In Search of Consensus: New Zealand's Electoral Act 1956 and its Constitutional Legacy, by Elizabeth McLeay. Wellington: Victoria University Press, 2018. pp. 254. RRP $40.00

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How much is there to learn from the story of a statute enacted sixty, and repealed twenty-five, years ago? Quite a lot sometimes, as Elizabeth McLeay shows in *In Search of Consensus: New Zealand's Electoral Act 1956 and Its Constitutional Legacy*. The book is not only a history of a constitutional innovation that has had perhaps unexpectedly lasting consequences for New Zealand. It also raises broader questions about the development and endurance of constitutional reform.

Professor McLeay explains that the Electoral Act 1956 was not self-evidently destined to become the sort of law about which books are written. It was, in the first instance, a fairly low-key response to ongoing dissatisfaction with certain aspects of election administration under the then-existing legislation. Yet political stars aligned to make it something more than a humdrum piece of technical legislation. Both the governing National Party and the Labour Opposition saw an opportunity to use this enactment to settle at least some of their longstanding partisan disputes, and agreed on a compromise that would transform the Electoral Act 1956 into a constitutional landmark.

The compromise consisted in introducing Section 189, a provision that entrenched some aspects of the Electoral Act 1956 by requiring either a three-quarters majority in Parliament or the concurrence of the voters at a referendum for their amendment. These were notably the duration of the parliamentary term, the definition of the population to which electoral representatives would be allocated, the criteria determining an individual's entitlement to vote, and the composition of the commission drawing the boundaries of electoral districts. Some of these matters had previously been the subject of partisan manipulation by both Labour and National, which Professor McLeay details; on others, there existed consensus, but also fear of partisan manipulation in the future.

As Professor McLeay points out, the entrenching provision was, symbolically, a remarkable innovation in a political culture imbued with orthodox ideas of parliamentary sovereignty and flexible constitutionalism subject to ongoing legislative control. Professor McLeay reviews the statements of both academics (cautiously favourable to revising the orthodoxy) and National Party politicians (quite reluctant). Such, indeed, was the power of the old ideas that it was widely agreed that, legally speaking, the entrenching provision would not be effective. It was thought constitutionally impossible to entrench the entrenching provision itself: a future Parliament must be free to escape its fetters. (This was described as a 'single' as opposed to a 'double' entrenchment.) The authority of the entrenchment would be entirely moral.

Yet the conjuring trick worked: no Parliament after 1956 legislated either to repeal or in violation of Section 189, or of its successor, Section 268 of the Electoral Act 1993 (subject to a possible, but doubtful, violation I shall mention below). Professor McLeay reviews the various instances in which amendments to entrenched provisions were carried by the requisite special procedures, and some in which proposed reforms were abandoned because their proponents failed to obtain the Opposition's assent. There is now, Professor McLeay writes—and, in light of the evidence she provides, one would be hard-pressed to disagree—a convention that the entrenching provision will be complied with. Its authority is thus a matter of constitutional, not only political, morality.

Why have these seemingly unlikely developments—first, the introduction of a legislative provision contradicting, if only symbolically, the untrammelled supremacy of Parliament, and then its crystallisation into convention—occurred? Professor McLeay points to the abolition the upper house of New Zealand's Parliament, the appointed Legislative Council, as the indispensable precipitating event that focused politicians' minds on constitutional issues. It also starkly illustrated the power of an executive supported by a majority of the House of Representatives (then elected on a first-past-the-post basis) to force through fundamental constitutional change. Once enacted, Section 189 changed the paradigm of electoral reform. Whereas previously both Labour and National governments had manipulated the electoral system to their advantage, the entrenching provision and its requirement of consensus elevated bi-partisanship (including, on occasion, bi-partisanship at the expense of other political actors!) into an attractive ideal, which has lost none of its force in the intervening decades.

Professor McLeay highlights, however, a paradox. For a law that was meant to constrain political actors, and succeeded perhaps beyond expectation in doing so, the

Electoral Act 1956 was passed in a manner that illustrated rather than circumscribed the powers of parliamentary majorities. The bill that would become the Electoral Act was introduced and passed first reading without Members of Parliament knowing its contents; a mere two weeks later, it received Royal Assent. The select committee that studied the bill, and which was responsible for introducing what became Section 189, received very few outside submissions, none of them from citizens or constitutional experts. The idea of a referendum on the new legislation, floated by the Prime Minister, was abandoned. Professor McLeay is sharply, and understandably, critical of this legislative process.

Despite this reservation, Professor McLeay appears to admire the achievement of the framers of the Electoral Act 1956. They may not have practised what they preached, but they have persuaded their successors to do constitutional politics differently. Professor McLeay places their accomplishment in its political, intellectual, and historical contexts, and makes a convincing case for the significance of their legacy. If her book has a weakness, it is that it leaves the reader to reflect on his or her own about whether the making and endurance of the Electoral Act 1956 might teach us anything about polities other than New Zealand, and times other than the 1950s. Some of the issues New Zealand was then facing are live in other jurisdictions. For example, there is controversy in the United States over whether total population or the number of citizens should count when determining the size of Congressional districts, and controversy in some Canadian provinces over the permissible size discrepancies among constituencies. Why do not politicians there find mutual disarmament as attractive a solution as those in New Zealand did? What might—or how might the voters contrive to—change their minds? It would have been interesting to know what Professor McLeay thinks about this. That said, she did not set out to offer lessons in comparative law or politics, and it is perhaps unfair to fault her for this.

Another omission, and perhaps a more surprising one, is that of the ongoing litigation in which prisoners assert that the Electoral (Amendment) Act 2010, which disenfranchised them, was enacted in violation of Section 268 of the Electoral Act 1993. This claim has so far been rejected by both the High Court and the Court of Appeal, but both accepted that it was justiciable. (A decision of the Supreme Court still pending.) In this respect, one of the expectations and hopes of the authors of the Electoral Act 1956—that their use of single entrenchment would keep the courts out of constitutional debates—may at last have been dashed. Indeed, in argument before the Supreme Court (which probably took place too late for Professor McLeay to take account of it), the Government appeared to concede that, if Parliament had in fact legislated in violation of entrenchment, the resulting statute would be invalid.

However much they were attached to parliamentary sovereignty, the authors of Section 189 may thus have planted the seeds of its subversion in New Zealand.

These quibbles aside, Professor McLeay's book is both informative and thought-provoking. It should be of interest not only to aficionados of New Zealand's history and theorists of parliamentary sovereignty, but also to those, across and beyond the Commonwealth, who are interested in the law of democracy and in constitutional reform.