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Reconstituting the Constitution

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Chapter 17
The Influence of International Law in New Zealand: Some Reflections

Treasa Dunworth

17.1 Introduction

New Zealand's constitutional culture has always been receptive and open to outside influences.[1] Consistent with that, New Zealand has actively sought to be part of a broader, international, community. Today this outward view manifests itself in the consistent appeal to multilateralism, support for the United Nations, as well as the international legal system more generally. There are many possible explanations for this constitutional culture of receptivity, but Professor McLean's analysis is certainly part of the answer – the connections and continuities between New Zealand's historical experience of empire and its contemporary approach to globalisation.[2] She argues that in New Zealand, we may be substituting "an idea of cosmopolitan citizenship for pan-British subject status".[3] Coupled with the political realities of the powerlessness of a small nation state, the internationalist outlook is no surprise, indeed, it is a matter of necessity rather than choice.[4]

Accepting this culture of receptivity, the question explored here is whether we have struck the right balance in the influence we allow international law to exert on

[1] James (2000).

[2] McLean (2004).

[3] Ibid, p. 167.

[4] My thanks to Sir Kenneth Keith for this observation.

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our domestic law-making. In exploring that question, I consider two separate but related issues. First, whether the current parliamentary scrutiny of executive treaty actions is sufficient to overcome concerns about a "democratic deficit". The second issue is to examine the extent to which, and basis upon which, the courts are drawing on international law to guide decision-making.

17.2 The Treaty-Making Process and Parliament

Until 1997 in New Zealand, the negotiation and conclusion of international treaties was a matter for the executive alone.[5] There was no obligation, legal or political, to consult Parliament or the public, before binding New Zealand at international law. The role of Parliament was confined to enacting legislation to implement the international treaty obligation into domestic law where this was appropriate or necessary. This arrangement reflected the doctrine of the separation of powers, whereby the executive has exclusive power to enter into treaties and the Parliament has the exclusive power to alter the domestic law. The arrangement also reflected the classical understanding of international law as being a system of law dealing with inter-state relations.

As the influence and awareness of international law increased, there started to be an exploration of ways of giving Parliament a greater role in the process by which New Zealand enters into binding treaty commitments. At the heart of much of the concern about the existing system was an idea that there was a "democratic deficit" in the existing system because Parliament was being bypassed entirely. The introduction of the Mixed Member Proportional electoral system from 1996 strengthened the trend away from executive control of treaty-making.[6]

The idea of greater parliamentary scrutiny had been debated for a number of years and in 1997, the Law Commission recommended an increased role for Parliament.[7] A trial "treaty examination process" was instituted which gave Parliament an oversight role. Except in cases of urgency, the executive would table all multilateral treaties in the House prior to ratification (but post-signature). A National Interest Analysis (NIA), prepared by the executive would accompany the treaty text. This would set out the reasons for New Zealand becoming party to the treaty; the obligations imposed by the treaty, including the economic, social, and cultural implications; information on how the treaty is to be implemented, and any consultations undertaken. Once tabled, the treaty and supporting NIA would be referred to the Foreign Affairs Defence and Trade Committee (FADTC), or other

[5] Nielsen (2007), p. 176. See van Bohemen (2008), p. 146.

[6] Chen (2001), p. 448 discussing in particular the way in which the Labour-led Executive was forced by its coalition partner, the Alliance Party, to seek symbolic approval in Parliament of ratification of the New Zealand Singapore Closer Economic Partnership.

[7] McKay (1997), McGee (1997), New Zealand Law Commission (1997).

select committee of Parliament where appropriate, for consideration. The government undertook not to take any further steps regarding the treaty during that period.

Although the trial did mark a shift away from exclusive executive control, Parliament's role was still extremely limited. Essentially, all that had been achieved was that Parliament was given a short period in which to review a proposed treaty action. It had no right of approval or any power to stop ratification if it did not approve. That raised the real prospect of meaningless consultation. A second limitation of the trial process was that it did not extend to bilateral treaties, although at the discretion of the Minister of Foreign Affairs and Trade, bilateral treaties could be subjected to the examination system. Finally, the executive could side-step the process if ratification, in its opinion, was urgent.

In mid-1999, it was decided to incorporate these procedures into Standing Orders on the Select Committee's recommendation.[8] Unfortunately there was no real debate at that time about the value or otherwise of the system – it had been a "trial" in name only. First, only 16 treaties had been examined in that period. In every case, the Select Committee had simply accepted the National Interest Analysis without further comment or discussion.[9] There had not been enough time or activity to be able to assess whether the new role for Parliament had had any impact at all, let alone any influence on how the courts approached an international treaty.

There was an attempt the following year to advance the debate. Keith Locke, for the Green Party, introduced an International Treaties Bill 2000, which, if it had become law, would have conferred on Parliament the right to approve, not simply consider, the ratification of all international treaties. This would have ended the executive's monopoly on the treaty-making power and the Bill's overwhelming defeat at second reading was inevitable because of the seismic constitutional shift this would have entailed. However, the Bill's introduction and the subsequent Parliamentary and Select Committee consideration generated some real debate about how to manage the inexorable influence of international treaties – debate that had been wholly lacking in the "trial". In the course of that debate, a number of interesting proposals emerged and some existing procedures were fine-tuned.

One important refinement related to bilateral treaties. Even during the trial, ambivalence about bilateral treaties had been evident. Underlying the split between bilateral and multilateral treaties is the assumption that the latter are always more significant in terms of the legal obligations arising, and, in particular, in terms of the impact on the domestic system, while the former are narrow, technical agreements. That dichotomy is completely unfounded. While it is true that many bilateral treaties may be technical and insignificant in nature, many others have enormous potential impact on New Zealand. An example which readily springs to mind is the

[8] New Zealand Government (1999), pp. 2–4.

[9] Order of the House of Representatives (2005), pp. 387–390.

plethora of bilateral free trade agreements to which New Zealand is a party. In recent years, the phenomenon of bilateral trade treaties has become particularly significant with the turn to bilateralism in free trade in the wake of failure to advance the Doha Round of multi-lateral trade negotiations.

Of course, bilateral treaties had not been completely excluded up to that point. Both during the trial, and in Standing Orders, "any major bilateral treaty of particular significance" could be included at the discretion of the Minister of Foreign Affairs.[10] In an effort to render the Minister's exercise of this discretion more transparent, the Ministry of Foreign Affairs published a document entitled "Bilateral Treaties: Criteria for Tabling in the House".[11] The criteria include: whether the subject matter of the treaty is likely to be of "major interest" to the public; whether the treaty deals with an important subject and departs substantively from previous models relating to the same subject; whether the treaty represents a major development in a bilateral relationship; whether there are significant financial implications, if the treaty cannot be terminated, or remains in force for a specified period; whether the treaty will be implemented by means of overriding treaty regulations; or if the treaty is a major treaty that New Zealand seeks to terminate. Although the final decision as to whether any particular bilateral treaty will be tabled in Parliament rests with the executive, the language of the Standing Orders ("any major bilateral treaty of particular significance") combined with these published criteria, go some way to increase Parliament's potential role, and acknowledge the more complex reality of bilateral treaties.

A second refinement concerned information being made available on pending treaty action. One of the difficulties in the efficacy of the examination process was the lack of clear information on pending treaty actions. As part of the dialogue that occurred during the Select Committee examination of the International Treaties Bill, it was agreed that the executive should provide a list of all pending and current treaty action. The aim was to make executive intention and action regarding treaties more transparent and also facilitate participation by interested parties in the process. The website of the Ministry of Foreign Affairs and Trade now contains an International Treaty List which provides such information.[12]

These two refinements, guidelines for presenting bilateral treaties and publication of pending and current treaty actions, went some way to better reflect the growing significance of international law. However, other proposals have not come to fruition. For example, the possibility was mooted that parliamentary Select Committees might draw on "shadow" or independent NIAs. In other words, instead of Parliament relying only on a NIA prepared by the (self-interested) executive, community groups or interested individuals might be able to formally submit

[10] Order of the House of Representatives (2005), 387(1)(d).

[11] Ministry of Foreign Affairs and Trade (2010).

[12] Ministry of Foreign Affairs (2011).

"shadow" NIAs, rather than submissions simply responding to the executive's NIA. Likewise, there was a proposal to establish a Standing Committee on Treaties based on the Australian Joint Standing Committee on Treaties (JSCOT).[13] The aim was to foster expertise in dealing with international treaties. Unfortunately, this proposal too, failed to gain any traction.

The impetus behind introducing the procedures had been the need to respond to the growing relevance and importance of international treaties and, in particular, to achieve greater transparency in terms of executive treaty action. If international treaties were such a major influence, then they needed to be managed more democratically. In some respects, there has been a real and significant improvement in the process but, partly because of the procedures themselves, and partly because of the constant encroachment of international law, it is difficult to conclude that the right balance has been struck. There are a number of specific difficulties with the current system.

17.2.1 Insufficient Consultation

The most serious deficiency in the current system is the lack of proper consultation on the treaties tabled for examination. A particular problem in this regard is that there is insufficient time allowed for making (or properly considering) submissions on proposed treaty actions. An early example can be seen in the Kyoto Protocol, tabled in Parliament on 31 October 2001, with its National Interest Analysis.[14] Less than a month was given for public submissions – a pattern that was to become commonplace. Given the complexity of this treaty (the NIA ran to 59 pages, the longest ever presented at that point), not to mention how politically contentious the Protocol was, the timeframe was entirely inadequate. Not surprisingly, only 35 submissions were made – only 15 in writing. The Select Committee heard submissions for 9 hours and took just under 3 hours deliberation.[15]

A month for public submissions seems to be the standard approach – even where the treaty is technical and complex. A recent example is the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area.[16] The Agreement, between the ten ASEAN nations, Australia and New Zealand covers not only trade in goods, but also services and investment. The main agreement runs for 150 pages, and was only made public a few days before it was referred to

[13] Foreign Affairs, Defence and Trade Committee (2001).

[14] Kyoto Protocol on the United Nations Framework Convention on Climate Change (1997) (adopted 11 December 1997, entered into force 16 February 2005); Foreign Affairs, Defence and Trade Committee (2002), p. 390.

[15] Foreign Affairs, Defence and Trade Committee (2002), p. 401.

[16] Foreign, Affairs, Defence and Trade Committee (2009). The treaty examination covered not only this Agreement, but also a number of related instruments.

Select Committee. Reflecting the complexity of the proposed treaty, the National Interest Analysis ran to 108 pages. Nonetheless, it was referred to Select Committee on 2 March 2009, with submissions only allowed until 20 March – only 18 days.

While the short timeframe in the Kyoto example might be justified on the basis that more extensive public consultation had been undertaken in 2001, while the government was still formulating its policy on how it would achieve its emissions targets, and thus implement the Protocol. Indeed, during those consultations 550 submissions were made.[17] However, this was not the case with the ASEAN example – not only was there no earlier public consultation, but the text of the treaty itself was only made available a short time before the Select Committee process began.

Another deficiency in the consultation process is the lack of transparency about who has been consulted in the process of reaching the decision that New Zealand ought to ratify a treaty, and the consequent points of debate. The NIA does not always specify who has been consulted prior to the tabling of the treaty in the House. Those consulted are often simply other government departments – the wider community is not necessarily consulted. Indeed the ASEAN example shows that concerns being raised in the wider community are consciously disregarded. There is a worrying lack of regard to concerns raised in submissions even from within government. For example, with Australia/New Zealand Therapeutic Products Authority treaty, the executive proceeded with signature even as the Health Committee was tabling its own report raising a number of concerns about the treaty.[18]

The lack of transparency surrounding submissions makes it difficult to assess any consultation process, either to form an assessment of the debate or to assess if the executive is influenced by the process. The Kyoto Protocol is again illustrative. The FADTC report suggests that while submitters were in favour of ratification, only one-third supported doing it immediately. It says "most of the other submitters supported the Kyoto Protocol, but subject to various conditions".[19] This slant is difficult to reconcile with the minority view provided at the end of the report which asserts that 23 out of 35 submitters did not support the ratification "at this time".[20] Admittedly, the process was complicated by being intertwined with the, as yet unreleased, Preferred Policy Package, the means by which the emissions targets imposed by the Protocol would be met. However, the opacity of the language makes it impossible to assess the contours of the debate, and may reflect the executive dominance of the process.

[17] Foreign Affairs, Defence and Trade Committee (2002), p. 410.

[18] Wakefield (2004), p. 381.

[19] Foreign Affairs, Defence and Trade Committee (2002), p. 391.

[20] Ibid, p. 397.

17.2.2 National Interest Analysis and Select Committee Reports

The lynchpin of the treaty examination system is the National Interest Analysis prepared by the executive and tabled with the treaty for Parliament's consideration. As explained earlier, the Standing Orders set out standard criteria which must be included. However, from the start, the NIAs have not been as thorough as they could be – a criticism made even from within government itself. The Regulations Review Committee, in its own review of the system, noted that the government was failing to include the advantages and disadvantages of the treaty entering into force for New Zealand, or the economic, cultural, social and environmental effects of the treaties as separate categories as required by the Standing Orders.[21] The executive's poor track record in preparing NIAs has also been noted by the Health Committee, which raised concerns about the NIA presented for the Australia/New Zealand Therapeutic Products Authority treaty, noting that in its view, the NIA did not adequately address the economic and social costs to New Zealanders. [22]

It must be acknowledged that some NIAs are thorough and comprehensive – one example is the NIA prepared by the Ministry for Culture and Heritage in relation to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 and its two Protocols.[23] However, this level of detailed and comprehensive analysis is far from commonplace.

Despite their shortcomings, most NIAs at least provide some information about the treaty and consequent obligations. By comparison, the Select Committee reports to Parliament are frequently devoid of any added value, simply attaching the NIA without comment or analysis. Occasionally, the report will contact a "minority view" – for example the ASEAN Free Trade Agreement closes with four short points made by the Green Party.[24] But even where a minority view is included, there is no meaningful engagement with those points.

17.2.3 Merging the Examination and Legislative Processes

Another problematic aspect of the examination procedures is the relationship between the treaty examination process and any subsequent legislative process. Part of the impetus in having a separate treaty examination process was that the legislative role, by itself, was an insufficient check by Parliament on the power of the executive. From that point of view, it is important to keep the processes entirely

[21] Regulations Review Committee (2002), p. 6.

[22] Wakefield (2004).

[23] Government Administration Committee (2008), p. 401.

[24] Foreign, Affairs, Defence and Trade Committee (2009), p. 6–7.

separate. The intermingling of the treaty examination process of the Rome Statute and the examination of its implementing legislation is a worrying departure.[25]

However, there are instances where the two processes – the international ratification and the domestic implementation – are so intertwined that it is unhelpful and possibly misleading to conduct them apart. The Kyoto Protocol serves as an example. The Protocol sets up a system of graduated binding limits on greenhouse gas emissions, but does not specify how that should be achieved at a domestic level. This is done by means of the Preferred Policy Package. Without a full understanding of that domestic policy, it is not possible to properly understand the impact of ratification. The NIA itself acknowledges this, stating that "domestic economic effects depend largely on New Zealand's choice of domestic policies for meeting its Kyoto commitments."[26] Despite this, the treaty examination proceeded before the domestic policy was finalised which explains, to some extent, the opposition to the ratification. From this perspective, it would seem that there are situations when the two processes ought to be combined, although generally speaking it will be preferable to keep them separate.

Although there has been some measure of increased transparency and public participation as a result of the changes to the treaty-making process, overall, the executive did not relinquish any real power to Parliament.[27] Whether the executive should retain its historical control over treaty-making is an important constitutional question.[28] However, even within the existing constitutional balance a number of incremental changes could be considered to make the process more effective. In particular, greater effort could be made to ensure that the National Interest Analyses properly meet the criteria in the Standing Orders. It would also be helpful if shadow reports were received, indeed they could be actively encouraged. This would go some way to mitigate the existing executive dominance of the process. Finally, broader and more transparent consultations would make the process more meaningful.

17.3 International Law in the Courts

Turning then to the second aspect of the relationship between international and domestic law, international law has always been a part of judicial decision-making in New Zealand.[29] Nonetheless, the change of pace from the mid-1990s is undeniable. Claudia Geiringer reports that the phrase "international law" appears in only

[25] For discussion, see Dunworth (2002), pp. 264–265.

[26] Foreign Affairs, Defence and Trade Committee (2002), p. 429.

[27] For a similar assessment of the reforms in Australia see Chiam (2004), p. 265.

[28] Nielsen (2007).

[29] See, for example, the early discussion in Keith (1965), pp. 130–148.

8 cases in the period 1966–1975, doubling to 15 cases in the next 10 years to 1985. In the period 1996–2005, 63 reported cases used the phrase.[30] The 10-year period from 2000 to 2010 gives 74 reported cases using the phrase.

Considered in the whole, it is possible to discern four points of entry[31] between international law and our domestic legal sphere. These are customary international law's status as part of the common law; direct incorporation of treaty provisions by statute; statutory interpretation consistent with international obligations and finally, international law's influence on the exercise of discretion. I will briefly canvass each of these in turn before turning to some general reflections.

17.3.1 First Entry Point: Customary International Law

Historically, customary international law has been considered part of the common law unless expressly excluded by statute or by prior judicial decision.[32] Reflecting this, in *Marine Steel v Government of Marshall Islands* it was accepted that in principle, the (customary international law) doctrine of sovereign immunity precluded the Court's jurisdiction to give leave to serve proceedings out of New Zealand.[33] Similarly, in a long line of cases, the customary international doctrine of sovereign immunity has been accepted as part of New Zealand law.[34] More recently, the High Court in *Fang v Jiang* refused an application to serve proceedings out of the jurisdiction on the basis of immunity.[35]

These cases reflect that New Zealand, like all common law jurisdictions, adopts a monist system for customary international law. That is, customary international law is treated as part of the common law. Despite the apparent broad terms of this rule, the practical role of customary international law within the common law remains constrained for a number of reasons. First, as the courts have consistently maintained, inconsistent domestic statutes will always override customary

[30] Geiringer (2006), p. 309. Her search was concluded using the LexisNexis New Zealand search engine, see footnote 60.

[31] The metaphor comes from a seminar conducted jointly with Professor Campbell McLachlan and Claudia Geiringer, Judicial Studies Institute.

[32] *R v Keyn* (1876) 2 Ex D 63; *West Rand Central Gold Mining Co Ltd v The King* [1905] 2KB 391 and *Chung Chi Cheung v The King* [1939] AC 160. For New Zealand, see Keith (1998), p. 22 and Dunworth (2004), p. 67.

[33] *Marine Steel v Government of Marshall Islands* [1981] 2 NZLR 1. Ultimately, the argument failed on the basis that the Marshall Islands was not a sovereign state.

[34] *Buckingham v Hughes Helicopter* [1982] 2 NZLR 738; *Reef Shipping Co Ltd v The Ship "Fua Kavenga"* [1987] 1 NZLR 550; *Controller and Auditor-General v Davison* [1996] 2 NZLR 278. Although the argument succeeded in *Hughes Helicopter*, immunity did not lie in *Reef Shipping* or *Davison* because the transactions in question were deemed to be commercial in nature.

[35] *Fang v Jiang* HC Auckland CIV-2004-404 5843, 21 December 2006.

international law.[36] Further, the opportunity for customary international law to apply is limited. In New Zealand, it mostly arises in the context of sovereign immunity litigation.[37] This is because that area of law is still governed, for the most part,[38] in the international sphere by customary rather than treaty law and there is no relevant domestic legislation.[39] In addition, arguments based on customary international law often do not succeed, not on the basis that customary international law does not form part of the common law, but rather, that the rule being posited, does not in fact exist as a matter of customary international law. For example, in *Bin Zhang v Police*, Clifford J found that the rule in article 36 of the Vienna Convention on Consular Relations (the right of a foreign national to be informed without delay of his right to consular notification in the case of detention or arrest) had not reached the status of customary international law.[40]

17.3.2 Second Entry Point: Direct Incorporation of Treaties by Statute

The second entry point of international law, the direct incorporation of treaties by legislation, is becoming more commonplace, reflecting perhaps the increasing technical nature of many treaties. For example, the International Crimes and International Criminal Court Act 2000, which implements the Rome Statute for the International Criminal Court, directly incorporates a number of key provisions in the Statute.[41] The Trade Marks Act 2002, the aim of which is "to ensure that New Zealand's trade mark regime takes account of international developments",[42] draws directly and extensively on both the Paris Convention and the TRIPS Agreement.[43] Section 51 Climate Change Response Act 2002, enacted to give effect to New Zealand's obligations arising from the Kyoto Protocol, not only incorporates into New Zealand law the obligations already agreed to in the Protocol, but gives any future agreements the status of law. Section 215 of the Child Support Act 1991,

[36] *Chung Chi Cheung v The King* [1939] AC 160. Confirmed in *Bin Zhang v Police* [2009] NZAR 217.

[37] But see *Attorney-General v Zaoui* [2006] 1 NZLR 289 (SC) considering the customary international rules on the interpretation of treaties; *Zaoui v Attorney-General* (No 2) [2005] 1 NZLR 690 (CA) considering the customary international law prohibition against refoulement (per Glazebrook J) and *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA) on the customary international law of freedom of the high seas.

[38] Note the United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not yet entered into force).

[39] cf. State Immunity Act 1978 (UK). See *Jones v Saudi Arabia* [2006] 2 WLR 1424 (HL).

[40] *Bin Zhang v Police* [2009] NZAR 217.

[41] See International Crimes and International Criminal Court Act 2000, sections 6 and 12.

[42] Section 3(e) Trade Marks Act 2002.

[43] Sections 28, 29 and 30 Trade Marks Act 2002.