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American Constitutionalism an Impediment to the Pursuit of Fairness? Lessons from New Zealand Political Culture

For the letter killeth, but the spirit giveth life.

(II Corinthians 3:6)

Introduction

Returning to America from an intensive five week study of New Zealand political culture, one thing really stands out: the New Zealand interest in asking what is fair. This is not to say that I can objectively establish that New Zealand is more fair than America. True, many New Zealand practices do seem fairer to me. For example, it definitely seems

like the caretaker government conventions are more fair than the American norm of presidents making appointments and starting initiatives after losing an election. And I really do like New Zealand's Accident Compensation Corporation (ACC), which effectively eliminates ambulance chasing by lawyers. But one person's fairness is another's injustice and determining actual fairness is far beyond the scope of this article. What I am suggesting is that the interest in asking the question of fairness is noticeably much

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more present in New Zealand than it is in America. Where Americans are inclined to settle for what is *legal*, New Zealanders are much more interested in asking what is fair.

The interviews I conducted with individuals from a variety of professions revealed a seeming omnipresence of the concern that people had a 'fair go'. Several noted in fact that *Fair Go* is one of New Zealand's more popular television programmes. But more significant is New Zealand's attempt at institutionalising the pursuit of fairness, with the Office of the Ombudsman, various tribunals, and a number of commissions whose mission is to seek what is *right* rather than merely settling for what is *legal*. Having returned to America, the fairness question is noticeably diminished and I find myself wondering if former president Bill Clinton's absurd remark to the grand jury is telling. As ludicrous as it sounded on the public air waves, when lawyers argue over the finer points of law it is not unusual to focus on questions determining 'what the meaning of the word is'.

In other words, I cannot help but wonder if perhaps one reason Americans are incapable of adopting something as sane as New Zealand's ACC could be our *insane* obsession with legalism. Moreover, this legalism seems to grow directly from the fact that Americans have put their faith in a written constitution. As New Zealanders contemplate becoming a republic and adopting a written constitution, it may prove beneficial to reflect on this debilitating consequence of American constitutionalism.

Constitutionalism and its chilling effects on the pursuit of fairness

While visiting in the 1830s, Alexis de Tocqueville found it remarkable that in America all political questions become legal issues:

The reason lies in this one fact: the Americans have given their judges the right to base their decisions on the *Constitution* rather than on the *laws*. In other words, they allow them not to apply laws which they consider unconstitutional. (de Tocqueville, 1969, pp.100-1)

Though de Tocqueville found this judicial capacity noteworthy, it is significant that during his time the practice of legislative judicial review was far from regularly accepted in America. Many were sceptical of allowing judges to engage in this overtly political practice, and in fact the US Supreme Court had only exercised the power once with regard to ruling legislation passed by the United States Congress unconstitutional. Yet de Tocqueville's observation proved accurate and because of the possibility for courts to

hold legislative acts unconstitutional, American democracy has been profoundly shaped by litigation.

Significantly, Americans never *explicitly* granted courts the power de Tocqueville refers to. Anyone searching for mention of legislative judicial review in the US constitution will search in vain. This should not be lost on New Zealanders considering the move to republicanism. If Dennis Rose is correct in arguing that '[a]ny decision to change the prerogative powers of the head of state is likely to require an associated re-balancing of other constitutional elements and, probably, formal enshrinement of those powers in a written constitution' (Rose, 2008), the republican debate should include thoughtful consideration of the potential tangential consequences accompanying a written constitution. According to former American chief justice John Marshall, the power of legislative judicial review inevitably grows directly from the very presence of a written constitution:

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States. ...

That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent. ...

If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply. ...

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument. (*Marbury v Madison* 5 U.S. 1 Cranch 137, 2 L. Ed. 60 1803)

Marshall's logic is important in that it demonstrates that even where courts have not been granted the specific power to exercise legislative judicial review, justices are compelled to do so when a written constitution is considered the supreme and permanent law of the land. It is by its very existence

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that a written constitution grants courts the political power de Tocqueville found remarkable. But there is a greater significance to Marshall's logic. If he is correct in arguing '[t]hat the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness [and this] is the [very] *basis on which the whole American fabric has been erected*' (emphasis added), it is no stretch to attribute the fixation with legalism evidenced by Bill Clinton's statement to American constitutionalism.

In modern democratic societies it is normally considered the legislative function to wrestle with questions of justice and fairness. This is their essential job. However, when a written constitution is adopted with the understanding that first principles of justice have been permanently settled, the nature of this legislative debate is changed. In fact, constitutionalism of this sort can have a chilling effect on the legislature's willingness to even engage in debates over fairness.

Consider, for example, the language of former American chief justice Roger Taney ruling in effect that Congress could not stop the spread of slavery in newly emerging territories and stating that African Americans (free or slave) could not claim citizenship. First note that Taney unabashedly acknowledges that the perception of fairness in his day was different from that of those who adopted the constitution:

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence and when the Constitution of the United States was framed and adopted. ...

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit. ... This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics which no one thought of disputing or supposed to be open to dispute, and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

Taney then fundamentally rejected the possibility of the court entertaining existing notions of justice:

It is not the province of the court to decide upon the justice or injustice ... of these laws. The decision of that question belonged to the political or lawmaking power, to those who formed the sovereignty and framed the Constitution. The duty of the court is to interpret the instrument they have framed with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted. (*Dred Scott v. Sanford* 60 U.S. 393)

Based on the above logic, Taney ultimately concluded that, fair or not, the United States constitution failed to afford Mr Scott a legal remedy to his problem. Though this might seem preposterous, Taney's logic is fully consistent with the American constitutionalism described by Marshall. Even more significant, however, is the fact that not only does this logic suggest that there is no *legal* remedy for Scott, it also suggests that there is no *legislative* remedy. As Taney noted, under the doctrine accepted by American constitutionalism the power to determine justice is considered the primary function of *those who originally wrote* the constitution and not the sitting legislature. In effect, then, except for debate to amend the constitution (something Marshall noted seldom should happen and takes 'a very great exertion'), American constitutionalism (at least in the dominant 'founding fathers' strain of constitutionalism) considers all debate over questions of justice to be settled. Ordinary legislative debate must be limited to what is legal within the confines of the written constitution.

A century and a half later, Americans do not of course totally reject questions of fairness in favour of legalism. Indeed, it would be naïve to think that members of the legislature, lawyers and even judges are capable of fully divorcing their personal opinions on what is fair from their legal responsibility to determine what is constitutional. Surely the regular occurrence of split decisions indicates something other than a universal objective understanding of what is demanded by the written constitution, and one cannot help but believe that personal assessments of what is fair are at work.

But significantly, American constitutionalism stresses the (legislative and judicial) processes for determining what the *law* is or should be – not what is *fair*. The symbolic blindfold of Lady Justice represents the ideal of removing bias towards or against one or other litigant from the judgement equation. The law is applied, irrespective of who the litigant is. 'Fairness' is the unbiased application of the law (i.e. *fair process*), not the unbiased application of law to deliver *substantive fairness*

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in result. Fair process is, of course, important. But without substantive fairness, the ordinary person sees legalism, the lawyer's skill of interpreting (or manipulating) words and facts, the endless and expensive argument about what the meaning of the word is. Constitutionalism becomes legalism, not a profoundly human inquiry into what is just and fair and right in contested circumstances.

In other words, even though *Dred Scott* could have been determined differently, and even though in many cases since, US courts have used constitutional arguments to check the majority of the population in ways that have arguably promoted more fairness for minorities, by relying on *legal* rather than *philosophical* arguments to determine what is and is not fair the outcome by default is legalistic thinking. Right becomes determined by what is legal.

Law obviously makes similar demands in New Zealand, as one would expect in any judicial process operating with the doctrine of 'living law' shaped by precedent, as well as by legislation. But my strong impression is that in New Zealand, legalism represents only part of the equation, measured by legislators, judges and by the institutional systems as a whole. Moreover, empowered to operate outside the confines of American constitutionalism, the enormous contribution of Lord Cooke in shaping New Zealand administrative law, especially the requirement that all those exercising public power should act 'in accordance with law, fairly and reasonably', is noteworthy (Knight, 2008, p.103).

For the system as a whole, New Zealanders have thus far refused to adopt the American constitutionalist approach that first principles are permanently settled. The numerous extra-judicial institutions dotting the New Zealand political landscape are evidence of this. The Office of the Ombudsman, Human Rights Commission and Privacy Commission as well as tribunals such as the Human Rights Tribunal and the Waitangi Tribunal have an ability to ask the question of fairness in ways courts simply cannot. As has been recognised by a number of New Zealand scholars, where courts must deal with legality, commissions are expected to ask what is right (see Boston et al., 1999).

Matthew Palmer notes that it was precisely an understanding of the importance of extra-legal moral arguments that led Māori to argue against the entrenchment of the Treaty of Waitangi in the 1980s:

At the level of principle, there was a significant Māori view that putting the Treaty of Waitangi itself into any law passed by Parliament would diminish its status. The Treaty would be transformed from a powerful normative symbol with moral legitimacy into a *mere* legal instrument.

... If the Treaty is outside the law its moral and normative power can continue untouched, to be a reference point for political agitation. Inside the law, it becomes *an instrument of the legal system and a plaything for lawyers and judges.* (Palmer, 2006a, p.31, emphasis added)

Indeed, questions of fairness are too easily set aside when justice becomes a 'mere legal instrument', a 'plaything for lawyers and judges', and by refusing to grant courts the ability to have the final say by determining what is constitutional, New Zealanders are better able to engage in a meaningful debate on what is fair, a debate that often gets derailed in the United States by the very presence of a written constitution.

In fact, concern over the potential debilitating effects of legalistic thinking led the original framers of the US constitution to be sceptical of a written bill of rights. If a written bill of rights was adopted, it was feared, future individuals could claim that the only rights deserving protection were those actually written in the bill itself (Hamilton). When ratification politics ultimately forced the inclusion of a bill of rights, the Ninth Amendment was inserted in an attempt to address this concern: 'The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people' (US Constitution, Ninth Amendment). However, the Ninth Amendment has proven no match against the power of American constitutionalism. Supreme Court justices, stuck in the belief that constitutional principles first laid down must not be tampered with, seem loath to acknowledge the Ninth Amendment demand to think more broadly and to date very little Ninth Amendment jurisprudence has developed.

This is not to say that entrenching a bill of rights in New Zealand would necessarily have the identical American result. New Zealand's historical understanding that the constitution includes social mores as well as both written and unwritten conventions which are fluid and continually evolving is a different kind of constitutionalism altogether (Joseph, 2001; Palmer, Geiringer and White, 2005; Palmer, 2006b). And where American constitutionalism encourages justices not to engage in debates over fairness, the New Zealand belief that courts are in a dynamic dialogue with Parliament (Butler, 2004) could be enough to slow New Zealand's descent into the debilitating legalism that discourages the fairness question. It is significant that even with the new activism of New Zealand courts in relation to the Bill of Rights Act 1990, '[r]ather than parliamentarians feeling compelled to follow the judiciary's interpretation of what individual rights require, ... Parliament repeatedly has proven willing to pass laws implementing its own understanding of those rights'

(Geddis, 2009). In short, New Zealand constitutionalism has historically rejected Marshall's claim '[t]hat the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness'. New Zealanders have not made this principle the basis on which their society has been erected.

Nevertheless, the effects of American legalism should still be considered in the debate over becoming a republic. If a formal written constitution is adopted as the means for spelling out new power arrangements in the absence of the Queen and governor-general, an increase in legalism, whether practiced by parliamentarians or by courts, will be difficult to curtail, especially if the new written constitution adopted an American constitutionalist perspective. In short, New Zealanders may want to consider limiting the scope of any new constitution. A written constitution which did nothing more than spell out the new power arrangements without going so far as to embody any suggestion that first principles of justice were permanently settled might be preferable. Perhaps refusing to entrench a bill of rights would be wise.

Conclusion

I have not lost sight of the fact that American courts have used their political power to temper the zeal of majorities, and that, depending on one's perspective of justice, it could be argued that in America de Tocqueville has been proven right – justice has been well served precisely because all political questions have become legal questions. Ironically, however, the judicialisation of American politics has come at a cost and has perhaps significantly contributed to the very despotism de Tocqueville was most concerned with. Though tyranny of the majority was a worry, he seemed more troubled by a potentially passive majority with very little political interest or savvy. De Tocqueville perceived this kind of political ignorance to be due primarily to an over-emphasis on individualistic material pursuits. And it is quite possible he was correct. Americans are indeed extremely interested in material goods. Nevertheless, it seems as if American political apathy has been exacerbated by the fruits of legalism. Note de Tocqueville's concern:

I am trying to imagine under what novel features despotism may appear in the world. In the first place, I see an innumerable multitude of men, alike and equal, constantly circling around in pursuit of the petty and banal pleasures with which they glut their souls. ... Over this kind of men stands an immense, protective power which is alone responsible for securing their enjoyment and watching over their fate. ...

Having thus taken each citizen in turn in its powerful grasp and shaped him to its will, government then extends its embrace to include the whole of society. It covers the whole of social life with a network of petty, complicated rules that are both minute and uniform, through which even men of the greatest originality and the most vigorous temperament cannot force their heads above the crowd. It does not break men's will, but softens, bends, and guides it; it seldom enjoins, but often inhibits, action; it does not destroy anything, but prevents much being born; it is not at all tyrannical, but it hinders, restrains, enervates, stifles, and stultifies so much that in the end each nation is no more than a flock of timid and hardworking animals with the government as its shepherd. (Tocqueville, 1969, pp.691-2)

Thankfully, America has not reached this state – yet. However, even with the socialist programmes which are readily accepted in New Zealand, America comes much closer to de Tocqueville's description than New Zealand does. In fact, in comparison to America, New Zealand democracy appears to be alive and amazingly responsive, as is evidenced by the 1996 adoption of mixed member proportional representation (MMP). In spite of both National and Labour resistance, and in spite of a somewhat complicated two public referendum process, MMP became a reality precisely due to the fact that the New Zealand public refused to be told what to do (Boston et al., 1999; Mulgan, 2004; Palmer and Palmer, 2004).

In comparison, all presidential politics came to a quick halt when in 2000 the US Supreme Court anointed George W. Bush president by ruling that Florida attempts to determine the actual popular vote were unconstitutional (*Bush v. Gore* 531 U.S. 98 2000). Like de Tocqueville's envisioned flock of timid and trusting sheep, Americans readily accepted the ruling as final and that was the end of it. And though there is definitely something to be said for a willingness to be governed by the rule of law – it is good that riots did not break out in response to the court's decision – public concern over a lack of fairness in the presidential elections did not lead to the formation of a commission, nor did it lead to actual change as in New Zealand. Moreover, though some initially complained that the process was unfair, these voices quickly disappeared and by 2004 everyone talked of President Bush's run for *re-election*; forgotten was the fact that he was not elected the first time. Finally, given their interest in fairness, it is hard for me to imagine a New Zealand court issuing the same ruling in a similar circumstance. Perhaps American constitutionalism has been too successful in tempering the majority. Perhaps the inevitable cost of a judiciary empowered to overturn acts of the majority's representatives is democracy itself

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(Goldsworthy, 1999). When all political questions end up being resolved by legal experts, it seems that intelligent people will intuitively understand that they had best be getting on with their material pursuits as they are certainly not capable of meaningful political participation (Allen, 2002).

It is sad when the question of fairness has become such a 'plaything for lawyers and judges' that a society's president can actually make statements as absurd as Bill Clinton's. And it is sad when the president of the self-acclaimed 'leader of the free world' can feel comfortable using mere legal technicalities to justify human torture. Indeed, it was disturbing that President George W. Bush did not feel the need to engage Americans in a serious discussion concerning the morality of using torture when national security is threatened. Rather, he found it sufficient to rely on legal experts to make the case that the Geneva conventions did not technically apply to terrorists not wearing the uniform of a recognised military.

New Zealand's unique history, geography, size and certainly constitutional conventions will undoubtedly

guarantee that it remains distinctly different from the United States. But if an American-type constitution were adopted, it would be extremely difficult to resist the demand to turn all political questions into legal issues. Reflecting on the US experience, I cannot help but wonder if the long-term result would be that the most distinguishing characteristic I found remarkable about New Zealand – the ability to seriously consider what is fair – would over time begin to lose a little lustre.

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