# A CONSTITUTIONAL TIMEBOMB:

## Is New Zealand's Government and court system unlawful?

It could be the most fundamental New Zealand issue of the century: if a group of Australian lawyers and researchers is correct, the Treaty of Waitangi ceased to be valid on January 10, 1920, and the New Zealand Government does not, lawfully, exist. In an even bigger potential crisis - nor do the laws. As Ian Wishart reports, even New Zealand constitutional lawyers can't rule out the possibility they may be right. If it sounds like the Coalition Government's worst nightmare multiplied by a factor of ten, you'd be right. Every three years for more than a century, New Zealanders have gone to the polls to elect governments believing, for lack of any reason not to believe, that this was how democracy worked. You elect a government, they make your life hell, you vote them out again.

We were told, as a nation, that the Government's powers derived from our status as a constitutional monarchy. But now, important new legal research is threatening to turn our perception of who we are, as a nation, on its head.

The establishment view of constitutional law is that New Zealand, lacking a written constitution, is a country where the Government holds the ultimate power to make laws and regulations.

Just how entrenched that establishment view is, can be demonstrated in a current debate in New Zealand legal and judicial circles about the powers of the Courts to rein in bad Government. Lord Cooke of the Privy Council, formerly New Zealand's Chief Appeal Court judge, has suggested the Courts do have some power to control the Government. He argues that if the New Zealand Government re-introduced slavery, for example, that the Courts could strike it down.

Unfortunately for those who believe the judiciary is a check on Government power, Lord Cooke is a lone voice in New Zealand's legal community. Other judges and lawyers have indicated they have a constitutional duty to uphold legislation passed by the Government, however damaging that law might be.

Even so, there is evidence from Australia that the mainstream legal and judicial view may be totally wrong - not because the Courts have special powers to ignore legislation, but because New Zealand and Australia's governments are not lawfully constituted.

Leading academics and judges in Australia are lending their support to research showing that both countries failed to constitutionally validate their legal sovereignty when they became independent from Britain early this century.

If it sounds impossible that the laws of New Zealand and Australia are invalid, read on. The Australian Government has based its current lawmaking powers on the Australian Constitution Act of 1900. That Act was passed by the British Parliament while Australia was still a Dominion.

The important fact to remember is this: the Australian Constitution is a *British* law. New Zealand was granted Dominion status in 1907. The title Dominion meant nothing significant, in British law and legislation the term was synonymous with colony. It wasn't until January 10, 1920, however that Australia became a sovereign nation in its own right when both Australia and New Zealand became foundation members of the League of Nations - the forerunner to the United Nations.

Membership of the League of Nations was restricted only to sovereign countries, and Article XX of the Covenant of the League of Nations required the extinguishment of any colonial laws applying to a member state pre-Sovereignty.

That meant the Constitution Acts in New Zealand and Australia passed prior to independence became legally void under international law. It was a condition of membership of the League of Nations and later the United Nations. But no new constitutions were ever forthcoming in either country.

It continues to be a founding principle of the United Nations charter that the laws of one state cannot be used in another unless ratified by a mutual treaty, so while the Australian Government has relied on a colonial act passed by the British in 1900, Britain has said otherwise, saying the Australian Constitution Act (UK) is null and void.

"No Act of the Parliament of the United Kingdom, or an Act that looks to the Parliament of the United Kingdom for its authority, is valid in Australia or its

territories in accordance with the laws of the United Kingdom and the Charter of the United Nations," wrote British officials responding to an information request.

For decades, Australians have obeyed federal laws seemingly passed with full legal authority on a raft of issues from law and order to taxation. In all cases the Australian Government has claimed its powers from the 1900 Constitution Act.

That fundamental reliance took a knock however, when the United Nations' International Law Commission ruled that Australia could not rely on Section 61 of its Constitution to provide the power to enter into international treaties, because the Constitution was a British law, not an Australian one. Instead, said the UN, Australia needed to look to its membership of the League of Nations in 1920 as providing proof of its sovereignty. An Australian group calling itself the Institute of Taxation Research has used that ruling and others to mount a serious challenge to the constitutional authority of the Australian Government, saying that if the Constitution Act did not give the Government power to sign international treaties because it was void, nor could it be used as the basis for domestic law.

In 1992, the Australian High Court held that:

"The very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives.

"In the case of the Australian Constitution, one obstacle to the acceptance of that view is that the Constitution owes its legal force to its character as a statute of the Imperial Parliament enacted in the exercise of its legal sovereignty; the Constitution was not a supreme law proceeding from the people's inherent authority to constitute a government."

In other words, the Australian Constitution does not establish the sovereignty of Australians or their government.

That ruling has been enough for the Institute of Taxation Research to hit the Australian Tax Office right between the eyes, point blank. In what began as a Freedom of Information request to the ATO, the group pointed out:

"For the Constitution to make the transition in status to that of a 'supreme law' as mentioned by [Chief Justice] Mason, mere opinion is not enough.

"Some legally recognisable instrument is required such as a Memorandum of Transfer from the UK Government, or the record of a referendum in which the Australian people have given informed consent to the new arrangements, or some other form of document recognisable under international law.

"Since the ATO is claiming this has occurred would their counsel, who as a practising barrister must know of this document and where it can be found, please produce it. In the presence of such documentary evidence I would be quite happy to acknowledge the continued existence of the constitution and the laws deriving from it."

Despite the request, the ATO could not produce any documentation proving its lawful authority to levy tax on Australian citizens.

"Firstly it was asked to present us evidence of the documents setting up the ATO," explains ITR spokesman Ian Henke from the organisation's Melbourne headquarters. "We've finally got a document that says 'the documents do not exist' signed by Erin Holland, Deputy Commissioner, on behalf of the Commissioner."

That letter was sent on 27 October 1999.

"There are several issues here," says Henke. "We also searched the *Commonwealth Gazette*, and there was no evidence at all of the ATO having been gazetted into existence. Finally in a court on the 20th of October, counsel for the ATO finally admitted that it wasn't." It is ITR, a group of lawyers, the occasional judge, business executives and researchers, that is making all the running on the issue, and it's an issue whose repercussions will be felt not just in Canberra, but Wellington and Ottawa too.

"The point is, under international law once you get a change in sovereignty then there is a break in legal continuity. The best example we can give you is Hong Kong. June 1997. On 30 June there was still British police, British law, British taxes, British Army, British Queen and so on. On the 1st of July, one minute past midnight, all of those things still existed - but they no longer had authority in Hong Kong."

In the United States, the transference of sovereignty from the King of England to the American people was also marked by a break in legal continuity - the War of Independence - followed by the establishment of the Constitution.

The Australian Government, allegedly realising its difficult constitutional position, passed the Australia Act in 1986 to repeal a range of Imperial laws and shore up its status. New Zealand, in the same boat as Australia, did likewise with the Imperial Laws Application Act of 1988. However ITR argues that both Acts are also void, as it is impossible under international law and the UN Charter for one nation to pass legislation repealing the laws of another nation.

So could there really be a major constitutional crisis facing New Zealand? Or is it a technical "tilting at windmills" that will lead nowhere?

New Zealand's Constitution, like Australia's, arose from Westminster in 1852 to provide authority for the colonial administration to govern on Queen Victoria's behalf. New Zealand was accorded "Dominion" status in 1907 and was therefore still a British colony when the Land and Income Tax of 1908 was passed. Like Australia, NZ signed the League of Nations Covenant in 1920 and, like Australia and Canada, was given legal separation from Britain in 1931 with the Statute of Westminster. However, New Zealand chose not to ratify the 1931 Statute, falsely believing that it could still function as a British colony despite having signed the League of Nations Covenant.

This was despite this speech from British Prime Minister Lloyd George at the Imperial Conference of 1921:

"In recognition of their service and achievements during the war, the British Dominions have now been accepted fully into the comity of the nations of the whole world. They are signatories to the Treaty of Versailles and all other treaties of peace.

"They are members of the Assembly of the League of Nations, and their representatives have already attended meetings of the League. In other words, they have achieved full national status and they now stand beside the United Kingdom as equal partners in the dignities and responsibilities of the British Commonwealth.

"If there are any means by which that status can be rendered even more clear to their own communities and to the world at large, we shall be glad to have them put forward."

The last paragraph should have sent clear signals to New Zealand that a change of constitutional status had taken place, whether the New Zealand government liked it or not. Colonies could not sign treaties, only sovereigns could.

But it wasn't until after World War II, and the formation of the United Nations in 1947, that New Zealand formally severed its colonial ties from Britain by ratifying the 1931 Statute of Westminster in a ceremony on November 25, 1947. Britain then drafted a new Constitution for New Zealand, again passed in Westminster, authorising its colony to change any provisions of the old 1852 colonial constitution.

Except, as the Australian Government has already learnt at great cost, no laws passed by Britain are valid in New Zealand or Australia, nor have they been since

1920.

The British confirmation to Australia that "No Act of the Parliament of the United Kingdom, or an Act that looks to the Parliament of the United Kingdom for its authority, is valid in Australia or its territories in accordance with the laws of the United Kingdom and the Charter of the United Nations," could equally be applied to the 1947 New Zealand Constitution Act passed in Britain for use in New Zealand.

"What principle of international law lets the parliament of one sovereign country amend the law of another sovereign country? It doesn't," argues Henke.

One to disagree, however, is University of Canterbury constitutional expert Philip Joseph, who says the gentle devolution of power from Westminster to the three colonies of Canada, Australia and New Zealand was legally effective, even if not as definitive as more traditional transfers of sovereignty.

Joseph believes international law, as set out in treaties signed by Australia and New Zealand, does not define how a nation must deal with sovereignty issues at a domestic level.

"Unlike all the other more newly emerged Commonwealth countries which have become sovereign, these three old colonies acquired full powers of legal continuity through an ongoing gift of legal powers from Westminster to the countries concerned."

This, of course, puts Joseph somewhat at odds with Henke and others who take a more fundamentalist view of constitutional law, and even Joseph admits that his views - shared by other mainstream constitutional lawyers in New Zealand - may be wrong at the end of the day. The reason for that is that it places an enormous amount of faith in Britain's legal ability to devolve power that way. Ninety-nine percent of countries have achieved independence either by physical revolution or by declaration of independence. The fact that only the three Dominions didn't, and are now facing major constitutional challenges, illustrates how the "gentle" way may in fact have failed miserably to deliver lawful government.

"It never properly tells us when we exactly became an independent sovereign nation, and insofar as we trace our powers through this continuity line back to Westminster yes, it is a problem," says Joseph.

The question of whether New Zealand's Government has been passing laws since 1920 without pure Constitutional authority to do so now lies open for legal debate and challenge, raising issues about the possible illegality of major policy decisions like state- asset sales or Waitangi Treaty settlements, not to mention the tax laws. The problem is even more volatile, as an unconstitutional parliamentary system

would mean New Zealand has an unconstitutional court system, bringing more headaches over whether any New Zealand court has jurisdiction to hear such a case.

Some lawyers suggest the New Zealand Government had the power, during the transfer of sovereignty, to ratify by legislation the earlier colonial constitution as remaining in force.

"If you wanted to argue the case," says Victoria University constitutional law expert Tony Angelo, "you'd say that on that date, 1920, when the cut off comes, that there has been an implicit affirmation or re-affirmation of certain rules as the laws of this 'newly independent state'."

Ian Henke doesn't buy that argument for a second.

He points out that in the recent Australian referendum on becoming a republic, the voters were asked to vote on a specific question that would also have provided a break in legal continuity. And they were asked to ratify it because there was no legal authority for the government to simply rubber-stamp it.

"We, the Australian people, commit ourselves to this constitution," was the referendum issue.

"By 61% to 39%, the people of Australia said 'no'," says Henke. "so they can't just 'ratify' it. The people said no."

But doesn't a government have the lawful authority, while it is becoming independent, to simply ignore its population and say 'We know what's best because we're the Government'?

"Of course not, because 'lawful authority' in independence, comes from the people. It's the only place lawful authority can come from."

Canterbury University's Philip Joseph agrees, saying the Government cannot claim a constitutional mandate simply because it was voted in during an election.

"That's too mechanistic in a sense. You've actually got to go back to the fundamentals: what gives them the right to be there to begin with, to actually put policies to the people?"

At a point during the interview, Philip Joseph acknowledges that what is being challenged is not whether an individual statute is constitutional or not - which has

been ruled on many times in the past - but a much bigger challenge: if the entire system has not been lawfully constituted, no national court can possibly adjudicate on it.

"I take your point on what you are saying," says Joseph, "and at this point you do step beyond the 'safe' parameters of constitutional analysis. You are actually asking now: what are the bases of a people, of a state, of a constitution."

The ramifications are huge. After all, you are asking lawyers who you may seek advice from to accept that their admission to the Bar and expensive law degree may not be valid.

Mainstream constitutional thought in this country has always been that sovereignty did not come in a definable moment as it has in other nations, but that the slow legal transition from Britain to New Zealand over a period of decades was lawful. To ask lawyers, judges and politicians to accept that the core of their constitutional beliefs and their power base is wrong in law is like asking the Titanic to stop on a dime. It is still a foreign concept in New Zealand legal thought that "the people" hold sovereignty in anything other than name only.

The New Zealand and Australian people, when independence from Britain came in 1920, were never asked by their Governments what laws they wished their new nations to operate under. Yet only the people can be sovereign, not the Government.

"Every country in the world has a constitution which is itslaw," stresses Henke. "The key about your constitution, and the key about our constitution, is that they are Acts of the British Westminster Parliament. They have never been passed by the domestic parliaments down here. They are not the will of these peoples."

In essence, he argues, the moves by Australia, New Zealand and Canada to simply continue their existing government systems without asking the citizens of the new nations for their views, were akin to building a skyscraper without getting a building permit or planning permission. Sovereignty, whether the governments realised it or not, had not passed from Britain to the former colonial governments, but instead had passed directly into the hands of the people by virtue of the international covenants that all three countries signed. Yet the governments acted as if they now had the power.

There are still lawyers who argue that international law has no domestic force. Again, the lawyers at ITR vehemently disagree.

"Certainly, in the early part of the century, sovereign states' rights were the only thing that was important. There was no such thing as individual human rights,"

says Henke.

The reason for this was simple. Until World War I, the world was essentially a collection of imperial powers - many of them controlled by monarchs with absolute, divine right of kings, power. Sovereignty rested with the monarchs, and was exercised via their governments. But the first world war brought that state of affairs to an end, destroying the Austro-Hungarian empire, Prussian aspirations and the Ottoman empire of Turkey that had once stretched from India to Spain.

From the wreckage of the war, new nations emerged where the people were suddenly free - sovereigns in their own right. The idea of absolute government sovereignty died in the trenches of the war, and this is the background that led to the League of Nations being formed - a group of free countries, each respecting the others' sovereignty and their citizens rights to shake off colonial shackles.

"Now probably the major development of the last half of the 20thcentury has been the swap from the emphasis on sovereign states' rights, to individual human rights. At this point in history, that's the dominant shift that's occurred," opines Henke.

"In Europe - and this is the problem that the people in Australasia have - human rights, the 1966 Covenant, the 1947 Universal Declaration, and the European Covenant on Human Rights, are all by treaty part of European law and are binding on all of the parties to the European Union, including England.

"So human rights are now binding, under international law and international agreement, on the United Kingdom. Yet we have governments in Australia who claim they operate on the basis of British law, namely our Constitutions, but at the same time want to not be bound by the sections relating to human rights.

"In fact, the remarkable thing is that two countries [Aust & NZ] whose governments speak so loudly about other people's abuse of human rights are very careful to avoid having human rights, of the international variety which are universal, being applied to their citizens."

Henke says the bizarre situation has arisen where Australia has sworn to uphold the international declarations on human rights, but where Australian courts have ruled the declarations do not apply domestically.

New Zealand too, is guilty of the same action by virtue of Government policy. According to Philip Joseph, the New Zealand Government, like Australia, has not allowed our domestic law to automatically recognise international law even if NZ is a signatory to it.

"There is this dichotomy between the international legal order and our national

legal order. It is still one of the foundation principles of our constitutional law that an international treaty which we sign and ratify - does not become part of our domestic legal system unless it is specifically incorporated by an Act of Parliament."

Which, as Henke argues, makes it a lot easier for two constitutionally unlawful governments to continue in power, without giving their subjects any rights of appeal under normal international legal channels.

"We actually had a judge say on the weekend, in discussion with a QC, that he didn't give a damn whether individuals were hurt - his job was to uphold 'the system' - the system as opposed to the law.

"Now that's the second judge we've heard say that. Justice Haine of the Australian High Court said this back in December of 1998. His job was to 'uphold the system'. I was in court when he uttered it."

But ITR admits there's another problem: if, as the evidence now strongly suggests, the Australian Constitution is invalid and the government has no powers to pass laws or enforce them, then the Australian courts also lack jurisdiction to hear such arguments.

By failing to consult their citizens - their new bosses - about what kind of system of government they wanted from 1920 onwards, and simply assuming that the laws that existed the day before were still legal, Henke's researchers believe the Governments acted illegally.

When America gained sovereign nation status, the new Constitution expressly provided that British common law precedent would continue to form the basis of American law, except where it was inconsistent with the principles of the Constitution. In this way, Americans ensured that they still had access to a code of laws.

But New Zealanders and Australians were not asked if they wanted British common law dating from the Magna Carta to continue as their legal basis. And without that permission, it is constitutionally possible that the New Zealand courts have no power to draw legal precedent from colonial times or earlier. In effect, there is a solid argument that virtually no laws exist in New Zealand, and that even the 1688 Bill of Rights protecting MPs from being sued may have no effect, as ITR points out.

"The only constitutional authority for British legal precedent is the authority on which the British courts rest: the legal authority of the British people as expressed through the British parliament. Now that lawful authority does not apply in

Australia. It doesn't apply in New Zealand.

"So all of the court decisions made in relation to that, unless we choose voluntarily and explicitly to take it into our laws, is no more valid for us than laws used in France, the United States or China."

Again, looked at objectively, there is no constitutional reason that British colonial law should have any more force in New Zealand, than Ottoman law from last century should have any force in modern Turkey or Egypt.

The only way this legal crisis could be dealt with is for the New Zealand Government to seek a mandate from the voters to be granted temporary emergency powers whilst a new Constitution is drafted for public approval.

Unlike Hong Kong, freedom downunder was not marked by a break in legal continuity while one side relinquished power and the other took command. Instead the former colonial governments did not understand the constitutional issues facing them.

As New Zealand constitutional law expert Tony Angelo, of Victoria University, points out, sovereignty up until that time had normally been transferred only at the point of a gun, usually after agitation. In contrast, British colonial citizens were loyal and not actively seeking independence.

"The British constitutional pattern, particularly for the old Commonwealth, was normally an evolutionary rather than revolutionary process, so the idea that there is a specific date before which you are 'dependent' and after which you are 'independent', as I understand it, was not part of British constitutional thinking.

"It is certainly a feature of some constitutional systems in continental Europe. In other words, if you wanted independence from France, everything would stop and start on a given date."

As you saw earlier, Britain had told Australia and New Zealand on many occasions that they were now fully independent, but it appears the colonials were not listening.

In Resolution 9 of the Imperial Conference of 1917, the colonies were told "there is a necessity to alter the constitutional arrangements of the empire. The conference feels it must put on record that such rearrangements will be on the basis of equality of nationhood."

Australia's Prime Minister Hughes tried, in 1921, to draft a new Constitution for Australia to reflect the new nationhood. But his plans were torpedoed by British-

owned commercial interests lobbying politicians against it. Hughes was voted out soon afterward, and the idea of a new Australian Constitution never arose until the Republican Referendum last year.

New Zealand politicians were even more backward, failing to realise they were legally independent for 27 years, and failing to implement a Constitution right up to the present day. Although the Lange government did pass the 1986 Constitution Act, it was an Act of Parliament not a people's constitution. It is also strongly arguable that the Constitution Act is void because the Government had no sovereign power delegated to it by the New Zealand people.

Leading British constitutional law expert, Professor D P O'Connell, a recognised international expert, says transfers of sovereignty must be marked by a break in legal continuity. But the former Dominions, thinking stability was the most important factor, ignored the need to re-codify the laws and constitutional basis of the government.

"There is a law called the Law of State Succession," says Henke, "which is basically the mechanics by which those breaks are overcome to ensure that you don't end up with total chaos. But nothing was ever done.

"All they've done is ignored the existence of the break and run a PR job on the people telling them everything is fine, deliberately made sure they never told them the truth, and just let it run from there."

The issue is so grave, that even New Zealand constitutional law expert, Victoria University's Tony Angelo, doubts that New Zealand courts would have any powers to even hear legal argument if their jurisdiction was challenged. He cites the case of Simpson v Attorney General, a New Zealand case from the 1950s where Simpson alleged the Government was unconstitutional because he discovered the electoral writs had not been issued within the timeframe required for the election.

"The court said 'well, this is all very fine, but we're not in a position to re-establish a parliament. We can say yes, everything's invalid because the process wasn't followed as it should have been, but we're not in a position to re-start the machine'.

"The judges said 'actually, if what you say is true, none of us have been lawfully appointed and therefore we can't validly decide your case'."

To get around the problem, the court opted for a novel solution, ruling that the word "must" in the Act could also mean "may". Whether the verdict was legally correct was irrelevant, as Philip Joseph points out.

"They managed to find a way around that, because it would have brought the

system crashing down on its head, otherwise. That was a pragmatic response to a pressing constitutional challenge."

It is issues like this, Joseph concedes, that demonstrate how the sovereignty of the people of New Zealand has arguably been usurped by Parliament and by the Courts. Both institutions will attest to the constitutionality of the other if either faces a challenge, whilst the people must accept their verdicts or actions.

"That is an argument that you could put, but ultimately if you test it in the courts you won't succeed, I can tell you that, because our Court of Appeal would simply say 'we can trace our authorities back'."

As for the arguments by other New Zealand constitutional experts that the Government's power to make statute law overrides everything else, Henke's attitude is "prove it".

"The question is: where does it get its power from? A very simple question. Every Government has to get its power based on something. It can't be based on the divine right of kings, because that ended when they chopped Charles' head off. The current Royal Family will be sovereigns only if they obey the specific requirements of English statutory law.

"Now try and think about this one: the courts have tried to push the idea that it's like dual citizenship - you can have the Queen of New Zealand and the Queen of the United Kingdom. But if you have dual citizenship you can surrender either one without affecting the other.

"However in this case it's an a priori requirement that to be Queen of New Zealand, somebody must already be the Queen of the United Kingdom. They could not abdicate as Queen of the United Kingdom and remain Queen of New Zealand, so trying to separate the British authority component is an impossibility. You can't do it."

Which raises an even more dramatic possibility, according to Tony Angelo:

"May we still be a colony? I mean, the person of our sovereign is in the UK. Our final court of appeal is in the UK. We have not localised those two things. Internationally we would say we are independent and we have a Queen of New Zealand who is different from the Queen of England, and the Privy Council advises the Queen of New Zealand not the Queen of England, but that is a total mystery - it is an act of faith to accept that."

"He could be absolutely right," says Henke. "That's one of the possibilities - that we are all still colonies of Britain and not independent. Now if that is so, then

every one of the treaties we have signed, and in Australia's case that's about 4000, are null and void. And we're all British citizens again, except that British law says we're not, so we become stateless people.

"As you can see, it's a fascinating series of twists. And we did not believe when we started out that we would find anything like this."

The problem now facing citizens of New Zealand, Australia and Canada is how to regain constitutional control of their governments.

The only previous attempt at drafting anything close to a real constitution in New Zealand was Sir Geoffrey Palmer's Bill of Rights, which codified a number of basic rights but said "notwithstanding" those rights, nothing in the Bill could remove the Government's statutory powers.

Ian Henke says attempts to draw up lists of rights are futile.

"Look, the issue is very simple. Once you become a sovereign nation, all of the rights belong to the people. And they delegate to a parliament and a government so much of their rights as are necessary to keep government going. And that's all. Anything that is not so delegated remains the rights of the people.

"In other words, you don't have to draft a Bill of Rights to say what rights the people have got. All you have to draft, in any decent democracy, is a Constitution that says which of the rights, belonging to the people, the government is allowed to exercise."

So New Zealand's new Constitution could say, "We the people retain all rights, but we delegate the following powers to the Government…"

Allowing for the fact that future Governments could face some unforeseen problem and require extra power, Henke suggests that the Government should be forced to ask its citizens, via binding referenda, to vote on constitutional amendments if necessary. Such a constitution could even provide for the Government to be allowed to exercise emergency powers, for a maximum of six weeks, in order to deal with an unexpected crisis. The time limit allows enough time for the issue to be put to the vote.

"The Government doesn't need all our rights to do things. It only needs some. So the Government must have no rights over the freedom of individuals, and so you just never give it to them. Then, in order to enforce something, the Government has got to prove that what they're trying to enforce falls under the context of what they have been granted by the Constitution.

"It puts the onus of proof on the Government to prove that they are acting lawfully, rather than as it currently exists where individuals must prove that the Government is acting unlawfully."

Angelo believes the recent push by New Zealanders for more control over their governments is driven by a subconscious realisation that we've been flying blind, in a constitutional sense.

"We have only one protection, and that is the semi-entrenched requirement of elections every three years. Intuitively, why people have consistently said 'we'll keep the term short' is, I think, because they've realised that it is their only hold on the system. Because logically you'd look for a four or five year term, but if you look at those referenda the populace consistently say 'no, don 't change it'.

"The Ombudsman came out of that desire for greater control, Official Information came out of that, MMP came out of that, but the basic issue is not being addressed and that is because it is not part of the Anglo-Saxon constitutional tradition to do things this way.

"The fact is that now we're probably the only nation that thinks like that, Britain is now so caught up with the European Union that even if it hasn't set its own constitution it is falling within other people's structures. It seems we 're closest to the 'pure model'.

"But until you can get some popular groundswell, no politician is going to run with it."

In Australia, however, it's a different story. The Institute of Taxation Research is playing hardball with the Australian Government.

"An application for the appointment of an International Criminal Tribunal has been submitted to the UN, for Australia. We have forwarded copies to every single country who has a delegation to the UN. No country has returned the document to us.

"Copies went to the Secretary-General as well as the Security Council. A number of countries have offered active support in bringing the matter to a head. It is currently being worked through by the [UN] Human Rights Commission. It is currently being worked on by a number of the other countries who were signatories to the treaties that gave Australia and New Zealand their independence. They have indicated to us that as signatories to those treaties they are duty bound to push the matter before the International Court.

"We are, despite what the politicians here are saying, moving down the track to a

declaration by the International Court that this current government is nothing but an illegal offshoot of the United Kingdom Government.

"Even the UK Government is saying now 'It's not us! It's them. We've given them the legislation saying they're independent. If these people are doing it it's them, they're doing it wrong. We're actually asking the International Court, amongst other things, to have the United Kingdom repeal the Constitution Act, just to strike it right out so there can be no pretence any longer that it still exists."

What *Investigate* expected when we began this research was to find strong and forceful legal opinion that this constitutional timebomb claim was wrong - that it was merely the ramblings of a few cranks. Instead, of all the leading New Zealand constitutional lawyers we spoke to, both on and off the record, one comment sums them up:

"It is very problematic, and there is no clear answer to these questions you are posing."

That such an admission carries with it the possibility that our courts are invalid, our government has no constitutional right to pass laws, that the Waitangi Treaty became null and void on 10 January 1920 when we signed the League of Nations Covenant, that the new drivers licence laws are invalid - pick any issue you like - all of this means New Zealand faces some very serious decisions in the very near future.

This question is likely to get a major airing when constitutional experts meet in Parliament's Legislative Chamber in April to debate whether New Zealand needs a written constitution. At this point, one might be tempted to say the question is not "whether", but "when".

From Reclaim Australia

Contributed by "deborah sweeney"

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