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Reconstituting the Constitution

Springer

the needs of victims, and the then-Government cited the CIR as support for the changes.[66]

The Government's refusal to act following the CIR in which 81.5% of New Zealanders agreed that "the size of the House of Representatives [should] be reduced from 120 members to 99 members" underscores the significant change if governments were bound to act on the outcome of constitutional reform referenda.[67] This would be a shift from Parliamentary sovereignty to popular sovereignty.[68]

8.7.1.2 Convention of Special Processes for Constitutional Change?

The limited number and scope of the government-initiated referenda to date make it difficult to argue that there is an evolving convention that "substantial constitutional changes should not be made by a bare majority vote of a coalition of minorities in Parliament."[69] The ACT, National and New Zealand First parties wanted to invoke such a convention that the Labour government could not abolish appeals to the Privy Council, if there was not 75% support of MPs for the law change. New Zealand First Party MP, Dail Jones, said[70]:

> We have seen how the minority Labour Government operates on constitutional issues through, for example, the Privy Council matter and the Supreme Court legislation. The Supreme Court Act was rammed through this House. It had the support of only 38 percent of those able to vote at the last election, yet it was rammed through the House. In fact, the majority on both sides was the same: 38.1 percent of those eligible to vote at the last election voted for that Supreme Court legislation, and 38.1 percent voted against. Yet the Labour Government rammed it through.

No referendum was held on replacing the Privy Council with the Supreme Court of New Zealand as our final court of appeal.[71] As former Attorney-General, the Hon

[66] The Victims' Rights Package of new legislation was announced by government on 12 June 2000. Hon Phil Goff (Minister of Justice at the time) and Hon Matt Robson (Minister for Courts at the time) said the "Victims' Rights Package delivers on the governing parties' commitment to victims of crime and recognises 92% support in the 1999 referendum for enhancing victims' rights" (New Zealand Government 2000). Subsequently the Victims' Rights Bill was announced by the government on 11 October 2002 also in reflection of the 1999 referendum.

[67] The result of the referendum held in conjunction with the general election on 27 November 1999 on the question "Should the size of the House of Representatives be reduced from 120 members to 99 members?" was Yes – 81.5%, and No – 18.5%.

[68] See Robert Hazell in Chap. 5 of this volume, p. [?].

[69] New Zealand Business Roundtable (2003).

[70] Jones (2004).

[71] Campaign for the Privy Council (2003): "The Labour, Greens, and the Progressive Coalition parties will have committed a shameless act of constitutional vandalism if they pass this bill.

Margaret Wilson, has said, "New Zealand has no tradition of holding referenda with Parliament being recognised as the body to make decisions."[72] The Labour, Green and United Future MPs did not support the matter going to a referendum, and the legislation was eventually passed by 63 votes to 53.[73] But the Green Party made its support of the Supreme Court Bill conditional on what became the Constitutional Review.[74]

There have also been complaints that this, along with other changes like abolishing the royal honours system,[75] replacing the title Queen's Counsel with Senior Counsel,[76] and removing the references to allegiances to the Queen from public oaths,[77] was the then government moving New Zealand away from a monarchy to a republic by stealth.[78]

The Government is not simply proceeding with a Constitutional reform with only a bare majority in Parliament: it is proceeding knowing that its plans are opposed by most New Zealanders."

[72] Wilson (2010).

[73] MPs from the Labour, Progressive Coalition and the Green Parties voted in favour of the Supreme Court Bill.

[74] Tanczos (2004).

[75] In 2000, former Prime Minister Helen Clark decided not to suggest further appointments to the Privy Council, the means by which the title "Right Honourable" was conferred. However in August 2010, the Queen approved the use of the title "Right Honourable" for all present and future prime ministers, governor generals, speakers and chief justices (see New Zealand Government 2010).

[76] Lawyers and Conveyancers Act 2006, sections 118–119. The current government has introduced the Lawyers and Conveyancers Amendment Bill 2010 (120–1) which would reinstate the title of Queen's Counsel.

[77] The Oaths Modernisation Bill 2005 (264–1) was introduced on 10 May 2005, passed its first reading on 18 May 2005, was referred to the Government Administration Committee which was unable to agree on whether it should be passed when it reported back on 24 March 2006. The order of the day for the bill's second reading was discharged on 1 June 2010 under the new National-led government.

[78] For example, Dr. Jonathon Coleman, National Party MP, commented during the committee of the whole on the Lawyers and Conveyancers Bill (59–3) on the government's proposal in the bill to replace the title "Queen's Counsel" with "Senior Counsel", stating: "It is republicanism by stealth, and I think it is really part of a wider agenda. If one removes enough of the trappings of the monarchy, little by little one erodes the public support for it, and there is no question that members of the Government would very much like to see the monarchy done away with and republicanism instituted at the earliest possible opportunity …. I can tell those Government members that most New Zealanders do not want to have republicanism by stealth. They want to have a proper debate on these issues" (Coleman 2006). Similarly during the second reading of the Supreme Court Bill, the Hon Georgina Te Heuheu commented that the bill was an "outrage": "it is being done by stealth and to Margaret Wilson's agenda, and we, the public of New Zealand, are the recipients of that. However, mark my words, the public of New Zealand have woken up to her. They consider her to be one of the most dangerous women in this country, because they can see that, by hook or by crook, she is setting out on a path to change the face of our constitution without their consent. That is where the outrage comes in" (Heuheu Te 2003).

There has also always been concern that, without first obtaining majority public support, various governments have conceded power to Māori and status to the Treaty of Waitangi through the foreshore and seabed negotiations, Treaty settlements and co-management and co-governance arrangements.[79]

The Labour government's response on the Privy Council abolition issue was the public's involvement through a 1999 discussion paper and related submissions, and an electoral mandate through foreshadowing such constitutional changes in the election manifesto prior to the 2002 election.[80] The process of consultation, discussion and decision-making took 3 years.[81] Some have also argued that the changes to New Zealand's final appellate court did not constitute a significant constitutional change requiring the mandate of New Zealanders.[82]

Conventions are also, by nature, imprecise and evolving, based as they are on practice and usage. Enacting a supreme constitution would require a significant process of consideration and thought about what should be protected, the process for making changes to the constitution, and how that process should be protected. In contrast, constitutional change based on conventions can be driven by public polling and/or government policy. We may end up with expensive and cumbersome referenda on subjects that are not constitutionally significant, yet no plebiscite when they are. Further, the lack of a referendum in these circumstances would not invalidate the resulting constitutional reform.

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[79] For example, see Barr (2010); Newman (2008b); Pepperell (2007); ACT Party (2005a, 2005b, 2005c). See also the discussion of the status of the Treaty in Constitutional Arrangements Committee (2005), pp. 70–72.

[80] See Barnett (2005): "The Government has been a busy one. Some decisions of a constitutional nature have been made – the Human Rights Amendment and the Supreme Court Act, for example. They were foreshadowed in both the Labour and Greens Parties' election manifestos before the Parliamentary votes on them. To put such measures to a referendum would go beyond what any other OECD country has considered necessary." Responding to ACT's call for a referendum on the abolition of appeals to the Privy Council, then Attorney-General Margaret Wilson said: "A referendum just asks a very simplistic question. A Select Committee gives people the opportunity to contest their views, allows facts to come out and misunderstandings to be cleared up … Severing ties with the Privy Council was first raised about 20 years ago and previous governments have discussed it. When we first became government in 1999 I put out a public discussion paper, submissions were received and there have been consultation groups. An advisory group was set up and most of the proposals have come out of its report. The government has attempted to ensure a maximum amount of input." (New Zealand Government 2003b). See also New Zealand Government (2003a, 2004).

[81] Wilson (2010).

[82] For example, see Harris (2003), p. 17: "… it is not clear that a national referendum is necessary or appropriate in respect of the Supreme Court Bill. The modest magnitude of the constitutional change may not warrant the invocation of such an expensive and cumbersome public decision-making mechanism. Informed debate should take place, and be fed into the regular parliamentary decision-making process through submissions to the Select Committee and through communications to individual members of Parliament."

Robert Hazell says that, "What matters in a constitution is not so much the written text but the underlying values, and whether people are willing to stand up and defend them."[83] But what if no-one stands up, as often happens when the New Zealand Parliament makes changes that will have constitutional impact? Thus, political sanctions may fail to "punish" breaches of the convention of obtaining public authorisation for constitutionally significant changes. Despite the controversy over the abolition of the Privy Council, only 70 submissions were received, leading the then Attorney General to reflect 5 years later as an academic that "[i]t was obvious this was not an issue that attracted a great deal of public concern and what concern that was expressed was amongst elites."[84]

Conversely, governments may be punished for making changes that are not of a constitutional nature without a referendum, if the public perceives (through the influence of interest groups, for example) that the changes are in fact constitutional.[85] One only has to look at the list of matters where referenda have been called for to see that there is some imprecision about what is and is not a constitutional matter in the public's perception, including:

(a) The Civil Union Bill and the amendments to the Human Rights Act extending the grounds of non-discrimination to include civil unions and de facto relationships[86];
(b) The provision of greater support to victims of crime and harsher penalties for violent offenders[87];
(c) The changes to local governance in Auckland[88];
(d) The amendment to section 59 of the Crimes Act restricting the use of corporal punishment by parents; and
(e) The adoption of a new flag for New Zealand.[89]

[83] See Robert Hazell in Chap. 5 of this volume, p. [?].

[84] Wilson (2010).

[85] See Barnett (2005).

[86] Section 21(1)(b) of the Human Rights Act (which sets out relationship status, including civil unions etc., as a grounds for non-discrimination) was inserted into the Act by the Relationships (Statutory References) Act 2005, section 7; New Zealand First Party (2004); see Justice and Electoral Committee (2004), pp. 8–9.

[87] The subject of a citizens-initiated referendum in 1999.

[88] John Key introduced a bill promoting a referendum on Auckland governance when he was in opposition in 2006: see references to this bill by Dr. Wayne Mapp, (http://waynemapp.co.nz/index.php?/archives/26-Aucklanders-should-have-right-to-decide.html) and by Clendon (2010). Last year Phil Twyford introduced another bill to the same effect: the Local Government (Protection of Auckland Assets) Amendment Bill (53–1), introduced in August 2009 the bill did not pass its first reading.

[89] On 5 August 2010, Labour MP Charles Chauvel introduced a Member's Bill which would establish a commission to consider whether New Zealand should adopt a new flag. Under the bill, a referendum would be held in which voters could decide if they wanted to keep the old flag, or change to one of three new designs. See New Zealand Labour Party (2010).

In conclusion, a supreme constitution would make it harder for New Zealand to evolve constitutionally in a pragmatic manner.[90] Future governments would no longer be able to decide the approach to take,[91] or how much publicity they want to give to the process. Future generations will be tied to whatever accommodation we come to over the Treaty, and to the rules and values of this generation. Further, amendments may be difficult to secure.

On the other hand, nearly 60% of United Nations members have made major amendments to their constitutions between 1989 and 1999.[92] A supreme law constitution with a specified process for making changes would give the public clear warning that constitutional reform was being embarked upon, would lead to public education about the constitutional matter concerned, and would ensure that a clearly-defined process was followed before constitutional changes could take effect. New Zealand's current uncodified constitutional arrangements would become clear and certain.[93]

Given New Zealanders' pragmatic evolutionary approach to constitutional matters, the best compromise may be achieved by enacting an extended ordinary constitution utilising the current Constitution Act, the NZBORA, and the Electoral Act, with greater entrenchment (and potentially double entrenchment) for important provisions.

8.7.2 Constitutional Protection for a Wider Range of Rights and Freedoms?

In thinking through what matters should be protected from change by special constitutional processes, the Constitutional Review said that "substantive values should not receive constitutional protection without broad and enduring social agreement."[94] To date, Māori and opposition politicians have tended to be the protagonists of proposed constitutional changes to protect rights and freedoms, including through the introduction of Members' Bills.[95] They have often been unsuccessful. However, changes can be made to the NZBORA to expand the substantive values it protects using an ordinary legislative process.

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[90] Constitutional Arrangements Committee (2005), p. 64.

[91] Ibid, p. 21.

[92] Ford (2004), p. 1.

[93] See BV Harris (2004) for some thinking on the processes for accomplishing any needed constitutional reform.

[94] Constitutional Arrangements Committee (2005), p. 7.

[95] For example, Te Ururoa Flavell's Local Electoral (Māori Representation) Amendment Bill 2010 (151–1), Rahui Katene's Foreshore and Seabed (Repeal) Bill 2006 (86–1) (since overtaken by the government's decision to repeal the Foreshore and Seabed Act, as discussed above), and the Members' Bills of Gordon Copeland (New Zealand Bill of Rights (Private Property Rights) Amendment Bill 2005), and Owen Jennings (New Zealand Bill of Rights (Property Rights) Amendment Bill 1998), discussed above.

The controversy over the Regulatory Responsibility Bill (RRB) and subsequent report of the Regulatory Responsibility Taskforce (Taskforce) suggests that we do need to have the debate on whether more rights and freedoms should be included in the NZBORA and whether that Act should be given higher law status. The heat in the discussions over the RRB as originally proposed by Rodney Hide as a Member's Bill in 2006, and subsequently amended by the Taskforce, arose because it seeks to not only ensure proper law-making *processes*, but also to protect *values*, including:

(a) The right not to have private property expropriated by the government except with "full compensation";[96]
(b) The principle that every person is equal before the law;[97] and
(c) The principle that a person's liberty, personal security, freedom of choice or action, and rights to own, use and dispose of property should not be diminished.[98]

The controversy has arisen because these values have been included as "principles of responsible regulation" in an ordinary statute, with the Courts able to enforce such principles by means of a declaration that a provision of any legislation is incompatible with these principles.[99] Law academics have said that this judicial involvement is essentially constitution-making without the proper democratic process or status of legislation. For example, Professor Paul Rishworth says that the Taskforce's proposed RRB would be very similar in effect to a second New Zealand Bill of Rights:

> In New Zealand . . . a law that diminishes liberty, or that takes or impairs property, would be incompatible with the principle but would not for that reason be "dis-applied". Still, a court could declare that it does diminish liberty or wrongly takes property and so amounts to incompatibility with the principles. That is, it could do under the RRB for liberty and security, etc precisely what it can do under the Bill of Rights for the rights in that document. That is why, in its key provisions – in its truly novel provisions – the RRB is functionally equivalent to a Bill of rights.
>
> What flows from this?
>
> . . .
>
> I think it a needless confusion and dangerous to have foundational civil and political rights spread around two statutes that operate in different ways. Here is why. First, I think it a bad idea to begin to proliferate statutes purporting to lay down a vision of the nation's fundamental values, against which legislation is to be compared. If rights in the RRB are of the sort that should be in the New Zealand Bill of Rights Act, then that is where they should be.[100]

[96] Regulatory Responsibility Taskforce, Draft Bill clause 7(1)(c).

[97] Ibid, 7(1)(a)(iii).

[98] Ibid, 7(1)(b).

[99] The Regulatory Standards Bill, introduced to the House on 15 March 2011, provides that the Court may make declarations of incompatibility of legislation with the principles contained in the bill (clause 12), albeit that such a declaration would not affect the validity, continuing operation, or enforcement of the provision in respect of which it is given (clause 13).

[100] Rishworth (2010), pp. 5–6. See also Ekins (2010).

Concerns have also been raised that the Taskforce's proposed RRB only protects certain values that are primarily of importance to commerce, but not other social values. Chye-Ching Huang states:

> If the RRB includes some constitutional principles but omits others, will it elevate those principles above others? If the bill includes principles not previously considered "constitutional" . . . then might the RRB significantly change how judges understand New Zealand's constitution? Might the RRB, by giving some "constitutional" principles a special role in the legislative process encourage judges to think that they too should give some "fundamental" principles of law more force than others? Are any of the potential impacts of the RRB, if likely, desirable? These questions are important to any assessment of whether the RRB should be enacted, but the Taskforce left them unanswered.[101]

8.7.2.1 Inadequacy of Current Quality Regulation Measures

The RRB is needed because most of the existing quality assurance measures in law-making are guidelines only, and not required by legislation. The Cabinet Manual requires a Regulatory Impact Statement (RIS) to be prepared prior to the proposed legislation being presented to Cabinet for consideration. The requirements were expanded in November 2009[102] to give effect to the Government Statement on Regulation.[103] Independent quality assurance must be undertaken on all RISs, either by the authoring agency or the Regulatory Impact Assessment (RIA) team at the Treasury.[104] If a regulatory proposal does not meet the RIA requirements, including if it is inconsistent with the Government Statement on Regulation, the Treasury may advise the Minister of Finance and the Minister for Regulatory Reform. Further, significant regulatory proposals that satisfy the criteria for the involvement of the RIA team at the Treasury and are agreed to by Cabinet, but do not satisfy the RIA requirements, will be subject to a post-implementation review.

Even with these improvements, however, there is no guarantee that the RIS will consider all relevant costs, and the content of these documents is not able to be challenged by external parties if it is inaccurate or incomplete. For example, the RIS accompanying the Cabinet Paper setting out the government's decisions on liquor

[101] Huang (2010), p. 92.

[102] Department of the Prime Minister and Cabinet 2009. Cabinet Office Circular (09) 8.

[103] New Zealand Government (2009); Se also associated press release by Hons Bill English and Rodney Hide (English and Hide 2009).

[104] The main changes made in 2009 provide for high-level criteria to guide decisions on whether the RIA team in the Treasury should independently assess the quality of an agency's RIS, more specific criteria around when it may be appropriate to claim an exemption from the RIA requirements, and the introduction of a more complete set of quality assurance criteria. Agencies who submit the RIS are also required to include a signed disclosure statement describing the nature and extent of analysis undertaken, and highlight any key gaps, assumptions, dependencies and significant constraints, caveats, or uncertainties concerning the analysis.

law reform only sets out the costs to the government of the reform and does not consider the significant costs to industry in any detail.[105]

The RIS remains a Cabinet requirement only, the Legislative Advisory Committee (LAC) guidelines are just that, and even a negative report prepared under section 7 of the NZBORA indicating a bill's inconsistency with the rights and freedoms protected under the NZBORA does not prevent a government from proceeding to legislate. Indeed, a bill introduced with a negative Bill of Rights report is almost certain to pass, because the government will have already determined that it has sufficient support in Parliament, and the political capital with the public, to weather any criticism.[106] There is a Legislation Design Committee to assist with the quality of bills, but bills are now rarely referred by responsible ministers. LAC submissions on bills before Select Committees are sometimes ignored.[107]

In summary, adding a takings clause to the ordinary status NZBORA, for example, would not necessarily mean that Parliament had to respect the value of private property. It could still legislate to expropriate private property without just compensation, as the NZBORA would remain ordinary law. Higher law status would be needed to prevent legislation in breach of such values.

The values articulated in the RRB, and the work done by the Taskforce, however, provides a starting point about the economic rights that might be incorporated in the NZBORA and whether that Act should then be given the status of higher law.[108]

Professor Rishworth has written in support of amending the NZBORA to include some of the rights in the RRB such as "security of the person", a right to property, and even a right to liberty.[109] The Minister of Justice also recently stated at a symposium celebrating the twentieth anniversary of the enactment of the NZBORA that:

[105] Ministry of Justice (2010).

[106] This is confirmed in the Hon Simon Power's Speech to the Bill of Rights Symposium (Power 2010). Note Keith Locke's new Member's Bill, the New Zealand Bill of Rights Act Amendment Bill 2010, which seeks to "strengthen the Bill of Rights," including by requiring a section 7 report to contain reasons for any opinion by the Attorney-General, and reports at later stages in the legislative process, and requiring Select Committees and their members to put forward any amendments to bills to provide such reports if the amendment appears to limit any rights and freedoms in the NZBORA.

[107] The Legislation Design Committee was established in 2006 to provide high-level, pre-introduction advice on the framework and design of legislation, with the goal of ensuring that policy objectives are achieved and the quality of legislation is improved. The Legislation Advisory Committee analyses all government non-financial bills when they are introduced to Parliament, however their recommendations have on occasion been ignored by Select Committees.

[108] As Sir Geoffrey Palmer said in the 1985 White Paper: "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. In that way a Bill of Rights provides a set of navigation lights for the whole process of government to observe". (Minister of Justice (Palmer G) 1985.)

[109] Rishworth (2010).

> Recognising a right not to be arbitrarily deprived of property is an important restraint on State power. . . . I expect the public dialogue on this issue to continue.[110]

The controversy over the Search and Surveillance Bill 2009 also reflects an increased concern about state intervention that leads, inter alia, to the impairment of private property rights. This is reflected in the submissions to the Justice and Electoral Committee, which considered the bill, such as that of the Human Rights Commission.[111] The bill was reported back from the Justice and Electoral Committee on 4 November 2011. At the time of writing the bill was awaiting its second reading.

These responses merely highlight the prior question of the appropriateness of those powers to "reasonably" search and seize property provided under extant laws. Similarly, the Justice and Electoral Committee acknowledged in 2007 on Gordon Copeland's New Zealand Bill of Rights (Private Property Rights) Amendment Bill "that there is significant public support for further legal protection of private property rights in New Zealand".[112]

Others may also want considered the inclusion of social rights and freedoms, such as the rights to education and housing. The process of getting majority agreement to a set of values and rights and freedoms in a single supreme law will necessarily require compromise.

8.8 Conclusion

In conclusion, I do not think a majority of New Zealanders would vote to immediately move to a supreme constitution in New Zealand, but I do think there is a growing public consensus around the need for authorisation by a majority of the public for significant constitutional changes. Further formal, systematic thinking on what comprises significant constitutional changes should start here.

The real issues that New Zealanders need to discuss is not a supreme Constitution, but rather:

(a) What are sufficiently important matters that a special constitutional change process is needed;
(b) What that special process should be; and
(c) How to protect that process from itself being changed.

Given New Zealand's pragmatic evolutionary approach to constitutional matters, an extended ordinary constitution utilising the current Constitution Act, the NZBORA, and the Electoral Act, with greater entrenchment of important

[110] Power (2010).
[111] Human Rights Commission (2009), paras 4.1, 4.3, and 4.4.
[112] Justice and Electoral Committee (2007), para 3.

provisions than those currently entrenched in the Electoral Act may be best. Consideration should also be given to expanding the rights and freedoms protected by our ordinary NZBORA.

As Justice Baragwanath said in a recent lecture in favour of "new clothes" and not recycling:

> [E]ngaging the community in debate concerning their law is, in my view, a condition of full confidence in the institutions of law . . . ultimately it is only New Zealand Parliaments, New Zealand judges, New Zealand scholars and our compatriots who can determine what is right for New Zealanders.[113]

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