**ICON-S Conference: Australia/Aotearoa New Zealand Chapter**

**Opening Plenary “Conversation” with Adrienne Stone**

**Sydney**

**29 August 2024**

**Claire Charters**

**NOTES**

**Explanation of the project: Constitutional Transformation to Realise Indigenous Peoples’ Self-determination: Lessons from Around the Globe**

* analysing, assessing and comparing laws and political/legal methods – globally - to recognise and protect Indigenous peoples’ rights constitutionally;
* to then recommend/devise ideal changes to Aotearoa New Zealand’s constitution to realise tino rangatiratanga Māori. My hope is to be able to come up with specific and practical tools designed to improve the legitimacy of the state, to reconcile Māori claims and non-Indigenous claims and to address the marginalisation of Māori economically, socially and culturally within Aotearoa.

I will analyse and assess how relevant states have accommodated Indigenous peoples under their constitutional systems taking into account the legal, constitutional, political, historical and social differences.

The assessment will include an evaluation of the context that made constitutional recognition and protection possible, the substantive impact of the constitutional recognition and the functional effectiveness of the form of constitutional recognition and protection.

* postcolonial Anglosphere liberal democracies: Canadian constitutional protection of treaty and Aboriginal rights; proposals to recognise Aboriginal peoples in Australia; the recognition of American Indian inherent sovereignty in the United States.
* Nordic liberal democracies: Denmark’s accommodation of Greenland Home Rule; and the Sámi Parliaments in Norway, Sweden and Finland.
* Latin American constitutions: Bolivian foundational constitutional accommodation of Indigenous peoples; Mexico’s incorporation of international law on Indigenous peoples’ rights and Indigenous districts with governance authority; Chilean attempts at constitutional reform, Ecuadorian cases regarding rights of nature and to the environment, recognising Indigenous peoples’ constructive sovereignty.
* Constitutional recognition of Indigenous laws: a variety of Pacific Island constitutions (likely including Samoa, Vanuatu, New Caledonia, Fiji and Tonga) and South Africa’s constitution.

**Examples:**

* United States:
	+ Most of the relevant jurisprudence is *under the common law*: 1830s Marshall decisions establishing tribal inherent sovereignty and contemporary cases that reaffirm or take away from that[[1]](#footnote-1), *McGirt[[2]](#footnote-2)*
	+ Indigenous governance not subject to the United States Constitution
	+ Human rights protections mostly enforced by Indigenous judiciary and governments
	+ More doctrinal scholarship relevant
	+ Longstanding policy of Indigenous self-determination
	+ Hundreds of Indigenous constitutions [Kirsty Gover]
* Canada:
	+ Most commonly referred to by non-Māori scholars when considering local constitutional transformation: example of a written constitution with protections of Aboriginal and treaty rights and arguably “Commonwealth appropriate”
	+ Also requires doctrinal analysis of important cases on treaty rights etc: recent Quebec cases[[3]](#footnote-3)
	+ Treaty settlements: involves jurisdiction sharing/self-determination
* Vanuatu:
	+ Vanuatu is made up of 83 islands and over 100 Indigenous linguistic and cultural groups, meaning their pre-colonial governance was already pluralistic and place-based
	+ Colonisation of the islands, named by Cook as New Hebrides, was unique as France and Britain agreed to share power as the ‘New Hebrides Condominium’. This shared power arrangement was ineffective and inefficient, and resulted in relatively little influence outside of the two main cities – which meant the majority of the islands continued living under customary law with their traditional economy and culture intact
	+ The Indigenous Vanua’aku Party gained huge popularity and won the 1979 pre-Independence election, formally declaring independence in 1980, creating the Republic of Vanuatu
	+ The new constitution is considered an Indigenous constitution in the Pacific, and sets out (for example):
		- All land in Vanuatu belongs to Indigenous customary owners and their descendants (i.e. Land Back);[[4]](#footnote-4)
		- Establishment of the Malvatumauri Council of Chiefs as advisors to the Parliament;[[5]](#footnote-5)
		- President of the Republic must be an Indigenous citizen;[[6]](#footnote-6)
		- The Constitution recognises customary law as part of the law of Vanuatu[[7]](#footnote-7) and courts are instructed to determine matters according to substantial justice and, whenever possible, in conformity with custom.[[8]](#footnote-8)
	+ However, it should be noted that:
		- There are issues with leasing customary land for up to 75 years and an urgent need to consider how to return land that has been developed to customary owners at the termination of the lease where both owner and investor are fairly treated (e.g. not enforcing owners to have to purchase the improvements on the land, and not enforcing the investors to leave without any compensation)
		- The customary law jurisprudence is set out as inferior to colonial law in the constitution, despite its importance and daily relevance to the Nivan people
* Chile:
	+ Recent attempts at constitutional reform with considerable rights to self-determination e.g. plurinational nation, Indigenous judicial systems, autonomous areas
* Denmark/Greenland
	+ Move towards independence under Home Rule Agreement
	+ Drafting a constitution for Greenland
	+ Issues regarding non-Inuit peoples
* Nordics:
	+ Sámi Parliaments: but more advisory/consultative?

**Challenges:**

More or less the “apples and oranges” issue – how can we learn anything meaningful/make recommendations that are Aotearoa New Zealand appropriate? Specific points include:

* Requires doctrinal *and* “normative” scholarship *and* assessment of political context e.g. what are the factors that make constitutional transformation possible?
* Needs to be critical
* Its breadth i.e. the number of constitutions it covers across most regions of the world
* Understanding the social, economic, political contexts in a way that enables lessons to be learned e.g.:
	+ non-Commonwealth regions
	+ some have human rights protections, some not [United States]
* Political vs legal factors driving constitutional change – e.g. in the Pacific, Ecuador and Bolivia the majority of people are Indigenous which enhances the ability to have an Indigenous and/or land-based constitution – in contrast, settler colonial states like Aotearoa New Zealand, Australia, Canada and the United States, Indigenous peoples are minorities and therefore must contend politically with majority populations of non-Indigenous people.
* Indigenous peoples are very diverse with different needs – we cannot take our views from our own Indigenous laws and expect to see the same things in other places e.g. where communities are matriarchal or patriarchal in their leadership, or where people have their languages and customs or not.

* Decolonial research methodologies – while approaching other academics in their home countries is usually an easy exchange, real care must be taken when seeking insights into Indigenous laws and practices from communities. It is a reality that the traditional academy can be extractive in the name of research, and we must enhance our abilities to approach with the necessary culture of reciprocity – e.g. appropriate introductions, story-sharing, koha etc.
* Some constitutions are poorly enforced – due to lack of funding, or corruption, or a lack of understanding/underdevelopment of Indigenous customary law e.g. in Vanuatu where overseas judges choose to apply written law (from the United Kingdom or France) over customary law, and do not often have the time or resources to consult customary experts.

BUT, more positively:

* Helps us think creatively about constitutional design: innovative [Sámi Parliaments and Australian attempts at a Voice to Parliament], and useful language e.g. the concepts of ‘intercultural’ and ‘plurinational’ in the Latin American constitutions which refer to the unity through diversity, as opposed to referring to Aotearoa New Zealand as ‘bi-cultural’ or ‘multi-cultural’ which only describes diversity.
* Encourages us to look at the dynamics of constitution making such as how the state might *recognise* Indigenous rights legally, and how Indigenous people *assert* their rights practically.
* Some potential “universal lessons” at a macro level – particularly the centrality of land/nature as a source of law and power – hence the popularity of the Land Back movement across Indigenous communities fighting for self-determination.
* Don’t always need analogous political, social, economic, cultural contexts – for example, all places we have looked at use court-like structures which are easier to compare and learn from, e.g. in Vanuatu, the 2014 constitutional amendments enables nakamal/community jurisdiction (equivalent to Māori marae) before appeal to Custom Area Land Tribunal, then Island Courts. The amendments ensure that customary law may only be applied by these forums, and that any appeal to the western Courts can only deliberate on the merits of the process, not the application of the customary law. This is an interesting comparison to the Māori land court and appeal process in Aotearoa New Zealand.
* Experience of colonisation similar at a macro level, albeit at different times over many centuries – leaving the same legacy issues of disconnection of Indigenous peoples from culture, language, and customary laws – showing that, globally, part of our constitution-making must include the healing reconnection of Indigenous peoples to our cultures – in a modern age – in order to be truly self-governing peoples. An example of this is the impact of colonial patriarchy which diminished matriarchal leadership and caused an imbalance in Indigenous ceremonies/forums of decision-making – and we see this struggle for rebalancing between genders in most of the movements for Indigenous self-determination, as it is a fundamental factor of Indigenous governance.
* Can compare how various states have attempted to address historical grievances.
* Some work already done on this kaupapa e.g. at the United Nations level.
1. *Johnson v M’Intosh* 21 US 543 (1823); *Cherokee Nation v Georgia* 30 US 1 (1831); *Worcester v Georgia* 31 US 515 (1832). [↑](#footnote-ref-1)
2. *McGirt v Oklahoma* 140 SC 2452 (US 2020). [↑](#footnote-ref-2)
3. *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families* 2024 SCC 5. [↑](#footnote-ref-3)
4. Constitution of the Republic of Vanuatu 1980 (Vanuatu), s 74. [↑](#footnote-ref-4)
5. ss 29–32. [↑](#footnote-ref-5)
6. s 35. [↑](#footnote-ref-6)
7. s 95(3). [↑](#footnote-ref-7)
8. s 47(1). [↑](#footnote-ref-8)