

Law Commission – 20th Anniversary Seminar
What is Distinctive about New Zealand Law and the New Zealand way of doing law?
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“New Zealand’s Constitution – Is it brilliant or odd?”

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Albert Einstein once said “make everything as simple as possible, but not simpler”. The question posed in the title of this paper requires evaluation, on an either/or basis. However, one of the problems about either/or approaches is that they may lead to oversimplification. Some of the common either/or approaches that arise in discussions of constitutions are between written or unwritten constitutions, judicial or parliamentary supremacy, democracy or “juristocracy”, monism or dualism in relation to international law and national law, national sovereignty or world government, and parliamentary sovereignty or the rule of law.

Sometimes, as one of my examples will show, an either/or approach may be the right one. But what we should be striving to do is to get the question right. This seems to me to be a recurring and critical issue for law reform and indeed for a whole lot of other aspects of the law and lawyering. After discussing getting the questions right, I will address some of the principles, the standards, or the evaluative tools that we should use to assess a constitution. I then discuss the question of how we go about changing the constitution. Finally I will make some suggestions about where we might go from here.

Getting the Question Right

The first example in the constitutional area of getting the question right goes back to the Danks Committee, the Committee on Official Information, established to study access to government information.¹ In a very early meeting of that committee which was comprised mainly of government officials but with two academics, Frank Corner, then the Secretary of Foreign Affairs, said in two very crisp sentences that the Committee had to make a basic choice, between Westminster and Washington. He had served in both of those capitals. Under the Westminster

* This version of the paper draws on the discussion at the Seminar and also benefits from the assistance provided by my clerk, Rebecca Jenkin.

¹ See Reports of the Committee on Official Information, *Towards More Open Government* (1980 and 1981).

system, official information is the Government's information, the Queen's information, and therefore available only if her ministers so decide. This was, of course, the law of New Zealand at the time. However, in Washington, official information is the people's information and accordingly available to the people unless a good reason for withholding it is established. There the issue was stated clearly and, as it happens, in an either/or form. That statement of the question allowed the Danks Committee to move quite quickly to the conclusion that what was previously a "Secrets Act" should become an "Information Act". The Washington approach was adopted and the *Official Secrets Act 1951* was replaced by the *Official Information Act 1982*.

Earlier in that process the question the Committee had to answer had been changed in a fundamental way but by the Government rather than its members. The Committee had been established to report on information classified for reasons of security. Very early in its work it proposed to the Prime Minister of the day that its task be broadened and he agreed. Something similar was seen a few years earlier when the Royal Commission established to examine and report on compensation for work injuries, with the approval of the Government but without any amendment to its terms of reference, made proposals on a much broader basis in respect of all personal injuries.²

My second example in the constitutional area of the value of getting the question right comes from the work of the Royal Commission on the Electoral System. The members of that Commission had been deluged with huge amounts of information about many different methods of voting. Information was provided about preferential systems from Australia, about the alternative vote that was to be found in many parts of the world, about the single transferable vote and about proportional systems of many kinds. The Royal Commission was becoming buried in detail. The Commission was beginning to develop the criteria for judging voting systems (which can be found in the second chapter of the report),³ when the opportunity of traveling arose. This gave the members of the Commission the opportunity to step back a little and think about what we were really doing.

² Royal Commission of Inquiry, *Compensation for Personal Injury in New Zealand* (1967).

³ Royal Commission on the Electoral System, *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (1986).

While in England, on our way to a meeting in the Houses of Parliament, members of the Commission walked through the end of Westminster Hall where for centuries the King's courts used to sit. I had just read an excellent discussion by G R Elton of one of F W Maitland's essays, about a 14th century Parliament⁴. I also read the Maitland essay. I suddenly realized that it was to this splendid Hall that people, elected two by two from their boroughs and towns, had come in those distant centuries, to help the King do his work, work which back then for the most part was court work; it was not about voting money and taxing people for the King's purposes, or making laws: that was not Parliament's primary task all those centuries ago. And so, in the first chapter of the report of the Royal Commission, which is only five pages long, the report asks "[w]hat specifically are elections for?"⁵. Originally, this question had not been clearly posed. The chapter then goes on to discuss, quite briefly, the huge changes that had happened since the English Parliament was established, and the major changes that had happened in New Zealand in the previous century in terms of universal, including women's, suffrage and the development of political parties. In these few paragraphs there is an elaboration of basic democratic principle, but also a recognition that democracy was not the only principle or value that had to be weighed.

The third example is an international one because it is essential that we see our legal system in its international context. For a long time governments and scholars have claimed that international law recognizes a right of humanitarian intervention - that a State can go into another State to protect basic human rights where gross violations of the rights are occurring. The language deployed has generally been "the right of humanitarian intervention". There has been a great deal of agony about the subject in particular since the events in Rwanda, Srebrenica and Kosovo, and more recently in Darfur. Some years ago, the Canadians took a very important initiative in relation to the issue of humanitarian intervention. The Commission it established, the International Commission on Intervention and State Sovereignty, with Gareth Evans, the former Attorney-General and Foreign Minister of Australia, as a member, produced a report in 2001 *not* called "The Right of Humanitarian Intervention" (although this is where they had begun). Rather, the report

⁴ G R Elton, *F W Maitland* (1985). The essay was about the records of the Parliament of 1305.

⁵ Note 3 above, [1.4].

was titled “The Responsibility to Protect”⁶. The Commission did not go quite as far as to say “the duty to protect” but nonetheless the language, the question, had been changed in a very important way. After much difficult negotiation, the 2005 United Nations World Summit, a gathering at the United Nations in September 2005 of Heads of State and Government, endorsed the concept of a “responsibility to protect”⁷ — a responsibility not a right, and protection not intervention. The concept has more recently been affirmed by a Security Council resolution.⁸ There remains of course the huge practical problem of getting that concept to work on the ground. The international community continues to struggle with that problem.

My main point is to demonstrate how important it is, in so many varied contexts, to get the question right. Getting the words right, getting the first sentence right, getting the first paragraph right, is something that a number of my teachers over the years, including Sir Owen Woodhouse, have pressed on me.

Constitutional Values

What are the principles, values and standards by which we should assess our Constitution? I may be allowed to quote the first and second paragraphs of the introductory essay included in the New Zealand Cabinet Manual for the past fifteen years:

A Constitution: What is it?

A constitution is about public power, the power of the state. It describes and establishes the major institutions of government, states their principal powers, and regulates the exercise of those powers in a broad way. While all constitutions have these general characteristics, each constitution is affected by the national character of the state it services.

The New Zealand Constitution: Its main features

The New Zealand Constitution is to be found in formal legal documents, in decisions of the courts, and in practices (some of which are described as conventions). It reflects and establishes that New Zealand is a monarchy, that it has a parliamentary system of government, and that it is a democracy. It increasingly reflects the fact that the Treaty of Waitangi is regarded as a founding document of government in New Zealand. The constitution must also be seen in its international context, because New

⁶ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001).

⁷ 2005 World Summit Outcome, A/RES/60/1, para. 139.

⁸ S/RES/1674 (2006).

Zealand governmental institutions must increasingly have regard to international obligations and standards.⁹

The general description in the first paragraph does not try to indicate how the elements of the Constitution are established, modified and enforced. Nor does it say anything about the values underlying or incorporated in the Constitution, although the second paragraph does make a beginning on those matters. In this section of the paper I select some of the values and rights which do or ought in my view to feature in the New Zealand Constitution.

Over recent decades, the values that should underlie our Constitution have been more clearly articulated in constitutional processes and documents. Democracy is prominent among those values, even preeminent. The importance of democracy as a fundamental principle is discussed in the early chapters of the report of the Royal Commission on the Electoral System. Even the title of that report makes the point: “Towards a Better Democracy”. While that title emphasizes “democracy”, it also includes an evaluative element in the use of the word “better”, and incorporates a sense of process in the word “towards”. The same can be seen in the title of the Danks Committee report as well: “Towards More Open Government”. We are engaged in processes and in establishing processes. Any products of those processes may be altered and indeed so may the processes themselves. We must recognize that we are just passing participants in the processes. As Dame Silvia Cartwright put it in one of her last speeches as Governor-General, we are engaged in a “constitutional journey”.¹⁰

While the Royal Commission on the Electoral System, still in that first chapter, saw democracy as “the fundamental principle of the constitution” it also, importantly recognized that majority rule has its limits. It referred to the extensive freedom of

citizens in groups and as individuals . . . to work out their own destinies. And they participate directly (for instance, through consultative processes) in political and governmental processes important to them.

. . .

Those ideas of autonomy and participation suggest some important limits on any unqualified version of majority rule. How, for instance, is the balance to be struck between majority power and minority right, or between the sovereignty of the people exercised through Parliament and the rule of law, or between the right of elected

⁹ Cabinet Office, *Cabinet Manual* (current version 2001), 1.

¹⁰ “Our Constitutional Journey”, Speech to the Legal Research Foundation (Auckland, 9 May 2006).

Governments to have their policies enacted into law and the protection of fundamental social and constitutional values? The very asking of these questions shows that the answer cannot always lie with simple majority decision-making. Indeed, those with that authority often themselves recognize that their authority is limited by understandings of what is basic in our society, by convention, by international obligations, and by ideas of fairness and justice. For instance, the power of a simple majority of the members of Parliament to determine basic features of the constitution, and thereby perhaps to look to their own particular partisan interest, is fettered by the requirement that key elements of the electoral system can be amended only if three-quarters of the members of Parliament agree or the people in a referendum approve.

The nature and basis of Maori representation — one of our major terms of reference — similarly indicates some of the limits in our polity of majority decision making. What role have autonomous Maori institutions to play? In what circumstances is it more appropriate to use the model provided by the Treaty of Waitangi of 2 peoples negotiating and agreeing with one another? When should Maori rights and interests (such as those covered by Article 2 of the Treaty) achieve a special recognition in the substance of the law or in the process used to make decisions? Or when is the law and its processes to be determined by the general recognition in Article 3 of the Treaty that the Maori belongs, as a citizen, to the whole community?¹¹

The proposal for a Bill of Rights which was being considered at the same time also proceeded in the first instance on the basis that the judges should have the power to protect the rights declared in the Bill, among other things by striking down legislation. Much of the opposition to that power was based on the role of Parliamentarians as the democratically elected representatives of the people and as the supreme law makers.

The proposed Bill of Rights and indeed the non entrenched measure that resulted have a number of important characteristics. An obvious one is the statement, in the first place by the executive in its proposal and, in the second place, by the legislature in the final enactment of the fundamental human rights and freedoms which are to be protected. I return to that characteristic.

A second is that, in major part, the Bill of Rights as enacted is a document about the protection of rights of process rather than product.¹² I have read with real interest a recent article in the *Yale Law Journal* by Jeremy Waldron¹³ who, stressing the dignity of legislation, has been consistently opposed to constitutional bills of rights enabling judges to strike legislation down. In that article he recognizes that his argument depends on the existence of the parliamentary process that is truly democratic. His next step, for he is a good listener, may be to say that there is an

¹¹ Royal Commission on the Electoral System, supra n 3, [1.15]-[1.17].

¹² K J Keith, "A Bill of Rights for New Zealand? Judicial Review versus Democracy" (1985) 11 *New Zealand Universities Law Review* 307.

¹³ Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115 *Yale Law Journal* 1346.

argument for protecting basic elements of the constitution so far as they relate to the electoral process, and that the courts may have a role in according that protection.

For New Zealanders that element of extra protection is not a new idea. Since 1893 the commission which determines electorate boundaries has had a majority of independent members, with two others nominated by the government party and opposition parties, and has exercised its function within narrow statutory limits. Gerrymandering has been effectively outlawed. Further, since 1956, the basic elements of the voting system (including those relating to the commission) have been the subject of “reserved” provisions which Parliament has said can be altered only with the support of the people in a referendum or of three quarters of the members of Parliament.¹⁴

In accordance with [those] requirement[s], the amendments made in the last 40 years to those provisions have been made only following agreement between the major political parties in the House or, in the notable instance of the change to proportional representation, following a binding referendum which had itself been preceded by an indicative referendum.

It also appears to be accepted, at the level of convention, that those voting requirements also apply to any proposal to amend that protective provision. Similarly, Standing Orders provide that entrenched provisions should be introduced by the House only by the vote which they would themselves require for their own amendment.¹⁵

A third characteristic of the Bill of Rights is also about process. The Bill of Rights is directed at the executive and the legislature, as well as at judges. In his Preface to the White Paper on the Bill of Rights, the Minister of Justice Geoffrey Palmer saw the Bill as a set of “navigation lights” for the “whole process of government to observe”.¹⁶ Speaking of the proposed power of the courts under the Bill of Rights to strike down legislation, he stated:

It is an important change but too much should not be made of it. Courts will only infrequently declare provisions in Acts of Parliament contrary to the Bill of Rights. In practical terms the Bill of Rights is a most important set of messages to the machinery of Government itself. It points to the fact that certain sorts of laws should not be passed, that certain actions should not be engaged in by Government.¹⁷

A final point that I would make about the values or principles reflected in the Bill of Rights is perhaps a paradoxical one, even controversial. I think, as I did when I was advising on this

¹⁴ *Electoral Act 1993*, s 268.

¹⁵ *Cabinet Manual*, supra n 8, 7.

¹⁶ *White Paper on the Bill of Rights* (1985), 6.

¹⁷ *Id.*

matter rather than being a judge, that the Bill of Rights is a democratic instrument. It is enacted by Parliament. It is Parliament that decides which important rights and interests are to be protected. And Parliament retains the power to override it if it so decides. It is true that the statement of rights is not exhaustive. It cannot be and indeed the Bill of Rights has an explicit savings provision. Be that as it may, the judges have in front of them a statement of rights affirmed and declared by Parliament, by the elected representatives of the people; further, the statement these days is based in large part on New Zealand's international obligations under the *International Covenant on Civil and Political Rights*. I have already mentioned the importance of keeping that international context in mind when one is stating rights and interpreting them. A matter related to the savings provision and to the procedural character of the Bill of Rights is the absence from the Bill, in any meaningful comprehensive sense, of economic, social and cultural rights. That in my mind does not detract in any way from the essential character of such rights as the right to education, to health care and to social security. That character has been recognized in New Zealand in legislation since 1877 for education, 1898 for old age pensions (with a preamble recognizing their basis in equity), 1938 for social security more broadly and 1941 for medical benefits generally. Again those rights are now backed by international obligations especially under the International Covenant on Economic, Social and Cultural Rights.

The choices that might be made by judges without such guidance from the legislature and executive (by way of treaty making) can be well demonstrated by Keir and Lawson's "Cases in Constitutional Law". That book was used from the 1920s well into the 1960s in many Commonwealth law schools. Its first chapter refers to "an ideal constitution".¹⁸ This ideal constitution was comprised of "fundamental rules of the Common Law which seem essential to the liberties of the subject and the proper government of the country".¹⁹ Those "fundamental rules" had been created by judges in Victorian times. Keir and Lawson refer to this "ideal" without any recognition that there might be a problem about its legitimacy. The rights or "liberties" contained in this ideal constitution include the right not to have property taken unless compensation is paid,

¹⁸ D L Keir and F H Lawson, *Cases in Constitutional Law* (1928), 3.

¹⁹ *Id.*

the right not to pay taxes unless the obligation is absolutely clear, and other rights of those kinds.²⁰ They say nothing about the rights of people accused of criminal offences nor about freedom of expression. This listing reflected the choices made by judges. For instance as late as 1948 when the *Universal Declaration of Human Rights* was being adopted, a judgment about freedom of expression on the streets of Wellington accorded freedom of expression less importance than the right to trade.²¹ Even twenty years later, in respect of a Vietnam War protest held on the steps of Parliament, a very distinguished Court of Appeal judge preferred the right of Parliamentarians freely to entertain their visitors within the House unembarrassed by unseemly behaviour on the part of intruders.²² Accordingly, the direction given by Parliament to the judiciary through the Bill of Rights is of major importance and adds a real legitimacy to their role.²³

One significant principle of the constitution, which is not included in the Bill of Rights but which has been increasingly recognized in the last forty years by the executive, the legislature and the courts, is the principle of transparency or open government. The introductory essay in the Cabinet Manual contains this passage headed “Towards More Open Government”:

Over recent decades the processes of government have become more open. Notably, in 1982 the Official Information Act reversed the basic principle of the Official Secrets Act 1951: the principle now is that official information is to be made available to those seeking it unless there is good reason for withholding it. Those reasons relate to public interest such as the national security and law enforcement, and to private interests such as confidences and privacy. Underlying that principle are a number of purposes, including enabling the more effective participation of the people of New Zealand in the making and administration of laws and policies, and promoting the accountability of Ministers of the Crown and officials, with the consequence of enhancing respect for the law and promoting the good government of New Zealand.

The emphasis on greater transparency in decision making and policy development is also to be seen in the legislation governing the government’s spending and fiscal policies (especially the Public Finance Act 1989 and the Fiscal Responsibility Act 1994), and in the operation of the parliamentary select committee processes.²⁴

Guidance may also be found in the pattern of legislation. Over the years legislative practice helps answer questions for instance about the conferral of powers: which body should exercise

²⁰ *Ibid*, 4-5.

²¹ *Hazeldon v McAra* [1948] NZLR 1087.

²² *Melser v Police* [1967] NZLR 437.

²³ Contrast for instance *Hopkinson v Police* [2004] 3 NZLR 704 with *Melser*.

²⁴ *Cabinet Manual*, supra n 9, 5.

them, following what procedure, subject to what constraints of substance and purpose and with what rights of appeal. The Law Commission and the Legislative Advisory Committee by surveying relevant parts of the Statute book and making submissions on Bills before Parliament have made significant contributions to the elaboration of guidance, notably in the Committee's *Legislative Change: Principles of Process and Content* first published in 1987. That guidance is mainly for the executive and the legislature in the preparation and processing of legislation, but Courts, increasingly it seems, also make use of it²⁵.

Changing the Constitution

I have already discussed some aspects of the processes involved in constitutional change. New Zealand is distinctive from most other countries we compare ourselves with because, on the whole, we do not have a formal method of amending the Constitution. In that sense it may, to return to the question I was given, be seen as odd. There is the exception which I have already mentioned relating to major changes in the electoral system. It is however important to look beyond the formal legal requirements to the process actually followed. As with the major electoral reform they may go beyond what is required by law and as a consequence they may provide extensive opportunities for public debate and participation.

My account under this heading is even more selective than under the preceding one. I could for instance have considered the processes followed in the reform of the state sector, in 1912 and 1962 (both with the assistance of a Royal Commission) and in 1986-1988 (without that assistance), the setting up of the office of Ombudsman (1961-62), the setting up of the Waitangi Tribunal and the extension of its jurisdiction (1975, 1985), the official information reform (1980-82), the reform of regulation making (1946-48, 1961-62 and 1984-89), the preparation of a new Constitution Act (1985-86), the public finance reform (1986-89), reform of the courts (1977-80 and 1986-90) and the introduction of the Supreme Court in place of the Privy Council in 2003.

One recurring issue is the use or not of independent commissions and committees in those processes. The Law Commission is working on the law and practice of commissions of inquiry. When should such bodies be used to inform the government and the wider public for instance in

²⁵ See e.g. the cases discussed by Dame Sian Elias, Chief Justice of New Zealand in her outstanding address to the 2003 Commonwealth Law Conference, "The Usages of Society and the Fashions of the Times", 6-8.

respect of matters of major political importance such as the Royal Commission of the late 1980s on Social Policy, and the Royal Commission (after the event) on whether New Zealand should federate with the Australasian colonies in 1901?²⁶

The Royal Commission on the Electoral System received written and oral submissions across the country and abroad over almost two years and reported in December 1986. Further public debate which had a critical role in election campaigns led to two referendums in 1992 and 1993, held in terms of the reserved provisions introduced into the electoral legislation in 1956, and to the introduction of the system we now have. There was a full 10 years from the time that the Commission reported to the time that the first MMP Parliament was elected. These changes were not rushed. Members of the public had extensive opportunities to participate and many took up those opportunities.

The Bill of Rights process differed in part. In this case the law required no formal process to be followed. The Government did however follow a deliberate consultative process to give effect to a proposal included in its election manifesto. The process lasted for six years and finally led to a Bill with a narrower scope and a reduced legal force. A government White Paper was published in early 1985. A parliamentary select committee undertook a wide public inquiry into it. The bulk of the submissions were opposed to the Bill, particularly the proposal to give it supreme law status empowering the courts to strike down legislation and to include provisions about rights under the Treaty of Waitangi. Some on the committee also thought that certain economic and social rights should be included if a Bill was to be introduced. In 1989 the Government introduced a Bill which no longer had supreme law status, which excluded the provisions about the Treaty of Waitangi but which did not include economic and social rights. The Bill was finally enacted in 1990. Again, whatever may be thought of the merits of the measure, those interested had extensive opportunities to participate. Also notable was the fact that the government did not use its majority to force an entrenched Bill through the House by a simple majority. That action was consistent with the principle now formulated in standing orders, as mentioned earlier.

²⁶ See K J Keith, "Commissions of Inquiry: Some Thoughts from New Zealand" in Allan Manson and David Mullan (eds), *Commissions of Inquiry: Praise or Reappraise* (2003).

Almost all of the changes I have discussed so far have required legislation. Other important developments or clarifications have been achieved by executive or parliamentary action or by judicial decision. The principal actors within the executive are of course Ministers. There is nothing new in the proposition that Ministers, notably through the development of conventions, may contribute major changes to the constitution. If I may go back over sixty years J C Beaglehole provides a brilliant account of such changes early in our constitutional history in his 1944 lecture on the Statute of Westminster and Constitutional Change²⁷. The actors effecting such change may not only be within the Ministry; as a valuable recent article by Matthew Palmer²⁸ shows, there are others within the broader system of government with significant roles in the operation and development of the constitution. Not simply because we have had the great pleasure of hearing the Governor-General both today and just two days ago at his swearing in, we should recall the important speeches given by holders of that high office about their constitutional and official role, especially in the formation of governments and in the calling of elections, and also in representing New Zealand abroad.²⁹

So far as the executive and legislature acting together are concerned, consider the important developments over the past fifteen years relating to treaty making. Parliament now has an enhanced role in what for some decades had been essentially a prerogative role preserved to the executive, an enhancement which recognizes that much important law is in reality made elsewhere. The Law Commission played a significant part in that change³⁰. And the courts have not been without influence. The developing practice has been informed by experience in other similar democracies where the formal constitutional documents may be silent or of no decisive effect. Another area of the foreign affairs or defence prerogative which could be the subject of similar closer study is the executive power to commit military forces to armed conflict: what for instance is or should be the role of Parliament?

²⁷ In J C Beaglehole (ed) *New Zealand and the Statute of Westminster* (1944) lecture ii.

²⁸ Matthew Palmer, "What is New Zealand's Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office Holders" (2006) 17 *Public Law Review* 133.

²⁹ See, for instance, Dame Silvia Cartwright, "Modern aspects of the role of the Governor-General of New Zealand", Speech to New Zealand Institute of International Affairs (Wellington, 27 June 2006).

³⁰ *The Treaty Making Process: Reform and the Role of Parliament* (1997).

Consider too the role of the commentators on constitutional matters. First I should mention the scholars, writing their books and papers, perhaps anticipating

the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought — the subtile rapture of a postponed power, which the world knows not because it has no external trappings, but which to his prophetic vision is more real than that which commands an army.³¹

A similar influence may also come from contributors to more popular media. They may be scholars or practicing lawyers such as J A G Griffith and Anthony Lester Q.C. in London, or journalists with strong academic credentials such as Anthony Lewis in New York. Further back, consider that early editor of *The Economist*, Walter Bagehot, and the continuing impact of his *English Constitution* (1867) which constitutional actors, law teachers and judges continue to use³². Conferences and seminars, particularly those that bring together Ministers, parliamentarians, public servants, academics and other commentators — even judges — may also have important effects.

I have made only limited reference to the judges and the courts so far. While I will come back to them in my concluding comments I would like at this point to mention one example, with a constitutional element, of their interaction with other public agencies and sources of law — sources, I should say, read broadly. The particular issue concerned the use by British Courts of parliamentary records or of Hansard in interpreting legislation. The issue came before the House of Lords in 1992.³³ For the Attorney-General the matter was constitutional: he argued that such use was a possible breach of the parliamentary privilege provision of article 8 of the *Bill of Rights 1688*. Some years earlier the Law Commission of England and Wales had recommended that the Courts should not use Hansard in resolving interpretation issues. The New Zealand Law Commission came to the opposite conclusion in 1990.³⁴ The New Zealand Courts were already making use of Hansard, the Commission saw no reason to recommend that they desist and it also concluded that legislation permitting and regulating that process, like that enacted in some Australian jurisdictions, was not needed. Anthony Lester QC in the British case urged the House

³¹ O W Holmes, “The Profession of the Law” (1886) in *Speeches* (1913) reprinted in Richard Posner (ed), *The Essential Holmes* (1992) 218, 220.

³² Consider for instance *Prebble v Awatere Huata (No 2)* [2005] 2 NZLR 467, [74] and [76].

³³ *Pepper (Inspector of Taxes) v Hart* [1993] AC 593.

³⁴ *A New Interpretation Act* (1990) (NZLC R 17).

of Lords to prefer the New Zealand practice, the arguments given by the New Zealand Commission and the scholarly work of Professor John Burrows.³⁵ He was successful — although it is interesting that in terms of judicial method at that time the principal judgment in the House of Lords makes no explicit reference at all to the Commission or to the professor.

Concluding comments – where to from here?

The Constitution is not just a document that was written in 1852 or in 1900 in London, or in 1986 in New Zealand. It is a document that must evolve, balancing continuity and change, heritage and heresy. There must be, as far as possible, public involvement in that process of evolution when the changes are likely to be significant. I have mentioned instances of that public involvement. It is important to ensure that this involvement is ongoing. The importance of public engagement was brought home very clearly in Europe last year when the people first in France and second in The Netherlands rejected the proposed new European Union Constitution. A large part of the explanation that has been identified is public ignorance, apathy, and straightforward nervousness about where European integration was going. There had not been a sufficient attempt in the preparation of the proposed constitution to engage the public and to try to deal with their fears and to explain exactly what the proposals were all about. Professor Quentin Quentin-Baxter, in a passage quoted last year by the (Dunne) Constitutional Arrangements Committee, urges us to ensure our Constitution does not become an abandoned “habitation”.³⁶ The Governor-General similarly reminds us about the importance of us having “a place to stand”.³⁷ All of us have a role in promoting sensible discussion of the real issues that properly engage us.

How is that to be done? The schools have an essential role. Some of us recall learning at primary school about Parliament if not about the executive. Professor Roger Clark some years ago prepared a very useful bulletin for schools on the Constitution³⁸ and there is now relevant material

³⁵ John Burrows, *Statute Law in New Zealand* (1992).

³⁶ Professor Quentin-Baxter, “The Governor-General’s Constitutional Discretions: An Essay Towards a Redefinition” (1980) 10 *Victoria University of Wellington Law Review* 290, quoted in Report of the Constitutional Arrangements Committee, *Inquiry to Review New Zealand’s Existing Constitutional Arrangements* (2005), 9.

³⁷ The Hon Anand Satyanand, “The Governor-General’s address at the opening of the 20th anniversary of the Law Commission” (Wellington, 25 August 2006).

³⁸ *The Development of the New Zealand Constitution* (1974 Department of Education).

readily available on government websites, some of which gives easily understandable accounts of our system of government.

Lawyers, especially those in the Universities, have an important role in presenting the issues to the public in a straightforward way. So too the members of the media, as Colin James demonstrates week by week. They have the example of Bagehot to inspire them and the principles and practices of open government to assist them. They are an essential part of the broader process on which I have placed such emphasis. They are processes which must be maintained and as necessary strengthened. I recall again the critically important processes, now in large part over one hundred years old, which are central to our electoral system, a matter at the heart of our democracy. The Law Commission with its open consultative methods, involving the gathering of fact and opinion, and the elaboration of proposals and the justification for them, is a now well-established part of those processes.

The Courts, to come to them, are also essential to the operation of the Constitution and our system of government. That hardly needs to be said. They have the power to keep the executive and other public agencies within the law. The judges exercise that power as their oath says, by doing right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will.

In my professional lifetime the judges have become more confident and, I think, more articulate in their principled exercise of that power. In that, they have been assisted by legislative changes, similar developments in other common law countries, the developing literature and, more broadly, changing attitudes towards public power, its exercise and control. In particular they have been assisted by the Bill of Rights. Should that assistance go further, especially to enable the judges to strike down legislation in breach of the Bill of Rights? Some within and outside New Zealand urge that cause. Others can assess better than I whether there would now be the necessary parliamentary and public support for that change. My only contribution at this stage would be to wonder about the difference which that change might effect. First of all, I recall that the “navigation lights” the Bill provides are designed to keep the executive and the legislative yachts from coming to grief on constitutional rocks. Those branches must keep their craft in good order. Next, the Courts have generally found that they are able to interpret legislation and state the

common law consistently with the Bill, which also in most situations means consistently with our international obligations. In the few cases when they have not (for instance in relation to the right to a jury trial) they have given an indication of the inconsistency without however going to the point of making a formal declaration. Finally, the court role has to be put in perspective. Many constitutional issues, and not only in New Zealand, get resolved or handled (for final resolution is sometimes better avoided) by the actions of other constitutional actors. And even when the Courts do become involved they may not have appropriate remedies on hand³⁹ or they may have very limited powers to make an independent assessment of the remedies which should be accorded.⁴⁰

A last point I wish to make about these constitutional processes concerns the careful use of words. I give two instances. Too often, in both national and international debates, the word “sovereignty” gets misused. A few years ago I was close to suggesting that we should that we should abandon the word.⁴¹ I was helped in that by a High Court of Australia judgment which quoted from a great American constitutional law book of the early 19th century.⁴² Joseph Story wrote that the words “sovereign” and “sovereignty” were used in different senses, something which led “to a confusion of ideas, and sometimes to very mischievous and unfounded conclusions”.⁴³ In a recent excellent discussion in “No Country is an Island: Australia and International Law”, Professor Hilary Charlesworth and her colleagues call attention to the misuse of the word “sovereignty” in the debates in Australia about Australia’s engagement with the world.⁴⁴ The authors identify the inconsistent position of the Australian Government whereby it sees no difficulty in ratifying very heavy commitments under World Trade Organization, but also adopts a strong language of concern, often, they say, not very well considered, about human rights obligations impacting upon Australia’s “sovereignty”. My other example is the use of the word

³⁹ See e.g. the comparative roles of the Ombudsmen and Courts discussed in K J Keith, “Administrative Law Developments in New Zealand as Seen through Immigration Law” in Grant Huscroft and Michael Taggart (eds), *Inside and Outside Canadian Administrative Law* (2006).

⁴⁰ See e.g. the final order of 20 November 2006 of the New York Court of Appeals in the case discussed by Justice Baragwanath in his paper, *Campaign for Fiscal Equity v State of New York*, 2006, NY Slip Op 08630.

⁴¹ K J Keith, “Sovereignty at the Beginning of the 21st Century: Fundamental or Outmoded?” (2004) 63 *Cambridge Law Journal* 581.

⁴² *Commonwealth v Mewett* (1997) 191 CLR 471, 541 (Gummow and Kirby JJ).

⁴³ *Commentaries on the Constitution of the United States* (1833) vol 1 [207].

⁴⁴ Hilary Charlesworth et al, *No Country is an Island: Australia and International Law* (2006), 20-21.

“war” in the expression “war against terrorism”. Francis Bacon got it right when four hundred years ago he declared “Curseth (saith the law) is he who removeth the landmark”.⁴⁵

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“Brilliant or odd?” If not odd, certainly unusual, probably unique among the Western democracies. But “brilliant”? Hardly in the standard sense of glittering, sparkling or lustrous or even the figurative one of splendid or striking the imagination. That last reference may help. What changing images have our constitution makers had of our country as it developed? To quote one of our great historians, “constitutional change does not take place in a vacuum. . . . Law to be of any use must answer the intelligible needs of society.” We do well, he continued, to be vigilant about our constitutional rights and duties, but “that is not to presuppose that the constitution is some silk-wrapped mystery, laid in an Ark of the Covenant round which alone the sleepless priests of the Crown Law Office tread with superstitious awe”⁴⁶! The constitution must combine principle with practicality. Through those who operate through and under it, it must be capable of addressing the evolving challenges facing the country and those who live here. Not “brilliant”, but I like to think a carefully imaginative continuing response and structure.

⁴⁵ *Of Judicature*. While he was speaking of judges his proposition is a broader one.

⁴⁶ J C Beaglehole, n 27 above 50.