The external affairs and defence of the Cook Islands — the 'Riddiford clause' considered

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Section 5 of the Cook Islands Constitution Act 1964 — sometimes known as the 'Riddiford Clause' — was once thought to reserve legislative power to the New Zealand Parliament in matters of external affairs and defence of the Cook Islands. This article traces Professor Quentin-Baxter's rebuttal of that proposition, and goes on to suggest that New Zealand and Cook Islands practice of at least ten years standing supports a convention by which Cook Islands Ministers are the effective source of advice to Her Majesty the Queen in Right of New Zealand in section 5 matters.

I. INTRODUCTION

When the course entitled "Pacific Legal Studies" was first offered by the Law Faculty at Victoria University in 1983, the teachers involved were Professor Quentin-Baxter, Professor Angelo, and the writer. We made a practice of attending one another's lectures. So it came about that I found myself presenting an account of the Constitution of the Cook Islands and, in particular, of the significance of Section 5, in the presence of Q.-B. himself. That the novice was allowed to deliver this account without interruption seems, in the light of my subsequent discovery of the depth of Q.-B.'s knowledge of the precise question, to involve an act of charity almost amounting to academic negligence on the part of Professor Quentin-Baxter.[1]

The purpose of this short essay is to delineate the problem of section 5, to consider Professor Quentin-Baxter's path-finding analysis of it, and to take stock of developments at the twenty-first birthday of the unique relationship between the Cook Islands

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1 The writer is most grateful to Mrs Alison Quentin-Baxter for making Professor Quentin-Baxter's 1969 memoranda available for the present purpose.

and New Zealand.[2]

II. THE PROBLEM OF SECTION 5: BACKGROUND

It seems generally agreed that the fuel which propelled the Cook Islands from legislative subordination to full self-government on 4 August 1965 was an admixture of New Zealand enlightenment and United Nations pressure — only the proportions of each element are the subject of dispute.[3] It is certain that New Zealand intended to comply with United Nations General Assembly Resolution 1541 and its Annex which proposed three means by which a "non-self-governing territory can be said to have reached a full measure of self-government". These were:

(a) emergence as a sovereign independent state;
(b) free association with an independent state; or
(c) integration with an independent state.

Following a process involving expert constitutional advice, the expression of the views of the limited Cook Islands legislature, and an election observed by a United Nations representative, the second of the three options — that of free association — found embodiment in a Bill for consideration by the New Zealand Parliament. That Bill contained the proposed *Cook Islands Constitution* as a Schedule.

It is now necessary to advert to the insertion of Section 5 of the *Cook Islands Constitution Act*. This was effected when the Bill was before the Select Committee of the New Zealand Parliament — the Island Territories Committee under the chairmanship of the Honourable Mr Riddiford M.P. The 'Riddiford Clause', as it is sometimes known, provided as follows:

> *5. External affairs and defence* — Nothing in this Act or in the Constitution shall affect the responsibilities of Her Majesty the Queen in Right of New Zealand for the external affairs

2 The writer should immediately declare interest, having been an adviser to the Cook Islands Government on constitutional and other legal questions from 1980 to the present time. The views expressed here may not, however, be imputed to the Cook Islands Government or to the Crown Law Office in the Cook Islands: they are those of a New Zealand teacher of law. It is nevertheless necessary to acknowledge the pleasant and instructive conversations, on the subject here discussed, with Mr M. C. Mitchell (formerly Solicitor-General of the Cook Islands), Mr A. M. Manarangi (the present Solicitor-General of the Cook Islands), and Dr C. C. Aikman (whose many contributions at the highest level to Pacific constitutional development over a long period confer *Kaumatua* status in these matters).

3 Without claiming to exhaust the field, the following works are of assistance in understanding the background: *A Report to Members of the Legislative Assembly of the Cook Islands on Constitutional Development,* C. C. Aikman, J. W. Davidson, and J. B. Wright, Government Printer, Rarotonga, 1963.
C. C. Aikman "Recent Constitutional Changes in the South-West Pacific" (1968) *New Zealand Official Year Book* 1104.
R. S. Clark "Self-Determination and Free Association — Should the United Nations Terminate the Pacific Islands Trust?" (1980) 21 Harvard International Law Journal 1,54-60.
K. I. Murray "The Cook Islands: A Microcosm of Constitutional Innovation and Evolution", apparently unpublished paper, circa 1983, on file at Crown Law Office, Rarotonga.

and defence of the Cook Islands, those responsibilities to be discharged after consultation by the Prime Minister of New Zealand with the Prime Minister of the Cook Islands.[4]

When the Bill was returned to the House of Representatives, with the addition of what was to become Section 5, a number of Members of Parliament alluded to the presumed effect of the clause.[5] The Chairman of the Select Committee, Mr Riddiford, said:

> Mr A. R. Henry [later Sir Albert Henry, first Premier of the Cook Islands] . . . gave evidence and, when questioned, expressed the view that the defence and external affairs of the Islands should continue to be the prerogative of the New Zealand Parliament. The delegates, when this was put to them, not only agreed that these two matters should be the prerogative of the New Zealand Government, but considered that provisions should be written into the constitution itself making it clear that the responsibility for external affairs and defence should be that of the New Zealand Government (p.2838).

Mr Mathieson explained that:

> At one stage we had some trouble drafting effective clauses to ensure that New Zealand is in every conceivable sense responsible for the defence and the external affairs of the Cook Islands. That aspect has, I am sure, been satisfactorily resolved . . . (p.2835).

Mr Hanan assured the House that:

> The New Zealand Parliament may no longer legislate for the Cook Islands except in respect of external affairs and defence . . . (p.2832).

Sir Leslie Munro opined that:

> We have in our own statute a provision that the control of foreign affairs and defence is vested in the Government of this country. I am not giving the exact words, but that is the purport of that entrenched provision, which has been requested by these fine people (p.2848).

Finally, Mr Nordmeyer stated that:

> There was one matter on which the Committee felt strongly, and that was that, however desirable it was for the people of the Cook Islands to have self-government, this House should reserve to New Zealand matters of defence and external affairs, and that has been agreed to by the representatives of the Cook Islands . . . they freely concurred in that reservation . . . (p.2851).

Following the enactment of the Cook Islands Constitution Act 1964 and its coming into force, the New Zealand Government reported to the United Nations through its

4 The expression "Prime Minister of the Cook Islands" was substituted for the expression "Premier of the Cook Islands" by the effect of the *Constitution Amendment (No.9) Act* 1980-81 (C.I.). The constitutional validity of that change was challenged before the Court of Appeal of the Cook Islands in *Henry* v. *Attorney-General* (unreported judgment of 19 April 1983). The Court held that the mere change in nomenclature did not require the special procedure for alteration of the entrenched provisions. This excursion serves to remind us that Section 5 *qua* Cook Islands law is now textually different from Section 5 *qua* New Zealand law. The same amendment substituted the term "Parliament" for the older expression "Legislative Assembly" throughout Cook Islands law. The newer terms will be used without further explanation.

5 The debates are to be found in (1964) 340 *New Zealand Parliamentary Debates.* The page references following each quotation are references to that volume.

representative, Mr Corner, on 17 November 1965, as follows:

> ... on 4 August 1965, New Zealand's jurisdiction over the Cook Islands came to an end; for on that day, at the request of their Parliament, a Constitution embodying the freely expressed will and desire of the people was brought into force. The New Zealand Parliament having legislated away New Zealand's power unilaterally to pass laws or make regulations having force in the Cook Islands, the Parliament of the Cook Islands has legislative autonomy and the Government of the Cook Islands is master in the country ...
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> Second, the matter of external affairs and defence . . . Note also these two more fundamental conditions; first, New Zealand has no unilateral power within the Cook Islands to pass laws or make regulations on external affairs or defence or anything else; therefore nothing New Zealand does on behalf of the Cook Islands in these fields can have practical effect there unless the Cook Islands Government takes whatever legislative, executive or administrative action is required. Secondly, New Zealand can discharge these responsibilities only so long as the Cook Islanders so desire; the Cook Islanders have the power, under Article 41 of their Constitution, to change the free association arrangement and discharge these responsibilities for themselves.
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> The position, in essence, is this: for so long as the Cook Islands chooses to be associated with New Zealand (rather than to become a sovereign state or to be associated with some other sovereign state) New Zealand cannot repudiate an ultimate responsibility for questions of external affairs and defence. Obviously the arrangement — one between two governments which are constitutionally equal, though only one bears international responsibility — can be maintained only by voluntary co-operation. If this voluntary co-operation should ever break down, it would rest with either to move to terminate an impossible relationship, but neither would have any right to coerce the other. Certainly New Zealand has no power to coerce the Cook Islands, because the executive branch of the New Zealand Government does not have civil power within the Cook Islands, nor can the New Zealand legislature make any change in the law in force in the Cook Islands except with the consent and at the request of the Government in Rarotonga ...
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> Henceforth the links between the Cook Islands and New Zealand rest on consent. That is what we understand by "free association".

Already, contradiction is apparent in so far as Mr Corner is stating quite clearly to the United Nations that New Zealand has no unilateral power within the Cook Islands to pass laws — on external affairs or defence or anything else — whilst parliamentarians at home and, as we shall soon see, the New Zealand Crown Law Office, are asserting the contrary.

III. PROFESSOR QUENTIN-BAXTER'S 1969 MEMORANDA

Professor Quentin-Baxter's 1969 memoranda, addressed to the Secretary of the Department of Maori and Island Affairs and dated 24 and 31 January 1969, were composed in the context of a suggestion that, in negotiations between the New Zealand and Cook Islands Governments over civil aviation matters, issues relating to landing rights and other external affairs aspects could be resolved in New Zealand's favour by use of a presumed ultimate power, under Section 5, to control external affairs aspects of civil aviation and even to *legislate directly* from Wellington on the supposition that Section 5 reserved a legislative control in external affairs and defence matters. This latter view was advanced by the New Zealand Crown Law Office and, indeed, carried all the appearance of orthodoxy if the tenor of the New Zealand parliamentary debates, still

ringing in the ears of officials and commentators, is recalled.

Professor Quentin-Baxter put the matter succinctly:

> It is then suggested that a stalemate in the negotiations might be ended by warning the Cook Islands that the very rights for which New Zealand is bargaining are New Zealand's in any case by operation of law.

His conclusion was equally to the point:

> This must seem to the casual observer like sticking a thumb in the scales of justice; and, upon analysis, I think that view must be sustained.

It is to the legal analysis by which Professor Quentin-Baxter reached the conclusion that Section 5 preserved no *legislative* power to the New Zealand Parliament over *any* aspect of Cook Islands affairs, whether internal or external, that we now turn.

First, what legal inference was to be drawn from the provision of Article 2 of the Constitution that "Her Majesty the Queen in Right of New Zealand shall be the Head of State of the Cook Islands"? Professor Quentin-Baxter thought that:

> It does not follow . . . that the Queen in the Cook Islands has been identified with the New Zealand Government. Indeed, the emphasis is almost the opposite. Article 12 establishes that in the Cook Islands the Queen of New Zealand will act only on the advice of Her Cook Islands Ministers . . . It shows that Her Majesty's Governments in New Zealand and the Cook Islands are associated on a basis of constitutional equality under one sovereign — Her Majesty the Queen in Right of New Zealand.

Secondly, the question whether Section 5 could be read as reserving legislative powers in matters of external affairs and defence is addressed. Reference is made to Dr Aikman's view, expressed a year earlier, that it could not[6]. Both jurists are keenly aware that the very feature which caused the United Nations to confer its *imprimatur* on the constitutional arrangements in respect of the Cook Islands, but to withhold it from the United Kingdom's variant in respect of the British Carribean territories, was the *express* reservation of legislative powers to the Westminster Parliament in external affairs and some other matters in the Carribean arrangement, which Professor Quentin-Baxter saw as:

> . . . a diarchy in which legislative competence is divided between the United Kingdom and each associated state . . . it would require a highly artificial construction to erect section 5 of the Cook Islands Constitution Act into a self-regulating system of this kind.

Thirdly, Professor Quentin-Baxter examined the law-making powers conferred on the Cook Islands Parliament by the Constitution:

> From this examination there emerges a clear and consistent intention. Under clause 3 of the Bill the Cook Islands are to be "self-governing" — an expression not qualified by the word "internal" or by any other limiting expression. Under clause 4 of the Bill, the Constitution is to be "the supreme law" of the Cook Islands — an expression hardly compatible with the reservation of legislative authority to an extra-constitutional source. Under Article 39 of the Constitution, the Cook Islands legislature appears to be given the same unlimited law-making authority which New Zealand had itself received from the United Kingdom Parliament.

6 Aikman op.cit. 1109.

To conclude otherwise, thought Professor Quentin-Baxter, no doubt with one eye on Mr Corner's assurances to the United Nations in 1965:

> ... must bring confusion. The elaborate facade of self-governing institutions is left in ruins. The Cook Islands Courts are compelled to determine which New Zealand statutes may legitimately be considered to relate to the external affairs and defence of the Cook Islands, and how their provisions may be reconciled with the corpus of local enactments ...

And so to a conclusion, first as to the general question:

> I think the better view is that Section 5 of the Cook Islands Constitution Act imports no reserve legislative power. It seems to me that it would in any case be contrary to the general tenor of the present relationship, and quite unprofitable, for the New Zealand authorities to rely on such a power; for the Cook Islands understand themselves to be — and are understood by the world to be — fully self-governing. The better course by far — and one which greatly influenced New Zealand's own constitutional development — is to recognise the growth of consitutional conventions, which refine the use to be made of legal powers.

As to the specific problem which had provided the context:

> The proper approach to the complex problems of airports and air services — with their large demands upon financial, technical and administrative resources — is the course that has been adopted: a negotiation between the two Governments for an agreement which gives each side an acceptable bargain. As may happen in any bilateral negotiation between governments, each may ask the other to take into account aspects of their mutual relationship which are quite outside the immediate area of negotiation. Dealings between New Zealand and the Cook Islands which involve huge investments in airfields and air routes will in all probability entail some consideration of New Zealand's total expenditure in the Cook Islands, and what New Zealand may reasonably expect in return. These are questions of political judgment and negotiating skill; but in my opinion New Zealand has no right — legal or moral — to use a constitutional weapon to gain a bargaining advantage.
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> The lure of Section 5 is that it appears to offer a way of reducing the Cook Islands to their old status as a dependent territory, and so of avoiding the tedious business of negotiating with an equal. For reasons of both law and policy, it seems imperative to put an end to that temptation.

Concerning the array of parliamentary opinion which was surveyed earlier, and with which Professor Quentin-Baxter was so firmly disagreeing, the Professor was tactful:

> Understandably, Members of Parliament seemed in 1964 to be hardly prepared for the speed and extent of the constitutional changes proposed ... there was ... a considerable area of imprecision in Members' minds as they grappled with the concepts of "self-government" and "free assocation".

Notwithstanding that the New Zealand Crown Law Office was not persuaded by the memoranda[7], to the writer's knowledge it has never since been seriously maintained that the New Zealand Parliament has reserve legislative powers in Section 5 matters. Since 5 June 1981, even the power to legislate by request and consent of the Cook Islands Parliament has been abolished, and Article 46 of the Constitution now states bluntly

7 A memorandum of 30 June 1969 from that office maintained the position that Section 5 prevailed over any legislative "sovereignty" which might be found in the Constitution because of the presence in Section 5 of the formula "Nothing in ... the Constitution shall affect".

that:[8]

> Except as provided by Act of the Parliament of the Cook Islands, no Act, and no provision of any Act, of the Parliament of New Zealand passed after the commencement of this Article shall extend or be deemed to extend to the Cook Islands as part of the law of the Cook Islands.

We have so far considered Professor Quentin-Baxter's treatment of the claim to a reserve New Zealand legislative power under Section 5 — as we have seen, that claim was rejected. But what of the effect of Section 5 on executive power, and on the possibility of a Cook Islands international personality? Here Professor Quentin-Baxter's argument becomes more subtle and, indeed, explicitly rejects any attempt to state the matter in constitutional terms:

> Section 5 adds nothing to the obligations of either party; but it makes explicit some major implications of the voluntary association. New Zealand must represent the Cook Islands internationally and in war as in peace they cannot be divided. Upon this interpretation, Section 5, though merely declaratory, is far from superfluous. In it New Zealand acknowledges a responsibility towards the Cook Islands which might otherwise be doubted or misunderstood. At the same time, the Cook Islands takes notice of the sense in which the two partners can never be equal. The New Zealand Government alone bears responsibility for the survival and well-being of both parties in the jostling international community. Failure by the Cook Islands to accept this inequality realistically must lead — not to the exercise by New Zealand of superior legal powers — but to the disruption of the partnership.
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> On the other hand, New Zealand's responsibilities in the fields of external affairs and defence are not a justification for riding roughshod over Cook Islands' wishes in every situation which may be said to have an external aspect. The Cook Islands has precisely the same right as New Zealand itself to promote its own separate interests. If, for example, the Cook Islands Government desires to complete a bilateral arrangement with French Pacific possessions, the New Zealand Government would have no constitutional warrant for withholding treaty-making facilities, even though it might regard the proposed arrangement as inimical to New Zealand's own trading interests. The arena for settling differences of this kind is, once again, the ordinary give-and-take of dealings between the executive branches of the two Governments. Similarly, the New Zealand Government would not be entitled to require the Cook Islands Government's compliance in accepting treaty obligations which New Zealand wished to undertake; but the Cook Islands Government would, of course, have a duty not to embarrass New Zealand by failing to comply with the terms of treaties by which the Cook Islands was already bound.

By 1972 this view was put even more explicitly to the International Law Commission. Professor Quentin-Baxter explained that ". . . the treaty-making power could be exercised only at the behest of the Cook Islands authorities or with their full agreement...".[9]

8 That change was effected by *Constitution Amendment (No. 9) Act* 1980-81 of the Cook Islands Parliament.

9 International Law Commission. Records of Proceedings of 24th Session. U.N. Doc. A/CN 4/SER A/1972/ para. 89.

There is only one further matter on which the writer would return to the 1969 memoranda. It concerns the means of communication between the Cook Islands Government and the Queen in Right of New Zealand. Professor Quentin-Baxter wrote as follows:

> There can, I think, be no doubt that the Cook Islands Government has a right of direct access to the Palace and that the routing through the New Zealand Vice-regal channel is in its origin purely a matter of courtesy. From a practical point of view, one would not want to see any change in this situation; and, given a healthy relationship between the two Governments, the practice of routing communications through New Zealand channels could well attain the character of a constitutional convention. In this, as in most, situations, the quiet growth of an acceptable practice is far better than an initiative which may force governments to take rigid and conflicting positions about aspects of their constitutional relationships.

That view is in fact consistent with the practice which has evolved in relation to the communication of the advice of the Prime Minister of the Cook Islands on the appointment of the Queen's Representative in the Cook Islands. Both Professor Quentin-Baxter's view and the practice just mentioned demonstrate that the Queen in Right of New Zealand has a Cook Islands identity in which Her Majesty is properly advised by Her Cook Islands Ministers. That conclusion will provide a good starting point for the final part of the essay, in which it is hoped to build upon Professor Quentin-Baxter's insistence that *convention*, the "quiet growth of an acceptable practice", is the appropriate method for explication of the relationship between the Cook Islands and New Zealand, just as it was for the Commonwealth in between the Great Wars.

IV. MODERN DEVELOPMENTS IN THE SIGNIFICANCE OF SECTION 5 OF THE COOK ISLANDS CONSTITUTION ACT 1964[10]

The riddle of Section 5 becomes more tractable as soon as it recognised that Section 5 *does not answer* the question: "Who has constitutional control of the external affairs and defence of the Cook Islands?" It *looks* as if it is *about* to answer that question, then it *looks* as if it *has* answered that question. But, to use the parlance of rugby football, it has "sold a dummy" and slipped away without discharging the ball. Players on all sides have spent earnest hours in search of the ball, some even claiming to have discovered it: if all these claims were true we would be playing billiards. The truth is that the ball never left the hands of the draftsman, and it is now necessary for this to be demonstrated.

10 Although the Constitution of the Cook Islands is clearly part, indeed the "supreme" part, of Cook Islands law, a question has sometimes been raised as to the status of the New Zealand Act to which the Constitution is a Schedule. In the writer's view it is clear that it, too, is part of Cook Islands law. There are strong internal clues in the Constitution pointing to this result, namely that provisions of the Act are entrenched by Article 41. More importantly, however, the guillotine on New Zealand law extending to the Cook Islands operated only on New Zealand Acts "passed on or after Constitution Day" (Article 46 of the Constitution). The *Cook Islands Constitition Act* was passed *before* Constitution Day although it did not come into force *until* Constitution Day. Since the *Cook Islands Constitution Act* 1964 declares itself to apply to the Cook Islands (Section 2(2)), it is received into Cook Islands law by combined operation of Section 618 of the *Cook Islands Act* 1915 and Article 77 of the *Constitution*, which preserves existing law after Constitution Day.

Certainly, Section 5 declares that the Queen in Right of New Zealand has 'responsibilities' for the external affairs and defence of the Cook Islands. But this is to do no more than state the obvious: the Queen in Right of New Zealand is the Head of State of the Cook Islands (Section 2 of the Constitution) and the orthodox position is stated by a long-standing authority:[11]

> It may be said that under British constitutional law, which in this instance is common law, the authority to make treaties is vested absolutely in the Crown as the unquestioned prerogative of sovereignty. In practice, the King exercises the prerogative and acts in the sphere of treaty-making only upon the advice of his responsible ministers.

The *real* question thus becomes: which Ministers are to advise Her Majesty the Queen in Right of New Zealand on Cook Islands matters and, more particularly on Section 5 matters? Section 5 does not supply an answer. Some have claimed that the use of the instrumental 'by' alongside the title of the New Zealand Prime Minister in connection with the consultation process somehow indicates that the advice is to be that of the New Zealand Prime Minister. On inspection, that suggestion is found to be fruitless: it requires the insertion of ghostly parentheses in this fashion: ". . . those responsibilities to be discharged (after consultation) by the Prime Minister of New Zealand . . .". But what are we now to do about: ". . . *with* the Prime Minister of the Cook Islands"? Where one goes, syntax sends the other also. If the consultation limb of Section 5 sends the New Zealand Prime Minister to the Palace, it is in a two-seater *with* the Premier of the Cook Islands. In truth, however, the consultation limb sends no one to the Palace; it simply requires consultation between the two leaders. We are left with the need to find responsible advisers upon whose advice Her Majesty the Queen in Right of New Zealand may act in Section 5 matters. They are not identified in Section 5, and it is submitted that we must turn to convention and practice for assistance.

An instructive analogy may be taken from New Zealand constitutional law. Until very recently, New Zealand law provided that:[12]

> Whenever any Bill which has been passed by the said House of Representatives shall be presented for Her Majesty's assent to the Governor, he shall declare according to his discretion . . . that he assents to such Bill in Her Majesty's name, or that he refuses his assent to such Bill . . .

Thus, from 1852 until 1987, the Governor-General of New Zealand had a *legal* right to refuse assent to any Bill passed by the New Zealand legislature, thereby preventing it from becoming law. Of course, an unshaken convention developed that, except in most unusual circumstances which it is not here necessary to catalogue, the Governor-General would not refuse assent.[13] On coming into force of the *Constitution Act* 1986, Section 56 will cease to be law, and will be replaced by the following: "A Bill passed by

11 Robert B. Stewart *Treaty Relations of the British Commonwealth of Nations* (MacMillan, New York, 1939) 228.

12 Section 56, *New Zealand Constitution Act 1852* (U.K.).

13 The *Report of an Officials Committee* (Department of Justice, Wellington, February 1986), which was responsible for recommending change to this provision, observed that assent had never been refused (see para. 3.47 and erratum slip).

the House of Representatives shall become law when the Sovereign or the Governor-General assents to it and signs it in token of such assent."[14] The Governor-General will no longer have a *legal* discretion to refuse assent; on the other hand, neither has he a *legal* duty to assent. The law is silent on the *legal* position. All is left to convention and the statute simply does not reveal the locus of power.

In 1976, the United States Government sought the advice of the New Zealand Government on the capacity and competence of the Cook Islands Government to sign an agreement relating to the Peace Corps. The New Zealand response is quoted in the *Digest of United States Practice in International Law.* It was that:[15]

> In accordance with this constitutional status the Government of the Cook Islands *has exercised* and *continues to exercise* in the field of foreign relations attributes recognised in international law as *attributes of a sovereign state.*
>
> The Cook Islands Government is not restrained from initiating international negotiations or concluding agreements and *there is no constitutional requirement for prior authority or approval from the Government of New Zealand.* (emphasis supplied)

Nothing could be more plain: indeed, when the New Zealand Note came to explain the Riddiford Clause, it will be seen that it gave the expression "responsibilities" the sense of "liability" and not at all that of "constitutional power", which it had already excluded in the passage quoted above:

> It is clear from the Cook Islands Constitution Act and normal principles of international law, that, until the Cook Islands assumes sole responsibility for the conduct of its international relations, New Zealand will remain internationally responsible for the acts and obligations of the Cook Islands.

Were it not known that the practice of the last decade was in complete harmony with this position, that document would alone establish beyond New Zealand recall that whatever the Riddiford Clause means, it does not mean that New Zealand Ministers control section 5 matters.

The Cook Islands position is identical. To take a recent statement of it, the Honourable Norman George M.P. recently reported to the Human Rights Committee of the United Nations on Cook Islands compliance with the International Covenant on Civil and Political Rights. In respect of the Riddiford Clause, the Cook Islands Minister said:[16]

> (These) responsibilities in respect of defence and external affairs are more in the nature of obligations on New Zealand's part *rather than rights of supervision and control* . . . I stress that the Cook Islands has *full constitutional capacity to conduct external relations* and to enter directly into international arrangements and agreements. (emphasis supplied)

14 Section 16, *Constitution Act* 1986.

15 *Digest of United States Practice in International Law 1976,* Eleanor C. McDowell, Office of the Legal Advisor, Department of State, p. 217. The New Zealand Note was dated 1 November 1976. The Department of State File Number is given as P76 0174-1788. I am grateful to my friend Roger Clark, of Rutgers University, for drawing my attention to this document.

16 Hon. Norman George M.P. reporting to the United Nations Human Rights Committee, 24th Session, New York, 28 March 1985.

If there is "no constitutional requirement for prior authority or approval from the Government of New Zealand" before the Cook Islands Government enters into international agreements; if the Cook Islands has "full constitutional capacity to conduct external relations and to enter directly into international arrangements and agreements", and if this bilateral doctrine is backed by more than a decade of regional and international practice carried out in conformity with it; then it would require extraordinary perversity to deny that a convention has developed, or at the very least is developing, to the effect that on Section 5 matters, the Queen in Right of New Zealand is advised by Her Cook Islands Ministers, whatever notional channel that advice might follow. Far from it being the case that the open-ended interpretation of Section 5 is a novel reinterpretation; on the contrary, it is the view that Her Majesty the Queen in Right of New Zealand is constitutionally required to be advised by Her New Zealand Ministers on Cook Islands matters which would be novel and require the New Zealand authorities to resile from both practice and doctrine of at least ten years' standing.

In sum, the argument is this — Section 5 does not, linguistically, decide between New Zealand Ministers and Cook Islands Ministers as the source of advice to Her Majesty the Queen in Right of New Zealand. It favours neither and eliminates neither. Accordingly, the gap must be filled by convention, and there is nothing odd or surprising about the proposition that the convention has shifted, over time, from one favouring New Zealand Ministers to one favouring Cook Islands Ministers. Indeed such a shift is wholly consistent with Commonwealth development as chronicled by Stewart.[17]

17 Supra n.11.