Caroline Morris · Jonathan Boston
Petra Butler *Editors*

Reconstituting the Constitution

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Preface

In mid 2000, academics, officials, business leaders and representatives of civil society gathered at New Zealand's Parliament in Wellington for a conference that was the first of its kind. Entitled "Building the Constitution" it was hosted by the Institute of Policy Studies (IPS) at Victoria University of Wellington. The aim of this event was to bring together a representative cross-section of New Zealand society, including people with a range of relevant expertise, to explore the foundations of the constitution, debate how it might be developed, and consider some of the critical issues that would need to be resolved if there were to be a new constitutional "settlement". At the time of the conference, New Zealand was undergoing a significant transition in terms of its identity and its sense of independence, and various long-standing political norms were being challenged. Debates about the role of the Treaty of Waitangi, our relationship with the international community and our identity within that community had led to calls for New Zealand to embrace a written, entrenched constitution. To the regret of many, the 2000 conference did not produce a roadmap for future constitutional development. It did identify, however, a range of important issues that would need to be addressed if significant constitutional changes were to be seriously contemplated. These issues were enunciated in an elegant and substantial volume – *Building the Constitution* – edited by Colin James and published by the IPS in late 2000.

To mark the tenth anniversary of the 2000 conference, the IPS and the New Zealand Centre for Public Law again brought together distinguished judges, academics, public officials, students and members of civil society, including several keynote speakers from overseas. The conference, entitled "Reconstituting the Constitution" held in August 2010 was generously sponsored by the New Zealand Law Foundation. As with the original event, the conference in 2010 traversed a diverse range of constitutional issues. This volume contains all of the papers presented there, introductions to the main discussions and a survey chapter by

Professor Elizabeth McLeay.* As the editors of this volume, we are greatly indebted to the many contributors, not least for the speed with which they have revised and amended their conference papers.

Understandably, the wider cultural, political and economic context surrounding the 2010 conference differed in many respects to that of its predecessor. Whereas the 2000 conference was held during the early stages of a Labour-led minority government and in relatively buoyant economic circumstances, the 2010 event occurred within the first term of a National-led minority government and in the wake of the global financial crisis. New Zealand's constitution, too, had witnessed some significant changes, not all of which had been expected at the time of the 2000 conference. The Supreme Court had replaced the Privy Council as the country's highest court. The controversial Foreshore and Seabed Act 2004 had been enacted, dividing community opinion and spurring the establishment of the Māori party. Almost as controversial had been the Labour-led government's changes to the regulation of electoral finance in 2008. The latter changes were criticized in the run-up to the 2008 general election by the Electoral Commission for their "chilling" impact on democracy, and spurred further reforms during 2009–2011.

Unsurprisingly, various issues that were contentious at the time of the 2000 conference remain so more than a decade later. Amongst these are the design of the electoral system, not least the merits (or otherwise) of proportional representation and the question of separate Māori representation. Other constitutional issues, too, remain the subject of periodic debate: the nature, powers and appointment of the head of state, the term of Parliament, the protection of indigenous (and other) rights, the governance of major cities, such as Auckland, and New Zealand's relationship with Australia.

The question of electoral reform will be the subject of a further referendum in 2011, held in conjunction with the general election. Whether this will resolve the matter remains to be seen. If a majority of voters favour a further change in the electoral system, a second referendum will be held at the time of the next general election, expected in 2014. This will pit the current Mixed Member Proportional (MMP) system against the option most favoured at the 2011 referendum. But even if a majority of voters support the retention of MMP (whether in 2011 or 2014), there is bound to be continuing pressure for adjustments to some of the details of the current electoral system (for example, the number of constituency seats, the size of the party-vote threshold, and the waiver to this threshold where a party wins at least one constituency seat). In short, continuing debate over electoral system design can be expected for some years to come, irrespective of the outcome of the electoral referendum.

But broader constitutional changes are also in the offing. In late 2008, the National and Māori Parties signed a "relationship and confidence and supply agreement". This included a provision requiring the establishment of a group to review various constitutional matters, including Māori representation. Two years

*The papers published include discussions and the law as it stood at 30 November 2010.

later, the National-led government announced how this "consideration of constitutional issues" would be conducted. In short, the agreed constitutional review process has four aims (see Appendix 1 of this volume):

- To stimulate public debate and awareness of New Zealand's constitutional arrangements and issues arising;
- To seek the views of all New Zealanders (individuals, groups and organisations) including those of Māori (iwi, hapū and whānau) in ways that reflect the Treaty relationship;
- To understand New Zealanders' perspectives on the country's constitutional arrangements, including the range of topical issues requiring further discussion, debate and policy consideration; and
- To identify whether any further consideration of the issues is desirable, and if so, on which issues.

The process, which is expected to take several years, is being co-led by the Deputy Prime Minister (Bill English) and the Minister of Māori Affairs (Dr. Pita Sharples). They will consult with a reference group made up of MPs from across all the parliamentary parties, and will be supported by a Constitutional Advisory Panel. Given the nature and duration of the agreed process, there will be an opportunity for extensive public consultation and debate. This is welcome. Indeed, one of the important themes of the 2010 conference was the desirability of facilitating greater public engagement on constitutional issues. To this end, several of the invited keynote speakers provided first-hand experience of the process of constitutional change in various jurisdictions. Professor Klug discussed the role of civil society in the making of the South African constitution; Father Brennan outlined the work of the Australian National Human Rights Consultative Committee (2008–2009), which he chaired and its consultative process; and Professor Hazell discussed the process and outcome of constitutional change in the United Kingdom since the mid-1990s. A general presumption underlying their presentations was that no major constitutional reforms should be undertaken without widespread and vigorous public debate.

In addition to a focus on the process of reforming constitutions, the 2010 conference had seven main themes: whether New Zealand should become a republic; whether the country needs a written constitution and (as part of this) a strengthened Bill of Rights Act; the future of electoral law; the influence of international treaties on the constitution; the evolution of the relationship between Australia and New Zealand; the role and governance of sub-national government; and the protection of future generations. The chapters in this volume cover each of these themes. While it is of course uncertain how New Zealand's constitution will evolve over the coming decades, we trust that this publication will contribute to a deeper understanding of constitutional issues amongst citizens and a more informed debate about the options for reform.

We would like to thank all those who contributed to the production of this book: the authors of the 28 chapters for their diligent and rapid re-crafting of their conference papers (or related contributions); the peer reviewers for their helpful comments on

earlier versions of many of the current chapters; Alec Mladenovic for his assistance in coordinating the peer reviewing process; James Gilbert and David Bullock for their assistance with the editing process; and Victoria University of Wellington for their financial support for this publication; the Minister of Justice, Hon Simon Power, and the staff of his Ministry for their support for the conference; Grant Robertson for his assistance in securing the venue; and the staff and students, especially Rachel Hyde, of the Institute of Policy Studies and the New Zealand Centre for Public Law for their competent and efficient organisation of the conference.

Lastly we would like to thank the New Zealand Law Foundation, without whose generous financial support this conference would not have been possible.

Jonathan Boston
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Chapter 1
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Elizabeth McLeay

1.1 Building the Constitution 2000: The Conference

A decade before the *Reconstituting the Constitution* conference was held in September 2010, its predecessor, *Building the Constitution* took place. The papers delivered in 2000 were subsequently published in a book of the same name.[1] The purpose of this chapter is to bridge the two conferences (and books), providing some context to the more recent proceedings. I finish by discussing the continuing problem of how the constitution of Aotearoa New Zealand should be changed, the question of appropriate democratic political processes.

The objectives of the conference held at the change of the century were "to stimulate and support the debate – and to help give it useful shape and substance".[2] The proceedings aimed "to give form to discussion that is now sporadic and often conducted in unconnected forums" rather than to arrive at particular conclusions.[3] In his opening remarks Sir Paul Reeves said that the conference had a twofold

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[1] The earlier conference was held on the 7th and 8th of April 2000 and, like the 2010 gathering, was held in the Legislative Council Chamber, Parliamentary buildings. The conference speeches and papers were subsequently published in James (2000b). I am grateful to the School of Law, Victoria University of Wellington, for granting me a visiting position during 2010, thus helping me to write this paper. I also wish to thank Polly Higbee for her helpful comments.

[2] James (2000a), p. 6.

[3] Ibid, p. 6.

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purpose: "to explore the legitimacy of our constitution"; and "to start a debate on the constitution, without trying to determine the endpoint".[4] The conference covered a broad range of topics, as can be seen below, an acknowledgement that, especially when a constitution is "unwritten", the notion of "the constitution" can be widely construed. Many of the topics were similar to those discussed in a previous conference, the *Constitutional Implications of MMP*.[5]

It was recognised that, "The constitution is founded on the belief that the constitution belongs to the whole people, can draw its legitimacy only from a broad-based agreement of the whole people and must not be changed without the approval of the whole people".[6] However, the fact that the conference participants in the 2000 gathering had been invited to attend was criticised in the mass media. The role of the government in co-sponsoring the conference was also the subject of hostile comment. The conference was "part-funded by the government on a decision made by a National party minister in 1999".[7] By 2000, the Labour–Alliance minority government (1999–2002) was in office. It also supported *Building the Constitution*. As Colin James relates, "[A] minor party leader tried to have the conference evicted from the Chamber and alleged a 'hidden agenda' by a supposedly self-anointed elite to advance the republican ambitions of the new Labour Prime Minister. He conjured up spectres of separate development of Māori and non-Māori".[8] This attack, like the criticism of the selective nature of the invitees, stimulated much interest from the media.[9] The publicity around the event demonstrated both the salience of the topic and its controversial nature.

In the next section I analyse the *Building the Constitution* conference's broad themes and debates (Sect. 1.2). I then switch the focus from the areas of disagreement to the areas on which there was substantial consensus (Sect. 1.3). From there I briefly map the constitutional developments of the 2000–2010 decade (Sect. 1.4), in part to provide further context for *Reconstituting the Constitution* but also because those developments nicely illustrate the continuing debates about the nature of New Zealand's constitutional arrangements. In that section I provide a more detailed case-study of one important change: the construction of a New Zealand final court of appeal. I conclude (Sect. 1.5) with some brief observations on the problem of determining legitimate processes when reconstructing constitutions.

[4] Reeves (2000), p. 41.

[5] See: Simpson (1998). The 1995 conference was organised by the New Zealand Politics Research Group and supported by the New Zealand Political Change Project and the Department of Politics, Victoria University of Wellington, and the Department of Political Science and Public Policy and the Centre for Continuing Education, University of Waikato. The Office of the Prime Minister, the Cabinet Office, the State Services Commission, and Te Puni Kōkiri were also involved.

[6] James (2000c), p. 439.

[7] James (2008).

[8] Ibid, p. 1.

[9] Ibid, pp. 1–2.

1.2 Building the Constitution 2000: The Issues

The substantive sessions of the conference held in 2000 focused on ten topics: the nature of the New Zealand nation; the constitution and the external world, especially treaties and international law; the development and nature of the constitution; the place of the Treaty of Waitangi; multiculturalism and the constitution; the future of the position of head of state; the cabinet, public service, and subnational government; parliamentary reform; the roles of judges; and whether or not a written constitution should be created. I briefly describe the main points of interest and contention in each of the above sessions, acknowledging that I cannot do justice to the fullness and complexity of the arguments presented and discussed.[10]

1.2.1 What Constitutes Our Nation?

Constitutional structure and development are closely interwoven with issues of identity and nationhood, it was generally agreed. The complexity of the interrelationships was, at least in part, shown by the significance of "difference", one of this session's main (explicit and implicit) themes. There were differences between the past and the present, between Māori and non-Māori, between men and women, between biculturalism and multiculturalism, and between Britain and its former colony, for example. New Zealanders developed a sense of national identity at the same time as they became more aware of the differences amongst them, an important cultural development in so far as the constitution has been concerned.[11] New Zealand's distance from the rest of the world, historically a dominant literary theme, had diminished due to modern technology; and the tension between the individual and the team, also prevalent in the literature, was echoed in debates about the relationship between the citizen and the state.[12] New Zealand's history had been dominated by binary assumptions, especially between the myths of nature and virtue.[13] These views had been supported, and challenged, by our myths.[14]

When had New Zealanders started questioning their constitutional arrangements? One answer was that, for a mixture of social and economic reasons, the consensus about the fundamentals of the country's constitutional arrangements had begun to break down during the mid-1960s.[15]

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[10] See also the masterly summary by James (2000a), pp. 14–33.

[11] Macdonald (2000); Phillips (2000).

[12] Manhire (2000).

[13] Williams (2000).

[14] Temple (2000).

[15] Phillips (2000).

1.2.2 *The Constitution and the World Around/the Constraints of Treaties and International Law*[16]

The eight papers on this topic demonstrated wide-ranging views. The external context of treaties and international law must be considered when developing a constitution, and New Zealand's small size made these external forces especially important.[17] This had been recently recognised by the House of Representatives when its select committees acquired the remit to scrutinise international treaties, a sign that the legislature was increasing its influence over the executive. Several speakers, coming from different philosophical perspectives, addressed the relevance of globalisation (a fashionably newish concept in 2000) to the constitution. Although the globalised world offered New Zealand many opportunities for a small nation with its own sense of identity,[18] globalisation, a complex phenomenon, also had detrimental effects when people's needs were not being addressed.[19] Globalisation was not only about trade and international obligations and relationships, however, for "Globalised society provides us with a wide array of international ideas. The challenge is to secure the room to form our own ideas".[20] The principles of a good constitution insofar as international relations were concerned were similar to those for other policies: governmental transparency, due process, accountability, consistency, and so forth; and a constitution should enable the development of bilateral and multilateral relationships.[21]

A different interpretation was that contemporary globalisation should be understood in the context of a very long history of colonisation. The decolonisation of New Zealand must take place; and a new relationship between Māori and the immigrant peoples must be developed to "provide a framework for the elaboration of a non-colonial form of governance arrangement, and for the creation of a society in which the history and well-being of some is not secured by obliterating the history and well-being of others".[22]

Several participants took the opportunity to discuss individual rights. One view was that the state should protect "negative" rather than "positive" rights and protect property and freedom of contract rather than provide "entitlement" rights. Thus, the main purpose of a constitution was to limit the power of the state in order to protect

[16] In the "Contents" of *Building the Constitution* (James 2000b), this section is labelled "The constraints of treaties and international law". On p. 104 it is labelled "The constitution and the world around".

[17] Mansfield (2000).

[18] Fletcher (2000).

[19] Kelsey (2000).

[20] Hawke (2000).

[21] Scott and Barker (2000).

[22] Sykes (2000).

individuals. However, judiciable rights were undesirable.[23] In similar vein, it was argued that economic rights should not be included in a constitution.[24] New Zealand's liberal voting rights, enfranchising permanent residents, might be reviewed, given the interrelationship between immigration and citizenship.[25]

1.2.3 What Constitutes the Constitution?

This fundamental question was addressed through the perspectives of different disciplinary approaches. One historical question concerned the origins of the modern scrutiny of New Zealand's constitutional arrangements and why this had happened. Was the mid-1960s the turning point, as proposed in an earlier presentation?[26] Or was it 1980?[27] What were the different trends and significant dates in New Zealand's constitutional history? It was observed that the period of the 1950s to the early 1980s, in contrast to later years, was a time of "Stability and Volatility".[28] From the beginning of the 1980s several of the engines of the constitutional changes that took place during that period were "independence", "public disenchantment", "the Māori renaissance", and "non-Māori resistance".[29]

The lawyers viewed the question through institutional lenses. When New Zealand's constitutional arrangements were reduced to their essential elements, these were: the sovereign; the executive; Parliament; and the courts.[30] Each element raised questions about its activities, the actual and desirable division of powers, and the expression of the rules that define the interrelationships.[31] Areas identified for future reform were: the adoption of a written constitution; entrenchment of the Treaty of Waitangi; abolition of appeals to the Privy Council; replacement of the Mixed Member Proportional (MMP) electoral system with another proportional system; reform of parts of the MMP system; entrenchment of the rights and freedoms under the Bill of Rights Act 1990; introduction of a constitutional guarantee to just compensation for the exercise of eminent domain (the taking of private property for public purposes); establishment of a Judicial Commission for making judicial appointments and promoting judicial accountability; and the introduction of a "paper" or physical separation between the political executive and

[23] Deane (2000).
[24] Sundakov (2000).
[25] Ibid.
[26] Phillips (2000), especially pp. 73–76.
[27] James (2000a), p. 3.
[28] Oliver (2000), p. 158.
[29] James (2000d), p. 161.
[30] Palmer (2000), p. 184.
[31] Ibid, pp. 184–185.

Parliament (for example, appointment of non-parliamentarians as Cabinet Ministers).[32]

1.2.4 The Treaty of Waitangi and the Constitution

A particularly difficult and contested topic succeeded the associated question of identifying the constitution: determining the constitutional status of the Treaty of Waitangi, past, present and future. On the one hand it was concluded that, "The Treaty gives Māori special status, but tino rangatiratanga as defined by the courts and the Waitangi Tribunal does not equate with the 'sovereignty' or governance of the Crown."[33] On the other hand it was argued that sovereignty should not be conceptualised as "a particular *site* of power" possessed only by colonising states but as a "concept of power which human societies can define and exercise in their own way".[34] The Treaty must be repositioned "as a relationship between equal sovereign powers."[35] The situation of Māori and the Treaty was echoed in other countries: nation states lose sovereign power but, at the same time, experience an "increasing demand for greater devolution of power to regional levels".[36]

The options regarding the Treaty's place in the constitution were to ignore it, to give it honourable mention, to choose simple incorporation, or to move towards "expansion".[37] The first three options were problematic. Thus:

> In all, it would seem appropriate to recognise principles or rights that flow from the Treaty without presuming to foreclose on the Treaty itself by presenting those principles or rights as complete. It may be appropriate to recognise New Zealand as a place for all peoples while recognising at the same time that in the interpretation and administration of laws, weight shall be given to the status of Maori as aboriginal inhabitants and the Treaty promise to protect their interests. In such ways the Treaty is expanded upon, has honourable mention and continues morally to bind but is not incorporated into law save to the extent specified.[38]

A concrete proposal was to construct three houses in a future Parliament: Tikanga Pakeha (the Crown House); Tikanga Māori; and the Treaty of Waitangi house, each with different but overlapping functions.[39] Another suggestion was to place both the Māori and English texts of the Treaty in the preamble to the Constitution Act 1986: "The Treaty cannot be overlooked by Parliament but neither

[32] Joseph (2000), p. 180.
[33] Graham (2000), p. 195.
[34] Jackson (2000b), p. 196.
[35] Ibid, p. 199.
[36] Graham (2000), p. 194.
[37] Durie (2000a), pp. 201–202.
[38] Ibid, p. 204.
[39] Winiata (2000).

can it be tied down nor limited."[40] A written constitution of higher status than ordinary law should be adopted to protect minority rights; and federalist principles should be considered, providing Māori with a state within a state.[41]

1.2.5 Multiculturalism and the Constitution

Demographic shifts, including New Zealand's changing ethnic composition, have constitutional implications. The locus of power had moved "away from a Pakeha hegemony towards a more ethnically diversified power structure". There were complex issues around the definition of Māori and other ethnic groups, given their implications for the Electoral Act and the Māori seats, and other statistical policy purposes.[42] Intergenerational and family issues were also significant.[43] The long history of the relationship between New Zealand and the Pacific Islands had been important for this country and must be acknowledged.[44] New Zealand's cultural plurality, plus identity issues, must be recognised alongside the rights of individuals. Since there was public concern on these issues, effective leadership was needed, institutions needed to be reshaped, and "Justice-based claims of recognition and institutional accommodation need to be carefully defined and justified".[45]

In this session, as in others, the point was made that the priority was to sort out Māori political claims: "[U]ntil the current conventions and principles of constitutionalism are renegotiated by Māori and the Crown, it is not reasonable to expect Māori or any other cultural group to assist the dominant culture to preserve the legitimacy of its institutions".[46] There had been a "paradigm of dominance and subordination".[47] Aotearoa New Zealand should have a written constitution "that reflects and implements the Treaty guarantees", including creating a Māori national body.[48] Crown-funded Māori hui should be created to arrive at a consensus on this.[49]

[40] Henare (2000), p. 211.
[41] Vasil (2000), pp. 214–218.
[42] Pool (2000), p. 225.
[43] Ibid, pp. 228–230.
[44] Pereira (2000).
[45] Spoonley (2000), p. 241.
[46] Wickliffe (2000), p. 244.
[47] Ibid, p. 244.
[48] Ibid, p. 245.
[49] Ibid, p. 246.

1.2.6 Who Should Be Head of State?

"In removing the Crown … we are doing more than removing the Queen as sovereign. We are, in fact, removing the underlying principle of the succession of government. This knowledge should inform our thinking as to what might appropriately replace 'the Crown' as the head of state".[50] Thus, altering the status quo would mean more than a minimal change to the constitution because, in so doing, it would construct the debate between republican and monarchist and because it would concern the historic relationship between Māori and the Crown. It was "inappropriate for the Crown to be removed without clear objectives as to who/what will replace it as the Treaty partner".[51] Reforms that changed the head of state could either go in the direction of "soft republicanism" (simply replacing titles and building on existing conventions) or, alternatively, towards "the full republican agenda" (including the constitution as higher law, with implications for Treaty relationships).[52] Again, though, the Treaty relationship could pose difficulties. In contrast with Australia, "our republican rock may be how to constitutionalise the relationship between Māori and others if we were to tear the Crown from the head of state."[53]

The present situation was that: "The role of the monarch has evolved to the point where she does very little in relation to Australia, New Zealand or Canada. From this perspective, formal establishment of a republic merely recognises and regularises the status quo". However, this argument worked both ways: "For republicans, it is an argument for taking the next, logical constitutional step. For monarchists, it is an argument for keeping the status quo".[54] The Australian experience provided New Zealand with helpful lessons, especially concerning the usefulness or otherwise of holding national conventions to make recommendations on constitutional issues.[55]

1.2.7 The Cabinet, Public Service and Subnational Government

It was argued that New Zealand should have a written constitution incorporating some of the existing conventions on executive government, including the institutions of cabinet and the public service and the position of Prime Minister. The constitution should not be too prescriptive, however, and should not include collective cabinet responsibility and individual ministerial responsibility because

[50] Hayward (2000), p. 262.
[51] Ibid, p. 266.
[52] Ladley (2000).
[53] Ibid, p. 275.
[54] Saunders (2000), p. 280.
[55] Ibid, pp. 281–283.

this would make the constitution too inflexible and give too much power to the courts. The *Cabinet Manual* sufficed for conventions and procedures.[56] Despite the advent of MMP, New Zealand continued to fit the model of parliamentary government. Some key questions were whether there should be increased separation between executive and legislative powers, whether or not cabinet composition and powers should be codified and/or restricted, and how cabinet could be made more accountable for its actions.[57]

Four crucial constitutional principles had governed the public service: the rule of law; ministerial responsibility; non-partisanship; and open government.[58] These conventions would remain in place in the future. Indeed, most of the possible constitutional changes that had been discussed would not much affect the public service unless a president were to be given substantial executive powers, and this was unlikely to happen. Greater stress on biculturalism, cultural pluralism, and devolution would have implications for how the public sector operated. But the primary conventions would remain the same.[59]

Local government, and its powers, stimulated a lively discussion. The point was made that, "[i]n local government's view, any conference on constitutional matters must begin to grapple with questions about the spatial distribution of authority and power".[60] Local government challenged the "centrist paradigm in New Zealand".[61] Good government should be close to communities, as is local government, for the following reasons: enhancing participation; sharing values; improving policy; protecting the liberty of individuals and communities; and enhancing local capital.[62] But local government needed a "power of general competence".[63] This did not mean shared sovereignty. New Zealand needed a national debate on constitutional issues, a debate that included the subject of the relationship between national and local government.[64]

1.2.8 Should Parliament Be Changed?

Unsurprisingly, the impact of the recent, radical electoral system change dominated the agenda in this session. New Zealand had just held its second general election

[56] Chen (2000).
[57] McLeay (2000).
[58] Boston (2000), p. 309.
[59] Ibid, pp. 314–315.
[60] Stigley (2000), p. 317.
[61] Ibid, p. 318.
[62] Ibid, pp. 319–321.
[63] Ibid, p. 322; and more fully, Jansen (2000), pp. 326–333.
[64] Jansen (2000), p. 331.

under the MMP rules. Electoral system design involved both macro and micro issues, it was pointed out, and perhaps it was the latter that should be amended.[65] Reforms, mostly micro changes, to the rules were proposed. More public education was needed because Parliament faced a legitimacy problem.[66] Electorally incorrect language should not be used (for example, using "list vote" rather than "party vote"). Perhaps both the party vote and the electorate vote should be renamed so that electors would understand their respective significance.[67] The roles of the list MPs should be reconsidered.[68] Other suggestions were to abolish the one-electorate threshold and to prevent MPs from remaining in Parliament after resigning from their parties.

MMP had already affected parliamentary procedures, it was explained. Other possible reforms were to reinstate an upper house, to create a separate Māori Parliament, and to entrench a bill of rights. Each change, however, had its disadvantages.[69] New Zealand might consider implementing fixed-term Parliaments (similar, perhaps to the Swedish situation) and a constructive vote of no-confidence.[70] Future changes to the ways in which Parliament operated would depend on what other aspects of the constitution were changed: the constitutional review of legislation, the separation of executive and legislative powers, or the creation of a second chamber, for example. But, whether or not these things happened, Parliament would continue to evolve.[71] One possibility was for the Māori Affairs Committee to "evolve into a Second Chamber within a unicameral Parliament" in so far as the legislative process was concerned.[72]

New Zealand's non-binding, citizens' initiated referendums, a mechanism to deliver direct democracy, were flawed, especially as "[t]here is too little supervision" of the referendum question.[73] But referendums, including ones that are binding on governments, are not necessarily the answer:

> An effective representative democracy with robust avenues for public participation does not depend on the existence of citizens-initiated referenda. The fact that the New Zealand public has at times been greatly disaffected with politics is not to be ignored. We should explore a **range** of ways to redress those concerns, and tailor our processes to fit the subject matter of those controversies.[74]

[65] Mulgan (2000).

[66] Ibid, p. 363; and Jackson (2000a), p. 346.

[67] Ibid, p. 363.

[68] Jackson (2000a), p. 348.

[69] Caygill (2000).

[70] Jackson (2000a), p. 348.

[71] McGee (2000).

[72] Ibid, p. 353.

[73] McLean (2000), p. 366.

[74] Ibid, p. 368 (emphasis added).

1.2.9 What Role for the Judges?

This question involved several large issues: the problem of the role the courts should play when the constitution is being changed (and any such role should recognise the collective will); how to entrench human rights (which should happen); and the abolition of the right to take cases to the Privy Council and the construction of a New Zealand Supreme Court (also deemed desirable). The new court should include one or two overseas judges alongside the local ones.[75] The role of the judiciary in the present constitution is contested and, partly because of increased public law litigation, it was observed, the media were taking more interest in the judiciary than in earlier years. There would be more attention on the judiciary still if the judiciary could interpret a written constitution or invalidate legislation.[76]

1.2.10 A Written Constitution?

The focus of the last session of *Building the Constitution* interconnected with the earlier ones and, furthermore, illustrated particularly acutely the sharp differences of opinion on whether or not New Zealand should codify more fully its constitutional arrangements and move towards a written constitution that was more substantial than the Constitution Act 1986.

One argument was that, because New Zealand compared well with other democracies, and because it was a small and non-federal country, it should not move towards codification. The (mostly) non-written constitution avoided the problems of having unelected, powerful judges; and a written constitution would be hard to amend and, once implemented, there would be no going back afterwards.[77] After a succinct summary of the possible drawbacks of written constitutions, another contributor observed that "[t]he essential risk of the written constitution is the rule of lawyers by reference to anachronistic rules".[78]

There was the particular question of whether or not New Zealand should make the Bill of Rights part of some sort of superior law.[79] Since the discussion over the development of the New Zealand Bill of Rights Act 1990, much had changed. More people were interested in superior bills of rights; and there were more models around for New Zealand to examine, for example, that of the United Kingdom. The international rights environment had also changed the situation. If New Zealand

[75] Cooke (2000).

[76] Taggart (2000).

[77] Allen (2000).

[78] Hodder (2000), p. 436. Note the interesting defence of conventions against statutes by McGee (2009).

[79] Rishworth (2000).

were to adopt a bill of rights that was a form of superior law, then this should be approved by referendum. But this radical change was not really necessary, unless other constitutional changes occurred such as political union with Australia.[80] Another speaker put forward the idea of a Citizenship Commission – perhaps a royal commission. This could investigate, among other things, the rights and responsibilities of citizens and leaders.[81]

The constitutional position of Māori was the fundamental quandary. What is the constitutional status of the Treaty? It was important to realise, it was pointed out, that there was a broader context: it was not only statutes that recognised the Treaty but also policies in government sectors.[82] And although some pieces of legislation referred to the Treaty, there were important laws with no Treaty provisions. Furthermore, " . . . the Treaty itself, even setting aside the contradictions between the English and Māori texts and the failure to assign Māori any rights to participate in government, has proved to be of limited value as a determinant of constitutional rights."[83] As for the future, New Zealand would continue to be an independent nation state; Māori would have special constitutional recognition as indigenous people; and "Māori autonomy will aspire to self-governance".[84] Constitutional change in New Zealand would be evolutionary. Two constitutional commissions should be formed: a Māori Constitutional Commission and one other.[85]

1.2.11 The Reconstituting the Constitution *Agenda: The Gaps*

Inevitably, perhaps, given the number of constitutional quandaries facing Aotearoa New Zealand at the turn of the twenty-first century, some significant constitutional issues were omitted from the conference agenda. These included the vital issue of the political parties, including their legal and parliamentary definitions, their democratic roles, and the question of funding and the regulation of election donations and expenditure. This last issue turned out to be particularly controversial during the first decade of the new century.[86] The other major gap was the rights and responsibilities of a New Zealand citizen and the definition of citizenship. Nevertheless, the 2000 conference tackled some big issues and difficult questions. There was also a degree of consensus around certain aspects of the constitution and its development, the focus of the next section of this chapter.

[80] Rishworth (2000).
[81] Frame (2000), pp. 431–432.
[82] Durie (2000b), p. 417.
[83] Ibid, p. 418.
[84] Ibid, p. 420.
[85] Ibid, pp. 421–424.
[86] For a recent analysis of parties see Geddis (2009).

1.3 Building the Constitution: Shared Assumptions

As I have shown so far, the nature of the constitutional changes that might be made, the extent of change, and who should make the decisions about those changes, were all contested issues at *Building the Constitution*. Nevertheless, a number of important conceptual assumptions about New Zealand and its constitution were generally accepted. These were not always overtly expressed but, nevertheless, underpinned deliberations.

1.3.1 Respect for Constitutionalism Is Fundamental to Our Democracy and to Rebuilding the Constitution

Although there was no explicit discussion of the nature of a constitutionalist state, nobody challenged the assumption that respect for the principles of constitutionalism was vitally important for a political culture. As argued by Andrew Sharp:

> Constitutionalism ... sees public life as working within rules and principles settled by tradition or agreement. It values continuity and stability more than change. A settled structure of expectations, it claims, is the basic prerequisite for the pursuit of change and opportunity; so that it values liberty indeed, but only that liberty settled by law.[87]

Constitutionalism values equality, "again within legal limits", and rights inherited from the past.[88] Constitutionalism values legal authority, but authority must respect property, economic and political rights.[89]

There would have been little or no disagreement among the conference participants about the importance of these principles. However, there was no agreement on precisely how these rights and arrangements should be weighted, expressed and implemented. Decades ago, a New Zealand constitutional law expert, Kenneth Scott, wrote that, "[a]n action is unconstitutional if it offends the provisions of constitutional law or if it offends the idea of constitutional propriety held by the people concerned, who in many cases are the electors".[90] The problem is that, in an era of mass communications, social and cultural complexity and the intense contestability of ideas, Scott's nicely crafted guideline provides insufficient guidance to the difference between what distinguishes constitutionality from unconstitutionality.

[87] Sharp (2006), p. 110.
[88] Ibid, p. 110.
[89] Ibid, p. 111.
[90] Scott (1962), pp. 26–27.

1.3.2 The Most Significant of the Fundamental Issues that Must be Settled is the Question of the Constitutional Status of the Treaty of Waitangi

There was overwhelming agreement that the constitutional position of Māori, including determining exactly how the Treaty of Waitangi should be acknowledged and respected, was the most urgent and troubling issue. No one disagreed – at least openly – with the assumption that any future reforms had to recognise more fairly the rights of the indigenous people. Exactly how this should happen, and what tino rangatiratanga really means, were – and are – difficult questions. The other leading issues were: republicanism, including changing the Head of State; the possible entrenchment of the Bill of Rights, leading to courts having jurisdiction over these issues; and adopting a written constitution, with its impact on the relationship between the courts and the Parliament. The Treaty of Waitangi is central to all these constitutional questions.

1.3.3 New Zealand will Continue to be a Parliamentary Democracy

Participants agreed that New Zealand would continue to have a system of parliamentary government. Despite its shifts away from the Westminster model, especially after the introduction of MMP, New Zealand would not, and probably should not, break away from its basic Westminster design in so far as the fused relationship between the political executive and the legislature was concerned. The executive would continue to be drawn from, and responsible to, the legislature. Further, the public service would continue basically to follow the Westminster model.[91] Suggestions that New Zealand should move towards separating the executive powers on the model of the United States, France, or towards some weaker form where MPs lose their positions on being appointed to ministerial office, were canvassed but barely discussed. New Zealand's future lay in refining and adapting its historic model of responsible government – albeit a more participatory and "European" version of that which has prevailed in Britain.

[91] Rhodes et al. (2009). The authors argue (pp. 46–50) that there are four essential "traditions" of Westminster: the Royal Prerogative which has become executive authority; responsible government; constitutional bureaucracy; and representative government.

1.3.4 Constitutions are Not Only about Rules Establishing the Formal Distribution of Political Power Within a State; the External Context Must be Considered in Constitutional Development, Both as Cause and Consequence

The international environment, especially the sheer number and significance of international treaties and other agreements, impacts on a country's politics and government. Alliances such as these offer opportunities, and provide constraints, including affecting New Zealand's actions as a sovereign nation. Globalisation and the internationalisation of constitutions and constitutionalism mean that New Zealand sits in an interconnected world of ideas and practices, experience and knowledge. But, at the same time, the volatile international environment creates a situation in which individual states can hold to few certainties. Given these circumstances, there were high levels of uncertainty around the possible unintended consequences of particular changes.

1.3.5 Constitutions are Not Only about Rules about the Formal Distribution of Political Power; New Zealand's Social Culture Must be Considered as Both Cause and Consequence of Change

New Zealand's growing cultural and ethnic diversity must be recognised in any future constitutional developments. Nevertheless, this process would not necessarily be easy, especially given the tension between biculturalism and multiculturalism.[92] Other cultural aspects must be considered, including responding to generational changes.

1.3.6 It is Inevitable that New Zealand will Become a Republic

Sooner or later New Zealand would become a republic and have a non-royal head. How or when this would happen was arguable, as were the extent of the various changes associated with republicanism. The relationship between Māori and the Crown under the Treaty would have to be resolved.

[92] See also Palmer (2007). He argues for (although he does not say this explicitly) a political science approach. Culture, including the beliefs of the participants, helps determine a constitution. Palmer also discusses New Zealand's constitutional norms.

1.3.7 New Zealand's Tradition of Constitutional Change is Evolutionary and "Pragmatic"

"New Zealand's political history has been experimental but, very importantly, not revolutionary".[93] This pattern dated from the state's very beginnings. And, "[a]bstraction has little tradition of popular following in Aotearoa New Zealand. Institutionally, we have tended to favour the simple, accessible and pragmatic".[94] Indeed, radical, revolutionary constitutional change is undesirable (and anyway does not fit with the New Zealand tradition). Although some constitutional changes need immediate attention, New Zealand is not undergoing the kind of constitutional crisis that would have to be dealt with through fundamental constitutional restructuring.

1.3.8 Whether or Not New Zealand Adopts a Written Constitution, Constitutional Codification Had Been Recently Increasing

Particularly over the last decades, and especially since the Constitution Act 1986, there had been considerable legislative and bureaucratic codification of New Zealand's constitution. There were many reasons why this had happened, including anticipating and responding to electoral system change and the increased awareness of rights-based issues. It is worth noting that this trend has happened elsewhere, even in Westminster states with written constitutions.[95] Contemporary political and social complexity tends to lead to the evolution and recording of rules.

1.3.9 Future Constitutional Reforms Must Use Legitimate and Appropriate Change Processes

There was universal agreement that, when embarking upon constitutional change, legitimate reform processes must be used. Future reforms must be made in a manner that is regarded as democratically fair by citizens and elites. This issue was closely related to the problematical question of who owns the constitution, and who should

[93] Moloney (2006).

[94] Macdonald (2000), p. 87.

[95] Rhodes et al. (2009) (p. 88) note that "constitutional conventions have been codified as governments have attempted to provide guidelines for politicians and officials". Also, "the codification of conventions and practices has blurred the distinction between written (codified) constitutions and unwritten constitutions".