Caroline Morris · Jonathan Boston
Petra Butler *Editors*

Reconstituting the Constitution

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Preface

In mid 2000, academics, officials, business leaders and representatives of civil society gathered at New Zealand's Parliament in Wellington for a conference that was the first of its kind. Entitled "Building the Constitution" it was hosted by the Institute of Policy Studies (IPS) at Victoria University of Wellington. The aim of this event was to bring together a representative cross-section of New Zealand society, including people with a range of relevant expertise, to explore the foundations of the constitution, debate how it might be developed, and consider some of the critical issues that would need to be resolved if there were to be a new constitutional "settlement". At the time of the conference, New Zealand was undergoing a significant transition in terms of its identity and its sense of independence, and various long-standing political norms were being challenged. Debates about the role of the Treaty of Waitangi, our relationship with the international community and our identity within that community had led to calls for New Zealand to embrace a written, entrenched constitution. To the regret of many, the 2000 conference did not produce a roadmap for future constitutional development. It did identify, however, a range of important issues that would need to be addressed if significant constitutional changes were to be seriously contemplated. These issues were enunciated in an elegant and substantial volume – *Building the Constitution* – edited by Colin James and published by the IPS in late 2000.

To mark the tenth anniversary of the 2000 conference, the IPS and the New Zealand Centre for Public Law again brought together distinguished judges, academics, public officials, students and members of civil society, including several keynote speakers from overseas. The conference, entitled "Reconstituting the Constitution" held in August 2010 was generously sponsored by the New Zealand Law Foundation. As with the original event, the conference in 2010 traversed a diverse range of constitutional issues. This volume contains all of the papers presented there, introductions to the main discussions and a survey chapter by

Professor Elizabeth McLeay.* As the editors of this volume, we are greatly indebted to the many contributors, not least for the speed with which they have revised and amended their conference papers.

Understandably, the wider cultural, political and economic context surrounding the 2010 conference differed in many respects to that of its predecessor. Whereas the 2000 conference was held during the early stages of a Labour-led minority government and in relatively buoyant economic circumstances, the 2010 event occurred within the first term of a National-led minority government and in the wake of the global financial crisis. New Zealand's constitution, too, had witnessed some significant changes, not all of which had been expected at the time of the 2000 conference. The Supreme Court had replaced the Privy Council as the country's highest court. The controversial Foreshore and Seabed Act 2004 had been enacted, dividing community opinion and spurring the establishment of the Māori party. Almost as controversial had been the Labour-led government's changes to the regulation of electoral finance in 2008. The latter changes were criticized in the run-up to the 2008 general election by the Electoral Commission for their "chilling" impact on democracy, and spurred further reforms during 2009–2011.

Unsurprisingly, various issues that were contentious at the time of the 2000 conference remain so more than a decade later. Amongst these are the design of the electoral system, not least the merits (or otherwise) of proportional representation and the question of separate Māori representation. Other constitutional issues, too, remain the subject of periodic debate: the nature, powers and appointment of the head of state, the term of Parliament, the protection of indigenous (and other) rights, the governance of major cities, such as Auckland, and New Zealand's relationship with Australia.

The question of electoral reform will be the subject of a further referendum in 2011, held in conjunction with the general election. Whether this will resolve the matter remains to be seen. If a majority of voters favour a further change in the electoral system, a second referendum will be held at the time of the next general election, expected in 2014. This will pit the current Mixed Member Proportional (MMP) system against the option most favoured at the 2011 referendum. But even if a majority of voters support the retention of MMP (whether in 2011 or 2014), there is bound to be continuing pressure for adjustments to some of the details of the current electoral system (for example, the number of constituency seats, the size of the party-vote threshold, and the waiver to this threshold where a party wins at least one constituency seat). In short, continuing debate over electoral system design can be expected for some years to come, irrespective of the outcome of the electoral referendum.

But broader constitutional changes are also in the offing. In late 2008, the National and Māori Parties signed a "relationship and confidence and supply agreement". This included a provision requiring the establishment of a group to review various constitutional matters, including Māori representation. Two years

*The papers published include discussions and the law as it stood at 30 November 2010.

later, the National-led government announced how this "consideration of constitutional issues" would be conducted. In short, the agreed constitutional review process has four aims (see Appendix 1 of this volume):

- To stimulate public debate and awareness of New Zealand's constitutional arrangements and issues arising;
- To seek the views of all New Zealanders (individuals, groups and organisations) including those of Māori (iwi, hapū and whānau) in ways that reflect the Treaty relationship;
- To understand New Zealanders' perspectives on the country's constitutional arrangements, including the range of topical issues requiring further discussion, debate and policy consideration; and
- To identify whether any further consideration of the issues is desirable, and if so, on which issues.

The process, which is expected to take several years, is being co-led by the Deputy Prime Minister (Bill English) and the Minister of Māori Affairs (Dr. Pita Sharples). They will consult with a reference group made up of MPs from across all the parliamentary parties, and will be supported by a Constitutional Advisory Panel. Given the nature and duration of the agreed process, there will be an opportunity for extensive public consultation and debate. This is welcome. Indeed, one of the important themes of the 2010 conference was the desirability of facilitating greater public engagement on constitutional issues. To this end, several of the invited keynote speakers provided first-hand experience of the process of constitutional change in various jurisdictions. Professor Klug discussed the role of civil society in the making of the South African constitution; Father Brennan outlined the work of the Australian National Human Rights Consultative Committee (2008–2009), which he chaired and its consultative process; and Professor Hazell discussed the process and outcome of constitutional change in the United Kingdom since the mid-1990s. A general presumption underlying their presentations was that no major constitutional reforms should be undertaken without widespread and vigorous public debate.

In addition to a focus on the process of reforming constitutions, the 2010 conference had seven main themes: whether New Zealand should become a republic; whether the country needs a written constitution and (as part of this) a strengthened Bill of Rights Act; the future of electoral law; the influence of international treaties on the constitution; the evolution of the relationship between Australia and New Zealand; the role and governance of sub-national government; and the protection of future generations. The chapters in this volume cover each of these themes. While it is of course uncertain how New Zealand's constitution will evolve over the coming decades, we trust that this publication will contribute to a deeper understanding of constitutional issues amongst citizens and a more informed debate about the options for reform.

We would like to thank all those who contributed to the production of this book: the authors of the 28 chapters for their diligent and rapid re-crafting of their conference papers (or related contributions); the peer reviewers for their helpful comments on

earlier versions of many of the current chapters; Alec Mladenovic for his assistance in coordinating the peer reviewing process; James Gilbert and David Bullock for their assistance with the editing process; and Victoria University of Wellington for their financial support for this publication; the Minister of Justice, Hon Simon Power, and the staff of his Ministry for their support for the conference; Grant Robertson for his assistance in securing the venue; and the staff and students, especially Rachel Hyde, of the Institute of Policy Studies and the New Zealand Centre for Public Law for their competent and efficient organisation of the conference.

Lastly we would like to thank the New Zealand Law Foundation, without whose generous financial support this conference would not have been possible.

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Chapter 1
Building the Constitution: Debates; Assumptions; Developments 2000–2010

Elizabeth McLeay

1.1 Building the Constitution 2000: The Conference

A decade before the *Reconstituting the Constitution* conference was held in September 2010, its predecessor, *Building the Constitution* took place. The papers delivered in 2000 were subsequently published in a book of the same name.[1] The purpose of this chapter is to bridge the two conferences (and books), providing some context to the more recent proceedings. I finish by discussing the continuing problem of how the constitution of Aotearoa New Zealand should be changed, the question of appropriate democratic political processes.

The objectives of the conference held at the change of the century were "to stimulate and support the debate – and to help give it useful shape and substance".[2] The proceedings aimed "to give form to discussion that is now sporadic and often conducted in unconnected forums" rather than to arrive at particular conclusions.[3] In his opening remarks Sir Paul Reeves said that the conference had a twofold

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[1] The earlier conference was held on the 7th and 8th of April 2000 and, like the 2010 gathering, was held in the Legislative Council Chamber, Parliamentary buildings. The conference speeches and papers were subsequently published in James (2000b). I am grateful to the School of Law, Victoria University of Wellington, for granting me a visiting position during 2010, thus helping me to write this paper. I also wish to thank Polly Higbee for her helpful comments.

[2] James (2000a), p. 6.

[3] Ibid, p. 6.

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purpose: "to explore the legitimacy of our constitution"; and "to start a debate on the constitution, without trying to determine the endpoint".[4] The conference covered a broad range of topics, as can be seen below, an acknowledgement that, especially when a constitution is "unwritten", the notion of "the constitution" can be widely construed. Many of the topics were similar to those discussed in a previous conference, the *Constitutional Implications of MMP*.[5]

It was recognised that, "The constitution is founded on the belief that the constitution belongs to the whole people, can draw its legitimacy only from a broad-based agreement of the whole people and must not be changed without the approval of the whole people".[6] However, the fact that the conference participants in the 2000 gathering had been invited to attend was criticised in the mass media. The role of the government in co-sponsoring the conference was also the subject of hostile comment. The conference was "part-funded by the government on a decision made by a National party minister in 1999".[7] By 2000, the Labour–Alliance minority government (1999–2002) was in office. It also supported *Building the Constitution*. As Colin James relates, "[A] minor party leader tried to have the conference evicted from the Chamber and alleged a 'hidden agenda' by a supposedly self-anointed elite to advance the republican ambitions of the new Labour Prime Minister. He conjured up spectres of separate development of Māori and non-Māori".[8] This attack, like the criticism of the selective nature of the invitees, stimulated much interest from the media.[9] The publicity around the event demonstrated both the salience of the topic and its controversial nature.

In the next section I analyse the *Building the Constitution* conference's broad themes and debates (Sect. 1.2). I then switch the focus from the areas of disagreement to the areas on which there was substantial consensus (Sect. 1.3). From there I briefly map the constitutional developments of the 2000–2010 decade (Sect. 1.4), in part to provide further context for *Reconstituting the Constitution* but also because those developments nicely illustrate the continuing debates about the nature of New Zealand's constitutional arrangements. In that section I provide a more detailed case-study of one important change: the construction of a New Zealand final court of appeal. I conclude (Sect. 1.5) with some brief observations on the problem of determining legitimate processes when reconstructing constitutions.

[4] Reeves (2000), p. 41.

[5] See: Simpson (1998). The 1995 conference was organised by the New Zealand Politics Research Group and supported by the New Zealand Political Change Project and the Department of Politics, Victoria University of Wellington, and the Department of Political Science and Public Policy and the Centre for Continuing Education, University of Waikato. The Office of the Prime Minister, the Cabinet Office, the State Services Commission, and Te Puni Kōkiri were also involved.

[6] James (2000c), p. 439.

[7] James (2008).

[8] Ibid, p. 1.

[9] Ibid, pp. 1–2.

1.2 Building the Constitution 2000: The Issues

The substantive sessions of the conference held in 2000 focused on ten topics: the nature of the New Zealand nation; the constitution and the external world, especially treaties and international law; the development and nature of the constitution; the place of the Treaty of Waitangi; multiculturalism and the constitution; the future of the position of head of state; the cabinet, public service, and subnational government; parliamentary reform; the roles of judges; and whether or not a written constitution should be created. I briefly describe the main points of interest and contention in each of the above sessions, acknowledging that I cannot do justice to the fullness and complexity of the arguments presented and discussed.[10]

1.2.1 What Constitutes Our Nation?

Constitutional structure and development are closely interwoven with issues of identity and nationhood, it was generally agreed. The complexity of the interrelationships was, at least in part, shown by the significance of "difference", one of this session's main (explicit and implicit) themes. There were differences between the past and the present, between Māori and non-Māori, between men and women, between biculturalism and multiculturalism, and between Britain and its former colony, for example. New Zealanders developed a sense of national identity at the same time as they became more aware of the differences amongst them, an important cultural development in so far as the constitution has been concerned.[11] New Zealand's distance from the rest of the world, historically a dominant literary theme, had diminished due to modern technology; and the tension between the individual and the team, also prevalent in the literature, was echoed in debates about the relationship between the citizen and the state.[12] New Zealand's history had been dominated by binary assumptions, especially between the myths of nature and virtue.[13] These views had been supported, and challenged, by our myths.[14]

When had New Zealanders started questioning their constitutional arrangements? One answer was that, for a mixture of social and economic reasons, the consensus about the fundamentals of the country's constitutional arrangements had begun to break down during the mid-1960s.[15]

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[10] See also the masterly summary by James (2000a), pp. 14–33.

[11] Macdonald (2000); Phillips (2000).

[12] Manhire (2000).

[13] Williams (2000).

[14] Temple (2000).

[15] Phillips (2000).

1.2.2 *The Constitution and the World Around/the Constraints of Treaties and International Law*[16]

The eight papers on this topic demonstrated wide-ranging views. The external context of treaties and international law must be considered when developing a constitution, and New Zealand's small size made these external forces especially important.[17] This had been recently recognised by the House of Representatives when its select committees acquired the remit to scrutinise international treaties, a sign that the legislature was increasing its influence over the executive. Several speakers, coming from different philosophical perspectives, addressed the relevance of globalisation (a fashionably newish concept in 2000) to the constitution. Although the globalised world offered New Zealand many opportunities for a small nation with its own sense of identity,[18] globalisation, a complex phenomenon, also had detrimental effects when people's needs were not being addressed.[19] Globalisation was not only about trade and international obligations and relationships, however, for "Globalised society provides us with a wide array of international ideas. The challenge is to secure the room to form our own ideas".[20] The principles of a good constitution insofar as international relations were concerned were similar to those for other policies: governmental transparency, due process, accountability, consistency, and so forth; and a constitution should enable the development of bilateral and multilateral relationships.[21]

A different interpretation was that contemporary globalisation should be understood in the context of a very long history of colonisation. The decolonisation of New Zealand must take place; and a new relationship between Māori and the immigrant peoples must be developed to "provide a framework for the elaboration of a non-colonial form of governance arrangement, and for the creation of a society in which the history and well-being of some is not secured by obliterating the history and well-being of others".[22]

Several participants took the opportunity to discuss individual rights. One view was that the state should protect "negative" rather than "positive" rights and protect property and freedom of contract rather than provide "entitlement" rights. Thus, the main purpose of a constitution was to limit the power of the state in order to protect

[16] In the "Contents" of *Building the Constitution* (James 2000b), this section is labelled "The constraints of treaties and international law". On p. 104 it is labelled "The constitution and the world around".

[17] Mansfield (2000).

[18] Fletcher (2000).

[19] Kelsey (2000).

[20] Hawke (2000).

[21] Scott and Barker (2000).

[22] Sykes (2000).

individuals. However, judiciable rights were undesirable.[23] In similar vein, it was argued that economic rights should not be included in a constitution.[24] New Zealand's liberal voting rights, enfranchising permanent residents, might be reviewed, given the interrelationship between immigration and citizenship.[25]

1.2.3 What Constitutes the Constitution?

This fundamental question was addressed through the perspectives of different disciplinary approaches. One historical question concerned the origins of the modern scrutiny of New Zealand's constitutional arrangements and why this had happened. Was the mid-1960s the turning point, as proposed in an earlier presentation?[26] Or was it 1980?[27] What were the different trends and significant dates in New Zealand's constitutional history? It was observed that the period of the 1950s to the early 1980s, in contrast to later years, was a time of "Stability and Volatility".[28] From the beginning of the 1980s several of the engines of the constitutional changes that took place during that period were "independence", "public disenchantment", "the Māori renaissance", and "non-Māori resistance".[29]

The lawyers viewed the question through institutional lenses. When New Zealand's constitutional arrangements were reduced to their essential elements, these were: the sovereign; the executive; Parliament; and the courts.[30] Each element raised questions about its activities, the actual and desirable division of powers, and the expression of the rules that define the interrelationships.[31] Areas identified for future reform were: the adoption of a written constitution; entrenchment of the Treaty of Waitangi; abolition of appeals to the Privy Council; replacement of the Mixed Member Proportional (MMP) electoral system with another proportional system; reform of parts of the MMP system; entrenchment of the rights and freedoms under the Bill of Rights Act 1990; introduction of a constitutional guarantee to just compensation for the exercise of eminent domain (the taking of private property for public purposes); establishment of a Judicial Commission for making judicial appointments and promoting judicial accountability; and the introduction of a "paper" or physical separation between the political executive and

[23] Deane (2000).
[24] Sundakov (2000).
[25] Ibid.
[26] Phillips (2000), especially pp. 73–76.
[27] James (2000a), p. 3.
[28] Oliver (2000), p. 158.
[29] James (2000d), p. 161.
[30] Palmer (2000), p. 184.
[31] Ibid, pp. 184–185.

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).