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Reconstituting the Constitution

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step too far for pragmatic New Zealanders and risks providing false hope for the electorate of some massively revamped – and politicised – Head of State role. Again, soft republicans see this as an unnecessary complication and risk.

The final element of the *who* question is the brand: what should be the name or style for new Head of State? As mentioned earlier, many assume the mantle of President is inevitable. But the constitution reformer's brush is not so limited. We can call them whatever we want. The language of President would seem to be awkward and connotes more dramatic reform.

A truly soft republican might therefore suggest that "new" title for the Head of State continue to be the same as the old title: Governor-General. While unprecedented, retaining the title of Governor-General minimises any change and is consistent with the brief of merely entrenching the reality of our Head of State role. Some might, though, worry that the retention of the title implicitly retains links to the Royals and does not do enough to repudiate the Governors-General's now subordinate status.

Another option might be adopting the generic title "Head of State". While perhaps lacking in grandeur, such a label would not be objectionable. Our Samoan cousins adopted this Head of State style in their constitution, but have also adorned it with the indigenous title "O le Ao o le Malo".[25] That approach seems sensible. One might expect over time the office of Head of State or Governor-General might be gifted a Te Reo title by Māoridom that may capture the essence of the revitalised role.[26]

7.4 What?

The *what* question – the question of the powers, functions and duties of the Head of State – is easy for the soft republicans. The new Head of State will be imbued with exactly the same functions, powers and duties as the monarch. Reforming legislation can make this clear with a generic statement detailing the transfer of power on these terms. The prerogative powers of the monarchal Head of State will continue with the new indigenous Head of State. This is the most modest and efficient approach. A more complex and time-consuming task is to create a catalogue of all the monarch's powers and to provide for specific transfer in each and every case.[27] At least in the first instance, I think this is an unnecessary and

[25] Samoan Constitution, s 16.

[26] The current Te Reo translation of the Governor-General's position is Te Kāwana Tianara o Aotearoa.

[27] See, for example, the present Law Foundation-funded project being undertaken by Dame Alison Quentin-Baxter and Professor Janet McLean (Law Foundation (2009)) to identify all the powers and functions of the monarch.

time-consuming task. Generic transfer is sufficient in my view, but the legislation might consider setting up a process for legislative references to be amended in due course following the ultimate transition of power.

More radical reformers will want to consider stripping the new Head of State of some of the prerogative powers or codifying the constraints on their exercise. Concerned about the (largely theoretical) power vested in the monarch and de facto Head of State today, they are worried that it will be exercised in a counter-democratic fashion. Our constitutional conventions, values and culture ensure, however, that this power is exercised consistently with the democratic imperative. We might consider codifying those conventions,[28] but this unnecessarily risks misstating them or making them overly rigid. For example, the conventions around government formation have evolved consistently with the evolution of our democratic systems under MMP and are generally thought to be working well.

We might also consider removing the reserve powers of the Head of State, as well as vesting the prerogative powers in those constitutional actors who in reality exercise them as responsible advisors. Professor Bruce Harris has provided a blue-print for such change.[29] Again, though, the soft republican remains agnostic. Such amendment has the potential to change the present political and constitutional balance within our system. The Governor-General's powers to act contrary to advice – the power to sack a Prime Minister, the power to refuse Royal Assent, and so forth – are dramatic but theoretical. We expect it is unlikely that they will ever be needed, but this theoretical possibility gives the political players some reason to be circumspect and not to test the outer boundaries of constitutionality.

The Crown is a metonym for the State or executive government.[30] The *what* question therefore also captures the reformation of the concepts of the Crown in right of New Zealand and the Realm of New Zealand. A move to a republic requires the transfer of power and responsibility from the Crown and to a similar entity, such as the "Republic of New Zealand", "Independent State of New Zealand" or "Republic of Aotearoa New Zealand, known as New Zealand". Again, soft republicans do not see this reformation as a significant hurdle. Reforming legislation need only create the State or entity and imbue it with the same rights and responsibilities as the Crown in right of New Zealand formerly possessed.

At this point, we must confront the effect of republicanism on the Te Tiriti o Waitangi and the on-going Treaty relationship. There has been much speculation about the impact of a change of the Head of State on the legal and political status of the Treaty. Many doomsayers think the Treaty cannot survive any change. Others think a change to a republic is an ideal window of opportunity to improve and

[28] See for example Jamaica (Constitution) Order in Council 1962.

[29] Harris (2009a), p. 285.

[30] *Town Investments Ltd v Department of the Environment* [1977] 1 All ER 813 at 831; and Cox (2002a), p. 237.

enhance the status of the Treaty. Some, including the Māori Party, think that *any* constitutional change must be Treaty-centred.[31]

Again, soft republicans warn against trying to do too much constitutional reform and overcomplicating the reform of the Head of State. It is legally and constitutionally possible to ensure that the Treaty retains the same legal and constitutional status within the new republic as it did within the monarchy. As Professor Stockley noted: "The Treaty obligations have *already* passed from the Queen in right of Britain to the Queen in right of New Zealand. If they have been transferred once they can be transferred again."[32] Even ardent monarchists concede a change to a republic would not alter the status of the Treaty.[33] The reality is that New Zealand's executive government is nowadays responsible for discharging Queen Victoria's original compact with iwi and hapū.[34] That will continue under a republic, with the State assuming those responsibilities.

Beyond the legal status, there remains the question of the more intangible symbolism and associated "honour of the Crown" in relation to the Treaty. Soft republicans are anxious not to undermine these important elements in any transition. As was acknowledged earlier, symbolism matters. And it is often said this is especially important to Māoridom. We must not only ensure the smooth transfer of the legal duties, but also the spirit of the Treaty. Some trust is needed, but it seems extremely unlikely a modern-day state would attempt to repudiate the treasured "honour" of the former Crown. The lodestar of minimalism and continuity that lies at the heart of soft republicanism must surely ensure that the extra-legal status of the Treaty is also preserved.

This can be fortified in republican legislation. Treaty obligations will be expressly transferred to the new republic, without promoting or diminishing its present legal status or preventing its continual evolution. Reforming legislation – styled in soft republican form – need not specifically refer to the Treaty because it would be captured within the generic transfer of powers and responsibilities. However, given its special importance in modern-day society, it would be desirable for the Treaty to be specifically mentioned, both in terms of its present legal transition (in the clause transferring the Crown's powers and responsibilities) and its historic importance in our constitutional heritage (in a preamble noting our previous constitutional milestones).

Finally, the *what* question requires us to address whether the change to our Head of State needs to change the constitutional position of the Niue and the Cook Islands. These self-governing states form part of the Realm of New Zealand,

[31] Katene (2010).

[32] Stockley (1996b), p. 101. See also Brookfield (1995).

[33] Cox, then Chairperson for Monarchy New Zealand, quoted in Milne (2004). See also Cox (2002b), p. 29.

[34] For a discussion of the meaning of the Crown in the context of the Treaty, see McLean (2008) and Cox (2002b).

along with Tokelau and the Ross Dependency.[35] Possible solutions have been proposed which might see these self-governing states follow New Zealand in becoming a republic or their translation into their own realms.[36] This aspect need not halt our moves to patriate our Head of State.

7.5 When?

The move to the republic has been cursed by many as being "inevitable", as was noted at the outset. Rather than fortifying the likelihood of the republic, this has nullified momentum. Inevitable seems to be code for "yes – but not on my watch".

The defeat of Keith Locke's Head of State Referenda Bill at its first reading in early 2010 should not be taken as meaning there is no parliamentary appetite for the commencement of a move to a republic.[37] A number of factors probably factored into its demise:

- Timing (the referenda proposal would have interfered with the staged referenda on MMP);
- Sponsor (some MPs appeared uncomfortable supporting constitutional change sponsored by an Opposition member);
- Text (the Bill that languished in the ballot for nearly 9 years was intended to catalyse the debate only and might have benefited from some fresh re-drafting); and
- Recession (a government wanting to be seen to be engaged in fixing bigger, more immediate problems).

There still appears to be some staunch royalist support within Parliament, particularly amongst the National Party. However, the debate of Locke's Bill had some positive benefits for the republican movement, with the creation of a cross-party parliamentary caucus on the issue and increasing engagement with the issue by parliamentarians.

The pragmatic approach to constitutional reform associated with soft republicanism looks to the end of the reign of Queen Elizabeth II as an important opportunity. While support for the republic continues to increase, particularly amongst younger generations), there still remains some fondness towards our present Sovereign. A pragmatic compromise might be completing necessary processes in order to become a republic, but deferring its commencement until the passing of our present monarch. A possible formula, based on the outcome of a referendum, might look as follows:

[35] Letters Patent Constituting the Office of Governor-General of New Zealand (SR 1983/225), cl 1.
[36] Townend (2003).
[37] Head of State Referenda Bill 2009 (defeated on 21 April 2010 by 68 votes to 53).

Commencement

(1) Subject to subsections (2) and (3), this Act comes into force 2 days after the date on which it receives the Royal assent.

(2) If the Chief Electoral Officer makes a positive referendum declaration, Part 2 (Transformation to Republic) of this Act will come into force:

(a) on the death of Queen Elizabeth the Second; or

(b) if Queen Elizabeth the Second dies before a positive referendum declaration is made, 6 months after the date of the declaration.

(3) If the Chief Electoral Officer makes a negative referendum declaration:

(a) Part 2 (Transformation to Republic) does not come into force; and

(b) this Act is deemed to be repealed.

Interpretation

(1) In this Act, unless the context otherwise requires,—

positive referendum declaration means a declaration under Part 3 (Referendum on Republic) of this Act that the proposal favouring the introduction of the republic as provided in this Act is carried;

negative referendum declaration means a declaration under Part 3 (Referendum on Republic) of this Act that the proposal favouring the introduction of the republic as provided in this Act is not carried;

Of course, that does not mean we can rest on our laurels. It would be preferable for us to have all the necessary arrangements in place so that the republic can take effect immediately, without more. The risk of not acting now is that we might be caught on the hop by the passing of Queen Elizabeth. While the soft republican approach does not require extensive legislative and structural preparations, it goes without saying that any change required popular support, at least through a plebiscite – which takes some time.

7.6 How?

It has been suggested that it might be technically possible to become a republic with a simple amendment to the Constitution Act promulgated through ordinary legislation.[38] But nowadays there does not seem to be any serious disagreement about the fact that a referendum is needed for any change. The change needs to have popular support to have moral legitimacy. Putting the issue to a referendum also circumvents the theoretical arguments about Parliament's capacity to effect such a revolutionary change.[39] A referendum ensures a "technical revolution" takes place.[40] The question of whether there is a need for majorities in referenda of both general and Māori rolls, as has been suggested,[41] seems to be driven out of

[38] Stockley (1996b), p. 98.

[39] See Brookfield (1995); and Cooke (1996). Compare Stockley (1996b) and Joseph's discussion of "autochthony", Joseph (2007), p. 478–485.

[40] Brookfield (1995).

[41] Ibid, p. 317 and Stockley (1996c).

concern for the future status of the Treaty. Such arguments carry less weight for a change grounded in minimalism and continuity – where the Treaty relationship continues unaffected.

Assuming the constitutional *how* is answered by a referendum, the practical *how* remains at large. Undoubtedly, support for the republic both amongst parliamentarians and the polity continues to grow. But more rapid progress is stymied by misinformation and misapprehension about the nature and magnitude of any change. Occasions such as this provide some opportunity for the path to the republic to be canvassed. But broader public education and involvement is required, if we are serious about attaining republic status. Options such as a formal constitutional convention or an eminent leaders group have been proposed.[42] The constitutional arrangements select committee process petered out somewhat.[43] Oddly, republican issues were not included in the much anticipated constitutional review, which is more focused on the status of the Treaty, Māori representation and other electoral matters.[44] Processes which seek to solve every possible constitutional issue are doomed to failure and only serve to delay further any progress towards a local Head of State. If a blue-print is needed for the public to better understand the implications of a republic, then there might be a delicious irony in a Royal Commission being charged with examining that single issue.[45] There is some weight in constitutional reform of this sort being deliberated on by wise people, so that the public can be given comfort that any move is sound and appropriate.

7.7 Conclusion

We are presented with two different models for the republic. An excessive "Rolls Royce" model – a complicated approach that lets the constitutional architects loose to try and fix each and every constitutional soft-point within the reformer's window of opportunity. Or we can take seriously the pressing need to patriate our Head of State in order that our identity and nationhood can continue to evolve. We need only promote the Governor-General from being a de facto Head of State to a real Head of State – same powers, same functions, same responsibilities, same house, same Treaty responsibilities. A Toyota Corolla, a minimalist's republic will be fine.

[42] Moore (2008).

[43] Constitutional Arrangements Committee (2005). Nothing much came of the report, particularly as the process of review failed to attract cross-party support (National and New Zealand First refused to participate).

[44] English and Sharples (2010).

[45] Compare with the Royal Commissions on the Electoral System and on Auckland Governance.

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Part 4
The Need for a Written Constitution? Strengthening the Bill of Rights Act and the Place of the Treaty of Waitangi

Caroline Morris

This session of the *Reconstituting the Constitution* conference was devoted to examining three key aspects of New Zealand's constitutional future: whether New Zealand should adopt a supreme law constitution, the future of the New Zealand Bill of Rights Act, and the status and nature of the Treaty of Waitangi. These quite disparate topics were brought together through the common theme of the New Zealand people – it is who we are, on so many levels, that will determine the process, speed, direction, and content of any constitutional change in the future.

The first and more general question is explored in Chap. 8 by Mai Chen, a notable practitioner of public law. She opened her presentation by asking whether this was the right question to be asking, for it is not in most New Zealanders' nature to be particularly engaged with constitutional questions; our approach is pragmatic, evolutionary, and low-key. Nor is there any constitutional crisis or problem afoot that might justify such a dramatic change. Moreover, starting the debate may open up a Pandora's box that could have a destabilising effect. Nevertheless, enacting a supreme law constitution could lead to a process where constitutional change is properly debated and change is agreed to by the public. Ms. Chen concludes that this would not only address the concerns that New Zealand's current constitutional arrangements are unclear and uncertain, it would also serve to educate and engage the public on constitutional matters.

In Chap. 9, Drs. Andrew and Petra Butler, a practising lawyer and an academic lawyer, respectively, acknowledge the positive effects of the Bill of Rights Act 1990 on freedom of speech, the criminal law, and the spheres of equality and discrimination law. But, they claim, much remains to be done if the Bill of Rights is to fulfil its societal and constitutional potential: the lack of a remedies provision, the inability of the courts to invalidate rights-breaching legislation and deficiencies in the vetting procedure are concerning from a procedural perspective. Moreover, the Bill of Rights provides no protection for privacy rights, social and economic rights, or the right to property, which leaves citizens vulnerable to government action that does not secure to them minimum entitlements that ensure the upholding of human dignity. The Drs. Butler then engage with the session questions, arguing that the Treaty of Waitangi should be dealt with as an issue outside the Bill

of Rights Act while a written constitution would enhance New Zealanders' understandings of their rights.

Finally, in Chap. 10, His Honour Justice Joe Williams echoes Mai Chen's approach of questioning the question. As he began his speech, His Honour said that the two questions he had been asked to consider: "do we need a written constitution? And should it include the Treaty if the answer to the first question is 'yes'?", were simply the wrong questions to be asking. The Treaty is a partnership, and therefore the real and prior question was "how do we perfect our partnership"? His Honour noted the changes in New Zealand society with respect to the position of Māori through the stages of partnership past, present and future, and concluded that as New Zealand's demographics continues to change and our society becomes more diverse, perhaps then will Māori identity become "*the core* aspect of national identity and culture; of the way in which we position ourselves globally; and the way in which we run our economy." Once we have perfected our partnership, then we can consider the nature and status of the Treaty.

Chapter 8
The Advantages and Disadvantages of a Supreme Constitution for New Zealand: The Problem with Pragmatic Constitutional Evolution

Mai Chen

8.1 What Is the Real Constitutional Issue for New Zealand?

My assigned topic of the advantages and disadvantages of a supreme constitution for New Zealand caused me some unease for although it may be of interest to constitutional lawyers and academics, this question is not one that most New Zealanders are asking, even though New Zealand is one of only three democratic countries in the world without a supreme or codified constitution.[1]

As the Hon Tony Ryall said during the debate establishing the Constitutional Arrangements Committee in 2004:

> [T]he one thing that came out of the constitutional conference [held at Parliament in 2000, entitled "Building the Constitution"] was the fact that there is no desire amongst the people of New Zealand for the sort of constitutional changes that this cabal known as a select committee will be discussing. As I travel around the country, no one asks me about the constitution. No one asks me about the role of the monarchy [or] . . . about the matters that this select committee will look at. People do ask me . . . about more police . . . about less red tape in the community . . .[2]

As the Chief Justice said, New Zealanders have been "notoriously indifferent throughout our history about our constitutional arrangements . . . [and] remarkably

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[1] Although it is arguable that the United Kingdom is subject to the European Convention on Human Rights which is supra-national supreme law. The European Convention has been incorporated into United Kingdom law through the Human Rights Act 1998.

[2] Ryall (2004).

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