutional inability to abolish an otiose upper house. But once having acquired plenary powers, there was nothing further to be done, or so it was thought.

In *R. v. Fineberg*,³¹ Moller J. cast doubt on Parliament's extraterritorial competence. Subsequently, a Special Law Reform Committee on Admiralty Jurisdiction³² reported that on the authority of *Fineberg*, the words "peace, order, and good government of New Zealand" in section 53 imposed a legislative limitation in the absence of clear language to the contrary in statutes having extraterritorial operation.³³ To avoid the inconvenient implications of *Fineberg*, the Committee proposed a clause in its draft Admiralty Bill,³⁴ that "[t]he jurisdiction conferred by this Act may be exercised notwithstanding any limitation express or implied in Section 53 of the Constitution Act, 1852". However, the Statutes Revision Committee observed this would leave uncertainty as to the validity of other legislation having extraterritorial effect, and proposed "first, that the powers of Parliament should be clarified and its full competence put beyond doubt, and second, that this should be done on a general basis and not by piecemeal amendments".³⁵ Accordingly, the New Zealand Constitution Amendment Act 1973 repealed section 53 of the principal Act and substituted, for United Kingdom grant, a locally enacted principle of legislative competence. Section 2 enacted that:

The General Assembly shall have full power to make laws having effect in, or in respect of, New Zealand or any part thereof and laws having effect outside New Zealand.

Thus again, major constitutional development was unsystematic and unplanned, as an immediate and practical response to the revelation of needs. The Constitution Act 1986 was partly of that ilk, being introduced to prevent a recurrence of the 1984 post-election impasse, but it also rationalised New Zealand's legal devolution by repealing the original New Zealand Constitution Act 1952 (Imp.), the Statute of Westminster 1931 (U.K.) and the New Zealand Constitution (Amendment) Act 1947 (U.K.). Section 15 declares: "The Parliament of New Zealand continues to have full power to make laws" and "No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend to New Zealand as part of its law". Section 15 effects a continuation of Parliament's post-1947 legislative powers, as redefined by the 1973 Amendment Act. New Zealand's continuous legal devolution therefore rests on the constitutional validity of the latter Act.

³¹ [1968] N.Z.L.R. 119. In *R. v. Fineberg (No.2)* [1968] N.Z.L.R. 443, the Court of Appeal did not consider it necessary to review Moller J.'s findings as to the legislative powers of the General Assembly.

³² *Report of Special Law Reform Committee on Admiralty Jurisdiction*, presented to the Minister of Justice, March 1972 (chaired by Beattie J.).

³³ *Ibid.*, p.52.

³⁴ Clause 14.

³⁵ See the Explanatory Note to the New Zealand Constitution Amendment Bill 1973. Other legislation cited by the Statutes Revision Committee as being of uncertain validity included the Antarctica Act 1960, the Crimes Act 1961, and the Aviation Crimes Act 1972.

III NEW ZEALAND CONSTITUTION AMENDMENT ACT 1973

The legislative premise was based on the *dicta* in *Fineberg*:³⁶ that the General Assembly's powers of legislation were not as broad as those of the United Kingdom Parliament, and that presumptively valid legislation could still be challenged as being *ultra vires*. The Explanatory note to the New Zealand Constitution Amendment Bill 1973 observed that the General Assembly was fettered by a territorial limitation. But though subject to the limitation, the General Assembly could (somehow) legislate to remove it. According to Moller J., the New Zealand Constitution (Amendment) Act 1947 (U.K.) provided the requisite authority. This empowered the General Assembly to amend or repeal "all or any of the provisions of the New Zealand Constitution Act 1852", of which section 53 was one. But Moller J. observed that at the time of decision in *Fineberg*, the General Assembly had not *expressly* repealed that section. Whence the need for *express* repeal? The doctrine of implied repeal holds that what can be done expressly by legislation can be done by implication.³⁷ Consequently, would not a statute which contravened the section 53 limitation not *impliedly* repeal it? On this reasoning, was there in truth any legislative limitation?

The Minister of Justice who introduced the 1973 amendment thought the question "academic". The Minister: "There is little profit in practical terms in going into scholastic disputes whether a Legislature can enlarge its own powers, [that] if the question came before them the courts would have regard to realities and commonsense rather than niceties of logic."³⁸ This attitude is surprising, as though the law had nothing but contempt for "scholastic disputes" and "niceties of logic". What is "law" if not rested on constitutional foundations? The following examines the background to Moller J.'s finding, and whether the new section 53 can be reconciled with New Zealand's pre-1973 legislative powers.

1. *Pre-Statute of Westminster extraterritoriality*

The question arose in the 19th century to what extent a colonial legislature could make laws having operation, either wholly or in part, outside the colony.³⁹ *Macleod v. Attorney-General for New South Wales*⁴⁰ was taken to have established a strict rule, that a colonial legislature enjoyed no powers of extraterritoriality. A New South Wales statute created an offence of bigamy "wheresoever" the second marriage took place. The Privy Council construed this as applying only to marriages within the Colony, for otherwise it would make amenable to the jurisdiction any person who married a second time anywhere in the world, and no colony could entertain such jurisdiction.

It is questionable whether the Privy Council was at all laying down a rule of colonial legislative competence. Much reliance was placed on Lord Halsbury L.C.'s comment:

"Their [the Colony's] jurisdiction is confined within their own territories, and the maxim which

³⁶ [1968] N.Z.L.R. 119, at 122 per Moller J.

³⁷ See *McCawley v. R.* [1920] A.C. 691 (P.C.).

³⁸ Per the Hon. Dr A.M.Finlay, letter to P.A.Joseph, 2 July 1975.

³⁹ See Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (1966), p.387 *et seq.*

⁴⁰ [1891] A.C.455.

has more than once been quoted, ‘Extra territorium jus dicenti impune non paretur’, would be applicable to such a case”.⁴¹

Jus dicere refers to adjudication, not legislation. The context of His Lordship’s comment was that “[a]ll crime is local”. Hence the *Macleod* ratio, that a court’s jurisdiction over crime is confined to the country where the crime is committed.⁴² However, in *R. v. Lander*⁴³ the New Zealand Court of Appeal extricated the *dictum* from its context to invalidate a statute operating beyond territorial limits.

Following *Macleod*, the Court of Appeal struck down a statutory offence applying to any person committing bigamy “in any part of the world”. Excepting a limited class of recognised “auxiliary powers”, Parliament’s power to make laws for the peace, order and good government of New Zealand confined the operation of legislation within New Zealand. Stout C.J. dissented. The accused, a British subject domiciled in New Zealand, married a second time whilst a member of New Zealand’s Expeditionary Forces in England. The Chief Justice thought the issue not one of extraterritoriality at all since the accused had never ceased to be within the jurisdiction of the New Zealand Government, but simply whether “the peace, order, and good government of New Zealand” called for the punishment of a domiciled British subject for an offence committed abroad. And in his view, the presence of criminals in the country did not conduce to peace, order and good government. The Chief Justice observed that a colonial legislature has, within the limits prescribed by its constituent statute, powers as plenary and ample as those of the Imperial Parliament.

Colonial decisions (both before and after *Lander*)⁴⁴ checked the application of the *Macleod* rule. In 1933, the Privy Council finally laid it to rest. In *Croft v. Dunphy*,⁴⁵ the Judicial Committee upheld a provision of a 1927 Canadian Customs Act authorising seizure of vessels hovering within 12 miles of the coast. If a topic of legislation was within a dominion Parliament’s competence, Their Lordships saw no reason for restriction of its scope by any other consideration than applicable to a fully sovereign state. The Act in question was pre-Statute of Westminster. Their Lordships nevertheless referred to section 3 of the Imperial statute (by which it is “declared and enacted that the Parliament of a Dominion has full to make laws having extra-territorial operation”) and observed, “the question of the validity of extra-territorial legislation by [a] Dominion cannot at least arise in the future”.⁴⁶ Or could it?

⁴¹ *Ibid.*, at 458.

⁴² *Ibid.* Compare *Re Choo Jee Jeng* (1959) 25 M.L.J. 217 (cited by Roberts-Wray, *op.cit.*, p.388); *Attorney-General of New Zealand v. Ortiz* [1984] A.C.1, at 19-24 per Lord Denning M.R.; *Her Majesty’s Attorney-General v. Wellington Newspapers Ltd.*, [1988] 1 N.Z.L.R. 129 (C.A.), per Cooke P.

⁴³ [1919] N.Z.L.R. 305.

⁴⁴ See *Ashbury v. Ellis* [1893] A.C. 339; *Attorney-General for Canada v. Cain* [1906] A.C. 542 (overruling the New Zealand decision *In re Gleich* (1879) 1 O.B. & F. (S.C.) 39); *Robtelmes v. Brenan* (1906) 4 C.L.R. 395; *Re Award of Wellington Cooks and Stewards’ Union* (1907) 26 N.Z.L.R. 394; *Semple v. O’Donovan* [1917] N.Z.L.R. 273; *Sickerdick v. Ashton* (1918) 25 C.L.R. 506; *Croft v. Dunphy* [1933] A.C. 156.

⁴⁵ [1933] A.C. 156.

⁴⁶ *Ibid.*, at 167 per Lord MacMillan.

2. *R. v. Fineberg*

Section 8 of the Crimes Act 1961 extends the criminal jurisdiction of New Zealand courts to crimes committed on (inter alia) a Commonwealth ship on the high seas. It was argued this provision was ultra vires section 53 of the 1852 Act. Moller J. agreed section 8 contains elements of extraterritoriality but, following the *Lander* dissent⁴⁷ and the Judicial Committee in *Croft v. Dunphy*, held that it fell within the auspices of New Zealand's peace, order and good government, and was intra vires the General Assembly.

His Honour held that section 3 of the Statute of Westminster 1931 was not itself a source of legislative power, but was declaratory of the principle of extraterritorial competence affirmed in *Croft v. Dunphy*. Its object was merely to settle any doubts arising from *Macleod's* case. Accordingly, Moller J. rejected the argument that, following the Statute of Westminster Adoption Act 1947, legislation having extraterritorial operation need no longer satisfy the section 53 criteria. Secondly, Moller J. held that, while the New Zealand Constitution (Amendment) Act 1947 (U.K.) authorised the New Zealand Parliament to amend or repeal section 53, it had not *expressly* done so. Parliament, therefore, did not cease to be trammelled by the requirements of peace, order and good government. Consequently, "the legislative powers possessed by the New Zealand Parliament are not as wide as those possessed by the Parliament of the United Kingdom, and laws passed by it can, in proper cases, still be challenged as being ultra vires".⁴⁸

These findings raise several issues. First, Moller J. observed the 1947 Amendment Act made it lawful for the General Assembly to amend or repeal the original section 53, but that this required *express* legislation. Why not implied repeal? In *McCawley v. R.*,⁴⁹ the Privy Council thought an "uncontrolled" Constitution Act to be no different from (to use Lord Birkenhead's analogy) a mere "Dog Act" for purposes of implied repeal. "It is", said Lord Birkenhead, "of the greatest importance to notice that where the constitution is uncontrolled the consequences of its freedom admit of no qualification whatever. The doctrine [of implied repeal] is carried to every proper consequence with logical and inexorable precision."⁵⁰ This "consequence" would be avoided only were express repeal clearly and unambiguously imposed by the 1947 Amendment Act, as a special manner and form of law-making. But Moller J. observed that that Act simply removed the *existing* manner and form requirement of United Kingdom legislation for alteration of section 53.⁵¹ On this reasoning, the argument in *Fineberg* was a *non sequitur*. If section 8 of the Crimes Act 1961 was not for New Zealand's peace, order and good government, it would impliedly repeal and prevail over those substantive requirements of law-making.

Secondly, why was section 3 of the Statute of Westminster 1931 not a separate grant of legislative power? Section 3 not only "declared" but "enacted" full powers of extraterritorial legislation. It was at least open to Moller J. to view section 3 as an independent principle of competence for extraterritorial statutes, complementing New Zealand's primary section 53 authorisation.

⁴⁷ [1919] N.Z.L.R. 305, per Stout C.J.

⁴⁸ [1968] N.Z.L.R. 119, at 122.

⁴⁹ [1920] A.C. 691, at 704. The term "uncontrolled" connotes a flexible constitution untrammelled by special procedures of law-making.

⁵⁰ *Ibid.*

⁵¹ [1968] N.Z.L.R. 119, at 122.

Thirdly, Moller J. concluded that section 53 and section 3 of the Statute of Westminster, juxtaposed, gave Parliament powers “to make laws for the peace, order, and good government of New Zealand, even though such laws have an extraterritorial operation”.⁵² In other words, neither section 3 nor the New Zealand Constitution (Amendment) Act 1947 were separate sources of legislative power. “All [the latter] did”, observed Moller J., “(and, significantly, all that the Parliament of the United Kingdom was requested by the Parliament of New Zealand to do) was to make it lawful for our own Parliament to alter, suspend, or repeal inter alia [section 53]”.⁵³ Having sought and obtained the removal of the United Kingdom entrenchment, the General Assembly was free, acting under its section 53 powers, to amend or repeal that section (whether by implication or, as Moller J. preferred, express repeal). This results in the logical absurdity that Parliament, acting *intra vires* section 53, could invoke that section to obtain the powers section 53 denied.⁵⁴ On this view, section 2 of the New Zealand Constitution Amendment Act 1973 is *ultra vires* and a breach of New Zealand’s legal continuity.

3. *Legal continuity and section 53*

The new section 53 may be reconciled in two ways. The first accepts that Parliament could not invoke section 53 to amend or repeal section 53 itself. The Government’s advisors believed the General Assembly was competent to alter or repeal that section by virtue of section 1 of the 1947 Amendment Act (U.K.),⁵⁵ which provided: “It shall be lawful for the Parliament of New Zealand . . . to alter, suspend, or repeal, at any time, all or any provisions of the New Zealand Constitution Act 1852”. In their view, this was more than a liberalising provision for removing the United Kingdom entrenchment limitation on the section 53 powers; rather, it was an independent grant of legislative (constituent) power for amendment or repeal of the 1852 Act, of which section 53 was part. They regarded section 1 as unfettered by any substantive limitation which may have hedged the section 53 powers. On this analysis, the 1947 Amendment Act altered the rule of succession of rules in New Zealand and provided for the supersession or amendment of its rule of recognition.⁵⁶

The second approach does not contrive a reconciliation of New Zealand’s legal continuity. This approach accepts Moller J.’s analysis that:

- (a) section 53 was Parliament’s sole source of legislative power, and all enactments had to abide the limitation it imposed;
- (b) a statute of wholly extraterritorial operation would contravene the limitation, as would a legislative attempt at removing it; and
- (c) the Statute of Westminster 1931 and the 1947 Amendment Act were either declaratory of existing powers and authorities, or were for the removal of outdated restraints on section 53 (but without removing the limitation inherent).⁵⁷

By expunging the section 53 limitation, section 2 of the 1973 Amendment Act extended New Zealand’s legislative powers. This proposes that section 2 severed New Zealand’s legal continuity. Until consolidated under the

⁵² *Ibid.*, at 123.

⁵³ *Ibid.*, at 122.

⁵⁴ See the Explanatory Note to the New Zealand Constitution Amendment Bill 1973.

⁵⁵ *Ibid.* Also advocated by the then Minister of Justice, the Hon. Dr A.M. Finlay, *op.cit.*

⁵⁶ Compare F.M. Brookfield and B.V. Harris, *op.cit.*

⁵⁷ *R. v. Fineberg* [1968] N.Z.L.R. 119.

Constitution Act 1986, the new section 53 was operative, was judicially recognised,⁵⁸ and for all intents and purposes was the legal seat of New Zealand sovereignty. On this analysis, the foundations of the constitutional order have changed, extra-legally, through an evolutionary shift in paramount power. The High Court of Australia has held such occurrence does not, of itself, annul or render inoperative any part of the constitutional structure.⁵⁹ The same conditions of law-making continue in force.

*Re Ashman and Best*⁶⁰ supports this construction. Wilson J. traced New Zealand's evolution since the passing of the Fugitive Offenders Act 1881 (U.K.). His Honour held that this statute, though still part of New Zealand law, had ceased to confer effective jurisdiction for issuing extradition warrants as New Zealand was no longer, in law, a "British possession" within the meaning of the Act. Wilson J. referred to the "new autonomy" gained from the adoption of the Statute of Westminster 1931, and stated "[a] much greater and more unequivocal move in the evolution of New Zealand from a 'self-governing' Colony to an independent nation was the severing of the last bonds of dependence on the United Kingdom by the passing of the New Zealand Constitution Amendment Act 1973".⁶¹ By this Act, said Wilson J., "New Zealand established itself in law as an independent sovereign State".⁶² His Honour referred to the Royal Titles Act 1974 as confirming the concept of a separate New Zealand Crown, that "the Queen of New Zealand is a different entity from the Queen of the United Kingdom, although she is the same person".⁶³ For Wilson J., these enactments ended the journey from Westminster to Wellington, and contemporaneously severed New Zealand's Westminster ties. It made New Zealand *autochthonous*.

IV AUTOCHTHONY

1. General

This concept addresses the problem of how the offspring of an imperial predecessor might mature, through adolescence, into a fully-fledged constitutional state.⁶⁴ The Mother of Parliaments, bearing ultimate sovereignty, was impotent, English theory held, when it came to cutting the umbilical cord and terminating her legal supremacy. Section 4 of the Statute of Westminster 1931 was British altruism writ large, but in law it was a perfectly nugatory attempt of the British Parliament to emancipate its offspring. "Any measure of emancipation at the hands of the Imperial Parliament", wrote R.T.E. Latham in 1937,⁶⁵ "would . . . suffer from the vital flaw that it was

⁵⁸ Compare *Re Ashman and Best* [1985] 2 N.Z.L.R. 224n (discussed below). Wilson J. proffered that the new s.53 established New Zealand as an independent sovereign state.

⁵⁹ See note 9, above.

⁶⁰ [1985] 2 N.Z.L.R. 224n, discussed by F.M. Brookfield, "New Zealand and the United Kingdom: One Crown or Two?" [1976] N.Z.L.J. 458.

⁶¹ *Ibid.*, at 226-227.

⁶² *Ibid.*

⁶³ *Ibid.* For a contrary view, see Brookfield, *op.cit.* The Court of Appeal has now confirmed the existence of a separate New Zealand Crown: see *Her Majesty's Attorney-General v. Wellington Newspapers Ltd.*, [1988] 1 N.Z.L.R. 129, per Cooke P. citing *Government of India v. Taylor* [1955] A.C. 421, at 507-508, and *Attorney-General of New Zealand v. Ortiz* [1984] A.C. 1, at 19-24.

⁶⁴ See Sir Kenneth Wheare, *The Constitutional Structure of the Commonwealth* (1960), Ch.4; Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (1966), pp.289-301; G. Marshall, *Constitutional Theory* (1971), pp.57-64.

⁶⁵ *The Law and the Commonwealth* (1937), p.530.

revocable at the Imperial Parliament's pleasure . . . Nothing that Westminster could do would remove this taint from its gifts." In *British Coal Corporation v. The King*,⁶⁶ Lord Sankey observed "[t]he Imperial Parliament could, as a matter of abstract law, repeal or disregard section 4" and re-assert legislative dominance over the dominions, notwithstanding equality of Commonwealth membership. This subordination of dominion status was met with sometimes arrogant indifference. Typical was Professor Berriedale Keith who, in 1931, observed of the proposed section 4: "Legally, of course, the clause is nugatory, for the Imperial Parliament, being sovereign, cannot bind itself, and there is a certain objection to any attempt to accomplish the impossible."⁶⁷ And, in 1932, of the enacted statute, that: "The Act itself, of course, is a singular assertion of the sovereign authority which still adheres to the Imperial Parliament."⁶⁸ All this was reason by assertion, everything was "of course", as though too axiomatic to explore. The dominions could entertain no outlook contrary to British legal conceptions of supremacy and superiority.

Constitutional convention achieved what English law could not, in checking Imperial legislative dominance.⁶⁹ Hence Lord Sankey's rider to his dictum about repealing or disregarding section 4: "But that is theory and has no relation to realities".⁷⁰ Once equality of Commonwealth association was established, pride in independence and nationhood worked a powerful psychology: the autonomous communities desired *autochthony* (from the Greek word meaning "sprung from that land itself"). They assert, said Sir Kenneth Wheare, "not the principle of autonomy only: they assert also a principle of something stronger, of self-sufficiency, of constitutional autarky or . . . a principle of constitutional *autochthony*, of being constitutionally rooted in their own native soil".⁷¹ They claimed their constitutions had force of law through their own native authority, and not because it was enacted or authorised by the Westminster Parliament. Uninterrupted legal devolution proved a mixed blessing, providing stability through regular development, yet confounding national sovereignty through continuing Westminster ties.

Autochthony was first asserted in 1922, when the Irish proclaimed the constitution of the Irish Free State.⁷² The framers of the constitution believed they were acting on behalf of the people and that the approval of their representatives (the Third Dail Eireann) gave force of law to the constitution they adopted. The preamble read:

Dail Eireann sitting as a Constituent Assembly in this Provisional Parliament, acknowledging that all lawful authority comes from God to the people and in confidence that the National life and unity of Ireland shall thus be restored, hereby proclaims the establishment of the Irish Free State (otherwise called Saorstát Eireann) and in the exercise of undoubted right, decrees and enacts as follows:

The United Kingdom refused to recognise Ireland as an independent republic, but as a part of the United Kingdom whose Parliament alone could grant

⁶⁶ [1935] A.C. 500, at 520.

⁶⁷ (1931) 13 J.C.L. 28 (quoted by G. Marshall, *Parliamentary Sovereignty and the Commonwealth* (1957), p.146).

⁶⁸ (1932) 14 J.C.L. 101. See further, Marshall, *ibid.*, p.145 *et seq.*

⁶⁹ See *Copyright Owners Reproduction Society v. E.M.I. (Australia) Pty Ltd* (1958) 100 C.L.R. 597.

⁷⁰ [1935] A.C. 500, at 520.

⁷¹ *Op.cit.*, p.89.

⁷² See Wheare, *op.cit.*

self-government. Parliament then passed the Irish Free State Constitution Act 1922,⁷³ enacting that the constitution adopted by the Constituent Assembly (set forth in the Schedule to the Act) shall be the constitution of the Irish Free State on being proclaimed by His Majesty. The preamble to the Imperial Act recognised the Constituent Assembly as a House of Parliament, not Dail Eireann, that its authority emanated from Imperial enactment, not from "God to the people", nor from "undoubted right". The Irish, on the other hand, insisted the constitution acquired supreme authority from the people and that the United Kingdom statute had force of law only within the United Kingdom, insofar as legislation was necessary for consequential change upon recognition of the Irish Free State. In *The State (Ryan) v. Lennon*,⁷⁴ the Irish Free State Supreme Court upheld the constitution as being indigenous, "proclaimed in the name of the people by Dail Eireann as an act of supreme authority . . . requiring and receiving no royal assent". But in *Moore v. The Attorney-General for the Irish Free State*,⁷⁵ the Privy Council held the constitution derived validity from the Imperial Parliament, without whose ratification the Constituent Assembly lacked standing. Devoid of Westminster authority, the Irish Free State had neither will nor existence.

Former Imperial attitudes have changed, the nature of the problem has not. Recently, Canada moved for the patriation of its constitution which would ensure all processes for constitutional amendment were locally operated. At Canada's request, the United Kingdom concluded a new constitutional settlement for Canada, renouncing all former legislative power.⁷⁶ Yet this was the gift of the United Kingdom Parliament, not the Canadian peoples. For them, the Canada Act 1982 (U.K.) is valid and operative because it was enacted for Canada, at Canada's request, and has force of law by virtue of the Westminster Parliament. Also in New Zealand, under the Constitution Act 1986,⁷⁷ and in Australia, under the Australia Act 1986 (U.K.), the lines of authority lead inexorably to Westminster. How might these communities accept their Imperial grants of local autonomy, and simultaneously deny they were ever made?

2. *Criteria of autochthony*

Geoffrey Marshall⁷⁸ identified three possible criteria: first, whether all processes for constitutional change are locally operated; secondly, whether, in the enactment of constitutional provisions or the setting up of constituent assemblies, legal continuity has been broken (or claims made that it has been broken); and thirdly, whether, with or without locally operating amendment processes or a break in legal continuity, the people and the judges and officials

⁷³ 13 Geo. V., c.1.

⁷⁴ [1935] I.R. 170, at 203 per Kennedy C.J.

⁷⁵ [1935] A.C. 484, at 497 per Lord Sankey.

⁷⁶ The Canada Act 1892 (U.K.). For background litigation, see *Reference re Amendment of the Constitution of Canada* (1981) 125 D.L.R. (3d) 1 (S.C.C.) (whether, by constitutional convention, provincial consent was required before a patriation proposal could be placed before the United Kingdom Parliament); *Manuel v. Attorney-General* [1982] 3 All E.R. 822 (Eng.C.A.) (whether, pursuant to s.4 of the Statute of Westminster 1931, the United Kingdom Parliament had power to amend the constitution of Canada without consent of the Indian peoples, and whether therefore the Canada Act 1982 was *ultra vires*).

⁷⁷ That is, if one accepts that s.2 of the New Zealand Constitution Amendment Act 1973 was validly enacted pursuant to the United Kingdom grant of authority under the New Zealand Constitution (Amendment) Act 1947 (U.K.).

⁷⁸ *Op.cit.*, pp.58-60.

regard the constitution as authoritative because of their acceptance of it. These criteria are not synonymous. The New Zealand constitution would have a native legal “root” and indigenous authority according to the first criterion, and possibly the third, but not the second (unless one accepts the rulings in *R. v. Fineberg*⁷⁹ and hold the 1973 Amendment Act to be *ultra vires*). However, the first criterion appears to be an *indicium* of autonomy rather than autochthony; it seems something more is required than a locally operating amendment process. Yet one cannot accept Marshall’s dismissal of the second criterion, that a breach of legal continuity cannot imply legal independence, “or legal anything; and the only answer to the question about an alleged ‘new’ system’s legal root would be that it had no legal root”.⁸⁰ Many newly independent states have successfully adopted a new constitution in a manner unauthorised by the pre-existing legal order. Some, indeed, such as Eire (the Republic of Ireland), India and Sri Lanka (Ceylon), deliberately contrived a breach of continuity that would irrevocably sever legal and historical links between the old and new orders. Lawyers must accept that a successful revolution sooner or later begets its own legality. Otherwise legal theorists would be committed to saying that the American constitution lacked force of law (indeed, supreme law), or that all post-1688 British statutes are legally invalid and that the Stuarts are still the rightful heirs to the British Throne.

Yet legal *discontinuity* is probably, itself, insufficient to establish a native legal root or local *grundnorm*. Autochthony is most likely to be successfully asserted when all the criteria are satisfied: where a community repudiates the existing legal order and, through a constituent assembly or a plebiscite or some other mechanism, proclaims a constitution in the name of the people with their acceptance and approval. A clear breach in legal continuity clears the way for the people to accord moral authority and binding force to the new order. What, then, is the status of the New Zealand constitution? Without revolution or contrived legal breach, is New Zealand beleaguered to remain the offspring of an historically and legally superior authority?

3. *Is New Zealand autochthonous?*

New Zealand’s historical root remains firmly embedded at Westminster. The Westminster Parliament established and empowered our institutions, and nothing has interrupted their continuous existence and functioning. But as a sociological fact, New Zealanders may accept their constitution as valid and authoritative not because of its original embodiment in British enactment,⁸¹ but because the rules it contains are locally appropriate ones, administered and amended exclusively in New Zealand, by New Zealanders. Local acceptance of the constitution may be a law-constitutive fact itself, *qua* New Zealand’s ultimate standard of legality, beyond which judicial scrutiny will not go.⁸² This may support a local legal root, as “sprung from that land itself”. The constitution would be autochthonous according to the first and third of Marshall’s criteria.

For H.L.A.Hart, while a habit of obedience to a country’s laws suffices for the general populace, critical acceptance of secondary rules by the courts

⁷⁹ [1968] N.Z.L.R. 119.

⁸⁰ *Op.cit.*, p.61. See also, Roberts-Wray, *op.cit.*

⁸¹ Notably, the New Zealand Constitution Act 1852 (Imp.).

⁸² Compare *Re Ashman and Best* [1985] 2 N.Z.L.R. 224n (discussed above).

and officials is determinative of a legal system's ultimate standard of legality.⁸³ What, then, is their (the courts' and officials') "internal viewpoint"?

A pattern of constitutional development indicates a growing New Zealand consciousness. Sir Arthur Porritt's appointment in 1967 as the first New Zealand born Governor-General was greeted in Parliament as "a compliment to New Zealand and a further recognition of our rise to full nationhood".⁸⁴ The New Zealand Constitution Amendment Act 1973 ridded the statute book of unwanted colonial remains in repealing four obsolete provisions of the original Constitution Act.⁸⁵ Now "[w]e are our own masters", said the Minister of Justice in the second reading debate on the Bill.⁸⁶ The replacement of the old section 53 re-couched New Zealand's legislative powers in words of New Zealand enactment.

The Royal Titles Act 1974 redefined the Queen in right of New Zealand "to lay primary emphasis on Her Majesty's designation as Queen of New Zealand, rather than on her status as Queen of the United Kingdom".⁸⁷ In 1953, the royal style and titles were proclaimed in London under the Great Seal of the United Kingdom; in 1974, they were defined in Wellington by local enactment without the Sovereign's Proclamation.

The Seal of New Zealand Act 1977 withdrew recognition of United Kingdom seals and provided that all state instruments henceforth were to be sealed with one official seal, the Seal of New Zealand. The Queen assented to and proclaimed this Act without affixing a seal, as the only existing ones were appropriate to her realm of the United Kingdom.

The Letters Patent of 28 October 1983 updated and "patriated" the Office of Governor-General in recognition of New Zealand's full autonomy and status. Former reference⁸⁸ to the Governor-General rejecting his Ministers' advice was omitted. Whereas the former 1917 instruments were issued by King George V on advice of his Privy Council, the revised Letters were approved by the Executive Council and issued by the Queen on advice of the Governor-General in Council. These were authenticated by the Seal of New Zealand, not (as previously) by the Great Seal of the United Kingdom.

The Constitution Act 1986 was an attempt "to devise a modern Act appropriate to New Zealand circumstances".⁸⁹ For the Officials Committee which drafted the legislation, "the time [was] overdue to free our constitutional law from the shadow of our former colonial status".⁹⁰ The residual power of the United Kingdom Parliament to legislate for New Zealand was "wholly out of accord with New Zealand's constitutional status".⁹¹ Hence the Constitution Act 1986 declares that "[n]o Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend to New Zealand as part of its law".⁹² Former reference under the 1852 Act to the Governor-General refusing assent to Bills was replaced by a general provision that Bills shall become law on receiving the royal assent.⁹³ Accompanying

⁸³ *The Concept of Law* (1961).

⁸⁴ *N.Z.P.D.* Vol.389 (1974), at 1-2.

⁸⁵ New Zealand Constitution Act 1852 (Imp.), ss.57-59 and 61.

⁸⁶ *N.Z.P.D.* Vol. 388 (1973), at 5235 per the Hon. Dr. A.M. Finlay.

⁸⁷ *N.Z.P.D.* Vol.389 (1974), at 1-2.

⁸⁸ See cls.V and VII of the 1917 Royal Instructions.

⁸⁹ Second Report of an Officials Committee, *Constitutional Reform* (1986), para.1.3.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*, paras.2.6 and 2.8.

⁹² Section 15(2).

⁹³ Constitution Act 1986, s.16.

amendment to the Acts Interpretation Act 1924 relegated usage of the term, "General Assembly". The amendment re-designated the General Assembly "Parliament", not only to accommodate popular usage but also in recognition of Parliament's full plenary status.

New Zealand's constitutional discourse no longer reminisces on Imperial unity and Empire but recognises New Zealand as a South Pacific nation, apprised of its regional obligations, whose social compact is between Maori and fifth generation Anglophiles. Accompanying the replacement of imposed British forms is a new commitment to principles of partnership under the Treaty of Waitangi. Their recognition under the State-Owned Enterprises Act 1986, together with the retrospective jurisdiction of the Waitangi Tribunal from 1840, have elevated the Treaty in the social contract. In *New Zealand Maori Council v. Attorney-General*,⁹⁴ Richardson J. reflected on the concept of the honour of the Crown, that it "captures the crucial point that the Treaty is a positive force in the life of the nation and so in the government of the country". Only the final right of appeal to the Judicial Committee of the Privy Council weighs New Zealand with its colonial past, and that may not be for very much longer. In 1987, the Labour Government announced it would initiate steps to dismantle Privy Council appeals. At the 1987 triennial Law Conference, Cooke P. observed that failure to abolish the appeal and "accept responsibility for our own national legal destiny . . . would be to renounce part of our nationhood".⁹⁵

Yet, the question whether New Zealand has a local *grundnorm* will never acquire more than theoretical importance. It would require the United Kingdom to force the issue, for example, by United Kingdom statute purporting to repeal the Constitution Act 1986 and legislate for New Zealand by paramount force. Then, a local court would have to decide which of two statutes (the United Kingdom repealing Act or the Constitution Act) had force of law. Continuity between the two legal systems could not be contrived from any self-denying, United Kingdom renunciation of legislative power (as under the Canada Act 1982 (U.K.)), since the Constitution Act 1986 unilaterally repudiated all residual United Kingdom legislative power. No doubt the question would never arise; but in the event, would any local court accord force of law to the British statute?⁹⁶

V SEVERING THE BRANCH

The Constitution Act 1986 invites the analogy of the axeman who, positioned on the bough of a tree, severs the limb at the trunk. Does the axeman fall to the ground with the branch? Or can he defy gravity and remain suspended, though he has lost his means of support? The Constitution Act repealed New Zealand's sources of legislative powers (namely, the 1852 Constitution Act, the Statute of Westminster 1931 and the 1947 Constitution Amendment Act),⁹⁷ yet nevertheless declared "The Parliament of New Zealand continues to have

⁹⁴ (1987) 6 N.Z.A.R. 353, at 390.

⁹⁵ Rt. Hon. Sir Robin Cooke, "The New Zealand National Legal Identity", *Conference Papers*, New Zealand Law Conference 1987, pp.268 and 271. See also P.A. Joseph, "Towards Abolition of Privy Council Appeals: The Judicial Committee and the Bill of Rights" (1985) 2 *Canta.L.R.* 273. And see the Law Commission's discussion paper, *The Structure of the Courts* (1987).

⁹⁶ Compare *Re Ashman and Best* [1985] 2 N.Z.L.R. 224n.

⁹⁷ Section 26.

full power to make laws".⁹⁸ Like the axeman who loses his only means of support, do Parliament's powers likewise fall to the ground? Can there exist, in law, a power without a source? To declare the continuance of powers does not constitute or create them. Such declaration premises their existence and, perforce, their source. Perhaps, on this view, the Constitution Act is New Zealand's ultimate proclamation of autochthony? Though itself a product of New Zealand's legislative autonomy gifted by the Westminster Parliament, it repudiates the source of that autonomy and denies the gift was ever made. Parliament's sovereignty may now have factual rather than legal force.

VI EMANCIPATION OF A SLAVE

Under the Constitution Act, Parliament may be likened to a freed slave. A is B's slave.⁹⁹ B says to A, "Go free, you may disregard anything I say from this time on." B then says to A, "I take back what I just said. You must come with me." A says, "Not so, I now have permission to disregard what you say." B says, "But your permission to do so flows from my authority and since I have revoked it, your permission no longer exists." The slave's position is that "[f]reedom, once conferred, cannot be revoked".¹⁰⁰ Once freed, he is under no subjection to command but is a sovereign individual, once more living in a state of nature. Conversely, the master's position is that the slave's freedom is dependent on his continuing authority (and beneficence) which the slave has no power to repudiate. Parliament, under the Constitution Act, approximates to the slave's position. Parliament, having in 1947 gained legislative freedom, acquired all the powers of a natural person whose existence is justification itself. By whose hand it was created and endowed is relevant only to the family tree.

⁹⁸ Section 15(1).

⁹⁹ The hypothetical is G. Marshall's, *Constitutional Theory* (1971), p.63 (note 1). This simple analogy belies the complexity of the actual legal system which may sanction the emancipation of a slave, or define in general terms the master's right to make laws.

¹⁰⁰ *Ndlwana v. Hofmeyr* (1937) A.D. 229, at 237. See also *Blackburn v. Attorney-General* [1971] 2 All E.R. 1380, at 1382 per Lord Denning M.R.