The Key Elements of a Constitution

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Introduction

In this short presentation, I have organised my thoughts under four key elements, which I term: the logistical element, the process element, the superstructural element, and the infrastructural element. The last of these – the infrastructural element – is the most important, but the other elements also need to be addressed.

Logistical element

This element addresses the question: What are you seeking to achieve in this workshop? A choice will need to be made: to entrench or not to entrench? You may opt to consolidate our existing constitutional arrangements: for example, by integrating within the one instrument the Treaty of Waitangi (New Zealand's founding document), the primary provisions of the Constitution Act 1986 (identifying the basic structure of government), and the New Zealand Bill of Rights Act 1990 (codifying our primary civil and political rights). This exercise would provide a constitution that is comprehensive and accessible but declaratory of our existing arrangements. Or you might opt for an exercise in constitution-building that is wholly constitutive. You might plump for a supreme law constitution that provides a new tiller for the ship of state. In this workshop, I will take a punt. I predict that you will seize the moment and plump for a formal, supreme law constitution.

Any lesser proposal would be seen as just that: a proposal for change which would not be distinguishable from the on-going constitutional changes that we have come to expect over the past 30 odd years. I suspect this workshop will set out with more ambitious purpose and advocate macro-constitutional change. Why would you squander the opportunity? To my mind, a change proposal which sought to repackage the status quo would be less than intellectually satisfying.

The logistical element is important because the election you make, one way or the other, will resolve several critical infrastructural issues: not least, to entrench or not entrench and the mechanisms for constitutional enforcement. A codified constitution enjoys "higher law" status and controls the exercise of all public power, including legislative power. Once you have settled on your choice of constitution, you will need to address the process element.

Process element

Let us suppose this workshop sets out with ambitious purpose. How, then, might a new constitution be adopted? We are not dealing with just another law enacted by majority of Parliament; we are

dealing with the "law behind the law" that is the embodiment of the State itself. The law behind the law denotes the constitutive laws that establish the organs of government and confer their respective constitutional authorities: to govern, to legislate and to adjudicate. A constitution in this sense, not being historically derived, must claim the authority of the people; it must have constitutional *legitimacy*.

How might the constitution acquire this legitimacy? What adoption process should be followed? Some States have convened a constituent assembly representing the main interest or power groups within society, with the objective to cement a popular consensus that might be broadly representative of the people. Usually these assemblies have been convened following some cataclysmic event, such as a revolution, defeat in war, or the desire or need to unite or break apart. However, none of those eventualities applies to us in 2012. Moreover, we are a unitary State free of the complexities of a federal system. So, would something more direct and simple suffice, such as a national referendum? Possibly "yes", although the answer may be contingent on the referendum outcome. What if only a bare majority of voters (say, 51 percent) favoured the new constitution? Would that be enough to cement a popular consensus that could accord legitimacy to the new settlement?

These are process questions which will need to be addressed. A new constitution enacted by bare majority of Parliament, without more, would not engender the necessary groundswell to guarantee its success. These issues were explored when the Fourth Labour Government (1984-90) proposed the White Paper Bill of Rights, which was to be a fully entrenched, supreme Law bill of rights. The then President of the Court of Appeal, Sir Robin Cooke, endorsed the proposal but only if the instrument could exhibit (what he termed) "practical sanctity". Some indication of popular approval was needed for the courts to uphold it as against the legislative powers of Parliament.

Superstructural element

I use the term "superstructural" in contradistinction to "infrastructural", which identifies my fourth key element. If the workshop promotes macro-constitutional change (a new codified constitution), then thought must be given to the principles, values and ideals that will inform the constitutional infrastructure – the detailed elements of the constitution that comprise the governmental system. Probably most codified constitutions contain recitals or preambles that set out principles of social or state policy. These principles identify what the State stands for in terms of political or state philosophy. Often these principles will be couched rhetorically. The United States constitution, for example, begins with the wonderfully powerful and evocative words: "We the people ..." The preamble acknowledges forming "a more perfect union" that can secure the blessings of liberty and ensure the general welfare, tranquillity and happiness of the people.

So, that will throw down a challenge for would-be constitution-makers. What is this country's dominant ideology? At once, we confront the hard questions. Is there a *dominant* ideology? Might we adhere to more than one ideology? All would agree that we are a liberal democracy: we hold to representative democracy, a system of independent courts, and the fundamental values of liberty and freedom that promote human autonomy and dignity. In short, we proclaim the rule of law and the ideal of limited government. But, most would say we are also *more* than that: that we are a

country organised on the principle of biculturalism that is enshrined in our founding instrument, the Treaty of Waitangi.

So, should we be talking about a melding of ideologies that can account for the unique foundations of Aotearoa New Zealand? I suggest the framers of a new constitution would need to embrace these two ideologies – liberal democracy and biculturalism. A codified constitution would presumably entrench the elements of representative democracy. But would it also entrench biculturalism and the Treaty (in addition to whatever Treaty reference is made in the preamble)? I pose this question because of the historically contested meanings that surround the Treaty, and its disputed application to contemporary issues such as intellectual property rights, radio spectrum rights and water rights. These are questions which will need to be worked through, because a supreme law constitution controls all laws, including legislation, which, in most countries, is enforced by the power of judicial review. Laws repugnant to the constitution will be judicially struck down or disapplied (as the case may be).

So, the superstructural element is crucial in settling upon the principles, values and ideals that will inform the detailed constitution, which brings me to the fourth element.

Infrastructural element

This is where the real bump and grind of the workshop will happen, in settling upon the detail of the constitution. Two features distinguish a formal codified constitution (if that is what the workshop will be advocating): *supreme* law and *fundamental* law. Supreme law denotes constitutional entrenchment: the constitution is protected from alteration by ordinary Act of Parliament. A supreme law constitution enjoys a higher legal sanctity than all other laws. Fundamental law, on the other hand, is *constitutive*. Fundamental law establishes the organs of government and confers their necessary authorities to function.

A proposal for a supreme law constitution has immediate consequence: the principle of parliamentary supremacy is jettisoned. Parliamentary legislation would be controlled by the constitution (including an entrenched bill of rights if this formed part of the constitution), and legislation that was repugnant to the constitution would be subject to judicial invalidation. Ardent democrats might rail against such a proposal. The people elect Parliament, not the judges. Their elected representatives ought to have the last word on what is law and what is not. But rule of law protagonists might counter that absolute power is anathema and cannot co-exist with the ideal of limited government and the rule of law. Already, one can discern the potential for bump and grind.

That said, there are certain characteristics or features common to all Western political systems. Each is founded on a separation of powers of sorts. I say "of sorts" because the ideal of the separation of powers has been construed differently by different States. But putting the detail to one side, all modern Western constitutions are organised around a rudimentary separation of the executive, legislative and judicial powers. Powers are separated in order to limit powers. Power corrupts, observed Montesquieu in 1748, and absolute power corrupts absolutely. So, the infrastructural element would establish the three organs of government (the executive, the legislature and the judiciary) and would confer upon them their corresponding constitutional functions and powers.

Apropos your task: this would throw into question what sort of a separation of powers a new constitution would implement. In the United States, there is a pure ("paper") separation of powers. There is no mixed or merged personnel as between the separate organs. However, contrast the position here, where we operate under the Westminster principle of the parliamentary ministry. It is a legal requirement of appointment as Minister of the Crown that the appointee be an elected member of Parliament (Constitution Act 1986, s 6). This represents a major departure from the separation of powers doctrine. But would we wish to jettison this central feature of our constitution? I would hope not as it has worked well until now. Better to sacrifice constitutional purity for a system that is workable, durable and robust.

The infrastructural element would also define the interrelationships between the organs. A supreme law constitution might incorporate the principle of judicial independence, guaranteeing judicial tenure and specifying the limited grounds on which a judge might be removed from office. The constitution might also codify, or endorse, the law of parliamentary privilege, guaranteeing Parliament's freedom of speech and autonomous functioning.

A new codified constitution would also need to settle upon an appropriate method of constitutional amendment. Many methods are practised around the world. Some States (eg the German Federal Republic) declare parts of their constitution to be inviolate and legally unalterable by any method. This feature may have resonance for Treaty advocates, who might agitate for the Treaty to be the centrepiece of their constitution. Declaring the Treaty to be inviolate and unalterable would protect it against either well-intentioned or mischievous change through the constitution's amending formula. It was this possibility that caused many Maori to oppose the entrenchment of the Treaty in the Lange Government's White Paper Bill of Rights.

Most States prescribe differing methods of amendment of varying rigidity. In the United States, constitutional amendment is carried by a two-thirds vote of both Houses of Congress and ratification by the legislatures of three-quarters of the states. The Australian constitution, in contrast, prescribes a simpler method on paper, but it has proved to be more difficult to satisfy in practice. An amendment must be carried nationally by a majority of voters and it must be carried in a majority of states. Perhaps an amendment formula might be simpler in New Zealand as we are a unitary State. Might a super-majority in Parliament or a national referendum of the people suffice? Those alternatives are the methods for altering the reserved sections of the Electoral Act 1993 (either a 75% majority vote of the House or a majority vote at a national referendum).

The infrastructural element would need to address two further things: the role of the Treaty within our constitutional arrangements, and the New Zealand Bill of Rights Act 1990. Should the Treaty and/or the Bill of Rights be included as part of the entrenched constitution? These are topics contained in the terms of reference of the Constitutional Advisory Panel. Supposing the Bill of Rights were to be included as part of the entrenched instrument: should further guarantees be included, such as pertaining to property rights, the environment, healthcare or education? Should further socio-economic rights likewise be included? In addressing these issues, realism may need to temper idealism. A constitution must be a workable instrument capable of delivering stable government. It should never promise more than it can deliver.

This workshop is convened with one eye on the Constitutional Advisory Panel's forthcoming review. Under the heading "Crown-Maori relationship matters", the panel's terms of reference list the question of separate Maori representation. This is a matter which might be addressed under a codified constitution; or it might be thought preferable to include this topic under the specialised electoral statute (as it now is). Other matters mandated for the panel include: the size of Parliament, the length of the parliamentary term (and whether it should be fixed); the size and number of electorates, and electoral integrity legislation. These matters are all presently dealt with under the Electoral Act 1993, but some things (such as the term of Parliament) may be thought sufficiently important as to warrant inclusion under an entrenched constitution.

Some topics of obvious constitutional importance were (deliberately one assumes) left off the panel's smorgasbord. The head of state question is the most obvious omission. As this was not a listed topic, you too may wish to park this issue for another day. But, if you are genuinely contemplating a proposed new constitutional settlement, you may find it unnatural or artificial to treat as an elephant in the room – there but not there.

Conclusion

I wish you well in your endeavours over these two days. It is going to be fascinating to see what transpires. This is partly because of the nature of the exercise. What is or is not constitutionally important, and worthy of consideration, is much like beauty – largely in the eye of the beholder. Matters which I have identified as key elements may bear little relation to matters which you might indentify. But that is not important; what is important is a group of intellectually energised young New Zealanders rolling up their sleeves and engaging with issues of nation-building. I commend each of you for getting involved. Equally, I commend the McGuinness Institute, and particularly Wendy McGuinness, for this marvellous initiative.