RN RESEARCH NOTE

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# Constitutional Theory for the Constitutional Review

12 APRIL 2013

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## 1. The constitutional review

In late 2010, the Government announced a review of New Zealand's constitution. The review is the result of a Cabinet decision which in turn follows from the supply and confidence agreement from 2008 between National Party and the Māori Party which provided for "the establishment … of a group to consider constitutional issues including Māori representation."[1] "The Deputy Prime Minister and the Minister of Māori Affairs will jointly lead a consideration of constitutional issues," reporting to Cabinet by the end of 2013. "They will consult with a cross-party reference group of members of Parliament" and have appointed an independent Constitutional Advisory Panel to stimulate public interest in, and seek the views of New Zealanders on, the country's constitutional arrangements before reporting to the responsible Ministers in 2013.[2] The Panel is made up of twelve members, five of whom are Māori, and one of the two co-chairs is Māori.[3] The Panel is enjoined, as is the review at large, to consult with Māori in a way that reflects the Treaty partnership.

The point of the review is to consider how or if New Zealand's constitution should change. The Māori Party's priority is to reconsider the place of the Treaty of Waitangi in New Zealand's constitutional order,[4] but the review's scope is broader than this. The terms of reference make specific mention of: (1) "electoral

matters", including the size of Parliament, the length of the electoral term and whether or not it should be fixed, the size and number of electorates (including changing the method for calculating size), and electoral integrity legislation; (2) "Crown-Māori relationship matters," including "the role of the Treaty of Waitangi within our constitutional arrangements" and Māori representation (which includes such issues as a Māori electoral option, Māori electoral participation, and Māori seats in Parliament and local government); and (3) "other matters," including the adoption of a written constitution and "Bill of Rights issues"—notably the introduction of a right to property and entrenchment of the Bill of Rights.[5] The terms of reference also make provision for consideration of other questions that arise during the course of the review's engagement with the public.[6] The most obvious such question likely to arise (although there may also be others) is whether New Zealand should become a republic.

The review is important, for it may result in significant change to New Zealand's constitutional arrangements. This paper is not a submission to the review: it does not argue that any particular changes should or should not be made to the constitution. Rather, the paper is a proposal for how one ought to think about constitutions and constitutional change. Section 2 begins with a discussion of the paradox of the New Zealand constitution. The nature and purpose of constitutions are explored in Section 3. Section 4 considers law, fundamental law and convention, and Section 5 examines the differences between written and unwritten constitutions. Section 6 distinguishes the universal and contingent in constitutional design, while Section 7 outlines New Zealand's current constitutional arrangements. The paper concludes with Section 8, which addresses how one should responsibly change the constitution.

## 2. The paradox of the New Zealand constitution

The review takes for granted that New Zealand has a constitution which may be changed. It is right to do so, for it is undeniable that New Zealand has a constitution. Nevertheless, it is often thought mysterious or paradoxical to say so. To understand the apparent paradox, consider the following account of what a constitution is:

> A constitution is the fundamental law of a particular community, which is written down in a single document called "the Constitution." The legal rules set out in this document are entrenched against subsequent change, which means that they cannot be changed by the ordinary law-making process.[7] The point of these legal rules is to limit the abuse of public power, especially by Parliament. To this end, the rules separate legislative and executive power. They also contain guarantees of individual or minority rights, which are directly enforceable in the courts (that is, such rights are *justiciable*).

New Zealand does not fare well when considered against this account. It has no single document called "the Constitution" (although it does have a Constitution Act[8]), and in any case New Zealand has very little "fundamental law." In fact, only the doctrine of parliamentary sovereignty[9] can be thought to count as fundamental, and this doctrine makes it very difficult, if not impossible, to entrench legal rules since it means that there are no judicially enforceable limits on what Parliament may do.[10] And, one might add, New Zealand's governing arrangements do not strictly separate legislative and executive power: not only are members of the executive drawn from members of Parliament,[11] but the executive also dominates, and to a large extent controls, the legislative agenda of Parliament.

To say, then, that New Zealand has no constitution is to take a constitution like that of the United States of America (to choose a well-known example) to be the paradigm of a (well-formed) constitution. However, as the discussion later in this paper makes clear, other possibilities are open. The way to understand constitutional government in general, and New Zealand's constitution in particular, is to consider the nature and purpose of a constitution. That is, one should ask: what is a constitution? What is a constitution for? And how does New Zealand's constitution measure up when viewed in this light?

## 3. The nature and purpose of a constitution

A constitution is a framework for the exercise of public power, constituting certain arrangements for its exercise and, hence, directly or indirectly limiting that exercise. The point of introducing and maintaining such a framework is to secure the common good. That is, creating and exercising public power in this way makes it possible to secure the conditions under which citizens may live well, or flourish. A community that is governed within a good constitution may live well, for a well-formed constitution is not a mere managerial or bureaucratic blueprint that co-ordinates officials and state agents so that they may efficiently do whatever *they* wish. Rather, a well-formed constitution institutes, directs and limits the exercise of public power such that the community as a whole may live well.

The constitution constitutes, allocates and limits public power. The political community needs some way to distinguish those who legitimately exercise public power from those who do not. For example, the constitution specifies that it is the assembly in Wellington known as "the Parliament of New Zealand," rather than any other person or body, that has authority to make laws for New Zealand. The constitution *constitutes* public power, making it possible for some persons or bodies to make laws, to adjudicate cases, and to decide what should be done. The constitution also *allocates* political power to different persons and bodies. Where there are many things to be done, it becomes necessary that certain kinds of questions be decided by a diverse number of bodies that employ different procedures. The good constitution, therefore, allocates or separates powers, determining who does what. For example, there is good reason to authorise independent judges, rather than Cabinet ministers, to decide how the law applies in some dispute—independent judges, unlike Cabinet ministers, are more likely to apply the law without fear or favour, fairly and impartially. This is not to say that some "pure" separation of judicial or legislative or executive power is a requirement of constitutional government, but rather that one of the most central questions of constitutional design is precisely who should do what and why.

The constitution also *limits* the exercise of public power. This can be done in a number of ways. The very act of allocating political power itself has a limiting effect—simply dividing the exercise of power among various actors places a limit on what each constitutional actor legitimately may do.[12] Beyond this, it is also possible for a constitution to place additional limits, whether substantive or procedural, on what may legitimately be done in the exercise of public power. Limits of this kind include some of the well-known provisions of the United States Constitution, such as the First Amendment which states that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

While the constitution does and should limit power, it is important to note clearly that the first point of a constitution is not to limit power but to create it, to make it possible for some persons to make laws, to adjudicate cases, to decide what should be done. The constitution helps the members of the political community jointly recognise and follow the persons and bodies who have authority to rule, to settle this or that contested question. And it is important that this occur, for otherwise it is impossible to secure social order. The community cannot have peace and justice without authorities of this kind. It follows that one misses much of the purpose of a constitution if one focuses mainly on the imposition of limits. Better to think of a constitution as a means to a set of related ends: realising good government; limiting the prospect of the misuse of public power; enabling democratic self-rule; and maintaining the stability and unity of the political community.

Constitutions realise good government by making it possible for authorities to make good laws and to repeal bad ones, and to carry out good policies subject to law. A constitution would fail to meet this end if, for instance, it required unanimity in law-making. While there is, of course, value in achieving consensus, requiring unanimity in law-making would make it too difficult in a large polity to enact good laws and to repeal bad ones. A further essential part of good government is the rule of law, in which law-makers enact clear, public rules and officials, as well as citizens, follow and act within those rules.

The well-formed constitution limits the prospect of the misuse of public power. The misuse of public power may occur when officials act mistakenly or, in bad faith, act for their own private ends. It is important to note the use of the word "limit" rather than "preclude:" no institutional scheme can guarantee justice; the persons who act within a particular scheme may always subvert or corrupt it. The well-formed constitution will also help recognise political equality and its realisation in collective self-rule. Political equality means that all citizens have an equal entitlement to share in government. Thus, a good constitution will make possible popular participation in law-making and public decision-making. And finally, a sound constitution will maintain the continued stability and unity of the political community. The constitution is the framework by which a community governs itself and is governed. The fracturing of the community, such that its members are unwilling to live peacefully together, sharing in collective self-rule, is an evil to be avoided.

In designing a constitution one should aim to adopt rules and procedures that jointly form a means to these ends. This account of the nature and purpose of a constitution suggests some grounds on which to evaluate any constitution: to what extent does this particular set of rules and practices make it possible for authorities to govern well, while also limiting the prospect of the misuse of public power, recognising the equality of all citizens and securing the continued stability of the political community?

## 4. Law, fundamental law and convention

A constitution is a framework for the exercise of public power and it consists in rules that settle the allocation of authority and how that authority should be exercised. Importantly, not all of these rules are fundamental law; in fact, they are not all legal rules. No constitution is exclusively legal; the constitution is wider than constitutional law. For an act or decision to be unconstitutional is not necessarily for it to be unlawful. In the New Zealand context, one might say—many did—that the Electoral Finance Act 2007 was unconstitutional but not unlawful. It is very true that the constitution includes legal rules, some fundamental and others contingent, but it also includes conventions, which are rules that emerge out of practice, which capture "the way we think things ought to be done here." For example, the rule that the Queen (or her representative the Governor-General) assents to all bills presented to her is a convention. And the responsibilities of ministers, set out in the Cabinet Manual, are also largely conventions. These non-legal rules are often more flexible than legal rules. They can change as the practice changes and they are not justiciable (that is, they are not enforceable in court): one cannot sue for their breach. The advantage of conventions is thus that they provide a way of having rules that may change over time without official law-making and over which judges have no authority. The disadvantage of conventions is that they *may* be more easily ignored or circumvented than rules of constitutional law because they lack judicially enforceable sanctions for their breach. That a rule is liable to judicial enforcement is often a virtue.

The legal rules that form part of the constitution are sometimes entrenched. Indeed, the idea that the constitution is fundamental law likely entails that it is entrenched. A rule is entrenched if it is protected against change by the ordinary law-making process. For example, section 268 of the Electoral Act 1993 provides that certain provisions of that Act cannot be changed without the support of at least 75 percent of MPs.[13]

The aim of entrenchment is to lock in some rule, to make it secure against later change. In one sense, all constitutional norm—legal or not—should be difficult to change. But this does not mean there have to be special legal obstacles to changing them. The advantage of entrenchment is that it makes it more difficult to disregard the rules.

However, there are reasons to be cautious about entrenching constitutional rules. First, it is difficult to entrench the rule that one thinks one is entrenching. If the rule is expressed in general terms, then its content may change over time as interpreted. And this means one is vesting considerable authority in the interpreter (typically the judiciary). Second, it may be unwise to entrench a rule. The rule may become outdated, when conditions change, or it may be interpreted badly. In either case, there may be good reason

later to change the rule and entrenchment, by its nature, makes such change difficult (in some instances practically impossible if the degree of entrenchment is sufficiently high).

These reasons for caution apply more strongly when one is entrenching a substantive rather than a procedural proposition. For example, a rule that free speech should be protected leaves much to be settled. For instance, does it include shouting "fire" in a crowded theatre in order to cause a panic? Or lying about one's qualifications? Or selling (child) pornography? By contrast, a rule providing that the electoral term is three years is much clearer.

Every constitution is a mix of law and convention. The mix of law and convention in different constitutions is important. The widespread use of entrenched constitutional law suggests a reliance on legal rules rather than political culture to achieve the ends of constitutional government. This reliance on law also tends to empower the judiciary at the expense of other institutions. The widespread use of convention and the absence of entrenched constitutional law suggests a reliance on political culture to secure constitutional government. Having said this, reliance on law will fail unless the political culture values the rule of law.

## 5. "Written" and "unwritten" constitutions

The constitution of any modern state is a mix of ordinary law, fundamental law and convention, rather than just a single document called "the Constitution."[14] Consider the United States: as well as the document called "the Constitution," the constitution includes "ordinary" statutes such as the Voting Rights Act and the Civil Rights Act, judicial interpretation and elaboration, the rules of procedure adopted by Congress, and conventions concerning the Electoral College and the President's role in the budgetary process. So even in countries possessing a charter termed "the Constitution," that single document is typically not the exclusive source of rules comprising the framework for the exercise of public power. Moreover, while having such a charter is undoubtedly one possible way of providing much (if not all) of this framework, it is not the only such means.

It follows that a country may have a constitution even in the absence of a document called "the Constitution." While most countries today possess such a document, and hence may be said to have a written constitution, New Zealand, the United Kingdom and Israel do not—the constitution each has may instead be said to be unwritten, for they have no such central, single document.[15] Why are most constitutions written? And, more to the point, why is New Zealand's constitution, like that of the United Kingdom, unwritten?

As S. E. Finer notes, there are basically two different sets of circumstances in which constitutions come to be written down: "the first when it seems necessary to replicate the old customary constitution and the second—the exact opposite—when it is deemed desirable to innovate and replace it."[16] The prime (and perhaps only) instance of the former is in the planting of colonies. Examples of such written constitutions include those of the ancient Greek *poleis* in Asia Minor and Magna Graecia, or the (pre-Revolutionary) charters of the North American colonies, which sought to replicate the constitutional arrangements of the mother country.

The second circumstance in which one commits a constitution to writing is where this is intended to mark a deliberate break with the old customary constitution, in order to reflect a *new* political or social situation and to create *new* ground rules. Such written constitutions often come about as a result of revolution, war, and decolonisation. Examples include the US Constitution of 1787 and the spate of constitutions arising out of the revolt of Latin American colonies from the Spanish Empire between 1811 and 1822. Likewise, a written constitution may arise out of federation, which renders continuation with the previous constitutional regime inadequate (or at least creates the perception that it is so). The adoption of the federal constitution of Australia in 1900 is an example.

New Zealand remains without a written constitution because the present constitution is continuous with a much older—in fact centuries old and heavily conventional—constitutional order that predates the widespread adoption of written constitutions, and because there has not (yet?) been a sufficiently strong

public will to make the kind of break that would necessitate the adoption of a written constitution. Rather, there has been a general contentment to continue to operate under the historic and heavily conventional Westminster constitution, making incremental changes when deemed desirable or necessary.

It is also worth noting that not only is there a very strong correlation between a written constitution and a reliance on constitutional law—indeed fundamental law—over constitutional convention, but the adoption of a written constitution would also seem to entail that its content is justiciable. While it would, in theory, be possible to imagine a situation where the constitutional rules (or most of them) contained in a written code called "the Constitution" are not considered justiciable rules of law, in practice the act of committing such rules to a written code ensures that they are considered law—indeed fundamental law—and as such are justiciable.[17] One important consequence of this is the juridification of the constitution as debates about the meaning and purpose of constitutional rules and practices are translated from the political to the legal sphere, argued by lawyers and settled by judges in court as a matter of 'constitutional interpretation.'[18] But another probable consequence would be the juridification of politics itself. As Professors Colin Turpin and Adam Tomkins (quoting Ian Holliday) remark: "'juridification of politics is one of the major problems created by a written constitution': much power, and much trust, are given to judges."[19] Many questions that are presently settled by the political (deliberative, democratic) process—according to which all citizens, in theory at least, have an equal say—would no longer be so settled, instead being subject to further and final "constitutional review" by a court (such questions therefore being settled ultimately by judges). Further, it may also be the case that the language and concepts of the law in general and the courtroom in particular would infuse and transform political discourse so that it too becomes much more "lawyerly" in nature.[20]

## 6. The universal and the contingent in constitutional design

As the above section demonstrates, there is more than one form of constitutional order. While the ends of constitutional government—securing good government, limiting the prospect of the misuse of public power, recognising political equality, maintaining the unity of the political community—are the same for all communities, the means chosen to those ends rightly differ by time and place, responsive to the detail of one's own community, its past and its prospects. The question of who should exercise power in a community is contingent. For example, we might say that the military should seize power if the alternative is Nazi rule or civil war. However, that the military seizing power may be justifiable in certain limited circumstances does not change the fact that military rule is nearly always a very bad idea since the military is wholly unfit for ruling well and such rule would corrupt the military's primary mission. And just as the question of who should exercise power is contingent, so too the questions of how to allocate and limit the exercise of public power are also contingent: there is no one right answer to these questions for all times and places. In designing a constitution, therefore, we need to think about how best, in our time and place (but knowing that future events and problems are difficult to foresee), to structure the exercise of public power to ensure justice and the common good.

Some constitutions stress entrenched, fundamental law, while others do not. Some, like the American,[21] give constitutional force to substantive rights, while others like the Australian, focus instead only on a procedural structure. The choice made between these alternatives turns on a number of grounds. The first is the way in which the constitution is made, whether slowly over time (incrementally) or in a single moment of decision, perhaps after (and in response to) some calamity. The second is the question of whether the constitution is intended to make a clean break with – to repudiate[22] – the past, or whether it is intended to extend an enduring constitutional tradition. The nature of that past may involve some judgment, whether positive or negative, on the wisdom of trusting, or permitting, popular participation in political life and on the likelihood of political culture restraining and shaping public power or becoming poisonous. It is instructive to contrast here the Anglo-American constitutional—in particular the Westminster—tradition, in which popular participation in political life plays a key role in acting as a constraint on the exercise of public power, with some other constitutional approaches much more wary

of anything that suggests majoritarianism or "populism"—perhaps best exemplified in modern times by post-World War II Germany, France (in the guise of the Fourth Republic), Italy and Japan.[23]

The third ground is whether the community in question is, or is to be, unitary or federal. For a federal polity a written compact, which consists in entrenched legal rules, would appear to be essential, lest the centre or the regions (the states, provinces, etc) collapse the federal arrangement. This goes a long way to explaining the constitutional structure of both Australia and Canada, neither of which were intended to repudiate the British constitutional tradition, but each of which needed to make some important modifications to this tradition—including the adoption of a written constitutional compact—in order to secure a federal form of government. For a unitary state, however, the imperative of a written constitutional compact is absent.

In sum, then, it is clear that there is more than one reasonable form of constitutional order. The constitution one chooses should be responsive to local conditions of the community, its past and its prospects. In evaluating any constitution (or possible constitution), it is therefore important to ask whether it is fit for a particular community given its past, its problems and its prospects: will it help this people and their descendants live well; will it help them to govern well, avoid tyranny, share in government as equals, and avoid the fracturing of the political community and the disruption of political life?

## 7. The constitution of New Zealand

How then should one understand New Zealand's particular constitutional arrangements?

New Zealand is a unitary state and a parliamentary democracy, constituted in part by law and in part by convention, and operating within the form of a constitutional monarchy. In this Westminster model, the central institution is an elected, representative Parliament. In law, the sovereign lawmaker is "the Queen-in-Parliament," but by convention the Queen (or her representative the Governor-General) always assents to bills approved by the House of Representatives.[24] The rule that whatever the Queen-in-Parliament enacts is law is fundamental. Whatever Parliament chooses to enact settles what is to be done; the courts have no legal or constitutional authority to overrule what Parliament enacts on any ground.

The government of the realm is carried out in the Queen's name. The Crown—by fundamental convention—acts on the advice of the Queen's responsible ministers, who are those members of Parliament that enjoy the confidence of a majority of the House and so are able to secure support for taxation (thus funding the government). These ministers[25] form a Cabinet, which directs the executive and sets the legislative agenda. Cabinet is one of the most important institutions in the constitution and is entirely a creature of convention.[26] Cabinet promulgates a manual which directs how ministers are to act and how Cabinet is to function, with civil servants directed to conform to this framework. There is also a partial fusion of the executive and the legislative arms of government which is characteristic of parliamentary systems in general and not just the Westminster model of parliamentary democracy.

Executive government is subject to law. The Crown's servants, including ministers and all subordinate officials, are subject to the law of the land in all their actions, whether such actions are undertaken in an "official" or "unofficial" capacity. The High Court and other tribunals apply the common law and statutory law; ministers and other executive officials who act contrary to law are—like all other persons—subject to the jurisdiction of the courts and the penalties of the law. One may dispute the legality of executive action by applying to the courts for judicial review, and the courts are independent of executive interference. Thus, the constitution makes provision for the maintenance of the rule of law.

As indicated earlier, New Zealand's constitution owes much to its historical continuity with the constitution of the United Kingdom. New Zealand was founded as a Crown colony to which representative government was subsequently devolved. The law and constitution of the colony was subject to the oversight of the Imperial Parliament in London. The New Zealand constitution is, thus, historically continuous with the

Imperial legal system and with the constitution and legal system of the United Kingdom. The Statute of Westminster 1931 (UK) made possible the constitutional (if not legal) independence of the Dominions, including New Zealand. New Zealand exercised that possibility in the Statute of Westminster Adoption Act 1947.[27]

The constitution of New Zealand is, as is to be expected, a mix of law and convention, including the fundamental legislative competence of Parliament (also known as the doctrine of parliamentary sovereignty) and Cabinet rule. Particular statutes as well are of constitutional importance, including English[28] statutes of continuing effect (for example, Magna Carta 1215, the Bill of Rights 1689, and the Act of Settlement 1701), and more recent, local statutes (for example, the Official Information Act 1982, and the New Zealand Bill of Rights Act 1990).

The constitution of New Zealand may be changed by particular legal acts, including judicial decision and legislative action, or by changes in convention, either in the gradual evolution of custom or in attempts to modify such sources of convention as the Cabinet Manual. It is possible to change most propositions of constitutional law by ordinary law-making—the doctrine of parliamentary sovereignty itself is the only exception, and the extent of the exception is a point of controversy.

In addition to the laws and conventions that make up the New Zealand constitution, when discussing New Zealand's constitutional arrangements, it is necessary to consider the Treaty of Waitangi. The Crown asserted sovereignty in 1840,[29] but made efforts to elicit Māori consent. And this consent was largely forthcoming, although quite possibly Māori and Crown had different understandings about what was guaranteed. There is good sense, then, in terming the Treaty New Zealand's foundational document. However, in saying this it is important to realise that the Treaty has no direct legal force, and it is not fundamental to the New Zealand legal system. The Treaty's significance for law turns almost entirely on positive legislative action to adopt or affirm it in relation to some particular area.

Still, this does not exhaust the Treaty's constitutional significance. The Treaty is of central constitutional importance as an object of argument about how the Crown, which includes the Crown acting both in its executive capacity and in its legislative capacity ("the Queen-in-Parliament"), *ought* to act. The Treaty's primary relevance is, therefore, in what might be termed political morality. Very often, it is the 'principles of the Treaty' rather than the Treaty provisions themselves that are in question.

Is there, then, a constitutional convention that Parliament must conform to the Treaty or its principles? Not quite. But the Cabinet Manual does direct ministers to confirm that proposed legislation complies with "the principles of the Treaty of Waitangi," and it draws Cabinet's attention to any bill that has implications for those principles.[30] Thus, while it is uncontroversial that the Treaty is important to New Zealand's constitutional history and tradition, its further significance is the subject of ongoing controversy.

In sum, then, we can say that New Zealand's constitution has developed over time, extending the Westminster constitutional tradition. It includes very little fundamental law, but many conventions and ordinary legal rules. The constitution relies heavily on political culture, rather than entrenched and justiciable legal rules, to limit the abuse of legislative authority. Though this model has proven difficult to transplant into other communities which lack this political culture, such a model has worked well in New Zealand. Still, many fear that New Zealand's constitution is too vulnerable or is predisposed either to executive dominance of the legislature or to majoritarian tyranny. How one assesses the constitution's merits will turn in part on how one views New Zealand's past, both in its own right and in comparison to government elsewhere in the world.

## 8. Responsible constitutional change

There is often good reason to change (part of) the constitution. How should one go about changing the constitution? There are many ways of effecting constitutional change. The judgments of the courts may elaborate or revise part of the common law or the interpretation of a particular statute; shifts in the

practice of officials may result in changes to a constitutional convention; or Parliament may enact or repeal a relevant statute. The one area of New Zealand's current constitutional arrangements that would be difficult to change is the doctrine of parliamentary sovereignty. There are no legal means to this end: the abolition of the doctrine of parliamentary sovereignty can only be achieved by *extra-legal* means, specifically agreement amongst citizens and officials (not least judges) to abandon it and replace it with something else.[31] And while other legal rules are not entrenched, that is not to say there are no relevant constitutional norms, for again the constitution is more than the law.

While it may be relatively easy to change most aspects of New Zealand's constitutional arrangements, for the constitution to work—in other words, for it to frame and discipline the exercise of public power—one should avoid changing it in ways that unsettle its capacity to reach this end. That is, one should avoid ad hoc changes, which threaten the constitution's continuity, stability and breadth of support. There is good reason, therefore, for a presumption against constitutional change; any changes that are to be made, further, should be considered and adopted only after a slow, careful, and open process. Otherwise, one risks undermining the mutual forbearance which makes constitutional government possible. The adoption of an open, participatory process may secure broad-based support such that the changes that are made are stable and are adopted by all.

Democratic fairness also warrants an open, participatory process. The constitution is the framework that makes possible self-rule, and it is best if it is changed in a way that invites and considers public attention and scrutiny. This justifies a presumption against constitutional change by judicial decision in favour of legislation, but legislation moved and enacted as far as possible after an open process. Changing the rules of the game by bare majority should be avoided as far as possible.[32]

There is a prudent statement of these principles in the Cabinet minute that constitutes the review itself, affirming the convention that major constitutional change should not be made without cross-party agreement and/or approval by referendum.[33] The structure of the review also provides, of course, that no change will be put to Parliament or to the electorate for its approval without first being framed and chosen by Cabinet. That is, the two ministers leading the review, and thereafter the entire cabinet, will retain a close control on the changes that are finally made open for adoption. One might argue that this is a democratically illegitimate restriction on what should be an open process, in which all and any proposals may be put directly to the people. On the other hand, however, one could also argue that it is a prudent way to avoid ad hoc, ill-considered constitutional change and, more generally, the instability that may follow from an unpredictable process.

The convention in favour of cross-party support and/or a referendum applies especially when a proposed constitutional change would be practically irreversible. In such cases, one cannot rely on the prospect of subsequent legislative change to correct or reverse earlier mistakes or self-interest on the part of legislators. Irreversible changes include at least the introduction of judicially enforceable limits on the power of Parliament or fundamental changes in the identity of the political community. Entrenching the New Zealand Bill of Rights Act as supreme law would be an instance of the former. The move from monarchy to republic might be an example of the latter. Joining the Commonwealth of Australia (as a constituent state of the federation) would be an obvious example of both. Quite possibly instituting the Treaty of Waitangi as fundamental law would also be an instance of both. In all these cases, unless the proposed change is wholly uncontroversial, which seems unlikely, there is good sense to invite the electorate itself to form part of the decision-making body, adopting or rejecting a detailed proposal worked up by Parliament.

*This paper was written following a public lecture delivered by Dr Ekins in March 2012, entitled "Scraps of Paper? Preparing New Zealand for the Constitutional Review." Audio of the lecture is available at: www.maxim.org.nz.*

## ENDNOTES

1 "Relationship and Confidence and Supply Agreement between the National Party and the Maori Party," (16 November 2008), p 2, http://www.national.org.nz/files/agreements/National-Maori_Party_agreement.pdf (accessed 28 January 2013).

2 Cabinet Paper, *Consideration of Constitutional Issues: Terms of Reference,* Appendix 1, p 7, http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/consideration-of-constitutional-issues-1/d/Cabinet%20paper%2018%20April%202011.pdf (accessed 28 March 2013).

3 Peter Chin, Deborah Coddington, Hon Dr Michael Cullen, Hon John Luxton, Bernice Mene, Dr Leonie Pihama (Te Ātiawa, Ngā Māhanga a Tairi, Ngāti Māhanga), Hinurewa Poutu (Ngāti Rangi, Te Āti Haunui a Pāpārangi, Ngāti Maniapoto), Professor Linda Tuhiwai Smith (Ngāti Awa, Ngāti Porou), Peter Tennent, and Emeritus Professor Ranginui Walker (Whakatohea); the two co-chairs are Emeritus Professor John Burrows and Sir Tipene O'Regan (Ngāi Tahu). See http://www.beehive.govt.nz/release/constitutional-advisory-panel-named (accessed 28 January 2013).

4 See, for instance, "Constitutional Courage, Constitutional Change," Issue 2, *Māori Party Publication*, http://www.maoriparty.org/index.php?pag=cms&id=172&p= constitutional-review---january-2011.html (accessed 28 January 2013); and "Te Tiriti o Waitangi: We Want to Face Our Past With Courage, So We Can Build Our Future Together," http://www.maoriparty.org/index.php?pag=cms&id=192&p=policy-2011---tiriti-page.html (accessed 28 January 2013). See also the Māori Party's *Constitution* which in Part 1 states that the party's "commitment to Te Tiriti o Waitangi as the founding document of this nation and to its whakapapa is steadfast:" http://www.maoriparty.org/index.php?pag=cms&id=133&p=constitution.html (accessed 28 January 2013).

5 Cabinet Paper, *Consideration of Constitutional Issues*, Appendix 2, p 15. http://www.beehive.govt.nz/sites/all/files/CR_Cab_paper_8.12.10.pdf (accessed 28 January 2013).

6 "Other issues are likely to arise during public engagement. The Deputy Prime Minister and the Minister of Māori Affairs will report to Cabinet on these matters, advising whether the issue appears to be of widespread interest and merits consideration: "Consideration of Constitutional Issues," p 15.

7 A comparison of various constitutions reveals a variety of modes of entrenchment, perhaps the two most common of which are the requirement of a legislative supermajority (for example, two-thirds or three-quarters of MPs) and direct popular participation in a referendum. It is worth noting that in federal polities there is an additional dynamic for entrenchment, the need for which is not so obvious in unitary states, viz. support *across* the various constituent parts of the federation (which may be quite diverse, not least in terms of language, culture or population). To this end, the mode of entrenchment in federal constitutions typically involves some kind of "federal" component (for instance, the requirement in the US that a proposed constitutional amendment be ratified by three-quarters of the state legislatures, or the requirement in Australia that a proposed constitutional amendment be approved by a double majority in a referendum—that is, both an overall national majority and separate majorities in a majority of states). More straightforward entrenchment formulae are typical in unitary states.

8 The Constitution Act 1986 collects in one place some, but by no means all, of the basic rules of constitutional law in relation to the Sovereign, the Governor-General, the Parliament, the Executive and the Judiciary. However, the Constitution Act does not play an analogous role to 'the Constitution' in many other countries and is itself an Act of the New Zealand Parliament that can be amended or repealed by a subsequent Act of Parliament passed in the ordinary manner. It therefore counts as neither entrenched nor fundamental law.

9 On the doctrine's development, both historical and philosophical, see Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Oxford University Press, 1999). And for a perspective on some of the contemporary debates about the doctrine see Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge: Cambridge University Press, 2010).

10 At the risk of oversimplification, as long as the rule of parliamentary sovereignty prevails, it is always open to a future parliament to legislate contrary to what a previous parliament has said since a present parliament cannot limit the law-making authority of its successors. That is not to say that judicially enforceable limits on the power of Parliament could never come about in New Zealand, but rather that they could only come about via an abandonment of parliamentary sovereignty which in turn can only be achieved via *extra-legal* means. And on the difficulties of entrenchment under a system of parliamentary sovereignty see further note 13 and accompanying text.

11 In many countries operating under a form of Westminster constitutionalism, the rule that members of the executive must be drawn from the legislature is a creature of constitutional convention. In New Zealand, however, this convention has now been made a rule of constitutional *law*. See section 6 of the Constitution Act 1986.

12 The idea here is as follows: imagine the set of the possible exercise of public power is comprised of X, Y and Z, and we wish to allocate this to three different actors: A, B and C. If we allocate task X to actor A, task Y to actor B, and task Z to actor C, then from the mere fact of allocating power in this way, it follows that it is unconstitutional for (1) A to do Y or Z, (2) B to do X or Z, or (3) C to do X or Y. This is so without having placed any substantive or procedural limits on the exercise of public power. As Vernon Bogdanor, "Introduction" in Vernon Bogdanor (ed), *Constitutions in Democratic Politics* (Aldershot: Gower, 1988), 1, 4 puts it: "[To] allocate functions, powers and duties is also, *ipso facto*, to limit power."

13 We mentioned in note 10 and accompanying text the difficulty of entrenchment given the doctrine of parliamentary sovereignty. Would it not be open to a sovereign parliament simply to legislate contrary to an entrenchment provision like section 268 of the Electoral Act? The New Zealand courts have not had occasion directly to rule on point and the answer is not entirely clear. There is case law in other parts of the Commonwealth in which the courts have held that while Parliament may not impose substantive limits on what a future parliament may enact, so-called "manner and form" requirements—that is, procedural limitations on how a future parliament must act in amending an existing law—are not inconsistent with the doctrine of parliamentary sovereignty and will be enforced by the courts. On this approach the courts would "strike down" any purported amendments contrary to an entrenchment provision like section 268; but ultimately such "manner and form" requirements cannot themselves be entrenched (such entrenchment, if it were possible, being known as "double entrenchment") and are therefore subject to repeal by the ordinary legislative process (that is, by way of simple majority). So even on this approach it would appear that Parliament could, if sufficiently determined, circumvent an entrenchment provision by first repealing the entrenchment provision and then amending the law in the ordinary manner. Moreover, the New Zealand courts might not even go as far as this line of authority on "manner and form" provisions and might therefore hold that Parliament is legally free to act contrary to entrenchment provisions like section 268 (although whether Parliament would be *politically* free so to act is another matter entirely).

14 Professor John Finnis, in his "The Responsibilities of the United

Kingdom Parliament and Government under the Australian Constitution," *Adelaide Law Review* 9, no. 91 (1983): 91-92, argues "that the constitution (small 'c') includes not only the law that judges can declare and enforce on the motion of litigants, but also the conventions that responsible ministers and legislatures (all those persons whom I will call 'authorities') acknowledge as authoritative and binding." This fact is more apparent in some countries than others. Of the countries with a written constitution, it is perhaps most apparent in those who also share in the Westminster constitutional tradition. For instance, in Australia it is entirely uncontroversial to state that there are many aspects of the constitution not mentioned in the Constitution—the office of Prime Minister perhaps being the most prominent example, it being entirely a creature of convention and mentioned nowhere in "the Constitution of the Commonwealth of Australia." In other countries the statement that the constitution is wider than the Constitution may attract more controversy, but it is no less true. What is typically done to avoid the conclusion that the Constitution does not contain all of the constitution is to reserve the use of the word "constitution" exclusively for the document going by that name and to invoke other terms (for example, an "organic law"—or its French equivalent "*loi organique*"—a "constitutional statute," or "a statute of constitutional importance," etc) to cover those aspects of the constitution absent from the Constitution. Of course, such a move fails to address the position of constitutional conventions.

15 Strictly speaking, one should speak of codified/uncodified rather than written/unwritten constitutions. A codified constitution is not just written down but is written down in a single or one predominant place (typically a document given the name 'the Constitution'). For instance, it is commonly asserted that the United Kingdom's constitution is "unwritten" while the United States' is "written." Neither statement is strictly correct. Although the United Kingdom has no document to which we could aptly give the name "the Constitution," some rules of the British constitution are written down in a number of different places (for example, Magna Carta 1215, the Bill of Rights 1689, the Act of Settlement 1701 and so on), and although the United States has a document called "the Constitution," some rules of the American constitution are not written down there or elsewhere. It would be more precise to say, therefore, that both the British and American constitutions are partly written and partly unwritten—which leaves one with a distinction that can be put to very little use since it would appear that every constitution is partly written and partly unwritten (with constitutions differing only in the extent to which they are written or unwritten). But the United States most certainly does possess a codified constitution and the United Kingdom most certainly does not. Despite this difference between codified/uncodified and written/unwritten constitutions *stricto sensu*, for ease of reference and because of their centrality in popular discourse, the main text uses the terms "written" and "unwritten" constitutions in the more common and less strict sense.

16 S.E. Finer, "Notes Towards A History of Constitutions" in Vernon Bogdanor (ed), *Constitutions in Democratic Politics* (Aldershot: Gower, 1988), 17, 20.

17 The constitutional history of the United States is instructive in this regard. During the ratification debates, whether the Constitution should be regarded as law and, if so, whether it is enforceable by the ordinary courts or law of a different kind (with a remedy for its breach laying in the political sphere) were open questions. See Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004), 73-92. Such a position is hardly surprising given the history of the development of constitutions up until that point. Constitutions were almost all unwritten, and with those few that were written, were mostly seeking to replicate a previous unwritten constitutional order whose rules were typically not justiciable. As it happens, the first question (viz. whether the Constitution is law) was settled during the ratification debates, such settlement being reflected in Article VI of the US Constitution which states, "This Constitution . . . shall be the supreme Law of the Land." The second question (viz. whether this law is justiciable or law of a different kind) was not, however, settled at this time, which is one of the reasons why the decision in *Marbury v Madison* 5 US (1 Cranch) 137 (1803) (which is regarded as establishing the practice of "judicial review" in respect of the Constitution whereby federal courts have a right and a duty to enforce the law of the Constitution over the supposedly co-equal branches of the federal government, including the enactments of the legislature) was so controversially received at the time. In time, however, the view expressed in *Marbury*, that the Constitution is law and *as such* is justiciable, came to be accepted. That the Constitution is not justiciable—while an arguable position up until the early or perhaps the mid-19th century—is in practice no longer arguable in the US or in most other countries with a written Constitution (they too having followed the important turn in constitutional thinking expressed in *Marbury*). The point of this aside is simply to remark that this history is instructive for New Zealand should it choose to go down the path of adopting a written Constitution. That the stipulations of a written Constitution are not justiciable is possible in theory but, if the experience of other countries (not least the US) is any guide, not so in practice. But cf note 18.

18 This statement is of course subject to qualification. First, there is the example of those few countries (for example, Switzerland) which do have a written Constitution but have not gone down the *Marbury* road of judicial review in respect of the Constitution. And secondly, even in those constitutional systems which have taken the *Marbury* road (including the US itself) arguments do occasionally arise whether *particular* constitutional provisions or questions are, as an exception to the general rule, non-justiciable. In our view, however, neither of these qualifications detracts from the general force of the point made here in respect of any future written Constitution for New Zealand.

19 Colin Turpin and Adam Tomkins, *British Government and the Constitution,* 6th edition (Cambridge: Cambridge University Press, 2007), 31 quoting Ian Holliday, "Democracy and Democratization in Great Britain" in Geraint Parry and Michael Moran (eds), *Democracy and Democratization* (London and New York: Routledge, 1994), 241, 253.

20 Interestingly, Alexis de Tocqueville, Henry Reeve (trans), *Democracy in America* (New York: Arlington House, 1966), Vol I, Part II, Ch 8 appeared to raise this very point in respect of the US as early as 1835: "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question. Hence all parties are obliged to borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings."

21 It was not always so. As originally drafted, the US Constitution did not give constitutional force to substantive rights, these being added by way of subsequent amendment. The inclusion of substantive rights was in fact a point of controversy from the beginning, with Alexander Hamilton (in *Federalist* No 84 and elsewhere) perhaps the most noted opponent of their inclusion. And it is also worth recalling that at the time substantive rights were given constitutional recognition in the US, the justiciability of the US Constitution was far from a settled question (on which see note 17).

22 Perhaps the clearest example of such constitutional repudiation is that of post-World War II Germany. Indeed, the renowned German constitutional theorist Carl Schmitt has described the German Federal Republic's *Grundgesetz* as an 'Anti-Constitution' to that of the Weimar Republic. See Kurt Sontheimer, "The Federal Republic of Germany (1949): Restoring the *Rechtsstaat*" in Vernon Bogdanor (ed), *Constitutions in Democratic Politics* (Aldershot: Gower, 1988), 229, 229 fn 1, quoting Carl Schmitt, *Verfassungsrechtliche Aufsätze* (Berlin: Duncker & Humblot, 1958), 487.

23 As Vernon Bogdanor, "Introduction" in Vernon Bogdanor (ed), *Constitutions in Democratic Politics* (Aldershot: Gower, 1988), 8, quoting Carl Friedrich, "The Political Theory of the New Democratic Constitutions" in Arnold J. Zurcher (ed), *Constitutions and Constitutional Trends Since World War II*, 2nd edition (New York: New York University Press, 1955), 33, puts it: "There was, in the constitutions of the immediate post-war period—the Fourth Republic in France, the Italian and the German (as well as the Japanese)—an understandable revulsion against any philosophy which exalted the political abilities of the average citizen; there was 'one rather striking divergence from the American, if not from the British, climate of opinion. Nowhere on the [European] Continent is there to be found any genuine 'belief in the common man' as that belief is taken for granted in the United States."

24 Since 1951, the New Zealand Parliament has been unicameral. Prior to this, the convention was that the Sovereign (or the Governor-General) would not withhold the Royal Assent from bills that had been passed by *both* houses of parliament. Should New Zealand ever return to having a bicameral parliament, then presumably the convention in its previous form would again prevail.

25 Or at any rate, most of them. The ministry nowadays is of such a size that there are also some 'junior' ministers outside of Cabinet.

26 As is the case with the written constitutions of other Commonwealth realms, the Constitution Act 1986, in section 6, provides for an "Executive Council." While there is considerable overlap between membership of Cabinet and membership of the Executive Council, these two bodies are, strictly speaking, distinct.

27 Over time relations within the British Empire evolved and the political reality was such that certain dominions of the Crown, including New Zealand, should no longer be viewed as subordinate colonies of an imperial power but rather as equal members of a Commonwealth of Nations. This political reality was eventually translated into constitutional reality by the Statute of Westminster 1931 (UK) in which the 'Dominions'—viz. (in alphabetical order): Australia, Canada, the Irish Free State, Newfoundland, New Zealand and South Africa—were declared to be on an equal footing with the UK and one another, and the Imperial Parliament disclaimed any intention, henceforth, to legislate for a Dominion except where the Dominion's own parliament expressly requested such legislation.

28 These statutes pre-date the union of the Kingdom of England with the Kingdom of Scotland in 1707 to form the Kingdom of Great Britain (which in 1801 itself entered into a union with the Kingdom of Ireland to form the United Kingdom of Great Britain and Ireland, which with the departure of 26 of the 32 Irish counties to form the Irish Free State—now Republic—subsequently became the United Kingdom of Great Britain and Northern Ireland).

29 The Crown had claimed sovereignty over part (but not all) of New Zealand as early as 1787, in its claim to New South Wales; and, moreover, in 1823, the Imperial Parliament conferred on the courts of New South Wales jurisdiction over matters in New Zealand (see the New South Wales Judicature Act 1823 (UK)). In practice, however, the colonial administrations of New South Wales and (from 1825, when colonial boundaries changed) Van Dieman's Land (subsequently renamed Tasmania) expressed little practical interest in New Zealand. Following the signing of the Treaty of Waitangi, the sovereignty of the Crown over all of New Zealand was formally declared on 21 May 1840. Thereafter, New Zealand was administered for a brief time as part of the colony of New South Wales until 1 July 1841, when it became a separate colony in its own right.

30 The *Cabinet Manual* (2008), http://cabinetmanual.cabinetoffice.govt.nz/ (accessed 28 January 2013) in paragraph 7.60 states: "Ministers must confirm that bills comply with certain legal principles or obligations when submitting bids for bills to be included in the legislation programme. In particular, Ministers must draw attention to any aspects of a bill that have implications for, or may be affected by: (a) the principles of the Treaty of Waitangi…"

31 There is, in fact, lively academic debate as to whether this has occurred in the United Kingdom through the adoption of the European Communities Act 1972 (UK), and the interpretation given it by the House of Lords (acting in its former judicial capacity as the final court of appeal in the United Kingdom) in the Factortame litigation, in particular in *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603 (HL).

32 It should be noted here that on this basis enacting the New Zealand Bill of Rights Act 1990 was unconstitutional.

33 Cabinet Paper, "Consideration of Constitutional Issues," p 6 para 33: "In keeping with New Zealand's constitutional history, any proposals to reform elements of the constitutional framework should only be decided after securing broad cross-party agreement in the House or the majority support of voters at a referendum."