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Reconstituting the Constitution

Springer

Devolution, and Europe

- Implement the Calman Commission proposals for Scottish devolution, and hold a referendum on further Welsh devolution;
- Establish a commission to consider the West Lothian question;
- Legislate to ensure that any future treaty that transfers powers to the EU will be subject to a referendum.

Transparency

- Public bodies to publish salaries of senior officials. On-line disclosure of all central government spending and contracts over £25,000;
- A new "right to data", so that government datasets can be used by the public.

Bill of rights

- Establish a commission to investigate the creation of a British bill of rights.

5.3.2 Prospects for the New Reform Agenda

The Liberal Democrat leader Nick Clegg has been put in charge of delivering this agenda. The Constitution Unit has published a detailed commentary on the feasibility of delivering all these commitments,[20] so they will not be fully discussed here. There will be a focus on just two: fixed term parliaments, and the referendum on AV. The new government has quickly introduced bills on both of these, which had their second readings in September 2010.[21]

On fixed-term parliaments, the main issues are the length of the term, and how to provide a safety valve to allow for mid-term dissolution. The government boldly proposes a fixed term of 5 years. That is long by Antipodean standards, with a maximum of 3 years. Australian states which have introduced fixed terms have opted for 4 years; as have Canadian provinces, and Canada at federal level. Most European countries have 4 year fixed terms. In recent British history 4 year parliaments have tended to be the norm, with governments holding on for 5 years only when they feared they would lose: Brown being the most recent example. So a 5 year fixed term is long and will be contested, particularly in the Lords.

The government proposes a dual safety valve. For the opposition there will continue to be the traditional mechanism of a vote of no confidence, passed by a simple majority, which requires a government to resign. There is for the first time a time limit: the Bill provides that if a new government which commands confidence cannot be formed within 14 days, Parliament must be dissolved.[22] The novel proposal is where the government wants a mid-term dissolution. Here, the threshold

[20] Hazell (2010).

[21] Fixed Term Parliaments Bill; Parliamentary Voting System and Constituencies Bill.

[22] Clause 2(2)(b) of the Fixed Term Parliaments Bill.

has been raised to a two thirds majority of all MPs, requiring that any government seeking to dissolve must obtain significant cross party support. The precedent is the dissolution mechanism created for the Scottish Parliament. This threshold can be seen as high, and governments wishing to dissolve may try to engineer votes of no confidence, as has happened in Germany.

The other point to note is that the Bill abolishes the prerogative power of dissolution. The Crown will no longer have the reserve power to dissolve Parliament, or to deny a dissolution: if the bill is passed, dissolution will be regulated entirely by statute, via the two mechanisms previously described.

Next, the referendum on changing the voting system from first-past-the-post to the Alternative Vote (AV). It is an ironic choice. It is not supported by the Conservatives, who remain staunch defenders of first-past-the-post (even though the system currently favours Labour, and operates against the Tories).[23] It is not supported by the Liberal Democrats, who have long campaigned for STV. The one party which did have a manifesto commitment to hold a referendum on AV is the Labour party; but they may decide to vote against the Bill. So the electorate risk being thoroughly confused.

The public know nothing about electoral systems, and care even less. Electoral reformers who want PR will press for a multi-option referendum that includes it, as New Zealand is to have in 2011. Britain is to be offered only the choice of AV. Those voters who try to understand risk becoming even more confused when the government tries to explain the difference from first-past-the-post. AV is not proportional. Had the 2010 general election been played out under AV, it is estimated that the Liberal Democrats would have gained 20 more seats, and the Conservatives 20 less. People are going to be really puzzled that a referendum is being held about such an apparently small change. In their confusion, they will either abstain; or vote to stick with what currently exists. That will be the second real test for the Liberal Democrats in the coalition (the first being the October 2010 Spending Review, which introduced 25% spending cuts in most departments). If the coalition cannot deliver the Liberal Democrats' holy grail of electoral reform, what is the point? The strains of coalition government may lead the Liberal Democrats to split, as New Zealand First split on the breakup of their coalition with National in 1998.

5.4 Unwritten Constitutions and Their Guardians

The chapter will close with four concluding remarks about unwritten constitutions, and their guardians. First is the importance of constitutional conventions, which are particularly important in countries with an unwritten constitution. Three have been

[23] Curtice (2010), pp. 632–635.

mentioned in the course of this chapter. There is the convention that Westminster, despite its sovereignty, will not legislate on devolved matters in Scotland, save with the consent of the Scottish Parliament. In appointments to the House of Lords, there is the proportionality principle, that new appointments will be made in proportion to the votes cast at the last election. And under the new Human Rights Act, there is emerging a convention that the government will always respond to a declaration of incompatibility by the courts, and invite Parliament to remedy the breach, although it is not obliged to do so.

These conventions have all developed in the last 10 years. To be upheld they need to be recognised, and ideally to have a name. Similar conventions exist in New Zealand, and new ones since the advent of MMP. Some are recognised in the Cabinet Manual, but there must be others which are not officially recognised or defined in that way. How can these constitutional conventions be recognised, and who should uphold them? The first of my three new British conventions does have a name (the Sewel convention), and is enshrined in documents of the British government and Scottish Parliament.[24] The other two conventions do not. There is a task here for academic commentators, following Jennings' definition of a convention, to try to crystallise these new conventions, explain their rationale, and give them greater public recognition and understanding.[25]

Second is the unresolved tension between the competing principles of parliamentary sovereignty and popular sovereignty. This is particularly evident in relation to the place of the referendum in the British and New Zealand systems. Referendums have been held in the United Kingdom before introducing devolution in Scotland, Wales and Northern Ireland, and before recreating the Greater London Authority with its directly elected mayor. It is accepted that no change should be made to the voting system for the House of Commons without a referendum. But few people have suggested that there should be a referendum before the House of Commons is reduced by 50 MPs. Half the members of the House of Lords were removed without a referendum, and no one currently proposes that a referendum should be held before deciding whether to elect the remaining half.

In New Zealand referendums, including a binding referendum, were held on the voting system, with another due in 2011; and on the length of the parliamentary term. But there was no referendum on the plans for the new Auckland Council, similar to the Greater London Authority. A citizens-initiated referendum was held to reduce the size of Parliament from 120 to 99 members, and carried by a large majority, but the result was ignored. Can any doctrine be developed in both systems about when a referendum should be held, and when the result should be respected by government and Parliament? Inquiries in both countries have tiptoed round this issue, and it may be that there is no satisfactory answer beyond that given to the 2005 Constitutional Arrangements Committee: that whether a referendum is

[24] Devolution Guidance Note 10, 2003. Scottish Parliament Standing Orders, chapter 9B.

[25] Jennings (1933).

required for any particular constitutional reform is ultimately determined by political judgment.[26]

The next point is the growing importance of constitutional watchdogs. These have mushroomed in Britain as a side effect of constitutional reform. There are now a dozen specialist constitutional watchdogs: eight of them created in the last 10 years. The new ones include the Judicial Appointments Commission; the House of Lords Appointments Commission, which appoints the non-party peers; and the new Independent Parliamentary Standards Authority, which regulates MPs' expenses and next year will decide on their salaries and pensions. There are fewer such bodies in New Zealand, but in both countries there is a growing tendency to create independent bodies as Platonic guardians of a corner of the constitution, because of a lack of trust in politicians and the political process. But in a democracy even the wisest Platonic guardians need lines of accountability. How can such constitutional watchdogs be held properly accountable, and to whom?

Finally, the need for a written constitution. Britain will not get one, so at one level it is futile to make the case for one. But anyone with some knowledge of written constitutions must doubt whether it would necessarily be a gain. Unwritten constitutions can be just as good as written ones, and in some respects may be better, because they can be updated more easily. But they do need to be nurtured and valued. What matters in a constitution is not so much the written text but the underlying values, and whether people are willing to stand up and defend them.[27] Unwritten constitutions need guardians to protect and defend them and to explain their underlying values. That is a task not simply for specialist constitutional watchdogs; it is a task that concerns us all. We should nurture our unwritten constitutions as a precious part of our heritage; and as with the rest of our heritage, each generation should seek to pass it on in better order to the next.

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[26] Constitutional Arrangements Committee (2005) paras 74–76 and Appendix H. See also House of Lords Constitution Committee (2010).

[27] Palmer (2007).

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Part 3
The Republican Question

Caroline Morris

A perennial topic in New Zealand constitutional debate is the question of New Zealand's constitutional status: should the country remain a monarchy, or is the time right and the reasons compelling enough to make the transition to a republic? A number of Prime Ministers have said that they think that the move to republic status is one that New Zealand will eventually make. However, unlike Australia, little has been done by way of serious governmental consideration of the issues or asking the question of the New Zealand people. This inertia, frustrating though it may be for advocates of change, just as it is comforting for proponents of the status quo, has created a space for academics and other interested parties to engage with both the symbolism and practicalities involved in the republic versus monarchy debate in a considered and measured way.

The question of who should occupy the office of Head of State – a member of the British royal family or an indigenous New Zealander? – raises in turn a number of other questions: When should that change occur? What powers should that person have? Should the Head of State be elected or appointed, and by whom? What is the effect on (or of) the Treaty of Waitangi? At times the discussion has threatened to move from its foundations into other constitutional topics such as the status of the Bill of Rights, or codification of the constitution more generally, or the design of the flag, none of which is strictly necessary to decide the fundamental points at the heart of the debate.

The *Reconstituting the Constitution* conference saw the presentation of arguments from opposing sides of the debate: Dr. Michael Cullen, a long-serving MP and former Deputy Prime Minister, speaking as a monarchist, and Dean Knight of the Law Faculty at Victoria University of Wellington as a republican. But those expecting a fiery clash would have been disappointed. The tone of the debate was instead restrained and moderate in tone – in fact the two chapters from these speakers contained in this section are mostly in agreement that the real question is, as heralded by various Prime Ministers, one of when, not whether. As this brief introduction to these papers reveals, this session of the conference was a remarkable illustration of the maxim *plus ca change, plus c'est la meme chose*.

In Chap. 6 Michael Cullen addresses several of the arguments put forward by republicans for moving towards a republic, and declares them "less substantial than at least their proponents seem to believe". These include concerns about the constitutional independence of New Zealand, her national identity, and the introduction of other constitutional reforms. He concludes nevertheless that the time will come for New Zealand to become a republic, not least because of the changing demographic in New Zealand. He advocates that no change should occur during the present Queen's lifetime, but at that point, the people should decide whether to continue as a monarchy. If the answer is no, then an election should be held, or perhaps an appointment made by Parliament, depending on the powers the new Head of State will have. Alternatively, Parliament could simply legislate for the present Governor-General to become the actual, rather than acting, Head of State. The status of the Treaty of Waitangi should remain unaffected.

In Chap. 7 Dean Knight presents the case for "soft republicanism". He disagrees with Dr. Cullen's conclusion on the strength of the claims about national identity, saying "symbols and identity matter". Apart from this point, the two speakers find themselves largely in agreement, as Knight expresses his preference for the existing powers of the present Head of State to be transferred to the Governor-General, for the Governor-General to be appointed through a super-majority parliamentary vote, for the question of whether to become a republic to be decided by referendum, and for the status of the Treaty to remain unchanged.

Chapter 6
A Republic for New Zealand? A Modest Approach

Michael Cullen

6.1 Introduction

It might be thought that today I will argue for the indefinite retention of the current constitutional monarchy and against the repatriation, or perhaps one should say patriation, of the New Zealand head of state.

And I do have to confess to a certain emotional attachment to the monarchy. As a 2 year old I waved in the street at the current incumbent on her wedding day and, 6 years later, watched her coronation live on television. And as a former Minister of Finance, the idea of a head of state that is almost entirely paid for by another country has some attractions, including the fact that the Queen's credit card, if it exists, is of absolutely no interest to the New Zealand media. But my arguments are more nuanced than those facts might suggest.

6.2 Addressing the Republican Arguments

The first point I wish to make is that some of the arguments in favour of moving to a republic are less substantial than at least their proponents seem to believe. These arguments range from the profound to the trivial. At the latter end of the spectrum

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Before retiring from a 27-year political career in 2008, Dr Cullen held the positions of New Zealand's Deputy Prime Minister (2002–2008), Minister of Social Welfare (1987–1990), Minister of Finance (1999–2008), Minister of Revenue (1999–2005), Minister of Tertiary Education (2005–2007), and Minister in charge of Treaty of Waitangi Negotiations (2007–2008). He also twice held the position of Attorney-General. Dr Cullen is now the Deputy Chair of New Zealand Post and acts as an adviser to a number of Māori iwi on a range of matters.

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are arguments around the behaviour and attitudes of some members of the Royal Family. Certainly the Prince of Wales and his father evince some strange characteristics. But talking to plants and extremely conservative views on architecture are scarcely confined to Prince Charles. And as for the Duke of Edinburgh, his insensitivity and prejudices would in our nation make him highly suitable material for a breakfast television or talkback radio show host – quite possibly the kind of person we could end up with as an elected president! Indeed, if I were choosing a head of state on the basis of their being intelligent, well-informed about world affairs, and unlikely to do or say something very stupid and the choice were between the Queen and the last United States President there would be no hesitation.

6.2.1 The Constitutional Framework

More serious is the argument that being a monarchy somehow influences the independence or nature of the politics of New Zealand and, therefore, in some undefined way we are less than a nation as a consequence. There is remarkably little evidence for these assertions. In practical terms, of course, the real functions of the head of state are carried out by the Governor-General who may be, in theory, appointed by the Queen but who is, in reality, appointed by the government of the day. The fact that we share the same head of state with the United Kingdom, Canada, Australia and others does not lead any informed person, here or elsewhere, to assume that we are not all entirely independent nations. For some, notably Canada, being a monarchy can be seen as an expression of independence given the real threat to that status in its fullest sense, a point I will return to later.

As for the general framework of politics, it is worth reminding ourselves that the current constitutional monarchies are amongst the most stable democracies in the world and some of those monarchies amongst the most egalitarian nations. The blame for the fact that we are not one of the latter can scarcely be laid at the door of Buckingham Palace. Certainly anyone trying to argue that becoming a republic will necessarily make us more stable, democratic or egalitarian would be stretching credulity too far. At the very least it shows a stunning ignorance of the nature of most of the world's republics. And we can be sure it will not narrow the wage gap with Australia, which only 18 months ago was supposedly the most important challenge facing New Zealand.

6.2.2 New Zealand National Identity

This brings me to my second point. The argument that becoming a republic will enhance a distinctive New Zealand identity is particularly weak on two grounds: it is attacking a problem of decreasing relevance and it does not deal with the real issues which are relevant to identity and independence.

The identity argument is one that, at base, is really about whether or not the colonial heritage is being unnecessarily kept alive by the retention of the monarchy. In other words the monarchy expresses a kind of colonial cringe, a continuation of a belief in Mother Britain, the idea of "Home" and all that goes with that. If one were to engage in this debate with young people in their teens or twenties or even older I suspect such assertions would be greeted less with disbelief than with incomprehension; they have simply outgrown any such notions. It is largely an obsession of some New Zealanders of much older years who fail to recognise that, on that score at least, they have already won.

My argument, however, is that that victory may be a Pyrrhic one. British political and cultural influence on New Zealand has been waning for many decades and is now minimal. The decisive moments in that evolution are many – from the rise of Hollywood, through the fall of Singapore, to the post-Second World War era. And, without wanting to appear anti-American, it is obvious, I would have thought, that the primary threat to an independent New Zealand identity has for decades inevitably come from the United State's cultural and economic dominance in the world.

The examples for us are numerous. Our accent, syntax, and vocabulary are moving measurably to American norms – listen particularly to teenage girls speaking. When we decimalised our currency we decided, with stunning lack of originality, to call it dollars and cents. Our television screens are dominated by American programmes and, where they are not, by those of its self-proclaimed deputy sheriff in the Asia-Pacific region. Many young Māori and Pasifika males, in particular, imitate the clothing, music, and styles of African-American youth so that even in our alienation we adopt the symbols of others. Perhaps only in our choice of sports does the British part of our cultural heritage remain dominant. Plus, of course, and significantly for this conference, in much of our constitutional arrangements, though there we have and are developing our own unique practices and traditions.

It would be supremely ironic if the move to a republic ended up becoming a Trojan horse for other constitutional changes which would reinforce the extent to which we mimic American norms, a point I will shortly return to in a different context. At this point what I want to turn to is therefore the need to address those issues which have far more relevance to the development of a unique Kiwi identity than whether our formal head of state remains Queen Elizabeth II. And at this stage I should at least note that for many Māori the links with the monarchy remain an important aspect of that identity as they are seen as inextricably linked to the status of the Treaty of Waitangi. It is far from clear that a move to a republic could be successfully accomplished without addressing the legal status of the Treaty.

6.2.3 The Treaty of Waitangi

In terms of the symbols of identity it is at least arguable that the Treaty is now far more important in any case than the nature of the head of state. Many of us might

also see the issue of the flag as being more important. It is certainly odd to find people who are strongly republican but want to keep the current flag which symbolises a relationship with Britain which no longer exists in reality. This, along with the confusion with the Australian flag and the lack of any uniquely New Zealand feature surely means that sooner or later the calls for a new flag must be heeded. I hanker after an adaptation of the Tino Rangatiratanga flag with the black changed to blue. The red, white, and blue colours would give a sense of continuity. The red can represent our part of the Pacific Plate on which we sit, the white Aotearoa, and the blue the sky, on which a Southern Cross could be superimposed. The original red, white and black flag would of course remain for its original purpose and meaning.

6.2.4 Economic Sovereignty

But there is a deeper set of issues which need addressing if what we want is a greater sense of our independence and uniqueness. These particularly revolve around the weakness of our economic sovereignty and the kinds of policies required to address that. In the end constitutional change within a context of economic dependency seems to me to be like making the icing without the cake. Obviously this is not the forum to discuss the best policies though in order to avoid misunderstanding I would simply note that economic sovereignty is not to be confused with economic isolationism.

6.2.5 Other Constitutional Reforms

Where I do believe it is important to limit the debate at this stage is in relation to the matter of a republic. As I said before, there is no need for this to turn into a Trojan horse for other constitutional changes. Issues such as a second chamber or a written constitution have no necessary relationship to the way in which we choose a head of state. Even more, moving to a republic does not require moving away from the sovereignty of Parliament and endowing the Supreme Court with the power to declare laws unconstitutional. In fact, there is no need to change the current powers of the Governor-General at all. As a ceremonial position in a small and active democracy it has served us well.

One of the virtues of the current arrangements is that arguably they lead to a higher level of political participation than in many countries with formal constitutions and powerful judiciaries simply because the political process is the means whereby change can be achieved. The politicisation of the courts and the police is scarcely something to admire or emulate.