Book Review: BUILDING THE CONSTITUTION
Edited by Colin James

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On April 7-8, 2000, the Building the Constitution conference was held in the Legislative Council Chamber in Wellington, New Zealand. The Institute of Policy Studies at Victoria University of Wellington convened the conference to address two main themes:

• What makes the New Zealand Constitution?
• What should now make the New Zealand Constitution?1

The Institute of Policy Studies invited a diverse range of people to prepare brief papers with the proviso that they be “accessible to the average intelligent and interested reader.” These papers then formed the basis for discussion and debate at the conference. A day was allocated to each theme, and the 100 participants, including local and international judges, academics, politicians, writers and representatives from the Maori community thrashed out the “big themes” of New Zealand constitutionalism.

* Lecturer, School of Law, Deakin University, Australia.

1 These were the two formal questions set down by the conveners to be addressed and discussed during the conference. New Zealand has a flexible Constitution. The variety of laws that are considered to make up collectively the New Zealand Constitution can, technically, be amended by a simple majority in Parliament. Consequently, the first day of the conference considered the issue, “What makes the New Zealand Constitution?” The editor described the discussion: “We assessed the state of the constitution and set out plainly the legal and political institutional arrangements it establishes and the framework that imposes on debate about it.” COLIN JAMES ED., BUILDING THE CONSTITUTION xiii (2000).

Additionally, as “the constitution is shaped by the nation,” participants presented papers presented and discussed New Zealand’s history, “its legends and myths, its arts and culture in the widest sense.” Id. The second day of the conference looked at the issue, “What should now make the New Zealand Constitution?” Participants canvassed the aspects of the New Zealand Constitution that may be in need of reform. This discussion then provided the starting point for a discussion on what kind of Constitution would best serve New Zealand in the first half of the twenty-first century. The discussion examined the role of the Crown, whether New Zealand should move towards a republican form of government, the role of each branch of government, and the desirability or otherwise of a written constitution.

2 Id.
Building the Constitution is the publication of these papers in one volume. It provides both a historical record of the conference proceedings and a framework to build an informed and, most importantly, public debate as to: (1) the nature and legitimacy of New Zealand’s current constitutional arrangements, and (2) whether or not those arrangements need to be reformed. In addition, an undercurrent running through many of the papers is that, whether people like it or not, constitutional change in New Zealand is inevitable. As a consequence, a number of papers canvass the kinds of constitutional reforms that might be considered appropriate in the future. From the outset, however, the Institute of Policy Studies stressed that it had no agenda for constitutional change and was not in cahoots with the new Labour-Alliance Government (perceived by the local media to be reform-minded) to reform by the stealth the fundamentals of the New Zealand Constitution.

Building the Constitution documents the papers given at the ten conference sessions. Each session examined one of the “big themes” of New Zealand constitutionalism. They were:

- What constitutes our nation?;
- The constraints and treaties of international law;
- What constitutes the Constitution;
- The Treaty of Waitangi and the Constitution;
- Multiculturalism and the Constitution;
- Who should be head of state?;
- The cabinet, public service and sub-national government;
- Should Parliament be changed?;
- What role for the judges?; and
- A written Constitution?

Generally, the papers are clear and to the point. The layers of linguistic and legal complexities that so often subvert meaningful constitutional dialogue have been stripped away to provide the reader as citizen, rather than lawyer or political scientist, with an invaluable resource to grasp the fundamentals of New Zealand constitutionalism and the challenges it currently faces. In particular, the Treaty of Waitangi, considered by many to be the foundation document of the New Zealand Constitution, looms large. Justice Edward Durie, Moana Jackson, and Sir Douglas Graham in their respective papers, explore the Treaty’s uncertain constitutional status and its relationship with the Crown. Complicating matters, because the Treaty was concluded by the Crown and Maori, any future steps towards republicanism must address the status of the Treaty should the Crown be removed from New Zealand’s constitutional landscape. As Andrew Ladley points out, pursuing a model of “soft republicanism” in New Zealand (i.e., replacing the Governor General with
a New Zealand President) may not prove so simple, for “the ‘Crown’ has far more symbolism to Maori than just the person who is head of state. So any suggestion of change would flush out a full-scale constitutional debate within Maoridom.”

Inevitably, the challenge posed by globalisation to the established constitutional order in New Zealand attracted robust debate. Under the theme “the constraints of treaties and international law,” the collection of papers impressively tackle the issue of how best to build a constitutional framework in New Zealand to strike “a balance between exploiting the advantages of globalisation and maintaining local values.”

Alex Sundakov laments the time and space devoted to what he considers “economic issues” and argues that “concern about the impact of globalisation on nations’ constitutional aspirations” are “misplaced.” Others, however, are more wary. Annette Sykes sees globalisation as nothing more than an advanced form of colonialism. Jane Kelsey draws an interesting distinction between internationalisation (good) and globalisation (bad), whereas Gary Hawke reminds us that “globalised society provides us with a wide array of international ideas” and says “the challenge is to secure the room to form of our own ideas.”

Of particular interest are the series of papers collected under the theme “should parliament be changed?” A more accurate title, however, might have been “should parliament be changed further?” With the creation of a statutory Bill of Rights in 1990 and the move to a mixed member proportional (MMP) system of voting in 1996, a minor constitutional revolution has already occurred in New Zealand. Richard Mulgan examines whether the move to MMP (which in effect guarantees coalition or minority government) successfully reasserted “public consultation and electoral honesty” in the parliamentary process. Additionally, Janet McLean critiques the referendum procedure as a method of effecting legitimate constitutional reform.

All the more topical with the move to MMP having been endorsed at a prior referendum are comments by Lord Cooke of Thorndon in his paper that further fundamental changes to the New Zealand Constitution may not be legally effective without the approval of the people. Lord Cooke’s comments represent a radical proposition and a challenge to the

3 Id. at 273.
4 Id. at 133.
5 Id. at 128.
6 Id. at 138.
7 Id. at 359.
The traditional notion of New Zealand parliamentary sovereignty, at least with respect to constitutional matters. It echoes a similar debate currently occurring in the United Kingdom and raises the possibility that the common law may recognise that deeper constitutional principles underpin the New Zealand Constitution. The final group of papers debate whether the time has come for New Zealand to adopt a written constitution, including an entrenched Bill of Rights.

Other recurring themes resonate throughout Building the Constitution. These themes include the development of a constitutional framework that will reconnect a politically disenfranchised citizenry with their democratic institutions; the importance of constitutionally recognising the unique historical and cultural position occupied by Maori; the need to work towards constitutional outcomes that will allow New Zealand to harness the opportunities provided by an increasingly integrated global society without surrendering its own cultural identity and national sovereignty. Throughout, the notion that the Constitution must belong to the people presents a common thread. A constitution can only belong to its people, however, when those people feel an affinity with its principles and understand and respect the benefits and obligations that it bestows. The key to building the New Zealand Constitution (whatever form it may take) is an informed and interested citizenry. To this end, Building the Constitution will prove invaluable. It is a highly readable text that will unlock for any interested citizen or observer the mysteries that so often unnecessarily surround the principles and institutions of constitutional government. Yet, its most important legacy may be to kick-start a meaningful and ongoing constitutional dialogue between citizen and state. As the failed republic referendum in Australia has recently shown, it is the people, not the judges, academics or politicians, who will ultimately determine New Zealand’s constitutional destiny.

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