Caroline Morris · Jonathan Boston
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Reconstituting the Constitution

of special laws and conventions, including the entrenched provisions of the Electoral Act 1956 (and, we might add, its successor, the Electoral Act 1993).[125] It might also be the case that the fact that MMP had been implemented through a referendum affected interest group and voter notions of due process on constitutional change issues. Indeed, citizens favoured being given a direct voice on the abolition of appeals to the Privy Council. A New Zealand Herald–Digi Poll on the eve of abolition asked, "Do you support the abolition of appeals to the Privy Council?" The responses were (leaving aside the non-responses and don't knows): Yes, 36.1%; No, 47.9%. When asked, "Do you think this is a change that should be put to a referendum?" 79% agreed while 16.2% disagreed.

The debate on the Supreme Court Act 2003 thus illustrated many of the dilemmas and questions about constitutional change, both substance and process, that had dominated the 2000 constitutional conference.

1.5 Constitutions and the Problem of Process

The question of legitimate political process is perhaps the most fundamental of all constitutional issues. This can be seen from the deliberations at the conference on *Building the Constitution,* from the deliberations of *Reconstituting the Constitution* that provide the chapters of this, later book, and from the story of the constitutional developments during the intervening decade. Change processes that are fair and democratic are at the heart of constitutionalism. If the elites get the process of change wrong, then the legitimacy of the reforms themselves can be challenged. But getting the process right is not easy, especially when the constitution itself provides so few indicators of how it can be legally, legitimately and feasibly rebuilt. The Constitution Act 1986 and the Electoral Act 1993 stipulate that certain fundamental features (including the age of voting, the type of electoral system and the triennial parliamentary term) can be changed only by referendum or by three-quarters of all MPs voting in favour of a reform. But most aspects of the New Zealand constitution including, for example, the Māori seats, can be changed by simple majority of the House of Representatives. Neither the constitutional conference in 2000 nor its successor in 2010 tackled the question of process directly, focusing rather on the substantive issues relating to the New Zealand constitution.

There are myriad questions about the political process of constitutional change. Of course citizens should be involved, but how? Through consultation and submissions or through the ballot box, for example? And on what constitutional issues should Māori make the decisions, or make the decisions as one of the two Treaty partners, or contribute as individual citizens? Which issues should be decided upon by Parliament? By judges? By the people? The whole question of

[125] Scott (1962), p. 54.

electoral finance, salient from the 2005 general election onwards, demonstrated the difficulty of the relationship between constitutional change and democratic political processes, as has the ongoing debate about the Māori seats, and the substitution of the New Zealand Supreme Court for taking appeals to London.[126] There are many other issues that illustrate the problem of process.

Further, where are the veto points on change? If a group of political actors, whether they are citizens, judges, other public servants, or elected representatives, implements constitutional change, how can the reforms be challenged if they do not fit with democratic notions of constitutionalist political process?

When a country has a codified constitution that sets out its key elements and its amendment processes, then these questions about proper procedures, although still difficult to determine in their detail, are easier to decide upon: the inherent value judgements about the relative rights and roles of citizens and elites are historically allocated and thus less prone to contestation.[127] On the other hand, as the conference participants in 2000 recognised, at least New Zealand's largely unwritten constitution has enabled its evolutionary and pragmatic habit of changing its constitution to develop. This, in turn, permits incremental re-examination of the ways in which power is distributed and arbitrated upon. Process can be developed piecemeal, along with substance. Sometimes this can be a satisfactory way of doing things, sometimes it is not. Thus, determining constitutionalist processes is perhaps a key problem for Aotearoa New Zealand, and one that remained unsolved at the end of *Building the Constitution*.

The topics discussed in 2010, in *Reconstituting the Constitution,* were all highly significant, as they were indeed at the earlier conference. In 2010 they included, as the rest of this book shows: republicanism; electing, and controlling the behaviour of, MPs; the influence of international law and treaties and the trans-Tasman relationship; and protecting the environment and future generations. The sessions also included papers on comparative constitutional change, focusing on Britain, South Africa, and Australia. Each of these three case-studies provided important lessons on how (or how not to) change constitutions, and how political, social and economic context influences the pace and nature of constitutional transformation. In general, however, process was subservient to substance in the 2010 constitutional conference, as it had been a decade before. In future we need to remember that, when it comes to changing the constitution, it is not only what we do but how we do it that matters.

[126] See also Geddis (2007), especially pp. 207–258.

[127] However, the change processes involved in a codified institution remain difficult. For example, Australia has compulsory voting. This is not part of "the constitution". Could the Australian Federal Parliament legitimately decide by simple majorities of each house to abolish compulsory voting? There are always significant elements of a country's constitutional arrangements that form part of the left-overs and add-ons to the key documents.

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Chapter 2
Reconstituting the Constitution: Opening Address I

Greg Robins

2.1 Introduction

It is an honour for Catherine Harwood and me to present the opening addresses to this Conference. I would like to thank Dr Petra Butler and Professor Jonathan Boston for inviting me to speak, and the Institute of Policy Studies and the New Zealand Centre for Public Law for hosting this Conference.

When we were invited to present the opening addresses, it was suggested we should include personal anecdotes relating to the constitution. How had it affected us? As young lawyers, as New Zealanders? How do we see it changing, evolving and operating in our everyday lives? What form would our ideal constitution take, and what should be in it?

Like many young New Zealanders, and until beginning tertiary education, I had no in-depth knowledge or awareness of our constitutional history or arrangements. There were no copies of the New Zealand Bill of Rights Act 1990 on our classroom walls and I never pledged allegiance to a flag, a set of laws, a form of government, or a Queen, Governor-General, Prime Minister or President. I probably knew (or thought I knew) more about the American Constitution than the New Zealand equivalent.

Some might think that is a deficit. But consider this: growing up, I had no reason to be concerned about police brutality, or any restriction of access to education, or the right to freedom of speech or peaceful assembly. Our country was not born of a constitutional struggle and change within our borders is regularly peaceful and piecemeal. Like many young New Zealanders, I knew I lived in a country where we

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could achieve whatever we wanted to achieve, without fear of interference from the government.

It needs to be said that I was fortunate enough to be brought up in a family and in an environment that gave me access to an excellent education, and there are many people today who do not have those same opportunities. As such, and given the relatively peaceful history we have enjoyed, is it any wonder that as a generation, or even as a country, we are obsessed less with our constitution and more with who trains as backup to Dan Carter? There is something to be said for living in a country where you can afford to be ambivalent about our constitutional arrangements.

2.2 The Relevance of Constitutional Change

The challenge we face now is making our constitution relevant, and finding a way to include the people of New Zealand in shaping it. The danger of allowing for ambivalence is that we will be unprepared to approach constitutional change in an informed manner when we need to. Because constitutional change *is* happening, and it *does* affect each of us.

In just the 10 years since the *Building the Constitution* conference, held here in April 2000, we have seen the application of the Human Rights Act 1993 to the government, the creation of our indigenous Supreme Court and the abolition (and re-introduction) of knighthoods and the title of Queen's Counsel.[1] We are witnessing ongoing debate about the foreshore and seabed and a proposal to remove the right of all prisoners to vote.[2] We will soon deal with the complications and power of the Auckland "Super City" and we will vote in at least one referendum on electoral reform. And this week, in advance of this Conference, we have seen the reignition of the debate of the role of the monarchy in New Zealand's constitutional arrangements.

2.3 The Contents of a New Constitution

It is obvious that constitutional change surrounds us constantly and so we must return to the original question. What form would our ideal constitution take, and what should be in it? Where should we go next?

My own view is that certain developments are inevitable and desirable: I believe that we will, one day, become a republic which will have at its core one or more

[1] The Lawyers and Conveyancers Amendment Bill, which would reinstate the title of Queen's Counsel, passed its first reading on 13 October 2010.

[2] The Electoral (Disqualification of Convicted Prisoners) Bill passed its second reading on 20 October 2010.

documents that have "supreme law" status. We should retain the diversity and collaborative spirit that proportional representation promises (and occasionally delivers), and we should seek to protect our founding document – the Treaty of Waitangi.

Like a republic, we already elect our representatives in Parliament in fair and regular elections, and Parliament passes laws after consulting with the New Zealand public through select committees.

We have a judiciary which has delivered judgments on our Bill of Rights Act for 20 years and is already well-versed in the principles of the Treaty.

None of those ideas is new or radical. Nor do they represent an overhaul of our current system of government. But in order to achieve these goals – or indeed to keep the status quo – I am far more interested in the steps that are taken to create and shape our constitution as the manifestation of the will of the people. As a young lawyer, and as a New Zealander, I am keenly interested in the fairness of the process and the informed nature of the debate. Rather than asking "what should be in our constitution?", the key question for me is "how do we get there?".

2.4 The Need for a Conversation

Any constitution must be well-understood by the public and built from the ground up: there must be democratic "buy in" from all sectors in society.[3] We are at the point in our nation's history where any constitutional change of the kind being discussed at this conference requires the broad agreement of the people.

Gaining that broad agreement, that legitimacy, means more than giving the people of New Zealand a list of choices in a referendum, holding select committees, or brokering deals between politicians.[4]

In order to change the constitution, we need to have a conversation: a conversation which takes place outside Parliament and our universities, and takes place in the living rooms of every household. A key part of that process is providing for better civics education in our schools, the fostering of public understanding of constitutional issues, and facilitating ongoing public discussion about our

[3] That is not to say that all sectors of the public need to agree on the final form of the constitution, but instead should have the right of full participation in the debate and be able to endorse it as a legitimate, working model. As the Royal Commission on the Electoral System noted (in relation to our voting arrangements): "Members of the community should be able to endorse the voting system and its procedures as fair and reasonable and to accept its decisions, even when they themselves prefer other alternatives." (Royal Commission on the Electoral System 1986, p. 12.)

[4] The 2005 report of the Constitutional Arrangements Committee noted that processes to change New Zealand's constitutional arrangements have typically involved public discussion papers, expert advisory groups, Law Commission reports, referenda, select committee consideration and Royal Commissions (Constitutional Arrangements Committee 2005, p. 21).

constitution – as recommended by the Constitutional Arrangements Committee.[5] Every citizen must feel as though he or she has had the opportunity to engage in matters of the state and have their voice heard. We must come up with innovative ways to encourage the participation of the public in shaping our state. Only then can any constitution claim to have the will of the people behind it.

But is this easier said than done and is it simply a lofty ideal? Our Canadian friends did not think so. To give but one example, in 2003 a Citizens' Assembly on Electoral Reform was established by the government of British Columbia to consider whether that province should change its electoral system. Ontario followed suit in 2006. Both Assemblies were composed of randomly selected citizens and spent over 8 months apiece learning about and debating different methods of electoral systems. Public hearings were held and experts were invited to speak. The British Columbia Citizens' Assembly recommended the adoption of a form of STV (Single Transferable Vote)[6]; their Ontario counterparts recommended MMP (Mixed Member Proportional).[7]

Unfortunately, neither proposal was accepted by the public in subsequent referenda, although the British Columbia model came very close to the required 60% "yes" vote.[8] Regardless of the result of the referenda, the *conversation* that took place was one to admire. You could not criticise the Assemblies for being elitist, ill-informed, simplistic, or biased in the result. They were drawn of the people, and their one task was to recommend an electoral system that would serve the people. By all accounts, the experiences of the Assembly members were overwhelmingly positive. To quote the Chair of the Ontario Assembly:

> The Assembly members constantly amazed me with their enthusiasm and deep commitment to the task they were given. Throughout the eight-month process, not one member withdrew from the Assembly. Members applied themselves to learning about electoral systems. They talked to people in their communities about the work of the Assembly and chaired public consultation meetings. Some members read hundreds of written submissions. Others participated on working groups to advise on the Assembly process or to do more research in specific areas. Many used an online forum to share information and discuss issues between meetings.[9]

[5] Constitutional Arrangements Committee (2005), p. 5. In response, the government agreed to give further consideration to the idea of establishing generic principles to guide significant constitutional change, and that more should be done to continue to improve civics and citizenship education in schools. However, the Committee's recommendation that the government might consider whether an independent institute could foster better public understanding of, and informed debate on, New Zealand's constitutional arrangements was not accepted. See New Zealand Government (2006), pp. 2–4.

[6] British Columbia Citizens' Assembly on Electoral Reform (2004), p. 1.

[7] Ontario Citizens' Assembly on Electoral Reform (2007), p. 1.

[8] "BC-STV" received majority support in nearly all of the electoral districts, but received only 57.69% of the popular vote (Elections BC 2005, p.9). A subsequent referendum in 2009 gathered only 39.09% support for BC-STV (Elections BC 2009, p. 17).

[9] Ontario Citizens' Assembly on Electoral Reform (2007), p. 24.

How lucky we would be to have such enthusiasm for a topic as complex and – let's face it – as dry as electoral law. How rich that conversation must be.

2.5 The Challenge for the Future

I wish to conclude by emphasising that it is crucially important to embrace new and innovative ways of shaping our constitution. Regardless of the form of the constitution, or what it includes and what it does not, the people of New Zealand will be looking to have their say in a constructive and meaningful manner. All efforts must be made to encourage inclusion and the expression of ideas and to discourage apathy. Those present today must take responsibility for starting that conversation if we, as a nation, are to continue to create our own constitution.

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