Common Law and Mastertext Constitutionalism:

A Response to Justice Glazebrook

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1. Introduction

Taiwan, in common with the vast majority of countries in the world, has what John Gardner helpfully termed a mastertext constitution: a single, comprehensive written text, positioned at the apex of the legal hierarchy, with judges empowered to invalidate all other laws and official action with reference to that text.[1] So numerically dominant is this mode of constitutionalism that it is easy to essentialise these features as necessary components of constitutional order. Justice Glazebrook's paper, introducing us to the practice of common law constitutionalism in New Zealand, challenges such assumptions. [2] New Zealand is – beyond any doubt – a well-functioning constitutional democracy. Yet it lacks a mastertext constitution. Adapting Justice Glazebrook's opening words, learning about constitutionalism in New Zealand can enhance our understanding of our own systems. In that spirit, I propose to offer three sets of reflections on Justice Glazebrook's paper: the relationship between mastertext and common law constitutionalism; the constitutional and common law features of common law constitutionalism; the points of reference – and hence potentially fruitful comparison – between common law and mastertext constitutionalism.

2. Mastertext and common law constitutionalism

Justice Glazebrook rightly and unsurprisingly rejects the simplistic claim that New Zealand has 'no real constitution at all', proposing instead that 'its constitution is *found in many places*, including the common law, the prerogative powers of the sovereign, constitutional conventions, statutes, both imperial and domestic, and the Treaty of Waitangi/te Tiriti o

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[1] John Gardner, *Law as a Leap of Faith: Essays on Law in General* (OUP Oxford 2012) 90.

[2] Susan Glazebrook, 'The Challenges and Possibilities of Common Law Constitutionalism' (2023).

Waitangi'.[3] I wish to explore a subtly different way of defending Justice Glazebrook's core claim that New Zealand has a real constitution. Rather than speak of the same type of constitution being located in different places, we can explore how we operate with two different senses of what a constitution is, bequeathed to us by the intellectual history of constitutional and legal theory.[4] On the one hand, 'constitution' refers to the whole set of laws and practices that constitute the governmental functions of the state. With slight nuances of emphasis, this sense is varyingly referred to as the political, material or informal constitution. [5] On the other hand, 'constitution' refers to a particular document with an entrenched status at the apex of the legal system: the mastertext constitution. What distinguishes the political constitution is content and function—laws and practices are 'constitutional' if they constitute the governance apparatus of a state. What distinguishes the mastertext is status—laws (and only laws count under this understanding) are 'constitutional' if they feature in the legal document that holds priority over all other laws in the system.

Once we understand 'constitution' as having these two different meanings, we can better chart the differences and relationships between each sense. In contrast, if we treat all usages of 'constitution' as constitutional in the same sense, we risk imposing a uniformity that does not exist. Recognition of the differences, overlaps and tensions between the two senses of 'constitution' is critical for enabling a comparison between jurisdictions where different understandings of the constitution dominate.

All states have a political constitution. Where states have a mastertext constitution, it will tend to dominate but not overwhelm the political, informal or material constitution. The precise balance between the two will vary depending on a range of factors. If the mastertext constitution is older, shorter, and more difficult to amend, we might expect the political

[3] ibid 2 Emphasis added.
[4] This ambiguity and distinction reflects what Loughlin has referred to as the two conceptions of constitution. Martin Loughlin, 'Constitutional Theory: A 25th Anniversary Essay' (2005) 25 Oxford Journal of Legal Studies 183, 184. ('The contrast . . . reveals two senses of the term constitution. A constitution can be viewed not only as a text, but also as an expression of a political way of being.')
[5] As a shorthand, I will refer to this sense as the political constitution.

constitution to regulate a greater portion of public life, a suspicion borne out by – for example – the constitutions of the United States and Japan.

There is considerable overlap between the content of the political constitution and the content of the mastertext constitution. The very fact that the mastertext constitution is superior to all other laws means that it must contain the most important constituting laws. However, the overlap is rarely, if ever, complete. Not all laws that constitute the governance structure of the state must be contained in the master-text constitution. At the very least, some level of detail will usually be regulated outside the master-text constitution. Conversely, mastertext constitutions may contain many provisions that do not constitute the governance function of the state. For instance, mastertext constitutions are a site for the expression of important national values,[6] preambles being the paradigm example.[7] Also, master-text constitutions contain laws that do not constitute the governance function of the state, most obviously fundamental rights provisions.

Whether or not to enact a mastertext constitution is a political choice. But no state can escape having a political, informal or material constitution. The constitutional experience of New Zealand is helpful because it requires those of us in countries governed by a mastertext constitution to confront the fact that we also have a political constitution, exhibiting many of the characteristics of the New Zealand constitution that Justice Glazebrook refers to in her paper. For example, we are driven to recognise the existence of constitutional practices, patterns of behaviour among political actors that are treated as normative. While these conventions play a more prominent role in countries without a mastertext constitution (UK and New Zealand), they almost certainly exist in all systems. The identification and acceptance of the mastertext constitution itself depends on convention, and conventions sometimes emerge to qualify the exercise of legal-constitutional powers. For instance, although Ireland has no discourse of constitutional conventions, there has been for over 40 years a practice that the legislature always accepts the legislative redistricting recommendations of an independent commission, a feature

[6] Cass R Sunstein, 'On the Expressive Function of Law' (1996) 144 University of Pennsylvania Law Review 2021.
[7] Wim Voermans and Maarten Stremler, *Constitutional Preambles: A Comparative Analysis* (Edward Elgar 2017).

that can best be understood as the political constitution supplementing the mastertext constitution.

As fascinating as these questions are for theorists of the constitutional system, their immediate relevance for judges is less clear. There is an important but niche debate as to whether courts should recognise or even enforce constitutional conventions. But the focus of Justice Glazebrook's paper lies elsewhere – on ways in which the courts in New Zealand have engaged in constitutional tasks not dissimilar to courts in countries with mastertext constitutions. Political and legal functions must be performed in every constitutional system, regardless of whether the political or mastertext constitution dominates. Common law constitutionalism – as generally understood and in the sense deployed by Justice Glazebrook – is the legal dimension of the political constitution. It can be contrasted with mastertext constitutionalism.

3. Common law constitutionalism: the common law and the constitutional

In her paper, Justice Glazebrook gives several examples of common law constitutionalism in New Zealand: the principle that legislation should be interpreted consistently with the Treaty of Waitangi; the principle that legislation must be interpreted in light of the presumption that Parliament did not intend to breach New Zealand's international obligations; the principle that statutes be interpreted to protect and uphold certain rights and values that the common law has identified as fundamental or as having a constitutional nature; the Bill of Rights Act and its requirement that legislation must be interpreted consistently with the Bill of Rights to the extent possible.

Justice Glazebrook analyses several cases that illustrate these examples of common law constitutionalism. She refers to the *Taylor case* in which the Supreme Court decided that it had the power to grant a declaration that legislation was inconsistent with the Bill of Rights, notwithstanding that such a declaration could not affect the validity of the law.[8] She then analyses the *Fitzgerald case* in which the Supreme Court decided that a 'three-strikes' law

[8] Glazebrook (n 2) 6–7.

– requiring that a person convicted for the third time of a particular class of offence must receive the maximum punishment for that third offence – breached the Bill of Rights guarantee right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.[9] Justice Glazebrook refers more briefly to the *D case* in which the Supreme Court considered the application of a law requiring registration on the sex offenders register to persons convicted after the enactment of offences committed prior to the enactment. The Court concluded that the statute was not sufficiently clear to rebut a presumption against retroactivity, protected as an aspect of the principle of legality, and therefore could not apply to the claimant. [10] Finally, Justice Glazebrook provides an extended consideration of the *Ellis case* in which the Supreme Court confirmed the status of tikanga Māori as part of the common law of New Zealand, for two majority judges prompting a development of the common law approach to whether legal proceedings could continue after the death of the claimant.[11]

We can ask ourselves two questions about these examples: in what sense are they common law? In what sense are they constitutional? The decision in *D*, relying on the judge-made presumption of legality, can easily be categorised as a common law case. *Ellis* is a common law case in two senses. First, it was judges who decided that tikanga Māori was part of the common law; second, judges determined the ultimate relevance of particular tikanga Māori norms for the case before them. *Taylor* and *Fitzgerald* are less straightforwardly common law cases, turning to a large extent on statutory interpretation, albeit that *Taylor* speaks to judge-made principles on the general power of courts to grant remedies. There is a further sense, however, in which the cases can be characterised as common law. Each decision can be reversed by the legislature, reflecting the traditional relationship between judges' powers at common law and legislative supremacy.

Turning to our second question: if the political constitution concerns only the government functions of the state, it is not immediately apparent why all the cases are constitutional in character. *Taylor* does concern the interaction of the organs of government, but the other

[9] ibid 7–10.
[10] ibid 11.
[11] ibid 15–19.

cases focus on individual rights and the development of common law. The appellation 'constitutional' is warranted for two reasons, however. First, *Ellis* speaks to foundational aspects of New Zealand's constitution: the relationship between the norms of the European settlers and the indigenous Māori norms. Second, *Taylor*, *Fitzgerald*, and *D* all demonstrate a judicial function similar to judicial activity in jurisdictions with a mastertext constitution, i.e. protecting rights through the re-interpretation of legislation. I suggested above that the ambit of 'constitutional' in the political sense is content-dependent, while the ambit of the 'constitutional' in the mastertext sense is status dependent. But this distinction requires some qualification. While the precise content of mastertext constitutions differs considerably, a typical function of mastertext constitutionalism is the judicial protection of textually stipulated rights. While the phrase 'common law constitutionalism' has a lineage in longstanding common law principles, its current understanding and prominence may owe as much to the globally numerically dominant mastertext constitutionalism influencing the sense of 'constitutional' under the political constitution.

Bringing common law and constitutionalism together, we can see how all the cases analysed by Justice Glazebrook advance constitutional values – broadly understood – despite the absence of legal-constitutional supremacy. Under the Bill of Rights Act, the New Zealand courts can declare legislation inconsistent with the Bill of Rights, but this has no implications for the continued legal validity of that legislation. The Attorney General must bring such a declaration to the attention of Parliament, but Parliament retains complete freedom on how to respond, if at all. Likewise, statutory interpretations reached as a result of the principle of legality can be circumvented by Parliament enacting new legislation in clearer terms. Despite these limits to judicial power, legislative supremacy does not eliminate the role of the courts in advancing constitutional values. Whether one adopts a framework of dialogue or collaboration, the judiciary play an important role in the advancement of constitutional values.

4. Common law and mastertext constitutionalism: points of reference

When we understand common law constitutionalism in this way, we can see two direct points of reference with mastertext constitutionalism. The first relates to the re-

interpretation of legislation to ensure conformity with rights / constitutional values. In New Zealand, this interpretative exercise holds (i) in relation to unincorporated international agreements, (ii) through the principle of legality, and (iii) under the Bill of Rights Act. But it is a judicial doctrine common across much of the world in a wide variety of constitutional systems. [12] Doctrines of constitutionally conforming interpretation (CCI) require that – where two interpretations of a statute are open, one constitutional and the other unconstitutional – the court should adopt the constitutional interpretation. While this doctrine could notionally operate as an interpretative tiebreaker between two equally plausible interpretations of a statutory provision, it more typically involves choosing a less plausible interpretation over a more plausible interpretation.

An interesting feature of Justice Glazebrook's cases is that the point of dispute on the Court frequently involved the question of whether the constitutionally conforming interpretation required excessive semantic stretching of the statute. In other words, was the court involved in an impermissible exercise of effectively enacting a new statute rather than reinterpreting an existing statute? All jurisdictions with CCI confront the same dispute. In Taiwan, Chief Justice Hsu has repeatedly criticised majority judgments of the Taiwan Constitutional Court that deployed CCI. [13] In Interpretation No 585 (2004), the Court considered a statute – enacted by the opposition-controlled legislature – that established an independent commission to investigate controversial events, including an assassination attempt, surrounding the President's re-election. The Court upheld the constitutionality of the commission on the grounds that it served to assist the legislature in exercising its constitutionally granted investigative powers. Justice Hsu considered that this CCI distorted the intention of the Act's supporters, who had intended the commission to be independent of the organs of government. The majority's CCI, in his view, distorted legislative intent and imposed the judges' understanding of the law. This analysis resonates with Justice Glazebrook's account of the disputes in the New Zealand cases. The difference,

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[12] Matthias Klatt, *Constitutionally Conforming Interpretation - Comparative Perspectives* (Volume 1: National Reports, Hart Publishing 2023).

[13] Chien-Chih Lin, 'Constitutionally Conforming Interpretation in Taiwan' in Matthias Klatt (ed), *Constitutionally Conforming Interpretation - Comparative Perspectives* (Volume 1: National Reports, Hart Publishing 2023) pt III 2.

of course, is that if a CCI is not available in Taiwan, a declaration of unconstitutionality may provide a remedy for the claimant; in New Zealand there is no equivalent remedy.

It is interesting that the same interpretative dilemma arises in radically different constitutional systems. While the norms of statutory interpretation are so jurisdiction-specific and their application to particular statutes so context-dependent as to render cross-jurisdictional comparison of particularly statutory interpretations almost meaningless, there is a broader relevance here. In the form of CCI, the courts in New Zealand perform one of the functions that is performed by the Constitutional Court of Taiwan. As a result, New Zealand and Taiwan are relevant comparators, notwithstanding that they respectively practice common law and mastertext constitutionalism.

The second point of reference between New Zealand and Taiwan is the framework and metaphor of dialogue and collaboration. In New Zealand, common law constitutionalism ensures that the legislature has what is sometimes called the 'final say'; but that final point is reached through dialogue between the legislature and the court, with the latter adopting CCIs that the former remains free to overturn. Or perhaps we could say, following Kavanagh, that the two organs of government collaborate in the enforcement of constitutional values: the court plays a crucial role in elaborating those values, while the legislature ultimately decides on the balance between those values and public policy considerations.[14] In Taiwan, a similar process can be seen through the use of suspended declarations. In Interpretation 748, the Constitutional Court held that the legislative prohibition on same-sex marriage violated the constitutional guarantees of freedom of marriage and equality. Rather than declare the legislation unconstitutional immediately, however, the Court gave the authorities concerned two years to amend or enact new laws consistent with this interpretation. If the legislature failed to enact new laws, same-sex couples would be permitted to register their marriage. This judgment opened scope for democratic deliberation and allowed the legislature a choice between a number of mechanisms to address the constitutional difficulty. In Taiwan, the 'final say' remains with the Court. But the institutional dynamic in practice may not be so different from that at play in New

[14] Aileen Kavanagh, *The Collaborative Constitution* (Cambridge University Press 2023).

Zealand, with a recognition that different organs of government are better suited to different constitutional functions. In both systems, the courts have the more important role in the identification of constitutional problems, while the legislature has the more important role in crafting solutions to those problems. The similarity of these inter-institutional dynamics suggests again that New Zealand and Taiwan, notwithstanding there many points of constitutional dissimilarity, are important comparators for each other.

5. Conclusion

Comparative constitutional law allows us to understand our own constitutional system better. For judges and advocates, it provides a trove of arguments and ideas that can help inform constitutional developments. Meaningful learning can only take place between jurisdictions that are sufficiently similar. Justice Glazebrook's paper highlights the differences in constitutional structure between New Zealand and Taiwan but, in doing so, draws attention to the similar judicial tasks undertaken in each jurisdiction, establishing a framework for fruitful judicial and scholarly engagement.