

ADDRESS TO THE ROTARY CLUB OF AUCKLAND INC.

**Held at the Stamford Plaza
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Sian Elias¹

After such a week as we have had, it is hard to speak of anything except the tragedy in Christchurch. Our hearts are with the people of that devastated city. Our heads are full of the stories of loss and sorrow. The sombre truth is that there is a long and arduous journey ahead not only for them, but for all of us. Whether we make the journey as one community or whether we fracture along fault lines of difference may well be a defining moment for us as a nation in the 21st century.

In the end what marks a community is the sharing of common values. We do not talk much about values these days. Somehow we seem to treat them as personal and private, but if we do not have common values, public values which set us apart as a nation, then it is hard to see why we resist the Federation next door. Its Constitution, as my Australian friends like to remind me, was drafted to include New Zealand, should New Zealand wish to join up.

I thought today I might talk a little about what we share in our own constitution. Something of the public shared values that make us our own nation. The constitution is too important to be left to lawyers to tiptoe around. The government has embarked upon a review of New Zealand's constitutional arrangements, to fulfil an agreement in the 2008 Relationship Agreement between the National Party and the Māori Party. It is time to get our thinking into order.

One of the purposes of the review is to “stimulate public debate and awareness of New Zealand's constitutional arrangements”.² It aims to identify whether there is support for reform, focussing particularly on electoral reform (including Māori representation) the place of the Treaty of Waitangi, whether we should have a written constitution and whether the scope of the New Zealand Bill of Rights Act 1990 should be expanded. A final report is to be produced by 2013.

A little history

Now, we have been down this track of constitutional re-examination before and always to date without stimulating any real public enthusiasm either for change or for our existing arrangements. That is not surprising

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

² Cabinet Paper “Consideration of Constitutional Issues” (8 December 2010) at 1.

perhaps when we remember that there was no particular enthusiasm in New Zealand for independence, when it was first dangled before us in the Statute of Westminster.³ It took over fifteen years for us to adopt the Statute of Westminster⁴ – well after the other Dominions had embraced it and not until we had been brought to a realisation that we were becoming a nuisance in clinging to the apron strings. Indeed, John Beaglehole’s verdict on us in the 1950s was that “New Zealanders have little talent or desire for abstract constitutional thought”.⁵

The Constitutional Society, made up of many eminent men of the day, presented a petition with a draft Constitution to Parliament for consideration in 1961 but the Public Petitions Committee declined to make any recommendations on it. The Society kept at it and in 1963 secured the appointment of a Select Committee to consider its petitions for a written constitution and the establishment of a second chamber. When the Minister of Justice Mr Hanan introduced a Bill of Rights, in fulfilment of an election commitment, it was referred to the same Committee for consideration. In July 1964, the Committee decided not to recommend action on any of the proposed measures – a Bill of Rights, the reinstatement of a second chamber, or the adoption of a written Constitution. Professor Northey noted in 1965 that the Committee on Constitutional Reform was “probably right in concluding that public interest in this sort of issue is not strong or increasing”:⁶

There is little prospect of any change being effected even in relation to the outmoded provisions of the Constitution Act 1852 and the instruments relating to the office of Governor-General. New Zealanders took only a small part in the development of responsible self-government; in 1947 they showed no awareness of having finally achieved this goal. It would be unrealistic to expect them to devote time and energy to uprooting the remaining vestiges of colonialism or to making innovations that have the appearance of being unnecessary.

In 2004, Parliament set up a Constitutional Arrangements Committee to review our existing constitutional arrangements. It conducted what it described as a “stocktaking exercise”, after which it concluded that “[no problems] are so apparent or urgent that they compel change now or

³ Statute of Westminster 1931 (UK) 22 & 23 Geo V c 4.

⁴ With the enactment of the Statute of Westminster Adoption Act 1947.

⁵ JC Beaglehole “The development of New Zealand nationality” (1954) 2 *Journal of World History* 106 at 115, as cited in Harshan Kumarasingham *Onward with Executive Power: Lessons from New Zealand 1947–57* (Institute of Policy Studies, Wellington, 2010) at 11.

⁶ JF Northey “The New Zealand Constitution” in J F Northey (ed) *The A. G. Davis Essays in Law* (Butterworths, London, 1965) 149 at 179.

attract the consensus required for significant reform”.⁷ Indeed, the Committee expressed the view that “public dissatisfaction with our current arrangements is generally more chronic than acute”.⁸ That verdict suggests acknowledgement of grumbling dissatisfaction, not amounting to a popular will for change.

It is not my wish to suggest we need constitutional reform. It does seem to me however, that a pervasive sense of unease about our constitutional arrangements is not a good position for any country to be in. What I think that condition suggests is that we are not really sure what our constitution is and unable to assess its strengths against values we have never had to confront.

It is in my experience quite common to encounter New Zealanders who do not think we have a constitution at all. That is quite wrong, if understandable. The fact is that our constitution is one in motion. It is in small part composed of statutes, like the Constitution Act 1986 which rather prosaically sets out the working parts of the constitution – the Parliament, the executive and the judiciary – and simply says flatly that they continue to have the powers they had at the coming into force of the Act. It is a measure of our casualness about the constitution that until the 1986 Act, our principal written source was the New Zealand Constitution Act 1852, a statute of the Imperial Parliament. It was enacted to give New Zealand limited representative democracy only. Anyone reading it, at least before late 20th century amendments, would understandably have had the impression that the Governor-General had real powers, that statutes could be disallowed by the Queen and that the Governor-General could set up Māori districts governed by Māori law. It is no wonder that those of us brought up before the late 1980s would have struggled to explain our constitution.

In 2003 we set up a court of final appeal, the Supreme Court, to replace the Privy Council. In a break from our usual reticence about constitutional fundamentals, the Supreme Court Act 2003 provides:⁹

Nothing in this Act affects New Zealand’s continuing commitment to the rule of law and the sovereignty of Parliament.

These then, are the twin poles around which our constitution seems to revolve. They are elements in necessary tension. There are risks in leaving them to be worked out on the hop, if the need arises, if we do

⁷ Report of the Constitutional Arrangements Committee Inquiry to review New Zealand’s existing constitutional arrangements (August 2005) at 8.

⁸ Ibid.

⁹ Supreme Court Act 2003, s 3(2).

not try to develop a better sense of the guiding principles of the constitution. There are risks also in reform if we do not have an understanding of the role of institutions like the judiciary and the police in a system of democratic government. If we do not know where we are starting from, it is not easy to achieve agreement about the direction we take. It is not always easy to appreciate that proposals which seem quite innocent or efficient or pragmatic may trample on basic principle.

The Constitution

The view that we have no written constitution arises perhaps because we have no single text of the constitution. Now, there is some real virtue in not having a single constitutional text. It means we are spared searching for the original intent of the framers, a form of ancestor-worship we see tearing the United States Supreme Court apart and which can be a dead hand on living societies. So there are advantages in our constitutional arrangements that we should be slow to throw over.

It is quite wrong to say that because we cannot point to a single constitutive document that we have no constitution. Our constitution is to be found scattered through a number of important statutes: some (like Magna Carta) of great antiquity, others (like the New Zealand Bill of Rights Act or the Official Information Act 1982), comparatively recent. The Electoral Acts stand in a special category because they establish the conditions of democratic government and have long been subject to supermajority requirements as a result. Apart from Acts of Parliament, constitutional arrangements are also to be found in the Standing Orders of the House of Representatives, or in the Cabinet Manual governing the operation of the executive, or in the Rules which control access to the courts. Sometimes I think we may not be vigilant enough to see changes which impact on these arrangements as impacting on the constitution and deserving of close scrutiny. I want to come on to say something about changes affecting the courts both because they are matters with which I am most familiar but also because the role of the courts in the constitution is easily overlooked.

First I want to conclude this short description of the constitution by referring to constitutional principle. The values to which we conform and by which we judge our institutions. It is a great mistake to see a constitution as static or in institutional terms only. Just as it is a real mistake to expect too much of laws. The rule of law is not a rule of rules. We do not develop greater law-mindedness or constitutionalism by creating another rule. That comes from a constitutional culture.

A great English judge made the point that something has gone wrong if law is only a rule of rules which people adhere to for the purely practical reason of keeping out of trouble.¹⁰ Law responds to a deeply held ethical need.

In New Zealand, moral authority of law and the virtue of government were acknowledged in the speeches at Waitangi. With such beginnings, we should be more confident about our direction.

The courts and the constitution

Because of our constitutional history, some of the more significant principles on which the constitution is based are judge-made principles of the common law. In the British constitutional system we have inherited, the constitution used to be the entire body of law, institutions and customs that comprised the Commonwealth. A common law constitution is a developing system which cannot be distinguished from the law of the realm. The sources of the general law were put by Sir John Salmond, New Zealand's most distinguished jurist, as legislation, custom, precedent and agreement.¹¹

If the New Zealand constitution is in part to be seen in the law of the land, it is difficult for Judges to avoid describing the constitution through cases when required to do so. There are risks here. I am not one who thinks that our constitution is deficient because the courts lack the ability to disallow statutes of Parliament as unconstitutional but it is worth remembering that judicial review arose in the United States because Chief Justice Marshall famously pointed out that when the legislature is limited by law, it is the role of the judges to say what the law is.¹² Saying what the law is remains the responsibility of judges even if the formal omnipotence of Parliament is respected. Usually, that brings the judiciary into collision with the executive, not Parliament. In some statutes, usually enacted to give effect to international obligations, the legitimacy of what Parliament has done may be the subject of judicial comment. The most obvious example is under the New Zealand Bill of Rights Act where it is sometimes necessary to consider whether a measure enacted by Parliament, or adopted by the executive by Regulations, is a justifiable limitation of rights in a free and democratic society.

¹⁰ See Lord Radcliffe "Law and the Democratic State" in *Not In Feather Beds* (Hamish Hamilton, London, 1968).

¹¹ PJ Fitzgerald (ed) *Salmond on Jurisprudence* (12th ed, Sweet & Maxwell Limited, London, 1966) at 112–114.

¹² *Marbury v Madison* 5 US 137 (1803) at 177.

In such cases, as in holding the executive within the limits of what is reasonable when acting under legislative powers, the courts may be pitchforked into controversy. Controversy may arise, too, in interpretation of legislation, particularly under the principles of statutory interpretation that require a rights-consistent meaning to be preferred. In areas of controversy, the position of the courts is exposed if the function being exercised is not understood. In articulating the common law constitution, the role of the courts is particularly vulnerable.

Democratic values are reconciled with the supervision of legality by the courts because Parliament can correct any decision of the courts it is unhappy with, but does that apply to basic constitutional values? This is an area of considerable controversy. So, a number of senior judges in New Zealand and in the United Kingdom have ventured the opinion that if Parliament purported to abolish the courts, that would be unconstitutional and the courts would be obliged to say so. Such a step would remove a basic element in the constitutional balance and overthrow the rule of law. Of course, even to state the proposition is to demonstrate that such a course would never be taken by a democratic Parliament – it offends against our deepest constitutional sense.

Direct threat is not the only thing we need to watch out for. Some reforms may chip away at fundamentals without any conscious design. It is important to be vigilant and open-minded. Starting at shadows is destructive, but so too is laziness of mind. A lot of reform which is rightly regarded as constitutional has taken place largely under the radar, imperceptibly. I do not mean to suggest that it is any the worse for that, but it is worrying if we sleep walk into constitutional shift. Some values may be unconsciously compromised. At the moment we are in the middle of a process of substantial statutory reform of criminal procedure. I wonder whether many outside those involved in criminal justice are taking an interest in it. Potentially, it has constitutional implications.

I do not want to give the impression that the courts can protect against erosion of constitutional principle, if public opinion over the long haul does not hold them to the mark. There are plenty of examples where courts have dropped the ball, particularly during the time of the development of the modern administrative state and at times of social stress, such as war.

Similarly, I do not think that the courts are always equal to the task of preserving access to justice if there is no public belief in it as a necessary constitutional good. In part, that is because in our administrative arrangements for the courts, the executive has significant control over the availability of the courts. Resourcing of the courts is within the responsibility of executive government. Regulations prescribe

the terms on which citizens have access to the courts. Court fees are within executive control. These are matters which should be subject to more public discussion than has been the case, perhaps because they are not seen as touching on the constitutional principle of access to the courts. One of my colleagues has asked, not entirely in jest, whether we would regard with similar equanimity the imposition of fees to have access to a member of Parliament or a responsible Minister.¹³

Part of the problem is that courts have come to be seen as providing dispute resolution services. It has to be said that modern case management adopted by Court Rules may have gone too far in accepting that characterisation. The measurement of outputs and a tendency to view litigants as consumers of services carry potential risks to judicial independence and impartiality. Fair processes and just outcomes cannot be traded off for gains in efficiency. The civil courts are not adequately seen as providers of dispute resolution services. There is public good in court determination because in many cases vindication of right is necessary. Litigation through the courts is not time efficient or cost efficient. It is however fair, open, subject to the discipline of reasons and subject to correction of error through appeal or review. These are considerable virtues which we should not throw over lightly.

In the time remaining, I want to develop the matter already touched on of institutional independence of the judiciary and to say a few things about the other matter under discussion in reassessment of our constitutional arrangements, the place of the Treaty of Waitangi.

Institutional independence

The New Zealand Constitution Act 1986 makes separate provision for the legislative, executive and judicial branches of government.¹⁴ It is not of course my claim that the judicial branch is other than the junior and the least powerful of the working parts of the constitution but in its work it is subject to the direction of Parliament only through legislation. It is not subject to the control of the executive at all. This separation is better understood in constitutional arrangements where each branch has direct authority conferred by the constitution. In New Zealand the independence of the judiciary from other sources of state power is fragile. Judges have security of tenure and salary and can be removed from office only by Parliament.¹⁵ They are however dependent upon the

¹³ The Hon Justice John Priestley "Chipping Away at the Judicial Arm?" (2009) 17 Wai L Rev 1 at 14.

¹⁴ Part 2 (ss 6–9C) of the Constitution Act 1986 deals with the executive. Part 3 (ss 10–22) concerns the legislature. Part 4 (ss 23–24) touches on the judiciary.

¹⁵ Constitution Act 1986, ss 23–24.

Ministry of Justice, a significant policy department with direct interest in much litigation for administrative support.

International statements of basic principles for judicial independence adopted both by the United Nations General Assembly¹⁶ and by the Commonwealth¹⁷ recognise that judicial independence has an institutional dimension. The Supreme Court of Canada has held that administrative independence in the organisation of judicial work and the support necessary to achieve it are aspects of such independence.¹⁸ In the United States, Canada, the United Kingdom and Australia, considerable operational autonomy is given to judges. The United Kingdom Supreme Court, recently removed from the House of Lords, has its own budget, a Registrar answerable to the Court, staff answerable to the Registrar and separate IT support.

In 1995 in New Zealand, the former Chief Justice succeeded in having the administration of the courts administered by a stand-alone department separate from the Ministry of Justice. The Department for Courts was answerable to a Minister for Courts and not the judges; it nevertheless set up a loose partnership to support the judiciary in judicial administration. That step was seen by Sir Thomas Eichelbaum as an intermediate one on the way to judicial control of the administration of the courts. In fact, only a few years later a decision in which the judiciary was not asked for its views folded the Department for Courts back into the Ministry for Justice. Our support staff are Ministry employees. The technology we use for internal communication and in preparation of our judgments is part of the Ministry system. The judges have no effective say in the allocation of the budget for courts and have had little influence in the priorities set by the Ministry. Decisions affecting court performance are largely outside judicial control. I have seen the provision of courts as a substantial undertaking of executive government but had hoped that immediate judicial support would come under judicial control. It is not appropriate for our staff and systems to be part of the executive, which is a major litigator in the courts and subject to judicial restraint where lawful authority is exceeded.

¹⁶ *United Nations Basic Principles on the Independence of the Judiciary*, endorsed in GA Res 40/32 and 40/146 (1985).

¹⁷ *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government*, as agreed by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting (Abuja, 2003) at IV.

¹⁸ *Valente v The Queen* [1985] 2 SCR 673 at [47]–[52].

The Treaty of Waitangi

In 1968 when I studied constitutional law, the Treaty of Waitangi was not mentioned. In a collection of essays published a few years earlier the Professor of Public Law at Auckland University, Jack Northey, in a significant essay on “The New Zealand Constitution” did not mention the Treaty at all.¹⁹

The Treaty of Waitangi Act in 1975 appeared a very modest statute, but it has been transformative of New Zealand society. The work of the tribunal set up under it to make recommendations to the government about how to meet its responsibilities under the Treaty provided a bridge in understanding and brought the Treaty out of the legal dustbin into which it had been relegated in the 1860s. When I wrote my dissertation at Auckland University in 1970 on New Zealand constitutional law – and whether we should have a Bill of Rights Act – I did not even mention the Treaty. Only a few international lawyers, such as Sir Kenneth Keith (now on the International Court of Justice) were interested in treaties. In the same collection of essays in which the essay by Professor Northey appeared in 1965, KJ Keith expressed the tentative view that the Treaty of Waitangi might be enforced as a contract²⁰ but I doubt whether any of his contemporaries in 1965 were thinking of such things. Indeed the Treaty had been famously described as a legal nullity in the New Zealand domestic courts in 1877,²¹ a result eventually (but not without some hesitations along the way) acquiesced in by the Privy Council when it confirmed that, as an international treaty, the Treaty of Waitangi had no force in domestic law.²² Recent scholars have questioned that apparent orthodoxy at least in its application to treaties of cession which otherwise effectively become unenforceable because the ceding party loses standing in international law.

Before we recoil from suggestions that the Treaty of Waitangi might be part of New Zealand constitutional law, we should remember not only the work of such scholars including Sir Kenneth Keith but also some of the arguments made at the beginning of New Zealand. In the 1840s and early 1850s there was considerable support for the view that the Treaty of Waitangi was a foundation of New Zealand law and able to be applied by the domestic courts. James Busby, who had as much to do with drafting the Treaty as anyone, staunchly maintained that it was

¹⁹ JF Northey “The New Zealand Constitution” in J F Northey (ed) *The A.G. Davis Essays in Law* (Butterworths, London, 1965) 149–179.

²⁰ KJ Keith “International Law and New Zealand Municipal Law” in J F Northey (ed) *The A.G. Davis Essays in Law* (Butterworths, London, 1965) 130 at 146–148.

²¹ *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 at 78.

²² *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590 (PC) at 596–597.

equivalent to the 1706 Treaty of Union between England and Scotland and was foundation law in New Zealand.²³ Editorial writers of the day supported his claims which were, unfortunately, never resolved authoritatively by the Privy Council as was attempted.²⁴

Perhaps the greatest New Zealand judge of my lifetime, Lord Cooke, said of the Treaty that “[a] nation cannot cast adrift from its own foundations”.²⁵ He also said, whatever constitutional status the Treaty has, can only remain.²⁶ If that is so, it would be good to think that the Treaty is not an impediment to achieving greater clarity in our constitutional arrangements and that it is, rather, an important source of the values that bind us and set us apart from others. Professor Quentin-Baxter, a distinguished New Zealand constitutional lawyer, said in this vein, and to return to the theme with which I started, that if New Zealand does have a future as an independent nation it was because these islands “were a meeting-place of two great races” and that, even in the worst of times that followed, their dealings together have always had a “certain grandeur”.²⁷

A constitution needs values, such as those of justice spoken of at Waitangi. It needs to look to speak to the future with optimism, as the leap of faith taken in that beautiful setting did. It needs to bind us together and set us apart from other nations, as the Treaty accomplished. It needs to be grand - as what was done at Waitangi was grand.

Conclusion

In drawing this talk to a close, I want to express my appreciation to you for the invitation to address you. Although I am greatly enjoying the work in the Supreme Court, it has the disadvantage that it keeps me tethered to Wellington. Before the Supreme Court was set up I used to spend part of my time sitting in the High Court in courthouses around the country. I miss the pulse of justice able to be taken in such places. I also worry about the effect of remoteness. Good judges must be part of their communities. It is said of Chief Justice Marshall, the great Chief Justice of the United States, that although he could not compare for

²³ Ned Fletcher and the Rt Hon Dame Sian Elias “A Collusive Suit to ‘confound the rights of property through the length and breadth of the colony’?: *Busby v White* (1859)” (2010) 41 VUWLR 563 at 583.

²⁴ *Ibid*, at 599.

²⁵ *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 308–309.

²⁶ *Ibid*, at 309.

²⁷ RQ Quentin-Baxter “Themes of Constitutional Development: The need for a favourable climate of discussion” [1984] NZLJ 203 at 207.

“book learning” with his contemporary, Justice Story, he was the greater judge because he never lost his habit of playing quoits behind the local tavern with the townspeople after the court had finished sitting. In England, the great Chief Justice Mansfield was a friend of poets and when he came to town, “drank champagne with the wits”.

Mind you, I am not sure that we could get away with some of these things today. When I foolishly allowed my son to persuade me to go to a pub quiz with him in Wellington – he thought I would have some antique knowledge of pop music in the 1960s – I was promptly outed in the *Dominion Post*. Even though it had to report that my team had won (a result achieved without any help from me I should say) a number of my colleagues were not very amused, so for me it is a treat to come home to Auckland and be among people who are allowed to be rather more deeply engaged in the community than I am.

I have also appreciated the opportunity to speak about our constitution. On more than one occasion when wrestling with it, I have thought about the English Cabinet Minister lost in a fog on Exmoor. Eventually, after stumbling around for some time, he came across a local and asked which way he should go to get to London. The local stared. “If I was going there” he said, “I wouldn’t start from here”. Well, we have to start from here – and it is a good place to start from if we recognise the history behind us and the principles we can draw from our heritage and which keep the constitution dynamic and responsive to the changing needs of New Zealand society.

In dark times, such as we are now experiencing, we need to remember that we are a national community with shared values. A constitution expresses the shared values that are fundamental to a society. It is also fundamental law which underpins the rule of law, under which all have security. Aristotle believed that law was “the principal and most perfect branch of ethics” – and a constitution is the most ethical branch of law.²⁸

It would be nice to think that we might in the current stocktaking take some steps which would make the constitution more intelligible and accessible. Even if we do not, shining a light on what we have is worthwhile in itself.

²⁸ As cited in William Blackstone *Commentaries on the Laws of England: Book the First* (Dawsons of Pall Mall, London, 1966) at 27.