

THE NEW ZEALAND CONSTITUTION: CONTEXT, CONVENTIONS AND CONTEMPORARY ISSUES

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Although New Zealand does not have a written constitution in the sense of a 'supreme law of the land', it does have traditions and practices that are of constitutional significance and that are important sources of stability and order for the country's political process. Even in a nation that possesses neither a constitution nor much in the way of a constitutional vocabulary, it is nevertheless intriguing that issues of a constitutional character do occur and attract attention from the news media, opposition political parties and the public. This article underscores the importance of what are described in New Zealand as 'constitutional conventions' by examining a succession of recent issues and events.

The New Zealand approach eschews constitutionally elaborate solutions for problems generally seen as amenable to short-term pragmatic solutions. However, the avoidance of a more formal approach – the enactment of a supreme constitutional document with all that that entails – demands good judgement, common sense, tolerance, patience and wisdom, qualities undeniably precious but ones that are often in short supply in any society.

L'absence de constitution écrite en Nouvelle Zélande n'empêche cependant pas pour autant l'existence d'usages et des règles dont la portée constitutionnelle ne peut pas être déniée. Elles confèrent stabilité et cohérence au système politique de ce pays. On constate également que dans ce contexte particulier, il existe un véritable débat constitutionnel qu'alimentent les médias, les partis politiques d'opposition et auquel s'associe souvent le public. Cet article, à la lumière d'exemples récents, souligne l'importance et la portée, de ce que l'on présente souvent en Nouvelle-Zélande, comme des 'accords constitutionnels'. Sera mis en exergue, une approche fondamentalement pragmatique retenue par les différents acteurs de la vie politique néo-zélandaise qui systématiquement et volontairement excluent les solutions théoriques trop complexes. Cependant, l'auteur souligne que l'exercice intellectuel qui tend à nier la nécessité de regrouper les principes constitutionnel au sein d'un seul et même texte, n'est pas sans difficultés. Il requiert du bon sens, de la tolérance, de la patience et de la sagesse, qualités qui sont souvent difficiles à obtenir dans n'importe quelle société.

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I INTRODUCTION

In many ways it is easier to talk about the United States Constitution, or the Constitution of Japan, than to talk about the New Zealand constitution.¹

In the case of the United States constitution we have the opportunity to look at the text of a document written more than 200 years ago in the American city of Philadelphia. We can talk about the way that the constitution was written. We can look at the process by which the constitution came to be accepted by the people. And we can consider how the constitution has been changed – by amendments, by Supreme Court opinions, and by changing interpretations of its language and purpose.²

With the Japanese constitution we are also working with an identifiable document. It is not disputed that there *is* a constitution; that it was written in Tokyo and approved by the Japanese legislature, the Diet; and that this constitution, too, has been subject to different views about its meaning and application in particular circumstances.

The New Zealand constitution is not so easily described. To begin with, strictly speaking, there *is* no constitution. New Zealand is one of the few countries in the world – the United Kingdom and Israel are the others – that does not have a constitution to organise its system of government.

If we wish, this can be a short presentation: New Zealand has no constitution. Hence there is nothing to discuss. But, of course, matters are not so simple.

II THE NEW ZEALAND CONSTITUTION

New Zealand does not have a written constitution – a single document describing itself as ‘the supreme law of the land’, a written text superior to all other laws and regulations. But in a larger sense, New Zealand has a ‘constitution’ – the same is true for Great Britain and Israel – for there are practices and procedures that are regarded as fundamental to the New Zealand political process. These provide the framework within which representative, democratic government is carried out. Although this constitutional context cannot be grasped through the examination of a single written text, it nevertheless provides the setting within which New Zealand’s politics and government take place.

Constitutions come into existence for all sorts of reasons. The American constitution was the product of compromise and reasoned argument, the outcome of a gathering brought

1 This article has its origins in a talk given in December 2001 at Gifu University in Japan. Appreciation is expressed to Professor Kondo Makoto for his support for my research and for his invitation to once again lecture at Gifu University. I am also grateful to his students, and to the others who attended this presentation, for their encouragement and interest, and for the warm welcome that I have always received when visiting Gifu University.

2 There is a vast literature on these subjects – the US constitution, Supreme Court decisions and constitutional amendments. An interesting overview of the US constitution, encompassing the original text and subsequent changes (both formal and informal) to it, is R Bernstein with J Agel, *Amending America* (New York: Random House, 1993). The text of the constitution, with amendments, is given in *Amending America* on pp. 279-299.

into existence in order to remedy problems with an already existing system of government. As the preamble to the US constitution so aptly puts it, the purpose of the document was to 'bring about a more perfect union', one that would enshrine the preeminent values of justice, security and freedom.

The Japanese constitution was written anew in the aftermath of war. National catastrophe often stimulates a search for new beginnings. The emergence of a new, democratic and peace-loving Japan may have been the product of war, but it was not its inevitable product. As in the United States, more than 150 years earlier, wise leadership was required to devise a new constitutional beginning for a country whose existing system and values had brought it to a dead end.

While the United States and Japan have thus had two national constitutions – the Articles of Confederation were replaced by the US constitution, and the Meiji constitution was succeeded by the current constitution – New Zealand has managed to govern itself without even one such document. If we look at the American and Japanese experiences, we can say that New Zealand has yet to have difficulty preserving its existence as a unified country; nor has it ever been defeated in war, occupied by a country determined to transform it.

Any country that has developed ways of carrying out its collective activities – so that there are expectations about how things are to be done – can be said therefore to have a 'constitution' in the broad sense of that word. Of what, then, does the New Zealand constitution consist?

We can specify a few components:

- *New Zealand statutes* – that is, laws passed by the New Zealand Parliament;
- *United Kingdom statutes* – that is, some laws passed by the United Kingdom, New Zealand's former colonial power, and still regarded as being in existence for New Zealand;
- *powers considered to be retained by 'the Crown'* – that is, New Zealand's Head of State (or the Head of State's representative), presently Queen Elizabeth II (represented in New Zealand by the Governor-General, residing in Wellington, presently Dame Silvia Cartwright);
- *constitutional principles* that have evolved over a period of time;
- *Court judgements* about the meaning of New Zealand statutes, inherited British statutes, Crown powers and constitutional principles;
- *International norms of behaviour* agreed to by the New Zealand government;
- a document known as the *Treaty of Waitangi*, signed in 1840, by which New Zealand came into existence as an entity under British sovereignty.

Perhaps one of the more difficult things to understand about the New Zealand system of government is exactly how little public or elite interest there is in constitutional subjects. While in many other countries political debate frequently becomes entangled with constitutional argument, in New Zealand the absence of a conspicuous and elaborate constitutional document – and the absence of much interest in drafting, debating and

adopting one at some time in the future – means that New Zealand’s political and policy-related discussion seldom utilises a constitutional vocabulary as a means of identifying the issues and principles at stake.

But this does not mean that constitutional principles cannot be invoked when significant challenges to important political values come to be made. However, while the word ‘constitutional’ is seldom uttered at such moments, the debate itself does address issues that in other countries would immediately be grasped as being of ‘constitutional’ significance.

In Japan, by contrast, a constitutional controversy is more clearly identified as such. A speaker will call for Japan to provide a meaningful contribution to an international military effort. Another speaker will rise up to oppose the idea. References to ‘Article 9’ will abound.³ Listeners to the discussion will understand what is involved.

In New Zealand, by contrast, constitutional debate is much less explicit. But the basic features of constitutional dispute can still be seen when actions are taken, or allegations made, that particular practices conflict with deeply held views about the proper procedures and principles for government.

Before citing a few examples – each of them intriguing – it might be a good idea to clarify in a bit more detail the different components of the New Zealand ‘constitution’ listed above.

A *New Zealand Statutes*

The most important New Zealand constitutional statute is a piece of legislation enacted by Parliament in 1986, only 16 years ago. It is known as the *Constitution Act 1986*.⁴ Despite its name, however, it is *not* a constitution. It does not have the status of ‘supreme law’. It is simply an ordinary Act of Parliament, describing the already existing institutions of government: the Head of State, Cabinet Ministers, Parliament and the courts. The status of the Constitution Act is exactly the same as any other law passed by Parliament. It can be

3 Article 9, ‘Renunciation of War’, commits ‘the Japanese people’ to ‘forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes.’ Article 9 goes on to say that ‘In order to accomplish [this] aim, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.’ The text of the Japanese constitution appears in many sources: see, for instance, *The Constitution of Japan* (Tokyo: Kodansha International, 1997). The circumstances under which the document was drafted and approved have also been extensively reviewed, both by official Japanese sources and by scholars (both Japanese and non-Japanese alike). See, in particular, J M Maki, *Japan’s Commission on the Constitution: The Final Report* (Seattle and London: University of Washington Press, 1980); K Shoichi, *The Birth of Japan’s Postwar Constitution* (Boulder, Colorado: Westview Press, 1998); G D Hook and G McCormack (eds), *Japan’s Contested Constitution: Documents and Analysis* (London: Routledge, 2001); D M Hellegers, *We, The Japanese People: World War II and the Origins of the Japanese Constitution* (two volumes) (Stanford, California: Stanford University Press, 2002).

4 This Act, as well as many other documents of constitutional importance, has been reprinted in S Levine with P Harris (eds), *The New Zealand Politics Source Book*, Third Edition (Palmerston North: Dunmore Press, 1999). The *Constitution Act 1986* is reprinted on pp. 50-53.

changed by the same procedures used to pass any other bill introduced into Parliament. It is, essentially, a descriptive piece of legislation that brought together in one Act information already contained in a number of different statutes.

Another law, more innovative and passed only four years later – 12 years ago – is the *New Zealand Bill of Rights Act 1990*. This law, too, has no higher status in New Zealand law than any other bill passed by Parliament. A simple majority of Members of Parliament, present and voting, could amend or abolish altogether any part of the Bill of Rights or, indeed, the law as a whole.

These statutes, however, although not part of a constitution, are of constitutional significance. This is a distinction worth making. Laws and practices can be of importance, in terms of fundamental principles of government, without being part of a single specified constitutional text. Another way of putting this is to say that the function normally performed by a constitution – establishing the basic principles of the political process in a given society – can also be carried out in other ways. Indeed, even countries that have a constitution have the content of that document supplemented by ideas and information coming from other sources.

Other laws in New Zealand also have constitutional significance. These include measures protecting privacy; extending rights of access to government information; establishing institutions to protect human rights, and to resolve complaints against public officials, the police and against racist speech and behaviour. These are all laws that in some way define the relationship between the individual and the State, and they do so in a manner designed to protect the people against unfair or arbitrary treatment.

B *The British Legacy*

Some measures inherited from the British colonial period have also left a continuing constitutional presence on New Zealand law and culture. These include the Magna Carta (1297), the Bill of Rights (1688) and the Act of Settlement (1700).⁵ Although hundreds of years old, this constitutional legacy provides the background for New Zealanders' freedoms; for the legislative supremacy of Parliament; and for the position of the monarch as the country's symbolic ruler, its Head of State.

C *The Powers of the Crown*

The powers of the Crown (that is, the Sovereign, or monarch) in New Zealand are also part of the constitutional framework within which the country's politics take place. It is accepted that the Crown does not take an active part in policy-making. Nevertheless there is some generally agreed upon understanding that in some manner the Queen – or the Governor-General acting in her place – can draw upon unwritten, undefined powers to

⁵ See Levine with Harris (eds), *The New Zealand Politics Source Book*, Third Edition, pp. 16-19. These three statutes are also singled out for special mention in a background note on 'The New Zealand Constitution' (15 February 2000) prepared by the Parliamentary Library for New Zealand Members of Parliament.

exercise an influence on events in exceptional circumstances. There are, however, strict conventions that guide and limit the exercise of such residual powers as may exist.⁶

All this sounds rather vague. It is so. Most of the New Zealand constitution takes the form of 'conventions'. But what is meant by that word?

D Constitutional Principles and 'Conventions'

Conventions can be described as customs, habits and practices – ways of doing things – that are understood and accepted as being correct. Constitutional conventions are understandings about the correct way in which aspects of government ought to be run.⁷

These include, for example, an understanding about the actual limits of the Crown's powers, even if there is no statute or regulation explicitly stating what these limits actually are. Thus although the Governor-General has the power to appoint Cabinet Ministers, in practice – by 'convention' – the Governor-General (whose powers seem so vast 'on paper') simply appoints the Ministers recommended to the Governor-General by the Prime Minister. Similarly, the final step in a bill becoming a law is known as 'the Royal assent'. Without the Governor-General (representing the Crown) giving his or her approval, the bill – though enacted by Parliament – cannot become law. However, in practice – by 'convention' – this apparently great power proves to be utterly without effect since it is the 'convention' that a Governor-General accepts and acts upon the advice of Ministers (that is, the government). As a result, a Governor-General is always expected to automatically approve measures passed by Parliament, and he or she inevitably and invariably does so. There is, therefore, a distinction between appearance and reality. The appearance of power may mask a far different reality. This is true in Japan as well.

The absence of a clear constitutional guide – and reliance upon 'conventions' – can make it difficult to know what is the correct behaviour in a given situation.

E International 'Conventions'

New Zealand governments also agree to abide by international conventions – customary principles of behaviour between sovereign states – and by international agreements, including treaties and covenants upholding principles of human rights.

6 For a recent Governor-General's view on the extent of these powers and the circumstances under which they can be exercised, see M Hardie Boys, 'Continuity and Change: The 1996 General Election and the Role of the Governor-General', in J Boston, S Levine, E McLeay and N S Roberts (eds), *Electoral and Constitutional Change in New Zealand: An MMP Source Book* (Palmerston North: Dunmore Press, 1999), pp. 412-420; and M Hardie Boys, 'The Role of the Governor-General Under MMP', in A. Simpson (ed), *The Constitutional Implications of MMP* (Wellington: School of Political Science and International Relations, Victoria University of Wellington, Occasional Publication No 9, 1998), pp. 63-77.

7 Two fairly recent studies focusing on constitutional conventions in the light of New Zealand's experience with multiparty Parliaments and coalition governments – experiences which have in some ways challenged pre-existing traditions about the ways in which the legislature and the executive normally function – are J Boston, S Levine, E McLeay, N S Roberts and H Schmidt, 'Caretaker Government and the Evolution of Caretaker Conventions in New Zealand', *Victoria*

The New Zealand system, to a great extent, relies upon *trust*. The absence of a clear, supreme and judicially enforceable constitutional text is an indication that New Zealanders generally expect their leaders, public officials and politicians to behave ‘appropriately’. It is expected, in other words, that those with power will behave ‘reasonably’, ‘responsibly’, and with a due respect for ‘the rules’. Even with the best of intentions, however, there can be some problems in observing the rules of the political system if political participants are uncertain what they actually are.

In Japan, much constitutional controversy centers on Article 9 – the place of the military in Japan and the place of Japan in the international community – and, to a lesser extent, the circumstances under which the constitution came into existence. In the United States, constitutional debate focuses on people’s rights – and judicial interpretations of them – as well as on particular problems that sometimes arise as a result of conflicts between the President and Congress or between the two main political parties, the Republicans and the Democrats.

In New Zealand, however, constitutional controversy does not revolve around any actual constitutional document. In fact, as already noted, constitutional argument takes place often without any use of or reference to the word ‘constitutional’. Yet the debate nevertheless is taking place around issues and problems that are constitutional in character. Often these involve ‘conventions’ and whether they have been broken or upheld.

III CONTEMPORARY CONSTITUTIONAL CONTROVERSIES

This constitutional debate *is* important, since it shows the emphasis New Zealand’s politicians and media place at times on respecting the unwritten yet nonetheless real rules of the political order. A few examples can be given, taken from recent pages of the New Zealand press.⁸

A Separation of Powers

One principle of democratic government has to do with what is known as the ‘separation of powers’. Related to that is the concept of ‘the rule of law’. These ideas lead inexorably to the principle that politicians – particularly Cabinet Ministers, who are part of the executive branch of government – should not interfere in the judicial process. Thus we have a constitutional issue in New Zealand highlighted when it is discovered that a Cabinet Minister

University of Wellington Law Review, Vol 28, No 4, 1998, pp. 629-648; and E McLeay, ‘What is the Constitutional Status of the New Zealand Cabinet Office Manual?’, *Public Law Review*, Vol 10, No 1, 1999, pp. 11-17.

8 This entire study was actually something of an experiment. When I was invited to Gifu University to talk about New Zealand’s ‘constitution’, I wanted to say something original (or distinctive) rather than simply offer an overview of the country’s institutional arrangements. It occurred to me to examine the New Zealand news media during a brief but entirely arbitrary period of time (31 October-22 November 2001) to see whether controversies of a constitutionally meaningful character were being reported. I hypothesised that there would, indeed, be news items focusing on (or derived from) such issues but I admit to being somewhat surprised by the ease (and frequency) with which they could be found.

has been contacting a judge in order to obtain favourable treatment for a member of her tribal group – in effect, her family. This is the case highlighted in the story headlined ‘Turia [a Maori Cabinet Minister] again reprimanded for meddling in justice’.⁹ The ‘again’ has been inserted into that headline to emphasise the fact that only a short time previously it had been discovered that this Minister had been contacting prison staff seeking to influence administrative decisions and arrangements for a particular prisoner who had lived with her family for a period of time. She had also been revealed to be seeking to influence the treatment of that prisoner through contact with police officials. In response, the Cabinet Office – which serves the executive – has been seeking to ensure that this Cabinet Minister will have a greater understanding of, and abide by, constitutional conventions not to interfere in the administration of justice. The Prime Minister, although defending her Minister, has noted the importance for all ministerial staff to have ‘a clear understanding of what is an appropriate form for communications’ – that is, a clear understanding of constitutional conventions.

These conventions need to be protected precisely because there is no formal written constitution to which political figures need to adhere. Other stories – ‘Turia in the gun for call to judge’ and ‘Turia lands Labour in trouble again’ – suggest the attention that this Minister’s behaviour has attracted.¹⁰ Another Cabinet Minister, responsible for the courts, has ordered a report from the Courts Department about this Minister’s actions, a response described by one commentator as ‘the first government acknowledgement that Mrs Turia’s interventions in the cases of her iwi [tribal] members, including a former foster child now in jail, have raised constitutional questions.’ The opposition National Party’s spokesman on justice issues has noted that the separation of powers between ministers and the judiciary – between ministers and judges – is ‘the most fundamental of constitutional conventions’, presumably because it establishes the principle that all people must be treated equally before the law.

The doctrine of separation of powers is also at issue in another case decided in late 2001. A headline entitled ‘Decision reserved on Skyhawk scrap’ focuses on this issue.¹¹ The case involves the government’s decision to disband, and dispose of, New Zealand’s entire air combat force. A group opposed to the action has challenged the government’s decision, not only on the grounds that it seems foolish – particularly at a time of heightened tension in the world – to do away with the air force altogether, but on the ground that the government does not have the authority to take such an action.

The group argues, instead, that the decision needs to be reviewed by Parliament, and that there are legal issues and matters for interpretation. The law provides for an air force and, argues the group, it is logical to observe that an air force must be armed.

The constitutional issues are two-fold:

9 See C Langdon, ‘Turia again reprimanded for meddling in justice’, *Dominion*, 17 November 2001.

10 See J Milne, ‘Turia in the gun for call to judge’, *Dominion*, 16 November 2001, and ‘Turia lands Labour in trouble again’ [editorial], *Evening Post*, 8 November 2001.

11 See ‘Decision reserved on Skyhawk scrap’, *Evening Post*, 16 November 2001.

- does the government need parliamentary approval (which it could, in any case, almost certainly obtain, given its support in Parliament) to disband the air force's combat capability – and, more generally, to make and enforce policy?
- do the courts have the power to intervene to prevent such a decision from being made?

In the absence of a written constitution granting the courts power of judicial review, it is difficult to see how a New Zealand court could be considered to be able to interfere in a policy decision involving the allocation of resources for defence spending. This was, however, precisely the issue – the power of the courts versus the power of the executive – on which the High Court needed to rule in order to arrive at a decision. In late November the court arrived at its decision, dismissing the application to delay the Defence Minister's decision. The court's action was welcomed by the Cabinet Minister concerned, who stated that it had 'clearly upheld the proper responsibility of Government to make and implement our policy'.¹²

B 'Parliamentary Privilege'

Parliament's extraordinary powers are the subject of another recent story, 'Beehive attack game may be in contempt'.¹³ In the United States and Japan, constitutional texts begin with the same inspiring words: 'we, the people'. The concept that these words establish is very clear: *the people* are the ultimate source of political power. This democratic idea is sometimes known as 'popular sovereignty'.

In New Zealand, however, although the country clearly adheres to democratic practices such as free elections and freedom of expression, this concept is neither well known nor fully endorsed. It is much more likely that the phrase 'parliamentary sovereignty' will be used in reference to the power of Parliament to legislate quite freely on topics of its own choosing. Parliament, of course, is comprised of the people's representatives, yet nevertheless there is a firm distinction between 'popular sovereignty' and 'parliamentary sovereignty', particularly since the powers of Parliament are not restricted or confined in any way through formal and explicit constitutional barriers. In the United States, Congress is also ultimately 'the people's representatives' yet no one would ever argue that there is such a concept as 'congressional sovereignty'. It is the people who are sovereign, and their representatives are subject to constitutional prohibitions put into place as an expression of the people's political will in establishing the State and, for that matter, the entire country.

This background is necessary to understand a news story that claims that a computer game, portraying an attack on the building housing the government – known as 'the Beehive' for its round shape – involves a 'contempt' of Parliament. After the game was brought to the attention of Members of Parliament, one MP argued that if any MP felt that the game 'amounted to threatening or assaulting or intimidating a parliamentarian, then that is a contempt.' He added, somewhat ominously: 'Then those computer makers are in real trouble'.

12 See 'Air squadron campaigners stick to guns', *Dominion*, 22 November 2001.

13 See 'Beehive attack game may be in contempt', *Evening Post*, 15 November 2001.

The Speaker of the House, Jonathan Hunt, also expressed concerns about the game and agreed that any MP could seek to have a contempt charge considered. If that were to be the case, the matter would go before Parliament's powerful Privileges Committee, which considers all actions that might be in breach of the 'privileges' of Parliament. This committee has few, if any restrictions on its powers to punish Members of Parliament, the news media or the general public for words or deeds that violate Parliament's rules or might be regarded as a 'contempt' for Parliament's authority. Fortunately – by 'convention' – these broad and virtually unchecked punitive powers are very seldom exercised; yet they still exist and can have an intimidating effect on freedom of expression, including the power of the news media to report on aspects of parliamentary proceedings.

C *Parliamentary Procedure*

A few other fairly recent events share one thing in common: they all involve Parliament's legislative procedures. The process for considering and enacting legislation is set down in the rules of Parliament, known as 'Standing Orders'.¹⁴ Essentially these rules describe how a bill becomes a law. This involves the introduction of legislation, its referral for consideration by a parliamentary committee, and its return to Parliament from that committee – accompanied by a report from the committee, giving recommendations and making changes to the bill as introduced – for debate, amendment and enactment by MPs.

The select committee system therefore acquires a great deal of importance. It permits MPs to consider opinions from members of the public, interest groups, and others who may wish to present their views (in writing and/or in person) to the committee. Since Parliament is often criticised for its acrimonious, highly personal and generally adversarial style of debate, MPs often claim that the 'real work' of Parliament is carried out at committees, and

14 Parliament's Standing Orders were substantially revised as part of the preparations for New Zealand's changed electoral system, which as expected brought changes to some of the norms and operations of the New Zealand Parliament. The current Standing Orders, as well as many other parliamentary publications, can be accessed through a website maintained by the Office of the Clerk: <http://www.clerk.parliament.govt.nz/publications>. A publication by the Clerk of the House, David McGee, entitled *Parliamentary Practice in New Zealand*, Second Edition (Wellington: 1994) provides an authoritative account of many aspects of parliamentary practice and procedure, including the select committee system. See also *Effective Select Committee Membership: A Guide for Members of Parliament* (Wellington: Office of the Clerk of the House of Representatives, 2000) for an overview of the select committee system. The website of the Office of the Clerk can also be consulted for useful and up-to-date information on Parliament's select committee operations: see <http://www.clerk.parliament.govt.nz>. New Zealand's change of electoral system (from a first-past-the-post system to one based on proportional representation) was itself a change of constitutional significance, made even more important for New Zealanders precisely because the electoral system with its triennial parliamentary elections (and 'entrenched' provisions in the Electoral Act requiring special procedures for particular changes to be made) is one of the few formal protections relied upon (and cited by) citizens as a means of exercising control over those who govern them. For an overview of what the new voting system (known as 'MMP', for 'mixed member proportional') was intended to achieve, see J Boston, S Levine, E McLeay and N S Roberts, *New Zealand Under MMP: A New Politics?* (Auckland: Auckland University Press, 1996). For a list of publications on how MMP has worked in practice, written by members of the New Zealand Political Change Project (based at Victoria University of Wellington), see the Project's website: <http://www.vuw.ac.nz/pols/research/mmptop.html>.

there is an attempt to take some pride in the quieter accomplishments of committee business.¹⁵

The claim that Parliament's committees are increasingly important is undermined, however, when the executive, confident of its control over Parliament, dismisses recommendations made by a committee for changes to government policy or practices. New Zealand changed its electoral system in 1996, a move intended in part to make the executive more responsive to Parliament and to give Parliament a larger role in policy-making. A recent select committee report highlights the obstacles to changing the parliamentary culture, however. As an *Evening Post* editorial points out, a parliamentary committee 'with cross-party support and representation unanimously agreed to 51 recommendations', following 18 months' scrutiny of aspects of education policy, only to have the Minister of Education dismiss most of the report while questioning the expertise of the committee's members.¹⁶

The tension between the executive and the legislative branches of government in New Zealand is an interesting phenomenon, since constitutionally there is much less formal separation than in the American system, for example. As a presidential system, the United States constitution requires that members of the executive *not* be simultaneously members of the legislature (Congress). By contrast, New Zealand's Cabinet Ministers, including the Prime Minister, *must be* Members of Parliament – and must remain MPs even after being appointed to ministerial positions – making each Minister both a member of the executive *and* the legislature at the same time.

Even so, Cabinet government seems to encourage a desire among Ministers to dominate the Parliament from which they come, the rules of parliamentary life notwithstanding. Changes to a proposed bill intended to deal with terrorism – the *Terrorism (Bombings and Financing) Bill* – were introduced in late October 2001 by the Justice Minister (who is also, as it happens, the Foreign Minister) in a manner that had the effect (intended or not) of shielding the bill from much public scrutiny.¹⁷ The proposal involved an amendment to a bill already before a parliamentary committee. Since proceedings of the committee are regarded as private until the committee issues its report, the details of the proposed legislation could not be released to the media – and conveyed to the New Zealand public – without breaking Parliament's rules. Anyone disclosing the information would be subject to questioning for a 'breach of parliamentary privilege'.

15 See F Barker and S Levine, 'The Individual Parliamentary Member and Institutional Change: The Changing Role of the New Zealand Member of Parliament' in L D Longley and R Y Hazan (eds), *The Uneasy Relationships Between Parliamentary Members and Leaders* (London: Frank Cass, 2000), pp. 105-130; and R Vandervorst, 'Parliamentarians' Perspectives on Proportional Representation: Electoral System Change in New Zealand', paper presented to the conference on 'Political Parties, Parliamentary Committees, Parliamentary Leadership and Governance' of the Research Committee of Legislative Specialists, International Political Science Association, Istanbul, Turkey, 23-26 June 2002.

16 See 'Literacy report worthy of better treatment' [editorial], *Evening Post*, 15 November 2001.

17 See 'Anti-terrorist Bill under wraps', *Evening Post*, 31 October 2001.

Only after criticism from the media, civil liberties groups and some left-wing MPs did the government agree to allow the wording of the bill to be released for public comment.¹⁸ This change of direction – to allow the normal rules to be followed, allowing public submissions to be made and the committee to consider revisions in the light of those opinions – was generally welcomed.¹⁹

However, the episode reflects a tendency for governments in New Zealand, irrespective of their party composition, to bypass parliamentary rules and procedures when it becomes convenient for them to do so. This behaviour raises constitutional issues since it deprives Parliament of the opportunity to carry out its proper function as a body independent of the executive, charged with the duty of conducting a competent scrutiny of government proposals prior to their implementation, while allowing public access and input to the policy-making process.

Thus the executive is fond of introducing ‘urgency’ – allowed under Parliament’s rules – which, in effect, is a procedure allowing for the suspension of the usual parliamentary rules so as to permit rapid passage of legislative initiatives. The existence of a rule that allows the normal framework within which Parliament is expected to function to be cancelled, on government whim, seems constitutionally questionable. It is not surprising, therefore, that a smaller party, new to Parliament – the Greens – has objected in principle to the idea of permitting the government to take ‘urgency’ as and when it wishes to do so. This has frustrated – even angered – the executive, but it is a reflection of a determination to see Parliament function the way it is supposed to. It also reflects a desire to see the new electoral system work the way many people hoped that it would. New Zealand’s government after the 1999 election was a two-party minority coalition, dependent on the Greens’ support for its legislative majority. The Greens’ desire to see the traditional prerogatives of Parliament restored and respected represents a constitutionally important development that is consistent with public preferences for stronger restraints on the power of the executive.

D Freedom of Political Expression

A final example of parliamentary law-making at its most chaotic underscores the way in which government high-handedness and parliamentary weakness can serve at times to undermine important features of New Zealand’s democracy. In November 2001 the Associate Minister of Justice introduced an amendment to a bill that was being debated in Parliament. The amendment had been approved by the Cabinet *after* the multi-party parliamentary committee had already completed its examination of the bill. The committee had already considered the proposal, however, and had rejected it. The proposal was buried within a larger set of amendments consisting primarily of technical revisions to New Zealand’s election law. After Parliament approved the amendment, it was revealed that the proposal would make it an offence to publish during an election campaign any untrue statement that disparaged (or ‘defamed’) a parliamentary candidate and that was ‘calculated to influence

18 ‘Journalists face jail under electoral law’, *Dominion*, 17 November 2001.

19 See, for instance, ‘A welcome backdown’ [editorial], *Evening Post*, 9 November 2001.

votes'. Anyone convicted of doing so could be fined up to \$5000 or face up to three months in prison.

Clearly the bypassing of the select committee process – there had been no public submissions to the committee on the proposal, since it had been introduced directly into Parliament after the bill had been returned from the committee – in this instance allowed Cabinet Ministers to develop and approve a proposal designed to shield parliamentary candidates from robust debate and criticism during an election campaign. The effect of the bill would have been to make New Zealand's already tepid press even more cautious about what it was going to publish. The offence – known as 'criminal libel' – would be unconstitutional in the United States. It would have been regarded by residents of the different states – and the colonies before that – as illegitimate even before the United States, with its constitution and Bill of Rights, came into existence more than 200 years ago. In New Zealand, however, despite the existence of a Bill of Rights Act (for the past 12 years), a desire to protect a person's public reputation is sometimes given greater weight than the need to protect press freedoms and broader rights to free expression.

The government's proposal involved potential conflict with the Bill of Rights in at least two respects. Most clearly, the idea of punishing a newspaper (or its reporter) for publishing political comment interferes with freedoms of press and of political expression. There was, moreover, a conflict with a provision in the Bill of Rights Act that involves parliamentary procedure and government (or ministerial) responsibility. The Bill of Rights stipulates that the Attorney-General must report to Parliament about any legislative proposals that threaten freedom of expression. This did not happen in this case and – to make matters worse – it was the Attorney-General herself, Margaret Wilson, who had introduced the proposal into Parliament.

By presenting the proposal after the bill's initial introduction the Attorney-General (and the government) had been able to circumvent obligations to scrutinise legislation for conformity with the principles and language of New Zealand's Bill of Rights. As one MP noted, 'the Attorney-General had an obligation to uphold rule of law principles. As statutory guardian of the Bill of Rights and its free speech guarantees, she has a specific duty to advise Parliament of fundamental rights and conflicts with forthcoming legislation. Instead, she created the conflict and tried to get it passed without debate.'²⁰

In this case, as in some others, the reporting of the government's conduct led to a rapid retreat. Only two days after the measure was somewhat surreptitiously introduced into Parliament, the government – under criticism from opposition MPs, civil libertarians and, most importantly, journalists (including the chairman of the press freedom committee of the Commonwealth Press Union)²¹ – decided to refer the proposal back to the parliamentary committee for further consideration. Perhaps the only positive consequence that could be said to have come from this experience is that the government demonstrated that it is sensitive

20 See C Langdon, 'Wilson gets around Bill of Rights', *Dominion*, 22 November 2001. See also C Langdon, 'Libel law was rejected before Wilson intervened', *Dominion*, 17 November 2001.

to the need to avoid potentially embarrassing international exposure of encroachments on individual rights and constitutional conventions.

IV FUTURE ISSUES

Any discussion about 'constitutional reform' or 'constitutional change' in New Zealand cannot avoid discussing future issues. One question would be whether New Zealand is *ever* likely to adopt a formal written constitution, a 'higher law' to which all other laws and practices must conform. The signs of this happening are few. Most New Zealanders think that the more informal approach, relying upon experience and adjustment, and drawing upon convention, is the best system for the country. A meeting in Wellington in 2000, intended to discuss constitutional ideas, was much criticised in Parliament and the media for doing so.²² There seems little support for moving towards a formal written constitution and there has been no preparation at all by Parliament or the government (or anyone else) for such a process.

The most likely future change to New Zealand's constitution would be for the country to sever its few remaining formal ties with the United Kingdom. The first to go is likely to be the Privy Council. This is New Zealand's highest court, although it does not hear many cases. This final court for New Zealand is actually located in London; it is a committee of the House of Lords, the upper house of the bicameral British Parliament. Although there may be some advantages to having a nation's highest court situated outside of its borders – and international tribunals of one kind or another are becoming much more common – it is difficult to construct a rational defence for the idea that the Privy Council in London is the most appropriate forum in the 21st century for New Zealand litigants to appeal to for final judgement.²³

It should be obvious that establishing New Zealand as a republic would also be a move of 'constitutional significance', even if there is no actual constitution to amend in order to bring about such a change. There *is* sentiment in New Zealand favouring an end to the tie to the British Crown. Why the New Zealand Head of State should be the same person as the British Head of State is difficult to say. There may be arguments in favour of connecting a small South Pacific island state to the wider world through ties to the British Royal Family. However, a move to disestablish the monarchy in New Zealand was proposed by the conservative National Party prime minister, Jim Bolger, who had hoped to see a republic

21 See, for instance, R Henderson, 'Law called threat to free speech', *Dominion*, 20 November 2001.

22 The conference was depicted in at least some media commentaries as a type of conspiracy by a small, left-wing, unrepresentative elite, in league with the Labour Party, to burden New Zealand with an unwanted and unnecessary constitutional document. The contributions to the conference were published in C James (ed), *Building the Constitution*, Wellington: Institute of Policy Studies, 2000.

23 Extracts from reports recommending alternatives to the Privy Council, and from a proposed bill introduced (but not enacted) in 1996, have been reprinted in Boston, Levine, McLeay and Roberts (eds), *Electoral and Constitutional Change in New Zealand: An MMP Source Book*, pp. 421-458.

established before the end of the previous millennium.²⁴ However, Prime Minister Bolger lost his job before the Queen lost hers. His replacement, New Zealand's first woman prime minister, Jenny Shipley, had little interest in removing another female from office. Prime Minister Shipley, however, lost power in 1999, when the current prime minister, the Labour Party's Helen Clark, became the first New Zealand woman to lead a political party to victory at parliamentary elections. Prime Minister Clark has stated that while New Zealand's becoming a republic is not a priority, it is (in her view) 'inevitable' that New Zealand will some day move in that direction.

The more contentious issue in New Zealand has been the status of the document known as the Treaty of Waitangi, briefly referred to earlier. Signed in 1840, this treaty brought about British rule over New Zealand. Put another way, it brought the country we now know as New Zealand into existence, through an agreement between a British naval officer and various tribal leaders representing the indigenous Maori population. The Treaty was interpreted to mean that the Crown gained sovereignty over New Zealand in return for promises to grant to Maori all the rights and privileges held by British subjects. The Treaty also contained commitments from the Crown to respect and preserve the traditional customs, practices and – most crucially – the lands of the Maori people.²⁵

The Treaty of Waitangi went unenforced through much of New Zealand history. Since the mid-1980s the document has gained in legal stature, so much so that at times parliamentary statutes have been set aside by the courts to ensure their compatibility with Treaty provisions or 'principles'.²⁶ This development, promoted by New Zealand's courts, goes against the powerful 'convention', noted earlier, that holds that Parliament is 'sovereign', unbound by any law or institution, possessing a virtually unrestricted capacity to pass any

24 A selection of five of Jim Bolger's speeches on the subject has been reprinted in Boston, Levine, McLeay and Roberts (eds), *Electoral and Constitutional Change in New Zealand: An MMP Source Book*, pp. 489-494. A perspective on the idea of a New Zealand republic is offered by G Winterton, 'A New Zealand Republic' (with commentary by J Hayward), in A Simpson (ed), *The Constitutional Implications of MMP*, pp. 204-235.

25 The texts of the Treaty of Waitangi, in both the English and Maori languages (including a translation of the Maori text that is not entirely identical with the English language version), are reprinted in Levine with Harris, *The New Zealand Politics Source Book*, Third Edition, pp. 20-24. There is a substantial literature on the Treaty of Waitangi. One useful collection of articles is I H Kawharu (ed), *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989).

26 See, for instance, *New Zealand Maori Council v Attorney-General* (1987) and *New Zealand Maori Council v Attorney-General* (1989). Extracts from the judgements in these two very important cases are reprinted in P Harris and S Levine (eds), *The New Zealand Politics Source Book*, Second Edition (Palmerston North: Dunmore Press, 1994), pp. 24-29. In 1989, during the term of the fourth Labour government, the Department of Justice issued a document, *Principles for Crown Action on the Treaty of Waitangi*, enumerating five 'principles' that were intended 'to help the Government make decisions about matters related to the Treaty'. This was an attempt to provide some clear and specific language, and some genuine content, to go alongside of increasingly common rhetoric invoking the 'principles' of the Treaty of Waitangi without actually stating what these happened to be. Extracts from this document, presenting the five principles, are reproduced in Harris and Levine (eds), *The New Zealand Politics Source Book*, Second Edition, pp. 30-32.

laws on any subjects it chooses. An effort to embed the Treaty of Waitangi within what was then only a proposed Bill of Rights, and then to establish this Bill of Rights as a genuine constitutional document – a ‘supreme law’, enforceable in the courts – failed, with opposition coming from many quarters, in part because of conflict over the meaning and status of the Treaty, and in part because of concerns by MPs about restrictions over Parliament’s legislative powers.²⁷

New Zealand’s principal constitutional challenge is to find a way to respect and safeguard the Treaty of Waitangi that can somehow satisfy Maori and non-Maori alike. Indeed, the main question hanging over any constitutional discussion is, simply, ‘what is the place of the Treaty of Waitangi?’ This is a question so divisive that most New Zealanders would prefer to leave constitutional matters off the agenda altogether. This seems a safer approach than raising a controversial and sensitive matter when the search for a satisfactory solution is likely to be long and arduous.

V CONCLUSION

Every country, every people, has its own history to face and to overcome. New Zealand’s history is very different from America’s or Japan’s. The constitutional design and approach taken by New Zealand reflects its distinctive historical experience. Although New Zealanders have been becoming more constitutionally sensitive, more constitutionally aware, more constitutionally literate in recent years, an interest in such matters is still far less common than in countries that have had to struggle much more energetically to establish their freedom and independence. For New Zealand, such things came easily – perhaps *too easily* to encourage the people, or their leaders, to expend very much effort in developing constitutionally elaborate solutions to problems always seen as amenable to short-term, pragmatic solutions. It is hard to say that the New Zealand approach is either right or wrong: what is certain, however, is that it requires good judgement, common sense, tolerance, patience and wisdom to succeed. But then these qualities are precisely those we all need to overcome life’s many and varied challenges.

27 The effort to introduce a Bill of Rights in the face of public and parliamentary indifference to the concept is analysed in S Levine, ‘Bills of Rights in Parliamentary Settings: New Zealand and Israeli Experience’, *Parliamentary Affairs*, Vol 44, No 3, 1991, pp. 337-352. The proposed Bill of Rights (‘supreme law’), disseminated in 1985, and the eventual *New Zealand Bill of Rights Act 1990*, are both reprinted in Harris and Levine (eds), *The New Zealand Politics Source Book*, Second Edition, pp. 43-49. *The New Zealand Bill of Rights Act 1990* has had its effects on legislation and litigation. A selection of court decisions relying on the Bill of Rights is reprinted in Levine with Harris, *The New Zealand Politics Source Book*, Third Edition, pp. 61-96.