

caretaker government and gave New Zealand all the ingredients of a first-class constitutional crisis.

The results on election night in 1984 made it clear that the National Government had been defeated by the Labour opposition, but the final official results were some days away under the rules allowing for special votes. New Zealand was then in the throes of a financial crisis. The Reserve Bank had suspended all foreign exchange dealings to stop the flow of money out of the country. Officials had briefed the outgoing government that an immediate response by way of a devaluation was required. Yet Sir Robert Muldoon, the outgoing National Prime Minister, at first refused to act. Later he said on television that he would not devalue as long as he was Minister of Finance. In response to the reporter's suggestion that there was little sense in not letting the government-elect make the decision, Sir Robert said that he hoped to give the incoming Prime Minister some instruction in the realities of government over the next day or two.

Sir Robert saw himself as still in charge. Legally he was; he was still Prime Minister and Minister of Finance and would remain so until the Governor-General accepted his resignation or dismissed him. Over the next ten days the Muldoon Government was the lawful government. Its actions were, however, considered to be limited by certain constitutional conventions. The most important of these is that the outgoing government must not undertake any action that will embarrass the incoming government. That rule was generally understood. The question was whether constitutional convention required the outgoing government to act at the direction of the incoming government on a major policy issue. The situation was resolved three days after the election when Sir Robert wrote to the Prime Minister-elect saying he would act on the decisions of the incoming government in relation to the currency crisis.

As explained in Chapter 1, the legal root of this crisis was resolved permanently by the Constitution Act 1986 clarifying who could be ministers and when government could change. Critical to resolving the crisis at the time was a press statement by the Attorney-General, the Hon. J.K. McLay, in which he formulated the conventions to which outgoing governments were subject. He put the essentials like this:

1. that it [the outgoing government] will undertake no new policy initiatives.
2. that it will act on the advice of the incoming government on any matter of such great constitutional, economic or other significance that cannot be delayed until the new government formally takes office—even if the outgoing government disagrees with the course of action proposed.⁷

[and]

⁷ J.K. McLay, press statement, 17 July 1984.

Amendment Act). Curiously, it took New Zealand from 1931, when the Statute of Westminster was passed by the United Kingdom Parliament, until 1947 to cut the constitutional apron string. Other oddities remained even longer. The United Kingdom could still make law for New Zealand by the request and consent of the New Zealand Parliament until that power was removed by the Constitution Act 1986. Finally and completely, the New Zealand constitution was 'patriated' to New Zealand.

Otherwise, the constitutional history of New Zealand from 1852 until 1986 was largely a whittling away of the 1852 act until all that was left at the end were twelve provisions where once there had been eighty-two. These provisions gave no clue as to the structure of government in New Zealand or how power was exercised. The old Constitution Act was a relic, harmless, but also useless.

It is very doubtful whether this strange relic would have changed quickly had it not been for a constitutional crisis in 1984. In July 1984, immediately after the Labour Government was elected, a serious constitutional event occurred. It arose from the unwillingness of the outgoing National Prime Minister, Sir Robert Muldoon, to recommend to the Governor-General urgent financial measures concerning devaluation of the currency which those who would form the incoming government saw as essential. Under New Zealand law then, there was real doubt whether, in law, an opposition party which had won a general election could immediately form a government and take responsibility for the measures. In the event, a grave situation was narrowly averted.

The crisis exposed major uncertainties in New Zealand's constitutional law. Clear practical rules to enable a swift transfer of power were needed, so the government decided to set up an expert committee of officials to examine the issue and make recommendations. The terms of reference dealt not only with the transfer of power problem but also required the committee to make a general review of New Zealand's constitutional provisions with the object of putting the most important into one enactment. The result was a report that formed the basis for the Constitution Act 1986,³ which was passed by the New Zealand Parliament with unanimous support. Even though it contains nothing radical, it represented a new constitutional beginning. To the public it passed without fanfare. Only eight submissions were received by the select committee of Parliament which scrutinised the bill.

NEW ZEALAND'S WESTMINSTER CONSTITUTION—UNTIL MMP

Most nations have a document called a constitution that lays down the framework

³ Report of an Officials Committee, *Constitutional Reform*, Department of Justice, Wellington, February 1986.