

## New Zealand's Constitutional Monarchy

*Dame Silvia Cartwright*



On August 24, 2001, *Green Bag* Contributing Editor Dan Currell visited Dame Silvia Cartwright, Governor-General of New Zealand, at Government House, Wellington. Dame Silvia has served as a Judge and Chief Judge of the District Court of New Zealand, and in 1993 she became the first woman to be appointed to the High Court of New Zealand. In 2000, acting upon the advice of New Zealand Prime Minister Helen Clark, Queen Elizabeth II appointed Dame Silvia to a five-year term as New Zealand's Governor-General.

– *The Editors*

*With respect to your role: The Queen is the Queen not only of the United Kingdom, but also of New Zealand and many other jurisdictions around the world, and you are the Queen's representative in New Zealand. To some, this might seem like an anachronism. What does it mean legally and politically now?*

The best way to start is to place your question into an historical context. British settlers arrived in New Zealand about 200 years ago. This was not initially an organised settlement, but eventually it became necessary to protect the indigenous Maori people from exploitation and to regulate the fledgling community. Queen Victoria, the great-great-grandmother of Queen Elizabeth II, asked

her representative in New Zealand to negotiate a treaty with Maori. And in 1840, the Treaty of Waitangi was signed by many of the chiefs of the Maori tribes. The Treaty gave British citizenship and rights over certain assets to Maori, and in return the British settlers could acquire land fairly. So we have had over 160 years of formal relations between the British and Maori.

Effectively we became autonomous in the 1930s when the Statute of Westminster was enacted – and totally so in 1986 with the passing of the Constitution Act. There are no remaining legal links in the sense of British oversight in any way. We retain a constitutional monarchy, and the Queen is our formal head of state – *de jure* head of

state – but we operate totally independently, retaining our historical friendship with the United Kingdom through our membership in the Commonwealth.

Although the Queen is interested in events and issues in New Zealand she does not give me instructions, nor do I personally consult her. As a courtesy from time to time I communicate with her – but that is literally in the form of a letter, just telling her how things are here in New Zealand. And of course when she comes to New Zealand, she then takes on the formal role of Head of State and I fade into the background. However, the days when the Governor-General felt obliged to leave the country when the Queen or King was here have gone. In fact she will be staying in this house with me when she comes to New Zealand.

*So – to import this into the American lawyer’s mind – does this mean that you lead the executive branch?*

I am in fact a non-executive Head of State. On the advice of my Ministers, I assent to legislation, I summon and dissolve parliament, I appoint the Prime Minister, I appoint the members of the highest level of the judiciary – indeed, the entire judiciary. I have a role of coordinating if you will. I am in that sense a separate branch all of my own.

*How do you spend your time? What do you do?*

My role is often described as having three facets to it: constitutional, ceremonial and community. At the moment the community part takes the majority of my time. That is something of an imbalance. Keeping in touch with the community – understanding its concerns and celebrating its achievements – is very important, but I think that there should be more emphasis on raising awareness about our constitutional arrangements and promoting our national identity. This is what a Head of

State normally does, but because our real Head of State is back in England and, naturally, the Queen does not act on behalf of New Zealand internationally, the Governor-General has not traditionally had much of a responsibility in that area. There is now much more desire to develop that side of my role. For that reason I will undertake more international visits for purposes such as meeting non-executive Heads of State with whom we have or wish to have friendly relations, or visiting our troops in their peace-keeping missions overseas.

*Your predecessor as Governor-General, Sir Michael Hardie Boys, has said that*

*the Governor-General has a responsibility for seeing that the system works as required by the law and conventions of the Constitution, but he does not try to do the work of the ministers. He can satisfy himself that the proposal does express the single mind of his advisors, but he himself while influencing the outcome of discussion in this way needs to be careful not to be an advocate of any partisan cause. So in doing this he has two dominant interests: the stability of government, no matter from which political party it is drawn, and regard for the total and nonpartisan interests of the people and the nation.*

*Do you see it this way?*

That’s precisely the way I see my role, yes. I have an obligation to discuss and ensure that, for example, legislation is constitutionally appropriate. But I have no direct political function. I have the reserve power to refuse to assent to legislation, but that would be a major step to take. I see my role at the bottom line as ensuring that our democratic system continues.

*So you provide constitutional oversight?*

Yes. My powers derive from the Letters Patent. I have express powers such as the appointment of members of the Executive

Council and Ministers of the Crown. On the advice of my responsible Ministers, I have the right to exercise the Royal Prerogative of Mercy, and defence prerogatives – the power to declare war, and control the disposition of the armed forces (to the extent that this has not expressly been superseded by statute), to declare martial law ... I also have reserve powers, which may in extraordinary circumstances be exercised at my discretion.

The courts are another line of defence. For example, we have a judicial review procedure that allows the High Court to exercise a supervisory role over the process followed by any organ of the state in reaching a decision. So it might be the way in which consent was given under the Resource Management Act to build a huge building somewhere. The Court may not consider the merits – for example whether it is a good idea to build the building; it's whether the process was followed according to the principles laid down in the legislation.

And of course, many cases are argued on the basis that an official has not taken into account important international obligations such as a United Nations Human Rights Convention ratified by New Zealand. So the courts have an important supervisory role there, and in fact that is closer to the real issues than my job has been thus far.

Another check falls within the responsibilities of the Attorney-General who must certify that before I may assent to it, legislation does not conflict with the New Zealand Bill of Rights Act.

*There is a sort of constitutional connection between your office and the judiciary, is there not?*

That connection is most obvious through the line of succession to the Governor-General's position. In my absence, the Administrator who is the Chief Justice assumes my duties. If she is not available, then the President of the

Court of Appeal officiates.

*With respect to constitutional structure – you are appointed by the Prime Minister, and the Prime Minister is appointed by you?*

Well, strictly I'm appointed by the Queen on the advice of the New Zealand Prime Minister. And yes, the Prime Minister is appointed by me at the conclusion of elections, or if there is a change of Prime Minister during the course of a parliamentary term.

*In a rather famous case in Australia in 1975, the Governor-General dismissed the Government, leading to a constitutional crisis. Has New Zealand struggled with incidents like this?*

There have been some frights, but I don't think there have been any incidents like that in recent history. There have been one or two incidents here in New Zealand where Parliament has been dissolved on the advice of the Prime Minister where there have been question marks as to whether the Governor-General should have taken that step. But the basic rule is that I act on the advice of the responsible Minister – and in the case of a decision to dissolve parliament, that person would be the Prime Minister who has the confidence of the parliament – unless there is a very, very serious reason not to. And I come back to my job, which is to make sure that the democratic system functions properly.

*Do you think that the extra step of having the Governor-General involved exposes Government action to more public scrutiny?*

Yes, because everything must be done transparently. After a general election, it generally will be obvious who will have the power to pull together a coalition and who is going to be the leader. It is generally obvious to everyone – you are effectively going to the polls to choose a parliament and a Prime Minister who will be

the leader of the political party that has a majority in the House – either an absolute majority or a majority by way of a coalition with smaller parties. So it's not as if I've got two or three to choose from. They emerge through the process and formally come and say to me, "I can govern; I have the support of this or that smaller party; I have a formal coalition of (as with the current situation) the Labour Party, the Alliance, with the support of the Greens." So the Labour Party in coalition with the Alliance has the majority in the House – and the majority party within the coalition is always going to want its leader to be the Prime Minister. The result has generally been very obvious.

*We have been discussing issues of constitutional structure, but New Zealand – as with most other countries based on the Westminster system – has not reduced its constitution to a single writing. What are the elements of the New Zealand constitution?*

There are in fact very few countries without a written constitution – the United Kingdom and Israel are the only others that I know of. It is correct that New Zealand, too, does not have a written constitution. It has a series of legislative provisions such as the Constitution Act 1986 and the Bill of Rights Act to which I have referred. The Treaty of Waitangi increasingly is considered an important part of what I term our "constitutional arrangements" and there is a Cabinet Manual which all members of Cabinet must agree to abide by in which all constitutional conventions are set out. These are for the main part longstanding conventions that are well accepted and which have evolved as circumstances have changed. For instance, new conventions developed when a proportional system of representation was introduced, to allow for the changes brought about by the need for coalition government.

The Cabinet Manual provides guidance as to how the Government's procedures should be

run. A description of my role is, for instance, included in a separate part so that everyone understands what the accepted conventions are. It is adjusted by consensus as new experiences occur. And when new ministers are sworn in, they must agree that they will abide by the provisions in the Cabinet Manual. So from a series of different places we collect our constitutional provisions.

*So in the absence of a single written constitution, much is governed by the Cabinet Manual.*

Yes. It is my view that eventually we will have to decide whether we will have some form of written constitution, but it is unlikely to be while we have the present system of a constitutional monarchy. You are probably aware that our Prime Minister has said that eventually New Zealand will be a republic, but she added that this is unlikely to happen for some time.

And as a lawyer I think ahead and think, well we are going to have to sit down and work out what our constitutional framework will be when finally we sever the ties with our head of state in the United Kingdom. And that may well mean a written constitution which will be brought together from all of these sources, including the Treaty of Waitangi.

So one day we will have to ask ourselves "what, if anything do we want to put into writing?" In a sense that will be the final act of maturity as an independent state, but a written constitution may not be seen as essential because we have never had any major constitutional problems. Everyone knows what their job is – and this is a country with minimal corruption, strongly democratic traditions, a well-educated population, good strong systems and a highly respected judiciary. Perhaps we don't need a book to tell us exactly what to do. And in a sense it would be a pity because a certain rigidity occurs when you have a written constitution – I speak for example of your Constitution – which is just about impossible to amend.

*Britain, Canada and Australia are all on the Westminster form of government. How are they different from New Zealand?*

Well, the United Kingdom has a second chamber. It may not be seen as the most effective second chamber in the world, but we in New Zealand don't even have that. I think only Israel and we are as unstructured. And perhaps we may need to think in terms of a more sophisticated structure. We have virtually no corruption; we have strong institutions here. But to be realistic, it may not always be like that.

About fifteen or twenty years ago we had a very autocratic Prime Minister. Many felt then that we needed to have more robust ways of controlling the executive. He was not corrupt – not at all. He was just a very determined man. He had a point of view that he believed was best for his people and he wasn't going to be deflected from that. Of course, not everyone agreed with him, and frequently there was forceful debate. I foresee the possibility of a more formal structure as part of the inevitable constitutional debate.

*Do you think a new constitutional arrangement would – or should – retain a position like yours?*

There must be a head of state. But the real question may be whether that person should be elected or appointed. An elected head of state has a mandate and will have stood for election on a particular slate of values and policy. We in New Zealand might ultimately go down that road. Certainly the recent Australian constitutional debate revealed that the people wanted to elect their own head of state. They didn't want Parliament to appoint that person, mainly I think because of the mistrust of politicians.

Personally I don't think that it is a good idea to have an elected head of state. Not only would that involve fundamental change of our

constitutional model but, and for the moment setting aside my appointment, governments have done quite well at finding independent well-respected people to be Governor-General; people whom the public broadly accept as a leader. For my part I think that system could continue. I think it's too big a jump to move to an Executive Head of State as your President is. I'm not sure whether it is cause or effect: because he is elected, he has to have policy; or he has policy responsibilities and therefore he is elected. We wouldn't necessarily have to adopt that system.

*You have said that New Zealand is substantially independent of the United Kingdom – but isn't there a remaining connection to London through the judicial system?*

It is still possible to appeal from the New Zealand Court of Appeal to the Judicial Committee of the Privy Council in London. There are something like 30 appeals per year. So it remains a significant part of our legal system. However, appeal is by leave of the Court of Appeal, and very few cases are eventually argued before the Privy Council. I believe there have been only one or two successful criminal appeals to the Privy Council in the last twenty years or so. Mostly the Privy Council considers major civil cases where the litigants have the money to bring an appeal. It's very expensive.

*Australia and Canada have abolished the Privy Council appeal – New Zealand is the largest nation within the Commonwealth retaining that feature of its judicial system. Is that likely to change?*

There are two schools of thought about appeals to the Privy Council. One is that it's a total aberration, a cultural cringe – the last remaining vestige of our “colonial” past. The other is that it is our link to the rest of the world.

One of the political reasons that it hasn't yet

been abolished goes back to the Treaty of Waitangi. The Maori people, New Zealand's original inhabitants, want to retain the right to petition the Queen through her Privy Councillors – usually Law Lords – as a vestige of their links with Queen Victoria. However I think that Maori are seeing increasingly that although New Zealand judges sit as members of the Privy Council from time to time, the courts here understand far better the background issues on which Maori base their claims. I don't mean individual Maori litigants, but Treaty issues like the rights to fisheries and so on – the courts here are far better positioned to understand and deal with those, have a far better understanding of the implications of the Treaty of Waitangi than the Judicial Committee of the Privy Council in London.

But while there are two schools of thought, it is clear that the right to appeal to the Privy Council will be abolished. Governments have been saying so for ten years now – the current Attorney-General has said it is going to go, as have previous Attorneys-General. She plans to introduce legislation to that effect, but much will depend on the structure of the indigenous Courts on abolition.

There is currently no real possibility of a regional Court of Appeal. The nations of the Pacific are very tiny and realistically that leaves only Australia and New Zealand. And as New Zealand does not have a federal system there might be distortions.

*How does the Privy Council operate – how does it fit into the Commonwealth judicial system?*

The Judicial Committee advises the Queen on petitions brought to it by a variety of countries that still retain that link. Judgments – or advice as it is called – represent the final determination in New Zealand's Court system. The judgments of the Privy Council have binding authority on New Zealand Courts

and persuasive authority for Commonwealth Courts that no longer retain the right of appeal to it.

New Zealand judges and judges from other jurisdictions that have retained the right of appeal to the Privy Council also sit in the Privy Council occasionally – our Chief Justice has sat as one of the members of the Judicial Committee of the Privy Council. And a former New Zealand President of the Court of Appeal – now Lord Cooke of Thorndon – sat in the British House of Lords, and occasionally in the Privy Council.

*Your background is in the judiciary – you were on the High Court, and sat on the Court of Appeal periodically. Is this the first time you have worked outside of the judiciary and legal profession?*

Yes, though I have had add-ons to my judicial and legal career. I have served on various commissions of inquiry and on a United Nations committee for years – and those positions haven't been strictly judicial or strictly legal. But I have been appointed to those because I have been a judge or lawyer. This is the first time that I have worked at something entirely distinct from the law.

I think a judicial background is a useful qualification for a Governor-General. In the early days of the new system of proportional representation in Parliament it was very reassuring to have a judge (my predecessor, Sir Michael Hardie Boys) in the position should there have been a constitutional issue to resolve. The same remains true, but it is not an essential pre-requisite. The legal background is useful in case some event occurred that required me to sift and weigh and make decisions, be impartial and exercise the sort of judicial discretion that a judge exercises. But I don't think that I was necessarily asked to be Governor-General simply for that reason. My intuitive reaction is that there were other reasons that were as important.

*Do you see yourself back in the judiciary?*

I don't think it would be appropriate. For example, I would have to be re-appointed. The Governor-General appoints the judiciary. How could I step down from this job and then put my hand up to the next Governor-General and say please reappoint me as a judge? So, no, I have closed the book on my judicial career which in about a month's time would have spanned twenty years.

*So there is no formal rule prohibiting your future judicial service, but convention frowns upon it?*

Yes, and for the same reason it would be extremely unusual for a politician to become a judge. There has been one controversial instance of a former Prime Minister being appointed Governor-General.

*On paper – on the face of your constitutional documents – it looks like there is a minimal division between the branches of government. But by convention the division is strong?*

There is in fact a very powerful conventional division between the branches of government, yes. I preside over the Executive Council, which the Prime Minister will often attend. Of course all three, the Prime Minister, the Chief Justice and the Governor-General, will often confer on non-constitutional issues, and the Prime Minister must keep me informed about issues of government, but there is a distinct divide between the three branches. As the Head of State, I can't go into the Debating Chamber.

*But you deliver the Speech from the Throne.*

Yes, but that's actually physically done in a different part of the building. Judges go into the Legislative Chamber to witness the Speech from the Throne as Her Majesty's

judges and sit there alongside the Governor-General and the Prime Minister on the other side, but the three never work together formally. The Prime Minister can't walk over here and take over my house and I can't go over to her place and take over hers.

*There are Governors-General in many jurisdictions. Are there occasions to meet your peers from other nations?*

As it happens we are going to meet next year because it is the 50th anniversary of the Queen's accession to the throne and she has invited us all to Windsor Castle for an event – dinner, and we are to stay in the Castle. But as far as I am aware it doesn't normally happen at all. There has never been to my knowledge a similar event. It might have happened at her coronation perhaps, but generally speaking you don't meet each other unless there is a formal exchange of state visits. So certainly I want to invite the newly-appointed Australian Governor-General to visit, but I will probably wait to do that until we've met in London.

*India and South Africa severed their ties to the United Kingdom in the twentieth century, and at the end of that century Australia entertained a referendum on becoming a republic – but that referendum failed. So at the dawn of the twenty-first century, Canada, Australia and New Zealand still have the Queen as their Head of State. It sounds like this won't last forever.*

Australia and Canada may well move to republican status in time. I think we in New Zealand will just take our time. There is no groundswell of public opinion seeking change at present. We have full autonomy and I think we will just take our time. And the time will feel right one day.

*The movement to full independence has gone very*

*far in Australia. Will you look to them to move first?*

While New Zealand and Australia are close neighbours who share many historical ties, the two countries are completely independent nations. It is entirely possible that Australia will move to republican status before New Zealand, but we have a totally different society here. We place great emphasis on our partnership between Maori and European and other New Zealanders. So if the Maori people don't want it, it won't happen. We all have to agree. Now there are different influences in Australia. So we might be out of step with Australia, we might become a republic earlier than Australia. We might never become a republic – who knows?

*I noticed today as I flew to Wellington that there are no metal detectors for domestic flights here. You trust your fellow Kiwis.*

Yes, I think we're a pretty homogeneous community. We have an unacceptable level of violence, but there is no widespread ownership of guns, so violence by and large tends to be at a lower level than in some countries. Having said that, there are armed hold-ups of businesses, so criminals can and do obtain guns. We do not however have a culture of private ownership of guns and the police are not armed as a matter of routine.

We have had our problems between Maori and Pakeha (New Zealanders of European origin), but these are not violent confrontations, they are vigorous debates, usually over assets and interpretation of the Treaty. When I look back at New Zealand from other parts of the world we are doing very well.

*From the visitor's perspective, the Maori culture is a prominent difference between Australia and New Zealand. And the difference is not just ornamental – there is a Maori Land Court to deal specifically with certain Maori issues. You have mentioned the*

*Governor-General's role in keeping New Zealand united – does that refer to the potential divide between Maori and Pakeha?*

Primarily, yes, when people talk to me about making sure New Zealand remains united I am really thinking about the Maori-Pakeha relationship. There are a large number of other ethnic groups here, but that is the fundamental relationship. The principles of the Treaty of Waitangi said we are to work together as two equal peoples in one country.

An interesting side issue is that in 1893 women here gained the vote for the first time anywhere in the world. But what is more remarkable still is that indigenous Maori women were also enfranchised at the same time. At that time, there was in most other parts of the world a patriarchal approach to indigenous peoples, and yet all our people – women, men, Maori and other nationalities – were enfranchised because we had a treaty stating that everyone was to be treated the same. It hasn't happened in reality, but in law it has.

*Women play a key role in government, especially now.*

It's pretty nice, isn't it? Prime Minister, Chief Justice, Attorney-General and Governor-General are all women. It gives you a real comfy feeling; New Zealand is in good hands. We don't find it so amazing ourselves as others do.

*You were one of the first women in the judiciary – so you have been an important leader for women in New Zealand government.*

Women were entitled to practise law from the end of the 19th century. The first female judge was appointed in 1975 and I was the second in 1981, so it took a long time. I think the first woman Member of Parliament was elected in



1910 or thereabouts. But it has taken over 100 years for women to be appointed to the judiciary. I was appointed as the first woman High Court judge on the 100th anniversary of women getting the vote. Change does take a long time.

We have had two woman Prime Ministers, and both have been the leaders of their political parties. There was no tokenism there. The current Prime Minister, Helen Clark, is the first elected Prime Minister in the sense that she led the party that won the majority at election. Jenny Shipley was appointed during a parliamentary term when she replaced the previous Prime Minister as the leader of the party. But you know there's no question of tokenism or anything like that – they fought their way through the political process to get there.

*So, you have served as lawyer, judge and now the*

*Queen's representative in New Zealand. Where will life take you next?*

I would like very much to use the skills I gained as a lawyer and judge and my United Nations experience. I believe that the United Nations fulfils a vital role in the international community, and there remains much valuable work to be done. I would love to serve on one of the United Nations' bodies such as the ICJ or the ICC. But that may well be a pipe dream. My government would be obliged first to nominate me, and then I would have to stand for election against very stiff international opposition. But as I have worked full-time since the day I left University, and part-time since I was twelve years old, I cannot imagine life without some challenging and useful work, whether that be paid or voluntary. 