

# *New Zealand Journal of Public and International Law*



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THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Fiona Barker	Carwyn Jones
RP Boast	Kate McMillan
Shaunnagh Dorsett	Sir Geoffrey Palmer
David Hackett Fischer	Andrew Sharp
Benjamin F Gussen	David V Williams
Mark Hickford	

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NEW ZEALAND JOURNAL OF  
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The Unearthing New Zealand's Constitutional Traditions Conference at which preliminary versions of these articles were originally presented was hosted by the New Zealand Centre for Public Law and was made possible with the generous support of the New Zealand Law Foundation.



# FOREWORD

## *I CONSTITUTIONAL TRADITIONS*

This special issue considers some of the varying traditions of thought and practice that have influenced and made our constitution during the short history of Aotearoa New Zealand. The editors believe that such consideration is an important part of understanding our society, politics, and legal system. It is an inquiry that is going on continually, in a variety of places and with diverse motivations – in government, in politics, in history lessons, in the Waitangi Tribunal and the courts, and in the wider conversations that New Zealanders engage in when they think about law and government in this country. All of this happens against a background of understandings about who we are, where we have come from, what our society should be like, how the exercise of political power is justified, and what governmental and law-making processes are legitimate. These are competing narratives that play out over time; in this way our constitution, our ideals, our practices, and our account of how these have played out over time are intertwined. Professor Paul McHugh has made these points in much of his work, and an example of the kind of analysis of our constitutional traditions along these lines is found in his essay on the history of Crown sovereignty in New Zealand. A flavour of his argument can be seen in his initial observations:<sup>1</sup>

Societies exist in time ... and hold images of themselves as so existing. ... as the [New Zealand] settler polity came to feel itself living in time... its members felt the attendant need to explain that dimension of its experience. ... when the Pakeha community came to develop a sense of the New Zealand polity's historical self, they looked toward the Victorian myth they had carried with them as ideological baggage. The difficulty was that the English story was based upon a deep-seated sense of historic continuity. It appealed to the notion of immemoriality. This may have suited the circumstances of Englishmen within the realm but hardly matched those of the new colony of New Zealand. The colony was gripped by Anglo-*philia*, and its leaders and thinkers sought to replay locally English notions of constitutionalism. The notion of immemoriality held great intellectual as well as symbolic attraction for them too. The difference, though, was that their New Zealand constitution would be "better" and even more glorious because less scarred by centuries of constitutional turbulence. It would be a new, improved, utopian version of the English constitution – younger, fresher, better, yet somehow holding the immemorial virtues of what was being emulated. The "Better Britain" that the settlers were anxious to build in New Zealand thus extended also to their way of conceiving their constitutional history.

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1 Paul McHugh "A History of Crown Sovereignty in New Zealand" in Andrew Sharp and Paul McHugh (eds) *Histories, Power and Loss: Uses of the Past – A New Zealand Commentary* (Bridget Williams Books, Wellington, 2001) 189 at 192–193.



This passage reveals the nature of the inquiry that is required if one wishes to understand traditions of thought and practice about our constitution – it must plausibly portray the lived realities of particular people in a place and time, demonstrating how they thought and acted and what that tells us about their visions of who they are, what are their values, and how law and government should proceed. We believe that the articles in this special issue are further contributions to our self-understanding of our constitution, and that they belie the story that McHugh identifies as dominant in the mid-twentieth century – that "English institutions had taken root in New Zealand soil with remarkably little trouble", which he sees as having "allowed constitutional lawyers to say that there is no 'theory' of the New Zealand constitution, just as it has allowed the popular belief to become current that the country has no 'history' of which to speak".<sup>2</sup> The articles in this special issue demonstrate that there has been both theory and history in the development of our constitution.

## ***II UNEARTHING OUR CONSTITUTIONAL TRADITIONS***

The articles comprising this special issue of the New Zealand Journal of Public and International Law were first presented as part of the *Unearthing New Zealand's Constitutional Traditions* conference, organised by the New Zealand Centre for Public Law in 2013. On 29 and 30 of August, more than one hundred academics, legal professionals, students, and members of the general public met in Wellington, kindly hosted by the Attorney-General, the Hon Chris Finlayson, in the magnificent setting of the Legislative Council Chamber in Parliament Buildings and the Banquet Hall in the Beehive. There they discussed a number of the traditions of thought and practice that have shaped New Zealand's constitutional order. Historians and lawyers, both from New Zealand and abroad, engaged in debates about early colonial constitutional practices, about diverse Māori constitutional traditions, about the distinctiveness of New Zealand's constitutional traditions when compared to those of other jurisdictions, and about the future of the country's constitution. Thanks to the generous funding of the New Zealand Law Foundation, the Centre was able to bring together speakers from all around New Zealand, as well as from Australia, the United Kingdom and the United States.

The Centre for Public Law, established at Victoria University Faculty of Law in 1996 and currently directed by Professor Claudia Geiringer, has over almost twenty years organised a large number of conferences examining our constitution, with earlier conferences having examined each of the three branches of government, as well as the work and thought of Sir Kenneth Keith and Sir Ivor Richardson, the idea of Reconstituting the Constitution, and popular participation in government. The Centre is also involved in regular symposia and public lectures concerning current constitutional issues and debates – including collaborating with Te Papa Tongarewa and Radio New Zealand National on the yearly "Treaty Debates",<sup>3</sup> and most recently its debate series associated

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2 McHugh, above n 1, at 198.

3 "The Treaty Debates" Radio New Zealand National <[www.radionz.co.nz](http://www.radionz.co.nz)>.

with the Constitutional Conversation convened by the Constitutional Advisory Panel.<sup>4</sup> We are proud of these contributions of the Centre to New Zealand's constitutional debates, and we are confident that this conference has made a further distinctive contribution.

The distinctive contribution of this conference was its focus on our traditions of thought about the constitution: the ideas through which different groups make sense of the use of government power, the moral and political ideals that we evaluate our constitutional practice against, and indeed the continual practices of constitution making and maintenance that play out in our political and legal system every day – which both shape and are shaped by the aforementioned ideas and ideals. The conference was organised on the view that discussing how these ideas and practices have developed over the years, from the varying perspectives of history, politics, and law, would shed further light on what we value as a society, what we actually do, and what we might do differently. We came up with a metaphor of "unearthing", in the sense that these ideas may be latent in current constitutional practices or else may be waning at present but have found expression in the country's constitutional past. Another sense of unearthing is the genealogical analysis of where an idea or practice originated, and how it developed and changed over time. The interplay of pragmatic evolution of the constitution and the principles and ideals that underlie our constitutional development was a particular point interest.

The contribution of the conference to our understanding of our constitutional traditions is found in these pages; in addition, most of the sessions of the conference were recorded and are available through the Centre for Public Law's website.<sup>5</sup>

### ***III THE CONFERENCE***

The conference began on Thursday 29 August with a welcome message from the Hon Chris Finlayson. The message was delivered by the Hon Chester Borrows, and it was followed by an opening address by the Chief Justice of the Supreme Court of New Zealand, the Rt Hon Dame Sian Elias. Dame Sian reflected on certain key moments of New Zealand's constitutional history, setting the stage perfectly for the first Keynote Speaker, Emeritus Professor Andrew Sharp. Professor Sharp presented a deeply interesting paper, entitled "On the Idea of Tradition" which, among other things, argued that "discussions that raise issues of sovereignty, the constitutive power of the people, and the importance of people's customs to them" should not be pursued to a definite conclusion. Instead, it might be better that the "community and government leaders continue in a tradition of 'political constitutionalism'".

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4 These discussions are available on the Radio New Zealand Website: "Constitutional Review" Radio New Zealand National <[www.radionz.co.nz](http://www.radionz.co.nz)>.

5 "NZCPL: Unearthing New Zealand's Constitutional Traditions" Victoria University of Wellington <[www.victoria.ac.nz](http://www.victoria.ac.nz)>.

Professor Sharp's lecture was followed by a plenary panel that explored some aspects of the origins of New Zealand's constitutional order, including legal transplants in early colonial times (Professor Shaunnagh Dorsett), Māori franchise before the establishment of the Māori seats (Dr Damen Ward), political constitutionalism in mid-19th century New Zealand (Dr Mark Hickford), and the rich traditions of democratic participation in the 19th century exemplified by the "Great Public Meeting" that took place in Nelson 1850 (Sir Geoffrey Palmer QC). After lunch, the conference delegates reconvened for the second plenary panel, entitled "Māori Constitutional Traditions", in which Dr Carwyn Jones, Dr Miranda Johnson, and Professor Richard Boast discussed aspects of Māori constitutional thought and of the legal debates surrounding the jurisprudence of the Native Land Court at the end of the 19th century and the beginnings of the 20<sup>th</sup> century.

The day ended with two excellent concurrent panels. One of the panels, which included papers from Dr Fiona Barker, Dr Kate McMillan, Edward Willis and Dr Petra Butler, examined central aspects of democracy, constitutional legitimacy, and rights in the context of the country's constitution. The other concurrent panel included papers that considered aspects of Māori constitutional thinking exemplified through a systematic examination of Māori language texts (Māmari Stephens), the constitutionalisation of environmental rights (Catherine Iorns), and the history of mediation in New Zealand (Dr Grant Morris).

Day two of the conference began with a Keynote Address by Professor David Hackett Fischer. A Pulitzer Prize winner and the author of *Fairness and Freedom*,<sup>6</sup> a comparative history of political ideals in New Zealand and the United States, Professor Fischer presented a paper entitled "New Zealand's Constitutional Tradition: A Comparative Perspective". Focusing on the role of the idea of fairness in the country's constitutional history, Professor Fischer maintained that "[a] feeling that New Zealand is not as fair as it was in the past, has for many generations inspired a determination to make New Zealand more fair in the future", and that "this process is a fundamental part of New Zealand's history and its constitutional traditions". Professor Fischer's address was followed by a plenary panel on "Constitutional Traditions and the Crown", in which Dr Kirsty Gover, Professor Geoff McLay, and Professor David Williams discussed various aspects of the relationship between Māori and the Crown, and of the way the powers of the Crown have been conceived in New Zealand and Australia.

This was followed by two concurrent panels: "Early Constitutional Steps and Choices" and "Constitutional Legitimacy". These panels included papers by Ben Gussen, Peter McKenzie QC, Dr Stephen Winter, and Gay Morgan on subjects such as New Zealand's provincial system in the mid-19th century, Sir William Martin's place in the country's constitutional history, transitional justice in New Zealand, and the prospects of a written constitution. A plenary panel followed, in which Professor Janet McLean examined three arguably conflicting constitutional traditions that have

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6 David Hackett Fischer *Fairness and Freedom* (Oxford University Press, Oxford, 2012).

nevertheless been accommodated in our written constitution (and that are reflected in the Constitutional Review terms of reference), and Dr Matthew Palmer QC argued in favour of an approach that would help us to assess the strength of the rule of law in New Zealand.

The conference was rounded out by a discussion amongst some of the most distinguished participants in and commentators on our constitution traditions: Sir Kenneth Keith, Professor Philip Joseph, Sir Geoffrey Palmer QC, and Professor Tony Smith. Sir Kenneth Keith began with a wide-ranging reflection on the principles underlying a number of constitutional developments over the years, with special reference to the importance of Māori values and democracy. Noting the influence of the American jurist Lon L Fuller on this point, he emphasised the importance of good process for the achievement of good outcomes, as well as the importance of keeping in mind the development of law at the international level. Professor Philip Joseph identified three important narratives or stories within our constitutional traditions: the continuing foundation of our constitutional framework on our historical colonial legal structures, the centrality of Māori constitutional traditions and the place of the Treaty of Waitangi in our public law, and (in a counterpoint to Sir Kenneth's focus on principle) the pragmatic evolution of our constitution, based not on doctrine, theory, or principles, but on workable responses to problems.

In his intervention, Professor Tony Smith, reflected on the ways in which the study of public law has changed in New Zealand. He recalled that, when he was lecturing in constitutional law in the 1970s, no references were made to the Treaty of Waitangi. Professor Smith also noted that there are no modern works that seek to "unearth" New Zealand's constitutional traditions and that there is ample scope for developing such a project. Sir Geoffrey Palmer focused on the subject of constitutional reform. He maintained that some of the problems that New Zealand will face in the future (such as climate change and increased global stability) will require a set of clear constitutional principles that the country currently lacks. He also stressed that there is no appetite for constitutional change in the country, and that this may be the result of a lack of education about the basic institutions of government.

#### ***IV THE SPECIAL ISSUE***

This special issue contains ten articles that are based on the papers presented at the conference.

The first two articles, the keynote addresses by Professor David Hackett Fisher and Andrew Sharp, provide wide-ranging responses to the idea of New Zealand's constitutional traditions. Professor Fischer draws on not only his deep knowledge and scholarship on the constitutional cultures of the United States (including *Albion's Seed*, his famous identification of the transplantation of four distinct folkways from England)<sup>7</sup> but also on his work on the comparative history of "open societies" – essentially, societies on the liberal democratic model where there is

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<sup>7</sup> David Hackett Fischer *Albion's Seed: Four British Folkways in America* (Oxford University Press, New York, 1989).

freedom for people to think and judge for themselves what is valuable for their lives; it is New Zealand that is the comparator for the United States in his recent book *Fairness and Freedom*. Professor Fischer initially sets out interesting features of the constitutional traditions of South Africa, Canada, and Britain, each with its own contribution to the idea of an open society, before providing a detailed analysis of competing visions of open societies found in the United States and New Zealand. We suspect that the varying examples of fairness Professor Fischer finds in our constitutional practices will provide stimulus for thought and response for years to come. Indeed, there is another tale of competing accounts of political fairness to be told concerning the electoral system, one that again came to the fore in 2011 with the debate on Mixed-Member Proportional system. Fairness in how political power is constituted through election was key to the rejection of a return to First-Past-the-Post.

Professor Sharp has done much for the understanding of political and constitutional ideals and their history both in the wider English-influenced world – for example, *Political Ideas of the English Civil Wars, 1640–49* – and more particularly in New Zealand – for example, the meticulous and illuminating *Justice and the Maori*, and his forthcoming book on Samuel Marsden.<sup>8</sup> In his speech, he considers what the results of an attempted "unearthing" of our constitutional ideals might be, beginning by connecting his analysis of the common law's own account of traditions with the work of another great New Zealand historian of such things, Professor JGA Pocock. When he turns to our understanding of the present, Professor Sharp highlights a caveat that lawyers and constitutional actors must heed when engaged in appeals to constitutional traditions: if we are at present telling a story of the legitimacy of and authority for the constitutional arrangements that we find before us, we are likely to suppress the complexity of "felt past realities". Instead of inquiring further into the traditions of our "official constitution", Professor Sharp throws light on three constitutional traditions that compete with the official account of sovereignty or rangatiratanga – the power of people to constitute governing power – the Māori, the whakapapa, and the universalist traditions. His final observations highlight possible problems in any attempt to provide a definitive and rigid version of our constitutional traditions in a written constitution, pointing to the varying traditions that compete for hearts and minds today in this country, and the benefits of resolving these differences in a "pragmatic" way through the continued development of a political constitution.

The articles that follow these keynote speeches further their insights in a number of ways. The vibrant discussion of the constitutional traditions of Māori, from the most "pan-tribal" and common ideals and actions to the particular and varied visions of iwi, hapū, and individuals, are reflected in the articles by Dr Carwyn Jones and Professor David Williams. Dr Jones sets out a vision of a Māori constitutional tradition based in fundamental values of tikanga Māori and Māori law:

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8 Andrew Sharp (ed) *Political Ideas of the English Civil Wars, 1640–49* (Longman, London, 1983); and Andrew Sharp *Justice and the Maori: Maori Claims in New Zealand political argument in the 1980s* (Oxford University Press, Auckland, 1990).

whanaungatanga, manaakitanga (and kaitiakitanga), mana, tapu/noa, and utu. These he sees as the key values of te ao Māori that legitimate the exercise of political power; it is interesting, at least for "outsiders" to Māori life like the present editors, to see that the seemingly crucial idea of rangatiratanga is understood not as a fundamental ideal in itself, but as the working out of more fundamental values. Dr Jones' analysis of the content and application of these values stands as the basis for further reflection and action on these principles in our contemporary political/constitutional life.

In contrast to this broad approach to the Māori constitutional tradition, Professor Williams emphasises two particular aspects: the suppression of iwi/hapū as legitimate holders of political and law-making power – or mana or rangatiratanga as it is often spoken of within the Māori tradition – within the formal New Zealand constitutional order, and the tradition of loyalty to the Crown that he sees as often disparaged in comparison with indigenous resistance to the colonising power. He provides references to historical accounts that are redressing the balance of our understanding and evaluation of Māori responses to colonisation, bringing our attention to the role and relationships that Ngāti Whātua have had with respect to the Crown since 1840; this particular tradition is presented by Professor Williams as indicative of the diversity of viewpoints that will continue to be expressed, and will need to be understood and accounted for, in the constitutional debates on the place of Māori rights in 21st century Aotearoa New Zealand.

Legal disputes involving Māori rights are also important features of the articles by Professors Richard Boast and Shaunnagh Dorsett, both of whom have brought more of our early legal history to light through the Lost Cases project based at Victoria University Faculty of Law.<sup>9</sup> Professor Boast's article draws on his celebrated and award-winning work on the buying and selling of Māori land and the workings of the Native Land Court,<sup>10</sup> but instead of bringing to light the jurisprudence of legal practice and argument that is buried in the Minute Books of that court, here he considers the personalities and perspectives of the judges themselves during the Liberal era. He argues that in this time of major change in both Māori and British/Pakeha life in the country, the judges of the Native Land Court were a diverse and interesting set of individuals, whose actual practices in deciding difficult cases under complex legislation were more complicated than the picture he sees as dominant in existing histories – the Court as either the handmaiden of Government or as a self-interested legal/political actor. Professor Boast's insights on the place of the Court in the 1890s New Zealand legal and political life provide a welcome reappraisal.

Professor Dorsett's article has parallels with Professor Boast's both in its detailed discussion of legal practice – this time of the early days of the colony and legal jurisdiction – as well as in its

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<sup>9</sup> "New Zealand's Lost Cases" Victoria University of Wellington <[www.victoria.ac.nz](http://www.victoria.ac.nz)>.

<sup>10</sup> Richard Boast *Buying the Land Selling the Land: Governments and Māori Land in the North Island 1865–1921* (Victoria University Press, Wellington, 2008).

being informed and linked with an impressive wider body of scholarly analysis and insight. Her work on the history and theory of jurisdiction and the legal nature of empire finds another example in an analysis of a colonial legal transplant's growth in mid-19th century New Zealand: Resident Magistrates Courts established for the recovery of small debts and the prosecution of minor offences. Her analysis of such courts in colonies of Australia and South Africa demonstrates how a shared legal infrastructure derived from English examples could take on very different roles in the service of particular pressing concerns of the place; the version that was set up here was directed towards enabling Māori to enforce civil debts against Pakeha in a situation where Māori were perceived to have little understanding of the substance or procedure of British law. The existing historical record of the use of this Court is laid out in a later section of the article. This, Professor Dorsett demonstrates, was however not only a means of securing private justice for individual litigants, but also part of a wider strategy of assimilating Māori into the British legal and political system.

Sir Geoffrey Palmer's article, as well as the article co-authored by Drs Fiona Barker and Kate McMillan, consider in different ways the relationship between the democratic ideal, political participation and New Zealand's constitutional order. Sir Geoffrey's article offers a close account of the proposals discussed in a meeting that was held in Nelson prior to the passage of the *New Zealand Constitution Act 1852*. After placing the debate in context, Sir Geoffrey discusses the arguments presented by the meeting's participants for and against proposals related to self-government, to the secret ballot, to the universal franchise, to the powers of the executive, responsible government, to the form of government and to the locus of the amending power. The article is a valuable contribution to the understanding of New Zealand's constitutional history; it documents an example of an intense debate about the basic elements of New Zealand's constitution, in which appeals to abstract principles competed with more pragmatic considerations. The Nelson meeting was not only a discussion about the content of a more democratic constitution (which, may be characterised, as Sir Geoffrey does, as a "conscious act of self-determination"). It also evidenced a political context in which democratic participation appeared to be more widespread than in contemporary New Zealand.

The article by Drs Barker and McMillan examines the reasons behind the decision to extend the franchise to New Zealand permanent residents in 1975. As they argue, this decision re-defined what counted as the political community and, in that respect, it goes to the core of the institutionalisation of the democratic ideal in New Zealand's constitutional order. Barker and McMillan maintain that the extension of the franchise to permanent residents can be understood as a manifestation of the pragmatism that has characterised the development of New Zealand's constitution, together with the ideal of egalitarianism which has also formed an important part of the country's constitutional traditions. In developing this argument, Barker and McMillan make an important contribution to the understanding of the concept of pragmatism. They maintain, for example, that academic lawyers sometimes use the concept of pragmatism to refer to incremental or piecemeal constitutional

changes (some of which are largely unperceived by the public), sometimes to refer to a practical approach to problems (as opposed to abstract theorising), and sometimes to refer to ad hoc or reactive decision-making.

Although not engaging directly with the idea of democracy, in examining the idea of subsidiarity as a constitutional principle, Ben Gussen's article addresses the ways the institutional power of local communities and that of central government can be organised in a democratic society. The article is organised around what Gussen identifies as two competing agendas in 19th century New Zealand: a "centralist" agenda and a "provincialist" one. Gussen then analyses the tension between these agendas from the perspective of subsidiarity. He maintains that the principle of subsidiarity is composed of three sub-principles: the rule of assistance, the ban on interference, and the notion of helping local governments help themselves. Interestingly, Gussen exemplifies the implication of these three sub-principles through a reading of the Treaty of Waitangi. In considering New Zealand's constitutional development in light of the principle of subsidiarity, Gussen argues that the New Zealand Constitution Act 1846 reflects the principle by placing legislative power closer to provincial and municipal constituencies, while, in contrast, the New Zealand Constitution Act 1852 placed legislative power in the domain of the central government.

We now come to Dr Mark Hickford's article – one of a series of recent contributions to our constitutional history, building on his monograph *Lords of the Land*<sup>11</sup> – which addresses some of the ideas that influenced the drafting of the New Zealand Constitution Act 1852. This is an important analysis since, according to Hickford, the focus on "constitutional pragmatism" has tended to divert attention away from the intellectual contexts that in various ways have shaped the development of New Zealand's constitution. The 1852 Act, the article argues, reveals "how a complex inheritance from the United Kingdom was transmitted to colonial theatres by way of legislative design".<sup>12</sup> For example, the notion of "constitutional balance" inherited from the United Kingdom was reflected in many ways in the discussions leading to the drafting of, and in the institutions established by, the 1852 Act. One of the most important contributions of the article is the discussion of what has been identified as the MS project – a draft of an alternative constitution for New Zealand whose authorship remains obscure. In contrast to the 1852 Act, the MS project seemed to understand the notion of "constitutional balance" as best promoted through "potent provincial legislatures with clearly insulated areas of statutory competence."<sup>13</sup>

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11 Mark Hickford *Lords of the Land: indigenous property rights and the jurisprudence of empire* (Oxford University Press, Oxford, 2011).

12 Mark Hickford "Considering the Historical-Political Constitution and the Imperial Inheritance in Mid-nineteenth Century New Zealand: Balance, Diversity and Alternative Constitutions" (2014) 12 NZJPIL 145 at 162.

13 At 180.



It is with great satisfaction that we introduce this special issue of the *New Zealand Journal of Public and International Law*. We would like to convey further thanks to those who played major roles in the success of the conference and in the preparation of this publication: Anna Burnett, Harriet Bush, and Claudia Geiringer.

***Mark Bennett and Joel Colón-Ríos (Editors-in-Chief)***