

CHIPPING AWAY AT THE JUDICIAL ARM?

Harkness Henry Lecture

I applaud Harkness Henry and the University of Waikato Law School for establishing and maintaining this annual lecture. Law is rightly seen as an academic discipline. The participants in that discipline are many and their roles diverse. Students, academics, barristers and solicitors, the judiciary, those in government, and parliamentarians, have different functions and foci.

Any dialogue between diverse groups of lawyers has great intrinsic and practical value. Since I entered a legal system class at the University of Auckland 47 years ago, I have personally put high value on interchanges of this type. The opportunity for students, academics, practitioners, and judges to listen to one another, particularly on topics which lie somewhat to the side of their normal preoccupations, is valuable and invigorating. So, long may this annual lecture and others like it continue.

My Thesis

A broad description of my topic this evening is the judicial arm of government in New Zealand. I make four statements which underpin my address. They are:

- Although New Zealand is a highly developed and, in international terms, senior democracy, its citizens have little knowledge or appreciation of their constitutional arrangements.
- New Zealand's parliamentary and political structures vest enormous, almost undiluted, power in the executive.
- The judicial arm of government in New Zealand, although respected, is often sidelined or downgraded. There are constitutional risks in this phenomenon.

- As a group, the New Zealand judiciary find it difficult to explain or defend its constitutional role and its importance. Occasional champions are needed. Who better than the legal profession, legal academics, and (rarely I fear) a well-informed media.

I consider there are risks inherent in these four statements. The judicial arm of government is independent. It administers what is loosely described as the rule of law which underpins the constitutional rights and freedoms of the citizens of a democratic state. Thus my thesis is that the judiciary needs champions to explain and defend its role.

Setting the Scene

As the more acute of you will by now have thought, these are unusual, certainly delicate topics for a judge to discuss extra-curially in a public arena. So I make it clear that I shall not be saying anything sensational (indeed there is no need for me to do so). Nor is there any express or implied criticism of governments or cabinet ministers. I am not on a crusade.

I give you two examples which underscore the misconceptions and ignorance, which prevail in New Zealand about the judicial arm of government.

In March this year, the five members of the Supreme Court received death threats in advance of sitting on an appeal. This became a television news story during which a relatively senior official from the Ministry of Justice, no doubt genuinely concerned, said words to the effect that the Ministry always gave high priority to the safety of “justice sector employees”.

In July, I was asked to present a paper at a seminar organised by a well known legal publisher. All attendees at the conference wore the obligatory name tag which depicted one’s name, firm, chambers, or university. My prepared name tag read “Justice John Priestley” from the “Ministry of Justice”! This from an organisation in the business of legal publication.

In the public mind judges are seen as part of New Zealand's law enforcement apparatus. Several times a month television presents powerful images of criminal trials, where judges and courtrooms appear in the same stories as prison vans, police officers, Department of Corrections escorts, and lawyers. It is common knowledge that judges are lawyers. They must be selected from the pool of practitioners. They are regarded as lawyers. What these images and impressions miss is that a judge, on appointment, is no longer a member of the bar. A judge is instead part of an arm of government, independent, and performing a vital constitutional role.

Misconceptions of this type are part of a wider constitutional canvas. There have been testy clashes which have occurred over the last 15 years in the United Kingdom. Areas of human rights, anti-terrorism legislation, detention in the immigration and refugee field, and parole, have triggered significant disputes and tension between the higher English Courts and the United Kingdom government.¹

And to a lesser extent we have seen similar issues raised (but yet to produce significant law review articles) between New Zealand governments and our Chief Justice. In the wake of the Foreshore and Seabed Act 2004 public exchanges between the Chief Justice on the one part, and the Attorney-General and the Prime Minister of the then government on the other, addressed issues such as "judicial activism" and "lack of understanding about judicial independence". Then in July 2009 comments made in an address by the Chief Justice on penal policy, with suggestions of sentence reviews and even a prisoner amnesty, brought a sharp response from the Minister of Justice supported later by the Prime Minister on the parameters of government policy and the observation that Parliament made the laws whilst the judiciary interpreted them.²

Against that background I turn to trace how New Zealand's constitutional arrangements, and particularly the judicial arm of government, have evolved to an

¹ An example is the "Belmarsh Prison" case, *A and others v Secretary of State for the Home Department; X and another v Secretary of State for the Home Department* [2005] 2 AC 68.

² A review of these two clashes involving the Chief Justice has been written by Fran O'Sullivan "Politicians are weighing in on the scales of justice" *New Zealand Herald* (Auckland, New Zealand, 18 July 2009), A19.

independent judiciary operating inside a Westminster model parliamentary democracy.

The Westminster route to judicial independence and parliamentary “sovereignty”

History of Evolution

Apart from the English civil war and the deposition or abdication of James II, the path to modern Westminster constitutional monarchies has been one of evolution rather than revolution. Tensions and compromises over the centuries have fuelled political and constitutional development.

The so-called “Glorious Revolution” led to the Bill of Rights Act 1688 and the Act of Settlement 1701. These great statutes were the cornerstones of the Westminster model. Politically, they were driven by a determination on the part of Whig aristocracy and Protestant parliamentarians to ensure that England remained a Protestant kingdom and that the centrality of Parliament, which the civil war had secured, was not diminished.

The Act of Settlement gave judges security of tenure for so long as they behaved themselves.³ The Bill of Rights Act effectively provided that Parliament, or more accurately the Crown in Parliament, was the supreme law making authority. This perception of the supreme power of parliament was classically expressed by Dicey:⁴

The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

³ Quamdiu se bene gesserint. Their salaries were to be paid from the public purse.

⁴ A V Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) at 39-40. Dicey gives as historical examples of the “supreme legislative authority of Parliament” the passage of the Act of Settlement “whereby the Sovereign occupies the throne under a Parliamentary title” and the passage of the Septennial Act in 1716 whereby Parliament extended its life from 3 years to 7 years to avoid an election which might have seen a Jacobite resurgence in the Commons.

These features of the 1688 revolution have been replicated in New Zealand's Constitution Act 1986, ss 14 and 15 of which define Parliament as the Sovereign and the House of Representatives with "full power to make laws". Sections 23 and 24 relate to the removal of High Court Judges and protection of their salaries.

The Judiciary

Essential to an understanding of this constitutional evolution is the fact that supreme or sovereign power in medieval times was concentrated solely in the hands of the monarch. The classic division of power, which Montesquieu⁵ observed in Britain, formalised in the constitution of the United States of America and which underpins many modern written constitutions, was an evolved division.

What needs to be stressed, and what is overlooked by so many New Zealanders, is that the judiciary is the judicial arm of government. It is not a creation of Parliament. It is not and cannot be a creature of the executive.

Interestingly the judicial arm became a permanent feature of royal government in England before Parliament. Parliament was summoned from time to time (with much greater dominance by the Lords than by the Commons) when the King was in need of money (supply). This need was particularly acute at various stages during the 100 Years War when the English monarch was attempting to expand or defend feudal domains in France.

In 1178 Henry II appointed five members of his entourage "to hear all complaints of the realm and to do right". Slowly over the next 200 years the common law courts evolved.⁶ Judges tended to remain members of the royal household serving on the King's Council. This could be fraught with political risk. An incentive for judges to avoid political matters occurred in 1387 when Richard II sought his judges' advice on the legality of a parliamentary commission which had assumed powers hitherto

⁵ Montesquieu's observations of 18th century Britain influenced in part his identification of the three arms of government and their need for separation. *De l'esprit des lois* (1748).

⁶ A brief but excellent summary can be found in Brooke LJ "Judicial Independence – Its History in England and Wales" in Cunningham (ed) *Fragile Bastion; judicial independence in the nineties and beyond* (1997).

exercised by the monarch. Six judges, including the Chief Justice of the King's Bench, Tresillian CJ, advised the King the commission was invalid and traitorous. For their pains all six Judges were impeached by the "Merciless Parliament" and condemned to death. Tresillian CJ was hanged. The other five were banished to various parts of Ireland (a 14th century fate equivalent to an Auckland judge being banished to the Chatham Islands).⁷

Judicial independence, or more accurately its subversion, was one of the drivers of the Glorious Revolution. It was vulnerable during the reigns of Charles II and James II. The former monarch dismissed 11 of his judges. The latter dismissed 12 within three years. One of the many unwise acts of James II was his intervention in an important case, *Godden v Hales*.⁸ The King had purported to dispense with the provisions of the Test Act which would otherwise have required officers in the army to take the oaths of allegiance and supremacy. The purpose of the dispensation was to allow Roman Catholics to hold army commissions. All but one of the 12 Judges who sat on *Godden v Hales* ruled in favour of the King (the King's position was legally arguable). However, James II had taken the precaution of interviewing privately all 12 Judges, being determined to secure a bench for the case's hearing which was favourable and compliant.⁹ The Bill of Rights Act 1688 put to rest forever the notion that the monarch had the power to suspend or dispense with laws.¹⁰

Nowadays, the independence of the judicial arm of government is secured not only by statute but also by convention and protective measures. Judges' salaries are an independent charge on the consolidated fund and cannot be tampered with by the executive. Judges have immunity of suit.¹¹ Judges have, as we have seen, security of tenure. And there is the strong convention (reinforced perhaps by the unhappy example of Tresillian CJ) that judges will not involve themselves in the political arena.

⁷ Brooke LJ, *op cit*.

⁸ (1686) 2 Show KB 477; (1686) 89 ER 1050.

⁹ See Bradley *Relations Between Executive, Judiciary, and Parliament: An Evolving Saga?* (2008) Public Law 470.

¹⁰ For a rare modern example of a prime minister purporting to dispense with the law see *Fitzgerald v Muldoon* [1976] 2 NZLR 615.

¹¹ Until recently a protection for higher court judges, but extended to the District Court Bench by the District Courts Amendment Act 2004.

Parliament

But what of the other two arms of government, Parliament and the executive?¹² The first obvious contrast with the independence of the judicial arm is that the parliamentary and executive arms are interdependent. This is in marked contrast to the position in the United States. Our cabinet ministers must sit in Parliament.¹³ A government (the executive) must retain the confidence of Parliament which is achieved by controlling it with a parliamentary majority. The development of political parties and, in Australasia, party caucuses, give to the leaders of a parliamentary government an iron grip on legislative and executive power. Executive control of Parliament can, if necessary, be reinforced by the ability of the Prime Minister or government to allocate or withdraw cabinet posts, under-secretaryships, and positions on Parliamentary committees.¹⁴

The foundations of this power, being essentially the supremacy of the Crown in Parliament, are historic. There can be no dispute about the centrality of parliamentary power. The interesting question is whether it is unlimited. What is its source?

Consider these great words penned in Philadelphia in 1776:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among those are Life, Liberty, and the pursuit of Happiness. That to secure these rights Governments instituted among men deriving their just powers from the consent of the governed....

Wonderful stuff. Easy for post-modernists and deconstructionists to snipe at the words by observing that they did not apply to slaves and women. But nonetheless, the 19th century concept that the legitimacy of government rests on the consent of the

¹² Two excellent articles trace and comment on these high constitutional matters. Joseph “The Constitutional State” in Finn and Todd (eds) *Law, Liberty, Legislation: Essays in honour of John Burrows QC* (2008) 249; Palmer *New Zealand Constitutional Culture* (2007) 22 NZULR 564. The best treatment of Parliament which asserts that it is unquestionably a sovereign body is J Goldworthy, *The Sovereignty of Parliament, History and Philosophy* (Clarendon 1999).

¹³ Constitution Act 1986, s 6.

¹⁴ This can properly be seen as a form of patronage although not as extensive of that practised by Whig prime ministers in the 18th Century such as Robert Walpole and the Duke of Newcastle. See Sir Lewis Namier *The Structure of Politics at the Accession of George III* (1929); *England in the Age of the American Revolution* (1930).

governed, underlies true republics and democracies. Yet, this is not initially what Westminster parliaments, and certainly the 1688 Parliament, had in mind. The concept of the consent of all the governed was raised by the Levellers during the English civil war and during the great debates of the Army at Putney. But the idea expounded by Colonel Rainborough was too radical for gentry, parliamentarians, and Model Army officers alike.¹⁵

Professor Martin Loughlin convincingly argues that the Convention Parliament which followed James II's departure and which invited William and Mary to reign "obfuscated" the issue of sovereign power and its true source, asserting it for Parliament.¹⁶ It was only through extensions of the franchise in the 19th and 20th centuries that Westminster parliaments were able to assert, with some legitimacy, that since their members are elected by universal franchise, the sovereign power they wielded was with the consent of the governed. Nonetheless, from a historical and evolutionary perspective, the notion of the Crown in Parliament being the supreme sovereign power has its origin in a 17th century aristocratic and Protestant revolution rather than in a *de novo* democratic consensus. Historically, the concept of parliamentary sovereignty was created contemporaneously with the concept of an independent judiciary. The notion of parliamentary sovereignty is arguably a common law doctrine,¹⁷ although there is historical force in the suggestion that the deference shown by the courts to parliament is a political choice.¹⁸

I raise briefly, but need not develop because others have, the issue of whether there are limits on the concept or perception that parliament's sovereign powers are not only supreme but are untrammelled. Any suggestion to the contrary is almost

¹⁵ Rainborough's comment was "for really I think that the poorest he that is in England has a life to live as the greatest he; and therefore truly, sir, I think it is clear that with every man that is to live under a government ought first by his own consent to put himself under that government" (Extract from the debates at the General Council of the Army, Putney, 29 October 1688, Clarke papers).

¹⁶ Loughlin "Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice" in Loughlin and Walker (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2007) 27.

¹⁷ Dame Sian Elias *Administrative Law for "Living People"* (2009) 68 CLJ 47, 54. The same article correctly observes that historically the power of the executive arm of government can be found only in legislation or prerogative.

¹⁸ See Goldworthy *op cit*, *passim*.

guaranteed to provoke a firm response from parliamentarians embroidered with epithets about activist judges and the undemocratic nature of the judiciary.

But most commentators allow the concept of a curb on parliamentary supremacy. Professor Joseph for his part¹⁹ sees the 1688 revolution as “the high water mark of historical myth-making and applied institutional morality”. In constitutional states such as the United States and Australia where the powers of the Supreme Court and the High Court of Australia extend to interpreting the Constitution or constraining constitutional breaches by the legislative arm, the issue does not arise.²⁰ The Constitution itself places legal limits on legislative power. It is only Westminster parliaments which resist that notion.

Rarely does the issue arise but there are clearly constraints. They may be political constraints (the accountability of a parliament in a democracy to the enfranchised voters).²¹ There are additionally respectable arguments that, either alone or in combination, the concept of the rule of law, or the underlying precepts of 1,000 years of English constitutional development, or the assumptions implicit in a democracy where power derives its legitimacy from the consent of the governed²² or even some Kelsenian concept of a *grundnorm*, must place some limits on parliamentary power.²³ The common denominator of these approaches is that the law is supreme rather than one of the organs of government. Or, as mildly suggested by Lord Cooke of Thorndon, there may be assertions by the judiciary and indeed rulings that there are implicit rights and freedoms in a democracy that limit legislative power.²⁴

The former Deputy Prime Minister and Attorney-General Hon Dr Michael Cullen, during the constitutional skirmishing which surrounded Parliament’s enactment of

¹⁹ Joseph *The Constitutional State*, op cit 276.

²⁰ At an early stage the United States Supreme Court asserted to itself the right to interpret the Constitution and review the constitutionality of acts of Congress. *Marbury v Madison* (1803) 5 US 137.

²¹ Stephen *The Science of Ethics* (1907) at 137, dealing with the Dicey postulation that in theory it would be possible for Parliament to legislate for the death of blue eyed babies stated that legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it.

²² *Supra*.

²³ See the example given by Heath J *Hard Cases and Bad Law* (2008) 16 Waikato LR 1, 12.

²⁴ Rt Hon Sir Robin Cooke *Fundamentals* [1988] NZLJ 158; and his further contribution as Lord Cooke of Thorndon *The Basic Themes* (2004) 2 NZJPIL 113, 114.

the Foreshore and Seabed Act 2004, stated in an address in April 2004 to the Otago District Law Society:²⁵

In our tradition the Courts are not free to make new law. It is fundamental to our Constitution that law makers are chosen by the electorate and accountable to them for their decision. MPs are accountable. Judges are not; they are in fact independent, and that is essential to their role in society.

We need their impartial rulings on what the law says and how it applies in individual cases; but if they begin to express views on what the law should say they enter dangerous territory. It is dangerous not only for the case at hand but also because it means the public begin to perceive the judiciary are politicised.

Undoubtedly a shot across the judicial bow. A correct description of the traditional roles. But, as by now I hope you appreciate, the issues surrounding the judicial arm of government, parliamentary sovereignty and its development, and the concept of limits on parliamentary power cannot be so simply stated.

An easy riposte to any perceived flexing of judicial muscle is to comment that judges are unelected. That is indeed true. Responsibility for policy formation rests, in the democracy, with the legislators who have mandates and are regularly accountable to electors. But the underpinning rule of law and the independence of the judiciary are not policy matters. Rather they are the bedrock of a democratic state and particularly the guarantee of the individual rights and freedoms of electors.

What does this all mean for New Zealand?²⁶

I focus in this section, not on a comprehensive analysis of how New Zealand's constitution works, but on the role played by the independent judicial arm of government.

²⁵ Palmer *New Zealand Constitutional Culture*, op cit 584, which replicates this and similar writings of Dr Cullen. Judges in Britain have clearly stated that fundamental rights and/or human rights cannot easily be overwritten by general or ambiguous words: for example *Regina v Secretary of State for the Home Department*: Ex parte Simms and another [2000] 2 AC 115, 131 per Lord Hoffmann; *Thoburn v Sunderland City Council* [2003] QB 151, 185 per Laws LJ; Lord Cooke of Thorndon *The Myth of Sovereignty* (2005) 3 NZJPIL 39.

²⁶ Much useful discussion about New Zealand's constitution and helpful assessments as to how it works and who the principal players are can be found in Palmer *What is New Zealand's Constitution And Who Interprets it? Constitutional Realism and the Importance of Public Office-Holders* (2006) 17 PLR 133, Joseph *Parliament, the Courts, and the Collaborative Enterprise* (2004) 15 KCLJ 321.

Unlike some states whose constitutional institutions are derived from the Westminster model (the United States and Australia being two conspicuous examples), New Zealand has no written constitution as such. But a written constitution is worthless if a state's major players lack the political or moral will to adhere to it. The most chilling photographic constitutional message I have ever seen was one of the Chief Justice of Zimbabwe, attired in a full bottomed wig and red robes (identical to those worn by New Zealand judges on formal occasions), swearing in Mr Mugabe as president. We have examples of failed states or near failed states in our own Pacific region whose constitutions have not kept arbitrary government or misrule at bay. The rise of the National Socialist government in Germany in the 1930s, leading to the Third Reich displacing the Weimar Republic, occurred legitimately and constitutionally in the first instance in a parliamentary democracy.²⁷ The former Soviet Union and pre-1990 republics in Eastern Europe had exemplary constitutions. However, their parliaments and judiciary were, in the main, ciphers of the communist regimes.

I do not consider parliamentary democracy or judicial independence in New Zealand are currently at risk. But reflect on the nature and extent of the parliamentary sovereign power which the New Zealand Parliament exerts compared with other Westminster-type parliaments. Our system of government is unitary. Our legislature is unicameral. Unlike Australia, Canada, and the United States we have no federal structure.²⁸ Because we have no federal structure we have no upper house or senate representing the states.²⁹ The hereditary days of the House of Lords have passed, but it still retains its constitutional function of a second chamber, although the Blair and Brown administrations have made no haste to resolve the basis on which the House of Lords is to be elected or appointed.

Once a bill has been read three times under the relevant parliamentary orders and processes it becomes law on receiving the Governor General's assent. New Zealand

²⁷ Bullock *Hitler: a study in tyranny* (1962) at chapters 4 and 5. Hitler was elected Chancellor. The Weimar Constitution was never formally abrogated. Constitutional rights were suspended by the legitimately promulgated Enabling Law.

²⁸ The short interlude of New Zealand provincial governments came to an end with the abolition of the provinces in 1875.

²⁹ The Canadian Senate is appointed. Senate seats are allocated regionally with each region's allocation being subdivided for specific provinces. S 22 Constitution Act 1867.

had a second chamber, the Legislative Council, until its abolition in 1950. Although there have been sporadic suggestions of reintroducing a second chamber, these have never gained traction.

John Stuart Mill in his *Considerations on Representative Government* (1861) saw certain mischief in a one chamber parliament. He pointed to “the evil effect produced upon the mind of any holder of power... by the consciousness of having only themselves to consult”.³⁰

Although constitutional purists see much benefit in a second chamber (delay, improvement, polishing, further objective consideration) the revival of the second chamber into New Zealand’s Parliament is unlikely to occur. One of the popular criticisms of the MMP system, which bubbles up in letters to the editor and talk-back radio, is that 120 plus MPs is too many. There would be little popular support for increasing the numbers of parliamentarians, which the institution of a second chamber would undoubtedly do.³¹

Some commentators³² make the point that in an MMP parliament, where no single party has an absolute majority, where cross-party negotiations are needed, and where opposition parties may sometimes have majorities on standing committees, the safeguard of a second chamber is unnecessary. That observation may have force as regards limits placed on a government’s legislative programme. But the majority still remain members of the one unicameral legislature who have reached a consensus.

Professor Waldron observes that the New Zealand Parliament, by Standing Order 38, has abolished the requirement for a quorum.³³ Provided the Speaker, the minister in charge of a Bill, and the Whip are present, the chamber can be empty during a

³⁰ The comment of J S Mill is equally apposite here if the law maker has only himself to consult in the administration of the law. Unchecked and untrammelled power, as history demonstrates, can lead, in the wrong hands or in difficult times, very speedily to tyranny.

³¹ Anecdotally similar populist views are voiced in Australia where each State (with the exception of Queensland) has two State Houses of Parliament overarching which are the Federal House and Senate.

³² Palmer and Palmer *Bridled Power: New Zealand Government under MMP* (3rd ed, 1997) Ch 1.

³³ Waldron *Parliamentary Recklessness* [2008] NZLJ 417, an article which usefully looks at the pros and cons of a unicameral parliament.

debate. This current quorum provision underlines the historical importance in New Zealand of the party caucus (whether there be a two party parliament or an MMP parliament). Parliamentary positions over legislation (other than at the select committee stage) are to a large extent determined by ministers with input from parliamentarians. The give and take of debate occurs away from public scrutiny in the caucus room. Waldron also refers to the speed at which the Electoral Finance Act 2007 passed through its second reading and Committee stages. There is perhaps an irony in the fact that this legislation, which inevitably imposed financial and public comment constraints on the November 2008 election, was regarded as flawed by both government and main opposition parties in the new Parliament and was repealed.³⁴

So how does New Zealand's constitution play out so far as an independent judiciary is concerned? In a pragmatic way, everyone muddles along. Confrontations are rare. Although history teaches us that individual freedoms and democratic values (again look at the Pacific region) can be lost in a generation, the dark clouds of tyranny do not currently loom over the New Zealand horizon.

I do not suggest the legislative and the executive arms of government are indifferent to the concept of judicial independence. The relevant conventions are clearly set out in the Cabinet Manual.³⁵ And very recently Parliament's Standing Orders have been changed requiring leave of the Speaker before a Member of Parliament can comment on a matter which is *sub judice* or mention in a parliamentary speech matters which are subject to a court's suppression order.³⁶

Pivotal to the inter-relationship between the judiciary and the other two arms of government is the Attorney-General. The current Attorney was a senior practising lawyer. Legally trained Attorneys-General will have a good understanding of their

³⁴ The Electoral Finance Act 2007 was repealed on 1 March 2009 by s 15 of the Electoral Amendment Act 2009 with 112 votes for such repeal and only 9 against.

³⁵ Department of Prime Minister and Cabinet *Cabinet Manual 2008* (2008) 49 - 50.

³⁶ Standing Order 111 (in effect since 4 October 2008) provides that "matters awaiting or under adjudication in any court of record may not be referred to in any motion, debate or question if it appears to the Speaker that there is a real and substantial danger of prejudice to the trial of the case". The Privileges Committee has recently made a number of comments and recommendations in regard to standing orders 111 and 112 which it wishes to see enacted as soon as possible.

constitutional role. A vital role of Attorneys, to which anecdotally they give close non-partisan consideration and consult widely, is recommending judicial appointments, which are mentioned in cabinet but are not the subject of cabinet decisions.³⁷ Regular consultation between the Attorney-General, the Law Ministers, and the judiciary, particularly heads of bench, away from public and media scrutiny is usually productive. Particularly will this be the case where there is a measure of consultation (the final choice being the government's) with heads of bench on judicial appointments and promotions.

Professor Joseph describes the relationship between parliament and the courts as a symbiotic one founded in political realities.³⁸ In his telling criticism of Ekins' thesis,³⁹ Joseph rejects the need to choose between parliamentary supremacy or judicial supremacy. Rather he sees the inter-relationship of the judicial arm and the government arm as being a "collaborative enterprise".

But Joseph does not downplay the crucial importance of the judicial arm. He cites with approval the dictum of Lord Bridge of Harwich in *X Ltd v Morgan-Grampian (Publishers) Ltd*:⁴⁰

The maintenance of the rule of law is in every way as important in a free society as a democratic franchise. In our society the rule of law rests upon twin foundations, the sovereignty of the Queen and Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law.

Joseph succinctly and correctly states:⁴¹

The joint functioning of the branches [of government] is key, although it is sometimes misrepresented. The trappings of judicial office may obscure the Court's contribution to public administration. The Court's are removed from national politics and do not seek any mandate from the people. They defer to the political decisions of the legislature, avoid making judgments about legislative policy, and are careful to preserve their detachment in public affairs but they are indelibly part of the *business* of government. The

³⁷ It is often overlooked that the Attorney-General is the titular head of New Zealand's Bar. The Members of the Bar have the unique right of access to the courts. With that right ride a number of constitutional obligations and conventions.

³⁸ Joseph *Collaborative Enterprise*, op cit 322. The symbiotic analysis is largely similar to the concept advanced by Sir Stephen Sedley of bi-polar sovereignty. See Knight *Bi-polar Sovereignty Restated* (2009) CLJ 361.

³⁹ Ekins *Judicial Supremacy and the Rule of Law* (2003) 119 LQR 127.

⁴⁰ [1991] 1 AC 1, 48.

⁴¹ Joseph *Collaborative Enterprise*, op cit 334.

term “government” comprises three elements – executive, legislative, and judicial – even if there is lacking a paper separation between them. Under the Westminster system, the executive and legislative elements collapse into one under the principle of the parliamentary ministry.... The judiciary stands apart, separate from the political branch under the principle of judicial independence. All legal systems must provide machinery for resolving claims and conflicts between individuals, and individuals and the State, according to law. An independent and impartial judiciary is indispensable to the principle of legality under the rule of law.

The above passages elegantly explain, in my view, what the rule of law is and why it is that the judicial arm of government is effectively the keeper of the flame of democratic and individual freedom.

New Zealand perceptions of the judiciary

But how is this judicial arm regarded? Matthew Palmer’s article⁴² adopts a legal realism approach. He identifies the various statutes of the Imperial and New Zealand Parliament which comprise our constitution. He identifies the various public office holders (rightly including the Solicitor-General, the Chief Electoral Officer, the Clerk of the House of Representatives, the Clerk of the Executive Council, and others), who are involved in the workings of New Zealand’s constitutional arrangements. Palmer sees the judiciary as having a “key role” in constitutional interpretation,⁴³ being mainly in the areas of the limits of a national government, protection of citizens against government, the role and powers of the judiciary, political participation and disputes of outcome in the democratic process and the legal liability of the executive. His conclusion is that a significant part of New Zealand’s constitutionalism is not judicial or legislative in nature but could be characterised as “office-holders’ constitutionalism”.

But in a subsequent article Palmer attempts to place New Zealand’s constitution in a cultural context.⁴⁴ He is correct from a historical perspective when he asserts that New Zealanders “expect and demand governments to exercise power, firmly, effectively, and fairly – to enable settlement, to resolve conflict, to build economic

⁴² See Palmer *What is New Zealand’s Constitution*, supra at n 26.

⁴³ Ibid 152.

⁴⁴ Palmer *New Zealand’s Constitutional Culture*, supra at n 12.

infrastructure and create the welfare state”.⁴⁵ He also comments that New Zealanders respect strong individuals with initiative, the constitutional culture of New Zealand showing streaks or characteristics of authoritarianism, egalitarianism, and pragmatism.⁴⁶ Palmer further refers to “the great New Zealand knocking machine” with its hostility to “tall poppies” leading to a demand that those involved in government should not see themselves as superior.⁴⁷

Palmer sees the New Zealand constitutional culture as downplaying the role of the judiciary or depreciating the centrality of the judicial arm to the maintenance of the rule of law.⁴⁸ He refers to the 1985 White Paper when the then government advocated entrenching a Bill of Rights and the Treaty of Waitangi. It attracted a large number of submissions. Many of those submissions rejected entrenchment on the grounds that a constitutional Bill of Rights would elevate judicial power over the power of Parliament. He concludes:

I believe that New Zealanders were, and still are, fundamentally suspicious of judges. At that time the highest court was composed of judges who were not even New Zealanders and who sat in London (in the Privy Council). More importantly, Judges are unelected, elite, former lawyers.

Palmer refers to a 2004 UMR research poll which, on a ten point scale, rated judges 7th in a list of 18 occupations which held public respect. The judges’ rating was 6.64 behind nurses, doctors, teachers, police, dairy farmers, and sheep farmers. Lawyers rated 16th and politicians last. A 2009 Readers Digest (NZ) poll of 39 “Most trusted professions” ranks judges 11th, behind police officers, (farmers have slipped to 15th) but well ahead of lawyers, journalists and politicians.

Dealing with the rule of law, Palmer writes:

Law exists independently of the lawmaker once it takes on its own written expression. Yet if the lawmaker has the unilateral and untrammelled power to change the law, or to apply it in a particular case, then the law has no

⁴⁵ Ibid 575.

⁴⁶ Ibid 576. Certainly Palmer is correct about New Zealanders’ expectation of their government. The colloquial expression “they should do something” has deep historical roots in New Zealand especially when, during colonial times, the undeveloped New Zealand terrain and the elongated shape of the country made central government the only possible organ for building ports, bridges, roads, railways, and generally fixing economic and social problems.

⁴⁷ Ibid 576.

⁴⁸ Ibid 585-589.

expression independent of the intention of the lawmaker. Law, in these circumstances, does not exist and cannot rule. The rule of law is only upheld when the lawmaker is not free to apply, and thereby determine the meaning of, the law in a particular case.

Yet despite analysing the importance of the rule of law as the spine of any constitution, Palmer expresses some doubts about its durability or recognition in New Zealand:⁴⁹

My intuitive hesitation about the rule of law as an ultimate principle of the constitution, and the reason I put it third behind representative democracy and parliamentary sovereignty, is a concern about how well entrenched the rule of law is in popular understanding and support. To the extent that it requires valuing the role and voice of the judiciary compared to elected politicians then [the article] suggests it is not well entrenched in New Zealand constitutional culture.

Palmer, I suggest, is pointing to a constitutional weakness which echoes the concerns I voiced at the outset of this paper. Indeed he sees it as a danger point:⁵⁰

In my view the rule of law, supported by the principle of judicial independence, is and *should be* a corner stone of New Zealand's constitution. In terms of my formulation of the notion, it is a key constitutional instrument by which the coercive powers of the State can be contained. But I sound a word of warning to the legal establishment. I am not confident that New Zealanders currently understand the rule of law or, in a crunch, would necessarily stand by it as a fundamental constitutional norm... The rule of law is *not* reinforced by New Zealand cultural value. Neither is this surprising given its lack of academic and legal articulation. Without academic and judicial clarification of the meaning and importance of the concept of the rule of law and judicial independence, and some concrete event or debate that generates public appreciation and regard for it, I believe the rule of law is a vulnerable constitutional norm in New Zealand.

So there is the warning. There are the reservations. Is this assessment of the judicial arm of government in New Zealand the product of some cultural hostility? Is it (more likely) because people do not know and do not care? And in any event how should the judiciary respond?

⁴⁹ Ibid 588-589.

⁵⁰ The inter-linkage of the concept of judicial independence and the community was examined by the Rt Hon Sir Ninian Stephen in *Judicial Independence – A Fragile Bastion* (1982) 13 MULR 334, where he observed that the ultimate protection of judicial independence is a community consensus that the independence is worth protecting (at 339).

The Judicial Arm of Government in New Zealand

I have traced and expressed the independence of the judicial arm from the other two arms of government. How does this arm operate? If Palmer is right⁵¹ it operates in the popular mind in an unknown fashion, clouded perhaps with a degree of suspicion.

In this section of the paper I suggest that the issue is not just one of perception. The perception is closely linked to systemic weaknesses which attend the judicial arm. Some of those weaknesses are internal. Many of them are the product of the judicial arm's interface with the executive.

The Judges: Is There Institutional Unity?

The New Zealand court system is hierarchical. At its apex sit five Supreme Court Judges. The Court of Appeal has nine permanent members.⁵² There are 35 High Court Judges of which 21 are stationed in Auckland, 10 in Wellington and 4 in Christchurch. Working with the High Court Bench are 8 Associate Judges. The District Court (which includes the Family Court) with its significant geographic spread comprises 137 Judges. There are a further four judges in the Employment Court, 10 in the Maori Land Court and 9 in the Environment Court.

So to what extent are the 217 New Zealand judges bound together institutionally as the judicial arm of government? Members of Parliament have the unifiers of party and caucus. Cabinet (with recent exceptions appearing in the cabinet manual to cater for coalition governments and MMP) have the overarching discipline of collective responsibility. Civil servants are bound together in both an employment and policy sense by their respective ministries and departments with their internal structures and responsibilities.

⁵¹ Palmer *New Zealand's Constitutional Culture*, supra at n 12.

⁵² That number of appellate judges would clearly be insufficient to cover the Court of Appeal's workload. Every year the High Court supplies approximately 85 judge days (effectively two High Court Judges every week) to sit on criminal and civil divisions of the Court of Appeal, such divisions being presided over by a permanent member.

Judges have no such unifier. Indeed the common law tradition is that individual judges are independent even of one another. Some commentators regard the feature of a dissenting judgment as being rooted in that common law tradition of independence.⁵³ The higher courts meet annually for a 2½ day conference. The District Court usually meets once every 2 or 3 years.⁵⁴ But such conferences are never used to ventilate constitutional issues of judicial concern.

All four levels of the judicial hierarchy have their own Head of Bench. The Chief Justice remains the head of New Zealand's entire judiciary. The Head of Bench job is an unenviable one involving, of necessity, substantial amounts of administration which is not regarded as an attraction of judicial appointment. Heads of Bench, however, speak out effectively when occasion demands.⁵⁵

As with other groups involved in New Zealand's government, generalisations about judges are impossible. They share with other human beings the normal range of strengths, foibles, and personalities. They have certainly demonstrated legal ability and intellectual acumen, otherwise they are unlikely to have been appointed. They are supportive of one another and value collegiality. They all have a commitment to their task. The Chief Justice is correct when she writes:⁵⁶

The fact of the matter is that judicial office and the judicial oath are taken very seriously indeed by Judges. Judging is not the exercise of personal power according to personal preference. It is always to be justified with reasons.

⁵³ See Dame Sian Elias, *The Next Revisit: Judicial Independence 7 Years On* (2004) 10 *Canta LR* 217; Lord Goff *The Future of the Common Law* (1997) 48 *ICLQ* 745, 755.

⁵⁴ Such conferences help promote collegiality but largely focus on matters of administration, topics which touch on the law (such as the economy, health, DNA) and continuing legal education topics. Over the past three years the High Court has had an additional one day conference which largely focuses on the increasing pressures that the Bench has faced in recent times.

⁵⁵ Sometimes this is in a reflective and deliberate way in a public address or article. Excellent examples are Sir Thomas Eichelbaum's inaugural Neil Williamson Memorial Lecture; *Judicial Independence Revisited* [1997] 6 *Canta LR* 421; Elias *The Next Revisit*, op cit. The Chief District Court Judge this year made some stringent criticisms over security concerns in court buildings. In 2007 the Chief High Court Judge, Randerson J, went public with quick results to stress to parliamentarians the need to hasten the passage of legislation which would permit serious Class A drug trials to be banded to the District Court in a situation where the High Court's criminal workload was close to being overloaded by the influx of methamphetamine trials. The Principal Family Court Judge and the Principal Youth Court Judge are particularly adept at defending and explaining their jurisdictions.

⁵⁶ Elias *The Next Revisit*, op cit 227.

Few judges are beguiled by the occasional publicity which attaches to their role. Television has joined the print media in courtrooms to report high profile trials. But I doubt whether that has affected judicial behaviour. Again I think the Chief Justice is right when she commented that “... what ... the greater accessibility of the electronic media has done, is emphasise the courts are the courts of our communities. That is a good thing”.⁵⁷

Many judges, particularly appointments over the last decade, have formidable people skills and distinct personalities. But these are rarely seen by the public. Judges who court publicity, release their judgments to the media in advance of releasing them to the parties, who arrange for letters to be written supporting their judicial promotion, or who publicly cast aspersions on the intellectual ability of their colleagues are aberrant and, fortunately, rare. Sir Ivor Richardson, a former President of the Court of Appeal, stressed the transience of judicial influence and reputation.⁵⁸

Judges are professional. They should not be concerned about their image or making their mark. It is a mistake to try to further a great vision with an ideal legal world. Lawyers who want to change the world should go into politics. The healthy reality is that the sands of time quickly wash over the great majority of appellate judgments – and that is how it should be.

Very few judges aspire to or will become a Denning, Owen Dixon, Robin Cooke, or Oliver Wendell Holmes. A judge’s case load and mix of work provide few opportunities to leap out of bed in the morning inspired to strike a blow against sovereign power or for judicial independence! Nor will judges consciously seek public attention.

This brief sketch is enough to suggest that New Zealand judiciary is institutionally unlikely to be proactive in promulgating its constitutional role. Occasional papers like this might help, but the impact or lasting effect of such judicial addresses is problematic.⁵⁹

⁵⁷ Elias *The Next Revisit*, op cit 222. But in recent times arguments have been raised that extensive media publicity in high profile trials such as *Bain* and *Weatherston*, with online stream reporting, constitutes a serious risk to the perception of jury trials and their integrity. Too many people think they know all about it.

⁵⁸ Sir Ivor Richardson *Closing Remarks* (2004) 2 NZJPL 115, 119.

⁵⁹ Sir Thomas Eichelbaum felt the need to explain to the public the significance of the judiciary’s role and independence “to the well-being of a free and democratic community”. Eichelbaum *Judicial Independence Revisited*, op cit 435.

Access to Justice and User Pay

One extraordinary feature of Ministry of Justice control of the financial aspects of the judicial arm is the entire system of court fees and hearing fees. In civil litigation, filing fees have to be paid for both originating applications and interlocutory applications. There are also, in the High Court, hearing fees which amount to approximately \$1,300 per half day.⁶⁰ These fees can be waived in the discretion of a Registrar, which is often the case where legal aid is involved.

The Ministry of Justice's philosophy for many years now has been that, because the judiciary is a scarce and highly qualified resource, those who resort to it need to defray the cost. Thus the fees which for the last financial year available approximate \$26,173,000.⁶¹

Think for a moment about the constitutional implications of this. In medieval times the sovereign embodied all three arms of government. Some medieval monarchs unwisely tried to sell justice. That great 1215 constitutional document, Magna Carta, provides in chapter 40:

Nulli vendemus, nulli negabimus aut differemus rectum aut justiciam.

King John covenanted with his barons that to no one would he sell and no one would he refuse or delay right or justice.⁶²

The difficulty which King John faced with the loss of his fiefdoms in Normandy, Anjou, and Maine, as did some of his successors, was the need to finance war in France. The King embarked on the outright sale of justice, sale of writs, and fees payable for outcomes. (The Barons were the main litigants). The practice not only raised considerable revenue but also caused much disquiet. Chapter 40 resulted.

A strong argument can be made that the requirement to pay filing fees and hearing fees amounts to the sale of justice. Is there anything comparable with the other two

⁶⁰ High Court Fees Regulations 2001, r 5(1) and Schedule.

⁶¹ Ministry of Justice, Annual Report, 1 July 2007-30 June 2008.

⁶² See Magna Carta 1297, Ch 29. This re-enacts chapter 40 of the 1215 Carta. See s 3(1) and Schedule 1 of the Imperial Laws Application Act 1988.

arms of government? There is not. It would never seriously be suggested that a citizen would have to pay \$100 to consult his or her Member of Parliament, or \$5,000 for the privilege of travelling to Wellington to lobby a Minister. Why is recourse to the judicial arm of government, for the purpose of the courts' constitutional role of resolving disputes, any different?

A second access to justice issue with which you will be familiar is the funding of legal aid. Effective representation in court means engaging a lawyer.

Legal aid schemes in New Zealand and elsewhere require money. Reducing or holding the level of legal aid remuneration has two undesirable effects. It discourages able lawyers to take legal aid briefs. And it causes an increase in the numbers of litigants in person who understandably are all at sea. This consumes judicial time while judges endeavour, patiently, to explain procedural issues to self-represented litigants. The result is a departure from the perception of even handed justice if only because the judge has to spend more time with the unrepresented litigant than with the represented.

The cost and efficiency of the administration of justice are areas where the legitimate constitutional concerns of the executive and judiciary meet. The current Minister of Justice, for instance, has made clear his interest in criminal justice reform to address costs and trial delays. There can be no quarrel with this as a legitimate ministerial concern. But those same issues are legitimately matters of judicial concern. Judges abhor lengthy trial delays, unnecessary or hopeless pretrial and bail appeals, and indifferent (a small minority) counsel on legal aid. The constitutional challenge is for both arms to pool their experience and perspectives. Because, properly, judges cannot be seen to be opposing policy initiatives in the criminal justice and penal policy areas, the judiciary's default response is to remain silent. Thus, areas of acute concern to the judicial arm's business frequently become, or are seen to be, the exclusive preserve of the executive.

The fiscal balance between the two relevant arms of government is a difficult one. Total control of the purse strings by the executive arm is problematic. The dilemma

was recognised and fairly put by the former Chief Justice of Australia, Murray Gleeson, who stated:⁶³

The administration of civil justice is not merely one of a number of alternative forms of dispute resolution. It is part of government. There are, therefore, major issues involved in requiring litigants to pay for court services. The courts are not merely service providers, and governments have responsibility to make justice available to the public. Attempts to introduce user-payers justice suffer from both practical and theoretical difficulties. Yet litigants are using valuable and scarce resources, and modern judicial control of litigation should aim to reflect that fact.

The Media and Criticism

Media coverage of judicial work has decreased. The internet has threatened the economic base of the print media. World-wide the numbers and content of daily newspapers have decreased. Dedicated court reporters are now a rarity.⁶⁴ The nature of the electronic media works very much against in-depth reporting. What will be reported are controversy and conflict. In the face of economic pressures and competition from the electronic media over the past 30 years, the print media increasingly focuses on entertainment rather than information.

This inevitable selectivity of media coverage applies to the detriment of all three arms of government. A good day's work or routine outcomes are not news. Criminal trials, particularly if the alleged offending has excited public interest or outrage, inevitably and properly receive media cover. Civil work is nowadays rarely covered unless it is some high profile defamation case, or a local body, government department, minister, or sports personality is the litigant.

The public are understandably concerned about such issues as offending whilst on bail, paedophilia, gang violence, homicides, sexual offending involving young children, and terrorists.⁶⁵ It is significant that most of the very public clashes in the

⁶³ Hon Murray Gleeson *Some legal scenery* (Judicial conference of Australia, Sydney, October 2007).

⁶⁴ In July, during the Phillip Field trial there was no reporter in court to witness the dramatic discovery by counsel, that the accused, when being cross-examined, had information written on the palm of his hand. The *New Zealand Herald* only discovered what had occurred as a result of a leak from the Bar and had to request access to the evidence transcript. The story appeared two days later.

⁶⁵ Because of public reaction to this type of offending the same topics are of interest (and legitimately so in a democracy) to politicians.

United Kingdom over the past 15 years between Home Secretaries (particularly Michael Howard (Conservative) and David Blunkett (Labour)) and the judiciary have involved the interface between the courts' functions of sentences and judicial review, and attempts by the executive to control the outcomes of sentences, parole, and refugee policies in refugee and immigration policy areas".⁶⁶ Thus, perceived light sentences in these areas, successful appeals against sentence which reduce prison terms, offending (particularly serious offending) committed whilst on bail, and repeated offending, will often excite strong public feelings (sometimes bordering on outrage) which lead to criticism of the courts and judges involved. The criticisms can be localised, or they can be nation-wide.

On occasions intemperate criticisms of the judges appear, sometimes supported by the media. Mr Wayne Brown, a former Auckland District Health Board Chair, in the wake of the Court of Appeal judgment⁶⁷ overturning the trial judge's judgment in the *Diagnostic Medlab* case referred to the judge as "some dumb judge" and suggested that because he had got matters "completely wrong" the judge "should go".⁶⁸ Subsequently a *New Zealand Herald* columnist opined that the judge should resign. Comments of this sort are constitutionally offensive.

Criticism of this type is impossible to counter. The Solicitor-General and the Attorney-General can rarely defend the judiciary in these instances because the Crown is usually involved as a party. And by long convention the judges themselves are gagged. They cannot enter into a vigorous debate with their critics.⁶⁹ And in a democratic society which values the freedom of expression, the criticism of the judiciary and individual decisions is legitimate. By and large criticism (coupled with

⁶⁶ See for example, published articles in *The Guardian* edited by Clare Dyer "Judges reveal anger over curbs on power" and "Judges speak out against erosion of independence by Government" *The Guardian* (London, United Kingdom, 26 April 2005) and also Bradley *Relations between Executive, Judiciary, and Parliament*, op cit.

⁶⁷ *Lab Tests Auckland Limited v Auckland District Health Board* [2009] 1 NZLR 776.

⁶⁸ "Wayne Brown calls for Judge to go" *Sunday Star Times* (Auckland, New Zealand, 28 September 2008).

⁶⁹ This is another important distinction between the judicial and legislative arms of government. Parliament is historically a debating chamber. A first instance decision can be upheld or reversed on appeal but debating the merits of a decision is impossible.

the appellate structure) is a feature of judicial accountability.⁷⁰ Academics and journal contributors will frequently and legitimately comment adversely on judicial decisions which appear to be wrong, or a departure from the corpus and principles of a particular branch of the law.

The executive and Parliament too are constantly subject to criticism, much of it unfair. The tone and mindset of many reporters who interview politicians is that the interviewee is being evasive or has something to hide. But criticism of the judiciary is, because of the constitutional position of judges, essentially one-sided. Champions seldom exist.

Certainly the judiciary has taken some steps to ease the flow of information to the media. In 1997 a judicial communications officer, who is a member of the Chief Justice's staff and is Wellington based, was appointed. That officer assists all levels of the judiciary and advises Heads of Bench and judges on media and communication issues. A judicial decisions website has been established. The Supreme Court regularly, and the Court of Appeal occasionally, issue press statements to accompany the release of judgments. But none of these initiatives really address the problems I have identified. The right to criticise and attack authority figures is an important right in a democracy. But the judicial arm is, for the reasons I have stated, particularly vulnerable to media-inflicted damage. One communications officer for 217 judges contrasts starkly with the media resources available to government departments and ministers. And beyond the traditional media sits cyberspace, with its blogs and sites, which are impossible to control.

⁷⁰ The New Zealand Parliament is accountable on a triennial basis to the electors although, with the introduction of MMP and the tendency of parties to place electorate MPs reasonably high on lists, local accountability of a MP is perhaps diluted by a MP, defeated in his or her electorate, being returned as a list MP. The traditional accountability of cabinet ministers has clearly eroded in Westminster parliaments over the last half century. The only cabinet minister in recent times to resign was the Hon Denis Marshall, the Minister of Conservation, in May 2006 because as Minister he considered he should be accountable for the Cave Creek platform disaster. Scott *The New Zealand Constitution* (1962) at 127, gives the example of the Minister of Works in the 1930s Mr Semple who declined to resign advancing the understandably pragmatic observation that although he was responsible it was not his fault!

Chipping Away at the Foundations⁷¹

In this section I highlight a few (space does not permit an exhaustive list) of the impediments faced by the judicial arm of government in New Zealand over recent years. Some of these relate to status. Some relate to legislative initiatives. Many relate to the tensions which arise out of the obligation of the Crown, through the executive arm, to fund the court system which is the institution through which the judicial arm functions.

Status Indicia

I see the official recognition of the status of judges as being merely a symptom of the regard which New Zealand culture accords the judiciary. But to earlier generations of judges, and particularly those holding office in the middle years of the 20th century, official status and recognition were important. Given that New Zealand, across its entire culture, is arguably an egalitarian society, individual office holders normally do not set much store on the status they are accorded. They would be chopped down to size if they did.

Most states have what is called an Order of Precedence. This sets out, usually for formal state occasions, the order in which people will process or be seated. The British Table of Precedence has to be seen to be believed and will answer all your questions on such arcane topics as whether the second son of an earl walks into dinner in front of or behind the Bishop of Bath and Wells or the High Commissioner for Australia. Nonetheless, Orders of Precedence, which are the preserve of the Executive, do say something about the importance with which people are formally ranked.

In 1973 the Labour Government of Norman Kirk re-ordered the Order of Precedence, much to the anger of the judges at that time. Only the Chief Justice retains high rank, being behind cabinet ministers and former Governors-General, but

⁷¹ Sir Thomas Eichelbaum in his *Judicial Independence Revisited*, op cit 422, considered the danger to judicial independence was “an insidious weakening of the castle foundations over a period of time”.

ahead of ambassadors and the Leader of the Opposition. Judges of the Supreme Court, Court of Appeal and the High Court rank behind members of parliament but ahead of mayors. This is in marked contrast to the Order of Precedence for the Federal Government of the United States where Associate Justices of the Supreme Court (and indeed retired Associate Justices) rank ahead of members of the cabinet, senators, governors, former vice presidents and congressmen. Scrutiny of the Orders of Precedence of Canada, the Commonwealth of Australia, and those Canadian and Australian provinces and states which have Orders of Precedence, reveals that certain of the judges of the highest courts, and in many instances the equivalent of our High Court, rank ahead of members of the legislature.

I do no more than to suggest the downgrading of the senior judiciary in 1973 was regrettable. At a symbolic level, and for unfathomable reasons, the New Zealand judiciary is not ranked as highly as it is in comparable democracies. That said, the judiciary, particularly its senior members, are generously treated when it comes to the bestowal of Honours.

The Supreme Court

At the apex of the judicial arm sits New Zealand's Supreme Court. The restraints of judicial comity prevent me from criticising the Supreme Court. Far from wanting to criticise it I applaud it. New Zealand jurisprudence has benefited from a number of high quality and well researched judgments. What I touch on in this section are perceptions of the Supreme Court which regrettably have called into question what ought to be its leadership role of the judicial arm.

The controversy which surrounded the passage of the Supreme Court Act 2003 and the public debate which generally surrounded the political decision to replace the Judicial Committee of the Privy Council by a domestic second tier appellate court, was unhelpful and did little to enhance the status of the judiciary.

My personal view, both then and now, is that against New Zealand's historical and political development, especially since the end of the Second World War, having a court at the apex of our judicial hierarchy on the other side of the world made little

sense. Yes, the calibre of the British judges was high, but what was it about New Zealand which made it difficult to follow the same route which Canada and Australia (comparable democracies and, like New Zealand, old Dominions) had taken many years previously?

There were a number of interest groups, including unfortunately some segments of the Bar, which attacked the entire idea of the Supreme Court. Judges would be of inferior calibre. The government of the day might try to stack the court with appointees who shared its political philosophy. The pool for high calibre judicial appointments was too small. One Auckland Silk submitted that High Court appointments were, in the main, second rate. Parliament divided on the passage of the relevant legislation. Ideally, in untroubled times, constitutional legislation should not be divisive.

Thus, through no fault of its own, the Supreme Court embarked on its role under a cloud. Destabilised perhaps by the strength of criticism, and doubtless wanting to give the lie to suggestions that it might be tempted to pack the Supreme Court, the government's initial appointments were uncontroversial. The four members involved were the then senior judges in the Court of Appeal.⁷²

There has been no criticism of the way the Supreme Court during the five years of its operation has carried out its responsibilities. On occasions there has been some surprise expressed by the Bar at decisions to grant or refuse leave.⁷³ Perhaps, with the advantage of hindsight it is regrettable that in the important *R v Hansen*⁷⁴ decision which threw up important constitutional issues about the range of ss 4, 5, and 6 of the New Zealand Bill of Rights Act 1990, there was no discernible ratio and the five judgments were to differing extents inconsistent with one another. Similarly

⁷² The Chief Justice is the senior Judge of the Supreme Court. The initial four appointments were Gault, Keith, Blanchard, and Tipping JJ.

⁷³ Given the high degree of public interest and the difficult interface of administrative law and commercial law it is perhaps surprising that leave was not granted in *Diagnostic Medlab Ltd v Auckland District Health Board* (2009) 19 PRNZ 217. In the same week that leave was declined leave to appeal was granted in *Jeffries v R* SC 84/2008, 4 February 2009, a case where a litigant was disputing a costs award in the Court of Appeal of \$750. In *Dysart Timbers v Neilsen* SC 54/2008, 15 May 2009, a case involving accord and satisfaction and whether a term should be implied, of the nine judges who considered the issue, the only two who disagreed were a minority of two on the Supreme Court.

⁷⁴ [2007] 3 NZLR 1.

in *Brooker v Police*,⁷⁵ the Court divided and the more interesting question of whether, as a matter of policy, the freedom of expression right extended in New Zealand society to protests which breached privacy of office holders inside their homes when they were not performing public functions was unaddressed.

One of the many suggestions made to the then Attorney-General in 2003 was that it was an error to house the new Supreme Court in Wellington. It would be too close to the Court of Appeal. The judicial community in Wellington was too small to have the two highest courts in close geographic and social proximity. Alternatively the Court of Appeal could be moved to Auckland. The Attorney-General, and correctly so, took the view the judges were well-practised in exercising their judicial function and would not be influenced by proximity of that type. Although concerns are periodically expressed about the inability of the inhabitants of a small city, such as Wellington, to remain aloof from the concerns of government, Ottawa and Canberra too are small cities.⁷⁶

But doubtless, as the years roll on, the Supreme Court's stature will continue to grow. How it performs its leadership role in the judicial arm of government will ultimately be judged on the calibre and consistency of its judgments and the messages they send. The Court will be a strong leader of the judicial arm if its appointees have a keen sense of constitutional issues and underscore the importance of the judicial arm of government.

Purse Strings and Control

There are inevitable fiscal tensions between the judicial and executive arms of government. Under our current arrangements financial control, and to some extent administration of the judicial arm, are the preserve of the Ministry of Justice.

There may be some significance in the fact that one of New Zealand's earliest judges, Justice Henry Barnes Gresson, who was appointed in 1857 shortly after his

⁷⁵ [2007] 3 NZLR 91.

⁷⁶ In legal circles the fact that all five direct appointments from the bar to the Court of Appeal have been Wellingtonians excites curiosity.

arrival in New Zealand, resigned in 1875 because of his refusal to accept that the Justice Minister had the right to order his transfer from being a resident judge in Christchurch to Nelson.⁷⁷

I do not argue that there has been a concerted attempt on the part of the executive to chip away at or diminish the independence and strength of the judicial arm of government. But the Chief Justice, in her Neil Williamson Memorial lecture address five years ago, did point to certain pinpricks.⁷⁸ These included the employment status of judges' associates and clerks being changed from Crown prerogative employees to Ministry of Justice employees, and the long-running issue of the judges not having their own computer server but being part of the Ministry of Justice's network.

The difficulty is, the judiciary has no responsibility for its own administration. It is totally dependent on the Ministry of Justice. There was, from October 1995 to 1 October 2001, a separate Department for Courts.⁷⁹ That, however, was remerged into the Ministry of Justice. There remains a separate Minister for Courts. The Justice portfolios have, for some time now, been divided.⁸⁰

The ramifications of this Ministry control of judicial administration are considerable. Judges' salaries are handled by the Ministry's payroll section. The Ministry alone dictates the supply of staff and buildings, although there is consultation. Ministry personnel have overall responsibility for staffing requirements in High Court Registries and the preparation of judicial rosters.

High Court administration is the preserve of the High Court Management Committee, chaired by the Chief High Court Judge, on which some List Judges and

⁷⁷ Gresson, Henry Barnes, from *An Encyclopaedia of New Zealand*, edited by A H McLintock (1966).

⁷⁸ Elias *The Next Revisit*, op cit.

⁷⁹ Sir Thomas Eichelbaum in his Neil Williamson memorial lecture in 1997, op cit, saw the creation of a new Department as court governance moving off the bottom rung in a continuum of court governance models. The abolition of the Department for Courts (although Courts remains a division of Ministry of Justice) perhaps represents slipping back off the rung.

⁸⁰ Under the current administration and the previous administration the portfolios of Attorney-General and Minister of Justice have been held by different Ministers. For most of the period from the 1960s to the 1980s a single cabinet minister was both the Minister of Justice and the Attorney-General.

key Ministry personnel sit. The administration of judicial libraries throughout New Zealand is the responsibility of the Judicial Libraries Management Board on which all levels of the judiciary are represented. But the purse strings are inevitably held by Ministry officials.

By and large the system works well. But hidden under the surface is the vital constitutional issue, by no means unique to New Zealand, of the cost and funding of the judicial arm of government. That funding is controlled by the Executive, determined in turn by budgetary provision from Parliament. The Ministry of Justice, like all ministries, must lobby and bid at various budget rounds in Wellington. When times are tight the flow of money reduces.

Despite the existence of a High Court Registry in Tauranga, since September 1987, clear demographic evidence of population growth in the Bay of Plenty and the inefficiency of the Tauranga Bar having to travel regularly across the Mamakus to Rotorua for short appearances, the provision of video conferencing facilities and High Court courtrooms in Tauranga (with judges sitting) have been a long time coming.

The new Manukau District Court, officially opened in December 2000, is wholly inadequate in terms of staffing and space. Until recently there was a demonstrable shortage of jury courts in the Auckland region (both High Court and District Court) and insufficient courtrooms for multi-accused trials. Court building programmes during my lifetime seem to go in fits and starts. There was a huge building programme, particularly in provincial centres, under aegis of the Hon. Ralph Hanan in the 1960s. There was another surge under the aegis of Sir Geoffrey Palmer in the 1980s and now, it would seem, there are further works in progress. Most of these building programmes have been driven by inadequate facilities rather than by future planning.

The pressure on judges and their workloads have increased dramatically, even in the nine years I have been a Judge. The complexity of rostering is such that the High Court rosters (available a year in advance) are now the sole responsibility of a National Rosterer. This system is efficient and helpful. But what it cannot

accommodate, and there is less flexibility than there was, is the need to provide judges with adequate time for writing judgments and reflection.

Judges are not meant to rush to judgment. Some work is routine and can be dispatched by way of oral decision. But civil litigation has become enormously complex. High Court civil and criminal trials have changed swiftly from being of two to four days' duration to frequently over a week. Different judges have different work habits. But the time needed at all levels of the judiciary both to preside over cases and to write judgments on complex reserved decisions has to be found and balanced. Most judges would tell you the balance is currently not right. The best time to reflect and write a judgment is immediately in the wake of the hearing. Sometimes judgment time is immediately available. Usually it is not. As a result judgments are delayed, litigants are kept waiting, and the Bar, with some justification, becomes critical.

Providing more judges, the immediate response, is not the answer if only because there is no room to put them. There are insufficient courtrooms for more judges. More courtrooms require more staff which requires more money which the Ministry is understandably reluctant to provide.

There are no easy answers to these problems. But they are problems which need to be addressed. And the judicial arm of government is virtually powerless to do much about it. When there is effective and harmonious relationship between the justice ministers and the Heads of Bench much can be achieved. When such a relationship does not exist there may be difficulties. But the relevant Ministers alone do not have the ability to increase their budget allocations. There are other government demands and priorities. The degree of political will to fund the judicial arm of government at an adequate level is not always high.

Sentencing Council and Law Commission Initiatives

In 2006 the Law Commission produced a report, *Sentencing Guidelines and Parole Reform*,⁸¹ which recommended the establishment of a Sentencing Council. A number of reasons lay behind the recommendation. One was increasing muster numbers in prisons. Another was research suggesting that the imprisonment rate for certain offences (particularly driving offences) varied from region to region. The fact that imposed sentences and their lengths impact on the money the executive needs to provide to service prisons was a policy factor.⁸² There was also a theme that sentencing policy should arguably be the preserve of Parliament, being representative of the community, rather than of judges. These recommendations led to the Sentencing Council Act 2007.⁸³

Although some judges supported the objectives of the legislation and noted that the Sentencing Council would comprise judicial members, not all shared that perception. The traditional analysis that Parliament proscribed specified activities as crimes and set out maximum sentences, leaving it for the judiciary to do justice in individual cases by exercising the sentencing discretion (subject to the Sentencing Act 2002), is not an unrespectable preference.

In the event, Parliament divided on the passage of the Act. The current Government made clear its opposition at an early stage. The proposed regime of a Sentencing Council will not proceed. Interestingly, well before the Act had cleared Parliament the Law Commission set up a Sentencing Establishment Unit which had the task of developing guidelines. Some judges served on that Unit, in effect laying the ground work for a sentencing regime which was contentious well before it passed into law. It is doubtful whether that blurring of constitutional roles can be justified.

Had the regime proceeded there would have been an undoubted diminution of judicial discretion in a constitutionally important area. Courts traditionally hold the

⁸¹ New Zealand Law Commission *Sentencing Guidelines and Parole Reform* (NZLC R94 2006).

⁸² The Hon Grant Hammond “Sentencing: intuitive synthesis or structured discretion?” [2007] NZ Law Review 211.

balance between the Crown and the citizen in the criminal arena. Sentencing guidelines would undoubtedly have curbed the discretion of sentencing judges to do justice in the infinite variety of cases over which they preside. Those factors cast doubt on the assumption that sentencing policy is more properly the preserve of Parliament than the judiciary. The entire episode, in my view, points to a tendency to fetter the judicial arm.

Another Law Commission initiative related to the prerogative writs. The Commission's issues paper *Review of Prerogative Writs* proposed amendments to the Judicature Amendment Act 1972 and the removal of extraordinary remedies which are part of the High Court's inherent jurisdiction under s 16 of the Judicature Act 1908. The Law Commission surprisingly stated it did not accept any notion of an inalienable inherent jurisdiction residing in the High Court.

A submission by Justice Fogarty trenchantly stated that New Zealand and United Kingdom parliaments had never sought to replace the common law jurisdiction of superior courts, which had developed to restrain abuse of power by the Crown, and that to do so would effect a significant change in the constitutional arrangements which had been in place since the Act of Settlement.⁸⁴ In the event the Law Commission abandoned its proposal.

Both these episodes perhaps point to the need for constant scrutiny and rigorous analysis of proposals designed to reduce or fetter the powers of the judicial arm.

Part Time Judges

The District Courts Amendment Act 2004⁸⁵ made provision for judges to sit on a part-time basis whilst holding standard judicial warrants. This is an interesting provision. A perusal of the parliamentary debates suggests that the provision was driven in part by a perception that part-time appointments might make the judiciary a

⁸³ See, for a description of all these developments, generally sympathetic to the policy of the Act, Justice Graham Panckhurst's Neil Williamson memorial lecture (2008) 14 *Canta LR* 191.

⁸⁴ See MacLennan "Reviewing the Review" (31 October 2008) *NZ Lawyer* 10.

⁸⁵ The provisions with which I am concerned found their form in s 5AA of the District Courts Act 1947.

more attractive career option for women, particularly those with children.⁸⁶ Certainly the debates contain references to the position of women and the general desirability of job sharing. In more recent times the provisions have attracted the attention of some judges approaching retirement who are looking for a form of painless transition.⁸⁷

There are, I suggest, risks inherent in this power to appoint part-time judges. It reinforces the perception that being a judge is some form of public service “job” which should be regulated by gender-equity considerations. The other arms of government have no such provision. We do not have a part-time Governor-General. Nor has there ever been any suggestion that Members of Parliament or cabinet ministers should job share or exercise their responsibilities on a part-time basis. The fact that an albeit uninvoked provision of this type passed into law with little adverse comment is further evidence of misconceptions about the judicial arm. An argument can be made that the very existence of the provision demeans somewhat the importance of the judicial arm of government.

Conclusion

This paper has of necessity been lengthy. It is impossible, if one wants to understand the topic, to avoid historical developments and constitutional theory.

I think Matthew Palmer is right, however, as was Sir Thomas Eichelbaum, in concluding that the constitutional importance of the judicial arm of government and its independence are imperfectly understood and not deeply entrenched in New Zealand’s culture.

There are attendant risks in that situation. Those risks include an imperfect understanding of the judicial role, a belief that the judiciary are junior or unimportant players, and a failure to appreciate the centrality of the judicial arm in maintaining

⁸⁶ This is a laudable objective although, in my experience, Heads of Bench and List Judges go out of their way to accommodate family responsibilities in rostering and leave.

⁸⁷ To date the provision to appoint part-time judges has not been used. The provision is totally different from appointing Acting Judges under s 11A of the Judicature Act 1908.

the rule of law which overarches and secures our constitutional arrangements. I have identified a number of issues and problems. The uneasy interface between the judiciary and the Ministry of Justice is an obvious area of concern.

So what is to be done? Constitutional analysis, the function of the judicial arm of government, and inherent risks to it, are not “sexy” topics likely to capture the imagination of the public or the media. Certainly attention will be engaged if there is some hint of conflict.⁸⁸ However, a healthy democracy or constitutional state should not need conflict to alert it to its life blood and underpinnings.

I have said twice that the judicial arm of government needs champions. Easier said than done. But judges cannot do this alone. We need help from a wider constituency of well informed and alert citizens. I see law students, legal academics, and particularly the profession, who are subject to a statutory obligation under s 4 of the Lawyers and Conveyancers Act 2006 to uphold the rule of law, as natural and appropriate allies.

Should there be a programme of action? I suggest there should. This should include:

- Close scrutiny by the profession and academics of the access to justice and fiscal control issues which I have highlighted.
- Active involvement with senior high school students teaching civics and explaining the three arms of government.
- Being vigilant and supportive when occasional threats to the judicial arm emerge, including unfair criticism, diminution of the status of judges, and speaking out in those difficult areas where the issues which excite public anxiety and anger (particularly in the criminal arena) are being debated. Modern European history is replete with examples where impassivity in the face of threats to unpopular sections of the community eased the road

⁸⁸ See the *New Zealand Herald* articles in March and April 2005 covering the supposed conflict between the Chief Justice Dame Sian Elias and the then Attorney-General the Rt Hon Michael Cullen.

to tyranny. I do not suggest this will happen in New Zealand in the foreseeable future. But it is a stark fact that criminal law is frequently the arena for personal and human rights contests.

- Be alert and do not hesitate to speak out, or lobby, or write in situations where resources are delayed or inadequate, or where the important access rights of citizens to the courts are being inhibited for fiscal reasons.
- Appreciate and inform others how the courts, and the legal profession which has that all-important right of access to the courts, underpin democracy.
- Be fierce and proactive in ensuring that judicial and professional functions remain potent and are enhanced.

I have no fears that, like the hapless Tresillian CJ, I will be taken out by an irate government and hanged! Nor do I expect to be closeted with the Governor-General to be made more compliant. Nor is there any risk of judges being dismissed or of Parliament becoming tyrannical. But the fact that those outcomes are currently impossible reflects a long and proud constitutional history throughout which the rule of law and the judicial arm of government have evolved to secure and underpin democracy. Be aware. Be alert. Guard it well.

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