CONSTITUTIONS

Ninian Stephen

INDIGENOUS PEOPLES

Paul Reeves

The Institute for
Advanced Studies in the Humanities

The University of Edinburgh

June 1993

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Introduction

Sir Ninian Stephen was a Justice of the High Court of Australia from 1972 to 1982, and Governor General from 1982 to 1989. Sir Paul Reeves was Primate and Archbishop of New Zealand from 1980 to 1985, and Governor General from 1985 to 1990. As Distinguished Visiting Professors of the Institute for Advanced Studies in the Humanities, Sir Ninian and Sir Paul delivered public lectures in the rooms of the Royal Society of Edinburgh, by kind permission of the President, and they are here reprinted with the agreement of the authors.

Peter Jones

Director

CONSTITUTIONS - A BRIEF ENCOUNTER

Ninian Stephen

Sir William Anson, in his introductory remarks to his major work, The Law and Custom of the Constitution, felt obvious sympathy for the searcher after that celebrated instrument of governance, the British Constitution. He wrote that:

> The student who has sought in vain among our institutions for it (the source of sovereign power), who has sought with no more success to find out how the constitution works by examining the legal relations of our King, his Ministers, and Parliament, may be driven to ask, "Where is the Constitution?"

Sir William's answer was that in Britain the Constitution lay in statutes, judicial decisions, customs, and conventions but that "in authoritative documentary form it is not to be found". He concluded that while puzzled foreign jurists might be prepared to agree with De Tocqueville that "the English Constitution does not exist, the English student of it will maintain that it is a true monument of political sagacity, if only he could find it."

None of this has prevented Sir William and very many

others from writing at great length about the British Constitution, some of them being misguided enough, as you have heard, to slip occasionally into calling it the "English Constitution".

Lacking a compendious written constitution, Britain is in this, as in so much else, a rare exception among nations. Worldwide written constitutions flourish. A study made some fifteen years ago by two industrious Dutch legal academics armed with a computer surveyed no less than 157 nations of the world, revealing that over ninety per cent of them had written constitutions. Of the remainder Britain was the only major power without one, its few companions ranging from Andorra through Bhutan and Burundi to San Marino. Today I suspect that the percentage of written constitutions will have risen to close on one hundred per cent and Britain may indeed be approaching a state of splendid isolation.

Of course, a curiosity of this situation is that no nation in the history of the world has been more active in conferring written constitutions upon peoples world-wide than has been Britain, more than forty in this century alone. And very many also in earlier years; for example, in Australia we have had six State Constitutions for well over a century and, as well, a Federal Constitution for more than ninety years – all

written documents and in the creation of all of them Britain was either the initiator or was most intimately involved. And the pattern was the same throughout the Empire.

However, to accept at face value any seeming dichotomy between written and so-called unwritten constitutions is to be misled. There is little in the way of any hard and fast line that can be drawn between the two. It is all very much a matter of degree, although Britain clearly stands at one end of the spectrum. For example, one finds that of that great majority of nations regarded as having written constitutions, in not a few cases their constitutions are not enshrined in any one constitutional text but are instead spread over two, three or even more distinct documents which together formulate the system of government of the state and are regarded as constitutional. And Britain itself could, I suppose, if it had to, muster something in the nature of a written constitution, albeit of a patchwork character - beginning with Magna Carta, running through the Bill of Rights 1689, The Act of Settlement 1701, The Act of Union with Scotland in 1707 and with Ireland in 1800, the 1920s legislation that brought to an end that latter Union, and, of course, the Parliament Acts of 1911 and 1949 and so on, ending for the time being with, perhaps, The Treaty of Brussels 1972 (the Accession Treaty to

the European Community).

But to attempt to gather together such a patchwork of so-called constitutional text would be as futile as the selection of its constituent parts would be contentious. And this because there exists a distinction between types of constitution which is a good deal more significant than that between the written and so-called unwritten constitution. It is whether or not a nation's constitution is given by law a special status superior to other laws of the land.

But before saying anything more about constitutions I should, if not define, at least attempt some description of, my subject matter. The term *constitution* in its present-day meaning of a system or body of fundamental principles according to which a nation is constituted and governed seems only to have come into use in the 17th century. It is a term of considerable width of meaning, which gives me a degree of freedom of choice. It could, for example, be made to extend to those precepts that Moses learned from God on the heights of Mount Sinai and taught to his people, as set out in chapters 20 to 23 of Exodus. Some precedent for doing so perhaps lies in the example of the modern-day state of Saudi Arabia, which I understand regards the Koran much as its Constitution. Again, might it perhaps reach back to include those

early codes of law, inscribed on columns of stone or tablets of clay, that archaeologists bring to light? Does, for instance, the code of Hammurabi, King of Babylonia, now more than four thousand years old and still, from its obelisk of black diorite, commanding a vanished people, does it qualify as a constitution? My answer to these questions can be in the negative; my topic, I think, should find more acceptable bounds. As I say, an advantage of the topic is its flexibility of content. Definitions of *constitution* abound, with almost as many as there are writers on the subject; so choice can be very much a matter for the individual.

My choice is a modest, if conventional one. It is linked to the concept of constitutionalism and has as its touchstone the quality of imposing restraints upon those who wield power within a state, restraints and limitations upon the exercise of what would otherwise be untrammelled power. True, such constitutions may give very wide powers to one person or to a group; they may fail to separate the legislative from the executive arm of government; they may not provide for an independent judiciary. But so long as they nevertheless lay down some structure of government and do so by assigning functions and powers to different elements in the polity that they recognise or create, that will be enough for my

purposes. The very act of distributing functions and powers, and thereby imposing bounds upon them, itself involves a degree of express or implied restraint upon the wholly unfettered power of any single autocrat or group of oligarchs.

It follows that my topic will not include those codes of law or commands of conduct, whether of divine origin or from the lips of great kings, which only dictate what shall be the conduct of the faithful without attempting to set up any framework of ordered government.

The prime function of the constitutions I speak of is that of apportioning by law powers and functions, just as the concept of constitutionalism consists of the observance of the bounds that a constitution sets to whatever allocated power or function is in question.

Some writers, I know, confine constitutionalism, and hence the subject of constitutions, more narrowly, requiring of them an essentially democratic flavour. They may, for instance, require constitutions worthy of the name to provide for a legislature elected on universal adult franchise, although that would until very recently have excluded that model confederacy, the Swiss, which for so long denied the franchise to women. Or they may require the existence of a truly independent judiciary, which would at present raise doubts

about the inclusion of a number of member nations of today's Commonwealth of Nations, let alone a host of other countries with more or less totalitarian regimes in power. Or they may demand other qualities; as, for instance, a strict separation of executive, legislative and judicial powers, which would certainly exclude the British Constitution and that of many of its former possessions which have adopted the Westminster model, where executive power lies effectively in the hands of those who command a majority in the legislature. Of course in the case of Britain there would be an added ground for exclusion - the position of the Lord Chancellor, who could be described, were such a feat physically possible, as having one foot in each of those three camps, executive, legislative and judicial.

But in any event to place any such limitations upon the scope of my subject is to advocate a particular type of constitution as the only one worthy of the name, something I certainly shrink from doing.

I have already discounted the significance of any classification of constitutions by reference to whether they are written or unwritten and have referred to a more significant distinction. It lies, I repeat, in whether or not whatever makes up a nation's constitution has been given some special status

over and above the rest of the country's laws. At least, even if it be no completely valid method of categorising constitutions, it does raise some interesting aspects of the structures that regulate the governance of nations. With this quality of special status usually goes also the quality of being capable of alteration only by special process. Common features of constitutions are, then, the special sanctity (for want of a better word) accorded them and their relative immutability. Here again Britain's Constitution is unusual since no single item in its mass of constitutional material has either quite that special status or certainly not that relative immutability. Instead Parliament jealously retains the power to alter or repeal at will any statute of the past and, of course, to nullify any constitutional convention or doctrine of the Common Law.

Perhaps here in Edinburgh, at the very seat of the Scottish judicature, I should somewhat qualify that last statement out of respect for those members of the Court of Session who have made strong claims for the superior status and immutability of those instruments that brought about the Union of England with Scotland. The Union, as we know, was brought about by two acts, one in each of the two national Parliaments. First came the Scottish Parliament's

Union with England Act 1707, promptly followed by the English Parliament's Union with Scotland Act 1706. Incidentally, as Professor C.R. Munro has recently pointed out, although the dates of these two acts appear inconsistent with the sequence in which they were enacted, this merely demonstrates, a Scot would say, the perverse insularity of the English. They at the time were still resisting adoption of the Gregorian calendar while Scotland, in common with the rest of Europe, had already adopted it; the result was that England lagged almost three months behind Scotland in moving, in terms of the calendar, from one year to the next.

But to return, after that rather chauvinistic digression, to the Court of Session. It has to my knowledge on two occasions, and perhaps there have been more, expressed doubts as to whether at least some provisions of the Acts of Union are at all capable of subsequent amendment or repeal by the British Parliament, which is itself a creation of those acts. With a very distinguished former member of the Scottish Judiciary at work as Lord Chancellor reforming the English legal profession, one never knows what may eventually overtake what Lord President Cooper has described, with what I detect as a degree of distaste, as that distinctively English principle, without counterpart in Scottish

Constitutional Law, "the unlimited sovereignty of parliament."

It is, of course, this commonly accepted view of unlimited parliamentary sovereignty that results in no part of the British Constitution being proof against amendment or repeal by subsequent Act of Parliament. This, it seems, even extends to European Community Law and, indeed, to the legislation by which Britain has become a member of that Community, legislation which future British parliaments would accordingly be free to repeal. It is this sovereignty of parliament that has been described as the one fundamental law of the British Constitution.

This characteristic of the British Constitution, that it lacks any degree of immutability, is not unrelated to its unwritten character, to the absence of any one written text enshrining it. Where the most formal component parts of the constitution are no more than statutes of the realm, in-distinguishable in form from any other statutes, it was a natural enough development of doctrine to regard no part of the constitution as exempt from amendment or repeal by simple legislative act. The British situation may be contrasted with that of other countries that have adopted the Westminster system, Where, as in Australia, a written Federal Constitution has been superimposed upon a Westminster system, the

relatively immutable constitution, capable of change only by recourse to special procedures set out in the Constitution itself, lives harmoniously enough with a qualified doctrine of parliamentary sovereignty – qualified to the extent that no act of Australia's parliament can of its own force alter that written Constitution and will, indeed, only be valid if in conformity with the grants of legislative power conferred by that Constitution.

Thus, one finds a general tendency for written constitutions to be made incapable of amendment except by some process more demanding than is required for the amendment of ordinary laws. Indeed in some instances whole constitutions, or those portions of them regarded as especially sacrosanct, are declared to be unalterable. One finds, too, that constitutions usually speak in terms that assume that the polity they have created will have an eternal quality. The reality is very different. The life span of constitutions in the modern world has proved to be a very uncertain one. Despite their pretensions as timeless structures, many last a few years only, ending in an atmosphere of odium usually deserved more by those who held power under them than by the constitutions themselves; and they then tend to be followed by the proclamation of a new constitution which, like its unfortunate

predecessor, declares itself to be its nation's charter for at least the next millennium. In the thirty years following World War II a substantial majority of the nations of the world changed one constitution for another, often several times; some, Syria among them, did so no less than nine times in that thirty year span. And the process still continues.

There remain, of course, some few examples of enduring constitutions; one thinks of the Swiss Constitution which is more than one hundred year old, and of the Constitution of the United States. Australia's Federal Constitution has already passed its ninetieth birthday with every sign of a long life still ahead of it. Canada's Constitution, for long consisting of the British North America Act of 1867, has now, as it is described, been "repatriated" and named in its amended form the Constitution Act 1867, and has been joined on the constitutional stage by the Canadian Charter of Rights and Freedoms.

But these and a number of other long-lasting constitutions are, on the whole, exceptions. Yet, despite their high mortality rate, most written constitutions seem, thanks to the enthusiasms of their authors, to share intimations of immortality. I know of only one endearing example, that of the Mongolian Peoples' Republic, in which a constitution

specifically provides for its own end. The Mongolian Constitution announces that it is to come to an end when a time is reached when there is no longer any need for the existence of the State. Mongolia apart, there must be some intoxicant in the atmosphere of constitution-making that drives out of the mind all sense of the lessons of history and convinces founding fathers that what they are about represents the unique occasion when the national ship of state will once and for all be set on a true course, their frequently very restrictive provisions for amendment only grudgingly acknowledging the possibility of the need for some occasional adjustment of the helm or set of the sail in the future.

In fact, even those few constitutions that, despite all the odds that the perversity of mankind stacks up against them, do survive the more abrupt hazards of domestic revolution and foreign conquest, even they seldom remain untouched by the passing of the years. For founding fathers who would pin their hopes on the permanence of meaning of what they create, the lesson of the years is surely "put not thy faith in future generations" nor, for that matter, in what they may see as the pellucid transparency of meaning of their constitutional text.

Whether it be by outright amendment, by judicial

interpretation or simply by changes in the domestic or international context in which they operate, constitutions are often so transformed in effect over time that their authors would scarcely recognise their creation a few score years on. The United States Constitution offers several examples of this and, in particular, of enlargement of federal powers as a result of judicial interpretation. Their great growth, at the expense of the power of the states of the Union, has been in part due to the seemingly innocent wording of the commerce clause in the Constitution. This clause was so expansively interpreted by the Supreme Court that by the close of the 1920s it was said, by one judicial interpreter, that "the commerce clause and the wise interpretation of it, perhaps more than any other contributing element, have united to combine the several states into a nation". Yet it is undoubted that Professor Frankfurter was right when he described the line of interpretation that the court had followed as "an audacious doctrine". The distinguished U.S. commentator on the Constitution, Raoul Berger, has said that had the present operation given to the commerce clause been foreseen at the time of federation "it would have wrecked adoption of the Constitution", because of the founding fathers' "jealous attachment to state sovereignty".

But it is not only by the gradual effect of developing constitutional conventions, or by judicial interpretation, that constitutions may have their effect dramatically altered from what was the intent of their founding fathers.

Let me illustrate this from Australia's own experience with its Federal Government's external affairs power. What was thought of by those, who, in the 1890s, drew up the Commonwealth Constitution, as a relatively minor legislative power conferred on the Federal Parliament, has proved over the years to be one of immense significance. The power is to make laws with respect to "external affairs". When the Commonwealth of Australia came into existence in 1901 it still remained a colonial possession, as had been the six federating colonies before it, and it possessed no international personality. It was Britain that conducted the foreign affairs of the Empire, made treaties and declared war. So there seemed little scope for Australian legislation on external affairs and the grant of that power to the new Federal Parliament was scarcely questioned by those who, on other matters, were vigilant in safeguarding the rights of the States.

However, all has now changed. Australia has for fifty years enjoyed an independent international personality as a nation state, conducting its own foreign affairs quite

independently from Britain, sometimes aggressively so. What is more, the whole world environment has changed at the same time; international treaties and conventions abound on subject matters undreamed of even fifty years ago, let alone at the time of federation. Australia has become a party to very many of them and that involves it in the domestic implementation of its international treaty obligations. It is at this point that the seemingly innocuous legislative power over "external affairs" emerges as potentially of extraordinary power: powerful because it has been held to authorise the Federal Parliament to make laws on an almost limitless range of subject matters, which at the time of federation would have been regarded as none of its concern but, on the contrary, very much within the exclusive province of the States of the federation.

Outraged advocates of States' rights complain that the Federal Executive, acting alone, is now able, by entering into an appropriate treaty or convention, to open up for itself at will whole new areas of federal legislative power. They say that this is distorting the entire, carefully designed, federal balance of powers between Commonwealth and States, a balance whose future maintenance was the basis of federation and which everybody thought at the time was safeguarded by the Constitution.

It has not been so much adventurous interpretation by judges as change in the international status of the Commonwealth, and extraordinary growth in the volume and range of international treaties and conventions, that has transformed in this way the effect of the Commonwealth's external affairs power. The power has proved to be protean indeed but it is not alone in that; other Commonwealth heads of power have likewise been found to possess unsuspected potentialities. The U.S. experience has been the same.

If one thing then is clear from any experience of constitutions it is that, even without any recourse to processes of formal amendment, they are likely to undergo extensive and unforeseen changes in operative effect over the years.

The two examples of change that I have cited, from the United States and from Australia, are cases of Federal Constitutions in which the doctrine of judicial review plays an active part. That is to say, courts are given the function, unknown in Britain, of determining by reference to the terms of the Federal Constitution the constitutional validity of Acts of Parliament, both Federal and State. The width of particu-Jar grants of legislative power, the extent of the Constitution's specific prohibition of certain legislative measures and the consequences of the supremacy that the Constitution accords

to Federal Law over inconsistent State Law all become matters for frequent court adjudication in both nations. This is, of course, something quite alien to the British doctrine of the unquestioned sovereignty of parliament. Yet curiously enough, it seems to owe its origin, as does so much else in matters constitutional, to British sources.

First explicitly asserted by Chief Justice Marshall of the U.S. Supreme Court in the great case of Marbury v. Madison in 1803, the origins of the doctrine of judicial review reach far back into English Common Law concepts of the limits of government power over the citizen, concepts that were enthusiastically embraced by Americans at the time of the Revolution and the Declaration of Independence. Bracton, in the mid-13th century, had spoken of the law as the bridle of royal power and in the 17th century Sir Edward Coke used that venerable authority to support his contention that King James I and VI, although as monarch subject to no man, nevertheless remained "under God and the Law". Substitute "legislature" for "King" and "constitution" for "law" and you have the doctrine of "Judicial Review of Legislation" ready-made.

Coke in fact went almost that far when he claimed supremacy of the great principles of the Common Law over

any Acts of Parliament that ran counter to them. In this Coke ventured, at the time, too far, in an England which was increasingly looking to Parliament, armed with its ancient powers and privileges, as a protagonist in the struggle against Stuart absolutism; it was no time to be casting doubts upon the supremacy of its statutes. However this spirit of the Common Law, transported to the American Colonies, ultimately emerged in the doctrine of judicial review and has spread to many quarters of the globe. Especially in the case of federations, where there is traditionally an allocation of legislative powers, some to the central Government and others to the regional units, there is a need for some arbiter between them in case of conflict or overlap; judicial review is one common constitutional response to this need.

It is not, however, the inevitable response. Some federations have no provision for review at all. Thus in Switzerland Federal Laws, as distinct from Cantonal Laws, are not subject to any review. And in many nations, both Federal and Unitary, constitutional review is not judicial in the sense of being undertaken by the ordinary courts of the land. It may, as in France under the Constitution of the Fifth Republic, take the form of a wholly non- judicial Constitutional Council, or, as elsewhere, consist of a special Constitutional

Court, sometimes having a strong non- judicial and policy-oriented flavour.

Anything at all in the nature of review of legislation for possible unconstitutionality does two inter-connected things: it gives new responsibilities and powers to the judiciary and it *pro tanto* diminishes the sovereignty of the legislature.

There exist in Britain, I suppose, two quite different possibilities that may in the future have particular local relevance: they are legislative devolution and a Bill of Rights with a status superior to ordinary statutes. Devolution of legislative power would presumably give rise to questions whether particular legislative measures were within devolved power or were a part of the power retained by Westminster. Some body, judicial or otherwise, would have to decide these questions, unless they were simply left to the Parliament at Westminster to decide, a solution likely to be a cause of infinite difficulties.

Again, any future British Bill of Rights, such as is mooted from time to time, and against whose criteria the validity of legislation and of executive action would have to be tested, would test a reviewing body still further. As has long been the case in the United States, and is at this moment

proving to be also the case in Canada since its adoption of the Charter of Rights and Freedoms, interpretation of broadly worded individual rights swiftly leads the interpreter (in those two countries their Supreme Courts) into areas of high policy and social engineering, not to mention controversy. Only the future can tell whether any of this lies ahead in Britain.

Not just in Britain and wherever else its Westminster model has been adopted, but also in constitutions world-wide that are more than mere facades for totalitarian rule, much of the day to day working of constitutions depends upon usages and customs; in other words, upon constitutional conventions. These legally unenforceable political practices come, over time, to be regarded as binding, at least until successfully departed from without dire domestic consequences.

It seems to be in the nature of things that conventions grow as vigorously around the text of written constitutions as they do in the less formally ordered environment of the British Constitution. The result is that any written constitutions that have seen many summers will contain, explicit on their face, only a fraction of all those rules that determine the actual mode of governing of their respective nations. Many of the relevant rules will instead take the form of unwritten constitutional conventions.

A celebrated example of such conventions at work occurs in the case of that very archetype of written constitutions: the U.S. Constitution. Without formally departing from the text of that Constitution, the prescribed manner of electing the President has, over the years, become so overlaid with conventions as to change the whole character of the process.

The founding fathers of the American Constitution, when they decided to create the presidency, were in search of a repository in which to vest central executive authority, something that had been abysmally lacking in the original Articles of Confederation and Perpetual Union of 1777 which the Constitution was to replace. They chose the office of President as that authority and concentrated in his hands all executive power. They had, of course, as models the Constitutions of the several confederating States, themselves modelled on the then already ancient Royal Charters that had long since been granted to the infant English settlements along North America's Atlantic seaboard. These Charters became, with suitable republican modifications, the Constitutions of each State when they declared themselves independent in 1776. And prominent in those Constitutions was the Governor, holding executive office, a ready-made model for

the new office of President.

Now the intention was that the presidency should be an elective office, but distrust of the electorate's capacity for calm and responsible selection of so powerful a figure led the founders to decide against any simple process of general election for the office of President. Yet one alternative, to entrust his selection to Congress (that is, to the legislature), seemed to violate the basal doctrine of the separation of powers and risked the President being the creature of a single faction within Congress.

A solution was found in a system of indirect election, each State choosing presidential electors who would then gather together in electoral college and there each cast his written vote for his particular choice of President. Their voting papers, unopened, would then go to the President of the Senate in Congress and there be counted.

This procedure, carefully designed to ensure a calm and deliberate nomination of his own particular choice of President by each of a group of leading and responsible citizens, selected in their State for their good judgment, is almost unrecognizable in today's U.S. Presidential election process. The members of the electoral college are not carefully selected – nor need they be – their task can be left

to nonentities since they are all pledged in advance to cast their votes in a particular way. They neither exercise any individual judgment, nor do presidential elections at all take place in a calm and deliberative atmosphere. Instead, aided by the methods which have evolved in each State for the selection of members of the electoral college – something that the Constitution left to the individual States – the election of the President has become, through usage dignified by the name of convention, the very thing that was intended to be avoided – namely, election by popular vote.

Constitutional conventions, as we know, also play a very major role in the British Constitution, as they do in all those polities that have adopted versions of the Westminster system of responsible government. I suppose it is fair to say that the whole notion of .responsible government, and with it Cabinet Government, rests with us upon constitutional convention as, indeed, does the concept of the constitutional monarch.

The part played by constitutional conventions in the framework of government is, if anything, more marked, or at least more obvious to the eye, when a constitution has been reduced to writing, especially when it essentially follows the lines of the Westminster model. This is because written

constitutions have a seemingly definitive quality about them as compared with the amorphous quality of Britain's Constitution. To find that they too need, for their understanding, a whole complex of conventions not included in the constitutional text, is therefore striking, seeming at first sight to deny the special significance one associates with national constitutions. Australia's Constitution provides an example of this. In it you have an elaborate document of 128 sections but not a word about such important matters as the office of Prime Minister and the existence of a Cabinet. Then there is the whole notion of the executive power of the Commonwealth, which it describes as exercisable by the Governor-General, but does not mention that it is in fact in the hands of the Prime Minister and his Ministers, on whose advice the Governor-General acts. All these glosses are supplied by convention and only in the light of existing constitutional conventions can the working of the system of government be at all understood. On the other hand, with Britain's unwritten Constitution, conventions sit more easily, and are less conspicuous among so much else that is not formal constitutional text.

We live, of course, in an era in which constitution-making has become one of the major preoccupations of the

day. Following 19th century trends towards liberalism, independence and nationalism, two great waves of constitution-making have followed one another, each in the wake of a world war: the first after the defeat of the central European powers and the Ottoman Empire in World War I, when new European nations needed constitutions and defeated nations sought fresh ones; the second after World War II, when two distinct factors operated – de-colonization and the coming to power of Communist regimes in Eastern Europe. The extraordinary increase in the number of nation states in this century – they have far more than doubled – and the great changes in patterns of power and in ideologies reflects this, and it is with this that the task of constitution-writing has had to keep pace.

One very obvious conclusion that may be drawn from the history of constitution-making is that cataclysmic events breed constitutions. Even Britain's own experience bears this out. Britain knew for a short time an era of written constitutions and it took a revolution to produce it and the restoration of the monarchy to end it. That conclusion also goes to explain why it is that Britain, almost alone of the nations, has had but one era of written constitutions, and that of short duration only.

As we have seen, it is no eccentric aversion to written constitutions that leaves Britain in its almost unique position. After creating them in plenty for self-governing colonies during the 19th century, the processes of de-colonization which so absorbed Britain immediately after World War II again involved it in constitution-making on a grand scale, particularly in Africa.

The situation is, rather, that Britain has not, with one exception, experienced those traumas of the state that call for written constitutions as their remedy. Constitutions like the British, not reduced to written form, are a complex growth, evolved over the centuries. They can only be cultivated in a climate undisturbed by revolution, civil war or foreign invasion, a climate that Britain has generally enjoyed for more than 900 years but which very few other nations have shared.

Britain's own experience during the Commonwealth, and its very familiarity, as a part of British history, make it a useful source of examples of quite general propositions about constitutions world-wide. It shows how crises breed new constitutions, perforce written ones; how their adoption, if they formally distribute power rather than leaving it in informal hands, imposes restraints upon the exercise of powers. Even the Restoration that followed in 1660 is also

constitutionally instructive in its own way.

The crisis that bred the written constitutions of Cromwell's time was a prolonged one, beginning with execution of a monarch, abolition of the House of Lords and birth of an English Republic "to be governed as a Commonwealth, or a Free State". As it turned out, the would-be Commonwealth was governed by an unacceptable Rump Parliament of some ninety members, all that was left after successive purges of the Long Parliament that had been elected nine years earlier.

No new constitution was put m place, so the Rump Parliament and a Council of State, most of them themselves members of that Parliament, jealously monopolized all the power of the state. The army, on which this unrepresentative Parliament depended for its continued existence, saw the Rump, sitting in constant session, intent on being interminably in possession of that power.

The unconstitutionality of it all was only aggravated by Cromwell's arbitrary expulsion of the Rump in 1653. Its brief replacement by a hand-picked assembly which styled itself a Parliament, The Barebones Parliament, did nothing to restore constitutionality. When it abdicated after a few months of sitting, the only legitimate authority in the country

was Cromwell who had been created Commander- in-Chief by Act of Parliament. In this crisis Cromwell's installation as Protector in December 1653 brought with it the first written constitution, the instrument of Government, which, although imposed by the army, did at least restore the concept of a distribution and limitation of power between executive and legislative. And it was a Constitution for Britain, with Scotland represented, albeit meagrely, in the Parliament.

That Constitution saw in two Parliaments but Cromwell found it impossible to work with either of them. Nor was the efficient but military-style rule of his Major-Generals in the provinces appreciated; some sounder constitutional basis was needed. The Commonwealth's second written Constitution, "The Humble Petition and Advice", had the virtue of an executive with known powers which was also subject to known laws, unlike the rule of the Major-Generals. It had the merit, too, of originating not with the army but with the second of those two Parliaments. It restored a second chamber, and gave wider powers both to the Lord Protector and to the Parliament. Yet it, too, Cromwell felt obliged to dissolve and his tragedy was that until his death the search for a constitutional basis acceptable to the nation eluded him.

The institutions of Monarchy and House of Lords, of

a Commons conscious of its power and a Judiciary independent of Government and administering its own time-honoured Common Law and Equity, these were (the period of Stuart Absolutism apart) very much the fabric of English society, having grown up over undisturbed centuries of constitutional development. The return to them at the Restoration was eagerly awaited by a community that had had enough of social experimentation. So it was possible to cast aside an existing written constitution without offering another in its place.

However, as a contemporary, Bishop Burnet, author of the History Of My Own Time, put it: "they had called home the King without a Treaty"; had there been some "Treaty" more explicit than what was offered by Charles II in the Declaration of Breda, he might have felt its restraints and been guided by them, and old constitutional ways might indeed have been restored; even James II might then have modified his policies and perhaps for longer retained his throne. In fact it took the Glorious Revolution of 1688 to see constitutionalism in place again.

In short, the period of the Protectorate is a microcosm of constitutional experience, with crisis after crisis producing for the first time written constitutions for the country's rule but, in the extraordinary circumstances of the time, satisfying

no-one, least of all perhaps Cromwell himself. A simple reversion to a constitutional past then seemed to be offered by the Restoration and was accepted with general relief. As to Scotland, it went back to its own Parliament and, after a short honeymoon with Charles II, Britain saw renewed once again the conflict with the House of Stuart until the Glorious Revolution, the Declaration of Rights and, finally, the Act of Settlement resolved the position once and for all.

INDIGENOUS PEOPLES AND HUMAN RIGHTS

Paul Reeves

Around noon on 13 December 1642 two Dutch ships sighted a "large land, uplifted high ... south east of us at about 15 miles"[1]. They were somewhere off Punakaiki on the West Coast of Te Waipounamu (or the South Island of New Zealand, as it came to be known). During the next three days the two ships edged up the coast, rounded a long sandspit and entered a large open bay. Smoke rose from fires lit at various places on the shore and doubtless these were signs of consternation and alarm. To the people on the shore the vessels must have seemed fantastic and the fair-skinned crew extraordinary. The two ships dropped anchor and towards evening two canoes approached. Here is the moment of contact. After a long time

> the men from the two prows began to call out to us in a rough, loud voice but we could not understand the least of it. However, we called out to them by way of reply, whereupon those people started again several times but came no nearer than a stone's shot. They also blew many times on an instrument which gave a sound like a Moorish trumpet. [2]

The rough call was probably a haka, a war chant, and the instrument probably a shell trumpet, a putaatara, challenging the strangers and calling the people on shore to be on the alert. In reply the second mate of one of the Dutch ships played his trumpet, a noise which must have sounded as strange to the Maori ear then as it does to me now. After these brief exchanges the canoes withdrew, and on board the ships double watches were set, muskets, pikes and cutlasses made ready and guns placed on the upper deck. Within 24 hours four Dutch sailors were killed.

The Dutch did not stay around. They left and there was no further contact between Maoris and Europeans until Lieutenant James Cook returned in 1769. It was then the turn of the Maoris to be killed. Initial contacts between Western explorers and native peoples, surrounded as they were by distrust and fear of the unknown, usually involved the loss of life. There is no longer an indigenous community on Hispaniola, the island where Columbus landed and where official ceremonies were held in October 1992 to mark the 500th anniversary of his arrival in the Americas. Mass killings of indigenous peoples may have reduced in scale over the past 500 years but they have not stopped – especially in the Americas. Indians were targetted when the army broke

the peasant revolt in El Salvador in 1932. The counter-insurgency tactics of the Guatemalan army to crush the armed opposition in the 1970s and 1980s claimed thousands of non-combatant Indian peasants as victims.

Violence can take many forms. On 2 January of this year a pall of black fabric decorated Saint Andrew's Episcopal Cathedral in Honolulu and for four days the Hawaiian flag without the accompanying Stars and Stripes flew over government offices in Honolulu. As you probably know, the nation of Hawaii in the 19th century was recognized in the international community as sovereign and independent, a country which had nearly 100 diplomatic and consular posts around the world. On 16 January, 1893, United States marines landed in Honolulu and assisted in the overthrow of Queen Lili'uokalani. In 1898 the former government and crown lands (1.8 million acres) were ceded to the USA. The property was returned in 1959 when Hawaii became a State, but the federal government retained 400,000 acres, and nearly 200,000 acres formed Hawaii's national parks with more reserves set aside for the military. The remaining 1.2 million acres forms a public trust with 20% of the income benefiting native Hawaiians. Under the Hawaiian Homes Act 1920, 192,000 acres (5% of Hawaii's land) was set aside for qualified

Hawaiians. By 1990 only 33,000 acres were in homestead use with about 6,000 leases. Seventy years after the Act nearly 19,000 Hawaiians remain on a waiting list. No wonder that in Saint Andrew's Cathedral on 2 January they prayed:

> Lord, we remember all indigenous peoples of the world who are exploited and marginalised, the forces of oppression that trample native peoples and the unjust systems which break the spirit of native peoples and rob us of our rights and dignity.[3]

Definitions

So who are Indigenous Peoples? The International Labour Organisation Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries in Article One speaks of:

> people in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited a country or a geographical area to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries or who irrespective of their

> legal status retain some or all of their own social, economic, cultural and political institutions.

By any standard that is a bloodless definition which captures none of the pain experienced by many indigenous peoples. Nor does it convey their current feelings of loss and powerlessness. Rosemarie Kuptana is President of the Inuit Tapirasat of Canada. Her statement, made in April 1993, gives us a better feeling of what it is to be an indigenous person

> ...Inuit are a distinct people. There is not one homogeneous Indigenous People, just as there is not one world community of black people, Asian people or white people. It is not our race in the sense of our physical appearance that binds Inuit together, but rather it is our culture, our language, our homelands, our society, our laws and our values that make us a people. Our humanity has a collective express10n and to deny us recognition as a people is to deny us recognition as equal members of the human family. Individual human rights protection will allow us to

> assimilate into the dominant society but they will not allow us to survive as a people and therefore will not allow us to survive as Inuit .... the Inuit agenda for the exercise of our right to self-determination is not to secede or remain separate from Canada but to enter Canada as a people and to share a common citizenship with other Canadians.[4]

Self-Determination

Article 1 of both the Covenant on Civil and Political Rights and the Covenant on Economic Social and Cultural Rights states: "All people have the right to self-determination". The scope of that right has never been clearly delineated. If it meant guaranteeing the right of full independence as a separate state to all indigenous groups then most, if not all, governments would be opposed. But in the US, for example, the issue is not as clearcut as that. In 1831 the Cherokee nation acting as a foreign nation attempted to sue the State of Georgia in the Federal Court. The judgement of Chief Justice John Marshall inter alia stated that: "The relations of Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else. They may

more correctly perhaps be denominated domestic dependent nations." The Indians lost insofar as they were described as domestic and dependent. But they were also described as nations, with the consequence that sovereignty and self-determination are still being tested in the US. American Courts stress the Government's obligations to tribes are *sui generis,* that is: rooted in the history of official relations with tribes.

In 1975 the Grand Council of Cree of Quebec signed a Treaty with Canada as a federal state and Quebec as a Province of Canada. The development of the James Bay Hydro Electric scheme on traditional Cree land had been a source of great controversy and the Treaty sought to offer protection of Cree food sources and to provide for rigorous environmental controls. But in the context of the 1990-92 Canadian constitutional debates, the Grand Council of the Cree, feeling that their Treaty rights were being disregarded, said:

> Canada was asked last year how it would protect our rights in the event of Quebec's separation. Would it respect our right to make a choice – our right of self-determination. We have been waiting for a year for the

> answer. We were told not to expect an answer, that Canada did not want to say anything that would upset Quebec. Indigenous people in Quebec are very concerned by these developments and the serious implications they have for the protection of the indigenous peoples who live in that part of Canada.
>
> The double standard being displayed on this question – Quebec's rights versus indigenous rights – is a blatant example of racism based on the supremacy of European populations over first peoples. The Crees will do everything possible to publicise the inconsistent, discriminatory and racist policy of the Government of Canada on this issue. We make no claim for the exercise of external self-determination unless and until Quebec attempts to separate from C1mada with our people and our 5,000 year old territory. In that event, however, our rights, all of our international rights, must be respected.[5]

My assumption is that if Quebec seceded the Crees would

want to stay with the Federation of Canada. But that would be their choice based on their perceived right of self-determination.

I want to look at an exposition of political philosophy which has been formative and far-reaching in its influence. I refer to Leviathan, published in 1651, Thomas Hobbes' exposition of the doctrine of the sovereignly of the modern state which has survived for 300 years after the author's death. He said that among essential Governmental powers of sovereignty are the right to make laws, the right of judicature, the right to make war and peace, the right to reward and punish, the right to regulate what opinions are allowed to be propagated in public.

> They are the marks whereby a man may discern in what man or assembly of men the sovereign power is placed and resideth. For these are incommunicable and inseparable.[6]

Hobbes pictures the sovereign power as Leviathan, the great sea monster of Job. Leviathan had the right and power to coerce his subjects and the right to define the content of justice. The people were subjects and not citizens. They were not equal with each other and had no rights against the sovereign. The content of law is the same as the content of

justice and the sovereign state is the sole author. The sovereign, Leviathan, will enforce his justice. "None is so fierce that dare stir him up ... when he raiseth himself up, the mighty are afraid ... upon the earth there is not his like."[7]

States have an indefensible moral right to control the politics of their territories by means of law and, if need be, by force. Without sovereignty there would be chaos. Time may have modified Hobbes' view of the state but the essential core still remains.

The Treaty of Waitangi

It would be helpful to look at the arrangements one incoming sovereign power made with a particular group of people who were there when they arrived and as a result of which the core doctrine of the Sovereignty of the State, which came down from Thomas Hobbes, was brought to New Zealand in 1840.

On 6 February, 1840, by all accounts a sunny clear day, and on a grassy slope outside the house of James Busby, the British Resident and an Edinburgh man no less, a Treaty was signed between William Hobson, the representative of Queen Victoria, and certain chiefs of Maori tribes of New

Zealand.

The historical and textual questions rise up sharply. The text was not the result of any prior consultations with the Maori. Ruth Ross, a New Zealand historian says: "The Treaty of Waitangi was hastily and inexpertly drawn up, ambiguous and contradictory in content, chaotic in its execution"[8]. The original document in English, of which we have several versions, was translated into Maori and neither means exactly the same as the other. The overwhelming number of signatories signed the Maori version.

A basic question is whether Maori gave away sovereignty when they signed. A Maori perspective is that "under Maori law it was clear that Maori had the power to treat and protect their self-determination and that under Maori law it was impossible for anyone to cede their authority of their tribal nations. No matter how powerful and respected Maori leaders were, they could not give away the authority of their nation. Indeed they not only could not, they simply would not because it was culturally incomprehensible for them to do so."[9]

Some questions never stop being asked. The 1980s was a time when New Zealand Courts, and especially the Court of Appeal, sought to define the place of the Treaty of Waitangi

within the constitutional processes of New Zealand. At the time the assertion of Maori sovereignty was not a claim of legal sovereignty over New Zealand. Most Maori argued for areas of immunity from European and Crown centred control. They wanted powers to administer separately education, health, social welfare policies, lands and waters. They wanted to avoid European totalitarianism – thus they asserted separate rights but did not claim to rule everything.

Was it right that the legislators, judges and local bodies constituted by law should deliver justice to the Maori? The Court of Appeal answered clearly: the right to decide stayed with the Parliament and the courts. The legislative power, because it could change the law, was sovereign. The Treaty provided a basis of partnership between Maori and the Crown. But this flexible relationship, in which each should act with reasonableness and good faith towards the other, first implied the subjection of the Maori to Pakeha (European) law and the establishment of sovereignty.

Maori have had two factors reinforced: first, the Act that created sovereignty in New Zealand was not the signing of a Treaty but the exercise of the Queen's prerogative; second, systems of sovereignty are closed – you cannot appeal outside the legal rules accepted as valid within them. (The

Crees are frustrated by the decision of the Canadian courts that the principles of international law don't apply to indigenous treaties. Indigenous peoples, they complain, have no recourse to the rules of interpretation in the Vienna Convention and are forced to go before the courts of the offending state to seek redress.)

Rights

I want to change direction slightly and quote from Alfred North Whitehead: "The literary world through all ages belonged mainly to the fortunate section of mankind whose basic human wants have been amply satisfied….Delicacies of taste displace the interest in fullness of stomach"

> Unfortunately the notion of freedom has been eviscerated by the literary treatment devoted to it…. When we think of freedom we are apt to confine ourselves to freedom of thought, freedom of the press, freedom for religious opinions. Then the limitations to freedom are conceived as wholly arising from the antagonism of our fellow men. This is a thorough mistake. The massive habits of physical nature, its iron laws, determine the scene for

> the sufferings of men. Birth and death, heat, cold, hunger, separation, disease, the general impracticability of purpose, all bring their quota to imprison the souls of women and of men …. The essence of freedom is the practicability of purpose .... The literary exposition of freedom deals mainly with the frills. The Greek myth was more to the point. Prometheus did not bring to mankind freedom of the press. He procured fire….[10]

Whitehead is going over ground traversed many times in the United Nations. He is emphasising that Human Rights are indivisible and all encompassing. Consequently civil, political, cultural, social, economic and, somewhere over the horizon, environmental rights belong together and must recognize each other.

You need to remember that the Charter of the United Nations includes two concepts which can be in conflict with each other: according to one concept the component units are the member states; the other concept focusses on individual human beings. In the organisation of the United Nations the former concept is more prominent and makes the primary task that of restraining and constraining states; the latter concept

expresses itself in institutions designed to relieve individual suffering and the promotion of human rights and fundamental freedoms.

But at a conceptual level there are difficulties. The Universal Declaration of Human Rights was issued in 1948. It is described in a preambular clause as "a common standard of achievement for all peoples". It is an enormous landmark in the contemporary development of the concept of human rights. But then came the task of formulating precise definitions of Human Rights which would then be subject to signature and ratification. In fact the stand-off between capitalist nations and the alliance of socialist and developing nations delayed the adoption of separate Covenants on Economic Social and Cultural Rights and Civil and Political Rights until 1966.

As I have already said, Article One of both Covenants states: "All peoples have the right to self-determination" but the scope of that right is unclear. Indigenous Peoples want the right to self-determination to be understood as a collective right, the right of a cohesive group of people. Governments remain opposed. I would be surprised if the issue is addressed at the World Conference on Human Rights which will be held in June 1993 in Vienna. Regional Declarations from the

preparatory meetings show that Indigenous Peoples will not get much out of this Conference. The San Jose Declaration speaks of commitment to the well-being of Indigenous Peoples but only so far as that is "without detriment to the unity of the State". The Tunis Declaration reaffirms the right of all peoples to self-determination but "only on the basis of respect for national sovereignty and non-interference in the internal affairs of states". The Bangkok Declaration stressed the right to self-determination is applicable only to "peoples under alien or colonial domination or foreign occupation and should not be used to undermine the territorial integrity, national sovereignty and political independence of States".[11]

Clearly the United Nations is in transition. It is moving from being a mostly diplomatic to an increasingly operational organisation. But as it does so there are two points which should be considered: first, Indigenous Peoples who have been buffeted by exclusive and watertight notions of sovereignty, who have been told they cannot expect any distinctive representation at the United Nations, would be very interested to read An Agenda for Peace, the important report of the Secretary General, where he says: "The time of absolute and exclusive sovereignty however has passed, its theory was never matched by reality." Indeed, if the Secretary

General is referring to intervention by the international community in the domestic affairs of a sovereign state, then this is not new. American and European assistance to former Soviet Republics is specifically geared to encourage their transition to democracy and free market economies. The imposition of sanctions on South Africa and the former Rhodesia in order to encourage political change in those countries is an intervention by the international community. Supplying arms to the opponents of a government is a clear form of intervention. Some would say that in the past some interventions have been done on a selective basis. One commentator has written:

> Had the world community reacted differently to the first invasion by Saddam Hussein, the invasion of Iran, the second invasion, that of Kuwait, would have been avoided. If Israel's first occupation of 1967 had been dealt with firmly and justly by the United Nations, the second occupation, that of Southern Lebanon, would not have occurred.[12]

Secondly, Indigenous Peoples who have been told that you can speak of individual but not collective human rights, with the implication that they are a collection of individuals

and not a people, would be very interested in the growing consensus of opinion that a denial of human rights can justify a humanitarian intervention in order to protect those who are at risk. As another commentator has put it:

> A nation can no longer maintain that the treatment of its own citizens is exclusively within its own jurisdiction[13]

The frontiers of domestic jurisdiction seem to be receding.

Though the phrase humanitarian intervention was studiously avoided, the principles to guide humanitarian assistance are annexed to the General Assembly Resolution 46/182 of 19 December 1991. But it is a slippery slope. There are obvious questions: will the force be appropriate or excessive? How long will intervention last and what is its purpose? Who bears the consequence of the intervention? But can there be a humanitarian intervention which does not contain some element of self interest? Security Council Resolution 688 passed in the aftermath of the 1991 Gulf War declared the Kurdish situation in Iraq to be a threat to world peace. Consequently a zone was established in Northern Iraq to protect the Kurds. Some saw Operation Provide Hope as an international intervention to prevent suffering. Others, noting Kurdish pleas had been ignored since 1920 and that the

intervention did not apply to Kurds elsewhere (notably Turkey), saw the whole enterprise as flawed by the self interest of the states which made up Operation Desert Storm.

Contrary to what they have been told, Indigenous Peoples are learning that, in the international area, sovereignty is less than absolute and a concern for what seems like collective human rights can be the justification for intervention. Indigenous Peoples wonder when their day is going to come. In the meantime they construct international networks knowing the more international support they gain the more domestic success they have.

There is much talk about restructuring the United Nations. Clearly there is a growing gap between the organisation's responsibilities and its resources. You may be interested to know that the size of the United Nations core budget ($5.2 billion in 1992) is less than the cost of operating New York City's Fire and Police Departments and on average the member states invest only $1.40 in peacekeeping for every $1,000 devoted to their own armed forces.

1995 is the 50th anniversary of the United Nations. There is talk of revising the Charter or more likely writing a parallel document. Nations of the South would like to make the Security Council more accountable to the General

Assembly. The membership of the Security Council and the veto powers of the Permanent Five are being scrutinised carefully.

Indigenous Peoples are presently linked to the United Nations through the Commission on Human Rights, one of the weaker arms of the system. In any reorganisation what they want are:

- the adoption of the Declaration of the Rights of Indigenous Peoples without amendment.
- mechanisms for Indigenous Peoples to have an input into environmental, economic and development activities of the United Nations.
- better coordination among agencies of their work on indigenous issues.
- regular statistical data on Indigenous Peoples.
- a Permanent Fund to provide seeding and development grants.

Lord Tennyson told of his Aunt Russell who set light to her headdress and rang frantically for the footman.

"William, I am on fire!"

"Very good, Madam. I will go and tell Amy".

Evidently it was the maid's business to extinguish her mistress.

Indigenous peoples do not want to be passed off as someone else's problem. Nor do they want to feed other people's agendas, whether they be environmentalists or some devotee of a New Age spirituality. Indigenous peoples are uncomfortable at being cast as the victims of civilisation, colonisation, progress or anything else. They want to contribute to the issues everyone faces: sustainable development, a durable social structure, a cultural frame of reference which reveals more than we thought was possible.

Among indigenous peoples there is a vast human resource. Things happen slowly but a Maori response is summed up in the saying "Ahakoa iti, he pounamu" – even though it is small, it is a treasure.

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