THE HAZARDS OF MAKING CONSTITUTIONS: SOME REFLECTIONS ON COMPARATIVE CONSTITUTIONAL LAW

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I RT HON SIR IVOR RICHARDSON

Accepting an invitation to take part in a conference recognising the achievements of the Rt Hon Sir Ivor Richardson is not a duty; it is an honour. Sir Ivor Richardson is one of the great New Zealanders of his generation. He has done many things with great ability, unstinting generosity, and characteristic modesty.

I first met Sir Ivor in 1968, and have had virtually continuous contact with him in a wide variety of roles ever since – academic colleague, Member of Parliament, Attorney-General, appearing in front of him as counsel, and as a friend of his and of Jane. I well remember telephoning him in London and persuading him to chair the Royal Commission on Social Policy.[1] A more impossible assignment would be difficult to imagine. But he accepted that with the same equanimity as he has borne so many other burdens over the years – with balance, good judgment and hard work.

His remarkable accomplishments are not widely known to the general public. He has never made any effort to promote himself. He has been a Judge of Appeal since 1977, and became President of the Court of Appeal in 1996. Many lawyers cannot remember a time when Sir Ivor was not a Judge. Yet his career and his interests are much wider and, in many respects, deeper than that of a Judge. They extend to business, taxation, administration, policy, universities, art, and the discipline of law and economics. His gentleness has often disguised the quality and penetration of his intellect. Few people have rendered more distinguished service to New Zealand and to the law.

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1 Royal Commission on Social Policy, *April Report* [1988] AJHR H2 (5 volumes).

II PERSPECTIVES

The organisers of this Conference have invited me to contribute a paper on making constitutions. It was requested that the paper draw on my own perspectives as a lawyer, academic, and former politician. Given the nature of the brief, let me draw a number of strands together.

As a lawyer, I practise exclusively in the field of public law and was the co-founder of New Zealand's first, exclusively public law firm. That practice is carried out in Wellington and it would be quite impossible to carry it out anywhere else in New Zealand, except the capital city. A number of the observations that are made in this paper flow from that experience over more than seven years now, of dealing with governments on a variety of issues on behalf of clients and seeing, on a daily basis, the subtleties, complexities, and mutations that occur constantly within the New Zealand system of government.

The second strand of the paper comes from teaching comparative constitutional law in the United States of America, something that I have done now on five occasions, beginning first in 1973 at the University of Virginia. In recent years I have taught the subject at the University of Iowa, as a short but intensive course under the following prescription:

> Comparative Constitutional Law: Canada, the United Kingdom, and the United States.
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> This course will compare constitutional law decision-making and substantive results under different constitutional systems of common law nations. The course will use Canada, the United Kingdom, and the United States as the primary examples and primary sources of law, but it may also draw upon examples from the constitutional law of other nations, such as Israel and New Zealand, and it may consider the effect of the European Convention on Human Rights on constitutional law in the United Kingdom. The course will sometimes stress the differences between the systems of government and the dependence and effect on such dimensions as separation of powers, federalism, allocation of legislative, executive, and judicial power, and protection of individual rights; and it will sometimes stress the differences and similarities of substantive individual rights and the relationship of those rights to such characteristics as judicial supremacy, parliamentary sovereignty, and qualified entrenchment of a Bill of Rights.

My teaching of this subject has concentrated upon a comparison of the Westminster system and congressional government, or in the more modern characterisation, presidential government as practised in the United States. The nature of the course has been to introduce the students to Westminster government in the United Kingdom, Canada (America's near neighbour about which the students know little), Australia, and New Zealand, with reference to some of the more exotic developments in places like Fiji. It is a rich tapestry.

American students are fascinated by the differences between their system and the Westminster system, but they are deeply suspicious of the amount of power that resides within a Westminster Cabinet. The degree of suspicion of State power and the manner in which it is exercised is one of the eternal themes of constitutional law in all countries. The monarchy fascinates Americans. Ministerial responsibility, the adjudicative responsibilities of the House of Lords and the Privy Council baffles them.

The degree to which different political cultures spawn different attitudes to political institutions becomes a source of fascination in teaching such a course. New Zealand and Nebraska share a preference for unicameral legislatures. But those members of the class not from Nebraska or New Zealand could not be convinced of the merit of a single chamber, despite quite strong arguments that can be advanced for such an arrangement at State level in the United States.

There are some wonderful harmonies and dissonances between the United States system and the Westminster system. And these two systems are the competing models for emerging nations to emulate, at least to some degree, when approaching the task of constitution building.

One of the major enterprises of American constitutional law in recent years has been to provide a lot of advice for new constitutions in places all over the globe, particularly in Russia and the former Soviet Republics, as well as the Czech Republic, Hungary, Bulgaria, the Ukraine, and Lithuania. There is, in all of this, a quickening interest in constitutional structures and a greater willingness to be inventive and strike out in new directions.

Much attention has been devoted by American scholars to the South African Constitution, in recent years, as well as to the fresh start made there to forge a new and fundamental commitment to human rights. That has been labelled an historic bridge, and is contained in section 35 of the Constitution:

> 35(1) In interpreting the provisions of this chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this chapter, and may have regard to comparable foreign case law.
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> (2) No law which limits any of the rights entrenched in this chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.
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> (3) In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this chapter.

The Constitutional Court of South Africa summed up the new ethos elegantly, in a 1996 case:[2]

> What is perfectly clear from these provisions of the Constitution and the tenor and spirit of the Constitution viewed historically and teleologically, is that the Constitution is not simply some kind of statutory codification of an acceptable or legitimate past. It retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable. It constitutes a decisive break from a culture of Apartheid and racism to a constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours. There is a stark and dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised. The past was pervaded by inequity, authoritarianism and repression. The aspiration of the future is based on what is 'justifiable in an open and democratic society based on freedom and equality'. It is premised on a legal culture of accountability and transparency. The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advanced by their enactment.
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> This approach has been consistently followed in Southern Africa. Even in jurisdictions without our peculiar history, national Constitutions, and Bills of Rights in particular, are interpreted purposively to avoid the 'austerity of tabulated legalism'. [Footnotes omitted.]

The third strand to the angle of narration that I am invited to adopt is that of a "former politician". Unfashionably, I believe that is an honourable estate, and I also believe that it provides a perspective on the subject-matter of this paper that is not easy to replicate, but perhaps not easy to explain either. Being a politician altered my constitutional thinking in many ways. It made me impatient with theory to some extent and with the lack of knowledge that many writers demonstrate of how things actually work in government.

In relation to constitutional change in New Zealand, I enjoyed some interesting experiences as a politician.[3] While I did not make a New Zealand constitution or even try to do so, I consciously did attempt to make some major changes to it. It is a set of

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2 *Shavalla v Attorney-General of Transvaal* [1996] 1 All SA 64, 77 (SA Const Ct).

3 Among those that are relevant to this paper was Ministerial responsibility for or heavy involvement in the Constitution Act 1986, the New Zealand Bill of Rights Act 1990, the Regulations (Disallowance) Act 1989, important changes to the Standing Orders of the House in 1986, as Leader of the House, particularly establishing a new and comprehensive set of Select Committees, the Treaty of Waitangi Amendment Act 1986, the Law Commission Act 1985, the establishment of the Legislation Advisory Committee, setting up the Royal Commission on Electoral Law chaired by the Hon Justice Wallace, working on the "Principles for Crown Action on the Treaty of Waitangi", the State-Owned Enterprises Act 1986, the State Sector Act 1988, supervising negotiations with Maori on fisheries issues, being the Attorney-General and Minister of Justice, supervising the production of the *Cabinet Manual*, and responsibility for the conduct of elections.

experiences that gave me some fundamental understandings of how the New Zealand system of government and the New Zealand constitution work.

In all of these various roles, there are a number of themes that seem constant. The first is that democracy can be characterised as "an organisation of the process of collective discussion about the right standards on which to organise public life".[4] The democratic power belongs to people, not corporations, the church or the military. And people should participate in discussion and decisions. There is no point in this paper discussing constitutions or constitutionalism not democratic at base.

The next point that always seems to arise in these discussions is the distribution of power within the constitutional arrangements. It is common that there are three branches of government – the legislature, the executive, and the judiciary – but the distribution of power between them is always a live issue. The American invention of judicial review, which gives the courts the capacity to strike down statutes passed by the legislature, has always been a point of fascination when comparing classical Westminster government with the United States system.

The further, but somewhat unrelated point is the location of the chief executive officers in the legislature under Westminster government. Indeed, they must be drawn from it. The fusion of the executive power with the legislative power, was never better expressed than by Walter Bagehot in his classic book, *The English Constitution*, first published in 1867, where he pointed out "The efficient secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers".[5] American notions of separation of powers are deeply offended by that feature of Westminster government, but it nonetheless has great fascination for American students who love to contemplate such questions as whether President Clinton could have survived in a parliamentary system under parliamentary questioning in relation to the Monica Lewinsky affair.[6]

4 Carlos Santiago Nino "Transition to Democracy, Corporatism and Presidentialism with Special Reference to Latin America" in Douglas Greenberg (ed) *Constitutionalism and Democracy: Transitions in the Contemporary World: The American Council of Learned Societies Comparative Constitutionalism Papers* (Oxford University Press, New York, 1993), reproduced in Vicki C Jackson and Mark Tushnet *Comparative Constitutional Law* (Foundation Press, New York, 1999) 237.

5 Walter Bagehot *The English Constitution* (repr, Fontana, London, 1993) 65.

6 I think the answer to that question is that he may have lasted a month, but not much longer, if he had lied to the Parliament, as he did lie to the American people. The powerful doctrine of parliamentary privilege that poses such a sanction on deliberately misleading the House, would, in the end, have been fatal had Clinton been a Prime Minister. See Richard A Posner, *An Affair of State – The Investigation, Impeachment and Trial of President Clinton* (Harvard University Press, Cambridge (Mass), 1999) 176-181. This issue shades into the question of the problems where the Head of State is also the Chief Executive, a matter upon which

One method of distributing power is federalism and federalism is as possible under a Westminster-style constitution, as Canada and Australia illustrate, as it is under the American model. Federalism in a Westminster setting, has the characteristic of reducing the power of the Federal Parliament. But the nature of federalism is extraordinarily subtle and sometimes even contradictory.

In the United States residual power was left with the States; in Canada it remained with the Federal Parliament. Canada must have looked in 1867, as if it was going to have a stronger central government than in the United States, leading one commentator to describe it as a quasi-federation,[7] at least on the face of the law. But as a result of practice and, to some degree as a result of Privy Council decisions, the Canadian provinces have been empowered. Nonetheless, most American students I have taught take the view that the American federal system is more centralised than the Canadian. As Professor Peter Hogg puts it:[8]

> … the point is that the distribution of powers in the Constitution of Canada is much less favourable to the federal power than would be suggested merely by comparing the text with that of the American or Australian Constitutions.

The point that arises here is that even with a federal system where powers are necessarily distributed by a written constitution, textual analysis can be an unreliable guide to what actually happens, a point that is one of recurring themes of comparative constitutional law.

In all written constitutions, the text alone will never be enough and the same is true of unitary States with a written constitution. As the Supreme Court of Canada sensibly put it, when answering in the negative the question whether Quebec could secede from the rest of Canada:[9]

> … the Constitution of Canada includes the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian [S]tate.
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> These supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are

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Westminster systems could be argued to be superior to the United States arrangements. I should point out that on my visit to Iowa in 1999, I taught impeachment exclusively as the instrument for comparison between the United States and Westminster. Why did impeachment fall into desuetude in the United Kingdom, and why does responsible government with votes of confidence provide a substitute?

7 Kenneth C Wheare *Federal Government* (4 ed, Oxford University Press, London, 1963) 19.

8 Peter W Hogg *Constitutional Law of Canada* (4 ed, Carswell, Toronto, 1997) 120.

9 *Reference re Secession of Quebec* [1998] 2 SCR 217.

> not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning. In our view, there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities.

Many of the issues relating to federalism were analysed in the United States when the Articles of Confederation were found to be inadequate and replaced by the United States Constitution. These issues are fascinatingly dealt with in the Federalist Papers.[10] One of the most elaborate versions of federalism I have encountered was that in the Solomon Islands where a nation of perhaps 480,000 people has seven provincial legislatures, as well as the National Legislature.[11]

The Solomon Islands Constitution is extraordinarily elaborate in terms of laying down a large number of particularities – too many. A similar criticism could be made of the 1997 Constitution of Fiji, although one understands the forces that impelled such prescription. The issue here is how far to go and what to leave out. Many things should not be in a constitution, or at least their detail should not be developed there.

The Constitution Act 1986 in New Zealand is admirable in its brevity and lack of detail, although that strength is also a weakness. It allows enormous flexibility to occur under the minimalist outline of establishment of the three branches of government that are sketched in the Act itself. That is one reason why making the Constitution Act a form of superior law would pose few problems, with the necessary qualification that if a republican constitution were to be promulgated, there would need to be basic changes.

III A SUPERIOR LAW CONSTITUTION

When one discusses the question of a superior law constitution, a complicated set of issues arises about the nature of trying to fetter the future. One recalls Menachem Begin's

10 Alexander Hamilton, John Jay, and James Madison *The Federalist – A Commentary on the Constitution of the United States* (edited, with an introduction by Robert Scigliano, The Modern Library, New York 2000).

11 Constitution of the Solomon Islands, <http://www.vanuatu.usp.ac.fj/paclawmat/Solomon_Islands_legislation/Solomons_Constitution.html>.

The powers of the Provincial Government can be set by the National Legislature. The Townsville Peace Agreement, 15 October 2000, agreeing to end hostilities in the Solomons that had broken out provided for more autonomy by devolution or constitutional amendment for Malaita and Guadalcanal provinces. It provides also for a Constitutional Council to rewrite the Constitution.

opposition to a formal constitution for Israel: "If the constituent assembly legislates a constitution, then the government will not be free to do as it likes".[12]

While that is obvious enough, it shows no appreciation of the virtues of limited government and for me that is the flaw in the doctrine of parliamentary supremacy. The Declaration of Independence for Israel provided that a prescription for a constitution be drawn up by the constituent assembly, a task that was never carried out, although it was the task of the first Knesset.[13]

And that point, in relation to Israel, brings us to a basic point about New Zealand. New Zealand's constitution is essentially political. That is to say its workings depend on political factors and what happens depends largely on the will of the politicians. It is that feature of it that raises issues of concern about the absence of a robust template. There is just not enough form and process laid down – a framework too incomplete with insufficient rules – too much is left at large. It is the reverse problem from that of the Solomon Islands and Fiji. There must be a happy median.

One analyst of comparative government, whose work has survived almost better than anyone else's, is Alexis de Tocqueville, who produced the classic, *Democracy in America*.[14] In a striking passage, when discussing the power of judicial review in the United States, de Tocqueville says:[15]

> In France, the constitution is an immutable work, or supposed to be so. No power can change anything in it: such is the received theory.
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> In England, they recognise in Parliament the right to modify the constitution. In England, the constitution can therefore change constantly, or rather it does not exist. Parliament is at the same time the legislative body and the constituting body.
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> In America, political theories are simpler and more rational.
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> An American constitution is not supposed to be immutable as in France; it cannot be modified by the ordinary powers of society as in England. It forms a separate work that, representing the will of the

12 Gary J Jacobsohn *Apple of Gold: Constitutionalism in Israel and the United States* (Princeton University Press, Princeton, 1993), quoted in Vicki C Jackson and Mark Tushnet *Comparative Constitutional Law* (Foundation Press, New York, 1999) 277.

13 Jackson and Tushnet, above.

14 Alexis de Tocqueville *Democracy in America* (translated, edited, with an introduction Harvey C Mansfield and Delba Winthrop, University of Chicago Press, Chicago 2000).

15 de Tocqueville, above, 95.

people, obliges legislators as well as plain citizens, but that can be changed by the will of people following forms that have been established and in cases that have been foreseen.

In America, the constitution can therefore vary; but as long as it exists, it is the origin of all power. The predominant force is in it alone.

It is the "does not exist" issue that is the source of concern for me about New Zealand's situation. The claim is often made that New Zealand, like the United Kingdom and Israel, is a country without a written constitution and these are the only such countries. A number of modern British commentators take divergent views on this. Professor A V Dicey described the United Kingdom constitution as unwritten or partly unwritten. If that is to be understood as meaning there is no single authoritative text, it would appear to be an accurate enough statement. After all, all the constitutional law is written down somewhere, whether it be by statute, or judicial decision or official documents. And even in New Zealand the unwritten rules are the subject of fairly extensive development in the *Cabinet Manual*.[16] But constitutional conventions are not written down the same way, as the constitutional law itself is.

While New Zealand has the Constitution Act 1986 and it does contain the main elements of the system, the New Zealand constitution, like the United Kingdom one, is to a large extent what might be termed uncodified.[17] Others have described the situation as amounting to a common law constitution. The late Sir Owen Dixon, Chief Justice of Australia, used that term.[18] For example, if one wants to explore the general constitutional proposition of the legislative supremacy of Parliament, one has to look at court decisions that indicate the power of Parliament to enact any legislation it likes.[19] One may argue that the same point that was made in *Fitzgerald v Muldoon*, is contained on a broad interpretation of the words of section 15 of the Constitution Act, which provides:

15. Power of Parliament to make laws— (1) The Parliament of New Zealand continues to have full power to make laws.

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16 *Cabinet Manual 2001* (Department of Prime Minister and Cabinet, Wellington, 2001).

17 Eric Barendt *An Introduction to Constitutional Law*, (Oxford University Press, Oxford 1998) 33.

18 Owen Dixon "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 Australian LJ 240.

19 *Fitzgerald v Muldoon* [1976] 1 NZLR 615 (SC). In this decision Chief Justice Wild cited with approval A V Dicey *Introduction to the Study of the Law of Constitution* (10 ed, Macmillan Education, Basingstoke, 1959) 622:

> The principle of parliamentary sovereignty means neither more nor less than this, namely, that parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of parliament.

> (2) No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend to New Zealand as part of its law.

Another English constitutional commentator, Vernon Bogdanor, wrote, as recently as 1995, when talking about constitutional monarchies, that: "Britain is one of only two constitutional monarchies – the other is New Zealand – where the constitution remains 'unwritten' and uncodified".[20]

By way of contrast, Rodney Brazier takes the view that, "The United Kingdom shares with Israel alone in the developed world the eccentricity of not having a written constitution".[21] After that he observes, by way of footnote, that New Zealand abandoned that state of affairs when she adopted a Constitution Act in 1986. It is therefore, of some importance in the New Zealand context to salvage for analysis the issue of what New Zealand's current constitutional arrangements are, given the fact that they are thought to have altered and, by some commentators, quite radically in 1986.

The most recent New Zealand analysis of the subject by Professor Philip Joseph puts it this way:[22]

> New Zealand's Constitution is termed 'unwritten' since it is not sourced in a document (or series of documents) that is known as 'the Constitution'. The Constitution is located in a range of legal and extra-legal sources, including the statutes of the British and New Zealand Parliaments, the common law, constitutional convention, the law and custom of Parliament, the great legal commentaries (such as those of Blackstone and Dicey), customary international law, the principles of the Treaty of Waitangi, and a host of Westminster traditions embedded in British constitutional history.

As Joseph points out, the issue is mainly one of definition. He goes on to point out that while the Constitution Act 1986 contains fundamental law, it is declaratory of New Zealand's existing laws, and it can be altered in the ordinary way without the need for a special procedure. In one place, he says it is "New Zealand's most comprehensive constitutional statute",[23] in another "New Zealand's premier constitutional statute".[24]

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20 Vernon Bogdanor *The Monarchy and the Constitution* (Oxford University Press, Oxford, 1995) 1.

21 Rodney Brazier *Constitutional Reform* (2 ed, 1998, Oxford University Press, Oxford) 1.

22 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 1. I do not share Joseph's faith that Westminster traditions are as well established in New Zealand as he says. Many MPs know little about them.

23 Joseph, above, 115.

24 Joseph, above, 21.

Whatever characterisation one adopts of the existing New Zealand situation, there can be little argument that New Zealand has an extraordinarily flexible, even fluid, constitution. It can be amended by ordinary statute and much of it can be altered by practice, with no need for a statute to be passed. While there are special procedures for the amendment of some provisions in the Electoral Act 1993 (as there were in its predecessor), the so-called reserved provisions, there are none in the Constitution Act, save for one that sets up a maximum three-year term of Parliament, which was formerly in the Electoral Act.[25]

The reserved provisions of the Electoral Act compared with the Constitution Act, themselves, raise some fascinating issues. Why should it be that relatively technical matters such as the Representation Commission that determines parliamentary boundaries can be entrenched, free from alteration except by referenda or a 75 percent majority in Parliament, but the requirement that Ministers must be Members of Parliament or that Judges have security of tenure, or even the existence of the New Zealand Parliament are not?

It may be possible, in terms of the constitutional theory applied in New Zealand that the New Zealand House of Representatives could abolish itself, much as it abolished the Upper House in 1950. It is not impossible to conceive of political circumstances that might cause such a policy to gain a relatively wide level of popularity. The law does not exist in a social and political vacuum and there are a great many values at stake that would cause such a move to be stoutly resisted. The resistance would probably succeed given the nature of New Zealand's political culture. Yet one cannot escape the point made by Professor M J C Vile that:[26]

> Western institutional theorists have concerned themselves with the problems of ensuring that the exercise of governmental power, which is essential to the realisation of the values of their societies, should be controlled in order that it should not itself be destructive of the values it was intended to promote. The great theme of the advocates of constitutionalism, in contrast either to theorists of Utopianism, or of absolutism, of the right or of the left, has been the frank acknowledgement of the role of government in society, linked with the determination to bring that government under control and place limits on the exercise of its power.

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25 Constitution Act 1986, s 17 provides that "The term of Parliament shall unless Parliament is sooner dissolved be three years from the day fixed for the return of the writs issued for the last preceding general election of members of the House of Representatives, and no longer". The Electoral Act 1993, s 268, the entrenching provision, also applies.

26 Maurice J C Vile *Constitutionalism and the Separation of Powers* (Oxford University Press, Oxford, 1967) 1. This seems a particularly acute observation when one thinks of what is occurring in Zimbabwe at the time of writing.

It is not only the excesses that are possible under New Zealand's existing constitutional arrangements that drive the need to change them. Indeed, it must be admitted that the risks posed by parliamentary supremacy have been reduced with the advent of MMP. But the unclear and indeterminate nature of much of the constitution in New Zealand is of concern. So is the fact that much of it is not justiciable, and therefore, is not enforceable. Given the essentially political nature of our constitution, a characteristic that it shares with that of the United Kingdom, in order to get change there needs to be cross-party agreement at least between Labour and National. But it is far from clear that any such political agreement or consensus on the need for a written constitution or its characteristics would be easily forthcoming. Constitutional policy hardly ever makes an appearance in New Zealand politics. We share with the British a general lack of concern with the constitutional experience of other nations.

Most citizens of most countries can point to a copy of the constitution of their country; but not a New Zealander. And this is one of the reasons why the level of civic virtue in New Zealand is so low. It is the reason why so few people know how we are governed or even have much conception of the law relating to it. If a country has a constitution, it can be taught in the schools. And while New Zealand does have a constitution, it is quite incapable of any simple authoritative description of the sort that the Constitution of the United States can give its citizens, even now so long after 1787.

To arrive at a condition where a constitution was thought to be necessary, it would mean that New Zealand governments would have to surrender part of their freedom of action. But of course their freedom of action is greatly circumscribed now in ways that it used not to be by the electoral system. It is for that reason that MMP (Mixed Member Proportional Representation) rates as the most important constitutional change of the twentieth century in New Zealand, not because it changed the constitution in any formal sense, but because it changed the way it worked.

Constitutional change in New Zealand is hardly ever sudden, and it is never comprehensive. It is gradual. The changes are essentially pragmatic and usually reactive to events and current political demands. There has never been any systematic or authoritative reconsideration of New Zealand's constitutional arrangements. The Constitution Act 1986 was a fortuitous and unplanned event. As a public policy issue the nature of the New Zealand constitution is barely discernible on the horizon.

IV PROTECTION OF FUNDAMENTAL RIGHTS

A basic issue that arises in any comparative constitutional law context flows from the protection of fundamental rights. The comparison between Westminster and the United States is less stark than it was, prior to the United Kingdom Parliament's enactment of the Human Rights Act 1998, but it is still substantial. The question of trying to weigh whether

fundamental guarantees that are superior law produce better outcomes is not easy to evaluate. There are some fascinating contrasts. Take the law of defamation as it has developed in the United States, the United Kingdom, Canada, New Zealand, and Australia.

The Supreme Court of the United States' line of cases that began with *New York Times Co v Sullivan,*[27] has adopted a more relaxed standard for defamation law as it applies to public officials, public figures, and issues of public concern:[28]

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Many years later, in 1994, Australia made a decision of similar stripe in a defamation action brought by an Australian Member of Parliament against a newspaper. Relying upon the "chilling effect" the common law of defamation had on political speech, the High Court of Australia changed the law but did not go as far as the United States Supreme Court.[29] The Supreme Court of Canada, considering a similar issue, looked at both the Canadian and Australian cases and decided that the common law of defamation in Canada survived and was not incompatible with the Charter guarantee of freedom of expression.[30] The law of defamation was not unduly restrictive or inhibiting and the Canadian Court upheld an award of damages of $1.6 million Canadian dollars, and refused to put a cap on defamation damages. The New Zealand Court of Appeal, in the heroic *Lange v Atkinson*[31] case, decided upon a change that also veered in the American direction. The Privy Council suggested a reconsideration based on the House of Lords judgment in *Reynolds v Times Newspapers*,[32] where their Lordships had considered a case involving a newspaper discussion of whether a former Irish Prime Minister had lied to Parliament. The case was remitted back to the New Zealand Court of Appeal who declined their Lordships' invitation. Their Lordships themselves did not want to decide the case because it had to be judged against New Zealand conditions and values.

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27 *New York Times Co v Sullivan* (1964) 376 US 254.

28 *New York Times*, above.

29 *Theophanous v Herald & Weekly Times Limited* (1994) 182 CLR 104.

30 *Hill v Church of Scientology* [1995] 2 SCR 1130.

31 *Lange v Atkinson* [1997] 2 NZLR 22 (HC); [1998] 3 NZLR 424 (CA); [2000] 1 NZLR 257 (PC); [2000] 3 NZLR 385 (CA).

32 *Reynolds v Times Newspapers* [1997] 4 All ER 609 (HL).

The New Zealand Court of Appeal declined to follow the House of Lords, but explained and made two qualifications to its own previous judgment, affording a privilege to defamatory statements concerning politicians. This is not the place to rehearse all the technicalities and precise differences in the results that were reached and the judgments supporting them, but the English law was decided as a matter of common law, and the test altered. Substantially, the same common law passed the constitutional test in Canada, but the common law failed the test in both Australia and New Zealand, even though neither of those countries have entrenched protections for freedom of expression of the type that both the American and Canadian Constitutions have.

The situation, for the purposes of comparative constitutional law, can be presented in stark terms as follows:

United Kingdom	no constitutional guarantee of freedom of expression	defamation law relaxed by common law decision
New Zealand	an unentrenched Bill of Rights guarantee of freedom of expression	defamation law relaxed by common law decision
Australia	no constitutional guarantee of freedom of expression	defamation law relaxed by common law decision
United States	constitutional guarantee of freedom of expression	defamation law relaxed by constitutional decision
Canada	constitutional guarantee of freedom of expression	common law of defamation held to be constitutionally compliant

It is by no means easy analysing a record like that to discern whether a superior law constitution with a Bill of Rights better protects freedom of expression, compared with constitutions that contain no such guarantee. How, therefore, are choices to be made in constitutional design? Is one method better than another at protecting the values in a Bill of Rights that a superior law Bill of Rights would contain if there were one?

When the doctrine of implied rights is added, the choice becomes even more indistinct. In 1992, the High Court of Australia, in a remarkable decision, held a Commonwealth statute unconstitutional on the ground that the statute in question breached an implied guarantee of freedom of access to and participation in and criticism of Federal and State institutions, amounting to freedom of communication in relation to the political and electoral process.[33] The statute, the Political Broadcasts and Political Disclosures Act 1991

33 *Australian Capital Territory v Commonwealth* (1992) 177 CLR 106. See also Leslie Zines "A Judicially Created Bill of Rights?" (1994) 16 Sydney LR 166.

prohibited the use of radio and television for political advertisements during election periods. The opinions relied upon a number of factors nourished by the structure of the Constitution in reaching that view:

- Responsible government;
- Representative government;
- Freedom of communication as an indispensable element in representative government; and
- Rights of citizens to equal share of power.

One can also point out the *dicta* of Lord Cooke of Thorndon, when he was in the Court of Appeal, as to the capacity of the common law to protect fundamental values even to the extent of making legislation invalid.[34] He pointed out "Some common law rights lie so deep that even Parliament could not override them".[35] So questions are generated about which is the superior mechanism for protection of fundamental values, although it must be unlikely that not mentioning them in the constitution could be the optimal method of protection.[36]

V CONSTITUTIONAL DESIGN

Here is a rather slim and somewhat unsatisfactory literature about what constitutions actually achieve. It is not easy to judge whether one set of distribution of powers is superior to another and why. These questions are hardly capable of empirical measurement or verification and the methodology for analysis is not well established.

From time to time the Americans wonder if they have got it right, and a few years ago it was fashionable in the United States to ask whether the adoption of more efficient, parliamentary-type institutions would be a good idea. This led to a Brookings Institution

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34 *L v M* [1979] 2 NZLR 519, 527 (CA) Cooke J (as he then was); *Brader v Ministry of Transport* [1981] 1 NZLR 73, 78 (CA) Cooke J; *NZ Drivers' Association v NZ Road Carriers* [1982] 1 NZLR 374, 390 (CA) Cooke J; *Taylor v NZ Poultry Board* [1984] 1 NZLR 394 (CA).

35 *Taylor v NZ Poultry Board* [1984] 1 NZLR 394, 398 (CA) Cooke J.

36 Ponder what Professor Ronald Dworkin said about the consequences of United States polices toward terrorism after 11 September in the *New York Review of Books* (28 February 2002):

> What has al-Qaeda done to our Constitution, and to our national standards of fairness and decency? Since September 11, the government has enacted legislation, adopted policies, and threatened procedures that are not consistent with our established laws and values and would have been unthinkable before.

Study, *Do Institutions Matter?*[37] The question at issue was whether political institutions affect the capacity of government to function effectively. The authors said that it was easy to answer this question in the affirmative, although that did not necessarily make political institutions or constitutional structures the most important element affecting governing capacity. That was because effective governance is multi-dimensional. It involved, they said, tasks as diverse as targeting resources efficiently, imposing losses on powerful organised groups, co-ordinating conflicting objectives, and managing deep societal cleavages.[38]

The researchers did conclude that some governments perform at least some of the tasks better than others, and that political and constitutional institutions do affect government capabilities and policy outcomes. They concluded that the parliamentary system compared with the United States system of checks and balances, often seen as a crucial element on government effectiveness, "captures only a small part of potential institutional influences on governmental capacity".[39] It is interesting to observe that they did add, as a result of their research, such features as electoral rules and norms leading to the formation of different types of government. Their findings in brief were most interesting. In summary they are:

- Although institutions affect government capabilities, their effects are contingent;
- Specific institutional arrangements often create both opportunities and risks for individual government capabilities;
- Policy-making capabilities may also differ substantially across policy areas within a single political system;
- Institutional effects on government capabilities are channelled through governmental decision-making characteristics. The ones that are particularly important are elite cohesion, multiple veto points, elite stability, interest group access and elite autonomy from short-term political pressures;
- Second-tier institutional arrangements influence government capabilities at least as much as do the separation or fusion of executive and legislative power;

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37 R Kent Weaver and Burke A Rockman (eds) *Do Institutions Matter? – Government Capabilities in the United States and Abroad* (The Brookings Institution, Washington DC, 1993). I should acknowledge here the debt I owe to my son's work in this area, particularly his unpublished dissertation at Yale University entitled Matthew Palmer *Constitutional Design and Law: The Political Economy of Cabinet and Congressional Government* (JSD Thesis, Yale University Law School, 1993).

38 Weaver and Rockman, above, 445.

39 Weaver and Rockman, above, 446.

- Neither "parliamentarist" nor "presidentialist" arguments offer satisfactory explanations of capabilities;
- Divided party control of the legislature and executive branches of government in the United States exacerbates some problems of governance, especially the problem of setting priorities;
- There are direct trade-offs between some institutional capabilities, for example party control will limit veto points but also creates risks of policy instability for exactly that reason; and
- Governments gain some room to work around basic institutional arrangements by generating countervailing mechanisms. For example parliamentary systems sometimes develop mechanisms for weakening centralised power such as by the use of broad consultation or devolution of power to regions.

These findings were based on a number of particular case studies of policy areas in particular countries.

The conclusion for the United States' researchers was somewhat chastening. Having discussed the very real governance shortcomings in the United States, they said it was important to compare them with other advanced industrial democracies, rather than with some theoretical ideal. Effective governance, they said, does not consist of choosing the single best set of institutions valid for all countries. It requires matching political institutions to a set of problems that determine which capabilities are needed most, and to political and social conditions, such as strong or weak cleavages in a country that determine whether particular institutional arrangements are likely to enhance or inhibit a specific capability.

The American research concludes by posing a number of questions for institutional reformers:

- What capabilities should be increased?
- What other values should be risked and potentially sacrificed to obtain the desired capabilities? – For example, in order to set priorities differently it may be necessary to sacrifice policy stability.
- Are facilitating conditions present to maximise the prospects of attaining the desired capabilities – they remark here that a healthy dose of scepticism about all institution reforms is necessary?
- Are facilitating conditions present that will minimise risks for the preferred capabilities and other values?

- Can these objectives be achieved by *ad hoc* sector-specific measures rather than general institutional reform?
- Is the proposed reform politically feasible? – Here they remark that proposed reforms that are likely to make some segments of society or some institutional office holders better off and others worse off will be controversial.

They go on to make the point that the most obvious route to institutional change is massive failure in governance. And they end with some warnings that need to be borne in mind when engaging in institutional reform. For example, they say during constitutional reform negotiations the problems of the country tend to take a back seat to the actual problems of the people at the negotiating table. Even major constitutional reforms rarely resolve the societal conflicts that are contributing failures to government performance. There is no single optimal set of institutions that can be applied to all countries at all times. Given the uncertainties and risks of re-designing institutions, the case for reform thus has to be very strong indeed before it is undertaken. The final caveat, is that constitutionally amending rules should not be too inflexible.[40] The balance, they say, between constitutional flexibility and rigidity must vary with the intensity of the political cleavages in the society:[41]

> Decisiveness in making public policy is not to be equated with bringing agreement from diversity. Indeed, institutions that facilitate decisiveness may work against acceptance of policies that are adopted and induce hostility against the institutions that adopted them. The capacity of government to manage conflict must be weighed against its capacity to steer and direct policy change.

The Brookings study makes the point that different institutions do facilitate or impede different types of policy capabilities, but the right set of political conditions can overcome most structural impediments. It needs to be borne in mind that the possibilities for leadership are also shaped by institutional arrangements.

So far as I know, not much work has been done in New Zealand on these issues. In particular, it would be interesting to know how such arrangements may affect the performance of the New Zealand economy.[42] Perhaps the most important insight of the American research cited above, is the point that while constitutions and institutions do matter, they are frequently not the most important aspect in producing a particular outcome. The point that second-tier institutional arrangements influence government

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40 Weaver and Rockman, above, 462-470.

41 Weaver and Rockman, above, 468.

42 Douglass C North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, Cambridge, 1990).

capabilities at least as much as the separation or fusion of executive and legislative power is critically important.

New Zealand has shifted from the classical Westminster pattern of First-Past-the-Post voting which produces single-party governments for the most part. It has moved to a proportional representation system in which coalition governments are the norm. Immediately, that increases the number of points at which decisions, requiring bargaining about, can be held up. A coalition government is likely to have less cohesion than a single-party majority government. And, furthermore, coalition governments, especially those in the minority, may be less able to stand up to short-term political pressures as well as single-party governments can.

Thus, MMP has moved New Zealand from a system where power was concentrated, to a system where it is now more diffused. Separation of powers in the United States system has a similar effect. According to the American research, the United States separation of powers system tends to cluster closely with the coalitional parliamentary regime systems in terms of associated risks and opportunities.

It is this feature that has made such a basic change to the New Zealand system, and one which has yet to be fully taken on board. What the research tells us is that generalisations about parliamentary systems are too crude and obviously those that have federations with written constitutions will distribute the powers differently from those that are a unitary State. And the type of electoral system adopted can have a profound effect on the performance of the system as well.

These issues raise extraordinarily complex questions about constitutional design that are really difficult to solve. There has been much constitution design undertaken in recent years, particularly since the collapse of Communism in Eastern Europe, and the collapse of Apartheid in South Africa. Constitutional changes in the United Kingdom, since the Blair Government came to power, have also been dramatic.[43]

There have been sharp debates about the need for written constitutions, the need to protect rights, the need to state democratic values, and the need to protect property rights. The methods of protecting the disadvantaged and the effects of constitutions on economic prosperity are all live issues. Constitutional law and constitutional design is a much

43 Human Rights Act 1998 (UK); Referendum (Scotland and Wales) Act 1997; Northern Ireland (Selections) Act 1998; Regional Development Agencies Act 1998; Government of Wales Act 1998; Scotland Act 1998; Northern Ireland Act 1998; and the removal of most hereditary peers from the House of Lords is also important. See also, A House for the Future, *Royal Commission on the Reform of the House of Lords* (2000) Cmnd 4534. Important changes have also been made in local government structures.

broader subject than has traditionally been understood in English law, and New Zealand law has had a similarly narrow approach, unfortunately.

In an important new book by Professor Cass Sunstein of the University of Chicago, he has stated the challenge in the following terms:[44]

> This book calls for a democratic understanding of the role of a constitution in political life. This understanding competes with prominent alternatives based on national traditions, or equality, or even justice. In my view the central goal of a constitution is to create the pre-conditions for a well-functioning democratic order, one in which citizens are genuinely able to govern themselves. Self-government is a good in itself. It is an important aspect of freedom. But self-government is also associated with other valuable goals. Consider Amartya Sen's astonishing finding that in the history of the world no famine has ever occurred in a country with democratic elections and a free press. This finding should be seen as an illustration of the many ways that democracy can promote social well-being, by increasing the likelihood that government will act in the interest of the citizenry, rather than the other way round. A good constitution ensures democratic elections and a free press. It thus creates self-government on dual grounds: liberty requires self-government, and self-government makes it far more likely that citizens will have good lives.

Sunstein is arguing that a constitution should promote deliberative democracy. That is to say, he wants political accountability with a high degree of reflectiveness, and a general commitment to giving reasons. Rather than seeing democracy as a sort of aggregating machine trying to sum up peoples' desires and translating them into law, he wants democratic government to be based on reasons and arguments, not just votes and power. Democracy, he contends, has an internal morality, one that requires constitutional protection of many individual rights. Democracy should not be antagonistic to rights because people cannot be independent if their property is subject to unlimited government readjustment.

Sunstein's theory does not include running the government on the basis of popular referenda. A self-governing citizenry does not take existing preferences as beliefs and beliefs as unalterable. It is interested in the formation of preferences as well as the preferences that may exist at any time.

The constitution has to deal with widespread disagreement and Sunstein posits that a central goal of constitutional arrangements, and indeed constitutional law, is to turn disagreement into creative force, partly by making it unnecessary for people to agree when agreement is not possible. Deliberation will clarify the basis for disagreement. There are dangers, Sunstein finds, in group polarisation, a process by which groups of like-minded

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44 Cass Sunstein *Designing Democracy - What Constitutions Do* (Oxford University Press, New York, 2001) 6.

people move to increasingly extreme positions. But he values incompletely theorised agreements – a process by which people agree on practices or outcomes despite disagreement or uncertainty about fundamental issues. An example is an abstract provision in a constitution protecting freedom of speech. Most will agree that freedom of speech should be protected, but when confronted with a particular example of speech they find repulsive, would not be moved to decide it in favour of speech – general principles do not decide concrete cases. The greater specificity, therefore, that a constitution contains the less ease there will be in obtaining consensus.

Sunstein also does not believe that a constitution can be explained or interpreted only in light of national traditions. It ought not to be tradition-bound – it looks forwards as well as backwards. He makes the important point about traditionalism: "As a creed for constitutional law, traditionalism respects common-law processes of case-by-case judgment and sees them as a model for legal and even social development".[45]

He makes the important point elsewhere that the constitution should be understood to allow majorities to choose among a range of political philosophies, rather than require the nation to select any particular one. Sunstein in this book develops a critique of Justice Scalia's belief that the United States Constitution should be taken to mean what it said when the relevant provisions were ratified. He does not deny that the original meanings are relevant; he simply says that they are not necessarily decisive. He therefore, rejects what he calls "hard originalism". At the end of what is a sophisticated work and at a relatively high level of abstraction, Sunstein arrives at some interesting conclusions. He states them himself in this way:[46]

> A deliberative democracy, operating under a good constitution, responds to political disagreements not simply by majority rule but also by attempting to create institutions that will ensure reflection and reason-giving. Some disagreements can be dispelled by getting clear on the facts. Others can be handled by delegating decisions to people who are especially trusted, perhaps because they are specialists in the topic at hand. Sometimes deliberation will show that one or another view really cannot be sustained, and people will change their minds accordingly. One of the points of constitutional arrangements is to protect the processes of reason-giving, ensuring something like a 'republic of reasons'.
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> In this light constitutional institutions, such as a system of checks and balances, are best understood not as a way of reducing accountability to the public but as a guarantee of deliberation. Deliberative democracies do not respond mechanically to what a majority currently thinks. They do not take snapshots of public opinion. A deliberative democracy requires the exercise of governmental power,

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45 Sunstein, above, 75.

46 Sunstein, above, 239-240.

and the distribution of benefits and burdens, to be justified not by the fact that a majority is in favour of it but on the basis of reasons that can be seen, by all or almost all citizens, as public-regarding.

In all democracies, however, there is a constant source of deliberative trouble: political disagreement can be heightened simply by virtue of the fact that like-minded people are talking mostly with one another. It is a simple social fact that if people tend to agree and spend some time in conversation with one another, they are likely to end up thinking a more extreme version of what they thought before. It follows that if like-minded people are talking mostly with one another, social fragmentation is highly likely. New technologies, including the Internet, increase this risk, simply because they make it so easy for like-minded people to find each other and to insulate themselves from competing views. In the worst cases, hatred and even violence are possible consequences.

A democracy's constitution can be extremely helpful here. It can increase the likelihood that government power will be unavailable to those who have not spoken with those having competing views. It can ensure that government will not act unless and until diverse people have had an opportunity to consult with one another and listen to one another's concerns. The system of checks and balances is central here. Part of its point is to make sure that government does not act simply because another segment wants it to do so. And a democratic constitution can increase the likelihood that whatever their disagreements about the largest or most abstract issues, people can agree on particular practices and on the low-level reasons that justify them. In a good democracy, constitutional rights protect political dissent and ensure against police invasions of the home – and people who disagree on a great deal can emphatically endorse those rights.

One does not see constitutional analysis in New Zealand, or about New Zealand, asking those questions or theorising about them. No doubt it is the product of a small society with an even smaller intellectual community. But our thinking on constitutional themes is too infused with analytical positivism, legalism, and traditionalism to reach the real policy issues that are at stake. New Zealand is never going to understand, in constitutional terms, what it has done, the choices that may be available to it in the future, and those that it should take, unless some fundamental analytical work of the character outlined above is done here.

VI THE SOUTH PACIFIC

The Constitutions of the countries of the Pacific Forum, and particularly those of the Solomon Islands and Fiji, are a rich source of material for constitutional lawyers and they matter to New Zealand foreign policy as well. The efforts at constitution-building in Fiji, and especially the 1997 Constitution resulting from the Reeves' Commission, was an ambitious effort, the success of which is debatable, although the Constitution is still alive.

The Fijian Constitution Amendment Act 1997 is, in many ways, a remarkable document. It makes the Constitution supreme law. It embodies a Compact in which the conduct of government is based on a number of principles, particularly those to do with

Fijian land and custom, but also fundamental rights. It has an extensive and generous Bill of Rights contained in Chapter 4. It establishes a bi-cameral Parliament, consisting of the President, the House of Representatives, and the Senate. The Senate is constructed in such a way as to give some rights of veto to indigenous Fijians. The Constitution sets up a system of compulsory voting and registration under a system of preferential voting, known as the alternative vote, virtually the same as preferential voting in Australia for the Federal House of Representatives.

The Senate has 32 members, 14 of which are appointed on the advice of the Council of Chiefs (Vose Levu Vakaturaga). Nine are appointed by the President on the advice of the Prime Minister; eight are appointed by the President on the advice of the Leader of the Opposition, and one is appointed by the President on advice of the Council of Rotoma.

The executive authority is vested in the President, who is Head of State and Commander-in-Chief of the military forces. But the President acts on advice, and the Constitution erects a system of Cabinet government, where the government must have the confidence of the House of Representatives. The Constitution obliges the Prime Minister to establish a multi-party Cabinet in a way set out in the Constitution. He is obliged by Article 99(5) to include political opponents in the Cabinet. That provision provides:

> In establishing the Cabinet, the Prime Minister must invite all parties whose membership in the House of Representatives comprises at least [ten] per cent of the total membership of the House to be represented in the Cabinet in proportion to their numbers in the House.

The Constitution goes to great pains to set out how the public service will be constituted and operated, as well as the judicial branch of government and the courts. It deals with the offices of such constitutional watchdogs as the Ombudsman, the Auditor-General and the Supervisor of Elections, as well as the Director of Public Prosecutions and the Secretary-General to Parliament, and has a specific part concerning freedom of information.

Chapter 13 of the Fijian Constitution has express provisions on group rights and makes it particularly difficult to alter certain statutes such as the Fijian Affairs Act, the Native Lands Act, and a number of other related statutes. Such a Bill is not deemed to have been passed by the Senate unless at its third reading in that House it is supported by the votes of at least nine of the 14 members of the Senate appointed by the Council of Chiefs. A similar provision governs alterations to the Agriculture Landlord and Tenant Act.

Chapter 14 deals explicitly with emergency powers and a number of special parliamentary majorities are required for the alteration of the Constitution. Some MPs have a power of veto.[47]

It would be hard to find anywhere a more elaborate and carefully considered constitutional document that has endeavoured to make careful provision for accommodating all the diverse issues that flow from the ethnic composition of the population of Fiji. Yet there was a coup, although one that the Court of Appeal of Fiji held not to have been efficiently executed. Thus, the Constitution is still in force.

That Court decision is one of the most remarkable constitutional decisions of any court in recent years and an absolute triumph of judicial statesmanship. It gave Fiji another chance, although it is still not clear that it will take it. *The Republic of Fiji v Prasad*,[48] involved an application of the doctrine of necessity, always an interesting constitutional doctrine, since it falls always to be applied in difficult circumstances. One of the interesting points was that all the Judges were appointed under either the 1990 or 1997 Constitutions, none of them had taken an oath of office under the Judicature Decree of 2000, promulgated by the interim civilian government. In essence, the issue before the Court was whether emergency action that had been taken was unlawful, since it would have been unlawful in normal circumstances, but which was justified in times of extreme crisis by the principle of necessity. The Court relied on the test in a case that arose in Grenada.[49]

The Court of Appeal of Grenada laid down a number of conditions for the application of the doctrine of necessity:

- An imperative necessity must arise because of the existence of exceptional circumstances not provided for in the Constitution, for immediate action to be taken to protect or preserve some vital function of the state;
- There must be no other course of action reasonably available;
- Any such action must be reasonably necessary in the interests of peace, order and good government, but it must do no more than is necessary or legislate beyond that;
- It must not impair the just rights of citizens under the Constitution; and

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47 The Fijian Constitution 1997, Article 192.

48 *The Republic of Fiji v Prasad* (11 March 2001) Fiji Court of Appeal, Civil Appeal No ABU0078/2000S < http://www.vanuatu.usp.ac.fj/paclawmat/Fiji_cases/Volume_QR/Republic_v_Prasad.html>.

49 *Mitchell v Director of Public Prosecutions* [1986] LRC (Const) 35.

- It must not be one the sole effect and intention of which is to consolidate or strengthen the revolution as such.

The Court of Appeal of Fiji pointed out that not all revolutions are successful and they held that the actions in Fiji did not amount to a successful revolution. They propounded an efficacy test in the context of the common law of Fiji. This was to the effect that:

- The burden of proof of efficacy lies on the *de facto* government seeking to establish that it is firmly in control of the country with agreement (tacit or express) of the population of the whole;
- Such proof must be to a high civil standard because of the importance and seriousness of the claim;
- The overthrow of the Constitution must be successful in the sense that the *de facto* government is established administratively and there is no rival government;
- In considering whether a rival government exists, enquiry is not limited to a rival wishing to eliminate the *de facto* government by force of arms. It is relevant in this case that the elected government is willing to resume power should the Constitution be affirmed;
- The people must be proved to be behaving in conformity with the dictates of the *de facto* government;
- Such conformity and obedience to the new regime by the populace as can be proved by the *de facto* government must stem from popular acceptance and support as distinct from tacit submission to coercion or fear of force;
- The length of time in which the *de facto* government has been in control is relevant; obviously the longer the time the greater the likelihood of acceptance;
- Elections are powerful evidence of efficacy. It follows that a regime where the people have no elected representatives in government and no right to vote is less likely to establish acquiescence;
- Efficacy is to be assessed at the time of the hearing by the court making the decision; and
- The interim civilian government did not discharge the burden of proving acquiescence and therefore failed to establish that it was the legal government of Fiji and the Court held that the 1997 Constitution remained in force throughout.

A subsequent decision of the Court of Appeal, in 2002, upheld the right of Mahendra Chaudhry, as Leader of the Fiji Labour Party, to be appointed to the Cabinet of the Prime Minister, Mr Qarase. The decision appears to be a perfectly unexceptional application of

the very clear provision in the Act requiring the establishment of a multi-party Cabinet. The decision revolves around whether Article 99 had to be based on an agreement between the parties that made up the Cabinet since it was argued there can only be Cabinet government if the parties commanding a majority of the House have a willingness to work together. That principle of Westminster government is well established, but it was equally plain on the face of the Fijian Constitution that the offer had to be made. The Court found that the Reeves Commission had seen it as a primary goal of Fiji's constitutional arrangements to encourage the emergence of multi-ethnical government.[50] The Court found the obligation was clear; there was no ambiguity. The meaning of the words used in the Constitution were clear. In answering the questions put to it, the Court held that the Prime Minister's letter of invitation of 10 December 2001 was consistent with the Constitution, because the invitation was unconditional. The Court also held that following his receipt of Mr Chaudhry's second letter dated 10 December (the acceptance letter) that the Prime Minister was required by Article 99 of the Constitution to tender such advice to the President, as would lead to the appointment in Cabinet in which the Fijian Labour Party was represented in proportion to its numbers in the House of Representatives. It is to be remembered that that party polled 38 per cent of the vote.

The Court also held that Mr Chaudhry's second letter was not conditional and could not be treated as if Mr Chaudhry had declined the Prime Minister's invitation. The Prime Minister was required to consult Mr Chaudhry in relation to the selection of members of the Fijian Labour Party for inclusion in the Cabinet, and thus the Prime Minister breached his constitutional or legal duty by advising the President to appoint a Cabinet that does not contain any Fijian Labour Party members, and in not consulting Mr Chaudhry in relation to the selection of members. The Prime Minister was also in beach of his duty in not advising the President to appoint any Fiji Labour Party members as Ministers and in not consulting Mr Chaudhry in relation to the selection of those members in the Cabinet. And the Prime Minister remained in breach of those obligations. It is now intended to appeal this decision to the Supreme Court of Fiji, although any lawyer looking at the decision of the Court of Appeal might reasonably have thought that it was unanswerable.

The interesting point that arises out of the judgment is not its application of the law, but rather whether it was a good piece of constitutional design to place such a provision in the Constitution in the first place? At a practical political level, it seems to be a recipe for Cabinet gridlock and to create massive problems in policy selection.

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50 *Chaudhry v Qarese and Ors* (15 February 2002) Fiji Court of Appeal, Misc. No 1/2001. – < http://asiapac.org.fj/cafepacific/resources/aspac/chaudhryqarase.html>; See also *In the Matter of Section 123 of the Constitution Amendment Act 1997* Fiji Islands, Supreme Court, Miscellaneous Case No 1/2002 < http://www.vanuatu.usp.ac.fj/paclawmat/Fiji_cases/Volume_GL/ In_re_Constitution,_President's_Reference.html>.

The significance of these events in Fiji in constitutional terms seems to me to lie in the absence of a political culture that supports democratic traditions and practice. The best piece of constitutional design possible to deal with the cleavage issues was not enough. How does one guard against the possibility of a coup if the wrong people win the election? In Fiji, it is the management of the cleavages between the two ethnic groups that is the critical issue. Political and governmental decisions that are seen to be against the interests of ethnic Fijians can easily cause a coup it seems. Some paradigm shift in the political culture is going to be necessary in order to arrive at a lasting resolution of these issues. The prospects of protecting the values of democratic constitutionalism do not look favourable. Those values are still in there with a chance, but their prospects of prevailing must still be regarded as problematic.

VII CONCLUSION

For the past decade or so there has been a quickening of interest around the world in constitutions, constitutional change, and constitutional design. These tasks remain as difficult as they ever were, and they are tasks that need to be approached with considerable humility and with limited expectations as to the results that can be achieved. There has to be an adequate analysis of the political reality, the political conditions, and the political traditions, as well as appropriate constitutional design.

The big choices between the United States style of government or a Westminster style of government really do not seem to be as significant when one gets down to the level of detail that a constitution like that of Fiji reaches. The outcomes do not necessarily flow from the constitutional structures. But what they do result from is frequently a mixture of so many variables of such complexity that they cannot be effectively calculated. Neither can clear lessons be learnt as to what should be placed in a constitution. While these may not constitute reasons why New Zealand should not make the effort to secure a more sturdy constitution, it certainly needs to be acknowledged that it is easy to get the choices wrong, and it is also far from clear when they are right.

In New Zealand we tend to be overwhelmed with a sense of false necessity about our existing arrangements. One thing comparative constitutional law does is to challenge such a belief.[51] We need to be aware though of the dangers of imitating others when that experience does not address our own real needs, although it can be strongly argued the adoption of MMP on the German model is an example of a successful constitutional adaptation from one country's experience to another. It is certainly true, even among countries sharing notions of constitutionalism, that particular norms play out quite

51 Vicki C Jackson and Mark Tushnet *Comparative Constitutional Law* (Foundation Press, New York, 1999) 169.

differently in different countries, as we have seen in the defamation example earlier in the paper.[52]

Economic factors, resources, geography, demography, and history are all likely to be as influential in shaping outcomes as a constitution. Law is a subset of the social system. Social and political conditions determine the law, particularly constitutional law, rather than the other way round. But New Zealand could do with some self-reflective comparison. A comparative perspective may be one way of distancing ourselves from our own dominant legal consciousness.[53] If comparative constitutional law does anything, it forces the analyst to think more deeply about his or her own domestic orthodoxies. That, in itself, makes the enterprise worthwhile.

What we need to do in New Zealand is to harness some energy to fashion more improvements to our own constitutional arrangements. In the end we must face the ultimate question. Do constitutions matter? The answer must be that they do, although we do not really know how much or why or what we should put in them. The challenge facing a constitutional reformer is to make the case for change in a manner that is compelling, and that is hard because it is not easy to show that effectiveness will be enhanced by the change when it has never been tried. Proof for the case for constitutional innovation is in short supply. But it happens anyway, whether planned or not, especially with a constitution of the type New Zealand has.

New Zealand's constitutional moment has never arrived. By that, I mean there has never been a crisis or extra-legal behaviour that has required action of the sort that the Americans took in 1787. There is a paradox here between the crisis that can generate constitution making and the conditions for good constitutional change, which are the antithesis of crisis. Perhaps in New Zealand, the constitutional moment will never come, although I suspect it may arrive when it is decided New Zealand should become a republic, as appears to be increasingly inevitable. But even there, the road to reform is strewn with obstacles, as the recent Australian experience has shown.[54] While Australian opinion was overwhelmingly republican in sentiment, it split as to whether the President should be appointed by the political elite or elected. In some way the issue became a referendum on whose republic is it, the politicians' or the peoples'?

Government is assuredly the most difficult of man's endeavours, but that is not a sufficient reason to resile from grappling with it. That point stimulates one to reflect upon

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52 A E Dick Howard "The Indeterminacy of Constitutions" (1996) 31 Wake Forest L Rev 383, 404.

53 Günther M T R Frankenberg "Critical Comparisons: Re-thinking Comparative Law" (1985) 26 Harvard International LJ 411.

54 John Uhr "After the Referendum: The Future of Constitutional Change" (2000) 11 Public LR 7.

what the perfect polity would look like in constitutional terms. It is, of course, a question that cannot be answered in the abstract and perhaps not at all, but it is worth more attention than it has had in New Zealand.

There was a conference held in the Legislative Council Chamber in 2000 designed to spark a debate on constitutional issues in New Zealand – it was organised by the Institute of Policy Studies at Victoria University of Wellington and the papers were published.[55] Nothing even remotely resembling a consensus emerged from the conference, but it did show that the issues are controversial. But the debate has not continued. It should.

I have endeavoured in this paper to face the uncertainties of the constitutional enterprise carefully. It may leave some with the impression that I am now sceptical about positions that I have adopted in the past about New Zealand constitutional reform. That is far from the case. I remain convinced that New Zealand needs constitutional reform and it needs a written constitution with an entrenched Bill of Rights to which I would also add the Treaty of Waitangi.[56]

A draft of such a constitution appears in the appendix to *Bridled Power*.[57] Constitutional improvement is worth the effort; the fact that it is difficult should not be seen as a deterrent to undertaking it. In the end constitutional reform is driven by fundamental values. About the debate and incorporation of these in our constitutional arrangements we need to be much bolder. The fact that not everything can be achieved by constitutional structures does not mean that nothing can be achieved by them.

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55 Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Victoria University of Wellington, 2000).

56 The Treaty of Waitangi is itself a subject of such complexity that I have not touched on it in this paper.

57 Geoffrey Palmer and Matthew Palmer *Bridled Power – New Zealand Government and MMP* (Oxford University Press, Auckland 1997) 317.