Constitutional Kōrero Conference – November 2022

Indigenous Futures and New Zealand's Constitution

He pataka kōrero – He tūapapa mō te Motu

The Constitutional Kōrero Conference was held in November 2022 at Waipapa Taumata Rau, the University of Auckland, enabled by the generous support of the Borrin Foundation and their commitment towards uplifting social justice in Aotearoa New Zealand.

The Conference spanned three days and featured Indigenous and constitutional scholars from Chile, Mexico, the United States of America, Canada, Vanuatu, Australia, Japan, the Philippines, Tanzania, Hawaii, Greenland, Peru, Sweden, Norway, as well as our own experts, scholars, judges and practitioners from Aotearoa New Zealand.

The conference focus was on presenting arguments and options for constitutional transformation to realise Māori rights in te Tiriti o Waitangi, He Whakaputanga and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). The underlying questions framing our discussions were:

- What would a Tiriti-based Aotearoa New Zealand look like?
- What unique constitutional structures could we design to realise this vision?

An ongoing constitutional discussion is needed in Aotearoa New Zealand for many reasons. Perhaps most obviously, New Zealand's constitution is fundamentally at odds with tikanga Maori, where our legal system is dominant and mono-legal.

Aotearoa New Zealand Perspectives

The opening panel of Ani Mikaere and Hon Justice Joe Williams discussed "how" to go about creating constitutional transformation. There are differing views on how to achieve transformation of the current systems of power – whether through incremental change within the existing system, or through direct assertion of tino rangatiratanga/"just doing it". Mikaere suggested to keep ourselves on track towards true constitutional transformation and to assert tino rangatiratanga, we need to being unflinchingly honest about what it is we are doing; hold both ourselves (as Māori) and the Crown to account; guard against complacency; and to check our ego so that our grandchildren are braver and better than we are.

Williams provided a different view on the incremental steps made, and spoke of a series of "constitutional moments". In the Māori world, in accordance with the laws of kawa and tikanga, constituting ourselves was always incremental. He considered whakapapa of how Kahungunu's influence spread across land through generations of strategic marriages, or how land in Manaia was shared to descendants of Tauranga Moana through "tuku". In these examples, people and land became blended through interaction over generations.

Lessons from Indigenous Constitutional Movements Abroad

UNDRIP as a tool for constitutional transformation

Distinguished Professor S. James Anaya spoke to the significance and relevance of UNDRIP in developing new constitutional arrangements relating to indigenous peoples generally and their territories. The very purpose of the declaration is to promote structural legal and policy reforms in states that have been constructed on indigenous peoples lands and that have imposed their authority on indigenous peoples. He argued that "international human rights law more generally, compels states to remedy the legacies of these injustices and to to secure indigenous peoples rights, including through reformed constitutional arrangements."

In modern constitutions, the recognition of indigenous rights ranges from non-existent to quite general, to quite specific and comprehensive. For example, at the one end is Canada's constitution, which generally recognises existing aboriginal and treaty rights and at the other is Ecuador's 2008 constitution, which includes numerous articles covering a range of rights of indigenous peoples in significant detail.

Comparative constitutional law

Professor Cheryl Saunders discussed how this conference brings together at least two sets of ideas in comparative constitutional law:

- The terminology of "transformative" constitutions are distinguished from "traditional" constitutions where they seek to transform key aspects of the society in which new constitutional arrangements must work. Effective implementation is critical and may take time, and the more ambitious the transformation, the more difficult it may be to achieve in terms of both ***cultural*** and ***institutional*** change.

- Pluralism, i.e. basically having two legal orders, challenges many core constitutional concepts, principles and practices in ways that may indeed involve a form of transformation, not only of those principles, but potentially of the very idea of a constitution. In recent years, the idea of pluralism has been revitalised with renewed interest in the complexities of the continuing decolonisation of constitutional ideas and forms, alongside the achievement of self determination for indigenous people. However, as Associate Professor Nicole Roughan noted, pluralism fails to explain how those two or more legal orders can or should interact with one another and may be limited in its ability to confront the kind of challenges of injustice that colonisation poses.

Lessons from North America

Professor Matthew Fletcher discussed the Anishnaabe experience with constitutions and courts. Indian Tribes have inherent sovereignty and powers to e.g. form governments and make laws or determine tribal citizenship. However, the United States constitutional theory which assumes the "consent of the governed" conflicts with the Anishnaabe constitutional theory of "Mino-Bimaadiziwin". This is a philosophy of harmony and interconnectedness and an encapsulation of natural law. It is their unwritten constitution. There may be opportunities for tribal or indigenous communities to take their own constitutions and their own laws seriously, embed them and then invest them with the principles they were designed for in the first place.

Similarly, Professor John Borrows noted that law is a human activity. It is something all societies participate in, not merely just legislation, courts or lawyers we may typically think of. There are criteria, precedents, cultural resources for making decisions and ways to resolve disputes.

Indigenous people can look to our own creation stories, to understand how we see ourselves and draw analogies to inform our actions today.

Professor Val Napoleon discussed using ***radical co-presence*** to overcome "abyssal thinking" where the way people understand the world erases "others" so they are invisible. We should focus on building relationships that make us as "others" visible, including making our laws, histories and culture visible as well. In other words we should build relationships that will then make establishing our rights possible.

Professor Angela Riley provided examples of native nations and sovereignty in the United States. Treaties were established between the United States and ***nations*** rather than racialised groups. Although "Indian rights" are not generally protected by the Constitution this also means tribes are the final voice on their own dispute e.g. tribal court decisions are not reviewed by federal courts in most cases. There is sovereignty and control over communities, but this jurisdiction is not territorial.

Lessons from the Pacific

As Professor Emerita Jennifer Corrin shared, nearly all of the Pacific Island constitutions include that customary law is a source of law to be applied generally. In most of these specific constitutions, customary law has been promoted within the preambles/prefatory provisions, enacting provisions and exemptions e.g. for customary law which allows it to prevail if there is an incompatibility with human rights provisions.

In Hawaii, Professor Kapua'ala Sproat highlighted some of the helpful constitutional provisions. Broadly, the constitution strongly affirms Native Hawaiian rights that are "possessed by kanaka who are descendants of native Hawaiins prior to 1778". Protections have been extended to practices exercised for "subsistence, medicinal, ornamental, cultural, religious purposes". These practices are place based, resource specific and define their identity and provide "everything that we need to survive and thrive from mountains to sea."

Lessons from Australia

Professor Megan Davis noted in Australia there have been no historical treaties, no historical recognition of state, or rights as First Nations, meaning their status has not been incorporated as a part of the constitutional structures and institutions.

She discussed the (at the time) upcoming Voice to Parliament Referendum which drew from UNDRIP and focused on indigenous participation in decision-making. During drafting, they had identified the only way to get the reform through was to ask Australians to walk with them in a "movement of the Australian people" to talk directly to the First Nations and not through politicians.

Mary Spiers Williams spoke about how according to the foundational law of their home "country" ***is*** the constitution. Notably, First Law demands the country is centered, and that people do not center themselves. Kirsty Gover further discussed how this understanding of "country" is where indigenous peoples get their authority. "Country will always assert itself because it's eternal, it will grow through and over settler law, and all law, all of our human conceits and enterprises and it is

in some important way, the source of all human responsibility, whatever authority we have, as humans, we exercise of behalf of country."

Lessons from Malaysia and Japan

Associate Professor Dr Ramy Bulan recounted tensions in constitutional legal pluralism in Malaysia where native laws and customs are dealt with through the native courts. Difficulties arise in deciding who can access the court, and what issues are relevant. How, for example, are individuals able to prove their native identity, and how do you distinguish between an issue that might be a religious law, or a custom of a native group? Additionally, although the Constitution of Malaysia recognises native identity, and customs may be understood to have the force of law, in practice, unless legislated, these customs will not be recognised by the courts. In a pluralist society, whose perspective takes precedence?

Professor Tsunemoto Teruki from Japan explained the importance of how "culture serves as the foundation for the existence of a people". It is through growing and developing culture that rights will be protected. In modern day Japan, it can be difficult to identify indigenous Ainu individuals, and difficult to assign collective land rights as Ainu now live as Japanese people and have no representative organisation. It is only once Ainu are fully recognised and supported, can a discussion about rights occur.

Lessons from Latin America

In recent decades, Latin America has seen a surge of new or revised constitutions that recognise indigenous peoples law and authority. A panel of Dr Isabel Altamirano-Jimenez, Professor Elisa Loncón Antileo and Associate Professor Roger Merino discussed aspects of constitutional recognition of indigenous rights in their countries.

Notably, while legal pluralism is important, the nature of the relationship between national law and indigenous normative systems is even more so. If indigenous normative systems are always subordinate to national law infringement of indigenous rights can always be present.

Loncón, who presided over the Chilean Constitutional Convention was able to provide an example of a drafted constitution that centres plurinationality, recognising that indigenous people pre-existed before the state and have rights to e.g. land territories, resources and autonomy.

Lessons from the Nordic Region

In Greenland, Sara Olsvig discussed the process to develop a Constitution for Future independent Greenland with indigenous people as the foundation, but also incorporating other citizens. When considering creating a strong document that protects rights, she questioned whether rights should be individual or collective. She also noted that youth voices are focused on decolonisation both physically and mentally.

Professor Mattias Åhrén spoke about Sami Parliament, and tensions between indigenous rights remaining at a local level, or centralising representation at a national level. Importantly, self-determination cannot exist if the Government is only required to listen or take into account its views. One people can't decide on behalf of the other if they're equal.

Lessons from Tanzania

Dr Elifuraha Laltaika outlined some suggestions on how to approach drafting a constitution. A constitution must be homegrown and cannot be based on a template, however, there are some broad steps to follow. First, there should be a community driven need for constitutional change; an expert body or commission should then draft a constitution to share widely with the nation; next a constituent assembly should further edit or improve the constitution; and finally a referendum should be held where the country decides whether to adopt or reject the proposed constitution.

Reflections for Aotearoa New Zealand

The final panel provided a summary of all the kōrero we had heard, and some key takeaways to reflect on. This panel consisted of Annette Te Imaima Sykes, Erin Matariki Carr, Dr Veronica Tāwhai and Professor Te Maire Tau. In summary, rangatiratanga must be built on political institutions and we need clear direction about where we are going as iwi and hapū. There are ways we can engage with colonial systems to carve out space to be mana whenua. We need to reconnect and remember who we are by believing in our mana motuhake. Land, language and leadership is key to constitutional transformation. Perhaps, most importantly, we need to suspend the belief that the country cannot be changed.