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Reconstituting the Constitution

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If he (sadly there are no women candidates at the moment) sees them as a critical link from the community to the council then the boards will be very busy. The more decisions are made at a local level, the more administration and infrastructure will be required locally. My prediction is that to run effectively, the new Boards will need to have a similar level of administration and infrastructure to that now existing in Auckland, Waitakere, North Shore and Manukau cities.

If the new Mayor does not make this a priority, then some of the boards could find themselves in the same situation as half the community boards in New Zealand where, over the last 20 years, they have effectively been starved of resources and not able to attract good people.

We then need to add the Remuneration Authority to this mix. For some reason, it has never fully understood the workload of local government elected representatives, especially at the local level, so they are highly unlikely to understand the inequity that is currently playing out.

All of this brings me to the conclusion that this Auckland model does not strengthen or support the role of local government for the future and may, in fact, put the fundamental principles of our democracy at risk in the long term.

22.3 The Principles of Local Government

I have come to understand certain principles that underpin a healthy democratic process in local government.

Firstly, it is important to see a functioning grassroots democracy as a benefit to our way of life and not a cost. This is a real challenge for all of us. The issue is the priority we are prepared to give to local democracy and community engagement compared to efficiency.

Secondly, it is imperative that people can relate to their local board representatives, have their voices heard, and know that they can meet face-to-face with someone on matters of importance to them. Given that the population ratio for the Auckland Super City is 10,000:1, compared to Denmark which is only 1,084:1, Sweden only 667:1, Italy even less at 397:1, and France smaller still at 116:1, I have real concerns about how this can really happen. It is interesting that all these countries have experienced the loss of democracy in the comparatively recent past – so they understand how truly precious it is!

Thirdly, remuneration packages need to be set at a level that will attract good people. For too long, participation in local government has been restricted to those that can afford to make themselves available – the retired, the self employed, those with a private income or a partner behind them, and a small handful of community-minded beneficiaries. It is different for the big cities, but to offer \$20–30,000 for a local board member to work for this huge organisation is simply unacceptable.

Then there is the issue of “relevance”. How relevant is twenty-first-century local government when many sections of our community are still not adequately represented at any level?

The government has made a very bad job of ensuring the representation of tangata whenua at the local government level. Added to this is the fact that, with nearly 40% of its residents being born overseas, Auckland is considered one of the most ethnically-diverse cities in the world. If the Super City does not achieve a fair mix of representation for Māori, Asian, other ethnic groups, and women, the ability to make good, fair and informed decisions will be undermined. This is a major challenge to our democracy, and if it is not sorted out effectively it will erode the ability to govern within a stable environment.

With the country facing the biggest changes we have seen in local government for the last 20 years, the advent of the Super City election and the advent of local government elections right across the country, it is alarming to see how poorly understood the concept of “governance” is. In my own District it is evident that a significant number of the “would-be” new Councillors really want to manage the place, rather than govern it!

In a country where only 47% of the population voted in the last local body elections, we need some serious education about the critical role local government plays in our daily lives. We must keep local government relevant, ensuring people can access both the information they need, and those making decisions for them, in a way that gets results.

Clearly, many European countries understand the need to have local decisions made locally by small groups. Is this a lesson we still have to learn? If the 21 Local Boards in the new Super City are not resourced well, and the elected members are not supported in what will be effectively full-time jobs, we could see a return to the old pre-1989 Boroughs.

Doing more with less, being driven solely by efficiencies, working professional staff to the bone, and setting up elected representatives in a part-time environment when the job description is already showing a full-time workload is not, in my view, a good recipe for the future sub-Governance of our country. On the other hand, if these matters are addressed and proper support is given, this experiment could be partially successful. I say partially because the population ratio of elected representatives to members of the public is still far too high for a country that up until now has prized democracy highly.

Chapter 23

Local Government: The Search for Constitutional Certainty

Mike Reid

23.1 Introduction

“The accumulation of all powers . . . in the same hands,” wrote Madison “may justly be pronounced the very definition of tyranny.” To protect liberty, then, power must be divided.¹

Constitutions, whether stated explicitly in over-arching constitutional documents or unwritten, as in the United Kingdom and New Zealand, are primarily concerned with placing limits on authority or more particularly ensuring such authority is dispersed or distributed. The underpinning rationale is perhaps the rather well-acknowledged maxim that power corrupts and the more power the greater the corruption.

Successful democracies are characterised by the existence of checks and balances which limit the exercise of public authority. As a unicameral country, the division of authority is less explicit in New Zealand than that which might be found in bicameral and presidential systems, although over recent years changes to the structure of Parliament, such as the introduction of the Mixed Member Proportional (MMP) voting system and the enhancement of the Select Committee system, have worked to introduce somewhat greater contestability within the system. Federalism, which divides authority between spheres of government – national, provincial and local – is also an explicit mechanism of distributing power. New Zealand is not a federal country, but it still begs the question, should we be

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¹ Gardner (2003), p. 1007.

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doing more to reinforce and strengthen the role and authority of sub-national government, and if we wish to do this, how should it be done?

In relation to the role of sub-national government, New Zealand performs poorly compared with the rest of the OECD. In fact *The Economist* recently described New Zealand as being the most centralised nation in that club. It was not a ranking given with any form of approval.² Highly centralised regimes, such as ours, limit the opportunity for local innovation and policy learning to take place and create significant information asymmetries as the central authority attempts to develop policy settings to address a highly diverse environment – the problem of “one-size-fits-all” solutions.

As the OECD observation indicates, when it comes to dividing policy responsibilities between central and local government New Zealand is the outlier, although the relative differences in scale between central and local government have only come about since the rise of the welfare state. In the mid 1930s, for example, local government spent roughly 50% of all public expenditure. Today that figure is around 10%.³

Not only is decision-making in the New Zealand state highly centralised, local government lacks the constitutional certainty that would enable it to provide an effective check and balance on the power of the executive. This is not a new issue. It was first articulated by the local government sector a decade ago, at this same venue, at the *Building the Constitution* conference.⁴

23.2 Local Government and the Constitution

At the *Building the Constitution* conference one of the topical issues was the then Labour–Alliance government’s intention to provide local government with a power of general competence.

Sir Geoffrey Palmer reflected on this in his presentation and suggested that this proposed new power signalled a “degree of power sharing or at least governance sharing”⁵ between central and local government. Also addressing the same issues was Sir Ross Jansen, a former President of the Local Government Association and Mayor of Hamilton, who suggested that there was, indeed, a very strong case to be made for giving local authorities a power of general competence.⁶

Whether justified or not, the concept of a power of general competence contained the promise that councils would develop a certain degree of

² *Economist* 31 October 2009, p. 66.

³ Local Government New Zealand (2010), p. 4.

⁴ See Jansen (2000); Stigley (2000).

⁵ Palmer (2000), p. 4.

⁶ Jansen (2000).

constitutional freedom, at least when compared with what currently existed at the time. Not all commentators, however, were so enthusiastic.

A number of national organisations, such as the New Zealand Business Roundtable and Federated Farmers of New Zealand, saw the proposed power of general competence as a significant threat to their members (and to the well-being of New Zealand in some cases) and argued that it would lead councils to expand into inappropriate new activities. Alisdair Thompson, chief executive officer of the Employers and Managers Association, Northern, predicted:

An almost unfettered right for councils to take investment risks, to run businesses, to compete with the private sector, to put ratepayers' funds at risk in non-core activities and even compete with central government in providing social services.⁷

A decade on we are in a better position to reflect on whether or not the introduction of general empowerment which was achieved with the Local Government Act 2002 (LGA) had any constitutional significance or changed the role of local government. So far the evidence that councils had used their new powers to invest in new services is scanty and three public reviews have so far failed to corroborate the fears these agencies have expressed.⁸ In fact most councils would probably argue that over the course of this decade they have been reducing the scope of their activities as the pressure to meet the cost of infrastructure maintenance and development has come to swamp competing claims.

A more sober observation might be that the much heralded general empowerment clause introduced in the LGA fell considerably short of a “power of general competence” and, other than enabling councils to behave in a more flexible and responsive manner, changed nothing in terms of the profile of council activities or the local central relationship. Indeed, some commentators have argued that the previous Local Government Act 1974 contained some very empowering provisions and that the changes introduced in the 2002 LGA were of no significance.⁹

It is interesting, in this context, that the new Conservative-led coalition government in the United Kingdom, as it begins to unravel 30 years of concerted centralisation, is about to table a “localism” bill which will, amongst other things, give councils a full power of general competence.

23.3 What Role Does Local Government Play in a Democracy?

In unitary states, such as our own, the concept of parliamentary sovereignty is seldom challenged and it is clear that local government operates within the rules set by that Parliament, as indeed do all other corporate bodies, whether private or

⁷ Vaughan (2002).

⁸ See Local Government Commission (2008); Local Government Rates Inquiry Panel (2007); Joint Central Government/Local Authority Funding Project Team (2005).

⁹ See Local Government New Zealand (2010).

public. Yet noting Parliament's right to set rules does nothing to diminish local government's primary accountability to citizens.

Councils are a form of club in which citizens group together to ensure the provision of a number of local public type goods. In this they possess a democratic legitimacy that is independent of Parliament and allows citizens to express political preferences that might even be in contradiction to the policy preferences of the government of the day.

Discussing local government's place in the constitution, therefore, raises questions about the exact nature of local government. There are two broad conceptions of local government that are relevant to this discussion: one is a functional conception; the other emphasises autonomy. The functional view regards local government as primarily an administrative mechanism for the delivery of services, many of which are provided on behalf of the state. The autonomist conception regards local government as a form of government in its own right and capable of independent action. Both conceptions are reflected in local government systems throughout the world in a dynamic manner, with systems moving between both poles over time. In every country councils provide services on behalf of the crown or national authority, but they also have space for autonomous decision-making, a space that varies considerably between nations.

It is the autonomist conception that underpins the views of those commentators who see local government playing an important "democratic", as opposed to service delivery, role and argue for some form of constitutional recognition. Advocates of the autonomist conception, while acknowledging the variable legal and constitutional restrictions that exist in different countries, focus on the potential within these systems for councils to exercise initiative and freedom of action. As Loughlin notes "the *ultra vires* doctrine does not, in itself render local authorities subordinate to central departments."¹⁰ These arguments have a long progeny.

Traditional liberal writers like John Stuart Mill regarded local and central government as distinct spheres of government within which central government should be restricted to only monitoring local government's activities. In addition Tocqueville argued that local government is necessary to give citizens the experience of government and act as schools of citizenship. His study of American democracy in the early nineteenth century found evidence that participation in local self-governing associations and local governments enabled citizens to come together to discuss common needs and increase their awareness of the needs of others.¹¹

Similar views also underpin much of the more recent theory of civic republicanism which regards the practice of self-government as building character and enhancing democracy.¹² Popular de-centralised self-government is seen to help

¹⁰ Loughlin (1986), p. 3.

¹¹ See de Tocqueville (1831), Chap. 5.

¹² Sandel (1996), p. 5.

guarantee the freedom of local communities, maintaining the separation of powers in which the interdependence of society dictates that all members should be active in promoting the public interest to avoid the possibility that government is left to a minority or distant elite.

23.4 The Value of Distributed Government

Ensuring that public authority is distributed over a number of levels of government reduces the ability of any one level of government to concentrate power in its hands alone. “De-centralisation of power and local solidarity are principal means to counteract the threats to freedom that any gap between rulers and ruled implies.”¹³ Checks and balances can be provided by the existence of an empowered and legitimate local government system. Victoria University’s Professor John Roberts argued, more than 40 years ago, that:

The growing power of government, as evidenced by its ever increasing intervention in the economic and social affairs of the people, constitutes another reason for the existence of an efficient system of local government. While central and local government must share, as collaborative partners, the total task of governing the nation, an effective local government structure is an important counterweight to the growth of central government power. Local government is not solely a matter of the management of local services; it provides the democratic machinery for the expression of local opinion on all matters of public policy.¹⁴

Political theory also recognises that local government provides a learning ground for budding central government politicians. It has lower barriers to entry, allowing participation by a wider and more representative group of individuals, while also giving new politicians a chance to develop their skills and experiment with innovative policy ideas. Such perspectives are captured in much of the new localist theories which are having increasing influence in policy-making, particularly in Europe. Localism is a normative belief in the value of local decision-making on the basis that it enhances democratic participation in public affairs; the efficient allocation of public goods and services; and the strengthening of community.

Localists regard smaller polities or localities as being more effective at providing opportunities for meaningful political participation than larger ones, reflecting citizens’ access to decision-makers. Participation is also regarded as a valuable social good in its own right, because it enhances moral autonomy and builds a sense of local identity.¹⁵ Ultimately it promotes civic virtue, understanding and strengthens “bridging” social capital, that is the increased social trust that comes from engagement between diverse communities.¹⁶

¹³ Norton (1994), p. 31.

¹⁴ Quoted in Boswell (1981), p. 30.

¹⁵ Sen (1999), p. 20.

¹⁶ Putnam (1995), p. 65.

Proximity to decision-makers better enables citizens to ensure that decision-makers provide the range of local public goods and services that meet their particular needs and preferences. This argument emphasises the heterogeneity of the national community and the difficulties faced by national providers in tailoring services to the circumstances and preferences of diverse communities.

Locating public decision-making closer to those communities affected by the decisions is also seen as strengthening community in its own right. Putnam's work in Northern Italy notes the relationship between the strength of regional government and the degree to which citizens participate in local clubs and societies.¹⁷ As a general trend, trust in local government tends to be higher than trust in national governments which would suggest that one way of addressing concerns about democratic deficits would be to endorse a policy of greater devolution.¹⁸

23.5 Why Is Greater Constitutional Recognition Important?

Local government is not only subordinate to Parliament but its rights and very existence depend on Parliament's will. As a nation we have not yet developed the tradition of legal localism found in the United States, for example, the view that local government of a municipality:

does not spring from nor exist by virtue of written constitutions; that it is not a mere privilege, conferred by the central authority, but that the people in each municipality exercise their franchises under the protection of the fundamental principles [the doctrine of an inherent right of local self-government].¹⁹

Instead local government's status is based on traditions and informal norms. In addressing the varied status of local governments, the Congress of the Council of Europe in *European Charter of Local Self Government*,²⁰ has encouraged its members to endorse the principle of subsidiarity (the principle that decisions should be taken at the level closest to citizens) and include reference to municipalities in their constitutions.

In New Zealand councils are extremely conscious of their subservient status, an awareness that is brought home by the frequency with which higher levels of government tend to amend their legislative framework. The ease (and speed) by which governments change the rules governing the way in which councils operate and adjust the range of activities councils are required to undertake, and how they should undertake them, creates instability, uncertainty and cost. It also reinforces local government's status as the junior partner in governance.

¹⁷ Putnam (1995), p. 65.

¹⁸ See Ingrid van Aalst and Associates (1999), p. 7.

¹⁹ Judge Eugene McQuillin in his treatise on the law of municipal corporations as quoted by McBain (1916), p. 190.

²⁰ Council of Europe (1985).

Since 1989 Parliament has spent a considerable time debating local government legislation to the point that significant changes to the sector's operating principles seem to be occurring every 7 or 8 years.²¹ Much of this reflects the political nature of Parliament and the different views of local government's role held by the left and the right. From a local government perspective this creates new costs and makes long-term planning that much more difficult. Having greater constitutional certainty, and perhaps achieving a bi-partisan view of its role, would allow councils to better meet the needs of their communities and play a more effective role in our local democracy.

Some changes are occurring which might result in a greater focus on local government regardless of the actions and views of the politicians and officials that make up central government. The new Auckland City is one of those changes. Its sheer economic, let alone democratic, status must demand a level of respect from the state that has largely been missing in central local government exchanges in the past. Indeed considerable thought is being invested by government officials into exactly this issue and new institutional mechanisms are being established to provide for effective dialogue between central government and Auckland City. This is more than a top-down discussion.

Yet the underlying reality remains: if local government becomes an inconvenience or nuisance it only takes 51% of the votes in Parliament to fix the matter. That makes people who believe in a strong autonomous form of local government extremely nervous and encourages local government to seek that its "core" legislation – that is, the LGA, the Local Electoral Act 2001 and the Local Government (Rating) Act 2002 – is entrenched, or "super" entrenched.

23.6 The Minister of Local Government's "Big Idea"

There is no shortage of models when considering the constitutionality of local government, from the South African Constitution, which makes specific provision for the three levels of public governance, to cities in the United States with "home rule charters".

On any continuum, with constitutional recognition at one end and creature of statute at the other, New Zealand, with its powers determined by simple parliamentary majority, sits at one extreme. This has more negative than positive implications for the sector as it encourages governments to make frequent changes to the rules which govern the way local government works, often based less on

²¹ The most recent, and perhaps strangest, being the LGA Amendment Act, passed by Parliament in November 2010.

detailed analysis of the system than anecdote and limited first-hand experience with a local council.²²

As one example of what can be done (although it requires a written constitution), the Australian Local Government Association is leading a campaign for constitutional recognition of local government in that country. Plans are in place for a referendum which would give local government specific recognition along with the states and the federal government. In recognition of its importance the Federal Government has recently provided the association with a contribution of \$250,000 to conduct community education programmes to inform people about the issue.²³

Closer to home the Minister of Local Government, Hon Rodney Hide, has also been highlighting the need for some sort of “constitutional recognition.” In the Minister’s own words:

With your input and assistance I want to produce next year a first-principles discussion document of the proper constitutional status of local government in New Zealand, how its proper function and structure should be evaluated and assessed, and how central and local government can better mesh both their decision-making and their work programmes to improve the service we provide in the communities we represent.

Too often local government is required to act like a government department owned and directed by government. They are not. To be a vital part of our constitutional make-up and democracy local government must be recognised as an autonomous level of government fiercely independent of central government.

I have tentatively called this project Smarter Government – Stronger Communities.²⁴

The project stems from a concern by the Minister of Local Government that other ministers find it simply too easy to impose costs and regulations on local government (and, ironically, to change the legislation) without any regard to the resultant costs on communities. It has become a *leitmotif* of recent speeches.

Included in the possible terms of reference are a desire to look at how local government should be constitutionally established and protected and to what extent; how to ensure we have stable durable local government institutions while allowing communities genuine opportunities to change structural arrangements from below; and whether formal cooperation mechanisms are needed with central government. It is intended that feedback from the discussion document will be forwarded to the Minister of Local Government in the new Government following the 2011 general elections. It is not yet clear how this exercise will contribute to the government’s planned constitutional review being led by the Ministry of Justice. Is this a case of the left and right hands not communicating?

²² For example, a number of the provisions in the LGA were regarded by many in the sector as specifically designed to stop Auckland City from privatising water and other services, regardless of whether they had any intention to do so.

²³ The Association has set itself an aspirational goal. Very few such referenda have succeeded in the past and on two separate occasions, 1974 and 1988, specific referenda seeking local government recognition have failed to receive sufficient support.

²⁴ Hide (2010).

23.7 Conclusion

It is not clear where the Minister will find allies for his project in the existing Parliament; however politics can generate some interesting bedfellows. In a column in the *Waikato Times*, the former Green MP, Nandor Tanczos called for a “radical localism” and argued that the weak position of local government in our constitutional set up was caused by the nature of our colonial experience as “a farm for England rather than a democracy”²⁵ and that “because power is seen as flowing down from Her Majesty, rather than originating in the people and flowing up to Parliament, local bodies [sic] provide no constitutional constraint on the Government.”²⁶

Internationally the focus also seems to be on finding more effective forms of horizontal integration or forms of co-governance in order to address the complex problems facing communities. As Roiseland notes, in relation to efforts to seek constitutional recognition of local government in Norway, “today there are widespread expectations, formal and informal, directing local and regional governments to engage in issues and problems that can hardly be solved within the frame of the same institutions.”²⁷ Put simply, dealing with today’s wicked issues will require much more inter-governmental collaboration that we have seen in the past.

The focus of this chapter has been on whether or not greater constitutional recognition for local government would be helpful, to democracy and to better outcomes for New Zealanders. It is not a discussion on what services councils should provide and whether or not citizens have enough ability to influence the choices made by their elected members. These are valid discussions but should not be confused with the desirability of limiting the role of central government by further empowering sub-national government. They are issues we can expect to be explored in some depth during discussions on the Minister’s project *Smarter Government – Stronger Communities*.

It might be over-optimistic to assume that Parliament will seriously reconsider the relative status of itself and local government but change seldom comes without struggle. The Minister’s constitutional review paper provides yet another opportunity for the sector to promote its case.

References

- Boswell D (1981) Local government. Self-published monograph, New Zealand
 Council of Europe (1985) European Charter of Local Self-Government. Available at <http://conventions.coe.int/treaty/en/treaties/html/122.htm>. Accessed Jan 2011
 de Tocqueville A (1831) Of the use which the Americans make of public associations in civil life. Available at http://xroads.virginia.edu/~HYPER/DETOC/ch2_05.htm. Accessed Jan 2011

²⁵ Tanczos (2010).

²⁶ Tanczos (2010).

²⁷ Roiseland (2010), p. 137.