Caroline Morris · Jonathan Boston
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Reconstituting the Constitution

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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Chapter 3
Reconstituting the Constitution: Opening Address II

Catherine Harwood

3.1 Introduction

I stand before a room not only of distinguished practitioners, academics and commentators, but people who are – or have been – key players in our constitutional framework: Judges, Prime Ministers, Governors-General, Ministers, and Members of Parliament. The programme reads like a who's who of New Zealand constitutional law.

When tasked with addressing you this morning, I pondered the topics on which I could speak with some authority. Not surprisingly, that list was rather short. I will ground this address in a context of which I am somewhat more familiar – insights into constitutional law from the perspective of someone from Generation Y.

I realise I am sacrificing my future ability to lie about my age when I tell you that I was born in 1985. That year, *Back to the Future* was playing in cinemas. New Zealand refused entry to the American warship *USS Buchanan*, due to our anti-nuclear policy. The Rainbow Warrior was sunk in Auckland Harbour. The Waitangi Tribunal was given power to hear grievances arising since 1840.[1] And the White Paper was tabled in Parliament by Sir Geoffrey Palmer.[2] In my lifetime, there have been three kingpins of public constitutional debate. They are:

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[1] Treaty of Waitangi Act 1975, section 6 as amended by the Treaty of Waitangi Amendment Act 1985, section 3(1).

[2] Minister of Justice (Palmer G) (1985).

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(a) Whether New Zealand should become a republic;
(b) Whether we should adopt a written constitution; and
(c) The role of the Treaty of Waitangi.

This address will briefly discuss each of these issues and set out some possible future directions for constitutional law.

3.2 Republic

New Zealand, though a constitutional monarchy, has been termed a de facto republic.[3] Our Governor-General is said to be akin to a President appointed by an elected Prime Minister.[4] However, there is also powerful symbolism inherent in the Crown, which harkens back to ties to the British monarchy. Many Māori perceive the Treaty to be a contract between the monarchy and signatory Māori.[5] While New Zealand's head of state is technically the Queen in right of New Zealand, not the Queen of England, the British nature of the monarchy has been valued by Māori.[6] Queen Elizabeth II has been considered guardian of Treaty principles and protector of Māori interests.

In comparison with the Australian flirtation with the idea in 1999, in which 55% of the public voted against even a minimal republic,[7] New Zealand faces more complex issues.[8] In particular, there are fears about the survival of protections under the Treaty and the future relationship between Māori and the state. The question whether New Zealand should become a republic is one which may not be able to be answered for quite some time.

3.3 Written Constitution

New Zealand has an unwritten constitution. I liken it to a patchwork quilt that gets passed down the generations. It is made up of many different pieces, all stitched together a bit haphazardly. Some parts of the quilt are second-hand, while others are original material. Some bits are fraying and need mending, some sections have been replaced, while others have been tacked on recently and look a bit out of place next

[3] Brookfield (1995), p. 310.
[4] Ibid, p. 310.
[5] Ibid, p. 316.
[6] Cox (2002–2003), p. 135.
[7] Australian Electoral Commission (2007).
[8] See a comparative discussion in Cox (2002–2003).

to their older neighbours. It still works as a blanket, but try explaining what it is made of and it all gets a bit confusing.

New Zealand is one of only three countries in the world without a written constitution. The other countries are the United Kingdom and Israel.[9] A poll in 2004 asked New Zealanders for their views on constitutional arrangements. Eighty-two per cent were in favour of a written constitution.[10]

What is it about a written constitution that is so attractive? One such constitution provides that the state guaranteed genuine democratic rights and liberties; that citizens enjoy equal rights in all spheres of State and public activity; that citizens are guaranteed freedom of speech, of the press, and of assembly; freedom of religious beliefs; the right to work; the right to education; freedom to engage in scientific, literary and artistic pursuits; freedom of residence and travel; inviolability of the person and privacy of correspondence. Those provisions are from the Socialist Constitution of the Democratic People's Republic of Korea.[11] A written constitution does not necessarily go hand in hand with the kind of society we aspire to live in.

It also shows that a written constitution is not a complete constitution. The legal realist would say "[t]he constitution is what happens".[12] Constitutions comprise written documents, but also judicial interpretations, conventions, practices and, increasingly, international law.[13] The way constitutional arrangements work in practice is just as important as how they are expressed in the abstract.[14]

What New Zealand does not have is a supreme constitution. New Zealand has adopted a rather pure Diceyan model of Parliamentary supremacy[15] that the House seems keen to retain.[16] The public may also be content with the current balance if a 2004 research poll is anything to go by. The public rated judges seventh in a list of 18 respectable occupations, just behind sheep farmers.[17] While the issues of a written constitution and a republic continue to simmer away quietly, the third question I see as being on the boil.

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[9] In addition, commentators have indicated that both these countries are moving towards codification, either formally (in the case of Israel) or informally (in the case of Britain). See Palmer (2006), p. 591.

[10] Colmar Brunton Poll (2004).

[11] Socialist Constitution of the Democratic People's Republic of Korea chapter 5 articles 64–65, 67–68, 70, 73–75 and 79.

[12] Quote attributed to Professor Griffiths as cited in Palmer (2006), p. 592.

[13] Palmer (2006), p. 608.

[14] Llewellyn (1934), p. 17; ibid, p. 593.

[15] Dicey (1959), chapter 1.

[16] See for instance Parliament's affirmation of the balance of the respective powers in the Supreme Court Act 2003, section 3(2) which provides "[n]othing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament."

[17] The occupations in order of respectability run as follows: nurses, doctors, teachers, police, dairy farmers, sheep farmers then the judiciary. See Priestley (2009), p. 11.

3.4 Treaty of Waitangi

The position of the Treaty will not wither away, but become more important. I suggest three reasons why this is so. First, the cultural demographic is changing. Between 2011 and 2026, the Māori population is predicted to grow by 21%, whereas the non-Māori population is predicted to grow by only 11%.[18] If this trend continues, it could lead to a stronger Māori presence in Parliament, which could put the Treaty firmly back on the political agenda.

Secondly, the Treaty's position outside justicable law has until lately been seen as recognition of its status above the legal order as "the founding constitutional document of modern New Zealand."[19] However, this changed when the government of the day enacted the Foreshore and Seabed Act 2004. That legislation has been condemned as discriminatory[20] and in breach of the Crown's Treaty obligations.[21] It reveals the reality of the non-justicable nature of the Treaty as well as the consequences of our model of Parliamentary sovereignty.

Thirdly, New Zealand has recently ratified the United Nations Declaration on the Rights of Indigenous Peoples,[22] which protects Māori as tangata whenua. It is no happy coincidence that New Zealand ratified the Declaration after the deadline passed for lodging historical Treaty claims with the Waitangi Tribunal.[23] However, the Declaration provides that indigenous peoples have the right to self-determination and to maintain distinct political, legal, economic, social and cultural institutions.[24] The recent commitment to indigenous protections may move the Treaty back onto the political drawing board.

3.5 An Emerging Area of Constitutional Law?

Another area of constitutional law may be emerging. The ground may be shifting on the assumption that was made in the middle of last century that only so-called "first-order" civil and political rights should be protected by legislation. Social, economic, environmental and collective rights are gaining attention.[25] New Zealand

[18] Ministry of Health (2010). See also Statistics New Zealand (2010).

[19] Harris (2004), p. 292. A similar view is expressed in Baragwanath (2008), p. 13.

[20] United Nations Committee on the Elimination of Racial Discrimination (2005).

[21] Waitangi Tribunal (2004); Harris (2005), p. 201.

[22] United Nations (2007). The Declaration was ratified by New Zealand on 20 April 2010.

[23] Treaty of Waitangi Act 1975, section 6AA provides that Māori cannot bring historical Treaty claims after 1 September 2008.

[24] United Nations (2007), Preamble, article 3 and article 5.

[25] See for example Bedggood (1998), p. 345.

has enacted few such rights, but there are isolated examples.[26] The Constitutional Court of South Africa has demonstrated how the judiciary can make decisions on social and economic rights without impinging on the resourcing discretion required for an effective executive.[27] In addition, the fact that a right is not justicable as against a third party is "not the test of whether the right exists or not."[28] There may be calls in future for the government to further promote social and economic rights, which could add to our colourful constitutional patchwork.

3.6 The Long Road to Constitutional Change

Many commentators have expressed dismay at the level of public awareness of constitutional arrangements.[29] Any hope of achieving workable outcomes on the aforementioned issues depends on one thing: education. While a written constitution would make this area of law more accessible, a good explanation of our existing constitutional arrangements could be just as effective. Developing effective online resources is particularly important, because Generation Y and our younger counterparts see the internet as a primary source of information. This truly is a digital age and constitutional law must move with the times.

New Zealanders are quite taken with the idea that we are like MacGyver. All we need is some number 8 wire and we can fix anything. However, "she'll be right" and "if it ain't broke don't fix it" are not particularly principled approaches to constitutional law. While our country has not recently experienced bloody revolution that requires us to rule off and start again, there should be some proactive direction rather than simply reactionary measures. Some view New Zealand as not ready for constitutional change because of our developing national identity.[30] A response to that is "New Zealand is what it is."[31] New Zealand's development has been piecemeal and pragmatic, and it makes sense that our constitutional law grows alongside it.[32] In addition, a constitution "gains authority from its continuity, and

[26] For instance, the right to education is a social right and is prescribed by the Education Act 1989, section 3.

[27] See for example *In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) and *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).

[28] Higgins (1994), p. 102.

[29] Joseph (1993), p. 99: "If asked, most New Zealanders would reply that they have never heard of the Constitution Act 1986." See also Harris (2005), p. 301; Priestley (2009), p. 12; and the recommendations contained in Constitutional Arrangements Committee (2005).

[30] Harris (2005), p. 283.

[31] Ibid, p. 273.

[32] Cartwright (2001), p. 15.

incremental change will tend to maintain this continuity better than more radical change."[33]

While at present there does not appear to be general consensus as to constitutional change, one certainty is that the content of New Zealand's constitution will ultimately be determined by politicians.[34] If and when constitutional issues are back on the political agenda, New Zealanders need to understand our current arrangements and the consequences of reform. Any process for reform must allow "widespread informed participation by the community as a whole, and ultimately reflect the wishes of that community."[35] In addition, to avoid tyranny of the majority, constitutional arrangements must be consented to by minorities, in particular Māori.[36] That way, the New Zealand community will have ownership over the arrangements which underpin our society.

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[33] Harris (2005), p. 283.

[34] Ibid, p. 310.

[35] Ibid, p. 283.

[36] Baragwanath (2007), p. 10.

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Part 2
Reforming Constitutions: Lessons from Abroad

Chapter 4
South Africa's Experience in Constitution-Building

Heinz Klug

4.1 Introduction

South Africa's Constitution is the product of a legal revolution unleashed by the democratic transition from apartheid. President Nelson Mandela promulgated the Constitution into law at Sharpeville, on 10 December 1996, after it was adopted by the Constitutional Assembly and certified by the Constitutional Court as required by the "interim" 1993 Constitution. This "final" Constitution came into effect on 4 February 1997. Since the creation in 1910 of the Union of South Africa by an Act of the British Parliament, the country has had three other constitutions, in 1961, 1983 and 1993. The 1996 Constitution is, however, the first one adopted by a democratically-constituted body representing all South Africans. Drawing on a thick description of this history of constitution-making in South Africa this chapter will identify and discuss five sources of variation in constitution-building processes that impact the different issues faced by those engaged in building a constitutional democracy.

In order to explore these different sources of variation in constitution-building processes this study will emphasise the particularities of this particular historical transition in what Kim Lane Scheppele has described as a "constitutional

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ethnography," in which the goal is "not prediction but comprehension."[1] The premise of my approach is that these different aspects of constitution-building in effect frame the more immediate task of constitution-writing, and thus have a profound impact on the overall project of building a constitutional democracy. The five sources of variation that will be explored in this chapter include, first, a temporal dimension, which may be characterised as being both macro and micro in scope. On the macro scale we should consider the general historic timing of a democratic transition, while on the micro scale there are the specific time-frames within the process of constitution-making, both registers of scale having clear consequences for the choices available to the parties. Second, there is the question of processes in which the specific means of constitution-building, chosen from a range of historic options, is deployed by the parties to achieve specific advantages over their opponents but can also serve as a means to ensure that the political transition continues towards the creation of a new constitutional order. Third, participation in the constitution-building process is an aspect that is important both for those who are active in the actual constitution-making process, as lawyers, politicians, drafters, activists etc., as well as the broader society that is called upon to accept and legitimate the constitutional product as the basis of a future social compact. Fourth, the recognition and use of constitutional principles is an important element of constitution-building in this era. Finally, the process of making substantive choices inherent in every constitution-making process involves alternative institutional designs and substantive elements of the constitution, all of which have a significant impact on the overall process of constitution-building.

In addition, there are two key elements that need to be highlighted in any description of South Africa's successful constitution-building experience. On the one hand there was the adoption of a two-stage process in which the constitution-making process migrated from an essentially bilateral negotiation between the apartheid state and the liberation movement to a democratically-elected constitutional assembly. Adopted to overcome the need of the apartheid regime's demand for legal continuity, as a means to secure certain minority guarantees before relinquishing power, the idea of first adopting an "interim" constitution as a step towards a "final" constitution was inherent in the "sunset clause" proposals, adopted by the African National Congress (ANC) in early 1993 and the National Party's acceptance that a "final" constitution would be produced by a democratically-elected body.[2] On the other hand there were also specific mechanisms that framed the process of constitution-making. First, there was the emergence, adoption and eventual reliance on the idea of constitutional principles. Second, the creation of relatively fluid transitional mechanisms brought the conflicting parties together to resolve particular crises and political tensions. In the first instance the presentation and debate over constitutional principles had the dual virtue of being both

[1] Scheppele (2004), p. 391.

[2] Klug (2000), pp. 104–105.