Constitutional reform in New Zealand: Some important preliminary considerations

Two principal difficulties immediately come to mind when considering reform of the New Zealand constitution. The first is the question of a written constitution, and the second is the issue of the Treaty of Waitangi.

It is a common misconception that New Zealand does not have a written constitution. It is true that there is no one document called "the constitution". But the principal Acts which establish, empower and regulate the organs of government are readily identifiable. The meaning behind the assertion that New Zealand does not have a written constitution is simply that New Zealand's constitution is not entrenched. Thus Parliament can, and does, amend the constitution through a simple majority vote.

In the modern world New Zealand, together with the United Kingdom, is virtually alone in not having an entrenched constitution. Unlike the United States, Canada and Australia—not coincidentally all federal systems, New Zealand cannot look to one single document embodying its constitution. But, although the provisions of the Constitution Act 1986 are not entrenched, and major constitutional changes could legally be effected virtually overnight by a bare majority of the House of Representatives, the issue is not purely or even mainly the legal one of entrenchment.

The approach of the New Zealand constitution is one of flexibility. The written rules are underpinned by what are called conventions. They are rules of political practice which are regarded as binding by those to whom they apply. Laws are enforceable by the courts, conventions are not. The major convention upon which the constitution is built is the constitutional principle known as the rule of law. This is based upon the practice of liberal

1 One of the purposes of the Constitution Act 1986 was to bring together in one place important constitutional provisions.
2 Though there is a procedural entrenchment of parts of the Electoral Act, it is doubtful whether this is effective.
3 Whether Parliament can in fact entrench an enactment remains controversial. The Union with Scotland Act 1706 (6 Ann c 11) (Eng) was declared to be entrenched, but has been subject to repeated amendments. Most recently, article 22 was repealed by the Statute Law (Repeals) Act 1993 (UK), s 1 (1) and schedule 1.
4 Although it may be questioned whether the Governor-General could, or indeed should, decline to give the royal assent to such a measure. See Dixon, "The Law and the Constitution (1935) 51 LQR 590.
democracies of the western world\textsuperscript{6}. It means that what is done officially must be done in accordance with law\textsuperscript{7}.

In Europe, where an entrenched constitution is the touchstone for legitimacy of government\textsuperscript{8}, there might be a general grant of power to the executive, and a bill of rights to protect the individual. In the British tradition, which New Zealand is alone in following in this respect, public bodies must point to a specific authority to act as they do\textsuperscript{9}. Thus we rely upon numerous specific grants of authority to the various organs of government, a much more flexible approach.

New Zealand might choose to adopt an entrenched constitution, but this would mean adopting a new approach to public law. In Canada, the newly renamed Constitution Act 1982 attributed to itself a position of legal paramountcy\textsuperscript{10}. On the model of the American Constitution there was to be no higher legal authority. This has meant that the Supreme Court of Canada has had to become increasingly involved in the political arena.

Indeed, it is a debatable point whether New Zealand has lost anything by not having an entrenched constitution. Not only would an entrenched constitution require the courts to assume a greater, more controversial role, thereby increasing the possibility of political selection of judges, but entrenched constitutions also tend to become out of date. This is due to the difficulty of amending them to take into account changes in circumstances. In Australia it was this latter aspect which was the real cause of the sacking of the Whitlam government in 1975.

An entrenched constitution is in no way a guarantee of better government, nor necessarily a limitation upon excessive legislative independence. Those countries which suffer most from military coups, revolutions, putsches and similar upheavals normally have entrenched constitutions. The way in which society functions, the emotional attachment to democratic processes, are a better safeguard than a so-called written constitution.

Because in Canada and Australia authority is shared between the federal and provincial or state parliaments, there must be some higher authority which determines who shall have what power or responsibility. As a unitary state, there is no need for the New Zealand constitution to be entrenched, apportioning authority and placing limits on the powers of Parliaments.

\begin{itemize}
  \item \textsuperscript{6}Heuston, \textit{Essays in Constitutional Law} (2nd ed 1964) 40-41.
  \item \textsuperscript{7}Arthur Yates and Co Pty Ltd v The Vegetable Seeds Committee (1945) 72 CLR 37, 66 per Latham CJ.
  \item \textsuperscript{8}Hardin & Lewis, \textit{The Noble Lie} (1987) 7.
  \item \textsuperscript{9}Entick v Carrington (1765) 19 State Tr 1030 per Lord Camden.
  \item \textsuperscript{10}'s 52. There is no single document which constitutes "the Constitution", though the Constitution Act 1982 (as the British North America Act 1867 (30 & 31 Vict c 33 (UK)) was renamed) comprises most of what one would expect in such a document. Most importantly, because of the federal nature of Canada the legal capacity of the federal (and provincial) parliaments are limited by an enabling Act which is itself entrenched.
\end{itemize}
It is generally agreed that Parliament is a sovereign body, able to enact, repeal or amend any law, including any self-imposed limitations. Such limitations are only effective in a federal state, where limitations on capacity are, by definition, part of the constitutional structure. Short of adopting a federal system of government precisely to entrench a constitution, it is doubtful whether any constitution would be held by the courts to be truly entrenched.

In August 1998 the Supreme Court of Canada considered the question of the Canadian constitution being circumvented by a referendum, thereby affirming the sovereignty of the people. But it felt that political institutions draw their legitimacy from the rule of law, which precluded such action. In the New Zealand context, this would mean that any attempt to introduce a truly entrenched constitution would threaten the legitimacy of the established legal order, because of its reliance upon inherited authority.

A more important factor to consider, and one which might point the way to the adoption of a new theory of government (one in which entrenchment is possible) is the position of the Treaty of Waitangi.

In New Zealand, the Treaty of Waitangi, as a principle of the constitution, is now politically all but entrenched. Formerly it might be said that he traditional national identity was of one people with one culture, that culture being (predominantly) Pakeha. But, like Canada, and especially since the 1970s, our liberal democratic ethos has generated what Kelsey calls an integration ethic and a self-determination ethic. These two ultimately may prove impossible to reconcile. They must however be addressed in any examination of the constitution.

The Treaty occupies an uncertain place in the New Zealand constitution. Legally, it is not part of the general law. No Maori law was recognised by the colonial legal system. The New Zealand Parliament has never doubted that it had full authority despite the Treaty. There have been some signs that this orthodoxy may be challenged, but it is difficult to be how this

---

11 Though this has only been established by a series of obiter dicta judicial statements, which may have authority, but are not binding in any other court.
16 Te Heuheu Tukino v Aotea District Maori Land Board [1941] NZLR 590, 596-7; [1941] AC 308, 324, per Viscount Simon LC (PC).
17 Wi Parata v Bishop of Wellington (1877) 3 NZ Jur (NS) SC 72.
could be achieved in the absence of an entrenched constitution and a Supreme Court on the American model.\textsuperscript{19}

The time may yet come for the courts to give judicial recognition to the Treaty of Waitangi, as they have been called upon to do by, among others, Professor Whatarangi Winiata of the Victoria University of Wellington.\textsuperscript{20} There have been clear signs that Lord Cooke of Thorndon, while President of the Court of Appeal, was inclined to reconsider the position of the Treaty\textsuperscript{21}, those orthodox position was outlined by the Privy Council in 1941.\textsuperscript{22}

Although the New Zealand political system is a democratic and popular one, it is not based upon the concept of popular sovereignty. Nor is tino rangatiratanga. In this respect, the differences between lawyer and politician are great. The politician could well argue that the New Zealand system of government is a popular sovereignty, along the lines that Locke discussed in his \textit{Two Treatises of Government}. Locke said that "every one has the Executive Power of the law of nature". The right of governing, and power to govern, is a fundamental, individual, natural right and power.\textsuperscript{23} To the lawyer, whatever the political reality, the legal sovereignty remains vested in the Sovereign in Parliament. Neither view reflect Maori attitudes to government.

The Maori dimension in New Zealand government is significant. The legal status in the Treaty of Waitangi is secondary to how it is perceived by Maori.\textsuperscript{24} Whatever the legal status of the Treaty of Waitangi, the chiefs yielded kawanatanga to the Queen. The Treaty settlement process has encouraged reconsideration of the system of government, and the constitution in general. But without specific concurrence from the Maori, as Treaty partner with the Crown, the significant revision of the constitution, such as the abolition of the monarchy would appear to lack legitimacy.\textsuperscript{25} Nor would a move to a republic absolve a future government of its Treaty obligations.\textsuperscript{26}

New Zealand, in contrast to Canada, has only two principal competing constitutional interests. Legal legitimacy in New Zealand is based legally upon the assumption of authority (of legal sovereignty) by the British Crown and Parliament in the middle of last century. But

\begin{itemize}
  \item \textsuperscript{19} Brookfield, "A New Zealand Republic?" (1994) 8 Legislative Studies 5-13.
  \item \textsuperscript{20} "Revolution by Lawful Means" 1993 New Zealand Law Conference Papers, \textit{The Law and Politics}, vol ii, pp 13, 16-18.
  \item \textsuperscript{21} \textit{Te Runanga o Wharekauri Rekohu Inc v Attorney-General} [1993] 2 NZLR 301, 305 (CA).
  \item \textsuperscript{22} \textit{Te Heuheu Tukino v Aotea District Maori Land Board} [1941] NZLR 590, 596-7; [1941] AC 308, 324, per Viscount Simon LC (PC).
  \item \textsuperscript{23} Locke, \textit{Two Treatises of Government} ed Laslett (1988) treatise II, chapters 6-9, 13; 128-30.
  \item \textsuperscript{24} The Royal Commission on the Electoral System, in its \textit{Report}, concluded that MMP would obviate the need for Maori seats, thereby indicating a lack of appreciation for the different perceptions of Maori to their need for representation in Parliament; "Towards a better democracy" (1986) 81-97.
\end{itemize}
this authority has been called in question, in particular by those who claim Maori sovereignty. Indeed, a crisis of legitimacy is afflicting all countries whose origins lie in colonial conquest and settlement. This is due in part to the justification for colonialisation being largely discredited.

As Hayward has said:

[T]he Treaty of Waitangi is a fundamental document in New Zealand, because it allowed for the settlement by Pakeha and the establishment of legitimate government by cession (as opposed to by military conquest).

Yet this is only partly true, for legally, the acquisition of sovereignty, and the settlement of this country by Europeans, can be ascribed to an act of state.

Legitimacy is sought through the advancing and acceptance of a political formula, a metaphysical or ideological formula that justifies the existing exercise or proposed possession of power by rulers as the logical and necessary consequence of the beliefs of the people over whom the power is exercised. This legitimacy is based upon two acts of state, the Treaty of Waitangi, and the proclamation of sovereignty over New Zealand by the Crown.

The authority of the Crown was imposed by Governor Hobson by proclamation of 21 May 1840. But this was based, morally at least, on the Treaty of Waitangi. However, the Maori version of the Treaty gave rather less authority to the Crown than did the English, and retained rather more to the Maori chiefs. Nor did all the chiefs sign the Treaty.

There is also a marked degree of dispute amongst Maori as to the extent of the powers given up by those Chiefs who signed the Treaty of Waitangi. Sir Hugh Kawharu, Professor of Maori Studies at the University of Auckland, in evidence to the Waitangi Tribunal, observed that:

[W]hat the Chiefs imagined they were ceding was that part of their mana and rangatiratanga that hitherto had enabled them to make war, exact retribution, consume or enslave their vanquished enemies and generally exercise power over life and death.

The leading Maori lawyer, Moana Jackson, proposes a markedly different view.

---

28 Mulgan, "Can the Treaty of Waitangi provide a constitutional basis for New Zealand's political future?" (1989) 41 (2) Political Science 51-52.
30 An act committed by the sovereign power of a country which cannot be challenged in the courts.
31 Tarifa, "The quest for legitimacy and the withering away of utopia" (1997) 76 (2) Social Forces 437-72.
32 For the text, see the despatch of Hobson to the Secretary of State for the Colonies, 25 May 1840, in *Parliamentary Papers* 1841/ 311, 15 at 18-19.
[In Article 1 the Maori granted] to the Crown the right of kawanatanga over the Crown's own people, over what Maori called "nga tangata whai muri", that is, those who came to Aotearoa after the Treaty. The Crown could then exercise its kawanatanga over all European settlers, but the authority to control and exercise power over Maori stayed where it had always been, with the iwi.

Kawanatanga could easily be taken for a distant power of protection against foreigners and other tribes, which would not impinge on the mana of individual chiefs and their own tribes.

Whatever the Chiefs believed, it is unlikely that they had any conception of the unlimited parliamentary sovereignty which was imposed upon them. However, the Treaty at least partially justifies or legitimates Parliament's claims to power, though in Jackson's view only in respect of Pakeha. Legitimation by effectiveness and durability of even a revolutionary assumption of power is a well understood principle of law, even amongst the early Maori. However, such a resolution presupposes that the original assumption of sovereignty was in some way illegal, itself a question open to dispute.

As will be seen from the above cursory examination of two issue of the constitution, entrenchment and the Treaty of Waitangi, any serious revision of the constitution risks rapidly becoming an unmanageable exercise. Although the general public are not overly concerned with esoteric concepts of constitutional theory, any reform must first seriously consider the theoretical basis of our legal and political system. This is especially important in view of Maori claims for "sovereignty". It would therefore be premature to ask, for example, what procedures for constitutional amendments would be appropriate in a new constitution.

At a time when the constitution is already facing a crisis of legitimacy, rather than looking to alternatives, it might be worthwhile looking at solutions within the existing structures.

In the view of Canadian observers such as David Smith and Anthony Birch, the most important of the defects of the liberal model of the Westminster type constitution- the view of the political theorist, is its failure to depict the role of the Crown in the system of government,
and the implications of the interrelated independence of the executive\textsuperscript{40}. Smith would argue that the Crown provides the necessary underlying structure. Monarchy concentrates legal authority and power in one person, even where symbolic concentration alone remains\textsuperscript{41}. The monarchy can be extolled as the one unifying symbol which New Zealand currently has. This is not merely consistent with the Treaty of Waitangi, but arguably required by it.

Unless they are prepared to wrestle with large issues, most contentious of which is the Treaty of Waitangi, proponents of constitutional reform should tread warily.


\textsuperscript{41}"The attraction of monarchy for the Fathers of Confederation lay in the powerful counterweight it posed to the potential for federalism to fracture"; Smith, David, \textit{The Invisible Crown} (1995) 8 relying on WL Morton. Provincial powers grew as the provincial ministries were accepted as responsible advisers of the Crown.