

CHAPTER 9

CONSTITUTIONAL REFORM AND THE POLITICS OF PUBLIC ENGAGEMENT: DELIBERATIVE DEMOCRACY AND PERFORMATIVE STATECRAFT

Cris Shore and David Williams

Advocates of republicanism and constitutional reform often argue that a key obstacle to political change is ignorance, or ‘lack of public understanding’ about what the constitution *is* and what its provisions actually mean in terms of the allocation of legitimate power and authority.¹ ‘If only people were better informed’, so the argument goes, they would naturally draw the right conclusions and accept the logic of the republican arguments that constitutional monarchy is an archaic, opaque, neo-colonial and outdated form of government. In the course of our interviews and conversations with republican activists and supporters in Australia and New Zealand, many told us that what was needed is more civics education, or public educational programmes targeted particularly at young people and taught systematically in schools. Paradoxically, these arguments were often echoed by monarchists, who also claimed that civics education and a better understanding of how constitutional monarchy works would inevitably lead people to recognise that their current system is by far the most stable and superior form of government compared to many countries with republican constitutions. These competing claims about constitutional reform and public engagement / apathy recall political and legal debates over the constitutional arrangements that best guarantee more deliberative forms of democracy.

New Zealand has had three major constitutional deliberations since 2005. Framed by successive governments as ‘national conversations’ on ‘the future of New Zealand’, these

¹ This paper developed out of a series of seminars on ‘deliberative constitutionalism’ held in London and Canberra in 2016. An earlier version of our chapter was published in Ron Levy, Hoi Kong, Graeme Orr and Jeff King (eds), *The Cambridge Handbook of Deliberative Constitutionalism*. Cambridge: Cambridge University Press (2018: 989-1033).

included an initiative aimed at engaging the public's views on constitutional reform and a consultation followed by two binding referenda over proposals to change the national flag. Yet what was striking about these constitutional reform initiatives was not their capacity to mobilise the measured consideration and interest of citizens but rather the lack of enthusiastic public engagement and, more pertinently, the lack of serious government commitment to the principles of deliberative democracy except on minor matters of its own choosing. These 'non-events' -- or what might be termed 'pseudo-deliberations' -- highlight one of the key challenges for advocates of deliberative constitutionalism and participatory democracy: how to prevent the 'performative' and theatrical aspects of the democratic process from overshadowing substantive and meaningful participation in political debate and constitutional decision making.

Our use of the term 'performativity' here draws on the idea of 'speech acts' developed by anthropologists and philosophers of language (Austin 1955; Habermas 1984; Turner 1988, Butler 1997) who argue that the capacity of speech and communication is not simply to communicate but rather to consummate action. Part of the work of constitutional deliberation -- like other kinds of speech act -- is to perform an identity and bring particular kinds of social reality into being. As these authors have all noted, public events and rituals -- from the highly ritualised routines in court-rooms to the political oratory government ministers use to advance legislative reforms - are invariably governed by particular codes of performance; signal systems that are designed to communicate one's place within a social group (see also Goffman 1969).

In this chapter we explore these themes in the context of New Zealand, but the debates also have implications for understanding and assessing the impact of referenda in other contexts, including Australia's vote on a republican constitution (1999) Ontario's 'Citizen's Assembly' (2007), Scotland's vote on independence (2014) and the UK's 'Brexit' referendum on

continued membership of the EU (2016). The New Zealand case, as we illustrate below, highlights a further problem for deliberative constitutionalism in countries whose political systems are based on Westminster model of constitutional monarchy. Namely, the difficulties of creating meaningful public consultation when key terms of reference – such as ‘Crown’, ‘monarchy’ and ‘constitution’ -- are so notoriously ambiguous, amorphous and opaque. To echo Stephen Sedley (2011: 269), ‘an uninstructed observer today might well find difficulty in discerning either the constitution or – except in its ceremonial form – the monarchy’.

Politicians acting in the name of the Crown go through the motions of public engagement. Yet the constitutional and political deliberations they initiate, if they are to have democratic legitimacy, have to be communicated and performed, and herein lie the politics and poetics of performativity. The concept of performativity, we suggest, helps us to recognise that there are other issues and agendas going on in most democratic events; that is, these are communicative acts that are wrapped up in issues of national identity and political interest.

Our argument is set out in four steps. First, we reflect on the rationalistic assumptions and normative frameworks that dominate most legal writing about, and advocacy for, deliberative democracy and deliberative constitutionalism. Second, we illustrate why greater attention should be paid to the symbolic and performative dimensions of political deliberation and the implications for understanding how democracy works in practice. Third, we exemplify our arguments drawing on two case studies of deliberative democracy from New Zealand, and one from Australia. Finally, we consider the utility and implications of this analysis of deliberative constitutionalism for understanding proposals for constitutional reform in New Zealand, Australia, Canada and the United Kingdom.

Deliberative Constitutionalism as a Normative Order

Debates about the role of deliberations in a democracy go back to Aristotle and the problem posed by the ancient Greeks as to whether ordinary people ‘who do not know a lot’ should control constitutional change (Werhan 2012). As Keith Werhan sums it up:

At its most pungent, the popular constitutionalism project is nothing less than an appeal that the People, or their elected representatives, replace the Court (at least to a substantial degree) as the day-to-day decision maker regarding the meaning and application of the Constitution.’ (Werhan 2012: 68).

The epithet ‘deliberative constitutionalism’ has a complex genealogy (Kong and Levy 2017), but seems to draw together at least two strands of literature. The first is the ongoing debate among political theorists, philosophers and scientists on the conditions that promote or hinder democracy. These questions, which also featured prominently in the writings of political philosophers from Edmund Burke and JS Mill, to John Dewey and Hannah Arendt, have attracted renewed interest since the publication of John Dryzek’s influential book *Deliberative democracy and beyond: liberals, critics, contestations* (Dryzek 2000). The second is the more recent debate, particularly among EU scholars, on constitutionalism in the European Union (EU) and how to redress Europe’s legitimacy problem arising from its ‘democratic deficit’. The common perception of a democratic ‘deficit’ in Europe stems from the fact that the EU, unlike its member-states, has no obvious or self-identifying ‘European public’, except at the level of political and economic elites. As critics note, ‘demos’ without democracy leaves only ‘cratos’, or power. That exercise of power by European policy elites can lay claim to little more than a second-order or derived legitimacy. This form of power often appears tantamount to mere assertions based on *raison d’état* (Leicester 1996: Shore 2000). Many scholars have sought a solution in Habermas’s theories of ‘communicative action’ and ‘constitutional patriotism’ (Habermas 1992), and the idea that political legitimacy can be garnered through a more rational (and less emotional) type of loyalty to the institutions and ideals of a post-national constitutional order. Habermas’s normative

framework and his arguments about the dangers of emotion and the affective dimensions of political life, highlight many of the same assumptions that underlie deliberative constitutionalism. To echo Patchen Markell (2000), these are all about replacing passion, ‘*polis* and *patria* with the calm certitudes of reason’ with the aim of ‘making affect safe for democracy’ (Markell 2000: 38). The desire for post-national patriotism or loyalty to some abstract constitutional principle may have made sense for some in the aftermath of World War II, but recent events suggest that prospects for the emergence of a Habermasian-style constitutional patriotism – and a public sphere serenely detached from the loyalties that feed it – are waning, not waxing.

As in the case of the EU, much of the debate over deliberative constitutionalism hinges on the idea that a clear distinction can be drawn between the rational and deliberative effects of constitutionalism and less savoury emotional forms of political persuasion based on ideology, propaganda and the appeal to baser instincts. Deliberative democracy is thus framed as something that encourages critical reflection and rational debate, thereby promoting somehow a freer, more open, ‘authentic’, ‘reasoned’ and participatory form of public engagement (Bohman 1998: 401-2). According to Dryzek, the end of the twentieth century was marked by a strong ‘deliberative turn’ in theories of democracy as democratic legitimacy has increasingly come to be recognised as a corollary of people’s ability to participate meaningfully and effectively in decision-making. As he wrote:

The essence of democracy itself is now widely taken to be deliberation, as opposed to voting, interest aggregation, constitutional rights, or even self-government. The deliberative turn represents a renewed concern with the authenticity of democracy: the degree to which democratic control is substantive rather than symbolic, and engaged by competent citizens (Dryzek 2000: 1)

This ‘renewed concern’ was doubtless a response to growing voter apathy and disenchantment with Western liberal democracies. As Colin Crouch (2004) summed it up in his provocative book on *Post-Democracy*:

While elections certainly exist and can change governments, public electoral debate is a tightly controlled spectacle, managed by rival teams of professional experts in the techniques of persuasion, and considering a small range of issues selected by those teams. The mass of citizens plays a passive, quiescent, even apathetic part, responding only to the signals given them. Behind the spectacle of the electoral game, politics is really shaped in private by interaction between elected governments and elites that overwhelmingly represent business interests. Under the conditions of a post-democracy that increasingly cedes power to business lobbies there is little hope for an agenda of strong egalitarian policies for the redistribution of power and wealth, or for the restraint of powerful interests (Crouch, 2004: 4).

The key condition for ‘authentic deliberation’, Dryzek wrote, is ‘the requirement that communication induce reflection upon preferences in non-coercive fashion’ (2000:1-2). The aim of this definition is to distinguish deliberation from forms of ‘domination via the exercise of power, manipulation, indoctrination, propaganda, deception, expressions of mere self-interest, threats ... and attempts to impose ideological conformity’. Dryzek’s goal, like that of other writers on deliberative democracy, was to define the conditions that would produce a purer and more authentic form of democracy freed from the distorting influences of emotion, ideology and political interests. As Bohman put it:

The attraction of deliberative democracy for many was precisely its promise to go beyond the limits of liberalism and to recapture the stronger democratic ideal that government should embody the ‘will of the people’ formed through the public reasoning of citizens. Deliberative democracy, broadly defined, is thus any one of a family of views according to which the public deliberation of free and equal citizens is the core of legitimate political decision-making and self-government (Bohman 1998: 401, n 10).

The problem, however, is how to create such conditions when the two ‘basic expectations of public governance’ – democratic participation by citizens and deliberative decision making – ‘appear to lie in sharp tension’ (Levy 2013: 355).

Democracy, Performativity and the Work of Symbols

This neat differentiation between ‘reflection’ and ‘manipulation’ and the Enlightenment ideals of free and equal citizens engaging meaningfully in rational self-government is

problematic and far removed from the way that democratic debate occurs in practice. While critics have argued that theories of deliberative democracy are often naïvely utopian and freighted with normative assumptions, (Gutmann and Thomson 2009: 40), Dryzek's (2007; 2012) later work has responded to these criticisms by defending deliberative democracy's normative dimension and arguing that the theory is not a naïve quest for consensus but simply offers a 'set of standards' against which democratic practices can be 'analysed, criticized and further improved' (Ercan and Dryzek 2015: 243)

Deliberative theory thus 'offers a lens upon which "real-world" practices can be contextualised, interpreted, and evaluated, rather than "tested" in order to be verified or falsified' (Ercan and Dryzek 2015: 244). However, perhaps a more useful and reflexive approach would be to reverse this analytical framing and use those 'real-world' practices as a lens to contextualise, interpret and re-evaluate some of these misplaced and de-contextualised theoretical assumptions.

While Dryzek and other deliberative democrats acknowledge that deliberation is a 'social process', the implications of that insight are overlooked. To argue that the essential condition for 'authentic' democracy' is that 'democratic control is substantive rather than symbolic, and engaged by competent citizens' (Dryzek 2000: 1) is to reduce symbols to filigree or window dressing; mere epiphenomena of the supposedly more substantive, institutional aspects of democracy. From an anthropological perspective, this perspective completely misses the point about the power of symbols or the work they perform. Symbols do not simply reflect political reality; they actively constitute it (Turner 1967; Kertzer 1987; Abélès 1993). For example, most of the concepts that frame democracy - including 'nation', 'state', 'sovereignty', 'freedom', 'justice' etc. - can only be meaningfully grasped or understood through their symbolic forms. In short, it is only through such symbols that citizens can ever come to know or engage with the social, political and legal worlds that they inhabit.

The ephemeral and symbolic nature of state has become a central theme in contemporary theories of the modern state (Mitchell 1999; Trouillot 2001; see also Chapter 3), but they also highlight the point that symbols are more than simply representational; they are performative and have considerable agency. As we illustrate below, New Zealand's recent constitutional debates can usefully be seen as performances that serve various political purposes. These include defining the nation and focusing public attention on issues of importance to the government and political elites rather than the public (a category which, perversely, these speech acts work recursively to create and sustain). In developing this argument our aim is to question some of the assumptions underlying democratic theory and to expand the theoretical repertoire surrounding debates over deliberative constitutionalism. To do this, it is necessary to deconstruct the term 'deliberation' and explore what constitutional debate and engagement mean in practice, particularly in those contexts where few citizens understand their constitution or how it works.

The invisibility of the state and its implications for democracy are particularly salient issues for Britain's former dominions that still share its system of constitutional monarchy. In New Zealand and Canada, for example, the term 'Crown' typically serves as a substitute or 'conceptual placeholder' for the State in civil law jurisdictions (Cox 2008). This adds further layers of complexity to what is an already complex and opaque entity, particularly as the concepts of 'Crown' and 'State', while often used interchangeably, have different meanings and do not map the same semantic terrain (see Chapter 3). Taking New Zealand's history of recent constitutional reforms as our focus, two key questions arise:

1. What insights can recent experiences of referenda offer to debates about democracy and deliberative constitutionalism?

2. How can citizens engage with the substantive issues of constitutional reform when the key aspects of their constitution are so opaque and obscure?

Indeed, considering the many obstacles to meaningful constitutional deliberation, we might also ask ‘to what extent can the ideals of deliberative democracy and deliberative constitutionalism ever be achieved?’

We turn to two case studies on deliberative processes. It is worth noting first, though, that New Zealand has effected several major constitutional changes without much or any democratic deliberation. Examples include the move to appointing New Zealanders (rather than British notables) as Governors-General; the creation of New Zealand orders and honours to replace British Empire honours; the creation of a Supreme Court of New Zealand as the final appellate court to replace appeals to the Judicial Committee of the Privy Council; and the abolition of knighthoods and damehoods in 2000 followed by their restoration in 2009.

Case Study One: New Zealand’s Constitutional Review (2010 – 2013)

The 2010-2013 constitutional review arose from a confidence and supply agreement in 2008 between the National Party and the Māori Party to allow the former to form a government with majority support in the House of Representatives. It arose initially out of controversy about the future status of dedicated Māori constituency seats in the House that have existed since 1867. Their continuation or abolition was an issue during the 2008 election campaign. The New Zealand Business Roundtable had published a working paper that proposed the ‘abolition of separate Māori representation in parliament’ (Joseph 2008). The National Party subsequently published its Treaty of Waitangi negotiations, Māori affairs and electoral law policies announcing that it would pursue ‘one voting franchise’ following the settlement of historic Treaty claims between the Crown and Māori (Taonui 2012).

The Māori Party won a number of the Māori constituency seats in the 2008 election and it was very determined that they should not be abolished. Thus, in the confidence and supply agreement between the governing parties, the following compromise was reached:

[B]oth parties agree to the establishment (including its composition and terms of reference) by no later than 2010 of a group to consider constitutional issues including Māori representation The National Party agrees it will not seek to remove the Māori seats without the consent of the Māori people. Accordingly, the Māori Party and the National Party will not be pursuing the entrenchment of the Māori seats in the current term. (National Party 2008).

As a result, in December 2010 Deputy Prime Minister Bill English (National Party) and Minister for Māori Affairs Dr Pita Sharples (Māori Party) announced a ‘wide ranging cross-party government review of New Zealand’s constitution’, establishing eight key areas of focus under three headings, as follows:

1. ‘Electoral matters’: the size of parliament, length of parliament and whether or not the term should be fixed, the size and number of electorates, and electoral integrity legislation;
2. ‘Crown-Māori relationship matters’: Māori representation – including the Māori Electoral Option, Māori electoral participation, Māori seats in parliament and local government, and the role of the Treaty of Waitangi in New Zealand’s constitutional arrangements; and
3. ‘Other constitutional matters’ including Bill of Rights issues (eg, property rights and entrenchment of some elements of the constitution by requirements for a special majority in parliament to effect reforms), and the question of a more comprehensive written constitution (English and Sharples 2010).

The review provided for additional matters to be discussed during the public engagement phase if the ministers advised Cabinet that an issue ‘appears to be of widespread interest and merits consideration’ (English and Sharples 2010).

Conspicuously absent from the review’s terms of reference was the possibility of replacing the monarchy with a republic, arguably the most important constitutional reform issue of all. Faced with repeated questions from journalists about this omission, English claimed that it

would ‘inevitably be part of the discussion’ but was not included as the government did not want it ‘overshadowing a range of other issues, some of which are more immediate’.

Sharples added that a republic was ‘not an issue for Māori’, but conceded that the question of a republic did have implications for Māori-Crown relations and the Treaty. Perhaps the most important, yet unspoken, implication was that becoming a republic would effectively render obsolete the idea of the Crown and the institutional architecture that sustains it. Despite this, the review was portrayed as the start of a major national conversation on the future of New Zealand’s constitution. At the press conference launch, English noted that the review was intended to canvass the opinions of ‘all New Zealanders’ as constitutions ‘belong to the people, not politicians’ (Scoop News 2010). While this may appear to be the language of deliberative constitutionalism, as we shall see, the participation sought did not amount to a serious exercise in deliberative democracy.

English and Sharples established a cross-party reference group of MPs to support the project and, by August 2011, had appointed a Constitutional Advisory Panel (CAP), an independent group whose role was to ‘listen, facilitate, and record New Zealanders’ views on constitutional issues’ (CAP 2013: 169), aided by a secretariat based in the Ministry of Justice. The twelve CAP members (half of whom were Māori) were selected to represent a cross-section of New Zealand society. The review took place over a three-year period. It included phases of clarifying issues and preparation, an election hiatus (to ‘avoid compromising the 2011 General Election and [Mixed Member Proportionality] Referendum’ (English and Sharples 2008), and then a series of public engagement exercises. That engagement included meetings with specific community groups and cohorts such as ethnic groups, ‘disability communities’ and youth; a series of radio debates to raise awareness and generate interest; national TV advertisements; and an online media campaign to solicit

submissions from the general public (CAP 2013:91). The Panel produced an interim report and then a final report in December 2013.

Despite being promoted as a ‘national conversation’, the constitutional review attracted only modest popular interest, and curiously little media attention. By January 2013, for example, it had still not launched its promised ‘engagement website’ and it had appointed only one permanent administrative staffer. In the end, although it did receive 5,259 individual and group submissions from the public, the review process attracted limited or no input from the major political parties. One party – New Zealand First – refused to participate, describing the process as a democratic ‘sham’ and (it alleged) part of a government coalition deal to promote formally enshrining the Treaty of Waitangi as part of the constitution. Only the two smallest political parties in Parliament (ACT and United Future) made submissions to the panel.

Surprisingly, neither the National Party nor the Māori Party who initiated the process provided any sustained commentary or policy announcements on the review other than at its launch. The Māori Party’s website placed constitutional change as number eight on a list of its fifteen policy agreements signed with the National Party. A round-up of the political events of 2012 in the Prime Minister’s Christmas message in December made no mention of the review at all (Key 2012), and his opening statement to the new Parliament in 2013 referred to it only in passing (‘the Government will continue to progress the review of constitutional arrangements’) towards the end of a 24 page document (Key 2013). The rationale behind the Crown’s constitutional review initiative was not so much to engage the public in serious constitutional deliberation. Rather, it seems, it was political expediency for coalition-building politics in a parliamentary democracy where members are elected by a proportional representation system and no one party wins a majority of the seats. This would seem to fit a pattern, all-too-familiar in Westminster-style democracies: Deal with awkward

or inconvenient issues by ‘kicking them into the long grass’ through the use of Royal Commissions or protracted official inquiries. Of course, sometimes such commissions can results can produce surprisingly critical reports with significant consequences, as with the 1981 Mahon Erebus inquiry in New Zealand and the 2016 Chilcot Iraq inquiry. There were no surprises, however, in the CAP report.

The main recommendations of the CAP final report were ‘to continue the conversation’, to ‘develop a strategy for civics education in schools’ and to ‘continue to affirm the place of the Treaty as a foundational document’ (CAP 2013:28). It found a lack of broad support for any constitutional changes such as enacting a written constitution that would be supreme law and enhancing the legal status of the Treaty of Waitangi. However, it did find some support for entrenching elements of the constitution such as the New Zealand Bill of Rights Act 1990 and Constitution Act 1986 and noted a minority perspective in favour of ‘a constitution which better reflects the Māori-Crown relationship or which establishes New Zealand as a republic’ (CAP 2013:14).

Unsurprisingly, given its anodyne recommendations, the report received little media attention. More tellingly, the same governing parties when re-elected in the 2011 and 2014 general elections did not take constitutional reform issues any further – except for the proposal to adopt a new national flag, to which we now turn.

Case Study Two: Changing the New Zealand Flag

Our second example of a Crown political process that might resemble performative constitutionalism concerns the 2015-16 referendum campaigns to change New Zealand’s national flag. This was something of a pet project – and legacy-building initiative – of the

then Prime Minister John Key who did much to spearhead the campaign. Although the flag could have been changed by ordinary legislation, Mr Key insisted that this was a ‘constitutional issue’ that required wide public consultation. The current flag – a blue ensign with the Union Jack in the top left-hand corner and with the four stars of the Southern Cross in red and white – was first designed for use on colonial naval ships in 1869, to implement an Imperial statute (the Colonial Navy Defence Act 1865 (Imp)). This blue ensign was then adopted as New Zealand’s national flag in 1902. On occasion since the 1970s there were calls for New Zealand to discard the Union Jack and create a new national identity by changing the flag, but none had gained traction. In 2010 Mr Key publicly announced his support for replacing the flag with the image of a silver fern (also used on the jerseys of the national rugby team, the All Blacks, and other sports teams). In a speech at Victoria University in 2014 he set out his case, arguing that the existing flag ‘symbolises a colonial and post-colonial era whose time has passed’, whereas efforts by New Zealand athletes had given ‘the silver fern on a black background a distinctive and uniquely New Zealand identity’ (BBC News 2014). Changing the flag, he added, represented ‘one more step in the evolution of modern New Zealand by acknowledging our independence’. Confusion over the similarity between Australia’s and New Zealand’s flags was cited as another compelling reason for the change. Yet the flag issue was not tied to any deeper post-colonial questions such as New Zealand becoming a republic, or even to relaxing ties with the United Kingdom, both of which Mr Key (a self-professed monarchist) opposed.

Unlike the CAP review, this exercise in constitutional deliberation was extremely well resourced. The Crown spent over NZ\$27 million promoting its ‘nationwide engagement programme’. This included a ten-month consultation process with national roadshows, publicity events and social media campaigns. The public were also invited to submit their own draft designs, some 10,300 of which were received, which were then reduced to a

shortlist of five. Official government leaflets presented this as ‘your chance to be part of history’. Yet opinion polls consistently showed most of the public had little desire to follow Mr Key’s lead, and a TV3 Poll conducted in September 2015 found that some 70% of the public were opposed to changing the flag.

INSERT PICTURES HERE - The New Zealand Flag design contest finalist and Lazar Kiwi

The process involved two binding referenda: the first, in November 2015, invited the public to select their preferred alternative from a list of five designs. The second, in March 2016, then asked the electorate which of two options – the current flag or the most favoured alternative (a silver fern with the stars of the southern cross) – they preferred. In the event, by a narrower than expected but still substantial majority, the public voted by 56.6% to 43.2% (and 0.2% informal votes) to retain the status quo (with 67.8% of eligible voters participating). This was a relatively high voter turnout. General elections in New Zealand in recent decades have achieved between 77% (in 2014) and 93% (in 1984) voter turnouts. The problem for this Crown initiative, though, was that those who wished for more thoroughgoing constitutional reform combined with conservative voters to defeat the Prime Minister’s pet project. As one veteran reporter, Duncan Garner, summed it up:

I consider myself a proud and patriotic Kiwi who cares deeply for this country. I love this place – what we stand for, how we live and how much we achieve internationally. But I couldn't give a toss about changing our current flag. I just can't get excited about the debate, it's a totally meaningless and expensive exercise. I'd much prefer a genuine debate about whether we cut ties with Mother England because I support us becoming a republic, with our own constitution. ... This flag debate is completely superficial – we're having a nationwide drawing competition to pick a winning flag to flog off in a referendum up against the current flag. Exactly who is demanding a change? I can't find anyone (Garner 2015).

One answer to Garner’s question was provided in an interview with economic geographer Nick Lewis. The flag debate, he notes, was ‘led by a group of celebrity New Zealanders and

brand developers deeply invested in the Brand New Zealand Campaigns of the last 20 years' (Hargreaves 2015). These somewhat blatant links with corporate and national branding probably helped to sink Key's campaign. However, it is worth noting that the silver fern had, for many decades prior, been a symbol of amateur sporting teams and has been the insignia used on Commonwealth war graves for New Zealanders since World War I.

More importantly, many voters rightly saw the flag referendum as a diversion from more important constitutional issues. It took place as Government ministers and Crown officials were negotiating a highly controversial and secretive Trans-Pacific Partnership Agreement (TPPA) – the largest international free-trade agreement in New Zealand's history – without any reference either to Parliament or the electorate. The public was not invited to offer its views on this far more substantive constitutional matter. The flag debate also provided a useful distraction from mounting concerns about increasing economic inequalities and government attempts to further open up New Zealand's economy and assets to overseas investors (including oil and gas prospecting, farmland, urban real estate, education, and even the right to citizenship). As critics of the TPPA argued, the powers it would grant to foreign corporations would threaten New Zealand's sovereignty, undermine environmental protections and copyright laws, weaken labour rights and business regulation, and place constraints on the ways the Crown can honour its Treaty of Waitangi obligations (Kelsey 2015). Paradoxically, the government was happy to rely on the Crown's unreviewable prerogative powers for treaty-making to negotiate the extensive commitments in the TPPA – signed with eleven participating nations in 2018 and renamed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership [CPTTP] – whilst requiring two binding referenda to decide on a symbolic changing of the national flag. The Prime Minister's hope, it seems, was that these concerns would be eclipsed by the flag spectacle. In the event, the government's discourse around constitutional change failed to create a nationalistic narrative

about a young and little nation at the end of the earth, defying the odds and punching above its weight whilst waving a silver fern flag.

Conclusion: The Limits of Constitutional Deliberation

We began this chapter by asking what insights can be gleaned from New Zealand's recent experience in apparent attempts to foster deliberative democracy leading to constitutional reform. We conclude with two points.

First, our case studies highlighted some of the tensions that exist between the ideals of deliberative constitutionalism (and deliberative democracy as a set of abstract and elusive principles), and the practices of performativity and political expediency that typically shape how constitutional debate and engagement are enacted empirically. In terms of performance theory, these are what we might term the 'perlocutionary' effects of these speech acts. As we have argued, constitutional deliberations should be viewed as *performances* that serve a variety of social purposes, including defining and mobilising the nation, focusing public attention on issues of importance to the government, and distracting attention from other potentially sensitive issues.

Introducing the idea of 'performance' to theories of democracy and constitutionalism may help to provide a more critical and reflexive lens through which to analyse the concept of 'deliberation'. It also helps us to understand how instruments ostensibly designed to enhance public engagement may have the opposite effect. Indeed, as Lawrence LeDuc observes, '[t]he theoretical concepts of *deliberative democracy* and the institutions and processes associated with *direct democracy* often pull in different directions, despite the surface similarity' (LeDuc 2015: 139). LeDuc suggests that this is because deliberative democracy is less interested in resolving issues than in discussing them. It is also because popular referendums

often tend to inhibit a deeper commitment to genuine deliberation, as New Zealand's flag debate demonstrates. We need to take symbols and the performative dimensions of politics more seriously when analysing processes of democracy and deliberation. This is not simply an acknowledgement of the emotional bases of political engagement or the 'bread and circuses' nature of much of what passes for participation in the political process, but rather a recognition that there is more to politics than rational actors and institutions operating in accordance with defined roles, interests and path dependencies. Symbols are performative and have a powerful influence over the way democracy is enacted; they do not merely describe or represent our political realities but actively constitute them.

Second, our chapter raised the question of whether meaningful and rational constitutional deliberation is possible when the constitution in question is so ambiguous and opaque that most members of the public find it incomprehensible. New Zealand's system of government – an unwritten constitution based around the elusive central conceit of a constitutional monarchy featuring the role of 'the Crown' in all three branches of government – leaves even constitutional experts struggling to grasp what this might mean for the process of reform. Significantly, the term 'Crown' features 79 times in the Constitutional Advisory Panel's 134 page report, yet nowhere is it defined, discussed or even questioned. It appears as an immutable fact; an entity so axiomatic and unquestionable that it lies beyond any constitutional conversation. Much like its presence in the commemoration of Anzac Day in Australia (Chapter 6), it is also 'hidden in plain sight'. In short, for most people in New Zealand, the Crown and its constitutional role are obtuse and invisible. One lesson from this, it would seem, is that government proposals need to provide a good deal more clarity about the existing constitutional arrangements before seeking to engage ordinary citizens in a meaningful conversation about constitutional alternatives. Theories of deliberative

democracy risk ignoring structural constraints (like class, cultural histories, and unequal access to information) that inhibit meaningful participation in the democratic process. In this respect, liberal democracies may indeed have helped to foster an apathetic citizenry (De Grieff 2012), and a political environment that places emotion and personal belief above objective facts in what is coming to be termed our ‘post-truth’ era.

Perhaps the most relevant point that these New Zealand examples highlight is to note the importance of controlling the terms of reference in any constitutional debate, and who decides those terms. The term ‘deliberate’, as our examples demonstrate, may mean careful, cautious and reflective, but it can also mean ‘intentional’, ‘calculated’ and ‘manipulated’. The main difference between these tropes lies not so much at the level of abstraction as in the way that constitutional deliberation is performed in practice by those in power. Serious constitutional deliberation is certainly possible in constitutional monarchies such as New Zealand, but that requires much greater public understanding of the work that political symbols do, the shifting meanings of concepts like ‘the Crown’, and an acknowledgement of what is at stake in the key terms of reference that frame these nationwide deliberations.

References

- Abélès, Marc 1993. ‘Modern Political Ritual: Ethnography of an Inauguration and a Pilgrimage by President Mitterrand’) *Current Anthropology* 23, (3) June: 391-404
- Attorney-General v Chapman, 2011. Supreme Court of New Zealand Decisions, SC 120/2009 [2011] NZSC 110: <http://www.courtsfnz.govt.nz/cases/attorney-general-v-chapman> [accessed 24 May 2016].
- Austin, J.L. 1962. *How to do things with words*. Oxford. Clarendon Press.
- Bagehot, Walter. 2001 [1867]. *The English Constitution*. Cambridge: Cambridge University Press.
- Berger, Peter and Luckmann, Thomas, 1991. *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*, Harmondsworth: Penguin.
- Key, J. 2013. Prime Minister’s statement to parliament. Retrieved February 23 2013, from <http://www.beehive.govt.nz/feature/prime-minister’s-statement-parliament>

- BBC News, 2014. 'New Zealand to hold referendum on national flag' 11 March <http://www.bbc.co.uk/news/world-asia-26524132> [accessed 16-05-2016].
- Berger, P. and Luckmann, T. 1991. *The social construction of reality: A treatise in the sociology of knowledge*. Harmondsworth: Penguin.
- Bohman, James. 1998. 'The coming of age of deliberative democracy.' *Journal of political philosophy* 6, (4): 400-425.
- Boyce, Peter 2008. *The queen's other realms: The Crown and its Legacy in Australia, Canada and New Zealand*. Annandale, N.S.W.: Federation Press.
- Butler, Judith, 1997. *Excitable Speech: The Politics of the Performative*. New York, London. Routledge.
- Chappell, Zsuzsanna., 2012. *Deliberative democracy: a critical introduction*. Palgrave Macmillan.
- Closa, Carlos and Fossum, John (eds) 2004. *Deliberative constitutional politics in the EU*. Oslo: Arena.
- Constitutional Advisory Panel (CAP). 2013. *New Zealand's Constitution A Report on a Conversation*. Wellington: New Zealand Government.
- Cox, Noel. 2002. 'Republican Sentiment in the Realms of the Queen: The New Zealand Perspective.' *Manitoba Law Journal* 29: 121-147.
- Cox, Noel, 2008. *A Constitutional History of the New Zealand Monarchy: The Evolution of the New Zealand Monarchy and the Recognition of an Autochthonous polity*. Saarbrücken, Germany: VDM Verlag Dr. Müller.
- Crouch, Colin, 2004. *Post-Democracy*. Cambridge: Polity
- De Grieff, P. 2000. 'Deliberative democracy and group representation', *Social Theory and Practice*, 26: 397-415.
- Dryzek, John, 2000. *Deliberative democracy and beyond: liberals, critics, contestations*. Oxford: Oxford University Press.
- Dryzek, J.S., 2007. Theory, evidence, and the tasks of deliberation. In *Deliberation, participation and democracy* (pp. 237-250). Palgrave Macmillan UK.
- Dryzek, John, 2012. *Foundations and frontiers of deliberative governance*. Oxford: Oxford University Press.
- English, B. and Sharples, P. 2010a. Consideration of Constitutional Issues. Office of the Deputy Prime Minister and Office of the Minister of Māori Affairs. Accessed 16 January 2017 from: http://www.beehive.govt.nz/sites/all/files/CR_Cab_paper_8.12.10.pdf
- 2010b. Government begins cross-party constitutional review. New Zealand Government. Accessed 16 January 2017 from <http://www.beehive.govt.nz/release/govt-begins-cross-party-constitutional-review>;

- Ercan, Selen A., and John S. Dryzek. 2015. "The reach of deliberative democracy." *Policy Studies* 36.3:241-248.
- Garner, D. 2015, 'Opinion' Flag this irrelevant debate and spend \$26m on hungry kids': <http://www.stuff.co.nz/dominion-post/comment/columnists/68392405/duncan-garner-flag-this-irrelevant-debate-and-spend-26m-on-hungry-kids>.
- Gay, Edward 2013. 'David Bain's case against minister back in court', *New Zealand Herald*, 11 April. http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10876843 [accessed 26-05-2016]
- Goffman, Erving. 1969. *The Presentation of the Self in Everyday Life*. London. Allen Lane.
- Gutmann, A. and Thompson, D., 2009. *Why deliberative democracy?*. Princeton University Press.
- Habermas, Jurgen. 1984. *The Theory of Communicative Action vol 1: Reason and the Rationalization of Society*. Thomas McCarthy trans. Boston: Beacon Press.
- Habermas, J. 1992. 'Citizenship and National Identity: Some Reflections on the Future of Europe', *Praxis International*, 12(1): 1–19.
- Hargreaves, Lynley 2015. 'Is our flag a brand?' *Science Media Centre Sciblogs*, 29 June. <http://sciblogs.co.nz/infrequently-asked-questions/2015/06/29/is-our-flag-a-brand/> [Last accessed 16-05-2016]
- Hayward, Janine. 1998. The Treaty of Waitangi, Maori and the evolving Crown. *Political Science* 49(2): 153-172.
- High Court of New Zealand, 2012. CIV-2006-404-003321, NZHC 3615 Judgement of Justice Duffy, 21 December 2012: (s.121); Hill, R. 2004. *State Authority, Indigenous Autonomy: Crown- Māori relations in New Zealand*. Wellington: NZETC: 54.
- Joseph, Philip 2008. 'The Māori Seats in Parliament. Te Oranga o te Iwi Māori: A Study of Māori Economic and Social Progress', *Working Paper 2. New Zealand Business Roundtable*. Available: <http://nzinitiative.org.nz/site/nzbr/files/publications/Māori%20seats%20in%20parliament.pdf>, accessed: 25-05-2016.
- Kelsey, Jane 2015. 'The TPPA: Treaty Making, Parliamentary Democracy, Regulatory Sovereignty and The Rule Of Law', *Trans-Pacific Partnership Agreement: New Zealand. Expert Series*, No. 1. Available at: <https://tpplegal.files.wordpress.com/2015/12/tpp-treaty-process.pdf>.
- Kertzer, David 1988. *Ritual, Politics, and Power*, New Haven: Yale University Press.
- Key, John 2008. 'Story: Ngā māngai – Māori representation. John Key on the Māori seats', *Te Ara. The Encyclopedia of New Zealand*, <http://www.teara.govt.nz/en/interactive/33915/john-key-on-the-maori-seats-2008>. [accessed 26-05-2016]

- Key, John. 2012. Merry Christmas! National on YouTube. Retrieved January 25 2012 from <http://www.youtube.com/watch?v=x48TNjVbSHk> .
- Key, John. 2013. Prime Minister's statement to parliament. Accessed February 23 2013, from <http://www.beehive.govt.nz/feature/prime-minister's-statement-parliament>
- Kong, Hong and Levy, Ron. 2017. 'Deliberative Constitutionalism', in André Bächtiger, John Dryzek, Jane Mansbridge and Mark Warren (eds), eds, *Oxford Handbook on Deliberative Democracy*, Oxford: Oxford University Press.
- Law Commission, 2014. *A New Crown Civil Proceedings Act for New Zealand* (IP 35) Wellington: Law Commission.
- Leicester, G. 1996 'A Pragmatic Approach to the Construction of Europe' in M. Herrero de Miñón and G. Leicester, *Europe: A Time For Pragmatism*, London: European Policy Forum, 6-19.
- LeDuc, Lawrence. 2015. 'Referendums and deliberative democracy. *Electoral Studies* 38 (2015): 139-148.
- Levy, Ron 2013. The Law of Deliberative Democracy: Seeding the Field. *Election Law Journal*, 12(4), pp.355-371.
- Markell, Patchen, 2000. 'Making affect safe for democracy? On "constitutional patriotism".' *Political Theory*, 28(1): 38-63.
- McLean, Janet 2008. "'Crown him with many crowns": the Crown and the Treaty of Waitangi'. *New Zealand Journal of Public and International Law* 6(1): 34-58;
- McLean, Janet 2012. *Searching for the state in British legal thought: competing conceptions of the public sphere*, Cambridge/New York: Cambridge University Press.
- McLean, Janet. 2015. 'Crown, empire and redressing the historical wrongs of colonization in New Zealand'. *New Zealand Law Review* 26(2): 187–212.
- McHugh, Paul. and Ford. Lisa. 2013. 'Settler Sovereignty and the Shapeshifting Crown', in (eds.) L. Ford and T. Rowse, *Between indigenous and settler governance*, Abingdon, Oxon; New York: Routledge: 23-34.
- National Party 2008. 'Relationship and Confidence and Supply Agreement between the National Party and the Māori Party'. http://img.scoop.co.nz/media/pdfs/0811/NationalMaori_Party_agreement.pdf.
- Office of Treaty Settlements (OTS). 2002. *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*. Wellington: Office of Treaty Settlements.
- Scoop News, 2010. 'Sharples and English Announce Constitutional Review', *Scoop News Audio* (8 December), <http://www.scoop.co.nz/stories/HL1012/S00066/audio-sharples-and-english-announce-constitutional-review.htm>
- Sedley, S., 2011. *Ashes and Sparks: Essays on Law and Justice*. Cambridge: Cambridge University Press.

- Steiner, Jürg, 2012. *The foundations of deliberative democracy: Empirical research and normative implications*. Cambridge University Press.
- Shore, Cris. 2000: *Building Europe. The Cultural Politics of European Integration*. London: Routledge.
- Steinmetz, George (ed.) 1999. *State/Culture. State-Formation After the Cultural Turn*, Ithaca and London: Cornell University Press.
- Taonui, Rawiri 2012. 'Ngā māngai – Māori representation – Controversy over Māori seats', *Te Ara - the Encyclopedia of New Zealand* (20 June), www.TeAra.govt.nz/en/interactive/33915/john-key-on-the-maori-seats-2008.
- Trouillot, Michel-Rolph. 2001. 'The Anthropology of the State in the Age of Globalization: Close Encounters of the Deceptive Kind' *Current Anthropology*, 42 (1) February: 125-138.
- Turner, Victor, 1967. *The Forest of Symbols: Aspects of Ndembu Ritual*, London: Cornell University Press.
- Turner, Victor, 1988. *The Anthropology of Performance*. New York. PAJ Publications.
- Vargova, Mariela. 'Democratic deficits of a dualist deliberative constitutionalism: Bruce Ackerman and Jürgen Habermas.' *Ratio Juris* 18, no. 3 (2005): 365-86.
- Wilson, M. 2011. 'Treaty Settlement Process for Historical Grievances Relating to Land 1999-2005: A Crown Perspective from a Former Minister', unpublished conference paper, *Between Indigenous and Settler Governance*, Sydney: University of Western Sydney: 18-20 August:1