Article

Fragile and Strong: The Oxymoron of Tax Administration and Constitutionality in New Zealand

Shelley Griffiths

Dean, Faculty of Law University of Otago, Dunedin, New Zealand. Prof. Griffiths currently teaches Taxation (including a paper on advanced issues in Taxation), Company Law and the Securities Market Regulation. Email: shelley.griffiths@otago.ac.nz

James Hartshorn

Faculty of Law University of Otago, Dunedin, New Zealand. Awared with Best 300-level Student in Politics in 2020.

Received 12 January 2022, Accepted 20 March 2022

KEYWORDS:

political constitution; tax system; tax principles; Common Law System; constitutional jurisprudence.

ABSTRACT:

It is usually argued that in New Zealand there is no constitution, however, the political constitution of a state is related to who or what institutions should exercise power and how they should exercise it and in this sense the previous statement would not be correct since these rules exist . In the case of this country, the study of constitutional norms is different than the Civil Law System countries, and its sources must be studied in a different way, which the author explains in this work. The three basic pillars of the constitutional system would be the sovereignty of parliament, the idea of limited government and the separation of powers, and the rule of law. From these and other considerations, the author focuses on the study of the influence of the Constitution on the tax system, at the legislative and administrative level, in various aspects, including the rights of taxpayers.

PALABRAS CLAVES:

constitución política; sistema tributario; principios tributarios; Common Law System; jurisprudencia constitucional.

RESUMEN:

Se suele sostener que en Nueva Zelanda no existe una constitución, sin embargo, la constitución política de un estado dice relación con quién o qué instituciones deben ejercer el poder y cómo deben ejercerlo y en tal sentido la anterior afirmación no sería correcta pues existen esas normas. En el caso de este país, el estudio de las normas constitucionales es diferente que los países de Civil Law System, y debe estudiarse sus fuentes de un modo diferente, lo que la autora explica en este trabajo. Los tres pilares básicos del sistema constitucional serian la soberanía del parlamento, la idea del gobierno limitado y la separación de poderes, y el estado de derecho. Desde esas y otras consideraciones, la autora enfoca el estudio de la influencia de la Constitución en el sistema tributario, a nivel legislativo como administrativo, en diversos aspectos, incluido los derechos de los contribuyentes.

MOTS CLES :

constitution politique; régime fiscal; principes fiscaux; système de droit commun; jurisprudence constitutionnelle..

RESUME :

On prétend généralement qu'en Nouvelle-Zélande il n'y a pas de constitution, cependant, la constitution politique d'un État est liée à qui ou quelles institutions devraient exercer le pouvoir et comment elles devraient l'exercer et en ce sens, la déclaration précédente ne serait pas correcte puisque ces des règles existent. Dans le cas de ce pays, l'étude des normes constitutionnelles est différente de celle des pays du système de droit civil, et ses sources doivent être étudiées de manière différente, ce que l'auteur explique dans cet ouvrage. Les trois piliers fondamentaux du système constitutionnel seraient la souveraineté du parlement, l'idée d'un gouvernement limité et la séparation des pouvoirs, et l'État de droit. À partir de ces considérations et d'autres, l'auteur se concentre sur l'étude de l'influence de la Constitution sur le système fiscal, au niveau législatif et administratif, dans divers aspects, y compris les droits des contribuables.

CONTENTS:

1 THE NZ CONSTITUTION

> "A constitution is not the act of a government without a constitution, but of a people constituting a government, and government without a constitution, is a power without a right" - Thomas Paine[1]

It is sometimes said that New Zealand does not have a constitution. The constitution of a nation, however, is the set of rules that govern how a government can exercise public power. A constitution identifies who or what institutions should wield power, and how they should exercise it. Given the generally unmatched coercive force at the hands of a government, the rules about how a government ought to exercise its power warrant careful consideration and discussion. In particular, those rules play a very foundational role in a democracy such as New Zealand. Discussion, debate and recourse to these principles and rules are not limited to jurisdictions where those rules are neatly reduced to one document and in fact such discussions are often just as fiercely engaging and productive in a country such as New Zealand whose constitution is, at least superficially, built on foundations of flexibility. It is true that New Zealand does not have a document or documents labelled as 'Constitution'. Its constitution is in fact founded in a web of legal and extra legal sources. Together they are part of a web that shapes the fabric of the New Zealand constitution.[2]

New Zealand is a unitary state and parliamentary democracy. It has a unicameral parliament whose members are elected by a proportional voting system. New Zealand's constitutional framework has been described elsewhere as one which is designed to "facilitate all citizens being able to participate fully in the mechanics of government, all aspects of society, and for the acceptance of diversity."(Gupta, 2020)

Although New Zealand's 'constitution' is one of only three in the world not to have been reduced to a single document or statement, the constitutional landscape is undoubtedly robust; a web of legal and extra-legal sources including the Treaty of Waitangi, legislation, conventions, common law, doctrine and practice. (Griffiths, 2011b; Joseph, 2014, p. 1; Palmer, 2008) It may be described as 'unwritten', in the sense that none of these instruments exhibit the twin characteristics that constitute a written constitution, namely: 'fundamental' law (the law that establishes the organs of government and invests them with the requisite authorities) and 'higher' law (the law that protects the constitution from ordinary amendment or repeal) (Joseph, 2014, pp. 1–20). It also means that there is no one place where the relationship between tax and constitutional principles is clearly laid out. Although there are occasional calls for this constitutional 'web' to be distilled into a more 'written' form,[3] change of this type does not appear to be on the horizon, for now at least.

As a constitutional monarchy, New Zealand has been described as having the "closest adaptation of the Westminster system in the British Commonwealth"(Joseph, 2014, p. 1). New Zealand's parliamentary structure carries on the historical agitation by the people for representation in government which has ultimately shaped the development of the Westminster system. The level and type of taxation are among the most important decisions made by voters in democracies as part of that historical agitation, and those decisions provide an image of the society citizens prefer. Those decisions, and the principles and rules

---

[1] *H Collins (ed)* Rights of Man *at 93 and 207, quoted by AW Bradley and KD Ewing* Constitutional and Administrative Law *(14th ed, Pearson Education, Harlow (Essex), 2007) at 5 and cited in Phillip A Joseph* Constitutional & Administrative Law in New Zealand *(4th ed, Thomson Reuters New Zealand Ltd, 2014) at 1. The extended quotation read: "A constitution is a thing antecedent to a government, and a government is only the creature of a constitution … A constitution is not the act of a government, but of a people constituting a government; and government without a constitution, is power without a right."*

[2] *On critiques of the current approach, see for example Geoffrey Palmer and Andrew Butler* Towards democratic renewal: ideas for constitutional change in New Zealand *(Victoria University Press, 2018)*

[3] *See, for example, Geoffrey Palmer and Andrew Butler* A Constitution for Aotearoa New Zealand *(Victoria University Press, Wellington, 2016).*

which govern them are deeply rooted in New Zealand's parliamentary system and constitution, despite the apparent lack of 'written' rules or a physical document to point to.

The study of a constitution has been described as traversing 'law, politics, history, and convention'.(Joseph, 2014, p. 2) Again, regardless of whether or not a jurisdiction reduces its constitution to a single written document, questions which could be described as 'constitutional' in nature cannot be answered by any simple application of the law. *Every* constitution is founded on the interaction of law, constitutional convention and what can be described as 'institutional morality'.(Joseph, 2014, pp. 1–2)

'Institutional morality' sits above both law and convention. As a concept, it addresses the moral dimension of public power and identifies closely with the substantive concept of the rule of law.(Joseph, 2008, pp. 249–261, 2014, p. 2; Joseph & Ekins, 2011, pp. 47–56) The rule of law used in this sense embraces not only the formal requirements of law (that it be prospective, certain, accessible etc) but also the higher-law ideals and values that identify the modern liberal democracy (personal liberty, freedom, autonomy etc, and the correct organisation of the State). (Bingham, 2010; Dicey, 1885; Fuller, 1969; HLA Hart, 1994; Kress, 1993, 1993; Raz, 1979, Chapter 11; Waldron, 2012) Institutional morality is the "weathervane that instils rationality and coherence in public affairs".(Joseph, 2014, pp. 1–2)

It represents "the road map of public law", operating in public life much as Adam Smith's "invisible hand" operates in the economic markets.(Joseph, 2008, pp. 248–258)

In New Zealand, this intersection of law, convention and a strong sense of institutional morality has produced an ever-emerging and shifting constitutional makeup, one which can be changed and developed comparatively easily but which also gives Parliament more power than those in other Westminster systems.(Palmer, 2006) It is worth briefly explicating the three most fundamental principles that underpin this landscape in order to found further discussion about New Zealand's constitutional landscape and in particular how it interacts with the context of taxation.

The first of (arguably) three fundamental constitutional pillars in New Zealand is the familiar concept of Parliamentary sovereignty. Put simply, this principle denotes that Parliament is the supreme and final source of law and its statutes the expression of that supremacy.[4] The law as expressed by Parliament is the overarching authority in the land to which all persons are subject, no matter their rank.[5] New Zealand's adaptation of the Westminster system has notably transposed a particularly strong version of this principle. When Parliament decided to legislate to affirm, protect and promote human rights in the New Zealand Bill of Rights Act 1990 (NZBORA), for example, it judged at the time in line with New Zealand's strong expression of Parliamentary sovereignty that it should not give that law any greater force than any other Act.[6] It has no status greater than any other piece of legislation and courts are unable to strike down legislation as incompatible with it. It is predicated on statutory construction as a means of protecting underlying rights and ensuring legislative consistency with human rights norms.[7] Although courts in New Zealand are denied the power to strike down any legislation, they are directed by section 6 of NZBORA to give meaning to

[4] *Constitution Act 1986 (NZ), s 15. A founding explication of this principle is set out in A.V. Dicey* An Introduction to the Study of the Law of the Constitution *(Macmillan and Company, New York, 1889).*

[5] *Una Jagose "Remedies against the commissioner: revenue through a public law lens" (paper presented to NZLS Tax Conference, September 2013) at 4.2.*

[6] *New Zealand Bill of Rights Act 1990, s 4. See also Geoffrey Palmer "What the New Zealand Bill of Rights Act aimed to do, why it did not succeed and how it can be repaired" (2016) 14(2) New Zealand Journal of Public and International Law 169-208; Andrew Geddis "The Comparative Irrelevance of the NZBORA to Legislative Practice" (2008) 23 NZULR 465-488.*

[7] *Claudia Geiringer 'Shaping the Interpretation of Statutes: Where are we now in the S 6 debate?' in: NZLS* Using the Bill of Rights in Civil and Criminal Litigation *(Wellington: July 2008) at 1; NZSC (Supreme Court of New Zealand) 20 February 2007,* R v. Hansen *[2007] NZSC 7, [2007] 3 NZLR 1.*

legislation that as far as is possible is consistent with the rights and freedoms in NZBORA. Section 5 permits limits on rights and freedoms where those limits can be "demonstrably justified in a free and democratic society". While a sovereign Parliament is able to legislate in a manner that is inconsistent with fundamental rights there is an additional safeguard in the New Zealand system. The Attorney General is required to report to Parliament whenever a legislative proposal is in the Attorney's opinion inconsistent with NZBORA. (New Zealand Ministry of Justice, 2022)[8] Parliament may disagree that the particular right or freedom is limited by the proposed legislation or it might consider a limit is justified in terms of section 5. What the process does, is ensure that Parliament makes such decisions with full knowledge and proper consideration of the issues.

The second and third of the pillars of New Zealand's constitution both relate to the idea of limited government. Under the doctrine of separation of powers, powers of government are separated in order to limit them.(Joseph, 2014, pp. 1–199). The doctrine identifies the executive, legislative and judicial functions of government, and their corresponding organs – the executive (the government), legislature (Parliament), and judiciary (the courts). The Westminster system adapts the doctrine in order to meld the legislative and executive organs. New Zealand, again, has transposed a particular version of the Westminster model where the separation of powers is notably dilute and incomplete, because of the power of Parliament and the model of cabinet government.[9] It leaves a comparatively centralised executive (each member of which is a member of Parliament) with broad, flexible decision-making and legislative powers.[10]

The most salient aspect of the doctrine in New Zealand relates to judicial separation and independence.(Joseph, 2014, pp. 1–197) Judicial independence is an indispensable principle of a liberal democracy and the rule of law.[11] For Sir Robin Cooke, it was one of two "unalterable" fundamentals that might arguably lie beyond legislative reach in New Zealand's constitutional landscape which is so often strongly refracted through the lens of parliamentary sovereignty.[12] All citizens of New Zealand – politicians and officials included – must be answerable to the law as administered in a system of independent and impartial courts (Joseph, 2014, pp. 1–197). Judicial review, part of the court's inherent jurisdiction and given statutory force in New Zealand through the Judicial Review Procedure Act 2016,[13] is the process whereby courts can, within certain established "heads of review", review the actions of government agencies. This gives to the judiciary an important role in the review of actions by government agencies. Equally, the courts and the courts alone hold the task of interpreting statutory provisions.

---

[8] *New Zealand Bill of Rights Act 1990, s 7.*

[9] *At 209.*

[10] *Constitution Act 1986 (NZ), s 6 outlines that ministers of the Crown must be members of Parliament. The particular expression of the doctrine led Professor Leslie Zines to famously label New Zealand an "executive paradise". (Zines, 1991, p. 47)*

[11] *At 797. For further writing that examines aspects of judicial independence in New Zealand, see generally Phillip A Joseph "Appointment, discipline and removal of judges in New Zealand" in HP Lee (ed)* Judiciaries in Comparative Perspective *(Cambridge University Press, Cambridge, 2011) at 66-95; G Hammond "Judges and free speech in New Zealand" in HP Lee (ed)* Judiciaries in Comparative Perspective *(Cambridge University Press, Cambridge, 2011) at 195– 216; G McCoy "Judicial Recusal in New Zealand" in HP Lee (ed)* Judiciaries in Comparative Perspective *(Cambridge University Press, Cambridge, 2011) at 322– 345; G Palmer "Judges and the non-judicial function in New Zealand" in HP Lee (ed)* Judiciaries in Comparative Perspective *(Cambridge University Press, Cambridge, 2011) at 452– 473.*

[12] *Sir Robin Cooke "Fundamentals" (1988) NZLJ 158 at 164, quoted in Joseph* Constitutional and Administrative Law, *above n 1, at 797. There are a number of mechanisms in New Zealand, both legal and convention-based, to protect judicial independence. Although Judges are appointed based on a recommendation of the Attorney-General (a member of the executive), there is a strong convention that the Attorney-General acts independently of party-political considerations when making such recommendations in New Zealand. The other two pillars of judicial independence are security of tenure and financial security, enshrined in s 23 and s 24 of the Constitution Act 1986 respectively.*

[13] *See Judicial Review Procedure Act 2016 (NZ) and Senior Courts Act 2016 (NZ). The latter constitutes and sets out the rules of the High Court, Court of Appeal and Supreme Court of New Zealand.*

This leads nicely to the third and final pillar of New Zealand's constitutional landscape - the 'rule of law', or collection of 'rule of law' ideas. The rule of law has been described as the "sentinel of constitutional government", the concept that reconciles 'organised state power and individual autonomy'(Joseph, 2014, pp. 1–153). It prescribes the formal requirements of legal norms, operates as a principle of institutional morality and it imposes discipline upon decision makers in the public sphere. (Joseph, 2014, pp. 1–153; Joseph & Ekins, 2011, p. 9) Therefore, although there is no one settled conception of the idea, the rule of law not only underpins the Diceyan principle that government should govern by known rules,(Dourado, 2011a, p. 152) it also arguably holds more substantive aspects which set out the vague boundaries of institutional morality guiding limited, representative government even where there may not be prescribed legal rules.(Fuller, 1969; Raz, 1979, Chapter 11; Waldron, 2002). These more subtle, substantive aspects of the rule of law hold particular explanatory power in New Zealand's flexible and unwritten constitutional context.

The sum of these principles, and their particular transposition to the New Zealand context has seen a constitution which has been sensitive to broad shifts in culture, both in a social and legal sense. The status of the Treaty of Waitangi is a clear example of this sensitivity.[14] The Treaty of Waitangi is not directly enforceable unless and until there has been some form of legislative incorporation.[15] Until the end of the 20th century the Treaty of Waitangi was virtually invisible to New Zealand law (Rishworth, 2016, pp. 137–141; Ruru & Kohu-Morris, 2020, pp. 556–569). However, its meaning and significance were reinterpreted by official institutions between 1973 and 1993, made possible by the strength of Parliamentary sovereignty as a principle in New Zealand and the emergence of a political will to incorporate the principles of the Treaty into New Zealand's constitutional landscape.[16] Parliament created the Waitangi Tribunal in 1975 and gave it the task of resolving the meaning of the Treaty,[17] and issuing reports on Treaty-related matters which are not binding on the Government, but in practice carry a high level of persuasiveness (Joseph, 2014, pp. 1–185; Ruru & Kohu-Morris, 2020, p. 560). Parliament referred to the Treaty for the first time in 1986,[18] and since then both the Courts and executive have recognised the meaning of the Treaty set out by the Waitangi Tribunal (Cabinet Office & New Zealand Department of the Prime Minister and Cabinet, 2017; Ruru, 2016, pp. 425–458). Despite this evolution, the Treaty still occupies an uneasy position in New Zealand's constitutional landscape. Its general meaning, as interpreted by official institutions and the courts, restricts requirements mostly to principles surrounding relationships and procedural fairness (Ruru, 2018, pp. 111–126). For all the revitalisation it has seen, the weight to be given to the Treaty and the implications of its meaning in particular cases often remain uncertain (Palmer, 2008, p. 3).

This again returns us to the spectre of flexibility and development. The informality of extra-legal rules in New Zealand's constitutional makeup enables the constitution to evolve organically, with the benefit of inherited wisdom and experience. The cabinet system evolved over a period of 200 years and is almost entirely conventional in character (Joseph, 2014, pp. 1–2). The Monarch's personal prerogatives and discretions became progressively

[14] *For a seminal work on the role of the Treaty in the colonisation of New Zealand, see Paul Mchugh* The Maori Magna Carta *(Oxford University Press, Auckland, 1991).*

[15] Te Heuheu Tukino v Aotea District Māori Land Board *[1941] NZLR 590 (Privy Council). See also Alex Frame, 'Hoani Te Heuheu's Case in London 1940–41: An Explosive Story' (2006) 22(1) New Zealand Universities Law Review 148.*

[16] *The Waitangi Tribunal commented on the meaning of the Treaty in a series of reports in the early 1980s; see Waitangi Tribunal* Motunui-Waitara Report *(Wai 6, 1983); Waitangi Tribunal* Kaituna River Report *(Wai 4, 1984); Waitangi Tribunal* Manukau Report *(Wai 8, 1985). The principles of the Treaty were first defined and explained, based on the meaning set out in the Waitangi Tribunal, by the Court of Appeal in* New Zealand Māori Council v Attorney-General *[1987] 1 NZLR 641 (NZCA).*

[17] *Treaty of Waitangi Act 1975 (NZ), s 5(2).*

[18] *State Owned Enterprises Act 1986 (NZ), s 9.*

diluted as cabinet government developed, resulting in a constitutional monarchy that was founded on representative democracy (Joseph, 2014, pp. 643–721).

Often it is these very vagaries of New Zealand's cabinet government which are themselves a reason why some rules ought not to be given legal precision. Not every eventuality can be anticipated, as when the Governor-General may be required to refuse ministerial advice or dismiss a government (Joseph, 2014, p. 261). Flexibility is a gift of the conventions defining the relationships between the organs of government, and not only allows for development, but is malleable in the face of shock and crisis.

Equally, flexibility, on the surface, may in fact deceive in New Zealand. It would require extraordinary circumstances for Parliament to legislate against the independence of the judiciary or to sever the British monarchy (Joseph, 2014, p. 21). Adoption of a republican form of government would, it is widely presumed, only follow after a referendum. There is however, no 'rule' that says as much. Change in the legal doctrines may also conspire against flexibility. There are suggestions that constitutional statutes, even where unprotected by entrenching procedures, are immune to implied repeal by general statutes.[19] Under the principle of legality, express or dedicated parliamentary legislation is required in order to abrogate basic rights,[20] and rights are fenced in practice by strong and active statutory interpretation in favour of their protection.[21]

And yet - there is always a looming sense that the pillars of New Zealand's constitution, although they remain watertight for now, are ultimately frail and fragile if and when they are challenged or ignored. The uneasy position and future of the Treaty of Waitangi is testament to this sense. This feeling also permeates through the taxation context, and will be returned to in the third part of the article. The challenge for New Zealand is to strike the balance between malleability in the name of evolution and efficiency, and the proper maintenance and supervision of a core of fundamental constitutional principles, ideas and processes which ought not be able to simply be ignored. It is indeed a fine balance.

2 TAX AND THE CONSTITUTION

What role does tax play in New Zealand's constitutional landscape? How do the two areas of tax and constitutional law combine? Taxation collection is a point of contact between the state and the individual. Across the history of the Westminster model of government, tax has been at the heart of the historical working out of the relationship between King and Parliament, between the sovereign power and the people. The "no taxation without representation" principle can be found in those landmarks of the British constitution, the Magna Carta and the Bill of Rights 1688 (Joseph, 2014, pp. 493–495). These principles were brought to New Zealand through the colonisation process.[22] In New Zealand, it is an enshrined constitutional principle that there can be no taxation by executive decree.

As with all actions of the New Zealand parliament and government, then, constitutionality in taxation, including all the processes around assessment and collection of tax, fall into several formal and informal processes that work together to ensure legality. As noted above, the power to levy tax belongs to Parliament alone. This is deeply entrenched within the whole concept of parliamentary sovereignty. However, no modern state can survive without taxation revenue. The collection of that revenue is by its very nature the exercise of governmental power. The constitutional significance of taxation almost goes

[19] Thoburn v Sunderland City Council *[2002] EWHC 195 (Admin), [2003] QB 151 at [60]–[69] per Laws LJ.*

[20] R v Secretary of State for the Home Department, ex parte Simms *[2000] 2 AC 115 (HL) at 131 per Lord Hoffmann.*

[21] *Geiringer, above n 17, at 1. See also* R v. Hansen *[2007] 3 NZLR 1 (NZSC).*

[22] *English Laws Act 1908, repealed in 1988, thereafter Imperial Laws Application Act 1988, s 7. See also New Zealand Constitution Act 1852 (UK) 15 & 16 Vict c 72.*

without saying (Griffiths, 2011b, p. 216).[23] The nature of that constitutional significance, and indeed the very legitimacy of taxation, will be a function of the particular constitutional principles and structures of the state in question (Elias, 2019).

It cannot be forgotten that the administration of the tax system is also fundamentally connected to constitutional concern (Ginsburg, 2017, p. 60). Often, in bringing the clearly grand and constitutional ideas that sit beneath tax 'onto the ground', so to speak, the more technical and regulatory strands of thought naturally dominate; ensuring that the 'mundane miracle' that is our tax system functions efficiently and fairly as possible within the inevitable resource constraints of the modern neoliberal state.[24] However, that ought not dilute the importance of constitutional and public law concern in this sphere.

The administration of the tax system rests with one body, the Inland Revenue Department under the direction of the Commissioner of Inland Revenue (Commissioner).[25] There is only one tax authority in New Zealand. Tax is levied by central government and as a non-federal nation there is no other tax collection function. The substantive taxing provisions that establish liability are organised in the Income Tax Act 2007, whilst the Tax Administration Act 1994 is the major piece of legislation that addresses the issues of tax administration. That split emerged out of a series of major reports on various aspects of the New Zealand income tax system from the late 1980s and through the 1990s. Along the way there was a major report on the organisation of the Inland Revenue Department itself,[26] and in the administration of taxation there was the introduction of a comprehensive penalties regime, the introduction of binding rulings and the enactment of a disputes resolution process.[27] This reform project was also the catalyst for a legislative re-write project. The re-write project, which took more than a decade to complete, recast the income tax legislation into a structure to "more clearly" reflect "a coherent scheme and purpose."[28]

There was also the transition to a self-assessment system that was completed in 2002. By the late 1990s, it was a fiction that the Commissioner assessed income tax; the notion of Commissioner assessment did not reflect what really happened.[29] In 2002, the reality of self-assessment was recognised in statute, and section 92 of the TAA confirms the fact of taxpayer assessment. However, there is also clear recognition that there remains a residual need for the Commissioner to be able to assess tax liabilities. For example, where the taxpayer does not comply with the obligation to self-assess, the Commissioner can make a default assessment.[30] Equally, the disputes or challenge procedure may end up in a result that requires the completion of a re-assessment. Similarly, the Commissioner and the

---

[23] *See also Sir Ivor Richardson "Foreword" in Adrian Sawyer (ed)* Taxation Issues in the Twenty-First Century *(Centre for Commercial and Corporate Law University of Canterbury, Christchurch, 2006).*

[24] *Dominic De Cogan "A Changing Role for the Administrative Law of Taxation" (2015) 24 S.& L.S. 251 at 266.*

[25] *Tax Administration Act 1994 (NZ), ss 5, 6, 6A and 6B.*

[26] *See Organisational Review Committee* Organisational Review of the Inland Revenue Department, *Report to the Minister of Revenue and the Minister of Finance (April 1994).*

[27] Legislating for self-assessment of tax liability A Government discussion document, *(Wellington: 1998), at 2.7; on introduction of penalties see Shelley Griffiths "The 'Abusive Tax Position' in the Tax Administration Act 1994: An Unstable Standard for a 'Penal Provision'" (2009) 15 NZJTLP 159 at 161-164 and on the disputes resolution process see Mark Keating "New Zealand's Tax Dispute Procedure – Time for a Change" (2008) 14 NZJTLP 425 and on the binding rulings see Adrian Sawyer "Binding Rulings in New Zealand - an assessment of the first ten years" (2006) 12 Canterbury Law Review 273.*

[28] Rewriting the Income Tax Act Objectives, process, guidelines A discussion document, *Wellington 1994; the end product is the Income Tax Act 2007; generally on the re-write project see John Prebble "Evaluation of the New Zealand Income Tax Law Rewrite Project for a Compliance Cost Perspective (2000) 54 Journal for International Fiscal Documentation 290 and Adrian Sawyer "Rewriting tax legislation: Reflections on the New Zealand's experience" (2003) 57 Bulletin for International Fiscal Documentation 578.*

[29] Legislating for self-assessment of tax liability A Government discussion document, *(Wellington: 1998).*

[30] *Tax Administration Act 1994 (NZ), s 106.*

taxpayer may reach a settlement of a dispute between them.[31] There may also be situations where there has been some mistake in the original self-assessment and that needs to be remedied. For all these reasons, the decision was made to retain the discretion for the Commissioner to amend assessments.[32]

As part of the rewrite project and the move to self-assessment, the decision was made to remove all similar 'discretions' held by the Commissioner but that related to substantive tax legislation - discretions exercised in order for liabilities to be determined (Birch, 1998, Chapter 4.3) .[33] This former aspect of the Commissioner's role was to be replaced by 'objective rules' which would govern the imposition of tax liability in the self-assessment context (Birch, 1998, Chapter 4.4).[34] Those discretions relating to administration of the tax system and the huge infrastructure of persons and technology to support that administration, however, were to remain and be organised in the TAA.

Sitting at the heart of these two pieces of legislation and holding them together, therefore, is the operation of two roles held by the Commissioner of Inland Revenue in New Zealand. The explication and functioning of these two roles, and their intersection, engage fundamental constitutional tensions and trade-offs that are necessary in order to allow for the efficient functioning of the 'mundane miracle' that is a tax system, albeit in a robust constitutional landscape.[35] The first of those roles, which can be called the "assessment" function, relates to determining the liability of taxpayers in a self-assessment context. It involves the application of substantive tax laws to transactions, ranging from the mundane to the complex, entered into by taxpayers.[36] This involves the interpretation of the law. It is a delicate balance, however. For, as was noted earlier, there can be no taxation by executive decree. Parliament has delegated powers to the Commissioner to assist in the *collection* of taxes. Naturally, part of that assistance has to include policing the assessment of when a tax is due, and its quantum. Yet, the Commissioner, as a member of the executive, cannot disregard or overrule legislation, for that would be repugnant to the rule of law.[37] Neither can the Commissioner misapply the law. It remains the proper role of the courts to have the final word on the meaning of statutory ambiguity, and the Commissioner must apply that meaning as decided by the Courts to the transactions of taxpayers.

Yet, it is impossible for the Commissioner to collect *all* taxes due as a matter of fact. This introduces the second role of the Commissioner set out in the legislation - that of the proper administration of the tax system. The Commissioner must manage the administration of the tax system in a way that best employs the resources of the Inland Revenue, and that allows for the system to remain efficient and effective, particularly given the importance of the voluntary compliance of taxpayers.[38] As such, the Commissioner is charged with the "care and management" of the tax system in s 6A of the TAA. This is the source of the Commissioner's discretion to use their 'best endeavours' to balance the 'integrity of the tax system' with an obligation to 'collect the highest net revenue over time' that is 'practicable'

---

[31] *See Inland Revenue Department "Care and Management of the Taxes Covered by the Inland Revenue Acts – Section 6A(2) and (3) of the Tax Administration Act" (Tax Information Bulletin, Vol 22, No 10) IS 10/07 [Inland Revenue Department "Care and Management"] at [152]. See also Mark Keating "The Settlement of Tax Disputes: The Commissioner is Able but not Willing" (2009) 15 NZJTLP 323.*

[32] *Tax Administration Act 1994 (NZ), s 113..*

[33] Legislating for self-assessment of tax liability: A Government discussion document *(Wellington: 1998) at 4.3.*

[34] *At 4.4.*

[35] *Shelley Griffiths "Is tax administration "ectopic"? Assessment, interpretation, adjudication and application: the roles of the Commissioner of Inland Revenue and the Courts" (2021) 52(4) VUWLR (forthcoming).*

[36] *Shelley Griffiths "Is tax administration "ectopic"? Assessment, interpretation, adjudication and application: the roles of the Commissioner of Inland Revenue and the Courts" (2021) 52(4) VUWLR (forthcoming).*

[37] Commissioners of Inland Revenue v Clifforia Investments Ltd *[1963] 1 WLR 396 (Ch) at 402.*

[38] *State Sector Act 1988 (NZ), s 32. See also Public Finance Act 1989 (NZ), s 34.*

having regard to available resource and compliance costs. This seems sensible. Discretion is required in the administering of the revenue Acts as a 'sheer, hard practical matter' in order to assist the Commissioner in their duty to be a good administrator by ensuring the system is legitimate, efficient and effective.[39] However, these provisions also provide the authority for the Commissioner to exercise administrative discretions such as a power in s113 to depart from the 'correct' position in relation to the liability of a taxpayer, or whether to recognise an agreement with a taxpayer to settle a tax dispute that represents a position other than the 'correct' position according to law.[40] The Commissioner can of course also decide not to pursue a re-assessment of an 'incorrect' tax position for reasons relating to resourcing constraints.

It is worth pausing to reflect upon how those administrative aspects of the Commissioner's role interact with the notion that the Commissioner cannot misapply the law and that it is the Courts who have the final word on the meaning of a statutory provision. These ideas are crucial in the history of taxation - they allow for a traceable link from a tax liability directly to Parliament, the representative body through which the people exert their democratic rights. Parliamentary sovereignty is arguably the most fundamental principle in New Zealand's constitutional landscape. However, taxation draws out circumstances whereby these very fundamental constitutional principles are eroded in favour other goals which are not strictly 'legal', such as efficiency and the 'integrity of the tax system' (Dourado, 2011a, pp. 15–17).

It is not the fact of these principles being eroded in themselves that ought to be cause for concern necessarily. More so, the point is that in a complex, modern neoliberal state such as New Zealand, constitutional principles are never the *only* concern, and nor do they operate in an absolute fashion (Joseph, 2014, p. 151).[41] In fact, it is a strength of New Zealand's constitutional landscape that these fundamental principles can be eroded in certain circumstances to allow for the effective and efficient operation of the tax system. However, there must be good reason. There must also be direct engagement with questions such as 'what role ought the rule of law play in a tax system where efficiency and clarity are so important?'; or 'when might these constitutional ideas be eroded in order to pursue some other desirable goal in taxation?'. All these questions are fundamentally constitutional in their nature, even though they do not refer to a single written document. Direct engagement with these often inchoate and malleable principles can undoubtedly produce good outcomes from both a public law perspective, and a raft of other perspectives. And as was noted in the first part, these truly constitutional questions can never be answered through a simple application of the law. It also reminds us that taxation in New Zealand is not only 'constitutional' in the obvious historical sense of tracing a link from the levying of a tax back to Parliament. The entire operation of the tax system, from the levying of tax to the administration and enforcement of the entire tax system engages constitutional principles, trade-offs and debate.

The final part of this piece will return to the conclusions of part one to reflect upon how the outcomes of these constitutional debates in the New Zealand tax context have tended to reflect our broader constitutional culture and landscape of malleability and sensitivity to change without necessarily the existence of concrete, impervious foundations.

---

[39] *Shelley Griffiths "'No discretion should be unconstrained': considering the "care and management" of taxes and the settlement of tax disputes in New Zealand and the UK" (2012) 2 BTR 167 at 186.*

[40] *The Court of Appeal found that the Commissioner is entitled, based on the care and management provisions, to make an assessment that reflects an 'agreement' rather than the 'correct' position in* Accent Management Ltd v Commissioner of Inland Revenue (No2) *[2007] NZCA 231, (2007) 23 NZTC 21,366. For further discussion on the settlement of tax disputes in New Zealand, see Keating "The Settlement of Tax disputes: The Commissioner is able but not willing", above n 60.*

[41] *See also Paul Daly "Administrative Law: A Values-based approach" in John Bell, Mark Elliott, Jason NE Varuhas and Philip Murray (eds)* Public Law Adjudication in Common Law Systems: Process and Substance *(Hart, Oxford, 2016) 23.*

3 TWO EXAMPLES – TAXPAYER RIGHTS AND GTPP

The first part of this article sketched, at a high level, the nature of the constitutional landscape in New Zealand, before the second part studied in a more detailed way how those flexible constitutional principles contribute to and shape New Zealand's tax system. This final part will use the examples of taxpayer rights and the 'Generic Tax Policy Process' (GTPP) in New Zealand to suggest that public law questions and debates in the tax context have tended to be resolved in a way that reflects New Zealand's broad approach to constitutionalism - informal, malleable and principled methods without a concrete, robust set of rules to point to if these are challenged or ignored.

3.1 TAXPAYER RIGHTS

First, with regard to taxpayer rights, New Zealand does not have a taxpayer charter, a specific bill of rights, nor a designated role to deal with the protection of taxpayer rights, such as a Tax Ombudsman. This does not mean New Zealand taxpayers are entirely without rights, as there are other instruments, such as NZBORA and general rules of law that apply. There is an Ombudsman, but without a special designation of someone within that structure to have a particular role in relation to taxpayer rights (Ombudsman New Zealand, 2023).[42] Inland Revenue does have a document called "Inland Revenue's Charter", the content of which is somewhat similar to taxpayer charters elsewhere (Inland Revenue Department, 2009). This charter sets out rights of professional interaction, reliable advice and information, confidentiality, consistency and equity, as well as a right to 'question' the revenue authority. As currently cast, it is directed more to the 'rights' of what we might style the 'taxpayer as customer' rather than 'taxpayer as citizen'. The IR Charter sets out how the Department will "deal with people". It will, inter alia, be courteous, prompt and professional, respect cultural and special needs, give reliable and correct advice and apply the law consistently. While these are entirely laudable and valuable, they do not address the constitutional rights discussed above.

There are also certain substantive provisions in the TAA that set out rights of challenge and appeal,[43] a right to privacy,[44] and to the protection of confidentiality.[45] Section 6 of the TAA also set out a number of 'rights' of taxpayers as part of the 'integrity of the tax system', as well as obligations on both the taxpayer and the revenue authority. Section 6 requires that every official who has some obligation in relation to the collection of tax must use "their best endeavours to protect the integrity of the tax system." The section goes to non-exhaustively define the meaning of "integrity of the tax system" by reference to taxpayer rights and responsibilities and highlighting the significance of 'taxpayer perceptions of that integrity". The rights and responsibilities of the taxpayer are:

- the rights of taxpayers to have their liability determined fairly, impartially, and according to law; and
- the rights of taxpayers to have their individual affairs kept confidential and treated with no greater or lesser favour than the tax affairs of other taxpayers; and
- the responsibilities of taxpayers to comply with the law.

[42] *Ombudsman Act 1975 (NZ): on the role and activites of the Ombudsman generally, see https://www.ombudsman.parliament.nz*

[43] *Tax Administration Act 1994 (NZ), Part 8A.*

[44] *Section 81.*

[45] *Section 18.*

The section also sets out the co-relative responsibilities of those administering the law. Those are to maintain the "confidentiality of the affairs of taxpayers" and to administer the law "fairly, impartially, and according to law".

However, the role and impact of this section are somewhat unclear. The section non-exhaustively defines the 'integrity of the tax system' as a value that all tax officials are required to use their best endeavours to protect as including 'the rights of taxpayers to have their liability determined fairly, impartially and according to law' and the 'rights of taxpayers to have their individual affairs kept confidential and treated with no greater or lesser fervour than [those] of other taxpayers'. Section 6 has not proved a fertile ground for litigation. It has been held to be non-justiciable and, unlike NZBORA, does not create a series of enforceable rights and obligations.[46] The requirement upon tax officials to use their 'best endeavours' to protect the integrity of the tax system is overshadowed by the parallel *obligation* in section 6A to 'collect the highest net revenue over time' that is 'practicable' having regard to available resource and compliance costs.[47] In *Russell v TRA*, the Court of Appeal emphasised both the primacy of the statutory challenge procedures and the overarching importance of correctness in assessment.[48] New Zealand courts have consistently held that the section 6 duties are owed to the 'public at large' and not to individual taxpayers.[49]

In recent times, proposed amendments to the TAA which may be breaches of NZBORA have been subjected to an Attorney General's report as required by section 7 of that Act. Applying this scrutiny to tax legislation is a comparatively recent change and is to be welcomed. In 2019 amendments to the Commissioner's information gathering and access to property powers were subject to a NZBORA consistency report.[50] There is thus some engagement between the rights as explicated in NZBORA and tax administration.[51] So while the 'rights' in the TAA itself have proved to have extremely limited protective force for individual taxpayers, there has been some recognition of the role of NZBORA in the protection of rights in that more specific manner. In a sense, this flexibility is entirely consistent with the overall manner in which constitutional principles operate in New Zealand.

Ultimately, the substance of the rights outlined across the various instruments that we have briefly sketched are not categorically different from those set out in other jurisdictions with more robust protections for those rights, often set out in the form of a taxpayer charter. What is different, however, is the primacy and power given to the individual rights in a context where the New Zealand government and revenue authority are more focused on the protection of that indeterminate and malleable idea - the 'integrity of the tax system' *as a whole* - possibly at the expense of individual taxpayers having to endure sacrifices for the 'greater good' of that system, so to speak.[52]

---

[46] Commissioner of Inland Revenue v Michael Hill Finance (NZ) Ltd *[2016] NZCA 276 at [78].*

[47] *See Jeremy Beckham "With Great Power Comes No Responsibility: The Commissioner's Assessment Function and Discretionary Adherence to the Law" (2018) 24 NZJTLP 83.*

[48] Russel v TRA *(2003) 21 NZTC 18,255 (CA).*

[49] Commissioner of Inland Revenue v BNZ Investments Limited *(2001) 20 NZTC 17,103 (CA);* Commissioner of Inland Revenue v Michael Hill Finance (NZ) Ltd *[2016] NZCA 276.*

[50] *Shelley Griffiths 'The New Zealand Bill of Rights Act 1990 and the Commissioner of Inland Revenue's information gathering powers' [2020] NZLJ 141: see also Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Taxation (Income Tax Rate and Other Amendments) Bill (New Zealand House of Representatives, Wellington, 2020)*

[51] See also *Avowal Administrative Attorneys v DC at North Shore* [2010] NZCA 183 and *Tauber v CIR* (2011) 25 NZTC 20,071 for application of NZBORA to tax administration cases by the courts.

[52] *Adrian Sawyer "Enhancing taxpayers' rights in New Zealand – an opportunity missed?" (2020) 18(2) eJournal of Tax Research 441 at 443.*

While New Zealand often prides itself in the integrity and lack of corruption inherent in our tax system, we should not be complacent.[53] Fortunately, in most instances, this system generally works. The small size of our tax profession and the churn of individuals working for private practice and Inland Revenue engenders a level of personal cooperation and trust, and a mutual expectation and desire for the system to function properly.[54] Furthermore, despite delays in access to the courts, an independent judiciary ensures any aberrations of conduct by the Commissioner (or individual officers) are effectively reigned in.[55] Although some of Inland Revenue's decision-making lacks transparency, most issues of concern to taxpayers or their advisers are nevertheless brought to light at regular conferences or in practitioner or academic papers.[56]

The informality of our regime, which requires taxpayers to rely upon the discretion or good graces of Inland Revenue officers to protect their unwritten rights, is broadly consistent with the manner in which other rights are protected and with the scattered nature of New Zealand's constitutional arrangements. It is not suggested that this is a weakness in and of itself, it being a reflection of the prevailing legal culture which has been set out in the rest of this article. It has been argued elsewhere, however, that in any other advanced economy, the New Zealand approach to taxpayer rights would not be tolerated and unlikely to operate for long.[57] It places taxpayers at the whim of unelected officials, who hold a vast level of 'tax power' with very few clear rights and remedies if that power does happen to be abused. Poor taxpayers' rights protection, accompanied by increased powers for the revenue authority, can lead to a reduction in trust in government and in levels of compliance, which in turn can lead to a downward spiral.[58]

It therefore does remain important that the possibility of certain stronger measures to ensure the protection of taxpayer rights remains squarely in the contemplation of New Zealand's legal discourse and policy design. Even in a country which prides itself on integrity and operates across the legal landscape in a flexible and principled manner, we must also recognise that there must be some contexts where malleable and scattered protections are not necessarily the best approach in all the circumstances. Given the fundamental constitutional importance of taxpayer rights, and the important role that the taxpayer perception of fairness plays in maintaining both the integrity of the tax system and the spectre of voluntary compliance, it may be that this is one of those constitutional circumstances where New Zealand's fervour for scattered and inchoate protections ought to be re-examined.

3.2 THE GENERIC TAX POLICY PROCESS

The tax policy process in New Zealand is another interesting example of an approach across our political, legal and constitutional culture where flexibility and adaptability are championed without necessarily the clear grounding of concrete foundations to rely upon for certainty or redress where the process is ignored.

Tax policy is an often under-valued area of taxation research. The intricacies of tax policy act as the conduit between political will and the legislation itself which actually *levies*

---

[53] *Mark Keating "Protection of Taxpayer Rights in New Zealand: A Mixed Bag" (2018) 24(2) New Zealand Journal of Taxation Law and Policy 147 at 169, quoted in Sawyer "Enhancing taxpayers' rights in New Zealand", above n 83, at 449.*

[54] *Keating "Protection of Taxpayer Rights in New Zealand", above n 84, at 169.*

[55] *At 169.*

[56] *At 169.*

[57] *Sawyer "Enhancing taxpayers' rights in New Zealand", above n 83, at 449.*

[58] *At 463. See also Sol Piccioto "Constructing Compliance: Game Playing, Tax Law, and the Regulatory State" (2007) 29 Law & Policy 11; Valerie Braithwaite (ed.)* Taxing Democracy, Tax Compliance and the Psychology of Justice *(Ashgate Publishing, Ashenden, 2003) at 45.*

the tax.[59] In this sense, all aspects of tax law and practice build upon the foundations of tax policy as reflected in the words of a taxing Act and subsequently as interpreted by the courts.

The review of the Inland Revenue Department in the mid 1990s engendered a shift to a new and innovative 'Generic Tax Policy Process' (GTPP) in New Zealand.[60] The initial brief for that review included a directive to determine best practice for how taxation policy advice should be provided to government. The Richardson Committee, which undertook the review, identified a number of problems with the previous tax policy development process, noting that:[61]

> ... the subject matter is complex, and tax legislation is very complex and difficult to understand. The tax policy process was not clear, neither were the accountabilities for each stage of the process. There was insufficient external consultation in the process

The report recommended the adoption of a new policy process, called the 'GTPP', as a form of administrative or customary practice, rather than by way of legislation or regulation. The GTPP has three main objectives which provided stimulus for the Government's decision to adopt the process. It encourages earlier and explicit consideration of key tax policy elements and trade-offs, provides greater opportunity for consultation and external input into the policy formation process and is designed to clarify the responsibilities of the two main departments involved in the process (Inland Revenue and Treasury).[62] Prior to the introduction of the GTPP, the responsibility for the development of tax policy lay principally with the New Zealand Treasury.[63] At that stage, the role of Inland Revenue was largely that of the administration of the tax system.[64] Tax policy was characterised by an absence of clarity and ascertainable accountabilities at the different stages of the process.[65] It also lacked external consultation throughout the formation process – which was recognised as particularly problematic given the oft-discussed complexity of taxation policy and legislation. The GTPP transformed this process to provide a clear structure whereby policy officials are able to draw upon the technical and practical expertise of the business community at each stage, and much of the policy-making responsibility became centralised in Inland Revenue in order to provide accountability.

The GTPP has five core stages, each with several phases.[66] Throughout the GTPP, there are linkages and feedback loops which are intended to reflect a flexible process, while recognising that some activities may occur simultaneously or in a modified order, such as the timing of legislative drafting.

It is generally considered that the GTPP represented a major step forward in tax policy development in New Zealand. Sawyer, for example, wrote in 1996 that "the GTPP represents a significant advance for New Zealand from the traditional secrecy of tax policy formulation and the associated budgetary process".[67] Commentary from both Australia and the United Kingdom since that time has generally cast New Zealand's GTPP as "international best

---

[59] *Sawyer "Enhancing taxpayers' rights in New Zealand", above n 83, at 402.*

[60] *Organisational Review Committee, above n 55.*

[61] *Organisational Review Committee, above n 55, at 5.*

[62] *Adrian Sawyer "Reviewing Tax Policy Development in New Zealand: Lessons from a Delicate Balancing of Law and Politics" (2013) 28 Australian Tax Forum 401 at 404; Peter Vial "The Generic Tax Policy Process: A "Jewel in Our Policy Formation Crown"?" (2012) 25 NZULR 318 at 319.*

[63] *Adrian Sawyer "Reflections on the Contributions of Lawyers to Tax Policy-Making in New Zealand" (2017) 27(4) NZULR 995 at 1015.*

[64] *At 1015.*

[65] *At 999.*

[66] *See Sawyer "Reviewing Tax Policy Development in New Zealand", above n 93, at 405.*

[67] *Adrian Sawyer "Broadening the Scope of Consultation and Strategic Focus in Tax Policy Formulation - Some Recent Developments" (1996) 2(1) New Zealand Journal of Taxation Law and Policy 17 at 39*

practice" in the sense that it provides a clear structure to the development of tax policy, and champions transparency and accountability which enhances the responsiveness of the tax system.[68] The openness of the process, the breadth of the policy put out for consultation and the willingness of the government to change its position (both policy and detail) have been said to make the GTPP a "jewel" in New Zealand's "policy formation crown".[69]

Given the apparent consensus as to the effectiveness and value of the GTPP, one would have thought it would be founded upon solid legal or constitutional grounding. Yet, the decision to engage in GTPP is no more than a *political decision* to engage in each of the various stages and phases it prescribes. It does not have its source in statute and therefore has no legislative force. It is a policy adopted by the Executive and therefore can be adapted, ignored or terminated without reference to Parliament. That is not to say necessarily that the lack of statutory grounding necessarily erodes its usefulness, however. In fact, flexibility and adaptability are both explicitly championed throughout the process.

Successive governments have recognised that the GTPP is a "generic process", that is to say it is open for the government to adapt the process to suit individual circumstances, and it is generally recognised that each phase is not independent.[70] Moreover, it has also been recognised that there are circumstances where it is most appropriate to not follow all the different steps of the GTPP in a rigid way. In particular, the extra time involved in the consultation and accountability mechanisms prescribed by the process is not always conducive to satisfactory outcomes regarding changes that require immediate action to protect the revenue base.[71] It would not be possible to move quickly and, at the same time, to engage in wide consultation on changes to close a recently identified loophole, for example, or to block a scheme that is losing the country hundreds of millions of dollars in revenue (Revenue, 2011) .

There have been certain times in the history of the process where the Government's commitment to the process has been questioned.[72] Most governments have, at times, made decisions to effectively ignore certain aspects of the GTPP in order to push through particular policies without full consultation and exhaustive examination by the tax community. The purely political nature of the process renders it weak in these such circumstances. However, it is also the case that suspending or bypassing the GTPP has been the exception as opposed to the rule, and although the framework is not linear or prescriptive or concrete, stakeholders have come to expect certain key elements.[73] Therefore, when these particular elements are not forthcoming, it is controversial.

Broadly, then, although there will be occasions where the Government needs or wants to act quickly, the clear preference of successive governments in New Zealand has been to make the entirely political decision to work through the GTPP process. This process enhances transparency, accountability and engagement with the tax community to ultimately land on better tax policy. It also, however, has some unique characteristics

---

[68] *See for example A Ryan* Tax Policy to Tax Law: Processes to Improve our Tax Legislation, *(CPA Australia, 1999); M. Dirkis and B. Bondfield "At the Extremes of a "Good Tax Policy Process": A Case Study*

Contrasting the Role Accorded to Consultation in Tax Policy Development in Australia and New Zealand" (2005) 11(2) New Zealand Journal of Taxation Law and Policy, 250.

[69] *Vial, above n 93.*

[70] *Dirkis and Bondfield, above n 99, at 264.*

[71] *Hon Peter Dunne* Speech to Deloitte tax conference *(June 14, 2006); available at: http://www.scoop. co.nz/stories/PA0606/S00240.html, quoted in Sawyer "Reviewing Tax Policy Development in New Zealand", above n 93, at 416.*

[72] *See for example Hansard,* In Committee on the Taxation (GST and Remedial Matters) Bill 2010 *(December 9,*

2010), and in particular the comments of David Cunliffe, Stuart Nash and Dr Russell Norman at 16,192, 16,113 and 16,196 respectively. These comments were all made after the Bill was introduced to bring in an 'Look Through Company' regime despite not having passed through GTPP process.

[73] *Vial, above n 93, at 337.*

reflecting the social and legal culture of New Zealand such that the flexible, indefinite and shaky foundations of the process are not necessarily a weakness. We are a small country, allowing our policy and administrative responses to remain fast and flexible with such a process in ways that larger jurisdictions could never expect to achieve.

4 CONCLUSION

We began this piece by suggesting that every jurisdiction has its own particular expression of constitutional culture at the intersection of law, politics, history, and convention. Moreover, we charted how the concerns surrounding taxation often sit at the very heart of these constitutional ideas and processes, and the debates that surround them. For, tax is inherently political in its nature. But tax is also deeply *legal* in its nature, and the ideas that it elicits.

In New Zealand, the intersection of those different areas has produced a constitution that is ever-emerging and shifting. It can be changed and developed comparatively easily. The ever familiar calls for strong constitutional foundations, checks and balances and barriers for change in many jurisdictions across the globe do not necessarily ring with the same urgency or gravity in New Zealand. That intersection, however, has also produced a constitutional culture that is quite content with the more nuanced, flexible and adaptable checks on the Government and taxation authorities.

An approach that espouses trust, values adaptability and prioritises the 'carrot' over the 'stick', so to speak, permeates across the organs of Government in New Zealand. In this sense, the levying of tax and the administration of the tax system in New Zealand does not operate in a constitutional vacuum. It does not exist in its own bubble, but is very much an expression of that general constitutional culture. Nonetheless, there are some concerns about the monopoly the revenue authority, Inland Revenue and its Commissioner, have over policy development, legislative drafting, and administration. The complexity of the system, the Commissioner's intertwined roles of interpretation and administration, the paucity of external review agencies, and the reduced role of the Courts in the context of disputes and challenge processes designed to keep disputes out of the Court mean there is, however, no cause for complacency. Like all societies, Aotearoa New Zealand should always be reminded of the sentiment attributed to Thomas Jefferson that eternal vigilance is the price of liberty.

5 BIBLIOGRAPHY

Bingham, T. H. (2010). *The rule of law*. Penguin Books.

Birch, B. (1998). *Legislating for self-assessment of tax liability: A government discussion document*. Policy Advice Division, Inland Revenue Dept.

Cabinet Office & New Zealand Department of the Prime Minister and Cabinet. (2017). *Cabinet Manual*.

Dicey, A. V. (1885). *Introduction to the study of the law of the constitution* (8th ed). Macmillan and Co. http://link.library.utoronto.ca/eir/EIRdetail.cfm?Resources__ID=483687&T=F

Dourado, A. P. (2011a). The Delicate Balance: Revenue Authority Discretions and the Rule of Law – Some Thoughts in a Legal Theory and Comparative Perspective. In C. Evans, J. Freedman, & R. Krever (Eds.), *The Delicate Balance: Tax, Discretion and the Rule of Law* (pp. 149–158). IBFD.

Elias, S. (2019). *Judicial Review and the Constitutional Balance*. New Zealand Centre for Public Law,. https://www.courtsofnz.govt.nz/assets/speechpapers/cpl_0.pdf

Fuller, L. L. (1969). *The morality of law* (12th ed.). Yale University Press.

Ginsburg, T. (2017). Written Constitutions and the administrative state: On the constitutional character of administrative law. In S. Rose-Ackerman, P. L. Lindseth, & B. Emerson (Eds.), *Comparative administrative law* (Second edition). Edward Elgar Publishing.

Griffiths, S. (2011b). Tax as Public Law. In A. Maples & A. Sawyer (Eds.), *Taxation Issues: Existing and Emerging* (pp. 215–216). The Centre for Commercial & Corporate Law Inc. http://www.nzlii.org/nz/journals/OtaLawRw/2017/3.html

Gupta, R. (2020). The Case for Tax in Democracies. *Australian Tax Forum*, *35*, 1–30.
HLA Hart. (1994). The Concept of Law. *Clarendon Press*, *15*(2), 307–311. https://doi.org/10.1111/j.1748-121X.1995.tb00064.x
Inland Revenue Department. (2009). *How we will work with you*. https://www.ird.govt.nz/about-us/charter
Joseph, P. A. (2008). The Constitutional State. In J. Finn & S. Todd (Eds.), *Law, liberty, legislation: Essays in honour of John Burrows QC* (pp. 249–261). LexisNexis.
Joseph, P. A. (2014). *Constitutional and Administrative Law in New Zealand* (4th ed.). Thomson Reuters New Zealand Ltd.
Joseph, P. A., & Ekins, R. (2011). The Rule of Law: Foundational Norm. In *Modern challenges to the rule of law* (pp. 47–56). LexisNexis NZ.
Kress, K. (1993). Coherence and Formalism. *Harvard Journal of Law & Public Policy*, *16*(3), 639–682.
New Zealand Ministry of Justice. (2022). *Bill of Rights compliance reports*. Constitucional Issues & Human Rights. https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/
Ombudsman New Zealand. (2023). *Ombudsman New Zealand | Tari o te Kaitiaki Mana Tangata*. https://www.ombudsman.parliament.nz/
Palmer, M. (2006). What is New Zealand's Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office-holders. *Public Law Review*, *17*. https://www.semanticscholar.org/paper/What-is-New-Zealand%27s-Constitution-and-Who-It-and-Palmer/079b232c4144d80e1524bccc3acc2fb83007ee2f
Palmer, M. (2008). *The Treaty of Waitangi in New Zealand's Law and Constitution*. Victoria University Press.
Raz, J. (1979). *The authority of law: Essays on law and morality*. Clarendon Press ; Oxford University Press.
Revenue, I. (2011). *Briefing to the Incoming Minister of Revenue*. http://www.ird.govt.nz/resources/f/5/f59e5f0049e7d9b483249b37e0942771/bim-2011.pdf
Rishworth, P. (2016). Writing things unwritten: Common law in New Zealand's constitution. *International Journal of Constitutional Law*, *14*(1), 137–155. https://doi.org/10.1093/icon/mow005
Ruru, J. (2016). Constitutional Indigenous Treaty Jurisprudence in Aotearoa, New Zealand. In P. Macklem & D. Sanderson (Eds.), *From recognition to reconciliation: Essays on the constitutional entrenchment of Aboriginal and treaty rights* (pp. 1–536). University of Toronto Press.
Ruru, J. (2018). The Failing Modern Jurisprudence of the Treaty of Waitangi. In M. Hickford & C. Jones (Eds.), *Indigenous Peoples and the State: International Perspectives on the Treaty of Waitangi* (p. 214). Routledge. https://doi.org/10.4324/9781351240376
Ruru, J., & Kohu-Morris, J. (2020). 'Maranga Ake Ai' The Heroics of Constitutionalising Te Tiriti O Waitangi/The Treaty of Waitangi in Aotearoa New Zealand. *Federal Law Review*, *48*(4), 556–569. https://doi.org/10.1177/0067205X20955105
Waldron, J. (2002). Is the Rule of Law an Essentially Contested Concept. *Law and Philosophy*, *21*(2), 137–164.
Waldron, J. (2012). *The Rule of Law and the Measure of Property*. Cambridge University Press. https://doi.org/10.1017/CBO9781139169318
Zines, L. (1991). *Constitutional Change in the Commonwealth*. Cambridge University Press. https://doi.org/10.1017/CBO9780511522277