Caroline Morris · Jonathan Boston
Petra Butler   *Editors*

Reconstituting the Constitution

Turia T (2010) Speech: address to Iwi leaders forum. 19 August. Available at http://www.maoriparty.org/index.php?pag=nw&id=1226&p=speech-address-to-iwi-leaders-forum-hon-tariana-turia.html. Accessed on 3 April 2011

Waitangi Tribunal (1983) Motunui Waitara report. Department of Justice, Wellington

Waitangi Tribunal (1985) Report of the Waitangi Tribunal on the Manukau claim (Wai 8), 2nd edn. Department of Justice, Wellington

Chapter 28
Creating a Constitutional People

Kate Stone

28.1 Introduction

The papers that have been presented over the course of this conference have dealt with various aspects of the Constitution and how they could be reconstituted. I will endeavour to deal with something slightly different, that is, the *process* of creating a constitutional people. The diminishing vibrancy of civic participation in western liberal democracies is a much lamented trend. Creating a constitutional people entails re-engaging the citizenry. I argue that this disengagement is symptomatic of the malaise in our decision making processes. Underlying this malaise is the problematic way in which we deal with information. Principally, our attempts in western society to extricate ourselves from and apply purportedly objective and rational methods of understanding to the natural world have limited our ability to understand our decision making context.

The consequences of our flawed decision-making process can be seen in our failure to protect future generations by not responding adequately to one of their biggest threats, human-induced climate change. I will argue that in the context of this particular issue protecting future generations requires that we expand our value of justice to incorporate intergenerational justice. I will suggest that one way to address these issues is through a constitution which provides for deliberative activities, facilitated by advancements in information communication technologies (ICT). Deliberative activities conducted through ICT could facilitate the appropriate management of information and the efficacious participation of citizens in the decision making process for long term planning, by changing the nature of the

Kate Stone is an Assistant Lecturer, Faculty of Law, Victoria University of Wellington.

K. Stone (✉)
19 woodley Avenue, Remuera, Auckland 1050, New Zealand
e-mail: kategeorginastone@gmail.com

information exchange between the citizen and the state and the arrangement of interests in society. Further, through participation in deliberative activities citizens receive the political socialisation to engage in the democratic debate that reconsideration of society's core values requires. Finally, I will make some suggestions as to substantive changes to our core values that could be reflected in any reconstitution of our constitution in order to protect future generations.

28.2   Unsustainable Understanding

Before advocating that our constitution needs to be reconstituted, I will explore the reasons why our current understandings of our decision-making contexts are unsustainable and fail to protect future generations. Since classical times Western society has tried to extricate itself from nature with the belief that from this position it may be able to objectively observe the natural world, to discern it with some degree of precision, and ultimately have dominion over it.[1] However, by extricating culture from nature the complexity, instability and uncertainty of our embedded existence is able to be masked by the fallacy of objectivity and all its tools – counting, classifying, categorising, encoding, calculating. These tools provide a sense of security, predictability, and ultimately control. These means of understanding involve a selective perception of things. This is a normative selectivity which reflects prevalent ways of thinking about humankind's relationship to the natural world, institutionalised in humankind's use of nature for human ends. Thus, underpinning this rubric of objectivity are masked subjectivities and institutionalised values.[2]

   The prevailing institutionalised values have been those of the market economy and its associated systems of understanding: accounting systems, based around the logic of rational calculation. These are organisational systems that work to remove uncertainty by constraining human behaviour; they increase the predictability of such behaviour by manipulating values and information that feed into decision making. In this way, methods of calculation can determine the premises upon which a decision is made and which choices are initially considered viable.[3] In a system where we are trained to make decisions on the basis of a cost benefit analysis, when the link between action and consequence becomes hazy or eludes us altogether (as is the case in relation to human-induced climate change), our choices will maintain the system, but may in fact be contrary to our interests. This sort of disconnection is inherent in the capitalist system where our choices are dominated by this model of rational calculation.

[1] Prigogine (1980), pp. 44–45.

[2] Elias (1987), pp. 4–6.

[3] Hopwood (1974), pp. 23–25.

28.2.1 The Economic (Mis)Understanding of Our Environment

In economics the distinction between income and capital is understood to be an important one. No sound businessperson would consider a business which was hastily using up all of its capital to be successful.[4] Applying the favoured economic models the Earth's natural resources and delicate ecological balance constitute the most important form of capital, which is irretrievable and which we are consuming rapidly.[5] However, as Jonathan Boston notes "natural capital is not integrated into mainstream economic analyses for policy purposes. In short, unlike financial capital, natural capital is not generally valued and accounted for."[6] This is normative selectivity which reflects a (fallacious) belief that there is a limitless supply of natural resources to accommodate our perpetual demand, and a belief in the capacity of science and technology to conquer the finitude of nature. This highlights the entrenched barriers to determining environmental risk independently of institutionalised social and historical norms in order to make appropriate decisions.[7]

The virtues of expansion and growth, which know nothing of the virtues of sustainability and intergenerational justice, have been normalised in our value system. As a result of these norms the frame of reference for our economic calculus is very limited, rooted in a conceptual framework of a linear, sequential cause and effect which externalises many environmental considerations. The environment is a deeply complex non-linear system: and thus the application of ideas of uni-linear development and progress, underpinning this imperative of growth, is inherently problematic. Consequently, we do not accurately perceive the causal link between our actions and their true consequences. As Boston has explained, climate change poses a significant challenge to the efficacy of the traditional cost-benefit analysis in relation to considerations of time, certainty, visibility and tangibility.[8] This is because measures to address climate change result in immediate costs, which are relatively certain, visible, and tangible; the benefits are largely long-term, less certain, less visible, and often intangible.[9] Governments justify their short-termism by discounting future profits. Jared Diamond articulates this logic:

> [It] may be better to harvest a resource today than to leave some of the resource intact for harvesting tomorrow, on the grounds that the profits from today's harvest could be invested, and that the investment interest thereby accumulated between now and some alternative future harvest would tend to make today's harvest more valuable than the future harvest.[10]

---

[4] Schumacher (1973), p. 13.

[5] Schumacher (1973), p. 13.

[6] Boston (2009), p. 12.

[7] Page (2006), p. 32.

[8] Boston (2009), p. 11.

[9] Boston (2009), p. 11.

[10] Diamond (2005), pp. 434–435.

The negative effects of actions underpinned by such short-termism often exist beyond the comprehension of our human perception and sensory intuition, and are felt by future generations who cannot protest or vote today. Our dogmatic adherence to this economic calculus enables those presently in the upper echelons of market capitalist society, due to the unequal distribution of costs and benefits, to take imprudent risks in relation to the environment.

28.2.2 Intergenerational Justice

This problematic logic highlights the need for intergenerational justice. In our rapidly globalising world the communities in which we are implicated are expanding, we now have shared presents and futures.[11] By virtue of our implication in this global condition we are also responsible for our communal future.[12] As the implication of our existence expands, our ability to understand the repercussions inevitably decreases; the results of our actions become somewhat indeterminate threatening the distant, unknown and unknowable future. Our actions, the choices we make today, have the ability to curtail the options of incalculable people in generations to come. This raises important questions about intergenerational justice – the equity of distribution of entitlements across generations. Consequently, as expressed by Boston, "a narrow presentist, anthropocentric moral framework is not justified."[13] As a society our decisions must be made on the basis of political considerations, not economic ones; on the basis of some systemic ethical theory about justice and entitlements, rather than myopic cost-benefit balancing.[14] Further, we need to develop a civic culture which understands and expects this form of decision-making.

28.3 The Clash of Ideals: A Moral and Political Question

In light of current day public misinformation and misunderstanding about the political system and the issues facing our society, as David Shearman and Joseph Wayne Smith have noted, "[i]t will require a fundamental change in society for the citizen to be able to understand the present political system, let alone the complexities of our dependence on ecological services."[15] If we arrive at a point

---

[11] Adam (1996), p. 94.

[12] Adam (1996), pp. 94–95.

[13] Boston (2009). Boston gives a very comprehensive argument for the need for reference to the value of intergenerational justice in his chapter.

[14] Page (2006), p. 14.

[15] Shearman and Smith (2007), p. 165.

at which we realise that traditional assumptions about how society should be ordered are unsustainable and must be modified (a position which I have argued for above), "[t]he only guide we can have. . .is not what is but what we think should be, and that inevitably means a clash of ideals."[16] A prior consideration for us today is whether we have the culture of democratic debate required to negotiate such a clash of ideals. As Michael Sandel has stressed:

> Health, education, national defence, criminal justice, environmental protection and so on - these are moral and political questions, not merely economic ones. To decide them democratically, we have to debate case by case the moral meaning of these goods in the proper way of valuing. This is the debate we didn't have during the age of market triumphalism. As a result, without quite realising it, without ever deciding to do so, we drifted from having a market economy to being a market society.[17]

Policies which will alter social and economic behaviour are very complex. There is a need for greater public understanding of the nature of decision-making, beyond the cost-benefit analysis. The character of information and knowledge production and dissemination is fundamental to achieving this. The concern then is whether we have the requisite culture of democratic debate to be able to deal with these moral and political questions.

28.3.1   A Passive Demos?

Civic engagement reaffirms the legitimacy of governing bodies by practically reinforcing democratic principles of inclusion and social justice.[18] In his classic work, *Bowling Alone,* Putnam concluded that traditions of civic engagement were necessary for successful government.[19] Participation has an integrative element, which facilitates collective decision-making.[20] Those excluded from participation in democracy have fewer resources and are not motivated to act for, nor identify their personal wellbeing with the common good.[21] A passive citizenry is further concerning given that participation or non-participation is self-perpetuating. Political participation, in its widest sense, has an important educative function. Engaging in public affairs educates the participant which in turn leads to further participation and so on. Conversely, disengagement has a negative effect on democracy, threatening further disengagement as a result of not being exposed to the socialising effects of participation. As Stephen Coleman has articulated, at its most simple a

---

[16] Flynn (2009), p. 192.

[17] Sandel (2009).

[18] Cornwall (2008), pp.13–17.

[19] Putnam (1995), p. 66.

[20] Pateman (2003), p. 41.

[21] Mill (2003), p. 314. The nature of the "common good" that we should be aspiring to is discussed in more depth further in the chapter.

democracy with a passive demos is not really a democracy at all.[22] As noted in the introduction there has been a decline in civic participation across Western liberal democracies. In part this decline derives from a sense of disillusion arising from a lack of public confidence in governments to deliver on their promises, and to inform and genuinely involve the citizenry in the democratic process.[23]

Putnam asserts that the decline in civic engagement in Western liberal democracies is reflective of a decline in social capital – which he defines as "features of social organization such as networks, norms, and social trust that facilitate coordination and cooperation for mutual benefit."[24] Charles Pattie, Patrick Seyd, and Paul Whiteley extended the analysis of patterns of participation to include other causes of civic engagement.[25] Their study looked at three overarching causal theories – general incentives, social capital, and civic voluntarism:

- *General incentives*. These include access to resources, positive appraisal of the benefits of participation, and a sense of political efficacy.
- *Social capital*. Pattie et al. concurred that social networks encourage civic engagement, but challenged Putman's hypothesis that this is based principally on trust.[26]
- *Civic voluntarism*. This includes raising interest in public affairs and being actively mobilised as important causal factors for civic action.[27]

All of these factors indicate the need for action on the part of the political elite to reengage the citizenry. This requires a commitment to genuine engagement in which to direct resources for beneficial participation, which instils a sense of political efficacy, and encourages new social capital building opportunities. Such genuine engagement, in a self-perpetuating manner, leads to increased interest in public affairs and further mobilisation of the citizenry.

28.4   Information Exchange, Citizenship, and Information Communication Technologies

At 28.2 I attempted to outline our problematic understanding of the nature of the issues we face as a society, and the consequent inadequacy of our policy solutions. At 28.3 I argued that our policy solutions require a political, not economic, decision making process, underpinned by robust democratic debate. In the following

---

[22] Coleman (2007), p. 166.

[23] Griffith et al. (2008), p. 25.

[24] Putnam (1995), p. 67.

[25] Pattie et al. (2003), p. 443.

[26] Pattie et al. (2003), p. 466.

[27] Pattie et al. (2003), pp. 465–466.

sections I explore avenues to address these flaws in our decision making. I argue that deliberative participation facilitated by ICT has the potential to change the way in which we, as citizens, deal with information. They have the potential to develop in citizens a consciousness of the values which underlie the generation of understanding from information, and a concomitant willingness to reassess these values when they cease to provide an efficacious framework for decision making. In particular I argue that through this process, given the nature of the organisation of interests in the ICT milieu, we could hope to incorporate the value of intergenerational justice into our decision making framework.

28.4.1 Civic Engagement, Information and ICT – Mass Amateurisation and Collaboration

The relationship between citizens and governing bodies, and the citizenry's ability to understand substantive issues and engage in the decision-making process is inextricably linked to the efficacy of the information exchange between the two. Thus, the unprecedented interactive capacity and diversified nature of ICT has the potential to transform this relationship.[28] The explosion of ICT has increased the volume and ease of dissemination and acquisition of information; the processing of information from start to finish has sped up; consumers have much more control over the information they receive; messages can be directed at particular audiences; the media has diversified; and the interactive capacity of citizens has been enhanced.[29]

Developments in ICT providing low-cost, two-way communication that is immediate and far reaching have opened the door to new possibilities for engagement both horizontally and vertically, and to participatory and deliberative modes of conducting public affairs. The exchange of information through ICT is characterised by sharing, rather than acquiring. The Internet has provided the tools for people to collaborate on an unprecedented level. Ward Cunningham's creation of the first wiki was based on the assumption there is a tendency towards trust between people who want to engage in collaboration, and therefore formal management processes would not be needed. The result was a user-editable website.[30] The most well-known wiki is Wikipedia. The articles on Wikipedia, because of this user-editable function, are in nature a process, not a product. Just as human knowledge is provisional, the nature of knowledge shared on Wikipedia is provisional.[31] By engaging in this sort of process citizens can come to understand

---

[28] Coleman (1999), pp.16–17.

[29] Delli Carpini and Keeter (2003), pp. 136.

[30] Shirky (2008), p. 111.

[31] Shirky (2008), pp. 111–119.

the true nature of the knowledge upon which political decisions have to be made. Further, the wiki format could serve as a model for less bureaucratic modes of participation based on ongoing argumentation over societal values and their expression through policy. As Clay Shirky explains "the freedom driving mass amateurization removes the technological obstacles to participation."[32] It may further socialise citizens to see value beyond the value attributed by the market, that which Yochai Benkler "calls nonmarket creation of group value 'commons-based peer production', in which citizens choose to participate without financial compensation."[33] The new capacities and culture around dealing with information in this milieu has the potential to socialise citizens in a way which prepares them to participate in the decision making process in relation to complex issues which do not fit neatly within a cost-benefit analysis, such as how we live sustainably within the earth's supporting systems.[34]

28.4.2 Socialisation for Effective Participation in the ICT Age

Ambivalent conclusions as to the efficacy of ICT to prompt political transformation tend to be tied to assumptions of the formal political elite and its traditional use of the mainstream media.[35] The narrative of civic disengagement largely relates to participation in traditional institutional structures. Assessments of civic engagement which are centred on traditional modes of participation and communication fail to acknowledge informal, non-Parliamentary political participation.[36] Peter Dahlgren stresses that we are in a transitional era which has seen the exponential growth of issue politics, played out in diverse contexts and through diverse media.[37] While by orthodox standards there may have been a decline in civic engagement, this is not reflective of a decline in the inherent interest and preparedness of citizens to engage with political issues, but rather it is reflective of the failure of the formal political machinery to engage citizens in the issues, away from traditional processes, in the diversified new media society in which citizens, particularly youth, live their everyday lives. As noted above, the causes of civic engagement (general incentives, social capital, and civic voluntarism) all require considered action on the part of the political elite to socialise people for effective participation.

However, to date, formal processes of socialisation have been out of step with current modes of civic participation. Individuals are now engaging with political

---

[32] Shirky (2008), p. 123.

[33] Benkler (2006), p. 133.

[34] Shearman and Smith (2007).

[35] Dahlgren (2005), p. 154.

[36] Dahlgren (2005), p. 154.

[37] Dahlgren (2005), p. 154.

issues in this diversified ICT world which is often largely dislocated from the traditional political institutions. Traditional political institutions and their underlying principles are largely absent from this socialisation that the individual undergoes by participating in the ICT arena. As a result political participation in traditional ways is losing relevance. Formal political socialisation is still generally conducted in reference to traditional modes of political participation, for example by focusing on increasing political party membership and voter turnout. In so doing the political elite are communicating with a (somewhat illusory) electorate whose political socialisation is located in the pre-information age, and ignoring the vast numbers for whom these traditional institutions hold little or no relevance.[38]

28.4.3 A Reconceptualised Citizenship

Consequently, the political elite need to engage with and socialise a citizenry reconceptualised in this ICT context. As a result of economic and cultural globalisation the monopoly of the nation-state in the identity formation stakes has been usurped by the increasing penetration of multinational corporations.[39] These economic, social and technological transformations have challenged the relevance, legitimacy, and the nature of sovereignty of Westphalian nation-states. As a result, that which Bart Cammaerts and Leo van Audenhove have termed an "unbounded citizenship" has developed, characterised by "cosmopolitanism, multiple identities, and embedded in transnational civil society".[40] Over the last 30 years primarily geo-political conceptions of identity have become increasingly difficult to sustain resulting from increasing mobility and innovation in communications technology. Local concerns can no longer be addressed locally as much power has been removed from the grasp of the nation-state and control has gone beyond the local to the global. As a result the individual's identity as a citizen is no longer solely linked to rights prescribed and executed by the nation-state; but is also tied to issues which transcend the nation-state, as they do not require national but rather international action, such as human-induced climate change.[41]

This re-conceptualisation of citizenship is required as a result of the shifting of allegiances, facilitated by developments in ICT, from communities of birth to communities of interest. The former are connected to traditional legalistic notions of the rights and duties of the nation and welfare state; the latter to multifaceted social, shifting affinities.[42] Increasingly citizens are engaging in social movement

---

[38] Oates and Gibson (2006), p. 13.

[39] van Ham (2002), p. 265.

[40] Cammaerts and van Audenhove (2005), pp.179–180.

[41] Adam (1998).

[42] Cammaerts and Van Audenhove (2005), p. 182.

organisations, which lie between formal political engagement and non-engagement.[43] A political system which only seeks to engage citizens at predetermined intervals is losing relevance amongst a generation which is "accustomed to empowerment, open discussion, and immediacy – all antithetical to the disempowerment and myopic discussion of bureaucratic government processes".[44] Engagement with traditional ideology, hierarchical political parties, and formal, process-oriented representative democracy is being replaced by involvement in social organisations characterised by their fluid and horizontal relationships, and direct action on single issues, which now play a much greater role in the formation of their identity than formal politics.[45] These fluid affinities require more, over and above the right to vote; they require space for deliberation. Currently constitutions provide for the exercise of the legal right to vote, but do not provide for the social activity of discussion. The constitutional framework of the nation-state needs to catch up with the social sphere in which citizens are interacting. This realignment requires both institutional and behavioural changes. Institutionally the constitution needs to provide for deliberation, behaviourally it needs to socialise citizens for effective deliberation.

28.5 Deliberative Democracy: Engaging Civic Incompetence

28.5.1 A Threat to Stability

Generally current day democracies lack the space for "proactive, self-informing, experimentally based, socially inclusive, democratically moderated but autonomous deliberation".[46] Today the advent of ICT means that the barrier to participation lies not in physical space, but in the lack of constitutional space. In part this is because the use of more direct deliberative activities in the decision making process, previously reserved entirely to elected representatives, is often seen as a threat to stability. The dichotomy between representative and more direct democracy tends to be too rigidly constructed.[47] Further, it is important to critique how representative our democracy really is when the ability for some sectors of society to genuinely participate is severely curtailed by a disparity in access to information and tools for participation. Utilising more direct forms of democracy does not preclude a representative system, but rather reinforces democratic ideals by expanding opportunities for meaningful participation.

---

[43] Cammaerts and Van Audenhove (2005), p. 182.

[44] Ferdinand (2000), p. 181.

[45] Hannon (2008); Dahlgren (2005), p. 154.

[46] Coleman (1999), p. 20.

[47] Coleman (1999), p. 18.