SPEECH GIVEN TO THE CONSTITUTIONAL LAW CONFERENCE AT THE GILBERT + TOBIN CENTRE OF PUBLIC LAW, THE UNIVERSITY OF NEW SOUTH WALES

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"FIGHTING TALK AND RIGHTS TALK"

Sian Elias[1]

Section 3D of the Police Offences 1927 is a New Zealand provision I haven't thought about in a long while. In 1967 we called it "the Policeman's friend". Spiro Agnew, then Vice-President of the United States, came to visit New Zealand. I remember the demonstration outside what was then the Intercontinental Hotel in Auckland, where he stayed. We called it "the Big I". It was a pretty light-hearted event.

I wasn't in Wellington when the Vice President called on the Prime Minister, Sir Keith Holyoake. We called *him* "Kiwi Keith". The Vice President was due at about 4pm. At 8.20 am four people were found to be chained to the pillars outside the front door of Parliament House. They were not impeding access to the door, but anyone entering the front door would see them. They were at the top of the flight of stairs down which a red carpet is rolled down on state occasions. (I know this because my office today looks out at the steps and at the state opening of Parliament I get to walk up the red carpet.)

The four were requested to move along but refused to do so or to unlock the padlocks. They stayed there, quietly, chained to the pillars all day. The police did not interfere with a crowd of 200-300 protesters at the bottom of the steps, simply ensuring there was sufficient passage through them so that those entering the House could do so. Shortly before the Vice Presidents's arrival, Melser and his companions were arrested. Their chains were cut through and they were removed and charged with disorderly behaviour within view of a public place under s3D of the Police Offences Act.

They were subsequently convicted in the Magistrates Court. They appealed to the High Court unsuccessfully. A further appeal to the Court of Appeal was also unsuccessful.[2] Counsel for the respondent was not called upon. The judges applied dictionary definitions and the legislative history to determine the meaning of "disorderly". They acknowledged that the standard set by the criminal law should not unduly restrict freedom of speech: "it required no Charter of the United

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1 The Rt. Hon. Dame Sian Elias, Chief Justice of New Zealand.

2 *Melser v Police* [1967] NZLR 437.

Nations to make such a right acceptable to us", as one appellate judge said.[3] But they considered that the actions of the protestors "on the occasion of the visit of a distinguished guest" was likely to annoy members of the House of Representatives "considerably". The members, too, they thought "had a right to freedom from interference of the doorway of their House and a right freely to entertain their visitors within that House unembarrassed by unseemly behaviour on the part of intruders".

You will understand that in New Zealand few of us have regarded *Melser* as a high point in our law. The contemporary verdict was harsh. And today the case seems to belong to a different world. So it was something of a shock to find it cited in the High Court in *Coleman v Power*.[4] The whiff of mothballs attaches to it.

The discussions today have similarly seemed far away from contemporary New Zealand at times. At one level that sense of distance is odd. We have always seemed close. Is it fanciful to think that we are diverging more than in the past? Not always in result, but in way we get there.

Some of the reasons have to do with our institutional differences. You have a written constitution with judicial power to strike down legislation inconsistent with it. Your starting point must be the text of the constitution itself. You are a federation and much of your constitution and the jurisprudence derived from it is concerned with those balances and ensuring that the powers distributed by the constitution are exercised by the right authority. The constitution does not contain any statement of human rights, and those that have been extracted from it must be implicit in the text or its structure. You have a final Court which has been sitting for a hundred years and which has built up a formidable jurisprudence. The doctrine developed by the High Court is rightly your principal reference in cases of novelty and difficulty. You are greatly exercised by concepts that are unfamiliar to us: the matter of matter, "characterisation" and "core power".

We have a constitution that is almost entirely unwritten. And we have traditionally been careless of it. Parliament is untrammelled by recognised legal restriction on its law-making function, beyond some unarticulated formal rule of recognition[5]. Some take the view that it is absurd, in such context, to speak about "constitutionality" as though it were a principle of law[6]. And I am conscious that what I describe as

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3 Ibid, 445 per McCarthy J.

4 [2004] HCA 39 [paras 7, 11] per Gleeson CJ.

5 *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154.

6 James Allan, "Changing the voting system or creating a brand new highest court - is one more constitutionally fundamental than the other in a liberal democracy?" (2005) 11 *Otago Law Review* 17.

"constitutional" may not seem anything of the kind to you. But principles and values properly described as "constitutional" underlie any legal system and are part of the common law, as Owen Dixon knew. Until last year, our final court has been the Judicial Committee of the Privy Council. Our Supreme Court has been sitting for less than a year. It will be some years before we develop a body of decisions of our own to draw on.

In the past 15 years we have been operating under a statutory Bill of Rights. It has provided organising principles for important values in the legal system. In the past those values have not always been acknowledged to have been engaged in litigation. They were sometimes treated as non-justiciable, matters for the legislator or the decision-maker to weigh as they see fit. They cannot be evaded now.

Leaving aside the federal dimension, the fact that Australia has a written constitution and we do not should not perhaps be critical. No written text can capture the constitution as a whole, as the High Court has long recognised. A constitution comprises all the principles of government and law which define the relationship between individual citizen and state and allocates functions of the state. They are arrangements based on the values of a society. And they inevitably evolve with the society and its values. Professor Neil MacCormick describes a constitution as a collection of rules which "interact and cross-refer."[7] And change.

Maitland[8] was of the view that the constitution of a country can be discerned only for a particular time and only through its general law. Bagehot wrote of "the great difficulty in the way of a writer who attempts to sketch a living constitution – a constitution that is in actual work and power. The difficulty is that the object is in constant change.[9]

Because it moves, the way a constitution is interpreted is critical. And it is principally about interpretation that I want to speak. My impression is that it is our vocabulary and methods when dealing with constitutional values that are diverging. I hope it is unnecessary to say that I make no claim that either way is better. Or that I intend any criticism. My purpose is simply to describe what seems to be happening.

There are undoubted disadvantages in a constitution as elusive as ours in New Zealand. We need to work harder to discover the principles that are essential. There may be disagreement on some of them. If the

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7 Neil MacCormick "Questioning sovereignty; law, state and nation in the European Commonwealth (1999) 79-95.

8 FW Maitland, *The Constitutional History of England* (1963), 538.

9 *The English Constitution* (1867) Oxford.

courts are called upon to identify them, they may be vulnerable. They have no text as road map.

There are, however, some benefits. Original intent is not a concept that greatly troubles us. We are comfortable with Sir Rupert Cross's view that a statute has a legal existence "independently of the historical contingencies of its promulgation, and accordingly should be interpreted in the light of its place within the system of legal norms currently in force."[10] We may have more room for relativity, dialogue and change. Certainly, there have been significant constitutional shifts in our times in both the United Kingdom and New Zealand, with remarkably little fuss and strain.

Nor is an unwritten constitution as dependent upon judicial interpretation, exposition and development, with the risks that entails for judicial legitimacy. Judges participate in a constitutional dialogue through cases decided under the general law, not under some separate part of the law identified as "constitutional". And judges are not the principal actors in the life of the constitution in the way they can be in states where constitutional amendment is difficult. The chief contribution of the judiciary to the life of an unwritten constitution is by the deliberative process of judgment, through reasons which are laid open for all to pick over.

The work of the courts has been at times an important prompt for the other branches in progressing good government. Thus, the development of administrative law by the courts over the past 30 years with insistence on rationality and demonstrably fair process, has been extremely influential in establishing a wider culture of openness and reasonableness. It led in New Zealand to the enactment of the Official Information Act (which entitles those affected to reasons for decisions as well as information held by public bodies), the work of the Legislation Advisory Committee (an independent group which advises the executive about, among other things, the constitutional propriety of proposed legislation), the Cabinet Manual (which imposes responsibilities on Ministers to identify conflicts with the Bill of Rights Act and to protect judicial authority), and the duty imposed by s7 of that Act on the Attorney-General to report to Parliament any conflict between a Bill and the Bill of Rights Act.

Any description of the working parts of the New Zealand constitution would be incomplete without reference to these important constitutional checks. And yet very little attention is given to them. Academic and popular writing is more fascinated by the role of the courts.

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[10] Cross, *Statutory Interpretation* (3rd ed) (1995), 52.

Those who like to think there is trench warfare between the courts, the executive and the legislature over human rights, do not sufficiently acknowledge that the cases arise under legislatively conferred jurisdiction. The legislation was promoted by the executive. It is hardly fair to those branches of government not to give credit for their vision of the constitution and their willingness to repudiate pretensions to power that is arbitrary and uncontrolled. Lord Lester refers to an instructive exchange in the House of Lords during the parliamentary debates on the Human Rights Bill when a former law Lord, Lord Simon of Glaisdale, attempted to amend the Bill in order to preserve the doctrine of implied repeal. The amendment was opposed by the then Lord Chancellor on the ground that the requirement to interpret legislation consistently with the Human Rights Bill "involves a wholly different scheme" which "rejects the route of the doctrine of implied repeal."[11] It is quite wrong to think of human rights protection in New Zealand and the United Kingdom as though it were the creation and in the care of the judges alone.

A legislative statement of rights provides focus and method for the courts. It gives content to the standards by which the court's supervisory jurisdiction is to be exercised. Lacking such standards, it is too easy either to defer to the decision-maker or simply to assert a conclusion of unreasonableness or unfairness, a criticism Professor Michael Taggart has made about pre-Bill of Rights Act administrative law[12]. I do not suggest that rights talk does not prompt similar sloppy reasoning. That would be romantic thinking. But at least it requires some effort to fit the case into a shared register. It gives the judges a framework for reasons for their conclusions that executive action is or is not within the boundaries of proper administrative discretion.

But of course a statement of rights does more than provide measures for judicial review. Where human rights are engaged, they can be expected to prevail unless the statute under which the authority is exercised clearly requires a result inconsistent with the human right or unless it is limited by another human right. That conforms with what I suggest is a widely-held intuitive view that where fundamental rights are engaged, legislature needs to speak unmistakeably. That is a traditional approach to statutory interpretation of common law method.[13] In the Bill of Rights Act, Parliament has made the method explicit and has made it the principal rule of interpretation where human rights are engaged. The approach has implications for the interpretation of all New Zealand statutes and for the application of the

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11 Lester "Developing constitutional principles of public law" [2001] *Public Law* 684, 689, fn9.

12 Taggart "Tugging on Superman's Cape: lessons from experience with the New Zealand Bill of Rights Act 1990" [1998] *Public Law* 266.

13 See recently *R v Home Secretary (ex parte) Simms* [2000] 2 AC 115; *Thorburn v Sunderland City Council* [2002] EWHC 195.

common law. Our statute applies to the legislature and judges as well as to those exercising public authority.

TRS Allan has argued – I think persuasively - that the rule of law entails and requires judicial commitment to rationality, demonstrated by deliberative process and through reasons.[14] The Courts are properly reluctant to give statutes meaning that erodes fundamental principle. This, Allan suggests, is "surely the key to making sense of the dialectic between reason and sovereign will at the heart of common law theory." Legal obligations are the product of reasoned judgment taken in context. Literal and intended meanings are relevant, but not conclusive. Such approach is, Allan suggests, a method of reconciling legislative supremacy and the rule of law.[15]

Professor Jeffrey Jowell has suggested that in human rights litigation the courts ask essentially two questions: Is there a breach of a fundamental democratic right? If there is, is the decision necessary in the interests of a legitimate countervailing democratic value? This he says, is review of the "constitutional co-ordinates of the decision."[16] This is the approach adopted by the Privy Council and the Canadian Supreme Court. It requires assessment that the means used are "no more than is necessary to accomplish …a legislative objective sufficiently important to justify limiting a fundamental right." In this approach some objective assessment of proportionality is inevitable. If a tenable interpretation less encroaching on recognised rights is available, in New Zealand and the United Kingdom it may be disproportionate to accept another interpretation, more appropriate in application of conventional principles of statutory construction but more destructive of the protected values. This seems considerably less deferential than the approach suggested by the High Court in *Lange*[17] and debated in *Coleman v Power*.[18]

The strong direction given to the courts in the United Kingdom[19] and New Zealand[20] to prefer an interpretation that is consistent with the rights and freedoms recognised over "any other meaning", may well displace common law canons of interpretation where human rights are engaged.[21] The consequences are likely to be far-reaching, as is

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14 TRS Allan "Fairness, equality, rationality: constitutional theory and judicial review" in *The Golden Metwand and the Crooked Cord* (Forsyth and Hare (eds) (1997) Clarendon Press).

15 TRS Allan "Legislative Supremacy and Legislative Intention: Interpretation, Meaning and Authority" (2004) *CLJ* 685.

16 Jeffrey Jowell QC "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] *Public Law* 671, 682.

17 *Lange v Atkinson & Anor* [1997] 2 NZLR 22 (HC).

18 Supra, n.4.

19 Human Rights Act 1998 (UK), section 3.

20 New Zealand Bill of Rights Act, section 6.

21 *R v Pora* [2001] 2 NZLR 37.

illustrated by the United Kingdom decisions in *R v Home Secretary (ex parte) Simms*[22] and *Thorburn.*[23] Lord Lester has suggested that it is interesting to consider whether the greater inroad upon parliamentary sovereignty is to be found in a "power to strike down inconsistent legislation or a duty to adopt a strained (though not absurd or fanciful) reading."[24]

What is developing under modern interpretation is a hierarchy of laws according to the human rights content. We have moved a long way from Dicey's view that the Dentists Act has equal status in law with the Act of Union.

Bogdanor in his review of the British constitution in the 20th century[25] finds "signs that Britain was coming to develop, once again, a constitutional sense, a sense that there ought to be publicly proclaimed legal rules limiting the power of government." Lord Steyn's view is "that gradually, through the combined work of academic lawyers and judges, our unwritten constitution is assuming more coherent form."[26]

Possessing a written constitution and a substantial body of constitutional jurisprudence, you already have a developed constitutional sense. We come in on a newer wave, in a different age. I have suggested that may lead our legal thinking and method to diverge. Whether that means that we will end up with very different positions on substantive human rights issues, remains uncertain. Over time, I think it unlikely. Our shared values and common heritage pulls in the same direction.

By one of those odd twists, coming over on the plane yesterday I sat next to a contemporary of mine at Auckland Law School. He is a prosperous and sober business man these days. I haven't seen him for years. I told him I was going to talk about the *Melser* case. "Ah, he said, do you remember the protest at the Big I?"

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22 Supra, n.13. Lord Steyn invoked the presumption "of general application operating as a constitutional principle": the principle of legality described by Sir Rupert Cross: Statutory Interpretation 3rd ed (1995) at 165-166. As Lord Hoffman in the same case explained Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be over-ridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.

23 Supra, n.13.

24 Lester, supra, n.11, 691.

25 Vernon Bogdanor (ed), *The British Constitution in the Twentieth Century* (2004, OUP), 716.

26 Johan Steyn, "Does Legal Formalism Hold Sway in England?" in *Democracy Through Law* (2004), 20.

Nostagia is a fine thing. No doubt there are many who would see in *Melser* a reminder of a more civil society. But it is an age that has passed.

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