"Building the Constitution" Conference

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Paper by Alex Frame

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1. A Note on the Origins of the New Zealand Constitution

1.1. A.H. McLintock has given us an indispensable account of the events leading to Sir George Grey's refusal to implement the Westminster Parliament's 1846 Constitution for New Zealand and its accompanying Royal Instructions , and of his role in the design of the 1852 replacement document. McLintock refers to the enigmatic Governor's account of the 'drafting process' :

> '...I had visions of a new form of constitution being helpful , far beyond New Zealand. In the end , when my thoughts had bent to a shape , I went up the mountains between Auckland and Wellington , camped on Ruapehu , in a little gipsy tent , and set to the task. A few Maoris accompanied me to carry the baggage ; nobody else , for I could not have drawn the constitution with a cloud of advisers about me.'[1]

1.2. Sir George Grey told Milne 50 years after the event :

> 'the greatest merit of my constitution , was that the people of New Zealand could alter it at any point , should they desire to do so. That was why it appeared to me unnecessary to ask a number of leading men : did they approve what I was doing ? I aimed at a most liberal constitution , and they could change it to their wishes as time went on.'[2]

1.3. Although the link with the 1852 London-enacted Constitution was formally severed by its repeal from 1 January 1987 by the Constitution Act 1986 , the continuity is maintained by express references in the 1986 Act to the unbroken life of the institutions and law-making powers of Parliament [3]. My first point , therefore , is that the structure and content of our Constitution has been pragmatic and provisional from its inception. Two other features of the birth of the 1852 Constitution are worth mentioning in the present context. First , Grey's 'hanging up' of the 1846 package was primarily a result of his opposition to London's reinterpretation of the Treaty of Waitangi which would have restricted Maori rights to land actually occupied.

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[1] A.H. McLintock , Crown Colony Government in New Zealand , Government Printer , Wellington , 1958 , p.331-332. Although McLintock is sceptical of some of Grey's flights of imagination , the evidence gathered at page 332 confirms Grey's central role in the development of the 1852 document.

[2] James Milne , The Romance of a Pro-Consul , Thos. Nelson & Sons , London , 1911 , p.160.

[3] See sections 10 , 14 , and 15.

Secondly, the 1852 Constitution included a provision permitting the maintenance of Maori custom as between Maori in designated areas.[4]

2. Caution in Constitutional Development - Dangers of the Architectural Metaphor

2.1.There are at least two reasons for caution in 'Building the Constitution' , to use the architectural metaphor which names our Conference.The first reason is articulated by Francis Bacon (1560 - 1626) , the Elizabethan lawyer and philosopher :

> 'It were good , therefore , that men in their innovations would follow the example of time itself, which indeed innovateth greatly , but quietly and by degrees scarcely to be perceived ...It is good also not to try experiments in states , except the necessity be urgent , or the utility evident ; and well to beware that it be the reformation that draweth on the change and not the desire of change that pretendeth the reformation. And lastly , that the novelty , though it be not rejected , yet be held for a suspect : and , as the Scripture saith , "that we make a stand upon the ancient way , and then look about us , and discover what is the straight and right way , and so to walk in it".'[5]

2.2 The second reason is the danger that the 'architects' envisioned by the metaphor , however skilled and well-intentioned , neglect or lose contact with the life and energies of the peoples and cultures the edifice is intended to serve. That danger is nowhere better expressed than in Carlyle's pithy comment :

> 'Nay , strictly considered , is it not still true that without some ...celestial sanction , given visibly in thunder or invisibly otherwise , no Constitution can in the long-run be worth much more than the paper it is written on ? The Constitution , the set of Laws , or prescribed Habits of Acting , that men will live under , is the one which images their Convictions - their Faith as to this wondrous Universe , and what rights , duties , capabilities they have there : which stands sanctioned , therefore , by necessity itself ; if not by a seen Deity , then by an unseen one. Other Laws , whereof there are always enough ready-made are usurpations ; which men do not obey but rebel against , and abolish , at their earliest convenience.'[6]

2.3. Put in the more technical language of the 'historical school' of jurisprudence , law tends to develop organically , and will resist the attempts of technicians to force it into shapes designed to serve the interests of 'social engineering', although it will respond and adapt to the dynamic forces of culture , including art and political and spiritual ideas manifested in the life of the people[7] :

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[4] That provision , section 71 of the 1852 Constitution , was repealed by the Constitution Act 1986. Although never used in Aotearoa , it was in fact advanced as justification for the maintenance of Cook Islands custom when those islands became part of New Zealand nearly a hundred years ago.

[5] Francis Bacon , Essays and Apothegms , Walter Scott Publishing , London , (1894?), at p.72

[6] Thomas Carlyle , History of the French Revolution , first published c.1839 , Grosset and Dunlap , New York , p.176-7

[7] Perhaps the most noted jurist to have emphasised this point is F.C. von Savigny (1779-1861) , in Of the Vocation of Our Age for Legislation and Jurisprudence , first published in 1814 , transl. Abraham Hayward , Arno Press Reprint , London , 1975 , p.27 :

> 'Instead of being traced to the deliberate will of the legislator , (the law's) formation was assigned to the gradual working of customs...As regards the State , law was assumed to be an antecedent condition .... In this way direct legislation was thrust into the background, while customary law was studied with particular interest , and regarded as the genuine manifestation of popular consciousness'.[8]

2.4. This is not of course to suggest that codification by a legislature is never appropriate : only that the groundwork of inquiry into customary values and understandings needs to precede it.Timing is very important.The French jurist , Laboulaye , drew attention to the consequence of such an approach :

> 'A people which , instead of holding history in contempt , lovingly searches it for the origins and antecedents of its institutions , is a people which gives up revolution because a new social order takes its place'[9]

2.5. The question whether a common law is emerging , or could in the future emerge , in our islands in which both major cultures can recognise their fundamental values is important for our country , and has inspired a project led by Judge Michael Brown and funded by the Foundation for Research Science and Technology. Involvement in that project has drawn me (I stress that this is a personal view) to conclude that a common law with such characteristics might be uncovered under two conditions :

> 1. A truly cooperative , mutually tolerant , and respectful relationship between Maori and Pakeha leaders and scholars
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> 2. Following from 1 , a wide-ranging , careful , co-operative cultural scholarship which refuses to succumb to adversarial posturing , political window-dressing , bureaucratic convenience , academic rivalry , or racial prejudice.[10]

3. Unity and Diversity - an apparent contradiction

3.1. A distinguished former New Zealand Prime Minister , Norman Kirk , has expressed the essential balance between unity and diversity , and the connection between culture and civil rights , in some pungent observations made in the New Zealand Parliament not long before his death in 1974 :

> 'this organic connection of law with the being and character of the people , is also manifested in the progress of the times; and here , again , it may be compared with language ...Law grows with the growth , and strengthens with the strength of the people , and finally dies away as the nation loses its nationality.'

For a critical discussion of Savigny's ideas , see Hermann Kantorowicz , 'Savigny and the Historical School of Law' , Law Quarterly Review , Vol.53 (1937) p.326-343.

[8] Paul Vinogradoff , quoted by Sir William Holdsworth in Some Makers of English Law - the Tagore Lectures 1937-38 , Cambridge University Press , 1966 , at p. 269.

[9] E. Laboulaye , "Essai sur la vie et les doctrines de Frederick-Charles de Savigny" , Paris , 1842 , at page 188. Quoted in Oliver Motte , Savigny et la France , Berne , editions P. Lang , 1983.

[10] These conclusions were advanced in a paper prepared for the Project and also presented at the University of Oxford's Centre for Socio-Legal Studies in November 1999.

> '...we are not one people ; we are one nation. The idea of one people grew out of the days when fashionable folk talked about integration. So far as the majority and the minority are concerned integration is precisely what cats do to mice. They integrate them . The majority swallow up the minority ; make it sacrifice its culture and traditions and often its belongings to conform to the traditions and the culture of the majority...' [11]

But Prime Minister Kirk did not neglect the 'unity' side of the equation either , observing in a letter to Premier Albert Henry of the Cook Islands in 1973 discussing the significance of the common citizenship of New Zealanders and Cook Islanders :

> 'The very survival of a state may depend upon the belief of its citizens in common ideals and their sense of loyalty towards each other.'[12]

3.2. Although the simultaneous pursuit of unity and diversity may appear at first glance to be contradictory , there are at least three reasons for believing it to be a coherent and beneficial policy:

> First in acting as a check on the undesirable consequences of the extremes of both tendencies .If 'unity' is taken too far by the state it can lead to a bland totalitarianism ; on the other hand , if 'diversity' is uncontrolled it can lead to anarchy and oppression. The enlightened State may encourage its several national identities and at the same time seek to build the new common national identity .Such a policy is not contradictory , but rather a means of maintaining an equilibrium under which the respective benefits of diversity on the one hand, and societal order around agreed values on the other , may be realised .
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> Secondly , recent studies[13] have suggested that diversity may be necessary for the effective guarantee of civil rights in any society. To the extent that some citizens languish outside the majority 'societal culture' , and that the alternative culture to which they belong goes unrecognised and unsupported by the institutions of state , they are correspondingly deprived of meaningful freedom , whatever theoretical equality is guaranteed to them by formal constitutional law.
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> Thirdly , the work of the French cultural philosopher , Claude Levi-Strauss , suggests that - within certain limits - cultures thrive and prosper best when they encounter other cultures , and the more different the cultures the better.[14]

4. A 'Citizenship Commission' as a first step towards Constitutional debate

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[11] Prime Minister Kirk , NZPD Vol. 391 (1974) at p.2691.

[12] Prime Minister Kirk to Premier Henry , 4 May 1973 , App.J.H.R. 1973 , A-10.

[13] I have in mind here the work of W. Kymlicka , Multicultural Citizenship : A Liberal Theory of Minority Rights , Clarendon Press , Oxford , 1995 , and James Tully , Strange Multiplicity : Constitutionalism in an Age of Diversity , Cambridge University Press , 1995.

[14] See Levi-Strauss' 1952 work commissioned by the United Nations titled Race et Histoire , UNESCO , 1952.

4.1. In this short Paper , I have tried to question the ‘architectural metaphor’ , with its assumptions that rational inquiry and skilled drafters could produce an optimal constitutional structure for New Zealand. History shows us many rational and elegant constitutions lying derelict and ruined whilst anarchy and barbarity rage around them - and Carlyle has told us why. A second danger is that if the architects disagree , matters may end badly - with unhappy compromises or worse. While I do not discount the value of rational law-making I would place equal importance on another metaphor - that of scholars lovingly excavating and uncovering the institutions and values of our peoples with a view to adapting and renewing the best of these for our present and joint needs.

4.2. I will end with a tentative suggestion. Public debate might be better stimulated - and sustained - by a more moderate and digestible bite into the constitutional loaf which would leave aside for the moment the large questions as to the ultimate shape and content of our constitutional arrangements and yet serve as a preparation and testing ground for that more far-reaching and fundamental debate in the future.The suggestion here made is that a Commission (perhaps Royal) could be established to inquire into the meaning of - and the rights and obligations implicit in - our citizenship. I quickly note some possible features of such an inquiry :

1. The separate status of New Zealand Citizenship was first created in 1948 , and there is now half a century of public experience concerning expectations of it.

2. The inquiry would necessarily consider the obligations of citizenship as well as rights.

3. It would focus on what is common to all New Zealanders , and could extend to the question to whom , or to what , is allegiance owed.

4. It could encompass discussion of ‘fundamental rights’ and the manner in which these are to be assured.

5. It could extend to the expectations which New Zealand citizens might reasonably have of their Government and political leaders , including expectations concerning social services such as education and health.

6. It could involve discussion of Article III of the Treaty of Waitangi to the extent that the Article recognises fundamental rights and guarantees their availability to Maori and - by necessary implication - to all New Zealanders.

7. It should extend to consultation with the representatives of those New Zealand citizens whose homes are in Tokelau , and the Associated States of the Cook Islands and Niue.

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