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What role, if any, does constitutional convention have in the operation and recognition of Māori rights under the Treaty of Waitangi?

I Introduction

The Treaty of Waitangi —and its te reo Māori counterpart, te Tiriti o Waitangi — has been accepted by successive governments over the last decades as the founding documents of Aotearoa, New Zealand.[1] Though foundational, the parameters of the Treaty's constitutional force remain limited. The Treaty does not impose any duties on Parliament to consult Māori before taking legislative or executive action affecting Māori.[2] Nor is the Treaty a Bill of rights or fundamental constitutional document controlling Parliament's legislative powers.[3] Notwithstanding the legal status of the Treaty is contingent on whether Parliament incorporates it into statute, the question arises to what extent does the Treaty continue to impose political and possibly legal constraints on how our democratically elected government may act towards Māori rights**.** Constitutional conventions are binding rules of behaviour accepted as obligatory by those concerned in the working of the Constitution.[4] This essay will argue that while constitutional conventions adapt to the nuances of political reality to bring stability to uncertain areas of the law,[5] they have the potential to constrain Parliament

[1] Phillip Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters New Zealand, Wellington, 2021) at 57.
[2] At 45.
[3] At 45; and *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (HC and CA) at 665, 691.
[4] K C Wheare, *Modern Constitutions* (2nd ed, Oxford University Press, Oxford, 1951).
[5] Sarah Kate Jocelyn "The Potential Consequences of a Transition from Constitutional Monarchy to Republic in Aotearoa New Zealand" (LLM Thesis, University of Otago, 2023) at 10.

from entertaining Bills and legislation that is inconsistent with the Treaty and, by extension, Māori rights.

Although this essay seeks to contribute to the ongoing discourse on constitutional transformation, it does not purport to prescribe a definitive pathway to achieve a Māori-rights affirming constitutional framework. Instead, this essay explores how the recognition of [arguably] emerging constitutional conventions might operate as a normative — or constitutionally moral — constraint on Parliaments legislative function to give greater constitutional recognition and protection of Māori rights under the Treaty.

Part II of this essay will examine the nature of New Zealand's unwritten constitution, specifically the current status of the Treaty. Part III will outline the struggle between parliamentary sovereignty and Māori rights enforcement, introducing the need for parliamentary constraints. Part IV will define constitutional convention, their role in constraining the exercise of parliamentary power, and how they are identified. Part V will make the argument for emerging conventions that are Māori rights-positive and encourage Treaty consistency in legislative proposals. This essay will then discuss the challenges and limitations of these emerging conventions and will set out overall conclusions.

II An "Unwritten Constitution"

A Sources of our unwritten constitution

Unlike many other systems, there is no single text or set of laws that is collectively known as "The Constitution" in New Zealand. That is to say, we have an unwritten constitution. As summarised by Phillip Joseph, the Constitution is located in a range of legal and extra-legal

sources, including statutes, the common law, constitutional convention, customary international law, and the Treaty of Waitangi.[6]

B Status of the Treaty

Although the validity of the Treaty, or at the very least its principles, has become more secure over time, the Treaty remains without a particularly settled position within our constitution.[7] In *Te Heuheu Tukino v Aotea District Māori Land Board,* the Privy Council established the orthodox approach that the Treaty of Waitangi — and by extension te Tiriti — cannot be enforced in the courts, except in so far that it has been enacted into municipal law.[8] Although developments have since been made that erode this orthodoxy, emphasising that treaty principles should colour the understanding or interpretation of legislation and decision-making,[9] the inclusion of the Treaty within our constitutional framework has primarily occurred by parliamentary accommodation. The Treaty remains, therefore, perceivable in law but not a *direct* source of rights as it operates within the constitutional paradigm of parliamentary supremacy.[10]

III A struggle without end – The problem of parliamentary sovereignty and the need for parliamentary constraint

[6] Jessica Orsman "The Treaty of Waitangi as an Exercise of Māori Constituent Power" (2012) 43(2) VUWLR 345 at 358; and Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 1-2.
[7] Sarah Kate Jocelyn, above n 5, at 3.
[8] *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590 (PC) at 596-597.
[9] *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 at 180.
[10] Paul Rishworth "Writing things unwritten: Common Law in New Zealand's constitution" (2016) 14 ICON 137 at 151.

Sir Robin Cooke famously stated, "A nation cannot cast adrift from its foundations".[11] Noteworthy, however, is that this statement did not preclude the Court from finding that despite claims of inconsistency with the Treaty, Ministers cannot be prohibited from introducing a Bill into Parliament.[12] The Court reasoned on constitutional principles that Parliament should be free to determine what it will or will not allow to be put before it.[13]

Due to the nature of our unwritten constitution, it is interesting how parliamentary sovereignty tends to suppress deeper scrutiny of whether government actions can be construed as unconstitutional. There seems to be comfort in explaining away government actions because Parliament is "supreme" rather than isolating that argument and requiring an explanation as to whether those actions are constitutionally moral or reflective of our constitutional values. For example, if a decision has been made that has implications for tikanga Māori, there should be a corresponding practice by officials to obtain sufficient consultation with Māori and identify whether the decision is consistent with the Treaty. As stated by Claire Charters, this is especially important considering Māori rights continue to be precarious and subject to Parliament's whim driven by a non-Māori majority.[14]

Furthermore, this lack of constitutional inquiry becomes increasingly problematic when the decisions of our democratically elected officials do not reflect political reality and posited morality but arbitrary ideals. A principal example is the advancement of the Treaty Principles Bill, where a large party enabled a minority party to lead policy that sought to redefine the Treaty. Ninety percent of submitters to the Parliamentary Select Committee affirmed that this

[11] *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1992] 2 NZLR 301 at 308.
[12] At 309
[13] At 309
[14] Claire Charters "Legitimising the State: Constitutional Reform to Recognise Rangatiratanga and Tikanga Māori" (New Zealand Law Commission Symposium, Wellington, 3 November 2016) at 9.

Bill brings Parliament into disrepute and should never have been allowed to be introduced to the House.[15]

In these scenarios, we can appreciate that while Parliament is supreme, it is essential that the executive and legislative branches of government subscribe to habitual practices and binding obligations that are widely accepted as being the proper and constitutional way of doing things (in a political or moral sense). In other words, there is a growing need for constitutional morality to pierce the shield of parliamentary sovereignty to constrain parliament actions, particularly its pursuit of legislative proposals that may adversely affect Māori if enacted. This concept is not novel scholarship. When challenging a Parliamentary Bill for Treaty consistency, Elias CJ wrote extra-judicially that "the application for parliamentary supremacy to New Zealand ignores our own history including the Treaty itself. The 20th century concern with the importance of fundamental rights is derived from experiences which must temper earlier complacence with notions of arbitrary power".[16]

While legal developments for Treaty recognition and protection have been unsatisfying, largely due to the Courts hesitancy to question the authority of Parliament,[17] this essay appeals to the political constitution to constrain parliamentary decision-making.

IV Constitutional conventions

As described by Mathew Palmer, conventions are a practice, norm or understanding which has gradually crystallised and become recognised by constitutional actors to exist and

[15] Principles of the Treaty of Waitangi Bill (94-1) (select committee report) at 16.
[16] Paul Rishworth, above n 10, at 152-153; and Sian S. Elias, *The Treaty of Waitangi and Separation of Powers in New Zealand*, in Courts and Policy 206 (Bruce Gray & Bruce Mclintock eds., 1994).
[17] Claire Charters, above n 14, at 9.

normatively govern the exercise of public power.[18] This portion of constitutional law may be termed the conventions of the constitution or constitutional morality.[19] Fundamentally, constitutional conventions are legally unenforceable and are recognised as indispensable to the effective working of every constitution that aims to restrict arbitrary government.[20]

For example, the caretaker convention is well-established in New Zealand law. It states that during the period in which a new government is in the process of being formed, the incumbent government should remain in office and constrain its actions until the political situation has resolved despite remaining the lawful executive authority.[21] This rule of behaviour arose out of political and constitutional necessity to ensure executive power was still operative during transition periods and to constrain the exercise of arbitrary power by incumbent governments on their way out.

My argument is that while the legal recognition of the Treaty is primarily due to parliamentary accommodation, there are compelling reasons to recognise the potential for conventions to bring stability to Māori rights recognition and Treaty consistency in legislation. After all, legal power has always been moderated by constitutional convention.[22]

A Utility in constitutional conventions

Arguments for the recognition of constitutional conventions may seem redundant as they are only politically enforceable and therefore non-justiciable,[23] as well as an unusual forum for realising Māori rights. However, despite the fact that conventions can be breached without

[18] Mathew Palmer and Dean Knight *The Constitution of New Zealand: A Contextual Analysis* (Bloomsbury publishing Plc, 2022) at 12.
[19] A V Dicey *Introduction to the Study of the Law of the Constitution* 1885.
[20] Janet McLean "The New Zealand Bill of Rights Act 1990 and Constitutional Propriety" (2013) 11 NZJPIL 19 at 19.
[21] Phillip Joseph, above n 1, at 292.
[22] At 22
[23] James Bowden and Nicholas MacDonald "Writing the Unwritten: The Officialization of Constitutional Convention in Canada, the United Kingdom, New Zealand, and Australia" (2012) 6(2) J.P.P.L at 370.

formal legal consequences, it is sociological dynamics and reactions — civic virtue, moral-suasion, political cost and public reaction — that help condition actors to do the right thing.[24] Due to the manner in which they arise, largely out of political necessity, conventions are able to facilitate constitutional development without requiring significant changes in the law itself.[25]

To illustrate the point that there is value in this political constitution, it is arguable that the Treaty Principles Bill was not defeated by legal action but rather the considerable public reaction, the demonstration of public and parliamentary protest, and the normative constitutional value that we place in the Treaty. While it is a requirement that conventions serve a constitutional purpose,[26] the social and political implications of violating those purposes have arguably more force in compelling parliamentary action than what the law in its current state can provide for. This is particularly true for constitutional matters involving Māori as the Treaty continues to morally bind but is not law save to the extent specified.[27]

B The test for identification

The informality of conventions means there is often debate about the existence and nature of a particular convention, especially how practices claim to serve important constitutional principles.[28] Sir Ivor Jennings has coined the test for the existence of a convention, stating they can be identified by asking three questions: what are the precedents, did the actors in the precedent believe they were bound by a rule, and whether there is a good political reason or constitutional purpose for the rule.[29] No convention can be asserted if the rule thought to be

[24] Mathew Palmer, above n 18, at 13.
[25] Sarah Kate Jocelyn, above n 5, at 53.
[26] Ivor Jennings *The Law and the Constitution* (5th ed, 1959) at 136.
[27] Caren Wickliffe and Matiu Dickson "Māori and Constitutional Change" (1999) 3 Yearbook of New Zealand Jurisprudence 9 at 28.
[28] Mathew Palmer, above n 18, at 13.
[29] Peter Leyland *The Constitution of the United Kingdom: A Contextual Analysis* (3rd Ed, Hart Publishing,

binding served no constitutional purpose or if it frustrated rather than served constitutional ends. Whilst the test is conjunctive, each of Jennings' criteria must be satisfied.[30]

V The case for recognising emerging conventions

The informality of conventions has allowed the Constitution to be more malleable and adapt to the changing political circumstances to limit government conduct.[31] The fact that emerging practice has not yet been described by the political actors as the operation of a constitutional convention is not evidence against the existence of such a convention as they are commonly articulated after the fact.[32] Importantly, however, is that in order for these conventions to be workable, political actors must internalise and accept that they themselves are bound by these constitutionally moral ways of doing things.

A Parliament subscription to Waitangi Tribunal findings and recommendation

There is a legitimate expectation by Māori and the Courts that Parliament takes into account Waitangi Tribunal findings and their recommendations when enacting policy that will directly impact Māori. Since the nature of the Treaty partnership continues to sustain these expectations,[33] it is arguable that Parliament's subscription to Waitangi Tribunal findings and recommendations prior to enactment is an emerging constitutional convention.

Applying Jennings criteria, members of Parliament have expressly considered Waitangi Tribunal recommendations and findings before enacting legislation. A notable precedent is

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Oxford, 2016) at 26-43.
[30] Ombudsman "Constitutional conventions: A guide to sections 9(2)(f)(i) -(iii) of the OIA" <www.ombudsman.parliament.nz/resources/constitutional-conventions-guide-sections-92fi-iii-oia> at 4.
[31] Sarah Kate Jocelyn, above n 5, at 55.
[32] Janet McLean, above n 20, at 25.
[33] Jessica Andrew "Administrative Review of the Treaty of Waitangi Settlement Process" (2008) 39 VUWLR 225 at 237.

the marked reliance by members of the House on the Waitangi Tribunal's Health Services and Outcomes Inquiry recommendations in advancing the Pae Ora (Healthy Futures) Bill, which was later enacted.[34] The Hansard debates frequently recorded how political actors felt compelling obligations to subscribe to the Tribunal's recommendations given its inherent jurisdiction to investigate claims brought by Māori on the extent to which the Crown has acted inconsistently with its obligations under the Treaty.[35] Moreover, there are strong constitutional reasons for recognising this as a binding rule of behaviour. It would encourage our government to actively honour Crowns obligations under the Treaty, that they feel increased accountability for the breach of those obligations, and that it incentivises the practice of Māori rights protection. Notably, the Courts have already recognised this convention in principle in *Attorney-General v New Zealand Māori Council.*[36] The Court stated that there was a legitimate expectation that relevant considerations, such as a pending Waitangi Tribunal report, should be taken into account prior to decisions that will directly impact Māori rights. This judicial recognition might significantly contribute to political actors feeling obligated to follow this rule.

B Legislative consistency with the Treaty

A balance has to be struck between the right of elected governments to have their policies enacted into law and the protection of fundamental social and constitutional values. In weighing these sometimes-competing interests, it is well established that those with the authority to make majority decisions often find themselves recognising that their authority is limited by the Treaty.[37]

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[34] (27 October 2021) 755 NZPD (Pae Ora (Healthy Futures) Bill — First Reading and Second Reading).
[35] Second Reading.
[36] *Attorney-General v New Zealand Māori Council* [1991] 2 NZLR 129 at 133.
[37] Cabinet Office *Cabinet Manual 2023* at 5.

The Cabinet Manual expressly states that a Minister must, when proposing a Bill, confirm its compliance with the Treaty.[38] Where a Bill does not comply, the Minister must draw attention to the inconsistency and justify it. While the Cabinet Manual is the primary authority for the conduct of Cabinet government, and its contents are specifically consented to by Cabinet,[39] it is at least likely that political actors feel an obligation to investigate into whether a Bill is Treaty consistent. This would serve several constitutional purposes. It serves the principle of responsible government which requires all sections of the population to be protected and that vulnerable communities be promoted, principles of liberal democracy, and the principle that members of the public service support the Māori-Crown relationship under the Treaty.[40] To the extent this rule serves these fundamental principles, this convention can act as a safeguard for Māori rights and interests, and facilitate greater transparency in executive and legislative action that seeks to circumvent it which is a crucial factor for constitutional change to progress Māori aspirations.[41]

VI Limitations and challenges

An inherent limitation in constitutional conventions is that they are positioned within the political workings of the Westminster system and parliamentary supremacy. While some Māori scholars do not consider the Treaty as being subject to our existing legal framework, this view cannot be reconciled with an analysis like constitutional convention that only moves within the bounds of the existing framework.[42]

[38] At [7.68].
[39] At xiii.
[40] At 155.
[41] Caren Wickliffe, above n 27, at 24.
[42] Jessica Andrew, above n 33, at 350.

Instead, the argument for finding utility in a convention can be advanced through Ani Mikaere's view that although carving out a small space within the state legal system may be better than nothing, that project should not distract Māori from an ultimate tino rangatiratanga goal.[43] Recognising the potential in the political constitution to generate constitutionally moral reasons for political actors to subscribe to Treaty consistency and Māori rights-enlightenment in legislation is arguably a small step towards, not a definite pathway for, achieving genuine Māori rights recognition.

Another limitation of these arguably emerging conventions is that they are primarily applicable to legislative proposals prior to their enactment, rather than serving as a mechanism for striking out settled legislation that is inconsistent with the Treaty. This reflects the practical difficulties of Jennings' criteria — particularly that there is a precedent for the rule, and that political actors felt bound to follow that rule. It would be a rare and unprecedented case for a parliamentary majority to collectively repeal legislation solely on the basis of Treaty inconsistency. While possible in theory, such powers of repeal can better be explained by political expediency than the existence of constitutional convention. Although a convention might serve an important constitutional purpose, it cannot in itself compel repeal without frustrating parliamentary supremacy. As previously mentioned, convention moves within the bounds of this framework. Thus, while the political and social consequences of breaching a convention might compel the repeal of a statute, convention alone cannot have legal force.

VII Conclusion

[43] Law Commission *He Poutama* (NZLC SP24, 2023) at 281-282.

Constitutional conventions, though legally unenforceable, play a vital role in our political constitution. Despite the on-going challenge of parliamentary supremacy which continues to ignore the Treaty as a direct source of rights, conventions have a crucial role as a normative and constitutional constraint on Parliaments law-making power. Recognising the social and constitutional utility in emerging conventions that seeks to promote Māori rights, allow for the organic growth of their preservation and the status of Tiriti constitutionalism beyond the limits of legal enforceability.