

"Building the Constitution" conference

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Globalisation and constitutional development

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Session two

New Zealand is a country with a small population, an enviable liberal democratic history, and a need to trade and welcome business in order to stay prosperous. In the developed world, like Britain and only a few other countries, it does not have a formal constitution. That means judges here have less power than in countries with entrenched, written constitutions. It also means government here can be flexible and adaptable, and that change involves relatively low transaction costs. These are important assets for a small open economy.

Background issues

Any consideration of the New Zealand constitution and of the possibility of fundamental changes to it should start with a recognition of the following:

1 Globalisation is not a threat to national sovereignty

- New Zealand benefits from openness and engagement with the world. Outward-looking policies enhance economic growth. Globalisation is not an ideology or a plan; it is simply what happens when governments loosen controls and allow people and businesses to make their own decisions.
- National governments continue to have enormous power and remain free to make choices over a vast range of topics.
- International commitments, such as those arising from the World Trade Organisation, are freely entered into on the basis that they benefit New Zealand.
- A threat to democratic sovereignty comes from sometimes ill-conceived treaties adhered to under the prerogative power without parliamentary scrutiny, and from judges who use them to influence their interpretations of domestic statutes.

2 The rule of law is of fundamental importance

- The essence of this idea is general rules known in advance that can be referred to in order to plan and guide conduct.
- It requires those who make public policy to operate on the basis of sound and predictable rules, not on an *ad hoc*, case-by-case basis.

- The rule of law may be impaired if judges were to have undue latitude in developing policy ostensibly in the name of justice or fairness but beyond the established legal framework.
- Fundamental law should focus on negative rights (ie limits on state action, including with respect to property and freedom of contract) and *not* on positive rights (ie obligations on the state to do and to provide things, or what might be termed 'entitlement rights').
- A prime purpose of constitutions is to limit the power of the state and protect the individual.

3 Property rights are crucial

- Strongly protected property rights are crucial for freedom, democracy and prosperity. Yet modern advocates of Bills of Rights no longer seek to include property rights (cf the United States and Canada).
- Were our statutory Bill of Rights Act to be constitutionalised, protection for property rights must be included.
- Compensation should be paid where private property is taken for public use and for other regulatory takings.

4 Freedom is only preserved if powers to tax, take and regulate are constrained

- We have elements of an 'economic constitution' in the form of the Reserve Bank Act, which constrains the government's monetary operations, and the Fiscal Responsibility Act, which requires the minister of finance to report regularly on the extent to which fiscal policy is consistent with specified principles of responsible fiscal management. These should be complemented by a Regulatory Responsibility Act requiring regulatory intervention to conform with proper principles and processes.
- Legal and economic structures protective of freedom of contract and association are important for their own sake, and because they foster economic, social and political well-being.

5 Limited government is crucial

- Written constitutions, associated with more powerful judges and incentives to seek change and promulgate new legal rules through the courts, do not obviously further this goal.

Specific issues

The possibility of constitutional change in New Zealand raises six key areas of concern to business:

A The electoral system

- Change here *is* necessary. MMP does not suit a small country, one that earns its livelihood by trade in the global market. It is cumbersome and gives disproportionate power to small parties. Nor are list MPs, chosen by parties and party leaders (not voters), a desirable feature of a responsible democracy.
- Following the review of MMP, options for change must be put to the public (my preference is first-past-the-post). It is simply not good enough for politicians to have the last word on New Zealand's voting system.
- A new binding referendum should be conducted on the basis of the same rules as the last one.

B Republicanism

- The key issue here is the use of reserve powers to maintain stable government, not the title of the person in Government House. There are no grounds for serious dissatisfaction with the Crown's performance of this role. The present system is low cost, well understood, and works well.
- This is not an issue of sovereignty. New Zealanders are already free to govern themselves as they are already fully sovereign.
- This debate is of relatively low priority. There is no discernible *public* desire for change. Any referendum for a change to republicanism is very likely to fail for the foreseeable future – the Australian experience here is instructive.

C Treaty of Waitangi

- New Zealand should not go down, or at any rate go any further down, the path of racial pigeon-holing and of different laws for different races.
- One rule of law for all is *not* a reactionary, oppressive ideal. It has been a crucial constraint on the ability of rulers or majorities to oppress minorities, for which many people throughout history have fought and died.
- In practical terms, this country needs a political consensus to move *soon* towards a settlement of valid grievances and reassert one set of rules for all. The essential requirement is to put an end to state-imposed racial distinctions, not to entrench them.
- 'Partnership' as a concept appears to be a judicial invention and a complicated and ambiguous one at that.

- The Treaty itself is too short, general and indeterminate to be included in a written constitution as a higher, entrenched law. Doing so in this simple form would run the risk of handing arbitrary and unwarranted power over to the judiciary.

D Privy Council

- Despite some recent decisions, this is a high quality, rule-respecting court. Even though few cases go this far, the very possibility that they can is a constraint on home-grown judicial activism and good for business. It helps keep New Zealand in contact with international business law.
- Resort to the Privy Council is not an infringement of sovereignty. Sovereignty is not infringed if judges stick to their basic role of administering law rather than creating it. From a business perspective, the key issue is the quality of judicial services, and New Zealand should avail itself of those of the highest possible quality. More work needs to be done on improving the structures and performance of the judicial system, and increasing commercial expertise in it, before consideration is given to cutting ties with the Privy Council.

E Local government

- Local government's powers should be limited. Councils should be constrained to focus on ensuring the provision of a limited range of local public goods and the administration of local regulation. Councils should not be given an expansive power of general competence.

F The process for constitutional revision

- Change involving any move to an inflexible, hard-to-alter, entrenched, written constitution requires substantial popular support to be legitimate. At the very least this requires success in a referendum supported by more than a simple majority after the electorate has had ample opportunity to evaluate the issues.

Conclusion

Stable, democratic government operating under the rule of law has been a key feature of most prosperous countries over the past 200 years. New Zealand's sovereignty and standards of living depend on economic success achieved through participation in the world economy.

There is no obvious need or desire for an overarching written constitution. Such a constitution, especially one with an entrenched Bill of Rights or Treaty, would inevitably shift great power to judges to make public policy case-by-case. This would not be an attractive prospect for business in New Zealand. It would be likely to lead to more uncertainty and to an even greater pace of new law-making.

The current constitution is not broken; it does *not* need fixing. There is inadequate consensus about positive versus negative rights, the Treaty, the need for governments to apply the same laws to all, and the importance of secure property rights. Any changes would reflect a balance of political power today that commanded no respect from those whose views were over-ridden, or from later generations.

What *is* needed is relatively limited government, government which values freedom and equality before the law. What *is* needed is a second binding referendum on the electoral system with an option for change. What *is* desirable is an extension of our 'economic constitution' to include government regulation. What *is* needed before *any* drastic change to our constitution is popular support in a properly structured referendum following a debate that fully exposes the issues. What is *not* needed is a process of subtle change that, with the benefit of later judicial support in the case law, bestows some sort of 'quasi-constitutional' status on regular Acts of Parliament. Business and the wider community need respect for the rule of law, well-protected property rights, sanctity of contract, and flexible, adaptable government.