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Reconstituting the Constitution

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Parliament (for example, appointment of non-parliamentarians as Cabinet Ministers).[32]

1.2.4 The Treaty of Waitangi and the Constitution

A particularly difficult and contested topic succeeded the associated question of identifying the constitution: determining the constitutional status of the Treaty of Waitangi, past, present and future. On the one hand it was concluded that, "The Treaty gives Māori special status, but tino rangatiratanga as defined by the courts and the Waitangi Tribunal does not equate with the 'sovereignty' or governance of the Crown."[33] On the other hand it was argued that sovereignty should not be conceptualised as "a particular *site* of power" possessed only by colonising states but as a "concept of power which human societies can define and exercise in their own way".[34] The Treaty must be repositioned "as a relationship between equal sovereign powers."[35] The situation of Māori and the Treaty was echoed in other countries: nation states lose sovereign power but, at the same time, experience an "increasing demand for greater devolution of power to regional levels".[36]

The options regarding the Treaty's place in the constitution were to ignore it, to give it honourable mention, to choose simple incorporation, or to move towards "expansion".[37] The first three options were problematic. Thus:

> In all, it would seem appropriate to recognise principles or rights that flow from the Treaty without presuming to foreclose on the Treaty itself by presenting those principles or rights as complete. It may be appropriate to recognise New Zealand as a place for all peoples while recognising at the same time that in the interpretation and administration of laws, weight shall be given to the status of Maori as aboriginal inhabitants and the Treaty promise to protect their interests. In such ways the Treaty is expanded upon, has honourable mention and continues morally to bind but is not incorporated into law save to the extent specified.[38]

A concrete proposal was to construct three houses in a future Parliament: Tikanga Pakeha (the Crown House); Tikanga Māori; and the Treaty of Waitangi house, each with different but overlapping functions.[39] Another suggestion was to place both the Māori and English texts of the Treaty in the preamble to the Constitution Act 1986: "The Treaty cannot be overlooked by Parliament but neither

[32] Joseph (2000), p. 180.
[33] Graham (2000), p. 195.
[34] Jackson (2000b), p. 196.
[35] Ibid, p. 199.
[36] Graham (2000), p. 194.
[37] Durie (2000a), pp. 201–202.
[38] Ibid, p. 204.
[39] Winiata (2000).

can it be tied down nor limited."[40] A written constitution of higher status than ordinary law should be adopted to protect minority rights; and federalist principles should be considered, providing Māori with a state within a state.[41]

1.2.5 Multiculturalism and the Constitution

Demographic shifts, including New Zealand's changing ethnic composition, have constitutional implications. The locus of power had moved "away from a Pakeha hegemony towards a more ethnically diversified power structure". There were complex issues around the definition of Māori and other ethnic groups, given their implications for the Electoral Act and the Māori seats, and other statistical policy purposes.[42] Intergenerational and family issues were also significant.[43] The long history of the relationship between New Zealand and the Pacific Islands had been important for this country and must be acknowledged.[44] New Zealand's cultural plurality, plus identity issues, must be recognised alongside the rights of individuals. Since there was public concern on these issues, effective leadership was needed, institutions needed to be reshaped, and "Justice-based claims of recognition and institutional accommodation need to be carefully defined and justified".[45]

In this session, as in others, the point was made that the priority was to sort out Māori political claims: "[U]ntil the current conventions and principles of constitutionalism are renegotiated by Māori and the Crown, it is not reasonable to expect Māori or any other cultural group to assist the dominant culture to preserve the legitimacy of its institutions".[46] There had been a "paradigm of dominance and subordination".[47] Aotearoa New Zealand should have a written constitution "that reflects and implements the Treaty guarantees", including creating a Māori national body.[48] Crown-funded Māori hui should be created to arrive at a consensus on this.[49]

[40] Henare (2000), p. 211.
[41] Vasil (2000), pp. 214–218.
[42] Pool (2000), p. 225.
[43] Ibid, pp. 228–230.
[44] Pereira (2000).
[45] Spoonley (2000), p. 241.
[46] Wickliffe (2000), p. 244.
[47] Ibid, p. 244.
[48] Ibid, p. 245.
[49] Ibid, p. 246.

1.2.6 Who Should Be Head of State?

"In removing the Crown … we are doing more than removing the Queen as sovereign. We are, in fact, removing the underlying principle of the succession of government. This knowledge should inform our thinking as to what might appropriately replace 'the Crown' as the head of state".[50] Thus, altering the status quo would mean more than a minimal change to the constitution because, in so doing, it would construct the debate between republican and monarchist and because it would concern the historic relationship between Māori and the Crown. It was "inappropriate for the Crown to be removed without clear objectives as to who/what will replace it as the Treaty partner".[51] Reforms that changed the head of state could either go in the direction of "soft republicanism" (simply replacing titles and building on existing conventions) or, alternatively, towards "the full republican agenda" (including the constitution as higher law, with implications for Treaty relationships).[52] Again, though, the Treaty relationship could pose difficulties. In contrast with Australia, "our republican rock may be how to constitutionalise the relationship between Māori and others if we were to tear the Crown from the head of state."[53]

The present situation was that: "The role of the monarch has evolved to the point where she does very little in relation to Australia, New Zealand or Canada. From this perspective, formal establishment of a republic merely recognises and regularises the status quo". However, this argument worked both ways: "For republicans, it is an argument for taking the next, logical constitutional step. For monarchists, it is an argument for keeping the status quo".[54] The Australian experience provided New Zealand with helpful lessons, especially concerning the usefulness or otherwise of holding national conventions to make recommendations on constitutional issues.[55]

1.2.7 The Cabinet, Public Service and Subnational Government

It was argued that New Zealand should have a written constitution incorporating some of the existing conventions on executive government, including the institutions of cabinet and the public service and the position of Prime Minister. The constitution should not be too prescriptive, however, and should not include collective cabinet responsibility and individual ministerial responsibility because

[50] Hayward (2000), p. 262.
[51] Ibid, p. 266.
[52] Ladley (2000).
[53] Ibid, p. 275.
[54] Saunders (2000), p. 280.
[55] Ibid, pp. 281–283.

this would make the constitution too inflexible and give too much power to the courts. The *Cabinet Manual* sufficed for conventions and procedures.[56] Despite the advent of MMP, New Zealand continued to fit the model of parliamentary government. Some key questions were whether there should be increased separation between executive and legislative powers, whether or not cabinet composition and powers should be codified and/or restricted, and how cabinet could be made more accountable for its actions.[57]

Four crucial constitutional principles had governed the public service: the rule of law; ministerial responsibility; non-partisanship; and open government.[58] These conventions would remain in place in the future. Indeed, most of the possible constitutional changes that had been discussed would not much affect the public service unless a president were to be given substantial executive powers, and this was unlikely to happen. Greater stress on biculturalism, cultural pluralism, and devolution would have implications for how the public sector operated. But the primary conventions would remain the same.[59]

Local government, and its powers, stimulated a lively discussion. The point was made that, "[i]n local government's view, any conference on constitutional matters must begin to grapple with questions about the spatial distribution of authority and power".[60] Local government challenged the "centrist paradigm in New Zealand".[61] Good government should be close to communities, as is local government, for the following reasons: enhancing participation; sharing values; improving policy; protecting the liberty of individuals and communities; and enhancing local capital.[62] But local government needed a "power of general competence".[63] This did not mean shared sovereignty. New Zealand needed a national debate on constitutional issues, a debate that included the subject of the relationship between national and local government.[64]

1.2.8 Should Parliament Be Changed?

Unsurprisingly, the impact of the recent, radical electoral system change dominated the agenda in this session. New Zealand had just held its second general election

[56] Chen (2000).
[57] McLeay (2000).
[58] Boston (2000), p. 309.
[59] Ibid, pp. 314–315.
[60] Stigley (2000), p. 317.
[61] Ibid, p. 318.
[62] Ibid, pp. 319–321.
[63] Ibid, p. 322; and more fully, Jansen (2000), pp. 326–333.
[64] Jansen (2000), p. 331.

under the MMP rules. Electoral system design involved both macro and micro issues, it was pointed out, and perhaps it was the latter that should be amended.[65] Reforms, mostly micro changes, to the rules were proposed. More public education was needed because Parliament faced a legitimacy problem.[66] Electorally incorrect language should not be used (for example, using "list vote" rather than "party vote"). Perhaps both the party vote and the electorate vote should be renamed so that electors would understand their respective significance.[67] The roles of the list MPs should be reconsidered.[68] Other suggestions were to abolish the one-electorate threshold and to prevent MPs from remaining in Parliament after resigning from their parties.

MMP had already affected parliamentary procedures, it was explained. Other possible reforms were to reinstate an upper house, to create a separate Māori Parliament, and to entrench a bill of rights. Each change, however, had its disadvantages.[69] New Zealand might consider implementing fixed-term Parliaments (similar, perhaps to the Swedish situation) and a constructive vote of no-confidence.[70] Future changes to the ways in which Parliament operated would depend on what other aspects of the constitution were changed: the constitutional review of legislation, the separation of executive and legislative powers, or the creation of a second chamber, for example. But, whether or not these things happened, Parliament would continue to evolve.[71] One possibility was for the Māori Affairs Committee to "evolve into a Second Chamber within a unicameral Parliament" in so far as the legislative process was concerned.[72]

New Zealand's non-binding, citizens' initiated referendums, a mechanism to deliver direct democracy, were flawed, especially as "[t]here is too little supervision" of the referendum question.[73] But referendums, including ones that are binding on governments, are not necessarily the answer:

> An effective representative democracy with robust avenues for public participation does not depend on the existence of citizens-initiated referenda. The fact that the New Zealand public has at times been greatly disaffected with politics is not to be ignored. We should explore a **range** of ways to redress those concerns, and tailor our processes to fit the subject matter of those controversies.[74]

[65] Mulgan (2000).

[66] Ibid, p. 363; and Jackson (2000a), p. 346.

[67] Ibid, p. 363.

[68] Jackson (2000a), p. 348.

[69] Caygill (2000).

[70] Jackson (2000a), p. 348.

[71] McGee (2000).

[72] Ibid, p. 353.

[73] McLean (2000), p. 366.

[74] Ibid, p. 368 (emphasis added).

1.2.9 What Role for the Judges?

This question involved several large issues: the problem of the role the courts should play when the constitution is being changed (and any such role should recognise the collective will); how to entrench human rights (which should happen); and the abolition of the right to take cases to the Privy Council and the construction of a New Zealand Supreme Court (also deemed desirable). The new court should include one or two overseas judges alongside the local ones.[75] The role of the judiciary in the present constitution is contested and, partly because of increased public law litigation, it was observed, the media were taking more interest in the judiciary than in earlier years. There would be more attention on the judiciary still if the judiciary could interpret a written constitution or invalidate legislation.[76]

1.2.10 A Written Constitution?

The focus of the last session of *Building the Constitution* interconnected with the earlier ones and, furthermore, illustrated particularly acutely the sharp differences of opinion on whether or not New Zealand should codify more fully its constitutional arrangements and move towards a written constitution that was more substantial than the Constitution Act 1986.

One argument was that, because New Zealand compared well with other democracies, and because it was a small and non-federal country, it should not move towards codification. The (mostly) non-written constitution avoided the problems of having unelected, powerful judges; and a written constitution would be hard to amend and, once implemented, there would be no going back afterwards.[77] After a succinct summary of the possible drawbacks of written constitutions, another contributor observed that "[t]he essential risk of the written constitution is the rule of lawyers by reference to anachronistic rules".[78]

There was the particular question of whether or not New Zealand should make the Bill of Rights part of some sort of superior law.[79] Since the discussion over the development of the New Zealand Bill of Rights Act 1990, much had changed. More people were interested in superior bills of rights; and there were more models around for New Zealand to examine, for example, that of the United Kingdom. The international rights environment had also changed the situation. If New Zealand

[75] Cooke (2000).

[76] Taggart (2000).

[77] Allen (2000).

[78] Hodder (2000), p. 436. Note the interesting defence of conventions against statutes by McGee (2009).

[79] Rishworth (2000).

were to adopt a bill of rights that was a form of superior law, then this should be approved by referendum. But this radical change was not really necessary, unless other constitutional changes occurred such as political union with Australia.[80] Another speaker put forward the idea of a Citizenship Commission – perhaps a royal commission. This could investigate, among other things, the rights and responsibilities of citizens and leaders.[81]

The constitutional position of Māori was the fundamental quandary. What is the constitutional status of the Treaty? It was important to realise, it was pointed out, that there was a broader context: it was not only statutes that recognised the Treaty but also policies in government sectors.[82] And although some pieces of legislation referred to the Treaty, there were important laws with no Treaty provisions. Furthermore, " . . . the Treaty itself, even setting aside the contradictions between the English and Māori texts and the failure to assign Māori any rights to participate in government, has proved to be of limited value as a determinant of constitutional rights."[83] As for the future, New Zealand would continue to be an independent nation state; Māori would have special constitutional recognition as indigenous people; and "Māori autonomy will aspire to self-governance".[84] Constitutional change in New Zealand would be evolutionary. Two constitutional commissions should be formed: a Māori Constitutional Commission and one other.[85]

1.2.11 The Reconstituting the Constitution *Agenda: The Gaps*

Inevitably, perhaps, given the number of constitutional quandaries facing Aotearoa New Zealand at the turn of the twenty-first century, some significant constitutional issues were omitted from the conference agenda. These included the vital issue of the political parties, including their legal and parliamentary definitions, their democratic roles, and the question of funding and the regulation of election donations and expenditure. This last issue turned out to be particularly controversial during the first decade of the new century.[86] The other major gap was the rights and responsibilities of a New Zealand citizen and the definition of citizenship. Nevertheless, the 2000 conference tackled some big issues and difficult questions. There was also a degree of consensus around certain aspects of the constitution and its development, the focus of the next section of this chapter.

[80] Rishworth (2000).
[81] Frame (2000), pp. 431–432.
[82] Durie (2000b), p. 417.
[83] Ibid, p. 418.
[84] Ibid, p. 420.
[85] Ibid, pp. 421–424.
[86] For a recent analysis of parties see Geddis (2009).

1.3 Building the Constitution: Shared Assumptions

As I have shown so far, the nature of the constitutional changes that might be made, the extent of change, and who should make the decisions about those changes, were all contested issues at *Building the Constitution*. Nevertheless, a number of important conceptual assumptions about New Zealand and its constitution were generally accepted. These were not always overtly expressed but, nevertheless, underpinned deliberations.

1.3.1 Respect for Constitutionalism Is Fundamental to Our Democracy and to Rebuilding the Constitution

Although there was no explicit discussion of the nature of a constitutionalist state, nobody challenged the assumption that respect for the principles of constitutionalism was vitally important for a political culture. As argued by Andrew Sharp:

> Constitutionalism ... sees public life as working within rules and principles settled by tradition or agreement. It values continuity and stability more than change. A settled structure of expectations, it claims, is the basic prerequisite for the pursuit of change and opportunity; so that it values liberty indeed, but only that liberty settled by law.[87]

Constitutionalism values equality, "again within legal limits", and rights inherited from the past.[88] Constitutionalism values legal authority, but authority must respect property, economic and political rights.[89]

There would have been little or no disagreement among the conference participants about the importance of these principles. However, there was no agreement on precisely how these rights and arrangements should be weighted, expressed and implemented. Decades ago, a New Zealand constitutional law expert, Kenneth Scott, wrote that, "[a]n action is unconstitutional if it offends the provisions of constitutional law or if it offends the idea of constitutional propriety held by the people concerned, who in many cases are the electors".[90] The problem is that, in an era of mass communications, social and cultural complexity and the intense contestability of ideas, Scott's nicely crafted guideline provides insufficient guidance to the difference between what distinguishes constitutionality from unconstitutionality.

[87] Sharp (2006), p. 110.
[88] Ibid, p. 110.
[89] Ibid, p. 111.
[90] Scott (1962), pp. 26–27.

1.3.2 The Most Significant of the Fundamental Issues that Must be Settled is the Question of the Constitutional Status of the Treaty of Waitangi

There was overwhelming agreement that the constitutional position of Māori, including determining exactly how the Treaty of Waitangi should be acknowledged and respected, was the most urgent and troubling issue. No one disagreed – at least openly – with the assumption that any future reforms had to recognise more fairly the rights of the indigenous people. Exactly how this should happen, and what tino rangatiratanga really means, were – and are – difficult questions. The other leading issues were: republicanism, including changing the Head of State; the possible entrenchment of the Bill of Rights, leading to courts having jurisdiction over these issues; and adopting a written constitution, with its impact on the relationship between the courts and the Parliament. The Treaty of Waitangi is central to all these constitutional questions.

1.3.3 New Zealand will Continue to be a Parliamentary Democracy

Participants agreed that New Zealand would continue to have a system of parliamentary government. Despite its shifts away from the Westminster model, especially after the introduction of MMP, New Zealand would not, and probably should not, break away from its basic Westminster design in so far as the fused relationship between the political executive and the legislature was concerned. The executive would continue to be drawn from, and responsible to, the legislature. Further, the public service would continue basically to follow the Westminster model.[91] Suggestions that New Zealand should move towards separating the executive powers on the model of the United States, France, or towards some weaker form where MPs lose their positions on being appointed to ministerial office, were canvassed but barely discussed. New Zealand's future lay in refining and adapting its historic model of responsible government – albeit a more participatory and "European" version of that which has prevailed in Britain.

[91] Rhodes et al. (2009). The authors argue (pp. 46–50) that there are four essential "traditions" of Westminster: the Royal Prerogative which has become executive authority; responsible government; constitutional bureaucracy; and representative government.

1.3.4 Constitutions are Not Only about Rules Establishing the Formal Distribution of Political Power Within a State; the External Context Must be Considered in Constitutional Development, Both as Cause and Consequence

The international environment, especially the sheer number and significance of international treaties and other agreements, impacts on a country's politics and government. Alliances such as these offer opportunities, and provide constraints, including affecting New Zealand's actions as a sovereign nation. Globalisation and the internationalisation of constitutions and constitutionalism mean that New Zealand sits in an interconnected world of ideas and practices, experience and knowledge. But, at the same time, the volatile international environment creates a situation in which individual states can hold to few certainties. Given these circumstances, there were high levels of uncertainty around the possible unintended consequences of particular changes.

1.3.5 Constitutions are Not Only about Rules about the Formal Distribution of Political Power; New Zealand's Social Culture Must be Considered as Both Cause and Consequence of Change

New Zealand's growing cultural and ethnic diversity must be recognised in any future constitutional developments. Nevertheless, this process would not necessarily be easy, especially given the tension between biculturalism and multiculturalism.[92] Other cultural aspects must be considered, including responding to generational changes.

1.3.6 It is Inevitable that New Zealand will Become a Republic

Sooner or later New Zealand would become a republic and have a non-royal head. How or when this would happen was arguable, as were the extent of the various changes associated with republicanism. The relationship between Māori and the Crown under the Treaty would have to be resolved.

[92] See also Palmer (2007). He argues for (although he does not say this explicitly) a political science approach. Culture, including the beliefs of the participants, helps determine a constitution. Palmer also discusses New Zealand's constitutional norms.

1.3.7 New Zealand's Tradition of Constitutional Change is Evolutionary and "Pragmatic"

"New Zealand's political history has been experimental but, very importantly, not revolutionary".[93] This pattern dated from the state's very beginnings. And, "[a]bstraction has little tradition of popular following in Aotearoa New Zealand. Institutionally, we have tended to favour the simple, accessible and pragmatic".[94] Indeed, radical, revolutionary constitutional change is undesirable (and anyway does not fit with the New Zealand tradition). Although some constitutional changes need immediate attention, New Zealand is not undergoing the kind of constitutional crisis that would have to be dealt with through fundamental constitutional restructuring.

1.3.8 Whether or Not New Zealand Adopts a Written Constitution, Constitutional Codification Had Been Recently Increasing

Particularly over the last decades, and especially since the Constitution Act 1986, there had been considerable legislative and bureaucratic codification of New Zealand's constitution. There were many reasons why this had happened, including anticipating and responding to electoral system change and the increased awareness of rights-based issues. It is worth noting that this trend has happened elsewhere, even in Westminster states with written constitutions.[95] Contemporary political and social complexity tends to lead to the evolution and recording of rules.

1.3.9 Future Constitutional Reforms Must Use Legitimate and Appropriate Change Processes

There was universal agreement that, when embarking upon constitutional change, legitimate reform processes must be used. Future reforms must be made in a manner that is regarded as democratically fair by citizens and elites. This issue was closely related to the problematical question of who owns the constitution, and who should

[93] Moloney (2006).

[94] Macdonald (2000), p. 87.

[95] Rhodes et al. (2009) (p. 88) note that "constitutional conventions have been codified as governments have attempted to provide guidelines for politicians and officials". Also, "the codification of conventions and practices has blurred the distinction between written (codified) constitutions and unwritten constitutions".