MAKING CONSTITUTIONS

MAKING COMMENTS ON MAKING CONSTITUTIONS

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I INTRODUCTION

Sir Ivor has made numerous and varied important contributions to New Zealand's constitution during his career. He has made the kind of relatively incremental change that the role of judge permits one to make. Yet, even in that role, some of the changes have appeared more revolutionary than incremental, because of their effect on the constitution. For example, Sir Ivor contributed to the *Maori Council Case* decision,[1] which altered the way many New Zealanders – including those in government – view the relevance and application of the Treaty of Waitangi today. Sir Ivor has also tried to make change in larger leaps and bounds. For example, as Chair of the Royal Commission on Social Policy, he recommended major changes to the relationship between the State and the individual in the areas of social policy.

The topic of constitutional change is highly relevant today. While it is always necessary to reflect on the incremental, evolutionary changes that go on daily, it is particularly necessary to reflect on constitutional change when there is discussion of major, more revolutionary change.

Over the last twenty years, the New Zealand constitution has already undergone major changes. For example, there have been changes to the legislature itself (for example, the switch to MMP), to the executive (for example, changes to the international Treaty-making process; State sector reforms), to the composition of the State (for example, corporatising and selling some previously State-owned assets and activities), to the relationship between the branches (for example, the New Zealand Bill of Rights Act 1990), and to the Crown's relationship with Maori, its Treaty partner(s). And the momentum for major constitutional

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1 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

change continues. There is currently a concrete proposal for major change to the structure of the judiciary, and there is serious discussion of removal of the Queen, as our Head of State and the re-constitution of New Zealand as a republic, possibly with the adoption of a written constitution. New Zealand has assisted other countries with the drafting and adoption of their written constitutions, but not undertaken this herself.[2]

It is fitting that the issue of constitution making is addressed in this setting.

II THIS PANEL

The panellists present a wide range of personal experience in making constitutions. All are lawyers but, consistent with the overall theme of the conference, they have played different roles and in respect of various different constitutions. The panellists were each asked to draw on their own perspectives, such that the papers presented contain a range of insights on different aspects of constitution making.

A Sir Geoffrey Palmer

Sir Geoffrey Palmer writes from more than one perspective: practising public lawyer, academic in New Zealand and United States, and politician – including as Attorney-General, Minister of Justice, and Prime Minister. As such, he has been involved (amongst other things) as a lobbyist for constitutional change, as a maker of constitutional change, and as an independent commentator on constitutions and change.

Palmer provides three "themes that seem constant": that democracy places constitutional power (for change or other) in the hands of the people; that the distribution of power between the legislative, executive, and judiciary is not fixed and is always subject to change; and that the law – which may be in a written constitution – always needs to be supplemented by its working in practice, if we are to reliably assess the performance of any constitution (such as, for example, the effectiveness of a particular distribution of powers).

Palmer spends the majority of his paper in comparative study of constitutions. Aspects of comparison he focuses on include:

- Written versus unwritten constitutions;
- The protection of fundamental rights;
- The effect of constitutional design on governance; and
- Efforts at making constitutions in the South Pacific.

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2 Unless you count the enactment of the Constitution Act 1986 as the adoption of at least a partially-written constitution.

These comparisons demonstrate well that comparative constitutional study is a worthwhile activity, whether or not one is already considering constitutional change. They provide one with a perspective from which to evaluate the workings and effectiveness of one's own constitution (or, as Palmer puts it, comparative analysis challenges "domestic orthodoxies"). And if one is already considering constitutional change, comparisons provide examples of options, including how different design options may work in practice, as well as how different processes for effecting change have fared in terms of achieving the objectives of peaceful, lasting and effective change.

Palmer concludes with an argument that New Zealand needs more "self-reflective comparison" and to pay more attention to the design of its own constitution. He maintains his view that "constitutions matter", and that New Zealand needs a written one. He thus argues that we need to continue the process of debate over constitutional reform. He implies that this should be done in an organised manner (for example, such as was begun in the Building the Constitution Conference in April 2000[3]), rather than simply being left to the general 'organic groundswell' process of public opinion formation.

B Alison Quentin-Baxter

Alison Quentin-Baxter contributes a paper from the perspective of a legal advisor on constitutions and constitutional issues. She writes primarily of her experience in advising on the creation of new constitutions in Niue, the Marshall Islands and Fiji. She comments that there are aspects of "both substance and process that may be relevant" to New Zealand's constitutional review and debate over adoption of a written constitution.

Quentin-Baxter covers a wide range of issues in relation to making constitutions, from when and how constitutions are made, to different elements that make them up. And she discusses these issues in relation to the three countries mentioned as well as, on occasion, New Zealand. As with Palmer's paper, I consider that the comparative analysis throws up some conclusions that would not have been so forthcoming otherwise.

The constitutional changes discussed involve "significant reallocation of political [and] other powers" and, at least in the cases of the new constitutions in the three Pacific States, were each considered to be a constitutional "fresh start". As such, they each had to "command the loyalty and respect of all", not just of a democratic majority. Quentin-Baxter rightly identifies that the key to achievement of this goal was the process adopted. While this process differed in each example (for example, because the sources of the powers to make or amend the constitutions differed), Quentin-Baxter is able to identify differences that affected the respective results. For example, the roles of the constitutional

3 See Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) for the papers presented at this conference.

advisor, of public debate and of the media in the discussion and adoption of recommendations, and the language(s) of the debate and drafting of proposals, all affected the result chosen and the later acceptance of that result.

In terms of substance, there is an important choice to be made: how much continuity with the existing system should be maintained and how much more radical change can be entertained. So, for example, several issues in these countries revolved around the differences between a traditional, chiefly system and a more modern democratic one. While all countries adopted Westminster systems of government, they chose different balances to accommodate their own particular circumstances.[4]

While Quentin-Baxter refrains from suggesting relevant lessons for New Zealand, there are clear lessons for any country involved – or considering being involved – in constitutional reform. Further, her paper contains particular lessons for those who would provide constitutional advice on such reforms.

C Alex Frame

Dr Alex Frame provides a paper from the perspectives of an academic and a constitutional advisor. Perhaps not surprisingly, it is a mix of the academic and the practical: Frame posits a framework for analysis of the task of constitution-making, illustrating it with examples primarily from New Zealand's constitutional history, and then provides an example derived from his experience as advisor, fitting the example into his framework.

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4 Indeed, see Alex Frame "Lawyers and the Making of Constitutions: Making Constitutions in the South Pacific: Architects and Excavators" *Roles and Perspectives in the Law,* 277, 286. Especially consider, footnote 17 of his paper -- on the use of the label "Westminster model" for these constitutions, which states:

> The expression "Westminster model" is a curious one. The explicit status as supreme law, and the codified form of the post-war Commonwealth constitutions, not to mention the presence of "fundamental freedoms", distinguishes them fundamentally from the traditional London pattern. My former colleague, Professor Ralph Carnegie of the University of the West Indies has observed in this connection:
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> > [t]hat psychological comfort still has a part to play in constitutional design is no doubt too obvious for any warning to be needed against denying its value ... when we speak of our Westminster model Constitutions, we are not being lawyers or even political scientists. We are at best being poets. Ralph Carnegie "Floreat the Westminster Model? A Commonwealth Caribbean Perspective" in *Meeting of Law Officers of Small Commonwealth Jurisdictions - 5-9 December 1988* (Commonwealth Secretariat, London, 1998).
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> The designation can be expected to persist, however, see for example Lord Dilhorne's description of the term as "felicitous" in *Hinds v The Queen* [1976] 1 All ER 353 (HL).

The framework devised concerns methods for making constitutions, which Frame considers rest on a continuum between two poles, with one end represented by the architect, and the other by the excavator. The architect is the designer of a constitution according to fundamental rules and principles, informed by reason, rather than existing social realities. The excavator comes at it from the perspective of social reality, trying to uncover the customs and 'living law' of the people, which then guide the creation of — or even constitute — a constitution.

Frame suggests that, traditionally, more attention has been paid to the architectural method, but that we should recognise the role that excavation plays in practice. We might not notice the results of the excavation approach as readily as the architectural, because they are typically gradual rather than revolutionary. But Frame warns that if constitution-makers depart too far or too suddenly from the excavatory historical pathways then they may deprive the Constitution of what he terms "that reservoir of determination in the hearts of the people", which he claims is the "ultimate foundation of constitutional effectiveness". We thus need to find a better balance on the continuum if constitution-makers are to arrive at an enduring and appropriate constitution for the society in question.

Frame's example of the gradual formation of practice around the fixed rules for succession of government laid down in the Cook Islands Constitution shows both the range and the limits of the architectural and excavatory approaches to constitution-making. While he concludes his paper with observations in respect of the role of a constitutional advisor as an (excavation-style) constitutional-shaping activity, this equally serves as a lesson for the design and reform of constitutions: even architects need to also become excavators.

D Sir John Wallace

Sir John Wallace provides the final paper in this panel, from his perspective as the Chair of the Royal Commission on the Electoral System. Wallace is an architect of constitutional reform, in that the Commission recommended the adoption of Mixed Member Proportional Representation (MMP), which was eventually achieved as a result of the Commission's report.

Wallace's paper reflects upon aspects of the report and of the MMP system in operation, focussing on those that have appeared to be the most controversial. A wide range of topics is covered, from the appointment of the Royal Commissioners in 1985, through some of the recommendations made by the Commission (such as the choice of MMP and some of its details), to current issues (such as party loyalty) and recommendations for the future (such as in relation to public education and a further referendum). Most comments reinforce the original report, although there is one area of

original recommendations that Wallace would change with hindsight.[5] Interestingly, this change of opinion was the sole source of media attention publicly devoted to the entire conference![6]

Wallace's paper is of a different type from the others on the panel: it is practical rather than theoretical, it is largely non-comparative (though there are occasional references to other countries' systems), and it focuses on one example of constitutional change. Yet it provides an equally important contribution: not only does it provide some rare insights to perhaps the most important fundamental constitutional change in recent New Zealand history – which is valuable in its own right – but it also provides lessons for future constitutional change. Most notably, and in common with the previous papers, Wallace's paper illustrates how and that the process adopted is very important to the resulting product.

The particular process by which the electoral system was changed (1985–1993) balances the architectural and excavationist approaches. For example, the Royal Commission's Report has the appearance and manner of an academic, principled argument, containing an overall grand design proposal. While this was only written after extensive consultation, including consideration of over 800 public submissions, it is still the result more of an architectural approach than the excavationist. (For example, the Commission's recommendations in respect of the Maori seats were based more on theory and principle than the reality of public opinion.) But the process of consideration of the Commission's recommendations included Select Committee scrutiny in 1988, two public referendums – including on options not recommended by the Commission – and further Select Committee scrutiny of the resulting reform bill, as well as a statutorily-mandated review by a select committee (the MMP Review Committee) that reported in 2001. In the end, several modifications were made to the original proposal, in line with opinions on the appropriate fit to various aspects of New Zealand's particular context. Indeed, the resulting provisions on Maori representation were a major departure from the Royal Commission's recommendations.[7] The architectural was modified by the excavationist

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5 The area is the threshold of votes that a party must obtain before it can obtain a seat in Parliament. Wallace agrees with the 5% party vote threshold that was adopted (rather than the 4% threshold that the Commission recommended) and would keep it for all parties, regardless of whether they obtained any electorate seats or not (ie, he would abolish the threshold waiver where a party wins a constituency seat even though this was recommended by the Commission and adopted into law).

6 See (6 April 2002) *The Evening Post* Wellington 2.

7 The Royal Commission recommended abolishing the Maori seats and instead leaving the party lists and Maori minority parties under MMP to better represent Maori interests. Instead, and as a result of submissions to the Select Committee, the Maori seats were retained, the seats were made proportional to the Maori electoral population, *and* the various parties better represented Maori – ie, instead of either/or, both methods were adopted.

approach and the results were probably the better for it, particularly in terms of widespread acceptance of the constitutional reforms.

III THEMES AND LESSONS

If there is one overarching theme or lesson to be provided from the papers on this panel, it concerns the value of the process employed for constitutional change. The process for achieving constitutional change is extremely important, as the process affects both the product and its acceptance by the society in question. Thus, the most important task of any constitutional reform project is to pay close attention to the process to be employed in the reform.

Particular lessons about the process to be employed include:

- *The value of comparative study*: Even though constitutional reform is necessarily particular to the society in question, it appears more likely to be successful if reliably informed about options presented by other constitutions – ie, by comparative study. All reform described by the panellists employed this technique. Indeed, Palmer argues that we need to look to other examples simply in order to be more self-reflective about our own constitution.

- *Balancing architecture and excavation*: Effective reform requires a mix of approaches to reform, particularly the mix of architectural design (eg, comparative study and reflection, consideration of theory and principle) and excavationist (tailoring to the specific New Zealand practices, needs and opinions).

- *The need for respected, independent advisors*: Quentin-Baxter's paper provides some detailed examples of how an independent and respected advisor can usefully assist in achieving reform appropriate to the society in question. An advisor may draft various options for reform, leaving the judgement between them to be made by the decision-makers. They may also provide written or oral explanations of the features and implications of the different options presented. Normally they would not express opinions about the desirability of the different options but could if requested. Once options are chosen, advisors may usefully assist with their drafting and then implementation. Quentin-Baxter comments that, where a constitutional advisor (whether a body or an individual) makes recommendations for provisions to be contained in a new constitution, the advisor should be

available for further explanation of the recommendations, even where a full report is provided.[8]

- *Public input and confidence*: For any constitutional change to be effective there needs to be public confidence in the final result. The panel papers demonstrate that acceptance of and confidence in the result can be achieved through public participation and confidence in the process. For example, Quentin-Baxter illustrates what can go wrong when the public is not able to participate adequately in the process;[9] Wallace illustrates how public participation can change advisors' recommendations and decision-makers' expressed opinions. Both papers provide, by way of example, suggestions for methods to help ensure that different groups in society can and do participate in the process.

- *Written constitutions*: Interestingly, most of the reforms discussed involved drafting written constitutions. While Palmer is clearly in favour of adopting one in New Zealand, he provides useful discussion of the differences between the two, including of their abilities to protect fundamental rights. Where a written constitution is chosen, there is a choice as to what kinds of matters and what level of detail to include in it. An interesting issue raised by Quentin-Baxter is whether to try with any reform to maintain as much continuity with the old as possible, or to take the opportunity to attempt more major reform and change any existing power (im)balances. I suggest that this overlaps with the debate on the approaches to reform identified by Frame. Whichever the approach chosen, the panellists demonstrate that, should New Zealand choose to attempt a written constitution, there is a wealth of experience to draw from in achieving it, both 'in-house' and overseas.

- *Balancing interests*: One theme that was identified as common across the whole conference is the need to balance various different interests in order to achieve effective law.[10] This was evident in this panel at least as much as any other. For example, in relation to the reform process employed, Frame identifies the need to balance the architectural and the excavationist approaches. There is a need to involve the public in the process, but there also has to be independent advice and information on options and their implications. The final result always has to

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8 See Alison Quentin-Baxter "Making Constitutions, From the Perspective of a Constitutional Adviser" (2002) 33 VUWLR, 661, 691. Note her discussion of the Commission of Inquiry process in Fiji, including her comments on its shortcomings.

9 Such as in Fiji, where there were problems with language, media publicity, and lack of public feedback on the decision-making process.

10 See Matthew Palmer "A Perspective on Balance and the Role of the Law" (2002) 33 VUWLR, 425.

balance power across the State, so as to provide effective government but whereby abuses of power can be prevented and/or remedied.

- *Lawyers' roles*: In common with another theme identified across the conference, there are a number of different roles available for lawyers in the process of constitutional reform.[11] There is, of course, the traditional role of client advice and advocacy. In the area of constitutional law reform such advocacy is not as likely to take place in a courtroom but in more public lobbying for particular reform options, in respect of both process and result. A different, but increasingly common and increasingly public role is the lawyer as independent constitutional advisor. This may be more of a public, architectural role, such as through an independent commission of inquiry and recommendation. It may be less visible, such as the drafter of laws to implement the reform options chosen. But the quality of advice is key to the quality of deliberations. Constitutional lawyers will thus play key roles in constitutional reform, even where the final result may be chosen by the public, and/or the legislature.

IV APPLICATION TO NEW ZEALAND

There is a low level of public awareness about New Zealand's constitution compared with many other Western democracies. Palmer suggests that one reason is the lack of a written constitution to point to or to teach about. Whatever the reason, there is a correspondingly low level of constitutional analysis or debate. Because of this, there is unlikely to be major constitutional reform in New Zealand as a result of a groundswell of public opinion. It is more likely to happen as a result of reform proposals made through an organised process, where that process has been 'kickstarted' by a constitutional architect. For example, the latest proposal to abolish the Privy Council did not arise as a result of public clamour but the opinion of the Attorney-General. While it has been discussed in legal circles for a number of years, and that discussion has extended to Maoridom because of the particular interest involved there, it hasn't been discussed publicly much more widely than that. There have been many other suggestions made for various different reforms over recent years but only those where there is commitment on the part of those in government ever seem to manage to start the reform process. And this even seems to be the case for more high-profile and publicly-discussed issues such as, for example, reforms in relation to partnership in government with Maori and making New Zealand a republic instead of a monarchy.

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11 See Rt Hon Sir Kenneth Keith "Concerning Choice: A Concluding Comment on the Roles of Lawyers" (2002) 33 VUWLR, 1081.

Thus, if there is major constitutional reform attempted in New Zealand, it will need to be attempted according to a carefully- and well-designed process. Such a process will need to raise public awareness about the issue(s), encourage public debate, and require public approval of reform options. There will need to be skilled constitutional advisors who can present options for reform and explain their implications. Such work must not be narrowed by political direction in advance. And while options must always be appropriate to New Zealand's social situation, overseas examples cannot be ignored – they may be able to be indigenised. Encouragingly, while we may have a small country with a correspondingly small intellectual and legal community, it should not be necessary to import the advisors themselves.

I suggest that there is a need for constitutional reform. There is also a need to develop the ongoing deliberative democracy that Sunstein argues for.[12] But we should not need to wait for the outcome of such deliberations before we talk about constitutional reform. We can formalise such deliberations to begin with – the constitutional conference organised in April 2000 is a good example. Out of such discussions may emerge reform proposals that can be taken further. And perhaps, as a result of whatever reform is implemented, a deliberative democracy can emerge. New Zealanders are not afraid of major reform if they think they need it – witness the switch to MMP. But I think that most New Zealanders do not think (or know?) that we need it. It may take some architects to change this inertia. When this happens, the lessons learned from this panel about both process and product will be very helpful.

12 Cuss Sunstein *Designing Democracy -- What Constitutions Do* (Oxford University Press, Oxford, 2001), referred to in Rt Hon Sir Geoffrey Palmer "The Hazards of Making Constitutions: Some Reflections on Comparative Constitutional Law" (2002) 33 VUWLR, 631. In particular, note footnotes 44-46.