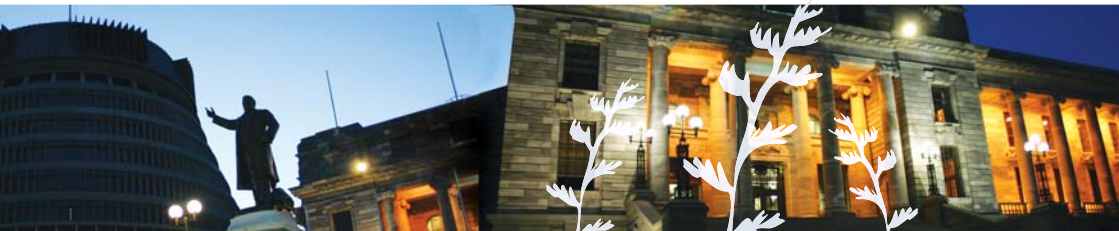


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LECTURE 20

*Parliamentary Recklessness:
Why we need to legislate more carefully*

PROFESSOR JEREMY WALDRON



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About Maxim Institute

New Zealand is a richly textured country. It has a great and colourful history and a thriving culture. Its people have inherited a vast and dynamic landscape. They know how to live and play well.

Yet, New Zealand faces serious challenges. How we respond today shapes the future our children inherit tomorrow.

Maxim Institute is an independent research and public policy think tank. We are committed to the people, land, history and culture of New Zealand.

Our mission is to foster ideas and leadership that enable freedom, justice and compassion to flourish in New Zealand.

As a think tank, Maxim Institute engages in the following core activities:

- producing research and informed analysis of contemporary issues;
- developing and promoting sound public policy;
- communicating our research findings and policy initiatives to the decision-makers and leaders of today;
- training and mentoring tomorrow's leaders for all areas of community, political and business life; and
- equipping New Zealanders to become better informed and more effective agents of change in their community.

The Annual John Graham Lecture



John Graham is a New Zealand hero. He has spent his life training, inspiring and mentoring young New Zealanders in education and sport, having had a celebrated and distinguished career in both fields. He has been Headmaster of Auckland Grammar School, Chancellor of the University of Auckland, Captain of the All Blacks and President of the New Zealand Rugby Football Union. He is a dedicated leader in our nation and his passion for New Zealand has endowed this

country with a brilliant legacy.

Appropriately, John was honoured for his services to education and the community in 1994 when he received a CBE. John Graham's commitment to service and to this country has made all New Zealanders richer.

The Annual John Graham Lecture holds up John Graham's life as an example to tomorrow's leaders to serve our country well. It provides an opportunity to invite leading international experts to contribute to the policy debate in New Zealand. Public debate and discussion stimulate creative thinking and this event offers a forum for new ideas to be articulated, tested and refined.

The inaugural Annual John Graham Lecture was delivered on Monday, 28 July 2008, at the Heritage Hotel in Auckland.

Professor Jeremy Waldron



Jeremy Waldron is University Professor at New York University School of Law, and teaches legal and political philosophy. He was previously University Professor in the School of Law at Columbia University.

He was born and educated in New Zealand, where he studied for degrees in philosophy and in law at the University of Otago. He was admitted as a Barrister and Solicitor of the Supreme Court of New Zealand in 1978. He studied at Oxford for

his doctorate in legal philosophy, and taught at Oxford University as a Fellow of Lincoln College from 1980-82. From 1982-1987, he taught political theory at the University of Edinburgh, and from 1987-1995, he was a Professor of Law in the Jurisprudence and Social Policy Program in the School of Law (Boalt Hall) at the University of California, Berkeley. He was briefly at Princeton, as Laurance S. Rockefeller University Professor of Politics, before moving to New York in 1997.

Professor Waldron has written and published extensively in jurisprudence and political theory. His books and articles on theories of rights, on constitutionalism, on democracy, property, torture, and homelessness are well known, as is his work in historical political theory (on Aristotle, Thomas Hobbes, John Locke, Jeremy Bentham, John Stuart Mill, and Hannah Arendt).

Professor Waldron gave the second series of Seeley Lectures at Cambridge University in 1996, the 1999 Carlyle Lectures at Oxford University, the Spring 2000 University Lecture at Columbia, and the Wesson Lectures at Stanford in 2004. He travels widely and has delivered public lectures all over the world, from Buenos Aires to Jerusalem. He was elected to the American Academy of Arts and Sciences in 1998.

*Annual John Graham Lecture
Auckland, 28 July 2008*

– PROFESSOR JEREMY WALDRON –

I want to thank Maxim Institute for the kind invitation to deliver this lecture, and particularly Alex Penk and Lissa Birse for making the arrangements. A few years ago, I was introduced to the work of the Maxim Institute by an old law-school classmate from Dunedin in the 1970s: Fiona Mackenzie, who many of you will know, and I have had many good conversations with Greg Fleming, Alex Penk, and their colleagues at the Institute.

I am particularly pleased to have the opportunity of presenting the first in the John Graham lecture series. I have not until now had the privilege of knowing Mr Graham personally: I am an alumnus of Southland Boys' High School in Invercargill, not Auckland Grammar. But John Graham is a household name in New Zealand and he stands for a dignity and greatness in public, educational, and sporting affairs that is emulated today all too rarely.

Parliamentary Recklessness: Why we need to legislate more carefully

Tristram Shandy

I begin with an observation about alcohol. Herodotus reports that the ancient Goths of Germany, when they had to decide anything important—like going to war, or moving their settlements or entering into a treaty—when they had to decide anything important, they would debate it not once but twice. The first time, they would debate the issue drunk, the second time they would debate the issue sober. Drunk—to give a bit of vigour and spirit to their deliberations; but also sober, to add a dimension of prudence and discretion.¹

The observation is reported by Laurence Sterne in his great comic novel *The Life and Opinions of Tristram Shandy, Gentleman*, published in the middle of the eighteenth century, and sometimes referred to as “the dirtiest novel in English.”² The narrator reports that his father was very much impressed by this custom of the Goths and sought to emulate it in his own decision-making. The trouble was that Mr Shandy, senior, was a teetotaler. We are told that

[i]t was not till the seventh year of his marriage ... that he hit upon an expedient which answered the purpose—and that was, when any difficult and momentous point was to be settled in the family, which required great sobriety, and great spirit too, in its determination—he fixed and set apart the first Sunday night in the month, and the Saturday night which immediately preceded it, to argue it over, in bed with my mother

The narrator passes over in silence the exact difference in spirit of these two nights in what his father called “his beds of justice,” but if you consider what used to be the rules and customs upheld by the church for the conduct of married life on various days of the week, you will understand that he had found a method for successive and varied modes

of deliberation so that, as Shandy puts it, “from the two different counsels taken in these two different humours, a middle [course] was generally found out which touched the point of wisdom as well, as if he had got drunk and sober a hundred times.”

Legislation: substance and process

My topic this evening is neither drunkenness nor the joys of married life, but something much more boring: legislative deliberation—law-making—in the New Zealand Parliament.

When I suggested this topic to Alex Penk, he sent me some information on statutes the Institute thought had been ill-advised and badly drafted: he mentioned particularly the Electoral Finance Act 2007 of course, and also the Crimes (Repeal of Seditious Offences) Amendment Act 2007, and the rushed schedule for consideration of the Climate Change (Emissions Trading and Renewable Preference) Bill. I was told that all these pieces of legislation by the New Zealand Parliament, enacted recently, or under consideration as we speak, were seriously flawed.

Tonight I don't want to get into the merits of any particular measure. I want to concentrate on the process—the *way* we make our laws not the merits of the particular laws we make. It may seem a dry subject—parliamentary procedure—however much one tries to liven it up with jokes from Tristram Shandy. But it is all-important in our system of democracy because, when you think about it, there is such a degree of substantive disagreement among us about the merits of particular proposals, there is so much contestation that any claim that law makes on our respect and our compliance is going to have to be rooted in the fairness and openness of the democratic process by which it was made. We obey because we think the law was made fairly, not because we agree with what it says.

Judge-made law versus legislation

Now, there are many ways in which laws can be made; the parliamentary process is just one of them. Any lawyer will tell you that a lot of our law—

especially the common law—is developed and elaborated by the courts rather than by Parliament.

That happens much more where I live, in the United States, than in New Zealand. It was the Californian Supreme Court, for example, not the Californian legislature which removed the legal obstacles to same-sex marriage in California in May of this year, just as it was a court which ruled in February 2004 that same-sex marriage could not be restricted in Massachusetts. In each case, the courts were responding to principled arguments that linked the permissibility of same-sex marriage to some rather abstract equality and anti-discrimination principles in the state constitutions. And, from some points of view, that's an admirable thing to do: to explore and take seriously the ramifications of our constitutional commitments even when they lead us to positions that some may be uncomfortable with.

I do not know what I think about same-sex marriage; I understand the arguments of those who want the support of the law for their loving and permanent unions. And I understand the concerns of those who oppose the implicit legitimisation of conduct that they take to be biblically forbidden. There are deep and powerful arguments on both sides; and everyone has a duty to think as seriously and sympathetically as they can about the concerns of the other side. But I am sure of this: I think it is a bad idea for these matters to be decided by courts, particularly when the communities in question are deeply divided.

In New Zealand, as I understand it, the issue of same-sex marriage is settled—at least for the time being—not by the courts (which in *Quilter v Attorney-General*³ had refused to touch the matter), but by Parliament in the Civil Union Act of 2004, the Relationships (Statutory References) Act of 2005 and in the Parliamentary failure, also in 2005, of Gordon Copeland's Marriage (Gender Clarification) Amendment Bill. And that's how it should be.

In California and in Massachusetts it would have been better if the judiciary had let the matter alone. A number of bills were making their way through state legislatures, and consideration of those measures would

have given everyone in the community the opportunity to have their say and to express their anxieties in public and considered engagement with the views of the liberals, radicals and moderates, who sponsored and supported same-sex marriage. No matter what happens, this issue will continue to divide the community.

When it is thrashed out in the legislature, at least there is a chance to air the disagreement, to test the waters, and engage the arguments of the supporters and opponents of the proposal. That—ideally—is what legislatures are for: they are a place where large numbers of elected representatives of various shades of opinion, from various sections of the community, can come together and help focus a public debate on whether the community wants to make such change in its legal and cultural arrangements.

Argument in a courtroom is no substitute for that sort of wide-ranging debate. Judicial law-making, applied to such a contentious issue, is bound to undermine the sense that the societies in question are self-governing democratic communities, whose citizens are entitled to sort these matters out among themselves.

So there's the premise of my argument this evening: it is important that laws should be made and changed in a parliament, in a democratic representative institution, devoted specifically to that task. If laws are to be made and changed, then we want it to be done in a place where everyone has the opportunity to play a part, not just by the election of representatives, but also by inputting their opinions and contributions and criticisms and information about their needs and interests. This, after all, is the way we are supposed to govern ourselves. And that is why Parliament is important.

But now is where the hard part begins. All of this, everything I have said so far this evening, assumes that we do actually have a good and fair parliamentary process for deciding these matters legislatively. I want to ask some hard questions about whether that is true, and whether that continues to be true as it once was in New Zealand.

In America, those of us who oppose judicial interference with

matters like same-sex marriage, say that they ought to be left to the state legislatures, which (we say) are capable of handling such issues openly, carefully, and fairly. That's the basis of our argument against judicial activism. And the question I want to raise is this: are you in a position to make the same argument in New Zealand? What sort of shape is the New Zealand Parliament in, so far as the openness, competence, fairness, and carefulness of its legislative proceedings are concerned? I have made a study of this over the past few years, and I have to say: I have my doubts.

Unicameralism

The Goths, in Tristram Shandy's account, debated every measure twice: once drunk and once sober. You can use this as an image of bicameral legislation. Think of the English Parliament of Laurence Stern's time: the House of Commons and the House of Lords and every piece of legislation had to get accepted in both settings: debated first in the cold puritan sobriety of the Commons, and debated second—well, I won't say, drunk as a Lord. But debated second, in an upper house that presented a different style or spirit of deliberation. Or maybe it is the House of Commons that sometimes seemed intoxicated; and it was the House of Lords that contributed an aristocratic measure of slow, deliberate wisdom. George Washington used a different image: he “illustrated the need for a Second Chamber by pouring a cup of hot liquid into a saucer and allowing it to cool. ‘Even so we pour legislation into the senatorial saucer to cool it.’”⁴ Either way, there were these two different modes in which a bill would be debated.

Now, as you know, the English House of Lords is being reformed as we speak—moving from being a largely hereditary and ecclesiastical chamber, to being an appointed assembly, and *perhaps* moving eventually towards some sort of elective basis. But there is no question in Britain of doing away with its second chamber.

Many countries that have second legislative chambers elect them, only

they elect them on a different schedule and a different representational basis than their elections to the lower house—so that any bill or legislative measure has to get by two different sets of representatives, sampling the spirit of the country in two different ways. Originally, the United States Senate was an appointive body, with two senators appointed by each of the State legislatures. But nowadays, in consequence of the 17th Amendment to the Constitution, enacted in 1913, the senators from each state are elected by the people of the state—but, as I said, they are elected on a different schedule from the one on which members of the House of Representatives are elected. And in that way, the American Constitution is supposed to provide a more thoughtful version of the Tristram Shandy idea: every piece of legislation is to be debated twice, not drunk and sober, but once by an assembly of representatives of the nation, elected according to one schedule, and then a second time by an assembly of representatives of the states, elected according to a second schedule.

All of which must seem very quaint to New Zealanders, who are used to having just one legislative chamber, since as you know our second chamber, the Legislative Council, an appointed body whose members had a seven year term—instead of being reformed, instead of being transformed like the United States Senate into an elective assembly—was abolished peremptorily in 1950. I am told that the money saved, by destroying this branch of government, was used to set up a fund for retired members of Parliament.

And so in New Zealand—in contrast with most advanced democracies—important legislative measures are debated not twice but once only—drunk or sober, depending on the hour of day and the mood of the House of Representatives.⁵

Hang on—you will say: even in our unicameral Parliament, each piece of legislation is still subject to the Tristram Shandy principle, for it is debated multiple times: there are First Readings, and Second Readings, and Third Readings; there are Committee Stages: the Committee of the whole House, debating measures clause by clause, and also consideration

by Select Committees. There are still opportunities for those who were drunk in one sitting to debate the same measure again more soberly in a Second or Third Reading debate.

That is true. I will come back to it in a minute, because one of the things I want to talk about is the way in which the present rules of procedure that New Zealand has for its House of Representatives has led to a very serious attenuation of such opportunities for multiple and protracted consideration as have survived our conversion to unicameralism. I want to say something in a moment about the abuse of urgency, the introduction of Supplementary Order Papers, and the use of closure motions to cut off debate to push through legislation in a way that does not allow the Tristram Shandy principle to operate.

But for now, suppose we concede that there *are* multiple stages of consideration even in New Zealand's single legislative chamber. We need to remember, however, that something similar is also true of bicameral systems. They have First Readings and Second Readings and Committee stages in each and both of the two Houses; in the Senate and in the American House of Representatives; or in the House of Lords and in the House of Commons. If the members of the House of Lords are drunk, then they debate measures drunk several times; and so do the members of the House of Commons when they are sober. Any way you slice it, the New Zealand decision in 1950 was a reduction in the amount—and above all a reduction in the variety—of deliberative attention that a given legislative measure would receive.

I am told that New Zealand does not need a second chamber, because it is a unitary state, rather than a federation like the United States. or Australia. Does that justify our way of doing things? Not really. The United States is a federal system with a bicameral legislature at the federal level; but 49 out of the 50 individual states themselves also have a bicameral legislature, for example: New York; New Jersey; Massachusetts; Florida; Texas; and California—all these states have two chambers each in their state legislatures (all but Nebraska). The same is true in Australia: the Federal

parliament is bicameral, but so is the legislature of New South Wales, South Australia, Victoria, Tasmania, and Western Australia. Queensland, I understand, is an exception. So the federalist argument will not wash. And anyway, many modern unitary nation-states also have bicameral legislatures: Japan, France, Ireland, and the Netherlands, for example.

Am I advocating a return to a second chamber?⁶ No, my understanding is that this is a lost cause in New Zealand, despite some heroic voices from time to time—I think Jim Bolger was one in the 1990s.⁷

The point I would like to make is that—accepting that we are now only going to have one legislative chamber in New Zealand—there is all the more reason to take care that that one chamber provides adequate opportunities for elected representatives to give careful and multi-dimensional consideration to measures that are put forward as potential laws. There is all the more reason to take care that the public's opportunity for input and comment is safeguarded in respect of a process that is going to be swifter and more ruthless in its operation than the legislative processes of most countries.

And I am worried that New Zealand has not only abandoned its second chamber, but abandoned also many other safeguards in its legislative process that might substitute for bicameralism.

I am a political philosopher and one of my favourite authors is the great 19th century thinker, John Stuart Mill. Mill had something to say on this topic of one chamber versus two. He spoke of “the evil effect produced upon the mind of any holder of power ... by the consciousness of having only themselves to consult.” He said:⁸

A majority in a single assembly ... —when composed of the same persons habitually acting together and always assured of victory in their own house—easily becomes despotic and overweening, if [it is] released from the necessity of considering whether its acts will be concurred in by another constituted authority. ... [O]ne of the most indispensable requisites in the practical conduct of politics [*he added*], is a willingness to concede something to opponents and to shape

good measures so as to be as little as possible offensive to persons of opposite views, and of this salutary habit the mutual give and take between two Houses is a perpetual school.

Maybe you get a bit of that in New Zealand through having now a system that virtually ensures that governments have to be coalition governments. But many systems in the world have both: they have coalition governments and bicameral legislatures. We have MMP and coalition government, and we say that is a substitute for the multiple layers of consideration that bicameralism provides. But most strong working democracies have both of these safeguards—two ways, not just one way, in which a dominant party is required to consider what other parties and other institutions will think of its actions.⁹ Most of them also have other checks and balances, like strong constitutional review or an executive veto.¹⁰ And that's my point. Other countries, other unicameral systems (like those of the Scandinavian countries, for example) have layer after layer of safeguards, checks and balances. New Zealand, by contrast, has stripped safeguard after safeguard away from its legislative process—leaving it with virtually none of the safeguards that most working democracies take for granted.

American legislatures versus the New Zealand Parliament

In a public lecture I gave in Wellington in 2005, a lecture which was subsequently printed in the *New Zealand Law Journal*,¹¹ I made a number of adverse comparisons between law-making in New Zealand and the law-making process in the United States. These were comparisons which surprised some of my New Zealand colleagues,¹² because we are accustomed to making fun of American legislatures and we take for granted that our parliamentary system is superior. There is indeed much to deride or make fun of in the American legislative process:

- Every evening on C-Span, which is a public service television channel in America, you can see Representatives in the federal legislature

making speeches in an empty chamber to one or two staffers sitting with them in the House. These speeches are purely for the benefit of the cameras and the constituents watching television back home. Yet they are inserted into the Congressional Record—their Hansard—along with everything else.

- I could mention the low standard of drafting in United States. There is nothing comparable to the excellent service provided in New Zealand by the Parliamentary Counsel Office.
- Legislation in the United States is often a mishmash of unrelated and barely coherent ideas. There is the practice of inserting extraneous provisions in bills as they make their way through the legislature, so that a finance bill might have an anti-abortion provision inserted into it, or a law providing for road safety might have something inserted into it about the teaching of “intelligent design” in high school biology classes. These abuses have been only partially combated by “single subject,” “original purpose,” and “clear legislative title” rules in state constitutions.
- And if you want to make fun of the American legislative process, you can also look at the way in which congressional districts are “gerrymandered” to protect incumbency: we organise misshapen, misbegotten districts with no relation to natural frontiers just so that those who already have a seat can be helped to retain it, even when there are demographical or political shifts in their constituencies. The result—according to the old joke—is that incumbency is so well-protected that there was more turnover by death in the unreformed hereditary House of Lords than there was until recently in the United States House of Representatives.¹³
- There is also the problem of judicial review, that I have already alluded to, and of which I am known as an implacable opponent.

So there are certainly absurdities, there is certainly much to make fun of, in the United States legislative system. But there is also much to

admire and, in my view, there is much for New Zealand to envy.

Independence of the executive

In the United States, state and federal legislatures are independent of the executive. The White House does not dominate Congress in the way that Cabinet can dominate our Parliament. Similarly, Governor Schwarzenegger, for all his power in the movies, cannot force measures through the California legislature; no one can force measures through that complicated institution.

In New Zealand, legislative proceedings are utterly dominated by the executive. You may say that coalition government mitigates this a little bit; and so it does. But the coalition in its governmental capacity—that is, as an assemblage of Ministers drawn from various parties—that entity continues to dominate the Parliament.¹⁴

This arrangement is sometimes defended in terms of the ancient doctrine of parliamentary sovereignty. But that doctrine does not really give New Zealand's Parliament any power in relation to the other institutions of government, except perhaps the judiciary. It certainly gives it no power vis-à-vis Cabinet. In the United States, without the benefit of the doctrine of parliamentary sovereignty, we have independent legislatures that can thumb their noses at the state governor or the President if that is what they want to do. If the President or the Governor wants to get anything done, he has to pass the John Stuart Mill test: he has to mould his proposals so that they are acceptable to an independently constituted body.

In New Zealand there is none of this: there is a unicameral legislature, which has evolved procedures for fast-track legislation which are quite disgraceful by world standards, and which is by and large the plaything of the executive. Now, it is true that who controls the executive is determined by Parliament. This is because the Cabinet is a committee of Parliament's dominant coalition, and Ministers control and rush through legislation on the basis of their electoral mandate which operates via their success in Parliamentary elections. But still I do not call that the sovereignty of

parliament: it is the sovereignty of a parliamentary executive, and that is something quite different.

I am not basing this concern on any abstract constitutionalist philosophy of the separation of powers, but on real-world implications. Do we have members in our Parliament who are there to legislate and deliberate on legislation, without expectation of the executive's favour? Well, the answer must be: very rarely, at least among the members of the governing coalition. This is a particular problem for a small parliament like ours; the New Zealand Parliament comprises 121 members, and since there are more than 25 ministerial positions available, it seems to me that every member of the governing party may think he or she has a good shot at office (a 50/50 shot, as far as I can see), which they know will depend in part on their subservience to the Prime Minister and her closest colleagues in legislative matters. And in a weaker form the same will apply on the opposition side, when the main party has a reasonable expectation of forming a government in the near future.

Time and urgency

In the United States, the legislative process takes time. This is partly the result of bicameralism, and it is partly because of the power of committees. But there is nothing in the United States legislative process which compares to the process of urgency that can be invoked in New Zealand at any time, to rush legislation through the House. As I said, New Zealand has procedures for fast-track legislation which are quite disgraceful by world standards and which are utterly at odds with what Walter Bagehot called "the slow and steady forms necessary for good consideration."¹⁵ It is unheard of for a bill in the United States to be enacted in this way. It could not be anyway, because of the bicameral requirement. And it certainly could not be rushed through just because the Cabinet wanted to avoid the political consequences of a protracted consideration. Maybe there is a case for using urgency to change revenue laws in the immediate wake of a budget, where we need to minimise the

time between announcement and enforcement; that is a matter of fiscal necessity, to avoid abuses and exploitation. But that should not be a prototype for using urgency for purely political purposes.

You will remember how rapidly the Electoral Finance Bill was rushed through its second reading and committee stages, with a velocity calculated to lessen the time available for full airing of objections to the Bill. This was a hugely important and controversial measure, affecting fundamental democratic freedoms. On any account it needed to be considered very carefully; on most considered accounts, a bill like this, affecting the democratic process itself, should have had a substantial degree of bipartisan support among all the major parties.¹⁶ Yet it was rushed through in the face of public concern and the most serious opposition inside and outside the House, in a way that was designed to limit the embarrassment that any criticism or deep consideration of the measure could pose to its sponsors and supporters in the government.

I say this as somebody who thinks that measures of this kind are sometimes important and necessary—limiting the effect that private money can have on public elections. That is hugely important in the United States and I believe it is important here too. You may or may not agree. But I am sure you will agree with me that whether the new Electoral Finance Act was justified or not, there is no justification whatever for the way it was rushed through the House.

As I said at the beginning, these concerns ought to be independent of your views on particular measures. And that is what we need to emphasise. We have to get away from a situation where those who support a bill support rushing it through the legislature, and only those who oppose the measure express any concern about the process. I have no doubt that if a National government, or a National-dominated coalition, is formed after the elections this spring, it will dominate the Parliament and make use of urgency and other parliamentary abuses, to get its measures through, just as much as its predecessor. That is what has got to stop. Some parliamentarians and some politicians have to begin standing up

for the integrity of the legislative process itself, even when it is politically inconvenient to do so.

Closure

Or consider another element of contrast between New Zealand and American legislatures: the processes for bringing legislative debate to an end. This is the process we call “closure.”

In the United States Senate, a debate on the floor cannot be brought to a conclusion by the motion of a member without the consent of a supermajority—three-fifths of its membership.¹⁷ But in New Zealand, Parliamentary debate can be cut short by a closure motion which, once it is accepted by the Speaker (in his or her discretion) is carried by the same simple majority that will eventually carry the Bill.¹⁸ Admittedly the United States system suffers from the opposite vice: it means that a minority can block a bill by making it impossible for it to be brought to a vote. But even that is preferable to what I have seen happen in New Zealand, where the Government benches, empty except for the minister sponsoring the bill, one whip, and a member to move the closure—and where the Government and the Speaker simply wait for a certain number of opposition members to talk themselves out before a closure motion is accepted and shoved through.

The American way is not the only alternative. In the United Kingdom, a closure motion can pass in the House of Commons on a simple majority basis, if the speaker does not judge that such motion is “an abuse of the rules of the House, or an infringement of the rights of the minority.” But the British rule is if there is a division, then the “question shall not be decided in the affirmative unless it appears ... that not fewer than one hundred Members voted in the majority in support of the motion.”¹⁹

That could not work in New Zealand because we no longer have any Standing Orders that require the presence of any number of members in the House.

Quorum

In the United States, when the House of Representatives is conducting its business, there is a requirement that at least half of the 435 members have to be present. In the Senate, it is 51 out of 100. Of course business is often transacted with many fewer members on the floor, but a roll call may be called for at any time to enforce the requirement of a quorum.²⁰

What about New Zealand? Well, in the New Zealand Parliament there used to be a quorum of 20 members; but that has been abolished. Now a quorum is not required for the passage of legislation. The chamber—the only chamber we have for enacting legislation—can be empty except for the Speaker and the minister sponsoring a bill,²¹ and a whip to call out the party numbers whenever anything needs to be voted on (I shall say something about the system of party voting in the New Zealand Parliament in a moment). The only exception is if a personal, rather than a party vote is called for: “Where fewer than 20 members vote or abstain on a personal vote, that vote is of no effect.”²² But a member’s call for a personal vote will be rejected by the Speaker unless the Speaker judges that “the decision on the party vote is so close that a personal vote may make a material difference to the result.”²³

I do not know of any other Parliament that lacks a quorum requirement. The United Kingdom’s Parliament has a quorum for any division, a modest quorum but a quorum nonetheless.²⁴ So does the Australian House of Representatives: any member is entitled to demand that business be suspended unless at least 30 members are present.²⁵

The party vote

This is aggravated by a feature of the New Zealand parliamentary process that I find particularly offensive, the absence of any requirement that members be actually present in the Chamber to cast their votes on any legislation that comes before the House. Since the late 1990s, New Zealand has used the device of “the party vote,” whereby the whips for each party, upon a division simply call out a number representing their parliamentary

strength, whether their members are around to walk through the lobbies or not. Theoretically they have to be in the precincts of Parliament where their offices are, but if they are away their vote can still be counted through a proxy system.²⁶

The result is that often only a handful of MPs grace the chamber with their presence. If it is a controversial measure, the Opposition benches may be packed. But the Government benches will have only the minister supporting the bill, one member to move for closure as soon as a certain number of opponents have spoken, and a whip to call out the parliamentary strength of the party. That is our legislative process.

The device of the party vote was drawn, I am told, from the example of the Netherlands.²⁷ But those who defend it on this basis neglect to mention that the Netherlands combines it with a number of the additional safeguards that we lack. Their primary legislative chamber has a quorum: it cannot act without half the sitting members.²⁸ Moreover, it has a bicameral legislative system. There are two legislative chambers and, in addition, all bills are reviewed *ex ante* by an additional body called the Council of State—a body comprising legal specialists, former ministers, members of parliament and judges or professors of law whose task it is to advise on constitutional and judicial aspects of legislation.²⁹ That is an array of safeguards that New Zealand simply does not have. We defend the stripping away of each safeguard by pointing to some other system that does not have it. But we only ever consider them one by one, without considering how many of these safeguards we have stripped away and how anomalous it is in the world to have a legislature with such untrammelled and unconstrained powers.

The Select Committee system

I am told that New Zealand's Select Committee system is a good safeguard.³⁰ But I would like to make a couple of points here: First, and to harp on the point I have made over and over again, almost all mature legislatures have select committee systems. And they also have the other safeguards

we have been talking about. Saying that the Select Committee system makes up for our lack of other safeguards is like saying of a car, defective in almost every other regard, “well, at least we have a rear-view mirror.” All cars have rear-view mirrors; but most of them have seat-belts and emergency brakes, and airbags, and power steering as well.

In any case, the Select Committee system suffers from its own versions of the defects I have already mentioned. The first is executive dominance: the Executive determines which committee a given bill goes to: for example, anticipating opposition in the Maori Affairs Select Committee, in 2004 the Government sent the Foreshore and Seabed Bill to the Fisheries Select Committee, which was more likely to provide the Government with the outcome it wanted.³¹ And caucus control of the ruling party’s majority or the ruling coalition’s majority on the Committee enables it to limit the time that is devoted to Select Committee consideration and the number of submissions that will be heard. This was a huge concern during the passage of the Electoral Finance Bill.

I am told that the effectiveness of the Select Committee system is also undermined by the constant use of Supplementary Order Papers—introducing rafts of Cabinet-sponsored amendments late in the day, that are not filtered through any layers of prior consideration, either in Select Committee or by the House as a whole, but have to be quickly read and digested during a dinner hour,³² before being subject to the same devices of urgency and peremptorily curtailed debate. This is the same device that disfigures the legislative process as a whole.

I know all this sounds like relentless unforgiving criticism, but really New Zealanders ought to be aware of how anomalous this situation is—how few of the safeguards—how few of the layers of safeguards—we have within the legislative process that other countries take for granted. No quorum, no second chamber, no requirement to attend in order to vote, no judicial review, no real independence from the executive, and constant recourse to urgency and “supplementary order papers.” It may be possible to justify each of these features considered in itself. That is

why I am being such a pain and insisting we consider them *together*—and consider their cumulative effect on the quality of public debate.

Efficiency and due process

If you ask why these safeguards have been taken away, the answer most commonly given is efficiency. It is a waste of time and public money to have members sitting around in the Chamber engaging in meaningless debate, when the outcome is preordained anyway. It is inefficient to delay the inevitable passage of legislation for no other purpose than protracting the amount of meaningless talk that takes place in the House of Representatives. It is a waste of money to have two chambers when we could push legislation through much more efficiently with just one. It is a spectacular waste of time to have members trooping through the lobbies in vote after vote, when we could do it purely notionally with a whip calling out the numbers.³³ Much of the rushed and peremptory character of New Zealand's legislative arrangements is defended on grounds of efficiency, value-for-money, and the procedural niceties that are pushed aside are derided as unimportant formalities, costly and dispensable in that quest for legislative efficiency.

But think of an analogy. If our law courts were to perform the functions entrusted to them as recklessly, as impetuously, and as peremptorily as Parliament performs its law-making functions, we would think the legal system was in very serious crisis. We do not sacrifice due process and natural justice to efficiency, to prosecutorial impatience, and to political expediency. We would be outraged—and rightly so—if trials were rushed, and parties were limited in the amount of evidence or the number of witnesses they could call, if court sittings went on into the night under “urgency,” if new items could be added to indictments by supplementary order paper halfway through a trial, if cross-examination and submissions could be peremptorily cut short on the motion of the prosecution, if jurors could vote on an indictment without having been present in the courtroom, if there were no arrangements for appeal,

and if things were set up so that the prosecution not only managed and controlled the proceedings but always got its way. Yet we do not raise any complaint about something essentially equivalent going on in the House, where *legislative due process* is sacrificed to efficiency, to executive impatience, and to political expediency.

You will say it is a false analogy. A courtroom is a place where the liberty of the subject is at stake, and there we do have to be scrupulous about due process and natural justice. But the liberty of the subject is at stake in Parliament too. Parliament is the place where the laws are laid down that will eventually be enforced in the courtroom. And if the liberty of the subject is at stake—as it is, for example, under the Electoral Finance Act—then the first safeguard of that liberty is the care and due process that take place in Parliament.

Michael Cullen is on record as saying that parliamentary procedures as they presently exist in New Zealand:³⁴

... provide ... ample opportunity—for testing legislation and remedying any faults it may have. The bulk of the time MPs spend in Wellington is given to the improvement of the nation's laws. ... [L]aw-making in New Zealand is not an arbitrary process. ... [I]t is fair to assume that fundamental norms have been taken into account and worked through with any piece of legislation that makes it to the statute books.

Well, it may not be an arbitrary process, but it is a reckless process. In light of what I have shown to you: a deserted chamber; bills rushed through under urgency; members subservient to the executive; constant closure motions; no quorum; no second chamber; and no checks and balances. Can we really take Dr Cullen's reassurance seriously? Can New Zealand's urgent, unicameral, peremptory political process provide any real reassurance that legislation is being properly and carefully considered? The fact is that you cannot get careful legislation on the cheap.

Or, think back to the point I made earlier about legitimacy, and the basis of people's respect for legislation that they do not necessarily agree

with. There is always going to be disagreement. And we hope that a fair process can secure legitimacy even in the face of disagreement. But how realistic is that hope when the process is so attenuated? Once again, we need to understand that we cannot always get the legitimacy that the democratic parliamentary process is supposed to provide, and the justice (or the minimisation of injustice) that close scrutiny of every bill is supposed to ensure we can not always get that political legitimacy on the cheap. We recognise that for the electoral process. It is time we recognised it for the representative legislative process as well.

Parliamentary debate

Above all the concerns that I have raised this evening go to the integrity of public debate. We are accustomed to think of the chamber of the House of Representatives as a place of hot-air, meaningless talk, and juvenile debating tactics. And I know there is bad behaviour, which often drowns out genuine debate, even though it is great fun as a spectator sport. But let me go back to my favourite political philosopher, John Stuart Mill. Mill said this about the amount of hot air in Parliament. He said:³⁵

Representative assemblies are often taunted by their enemies with being places of mere talk There has seldom been more misplaced derision. I know not how a representative assembly can more usefully employ itself than in talk, when the subject of talk is the great public interests of the country, and every sentence of it represents the opinion either of some important body of persons in the nation, or of an individual in whom some such body have reposed their confidence. A place where every interest and shade of opinion in the country can have its cause even passionately pleaded, in the face of the government and of all other interests and opinions, can compel them to listen, and either comply, or state clearly why they do not, is in itself, if it answered no other purpose, one of the most important political institutions that can exist anywhere

I worry that in New Zealand, we have moved about as far away from that image of parliamentary debate as is possible while still having a Parliament. We have moved to the idea of dispensable debate, where debate is seen simply as an embarrassing ritual that needs to be gone through as quickly and with as little cost to the public as possible—like a funeral service attended by those who have lost their faith, mumbling their way through hymns they have forgotten, and hoping that the prayers that embarrass them will end as soon as possible so they can move on to the serious business of drinking.

At best parliamentary debate just becomes a purely symbolic exercise, where members proclaim views that have already been established in party caucuses and are not going to be available for genuine engagement or modification by discussion with the other side. So, for example, the government might say: we all know what the National Party position is on the Electoral Finance Bill. We know it undermines their political interests. Well, this is supposed to be a democracy, so let them have their say. But let us not devote any more time or money to this charade than necessary. Let them give their one or two speeches in the House of Representatives, and allow them their one or two amendments, and then we will force the vote through with the majority that we command.

That is the attitude. Parliament is not a place of genuine engagement any more. According to the 1995 Standing Orders Committee: “Parties are expected to have policies which they will follow if they are represented in the House.”³⁶ And as law professor and constitutional expert, Philip Joseph commented on this: “The debating chamber enables parties to state their position without carrying any realistic expectation that debates will change a party’s position.”³⁷ That’s what New Zealand’s Parliament has become: a place where preordained positions are stated, with hopefully as little fuss and as little public expense as possible. Parliament—the one forum supposedly dedicated to public debate—is becoming the one place where public debate is perfunctory, a simple matter of political posturing.

The quality of public debate

Finally we come to the role of organisations like the Maxim Institute. If Parliament is no longer the place of genuine public debate, what is? Is there another forum? Or do New Zealanders have to create an informal process of debate for themselves, where they listen to and take seriously one another's views, since their parliamentarians have abandoned this function?

The fact is we need debate in a modern society; we need multiple inputs. This is one of the reasons why in our civilisation we have always set up Parliaments with hundreds of members, related to different arrays of interests and opinions around the country.³⁸ We need open and wide-ranging debate and if we are not going to have it in Parliament, then it has to take place in civil society. If it is not going to be orchestrated by the Standing Orders of Parliament, if indeed debate is going to be to all intents and purposes suppressed by the Standing Orders of Parliament, then we have to rely less on formal rules and arrangements, and more on a culture of exchange and interchange in society at large.

At best, we would have both. There would be an important relation—a mirroring relation back and forth—between deliberation in Parliament and deliberation (broader and more informal deliberation) in the community. But we have a mockery of a Parliament and the free and sustained interchange of ideas out in society at large is all we have. I believe that an organisation, a think tank, like Maxim Institute can make a big contribution. I know that some of its energies still have to be directed towards the formal legislative process, such as it is—to such opportunities for input as there are in what has increasingly become a mockery of deliberation. But beyond that, the Institute and its sister organisations, among whom I include its political and ideological opponents, can help construct debate in the society at large that at its best will put to shame the shabby and peremptory proceedings in Parliament.

That is the best case. But here is what I am afraid of. I am afraid that a society which has allowed its tradition of formal parliamentary debate to

atrophy is also in danger of allowing its traditions of more informal public debate to atrophy. As Parliament becomes a place where people simply state preordained opinions, maybe civil society is in danger of becoming a place where people simply state preordained opinions. Parliament becomes a place where no one listens and society too becomes a place where people deafen themselves to the opinions of others. Parliament becomes a place where the governing party thinks it has won a great victory when debate is closed down and measures are pushed through under urgency; and the social and political forum generally becomes a place where the greatest victory is drowning out your opponent with the noise that you can bring to bear. And then the premium is on name-calling, on who can bawl the loudest, who can most readily trivialise an opponent's position, who can succeed in embarrassing or shaming or if need be blackmailing into silence anyone who holds a different view. That is the nightmare that I think you face when you have allowed the safeguards and formalities attending your formalised processes of debate to be stripped away, in the way that you have. The debasement of debate—the lack of mutual respect and engagement—that takes place in Parliament will feed, or mirror, a debasement of debate and a repudiation of engagement and mutual respect among citizens and among advocacy groups in society at large.

Debate disappears from Parliament, debate disappears from society, debate and engagement eventually disappear altogether. All we have anymore, anywhere, in either forum, is a show of force, the posturing of preordained positions, and the quick and ruthless exploitation of momentary political advantage.

So I want to end with that note of warning. I have said some hard things about the processes of the New Zealand Parliament, and that institution and those who maintain it deserve the criticism I have levelled. New Zealanders have been terribly irresponsible in their attitude towards parliamentary institutions. It may be too late to do anything about Parliament—I do not know, but it is not too late to prevent the

abuses of a dysfunctional parliamentary procedure from infecting the political culture at large.

Or—slightly more optimistically—it is possible, just possible, to imagine a revitalised and more respectful form of public debate, in which people take time to consider each other's views and each other's hopes and fears seriously and address them as though they deserved a hearing as well as an answer. A revitalised debate among members of the public in which everyone tries to answer the best, not the worst, that can be made of their opponents' positions. A revitalised public debate in which people take time to consider that they might be mistaken and to imagine at any rate what it must be like to hold another view—who knows? A revitalised public debate that answers to those specifications might go some way to reversing the debasement of deliberation that we currently see in the antics of the New Zealand Parliament. Certainly a revitalised debate like that would be a better tribute to men like John Graham, who have contributed so much to what was once the greatness of political deliberation in this country.

Questions

I wonder if you can comment: you have missed one part out I think. It gets worse in New Zealand, when 113 MPs vote for legislation which is opposed by 80 percent of the population; if we get 390,000 signatures, we can force a referendum. But under the parliamentary system here that referendum can be ignored. Can you comment about how many states in the United States have similar procedures, whereby a binding referendum is held so citizens can actually—even with all the other checks and balances—still maintain their right, their sovereignty?

I do not know off-hand the numbers of United States states that have that referendum possibility. The best-known case is California, which certainly does. It is a difficult process, because you get tremendous opportunism as groups in the community compete sneakily to frame the question that will be put to the people. Often, once a campaign for that number of votes to force a referendum gets underway, other advocacy groups try to hijack it and come up with a more moderate or a more extreme version of the question. This leads to some very elaborate fights in court, and in the legislature to see how the referendum will be framed. It has not been a wildly successful process in California. But you are absolutely right, it is an additional layer of checks and balances.

Ideally, you design a representative system and a party system so that there is a way of pre-digesting—through caucus debates, through responsiveness between Cabinet debates, caucus debates, and what is going on in the country. You design it so that the hundreds of representatives you assemble, in Sacramento or in Wellington, are capable of framing an issue in terms that will be responsive to the division of opinion in the community. Obviously that sometimes goes wrong. But, rather than insist that a referendum is the desirable layer of additional safeguard (which it is), I would look for some better ways of ensuring that the representative process was genuinely representative. If there was that number of people

who felt dissatisfied with what was going on through Parliament, there should be some reform of the legislative process. But it is a little bit like what I said about the other check that I mentioned a few times, judicial review, of which I am an opponent. I think that what is best are checks and balances within the legislative process of Parliament, rather than checks and balances from the outside of Parliament.

Why does the general legal establishment in this country not think like you? It's an intriguing question to me, and let me ask it in relation to something that you are very familiar with, and that was New Zealand's decision to abolish appeals to the Privy Council. This, in so many respects, had constitutional dimensions to it, arguably it should have been the subject of a referendum, or at least a supermajority in parliament; but it was treated as straight-forward parliamentary legislation. The general mass of the legal establishment in the country were absolutely behind that process—the judges could not get rid of the Law Lords in London looking over their shoulders too quickly; the Solicitor-General, the Law Commission were in that space, the legal academics in the country were typically there. When it came to the Select Committee, a very substantial majority of submissions were against the abolition of appeals to the Privy Council, but there was no such consideration by the Committee, which was dominated by the Government. There was also no independent process prior to that—no task force or anything of that sort. So here we look at a situation where the legal establishment, one might have thought, would subscribe to the kind of views that you have been expressing tonight, and would be saying—as many editorials and newspapers were—that it was an abuse of process. Why did we not hear that?

I have no idea particularly so far as the Law Society is concerned, although I understand the Law Society did make good and critical submissions on the Electoral Finance Act. I do know this: that so far as the legal academy is concerned—I mean the law professors, the law lecturers in the five or six law schools in the country—there is a tendency simply to

report these processes of change, and to take at face value whatever is in the White Paper that sets them out. Recently I was reading an account of the recent changes to the Standing Orders of Parliament given by Philip Joseph, who is a law Professor at Canterbury: it is an entirely uncritical piece of analysis, if an analysis you could call it. It is simply a piece of stenography: he just lists the changes that have been made and reports some brief comments as to why they were justified. There is no attempt to assess the justification; he simply takes them at face value. I worry that there is not a layer of scrutiny at that level: it is one of the responsibilities, it seems to me, of tenured legal academics to participate and help inform public debate on these issues. But as to the Law Society, and why it said nothing on the particular issue you mention, I really have no information. I do worry that there is not the same sort of culture of standing up and worrying aloud about constitutional arrangements in the legal establishment that there certainly is in the United States.

If I take everything you have said to heart, we live in a no-democracy democracy; checks and balances have disappeared, we have minorities who—through a system of MMP and other systems—push through legislation which the majority object to. The logical conclusion to that is civil unrest, is it not?

Well, you may have repealed the seditious offences, but it is not for me to make any observations about the prospects for civil unrest. No doubt there are limits, or there ought to be limits, to how far a free people will put up with being represented in this manner. I mentioned various ways in which political process can make a difference to the legitimacy of the measures that are enacted. Legitimacy is not just a matter of whether there is civil unrest or not; it's also a matter of how grudging the cooperation of members of the public is. It's a question of whether members of the public are prepared to play their part in the normal processes of the administration of some law; and if you lose that—if it is business law, if the business community loses faith in the laws that they are required

to self-administer; if it is general civil liberties law, and the citizens lose their faith in the measures that they are required to administer—then you get a sort of dysfunctional democracy. You don't necessarily get rioting in the streets, but you get a sullen, grudging acquiescence, and a failure to exhibit what really ought to be distinctive of any democracy: that the people regard the laws as in a sense their laws, they take ownership of the laws, they do not simply see the laws as thrust upon them by people they have voted for. They take ownership of the laws, and are prepared to administer them freely among themselves, because they can identify with the processes by which they are passed. So my short answer is that, well before you get to any sort of degree of civil unrest, there are many stages of the collapse of political legitimacy ...

... but Jeremy, New Zealand has lost an enormous amount of New Zealand. We have lost almost our souls, in many cases: that is the point I'm talking about. I'm not about to create civil unrest, but logically, that is where we will head, unless we have [interrupts] ...

Yes, and I think that what I wanted to say towards the end of the lecture is that, quite apart from the issue of civil unrest, it is not as though these parts of New Zealand that have been lost have been taken away by other societies: it is not the Americans that have taken this away, or the Australians. This is something that we have acquiesced in. We have manufactured processes of public debate that are beginning to mirror the mockery of debate that we see in Parliament. And that is where we have to start taking things back, not necessarily by taking to the streets, but by doing the sort of thing that Greg and Alex and others in the Institute are doing; engaging in thoughtful debate that will put to shame those who have abdicated their responsibilities for more debate in Parliament.

I realise you already addressed one question regarding referenda, and your objection was the wording. I think that is a valid criticism, but I think that also can be addressed. Now we have had the anti-smacking

law that has been opposed by the vast majority of the voters. Now, going back a step, under First-Past-the-Post, the theory was that MPs voted according to their conscience, because they were representatives of their Electorate. Now we have changed to MMP, so at least half these MPs are representative of no one. During the debate on the anti-smacking bill, MPs pushed for an amendment that would mean that before the anti-smacking bill became law it would have to be ratified at a referendum. I would just like your view on this, if this would be a check on the excesses that you have discussed this evening?

It would certainly be a check on some of the excesses. As I said in response to the earlier question, I am somewhat uncomfortable with that referendum process, although I understand the impulse towards it. Let me give an analogy: long before the anti-smacking bill there was the issue about the abolition of capital punishment in New Zealand, which I think happened—if I remember rightly—in the early 1960s. I am sure that if you had had a referendum at the time of abolition, most New Zealanders would have voted against the abolition of the death penalty. But the death penalty was abolished and it has not really seriously been considered for re-introduction since then. There were people like—and I only mention this name because I come from Invercargill—there were people like Ralph Hannan, who was Minister of Justice in this matter, who I think spoke very eloquently under protection of conscience in the House, fully addressing the concerns of those who were opposed to the measure. And the debate was—I think—one of the great tributes to parliamentary debate in New Zealand. Ideally that would be the way you do it. I am not a believer in direct democracy. I understand the point that it would be an additional check; but it would be a check which would further squander the ability of Parliament itself to be a place of genuine engagement where views can be expressed and can engage with one another in a reasonably sophisticated way. Most legislation, for example, is complicated; I imagine even the anti-smacking legislation was. You have to have definitions of various degrees of violence that might be

involved, and serious thoughtful legislation on this will be complicated. The idea is to try and reconcile the complexity of the legislation with the will of the electorate. But sometimes that can be done through a fair, open, genuine and engaged parliamentary debate, as it was in the capital punishment issue in the 1960s. It sounds to me as though on this anti-smacking bill, there was not that same level of fair, engaged debate in Parliament, and given that background, neither I nor the sponsors of the legislation are in a position to reproach this suggestion of a referendum. The only strong ground from which you can reproach the suggestion of the referendum is that the Parliamentary debate is already respectable enough, open enough, complicated enough and engaged enough, to be an adequate substitute for a direct expression of will by the people.

Professor Waldron: an observation and a question; from that you will know I am a lawyer. The observation is that I was on the Auckland District Law Society submissions committee in relation to the Privy Council repeal. We argued very strongly that the issue was an issue of best law, where are we going to get the best law answers? And the answer was clearly the Privy Council. That was the same track taken by the Law Society, and while I agree that the way that the process went through was constitutionally abhorrent, nonetheless that was where the lawyers took their stand, and stood by that. So that is the observation. The question is: having outlined these issues for us in such a pungent and clear way, why say that we cannot argue now for bicameralism, which is what I had thought one of your observations were. If we do not do that, what are we going to do?

Yes, I have kind of taken for granted (and maybe I should not) that the bicameralism debate is a lost cause, and that the chances of setting up a second chamber again are virtually zero—despite the very eloquent plea that was made by Jim Bolger in the 1990s. If I am wrong about that nobody would be happier than me. But it is not the only way in which these problems can be remedied. Another way is by the election of

representatives to Parliament, and the development of a culture among parliamentarians, where the parliamentarians begin once more to actually care about the processes of Parliament itself. At a conversation one evening a year or two ago after some dinner in Wellington with the then Clerk of the House, I was told that there are very very few members in the modern New Zealand Parliament who actually care about parliamentary processes. They care about it as a basis for partisan advantage or manoeuvring, but they do not make a study of it. He said that once upon a time and not in the too distant past, there were people like Jonathan Hunt, or Richard Prebble, who really did understand the point of parliamentary procedures, and valued the procedures and loved them. And that is what you need: you need to have parliamentarians coming into Parliament who are like that, or old parliamentarians reviving their love of the procedures. You need to have people who care more about the integrity of the processes of the House than they care about Cabinet position. So that needs to happen. And probably in order for that to happen there has to be some impetus and cover for that within the party caucuses and within the party structures themselves. So all of that, I think, is very important. Probably on the occasions when the House does look at its Standing Orders, which it does from time to time, you need to have stronger public input into this matter—not seeing it as merely technical, but as serious. So even without what I think of as the forlorn prospects for a second chamber, there are these other safeguards that we could install, and there are other ways in which we could say, “OK, we have experimented for a while with a lack of quorum, we have experimented for a while with simple majority closure of debate—and we are not going to do that anymore.” And as I said, if possible, the quality and integrity of the informal debate in a society could possibly begin to stand—as absurd as this may seem—as a model to Parliament, rather than vice versa.

Mine is not so much a question as a defence of the legal academy, since both Roger Kerr and you suggested we were not up to it. I try not to pull

my punches about judges and others, but I have to say in relation to the abolition of the Privy Council, that the reason that I did not fight for its retention was that the British judges, one way or another, had not stood up for independence. In the two cases that really counted—which were Lange v Atkinson, and Invercargill v Hamlin—we had contested the President of the New Zealand Court of Appeal’s rulings on negligence for years, some of us, but when it came to it, the Privy Council said this is for New Zealand and refused to even engage, as they did in relation to the law of defamation in Lange v Atkinson, they refused to engage. Once they refused to engage it seemed to me that it was pretty hard to defend the retention of the Privy Council, on the crucial issues the British judges had given up on us, and I think one way and another they had decided that they had enough business of their own to do, to not to worry about the ex-colonies. I mean, I had a lot of admiration, and still do, for the British judiciary, but when the chips were down the British judiciary did not do their job properly.

I would not disagree with any of that. I do remember reading the judgments upon the negligence issue, and also some issues about punitive damages, in which the Law Lords sitting as the Privy Council more or less said “We have no idea what you are doing down there; you sort it out.” And of course, on that basis, when the whole reason for having a second layer of appeal is to do hard work at sorting out the knottiest conundrums, then you have to have that entrusted to some institution which is actually willing to take it on. So I accept that position.

The huge limitations of MMP have become increasingly obvious. As someone who has studied voting systems around the world, no doubt, as part of democracy, have you got a view on what you believe might be an optimum voting system for New Zealand, in terms of things you have studied around the world? Because, as I said, clearly MMP does not, and will not work.

How long has MMP been in operation in New Zealand now? Ten years? Twelve? It does seem to me that the worst of all possible worlds would be to keep making changes back and forth. It is unfortunately one of the situations where a system of voting and an electoral system will not begin to work properly, until a political culture grows up around it. And a political culture does not grow up over night, it grows up by trial and error. You have to allow enough time to go by so that people can begin, continue and end their political careers under a particular system, until you see how it is really going to work. People need to work out what it is to make a political career under an MMP system. So one of the points that I would make is that if you change the rules too often you are going to get a debacle—like changing the rules of rugby too often, and nobody knows how to play the game anymore. When you change the rules of rugby you are not just changing something on paper, you are changing the way that people organise their reflex physical reactions, the way people roll when they are tackled, the way that people kick when they are under pressure. And similarly when you change the rules of the political game, you have to allow sufficient time to pass, so that people can hone their political reflexes, and train for the new rules. Again from a position of relative ignorance on the New Zealand situation, I would say that you have to allow MMP time to develop a distinctive political culture of its own. You are still in a transition stage, about ten years out from the change. If you start the business of changing back and forth, particularly if it started to change back and forth with every electoral cycle, or even every two electoral cycles, you would run the terrible risk of having no stable political culture at all. So the thing that worries me, and the thing that I think has to be the focus of concern, is not so much trying to micromanage the optimal electoral system, or the optimal voting system, it is trying to allow an opportunity for a good, strong culture of integrity to grow up around the voting system that we have. That is another reason why I did not think in the end that there was any real prospect of making a change by introducing a second chamber. We have a one chamber system, what we

now need is a responsible political culture for operating in.

Your analysis of the New Zealand parliamentary system—if we looked at it, could be a legal or political analysis, using the word crisis—but there are a couple of other terms that you used, and one was integrity, there was another one about give and take; and I am wondering to what extent do you think the crisis that you are talking about is actually a moral crisis, as opposed to technically a legislative or political one?

I think it is a moral crisis, for exactly the reasons that I was talking about a moment ago. It is moral in the sense that you are dealing with the morale and the attitudes and the culture that have grown up around the political system. I do not think it is a moral crisis in the sense of, say, sexual morality or honesty necessarily—although there are always issues about honesty and probity surrounding parliamentary proceedings. But it is a crisis of attitude and culture, more than anything else. There are worries that we have stripped away these particular technical safeguards. But with each layer of safeguards stripped away there ought to have been a more robust culture, a more robust insistence on the integrity of the process that remained. In fact it was almost the reverse: each layer of safeguard that was stripped away made it easier to strip away the next one. And so in the end I think it is a moral matter: it is certainly a matter of moral fibre, because people need to pause and start to stand up for the integrity of the process—even when that is against their particular political interests in having this measure passed, or that measure defeated. So that is why I insisted so strongly on the political culture element, and on the need for people to begin taking a different attitude to their own participation in the formal political process.

ENDNOTES

- ¹ The attribution of this anecdote to Herodotus is found in J. Frank, "Civil Law Influences on the Common Law—Some Reflections on 'Comparative' and 'Contrastive' Law," *University of Pennsylvania Law Review* 104 (1956): 887.
- ² L. Sterne, *The Life and Opinions of Tristram Shandy, Gentleman*, Vol. 6, Chapter 17, <http://www1.gifu-u.ac.jp/~masaru/TS/vi.60-79.html#ch.17>. For "the dirtiest book," see F. Brady, "Tristram Shandy: Sexuality, morality, and sensibility," *Eighteenth-Century Studies* 4 (1970): 41.
- ³ [1998] 1 NZLR 523.
- ⁴ S.D. Bailey, "Introduction." Symposium on Bicameralism, *Parliamentary Affairs* 7 (1953): 7.
- ⁵ As well as bicamerality, the United States legislative process has an additional safeguard. Each Bill must be approved by the Governor (if it is state legislation) or by the President if it is federal legislation. Formally there is something like this in the Royal Assent; but in New Zealand, I do not think the Governor-General has ever vetoed legislation since we acquired responsible government and in Britain the Royal Assent has never been used negatively since the time of Queen Anne. The President of the United States uses his veto all the time. It is not an absolute veto. He must state his reasons for the veto, and it can be overridden by a supermajority in the Senate. But it is another way of slowing things down.
- ⁶ Compare G.A. Woods, "New Zealand's Single Chamber Parliament: An argument for an impotent upper house?" *Parliamentary Affairs* 36 (1983): 334.
- ⁷ Jim Bolger proposed the establishment of an elected Senate when National came to power in 1990. As I understand his proposal, senators would be elected by Single Transferable Vote, with a number of seats being reserved for Maori, and would have powers similar to those of the old Legislative Council. The House of Representatives would continue to be elected by First Past the Post. Bolger's proposal was that a question on a Senate should be included in the second referendum on electoral reform: voters would be asked, if they did not want a new voting system, whether or not they wanted a Senate. However, as many people thought this would confuse the issue, the Senate question was removed by the Select Committee on Electoral Reform, and the issue has not been pursued since.
- ⁸ J.S. Mill *Considerations on Representative Government*, cited in Lord Campion, "Second Chambers in Theory and Practice," *Parliamentary Affairs* 7 (1953): 19.
- ⁹ I am not saying that it is absolutely necessary to have a bicameral legislature. Bicameralism is one safeguard among others that a legislative system may have. A

bare majority of OECD countries (17 to 13) are bicameral (Australia, Austria, Belgium, Canada, the Czech Republic, France, Germany, Ireland, Italy, Japan, Mexico, the Netherlands, Poland, Spain, Switzerland, the United Kingdom and the United States are bicameral. Denmark, Finland, Greece, Hungary, Iceland, Korea, Luxembourg, New Zealand, Norway, Portugal, the Slovak Republic, Sweden and Turkey are unicameral). However, in the world at large unicameral legislatures are more common than bicameral legislatures. They exist in most third world countries, as well as in China, Israel, and most of the Scandinavian countries. See United Nations Development Programme, "Legislative Chambers: Unicameral or bicameral?" <http://www.undp.org/governance/docs/Parl-Pub-chambers.htm>.

- ¹⁰ Or they have special supermajoritarian rules in their legislatures before bills can become law. Political economist William Riker argued for the equivalence of bicameral and supermajoritarian arrangements. See W.H. Riker, "The Justification of Bicameralism," *International Political Science Review* 13 (1992):101. Judicial review has sometimes been compared to an unelected Senate; many of those who urge the necessity of a second chamber as a check on the power of legislators acknowledge that judicial review could be another way of performing this function. In general we know that some forms of judicial review, particularly by Constitutional Courts in Europe, do operate in effect as a second chamber, often passing on legislation *ex ante* before it is put into effect.
- ¹¹ J. Waldron, "Compared to What? Judicial activism and New Zealand's Parliament" [2005] NZLJ 441.
- ¹² See, for example, J. Allan and A. Geddis, "Waldron and Opposing Judicial Review—except, sort of, in New Zealand," *New Zealand Law Journal* April (2006): 94-96. For an account more favorable to my critique of the New Zealand legislatures, see C. Charters, "Responding to Waldron's Defence of Legislatures: Why New Zealand's Parliament does not protect rights in hard cases," *New Zealand Law Review* (2006): 621-663.
- ¹³ The joke is retold in J. Allan and A. Geddis, "Waldron and Opposing Judicial Review—except, sort of, in New Zealand," 94-95.
- ¹⁴ This, of course, is in the nature of a Westminster system, where the Cabinet is in effect a committee of the Parliament, and the head of Government is the MP who leads the largest party in Parliament (that can command a majority).
- ¹⁵ W. Bagehot, *The English Constitution* (Oxford University Press, 1961), 133-134.
- ¹⁶ Cf. The McCain/Feingold measure altering campaign finance arrangements in the United States: the Bipartisan Campaign Finance Reform Act 2002. It was sponsored by John McCain, Republican senator from Arizona and current Republican presidential candidate, and Russ Feingold, a Democratic senator from Wisconsin.
- ¹⁷ See the account in C.M. Davis, "Invoking Closure in the Senate," *CRS Report for Congress*, 4 June, 2007, <http://www.senate.gov/reference/resources/pdf/98-425.pdf>.

- ¹⁸ Standing Orders 137-139.
- ¹⁹ House of Commons Standing Orders 2007, §§36-37.
- ²⁰ United States Constitution, Article I, clause 5.
- ²¹ Standing Order 38: “A Minister must be present during all sitting hours of the House. If a Minister is not present, the Speaker interrupts proceedings and the bell is rung for up to five minutes. Where no Minister appears, the Speaker adjourns the House until the time for its next sitting.”
- ²² Standing order 152.
- ²³ Standing Order 145.
- ²⁴ House of Commons Standing Orders 2007, §41 (1).
- ²⁵ *House of Representatives Standing and Sessional Orders (as at 12 March 2008)*, Standing Orders 54 and 57, <http://www.aph.gov.au/house/pubs/standos/chapter8.htm>.
- ²⁶ Standing Order 144.
- ²⁷ D. McGee, “Parliamentary Practice in New Zealand,” 3rd ed. (Wellington: Dunmore Publishing, 2005), 204.
- ²⁸ Article 49. Quorum: The President shall open the meeting if the attendance list has been signed by over half of the number of sitting members. Article 50. Lack of quorum 1. If the requisite number of members is not present on or shortly after the hour for which the meeting has been called, the President shall open the gathering and have the names of the absent members read out. He may give notice of any documents received. Afterwards he shall adjourn the meeting to a later time. 2. The names of both the present and the absent members shall be recorded in the official report of the Proceedings of the House; in the case of the absent members, the reasons given for their absence shall also be recorded. These rules are set out at The Dutch House of Representatives, *Rules of Procedure of the Tweede Kamer der Staten-Generaal*, http://www.houseofrepresentatives.nl/how_parliament_works/rules_of_procedures/index.jsp#TitleLink5.
- ²⁹ All laws proposed by the cabinet have to be sent to the Council of State for advice. Although the advice is not binding, the cabinet is required to react to the advice and it often plays a significant role in the ensuing debate in Parliament. The Council is *ex officio* chaired by the Queen. Currently the crown prince is a member as well. The Queen however leaves daily affairs to the vice-chair of the Council, and the other councilors, who are mainly legal specialists, former ministers, members of parliament and judges or professors of law. See The Dutch House of Representatives, *Rules of Procedure of the Tweede Kamer der Staten-Generaal*, Article 115, http://www.houseofrepresentatives.nl/how_parliament_works/rules_of_procedures/index.jsp#TitleLink5.
- ³⁰ For example, Allan and Geddis state: “Professor Waldron fails to pay due attention to

the growing importance of select committees as a venue for scrutinizing and critiquing legislative proposals." J. Allan and A. Geddis, "Waldron and Opposing Judicial Review—except, sort of, in New Zealand," 95.

- ³¹ C. Charters, "Responding to Waldron's Defence of Legislatures: Why New Zealand's Parliament does not protect rights in hard cases," 640.
- ³² See C. Charters, "Responding to Waldron's Defence of Legislatures: Why New Zealand's Parliament does not protect rights in hard cases," 642-643.
- ³³ P. Joseph, "Constitutional Law," [1997] NZLR 209, 220-221, records Hon Wyatt Creech, then Leader of the House, saying of "the time-saving effect of the party vote" that: "This should stop the endless queuing through the lobbies on endless votes for which the result is obvious, that has been a feature of our Parliament in recent years. That had to be the most pointless activity that one could imagine."
- ³⁴ M. Cullen, Speech to Conference on "Parliament: Supremacy over Fundamental Norms" (Wellington, 29 October 2004).
- ³⁵ J.S. Mill, *Considerations on Representative Government* (Buffalo, New York: Prometheus Books, 1991), Chapter V, 117.
- ³⁶ Report of the Standing Orders Committee, "Review of Standing Orders" (1995) AJHR I.18A, 23.
- ³⁷ P.A. Joseph, Constitutional Law, [1997] NZLR 209 at 219.
- ³⁸ See J. Waldron, "Legislation by Assembly," *Loyola Law Review* 46 (2000): 507. Also see J. Waldron, *Law and Disagreement* (Oxford University Press, 1999), 49-68.