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*The Governor-General of New Zealand*

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Constitutional

# Harkness Henry Lecture

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In late 1994, the High Court of Malaysia was asked to rule on a weighty matter of constitutional law. Following a general election in one of the states of Malaysia in February that year, the head of state in that jurisdiction had appointed a new Chief Minister and, on his advice, other Ministers to form the new government. There was no question about the correctness of those actions - the Chief Minister had been the leader of what was clearly the majority party in the newly elected Parliament at the time. But politics can be volatile. By March there had been defections from the governing party to the opposition. The Chief Minister lost his majority. He duly tendered his resignation. On the same day the head of state appointed a new Chief Minister - one assumes from the facts that the person appointed was the leader of the opposition. A week later, on the advice of the new Chief Minister, the head of state also appointed a number of other Ministers to form the new Cabinet.

So far so good. For those who keep questions of constitutional law fresh in their minds, this would seem to be a straightforward change of government without a general election, following a change in the levels of support in the elected Parliament. But one of the outgoing Ministers was unhappy. He sought to challenge the actions of the head of state in appointing the new government, on the basis that he personally had never resigned from office. (You will recall that the Chief Minister had resigned - the question was whether it was necessary for all members of the Cabinet formally to tender their resignations in this situation.) On that basis, this lone Minister sought a range of declarations from the court, essentially with the aim of securing a declaration that - despite the change of government that appeared to have transpired - he was still a Minister, was still entitled to exercise the powers, privileges and responsibilities of office, and was still entitled to attend Cabinet meetings. The arguments were based on detailed interpretations of the written constitution of the state.

An initial motion to strike out the claim failed. On the papers, there was a case to be answered. But at the full hearing the Court dismissed the application. It held that, where a Minister who has lost the confidence of the House resigns, the written constitution,

convention and usage all resulted in the other members of Cabinet being deemed to have vacated office, even if no formal resignations are submitted. The aggrieved "Minister" had indeed lost office in March and must become reconciled to the opposition benches.

## The law in context

The main point I take from this case is a general one, about the importance of context. It is always useful to consider areas of law in their social and economic context. But constitutional law in particular is inextricably intertwined with politics, and must always be considered in its context if one is to be confident of reaching sensible conclusions. It may seem an arcane and dry subject, but the application of constitutional law in fact requires an intensely practical approach. A constitution like ours is not just law, but comprises a complex mix of law (both statutory and common law), convention, principle, politics and administrative practice. In this address I aim to illustrate that general point by reference to the events surrounding the 1996 general election. The political events of last year are well known, and the legal principles are also relatively clear. But tonight I will also set out the practical and administrative steps which were taken to give life to those principles and mesh them with the political events.

This general point about the importance of context can be made over and over in relation to any number of constitutional and administrative law issues. Looking only at the tangle of written provisions of the constitution in that Malaysian state, our aggrieved Minister may have been able to mount an arguable legal case. But if one paused only briefly, and looked at the practical and political context, the answer was of course obvious. Support in the Parliament had shifted. The government had changed, in accordance with the representative democratic will. It was in practical terms unthinkable that any court would find that a lone Minister was entitled to continue in office and continue to serve as a member of a Cabinet which was in all other respects made up of that Minister's parliamentary opponents.

The relevant background to an issue may be the political, historical, social or economic context. For example, you need context to understand fully what was going on in *Fitzgerald v Muldoon*, how the case arose and why the court acted in the way it did in relation to a remedy. In that case the Prime Minister had issued a press statement which the court found purported to suspend the law without the consent of Parliament. In effect, the Prime Minister was attempting to end the then-operating superannuation scheme, without waiting for legislation to repeal and replace the scheme. His action followed a large election victory in which superannuation policies had been a key issue. He clearly had a democratic mandate to end the scheme, but the court held that he had no legal power to do this in advance of the appropriate legislation. In a pragmatic move, which recognised the political and administrative context of the issue, the court did not initially rule on a remedy, but adjourned the hearing on remedy for six months. In this period the government was able to steer the necessary legislation through Parliament. The court was then able to decide that no further action was necessary.

A further example of the importance of context, which attracted attention both in the Muldoon era and in the transition to MMP, is the convention on the conduct of caretaker governments. The convention cannot be sensibly considered without some recognition of the political environment in which it will inevitably be operating. This background also



provides the answer to those who might wish the convention to be a stronger beast, perhaps with some legal teeth. The context is that the government in office retains the legal power to govern, and take all the actions that a government is generally entitled to take. But in recognition that the government no longer has the support of the House, the convention constrains the actions of the government in decisions of significance.

The application of the convention in New Zealand has generally been straightforward, in the situation where the next government has been clearly identified and there is just a brief transition period until it takes office. During this period it has long been accepted that the outgoing administration acts on the advice of the incoming administration. The one notable exception to this practice was of course following the general election in 1984, when the Prime Minister and Finance Minister initially refused to accept the decision of the incoming Labour government to devalue the dollar immediately. This incident resulted in the convention being articulated with greater clarity and also provided the catalyst for other more general clarification of New Zealand's core constitutional law.

The convention has attracted more attention and controversy following the last two general elections, neither of which on election night gave a single party an immediate and clear majority of seats in the House. In 1993, the final election results did produce a clear majority and so the convention operated for only a short time. But in 1996, the political situation in the House could only be resolved by the political parties in Parliament negotiating with one another over the formation of a coalition as the next government.

The topics of coalition negotiations may well coincide with actions the incumbent government may be having to consider in the context of the caretaker convention. That is one powerful reason why the convention operates in the political realm only, and recognises that the decision on appropriate government action, finally, is for the government to take. That decision will balance a raft of differing factors, including the perceived significance of the issue, the effect of delay, the attitude of other political parties to the question and public sentiment on the issue. As the New Zealand courts have already recognised, that is not the type of decision which legal institutions can or should attempt to second guess, simply because it is a decision during a caretaker period.

### **Appointing governments under MMP**

The example of constitutional law in practice on which I wish to concentrate tonight is the events surrounding the 1996 general election and, in particular, the translation of the core constitutional powers of my office into practical administrative steps.

You will not be surprised, given the timing, that when I was preparing to take up office as Governor-General in early 1996, I felt it necessary to give close attention to some of the core powers of the office. Often loosely called the reserve powers, the key powers are the powers to summon and dissolve Parliament and to appoint and dismiss the Prime Minister. They are set out in deceptive simplicity in the Constitution Act and the Letters Patent.



It also seemed prudent to adopt a comparative approach, and obtain a practical understanding of how governments are formed in other countries, particularly those with similar constitutional arrangements which routinely experience hung Parliaments. Therefore, immediately before I took up office, I travelled to Ireland and Denmark to examine the operation of relevant powers in those countries. Others had also been looking to overseas examples to gather information on how these and other matters were handled in countries with proportional representation systems and the results of those efforts were starting to become available.

In Denmark, governments are formed within a few weeks of a general election. The tradition seems to be of minority governments, which are often coalitions as well. Apparently the polls close at 8pm, and the results are known by about 11pm. The process of government formation begins that night, as party leaders debate on television. The next morning, the Prime Minister sees the Queen. If the election outcome is unclear, the Prime Minister will advise the Queen to meet with the leaders of all of the parties represented in the new Parliament, in a process known as "the Queen's round". The Queen meets each of the leaders for about 10 minutes, in order of the size of the party in the House. The party leaders bring written advice to the Queen on their view of what should now happen. The advice is simple, even direct. The typical example, I was told, was along the lines of "We advise the Queen to choose X to form a government". The advice is also made public immediately after the meeting.

Drawing on the advice, the Queen will then appoint a Royal Investigator, to lead political discussions on the formation of the next government. This person is usually a leading politician who could well become the next Prime Minister. The Investigator reports back on the results of the negotiations and provides advice on the next step. If all is going smoothly, that advice is likely to be to appoint a particular person as Prime Minister. If not, the advice may be to begin "the Queen's round" again, so that further discussions can be held.

There are several consequences of this approach. The Queen is seen to be separated from active participation in the political discussions which must take place to form a new government. And the Queen is seen to be receiving information directly from all of the parties in the House. The Queen is therefore publicly distanced from the political process, but also - publicly - informed about the outcomes of that process.

In Ireland the situation is different again. The Constitution gives the President the power to appoint the Prime Minister, "on the nomination of the Dail" (Parliament). The House meets within a month of the election: once a Speaker is elected, its first task is to vote on whom to nominate to the President as Prime Minister. Thus the formal power of appointment still rests with the head of state. But again the head of state is explicitly distanced from the political negotiation and receives very public and unequivocal advice on its conclusion. In Ireland however, the advice on whom to appoint is channelled through the Parliament, rather than received directly from the political parties, the Prime Minister, or some appointed intermediary.

There are many other examples. The Netherlands and Norway both use intermediaries appointed by the sovereign, in processes similar to that in Denmark. In the Netherlands however, the time-scale is usually considerably longer, and it can take eight months rather



than eight days for a new government to be formed. Germany and Sweden are both closer to the Irish model and use a formal vote in the Parliament to determine who should be appointed as Prime Minister. In Germany, the appointment itself is still made by the head of state after that vote, but in Sweden even the formal power of appointment no longer resides with the head of state, but has been shifted to the Parliament. Some of the Pacific constitutions also use the device of a formal vote in the House as the basis on which the government is appointed. In countries with relatively loose or changing political parties, this process provides unequivocal information on which the head of state or other relevant officer may act, in what may otherwise be volatile and confusing political circumstances.

You can see therefore, that clear principles or themes emerge quite quickly. Indeed I have commented that the similarity across countries, in even this most basic of national processes, is quite striking. In all of the countries examined, it is very clear that the real responsibility for forming a government rests with the political parties. That political parties provide this vital link between the democratic election process and the formation of a government, has long been the case in New Zealand. MMP has made their importance more apparent. It is political parties which, through negotiation, must find a viable government in the Parliament. No-one else can arrive at the solution for them, or impose an outcome on them.

Once negotiations between the parties have resulted in a clear view on who will be able to form the next government, the question is how that information is presented to the head of state (or whoever holds the relevant formal power of appointment), in an authoritative form. A range of processes is used in different jurisdictions to ensure that the holder of those powers does not need to begin to make subjective judgments on the merits of competing claims, but can exercise the relevant powers on the basis of unambiguous information.

### **The process of public education**

At the same time as I and others were researching these matters, the level of public and media interest in them was growing as the election loomed. There was much speculation, both informed and uninformed, about the role of the Governor-General in the process, and indeed about what process there might be after the election.

Governors-General do not usually give advance notice of their actions. But we were in an extraordinary period of change. As the attention given to the educational role of the Electoral Commission showed, public education was vital if confidence in the electoral and political system was to be maintained. The participants in the political process would also be assisted if there was at least some common understanding of the basis on which I intended to act. And of course, there was the perennial refrain of the need for the money markets to be informed and reassured about how this leap into the new era would be resolved.

Therefore, in April last year I gave a speech which was widely reported, in which I outlined in general terms how I saw my role. I also gave a series of interviews over the following months repeating and clarifying these key points, culminating in my participation in a television documentary which screened very shortly before the date of the election. The aim was to ensure, so far as possible, that the principles and processes for moving from the election to

the formation and appointment of a new government were clear and understood by a sufficient number, so that the focus of public attention could be where it belonged - on the political actors who would be required to negotiate and work together to reach a political resolution.

The work of the Electoral Commission in its public education campaign was also relevant. Its public education material contained brief explanations of the role of the Governor-General, the reserve powers and the concept of caretaker government.

Overall, my personal assessment is that this aspect of the process went well. In the period following the election, all the participants demonstrated a clear understanding of their respective roles and the relevant processes. The media in particular were very clear on election night and over the following weeks on what needed to happen. There was no media entourage camped outside Government House, waiting for me to emerge and proclaim some magic resolution. Rather the country witnessed the media day after day camped in the corridors of Parliament, swarming around the politicians when they periodically emerged from their coalition talks.

### **The core principles**

Through this public speaking and writing I tried, in essence, to make clear a few simple points:

- The formation of a government is a political decision and must be arrived at by politicians.
- My task as Governor-General is to ascertain where the support of the House lies. In an unclear situation, that might require me to communicate with the leaders of all of the parties represented in Parliament.
- Once political parties have reached an adequate accommodation, and a government is able to be formed or confirmed, the parties could be expected to make that clear by appropriate public announcements of their intentions. At that point it might be necessary for me to talk with some party leaders. I would then expect to have sufficient information to be able to appoint a new Prime Minister, if that were required.
- Throughout this period of negotiation, the incumbent Prime Minister remains in office, governing in accordance with the caretaker convention.

The second of these points is the nub of the matter. In a parliamentary democracy, the exercise of my powers must always be governed by the question of where the support of the House lies. It is this simple principle which provides the answer to those who sometimes suggest that in situations like that encountered by New Zealand after the last election, the



head of state should simply call on the leader of the largest party to form a government. Size alone provides no reason to prefer a party if its leader does not appear to have the support of a majority of the House. It is better to wait for negotiation among the parties to produce a majority. This principle is also the answer to those who regularly write to Government House suggesting that the Governor-General dismiss the government and call another election, based on perceived public sentiment, dissatisfaction with particular actions, or opinion polls. To repeat: in a parliamentary democracy such as ours, the exercise of the powers of my office must always be governed by the question of where the support of the House lies. If that is unclear, I am dependent on the political parties represented in the House to clarify that support, through political discussion and accommodation.

### **The 1996 election: some constitutional markers**

What took place after the election in October last year, in political terms, is still relatively fresh in the minds of most of us. And as I have just set out, the general constitutional principles are also relatively clear. But it may be useful if I take this opportunity to outline what took place in terms of constitutional markers, in order to give some insight into the approach taken to dealing with the constitutional niceties at the practical administrative level.

#### *Election day:*

- As the votes were counted on 12 October, it was clear by late that night that, as predicted, no single political party would be able to command a majority in the House. In media interviews all the party leaders confirmed that they would now begin a process of discussions amongst themselves over the possible formation of a coalition or minority government.
- The media statement by the Prime Minister also made clear that the government now viewed itself as bound by the caretaker convention until resolution of the political situation was achieved.

#### *The beginning of negotiations:*

- The next day I issued a press statement reiterating the key points as I saw them, about the process for moving to the formation of a new government. The aim was to provide the media and others with confirmation that my position on these matters had not changed in light of the election results.
- I also determined that when a political leader thought that he or she was in a position to form a government, he or she should in the first instance contact the Clerk of the

Executive Council, who could clarify with the political leader what information I would require before acting. In that capacity, the Clerk also offered assistance to all party leaders with any issue relating to the actual formation of a government. This contact was to take place only with my authority and in the strictest confidence. The aim of making clear the Clerk's role as my agent or intermediary at this early stage, was to facilitate the smooth operation of the relevant constitutional processes.

#### *The conclusion of negotiations:*

- On 10 December 1996, after some eight weeks of parallel negotiations between New Zealand First and the Labour and National parties, the New Zealand First party reached a decision and publicly announced that it would be joining the National party in a coalition government. The Prime Minister publicly confirmed that agreement had been reached between the two parties and the leader of the Labour party conceded that they could not form a government. The Clerk, on my authority, began liaising immediately with the Prime Minister over the arrangements for the change to the new coalition administration. With his agreement, she also worked with the leader of the New Zealand First party on the administration of the transition.
- The next day I spoke with the Prime Minister and received his direct confirmation that the agreement reached meant that he was able to lead a government which would have the confidence of the House. For the sake of clarity, I issued a brief press statement confirming my acceptance that this was the case.
- The basis on which the two political parties were agreeing to form a government together was set out in a detailed written coalition agreement. The two parties publicly signed and released the agreement in a brief ceremony on 11 December 1996, involving the presidents and leaders of both political parties.

#### *The change to the new administration:*

- The leaders of the two parties then proceeded to take decisions on the individuals to be appointed as Ministers in the new government. The new Ministry was announced by the Prime Minister on 15 December.



- Given the significance of the change to the new coalition government, the Prime Minister chose to give effect to the change of administration with a full resignation of the incumbent Ministry and a full swearing in of the new government. All Ministers, including the Prime Minister, resigned from office both as Ministers and Executive Councillors. Those who were to hold office in the new administration were then sworn in, in a full ceremony at Government House on Monday 16 December.

### **The timing and length of the transition period**

There are a couple of points about the transition process which may be worth comment. They concern the length of time taken by the negotiation and transition process.

The passage of eight to nine weeks between the election and the conclusion of coalition talks surprised many. I do not wish to be seen to be offering comment on whether that was necessary or unnecessary. I had certainly made the point in my public statements that we should not be afraid of some time passing before a new government was formed, and that it was better to take the time to hold considered discussions. I had also noted that there is an established convention on caretaker government which would enable the business of government to continue during an interregnum. It may be that the novelty of the process for all concerned meant that the process took longer than, or was approached differently from, what might happen in the future. One should not assume that a New Zealand standard has now been set. Only time and greater experience will tell us what an "average" period of and process for negotiations in New Zealand will be.

I had also commented on the fact that the requirement for Parliament to meet within approximately eight weeks of the election could act as some sort of incentive for the politicians to reach a resolution. In the end, it was clear that the meeting of Parliament did operate as an informal deadline for the process. The Constitution Act 1986 required Parliament to meet no later than Friday 13 December. As already mentioned, coalition talks concluded on 10 December, and an agreement was signed on 11 December. The formal Commission opening of Parliament took place on Thursday 12 December, with the State Opening and the Speech from the Throne the following day.

The timing at the end of the year was unquestionably tight. This created some practical difficulties. From my position, the obvious illustration of the awkwardness was the Speech from the Throne, which I am required to deliver on the day of the State Opening. At a general level, its historical purpose has been to explain the reasons for the calling of Parliament. But it has traditionally been seen as a vehicle for the government to outline its legislative programme to the Parliament. The ceremonies which surround the Speech make it clear that it is a government statement, delivered by the Governor-General on the advice of the Prime Minister.

In 1996, it was clear who the new government would be - the coalition agreement had been signed and released on the Wednesday - but it had not assumed office by the time of the State Opening on the Friday. The content of the Speech was therefore slightly awkward. But again a practical approach provided the answer. The incumbent Prime Minister, who was after all to continue in that office, provided the necessary advice to me. Hansard records that the speech was brief, and described the current political situation and the transition process. The speech briefly reflected the principles for the incoming government which had been outlined in the coalition agreement.

I make no comment as to whether our recent experiences on these and other points were good or bad. I merely note that the change to the electoral system has raised and will continue to raise further questions such as these for examination. These consequential issues are both large and small, practical and symbolic, ranging from the reserve powers, the procedures for opening Parliament, to the minutiae of parliamentary procedures and the budget cycle. Attention has now been drawn to these various points. There is also greater awareness of the fact that others organise the same matters quite differently. Information on overseas systems has become easily accessible. Debate does not suddenly end, once it has been awoken. We can expect the process of constitutional debate and change, of which the move to MMP has been a part, to continue for some time yet.

## **The international context**

In this light, it may be timely to note another point about context. Particularly in this area of law, New Zealand is not an island. The links between the Commonwealth countries on the way the law and practices develop, have been extremely strong. The very evolution of an Empire to a Commonwealth of Nations means that our constitutional development inevitably has been tied up with the constitutional development of all other former British colonies. The Imperial Conferences following World War I, which resulted in the Balfour Declaration and ultimately the Statute of Westminster, are a clear illustration of the fact that New Zealand is, constitutionally, one member of a family. The family tree may often contain clues as to why particular steps were taken at particular times.

Pick up any essay on the reserve powers and you are immediately directed to Canada in the 1920s, Australia in 1975, Great Britain between 1910 and 1915, and so on. The precedents are few and far between and analogous systems will always look to each other for guidance. In my current position that academic comparative approach becomes more personal. One finds that the fate of Lord Byng in Canada, or Sir John Kerr in Australia, resonate in the background, providing some markers of dangerous territory.

Clearly we can benefit from awareness of the past and continuing experiences of other democratic countries. But we should also bear in mind that there is no body of constitutional precedent in the sense that the common law forms a body of legal precedent. The international experience is no more than a series of events of constitutional history in the countries concerned, which offer lessons for the future. Events in New Zealand are now contributing to that body of constitutional experience, and providing lessons for us and others for the future.



## Conclusion: a climate of change and demystification

As James Belich notes in the conclusion to his new work on our early history, New Zealand history is not very long, but it is very fast. The picture he paints is of a precocious nation, where international forces for change are concentrated into a cauldron of progress. At the outset he notes that:

"[The] characteristics of small population size, great isolation, and short history, combined with various cultural cringes, have sometimes given New Zealand history a mundane reputation - educative to the dutiful, exemplary to the patriotic, but a good place for those in search of inspiration or insight to slit their wrists. This work sets out to show that, on the contrary, New Zealand is an historian's paradise: a laboratory whose isolation, size and recency is an advantage, in which grand themes of world history are often played out more rapidly, more separately, and therefore more discernibly, than elsewhere."

I suggest that New Zealand's constitutional history illustrates this point well. Over the last decade or more, constitutional debate in this country has reflected pressures that are felt internationally, but has often resulted in more immediate and perhaps more dramatic change. In a climate of reform, and with the growing culture of open government, reform and its consequences have also been studied and discussed quite freely. Aspects of the constitution which elsewhere remain in the shadows have in New Zealand, particularly with the move to MMP, become quite regularly discussed by academics and other commentators. As tonight illustrates, the participants also show a greater willingness than in the past to speak out about their roles.

For my part, I see the role of the office of Governor-General in New Zealand in the area I have been discussing tonight as allowing the holder to act innovatively when that is necessary, while always adhering to democratic principle. Our own Professor Quentin-Baxter has said of the role in relation to the appointment of a Prime Minister:

"Even in a situation of doubt, it is not the function of the Governor-General to form a view about the relative merit of possible contenders. His task is the more humble one of finding the true successor, by ascertaining the will of Parliament. Where no party has a majority, it will be the normal course for party leaders to conduct their own discussions until a coalition [or I would add, a minority government with support] identifies itself and its leader. In such circumstances, the Governor-General will no doubt wish to satisfy himself by consultation that he understands correctly the alignment of parliamentary forces. Only in limiting situations the responsibility for which would rest with the political leaders, should the Governor-General commission a Prime Minister whose immediate support in Parliament is not assured."

These simple propositions, written long before a change to our electoral system seemed a serious prospect, are in my opinion sound in principle. They express the essence of the procedure that is most likely to lead to the exercise of reserve powers in a manner that fits New Zealand's needs while adhering to principle. They should result, as expeditiously as appropriate, or at least as practicable, in the appointment or confirmation in office as Prime Minister of the person whose administration will be supported by a working majority in the

House. The Governor-General has the responsibility of ascertaining the will of Parliament and of acting on it. While different means may be followed in different political situations to achieve this end, it should always be the touchstone for exercise of the powers. The experience of 1996 shows this philosophy in practice and, I cautiously suggest, shows it to be effective.

To recall the words of J C Beaglehole, writing more than fifty years ago, the constitution should not be "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." The advent of MMP has dusted off and unwrapped for public inspection some central aspects of our constitution, which in times past have tended to be the preserve of an honoured few. I hope that with tonight's talk, I have been able to shed some light on the approach taken to the practical operation of these issues in last year's election, and so remove some of the superstition and awe.

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