Reflections

EmpowerNZ: Drafting a Constitution for the 21st Century

by

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The two-day workshop was an innovative and challenging initiative. I enjoyed my role: addressing the students on the key elements of a constitution and acting as roving facilitator during day-2 of deliberations. The student discussions became increasingly intense as the work streams warmed to their tasks. The groups experienced some difficulties avoiding inconsistencies and co-ordinating their proposals, given that each had to devise a distinct component of the constitutional design. But despite the pressures and the daunting day-2 deadline, the students retained their composure and did marvellously well to produce a coherent Draft Constitution.

There were both notable and unusual features of the final product. The clear preference for political rather than judicial solutions was, for me, notable, given the "judicialization" of constitutional discourse in North America and other parts of the world. Under section 1.5 of the Draft Constitution, a court might declare legislation unconstitutional but such declaration would have no effect on the continuing validity and operation of the enactment. The thought that unconstitutional legislation might remain valid and operative is unusual to say the least, although section 1.5 does oblige the legislature "to respond to any declaration of unconstitutionality". This mechanism contemplates a constitutional dialogue between the political and judicial branches, with a declaration of unconstitutionality prompting the introduction of remedial legislation to make good the omission or departure.

An unusual feature of the proposed institutional design concerns the Waitangi Tribunal. Again, there is a clear, if implicit, preference to avoid judicial solutions where issues can be resolved through extra-judicial means. Part 2 of the Draft Constitution authorises the Waitangi Tribunal to oversee Crown-Maori relations and secure compliance with the "principles" and "spirit and intent" of the Treaty of Waitangi. What is unusual is that the Tribunal may provide direct remedies for breach of the Treaty. The Tribunal is not a court of law and its findings are not binding in law, nor does it have power *to order* reparations or relief.

Under section 6 of the Treaty of Waitangi Act 1975, the Tribunal may make recommendations to the Crown where it finds Maori have been prejudicially affected by action in breach of the principles of the Treaty. The Tribunal may recommend that the Crown compensate or make reparations or otherwise remove the prejudice. Section 2.7 of the Draft Constitution affirms the right of Maori to bring a claim under section 6, but section 2.8 then empowers the Tribunal to

"provide a remedy to a claimant if a breach of a right arises from a breach of the principles of Te Tiriti". How might these provisions mesh together? Does section 2.8 not subsume section 2.7? The relationship between these provisions is an uneasy one and may require further thought. In particular, should the Tribunal exercise constitutional authority to order (as opposed to recommend) reparations?

Another unusual feature concerns the selection of rights and responsibilities warranting protection under Part 1 of the Draft Constitution. As expected, this Part adopts the rights and freedoms affirmed under the New Zealand Bill of Rights Act 1990 (section 1.1). Section 1.2 then adopts several socio-economic rights and affirms the Government's responsibility to promote the realisation of the rights within its available resources. However, two further affirmed rights warrant mention: namely, the rights to academic freedom and to be free from discrimination on the ground of gender identity. I applaud the right to academic freedom affirmed under sections 160-161 of the Education Act 1989 but I do not regard it as a hallowed right warranting constitutional endorsement. The pre-eminent right to freedom of speech might arguably trump the right to academic freedom, with the latter representing but one manifestation of the right to freedom of speech.

Nor would I single out the right to freedom from gender discrimination for special treatment. First, if such discrimination occurs in the public sector, then it is already covered by section 19 of the New Zealand Bill of Rights Act. Section 19 incorporates the grounds of unlawful discrimination under the Human Rights Act 1993 (including discrimination on the ground of sex) and makes them applicable in the public sector. Secondly, if gender discrimination occurs in the private sector, then the question must be asked: What distinguishes this ground of unlawful discrimination from the other grounds under the Human Rights Act 1993? Section 21 defines 13 grounds of unlawful discrimination that are lacking any ethical justification. Gender discrimination is but one ground. A suggested amendment would be to replace reference to gender identity in section 1.2(d) with a generic reference to the grounds of unlawful discrimination defined under the Human Rights Act 1993. That would then extend the same protection against all forms of unlawful discrimination to both the public and private sectors.

Part 3 of the Draft Constitution establishes a Republic of Aotearoa New Zealand but otherwise remains more or less faithful to the current structure of government. Two points of distinction concern the proclamations of who we are as a nation in section 3.1, and the aspirational values identified in section 3.9 concerning the legislative branch of government.

Part 4 is tilted, "Mangai o te motu" (the voice of the people). This Part is also largely declaratory of existing arrangements concerning the electoral system (the Electoral Act 1993 is affirmed in section 3.7) and the operation of the legislative branch of government. However, it does introduce one important change which is commended. Section 4.4 extends the parliamentary term from three years to four and fixes the term. This change removes the prerogative of the Prime Minister (Tumuaki under the Draft Constitution) to call an early election where the polls indicate an advantage. However, this change, while commended, omits an important safety valve were a vote of no-confidence in the Government carried

mid-term. In that event, there may or may not be another party leader who could claim the confidence of the House of Representatives. Should it transpire that no one could form an alternative government, then the only recourse would be to hold fresh elections to resolve the political uncertainty. It is suggested that the following proviso (shown in italics) should be added to section 4.4: "The parliamentary term shall be four years and the electoral term shall be fixed, *subject to a vote of no-confidence in the Government which may necessitate the calling of an early election*." All countries that have fixed their parliamentary term operate under this safety-valve. Omitting it creates potential for constitutional impasse.

Part 5 attends to operational elements. The only matter I raise concerns the Privative clause under section 5.4. This clause locks in the commitment to seek political rather than judicial solutions. It confirms the intent behind section 1.5 (apropos legislation inconsistent with adopted rights) by declaring that the judiciary has no power to declare legislation "to be invalid". However, I would also add the phrase: "or otherwise disapplied or inoperative". Following the House of Lords decision in *R v Secretary of State for Transport; Ex p Factortame Ltd* [1990] 2 AC 85 (HL), the courts often speak of "disapplying" legislation rather than invalidating it. Whether or not one invalidates or disapplies legislation, the result is the same: the enactment is made inoperative. However, it is not clear whether the courts regard these two things (invalidating and disapplying) as distinct forensic exercises. Consequently, it would be prudent also for the privative clause to prevent a court disapplying and/or making inoperative an unconstitutional enactment.

I conclude with one final reflection: what is the exact status of the Treaty of Waitangi under the Draft Constitution? The Treaty is covered in Part 2 but only Parts 3 and 4 (the Branches of government and the Voice of the people) are entrenched and placed beyond alteration by ordinary Act of Parliament. On orthodox principles, a government could alter any part of Part 2 (dealing with the Treaty and Treaty principles) by legislation passed by a bare majority of the House. This raises the question whether legislation enacted in breach of the Treaty or its principles would be "unconstitutional". The doctrine of implied repeal (assuming it applies to non-entrenched constitutional provisions) holds that a later inconsistent statute prevails over an earlier one to the extent of the inconsistency. Thus a statute enacted in breach of the Treaty or its principles would prevail over Part 2 of the Draft Constitution by impliedly repealing the operative provision or provisions. It is doubtful that that result would have been intended by the work stream that promoted the inclusion of the Treaty in Part 2. One solution would be to include Part 2 within section 5.3 and make it an entrenched part of the Draft Constitution.