NEW ZEALAND CONSTITUTIONAL CULTURE

MATTHEW S R PALMER*

This article takes seriously the relationship between culture and a constitution. It suggests that three aspects of New Zealand cultural attitudes to the exercise of public power are salient: egalitarianism, authoritarianism, and pragmatism. None of these attitudes support the constitutional norm of the rule of law and separation of powers in New Zealand, making that norm vulnerable. The salient New Zealand cultural attitudes to public power do reinforce the other three key norms of the New Zealand constitution: representative democracy; parliamentary sovereignty; and the unwritten and evolving nature of the constitution. The last of these is the most internationally distinctive aspect of New Zealand's constitution and resonates with both our British constitutional heritage and the Māori notion of tikanga; our constitution is not a thing but a way of doing things.

I. THE NATURE OF A CONSTITUTION

A nation's constitution is the set of factors that determines who exercises public power and how they exercise it. This is important in New Zealand. We are a relatively small nation, with a history of strong government. Public power is still the most awesome human force in the nation state of New Zealand. The government has the legal ability to coerce us all through taxation, criminal and regulatory laws, backed by the police, courts and prison system, and through its power of public expenditure. Furthermore, the views of a government can still exert a powerful pull, or push, on the values and beliefs of New Zealanders – on our social identities, relationships, and cultures. The behaviour of the branches of New Zealand government, in exercising public power, significantly affects the economy, polity, society and culture that constitute New Zealand collectively.

My experience of the New Zealand constitution is that its content is determined, to a significant extent, by the beliefs and behaviour of those who are involved in its operation (and by the beliefs and behaviour of those others whose opinions affect those involved in its operation). As I have argued in several recent articles, constitutional analysis must recognise this reality.[1] My

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* 2005 International Research Fellow, New Zealand Law Foundation (2006-2008) and Fulbright Senior Scholar, Yale Law School. For comments on draft material that ended up as this article, I thank: Benjamin Berger, David Collins, Bob Ellickson, Gary Hawke, Mark Hickford, Colin James, Justin Malbon, Paul McHugh, Sir Geoffrey Palmer, Nicole Roughan, Patricia Sarr, Ruth Wilkie, a Faculty Seminar at the Suffolk University Law School and a Faculty Workshop at the Yale Law School. Thanks also to an anonymous referee for helpful comments and to Chris Bishop and Clare McAloon-Balfour for research assistance in relation to the passage of the Constitution Act 1986 and the 2005 amendments to it. The views expressed are, of course, personal to the author and not to be attributed to any other individual or organisation. Comments are welcome, to Matthew.Palmer@aya.yale.edu.

1 Matthew S R Palmer, "What is New Zealand's Constitution and Who Interprets it? Constitutional Realism and the Importance of Public Office-holders" (2006) 17 Public Law Review 133; Matthew S R Palmer, "Using Constitutional Realism to Identify the *Complete* Constitution: Lessons From an Unwritten Constitution" (2006) 54 American Journal of

label for this perspective is "constitutional realism".[2] Like American legal realism of the 1920s and 1930s, the essence of constitutional realism is the rigorous use of candour in penetrating the form and fiction of a law or constitution in order to understand the reality of what is going on in the underlying human interactions.[3]

So, in the only serious treatment of constitutions by a legal realist, Karl Llewellyn suggested in 1934:[4]

> Some institutions – for instance, our present [US] Constitution – have found words and rules serving them as midwife or even as ancestor; but in the main it is action which comes first, to be followed by delayed perception of that action, then by rationalization of the action delayed still longer, and finally by conscious normatization of what has been perceived or rationalized. Before these latter processes have been worked out, the lines of the action commonly have shifted.
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> It has been urged thus far that a working constitution is an institution, that it is an institution highly complex in nature, that it can be viewed with some adequacy as the interaction of the quite different ways and attitudes of three diverse categories of people, and that of these *the specialists in government stand at the focus*. [the others being: 'the interested groups' (aggregations of people more or less organized around some interest) and the general public].

A constitutional realist seeks to identify and analyse all those factors which significantly influence the generic exercise of public power. In my view, a complete view of a "constitution" includes all the structures, processes, principles and even cultural norms that significantly affect, in reality, the generic exercise of public power. As Sir John Salmond stated:[5]

Comparative Law 587; and Matthew S R Palmer, "Constitutional Realism about Constitutional Protection: Indigenous Rights under a Judicialized and a Politicized Constitution" (2006) 29 Dalhousie Law Journal 1. (See <www.works.bepress.com/matthew_palmer/> (last accessed 20 October 2007). The Public Law Review article received the 40th Anniversary Sir Ian Barker Published Article Award from the New Zealand Legal Research Foundation for the best article, essay or discrete book chapter published by a New Zealand-based author in 2005 or 2006.

2 After I started using the label of "constitutional realism" I discovered Herman Belz's older use of the same phrase to denote the realistic study of the Constitution in the US: Herman Belz, "The Constitution in the Gilded Age: The Beginnings of Constitutional Realism in American Scholarship" (1969) 13 American Journal of Legal History 110. Belz identified constitutional realism in the work of a number of political scientists and constitutional historians of the second half of the nineteenth century.

3 See Neil Duxbury, *Patterns of American Jurisprudence* (1995) 71: "Realism describes accurately what was possibly the single unifying ambition of so-called realists: namely, the commitment to candour, to telling it – whatever 'it' happened to be – as it is."

4 Karl N Llewellyn, "The Constitution as an Institution" (1934) 34 Columbia Law Review 1, 17 at n 30, and at 21. Though see Frankfurter's earlier "realist" analysis of the factors affecting the outcome of constitutional cases dealing with the regulation of hours of work: Felix Frankfurter, "Hours of Labor and Realism in Constitutional Law" (1916) 29 Harvard Law Review 353.

5 John W Salmond, *Jurisprudence: or the Theory of the Law* (1902) 205. This statement endured to the 12th edition: P J Fitzgerald, *Salmond on Jurisprudence* (12th ed, 1966) 87.

> A complete account of a constitution, therefore, involves a statement of constitutional custom as well as of constitutional law. It involves an account of the organised state as it exists in practice and in fact, as well as of the reflected image of this organisation as it appears in legal theory.

The point of this article is to take seriously the claim that culture, and cultural norms, are part of a constitution. The article suggests that the underlying foundations of a constitution, even if contested, are deeper-seated than even the formal Westminster device of constitutional conventions would indicate. The foundations of a constitution are culturally embedded in its operation through the values of those who operate it and who, inherently, subscribe to a national culture. Constitutional culture derives from the complex mixture of factors which reflect and affect national culture as it manifests in attitudes to the exercise of public power. The nature of the attitudes to public power in New Zealand national culture means that some norms of New Zealand's constitution run more deeply than others and change more slowly. These norms are culturally key to the way in which New Zealanders believe public power should be exercised.

The nature of constitutional norms, and the constitutional culture from which they arise, forms a landscape that influences the likely success or failure, or at least the relative ease or difficulty of acceptance, of any constitutional reform. If a reform is consistent with a constitutional norm, it will likely have an easier road to general acceptance. If it is inconsistent, the road will be harder and/or longer – though not necessarily unworthy of travelling (unless it ends in an abyss). For a constitutional realist proposing reform, it is essential to understand the landscape through which your proposed road travels. Formalist "paper" roads can often give a misleading impression of likely progress in the reality of the youthful jagged New Zealand landscape of the constitution.

II. The Nature of Constitutional Culture and Norms

A. Theory and Culture

A lot of jurisprudential ink has been spilled in seeking what it is that underlies a legal system or constitution. Common to many of the suggestions most popular in the international legal academy is a notion that there is some consensus, more or less choate, amongst some group of people about what fundamental principles do govern, or should govern, behaviour in a polity. So, Hans Kelsen announced that there exists, hypothetically, a *grundnorm* on which all subsequent levels of a legal system are based.[6] Herbert Hart developed this by suggesting that every society has a "rule of recognition", a social rule that differentiates between norms that have the authority of law and those that do not.[7] Ronald Dworkin differs, insisting that, where rights are controversial, courts develop interpretations that articulate a theory which best

6 Hans Kelsen, Max Knight (trans), *Pure Theory of Law* (2 ed, 1967) at 8.

7 H L A Hart, *The Concept of Law* (2 ed, 1961).

explains and justifies the past practice of the legal system as a whole.[8] Yet his theory still depends on a social determination of the principles underlying the legal system (through reconciliation with its history). Before all of them, New Zealander Sir John Salmond explained that ultimate legal principles must exist "from which all others are derived but which are themselves self-existent".[9]

I suggest that in thinking about the social dimension that underlies legal systems and constitutions it is useful to focus on the notion of "culture", and the norms that derive from culture. As I use it here, the term "culture" refers to the general understanding of a group of people, or their collective mindset or way of thinking about the world. Geert Hofstede's definition of culture is "the collective programming of the mind which distinguishes the members of one group or category of people from another."[10] Similarly, Pierre Legrand suggests:[11]

> I understand the notion of 'culture' to mean the framework of intangibles within which an interpretive community operates, which has normative force for this community (even though not completely and coherently instantiated), and which, over the *longue duree*, determines the identity of a community *as community*.

Cultures arise, exist and evolve within any and all groups of people to reflect and constitute the identity of that group relative to other groups of people. As people belong to a variety of overlapping groups, so they are part of a variety of overlapping cultures. A culture derives from a complicated mixture of human and physical geography that has developed historically through the iterative interplay of beliefs and behaviour in reaction to events. It is manifested in symbols, rituals and values. It changes, but it usually changes slowly.

Legrand's last phrase quoted above suggests that, in an important theoretical sense which I note and support but do not pursue here, culture is inherently "constitutive" of a group. It is "our" shared understandings of what is important in the world, and why, that determine how "we" differ from other groups. "Our" shared culture *constitutes* "us". This suggests that any proper treatment of a "constitution" must deal with the notion of culture. In the words of Hannah Pitkin:[12]

> So, although constituting is always a free action, how we are able to constitute ourselves is profoundly tied to how we are already constituted by our own distinctive history. Thus there is a sense, after all, in which our constitution is

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8 See eg Ronald Dworkin, *Justice in Robes* (2006).

9 John W Salmond, *Jurisprudence: or the Theory of the Law* (1902) 109. Alex Frame suggests Salmond's notion of ultimate legal principles, which predates Kelsen's "*grundnorm",* deserves more recognition: Alex Frame, *Salmond: Southern Jurist* (1995) 66. Frame also suggests that Hart acknowledged Salmond's contribution, though examining Hart's reference shows that that acknowledgement was not particularly complimentary: H L A Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harvard Law Review 593, 605.

10 Geert Hofstede, *Cultures and Organizations: Software of the Mind* (1991) 5.

11 Pierre Legrand, *Fragments on Law-as-Culture* (1999) 27.

12 Hanna Fenichel Pitkin, "The Idea of a Constitution" (1987) 37 Journal of Legal Education 167, 169.

> sacred and demands our respectful acknowledgement. If we mistake who we are, our efforts at constitutive action will fail.

B. Constitutional Culture and Norms

There are a variety of academic treatments of culture in relation to constitutions.[13] However, few academics have developed the concept in the way used here. Apart from a definition of constitutional culture as limited to the "extrajudicial beliefs about the substance of the [US] Constitution", Bob Post's treatment of the US constitution is compatible with the approach taken here.[14] Otherwise, the precedents seem to be primarily Canadian – in recent work by Ben Berger and David Schneiderman and Jeremy Webber's earlier impressive response to a crisis in Canadian constitutionalism.[15] An inspiring Canadian perspective is offered by political theorist James Tully, who discusses "the assumption that culture is an irreducible and constitutive aspect of politics" and calls for a new normative understanding that:[16]

> Constitutions are not fixed and unchangeable agreements reached at some foundational moment, but chains of continual intercultural negotiations and agreements in accord with, and violation of the conventions of mutual recognition, continuity and consent.

My interest is in examining New Zealanders' constitutional culture which I understand to be New Zealanders' mindset or set of attitudes that relate to the exercise of public power. This is closely related to New Zealand political culture, which I take to be New Zealanders' attitudes about how political relationships are and should manifest themselves in New Zealand. But constitutional culture is wider – for example, it extends to attitudes to the judicial branch of government. It is also deeper, involving attitudes to the relationship between public power and individual New Zealanders or groups of New Zealanders that could be conceived of as popularly-held philosophical tenets. Most importantly, New Zealand constitutional attitude must reflect New

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13 For an illustration of the diversity of understandings of culture in legal study see Austin Sarat and Jonathan Simon (eds), *Cultural Analysis, Cultural Studies and the Law: Moving Beyond Legal Realism* (2003).

14 Robert C Post, "Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law" (2003) 117 Harvard Law Review 4, 8. Robert Nagel's work also appears, albeit implicitly, to be similar in approach: Robert F Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review* (1989).

15 Benjamin L Berger, "Law's Religion: Rendering Culture" (2007) 45 Osgoode Hall Law Journal; David Schneiderman, "Property Rights and Regulatory Innovation: Comparing Constitutional Cultures" (2006) 4 International Journal of Constitutional Law 371; Benjamin L Berger, "White Fire: Structural Indeterminacy, Constitutional Design, and the Constitution Behind the Text" (2008) Journal of Comparative Law (forthcoming); Jeremy Webber, *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (1994). For a nice development of what I *think* is a sympathetic philosophical notion of culture to mine, see Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (2002).

16 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995) 5 and 185.

Zealand's distinctive national culture compared to, say, France. Pierre Legrand says:[17]

> French law is, first and foremost, a cultural phenomenon, not unlike singing or weaving. The reason why the French have the *chanteurs* they have lies somewhere in their history, in their Frenchness, in their identity. Similarly, the reason why the French have the legislative texts or the judicial decisions they have, say, on a matter of sales law, lies somewhere in their history, in their Frenchness, in their identity.

I suggest that when the mindset that is New Zealand constitutional culture is applied to the exercise of public power it yields a series of key norms that lawyers express as principles, expound as "doctrines", or even crystallise as constitutional "conventions". These norms form and dissolve through the iterative interaction of the beliefs and behaviour of all those who participate in a constitution over time.[18]

In looking for "New Zealand" constitutional culture and norms, I do not ignore the existence of a variety of cultural attitudes to the use of public power among different groups of New Zealanders. In particular, the attitudes of Māori about the constitution are likely to be different from, though probably overlapping with, those of non-Māori New Zealanders. There is social science survey data which strongly suggests that that is the case.[19] And I am sure that the formation of the nebulous notion of "public opinion" can be found to be led or influenced by some groups of New Zealanders – presumably those with greater access to power, money and/or media exposure – much more easily than others. But for the purpose of this article I am concerned to understand the prevailing constitutional culture of "New Zealand" as a collective society and polity, with all its imperfections and unbalanced power relationships.

The approach to constitutional culture and norms here is consistent with constitutional realism. It helps to capture something of the complicated relationship between the behaviour and beliefs of constitutional officials, and the development of elements of a constitution over time. Of course, it resonates with realist Thurman Arnold's view of the "law" more generally:[20]

> The thing which we reverently call "Law" when we are talking about government generally, and not predicting the results of particular lawsuits, can only be properly described as an attitude or a way of thinking about government. It is a way of writing about human institutions in terms of ideals, rather than observed facts. It meets a deep-seated popular demand that government institutions symbolize a beautiful dream within the confines of which principles operate, independently of individuals.

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17 Pierre Legrand, *Fragments on Law-as-Culture* (1999) 5.

18 This process is similar to that analysed by US social norm theory, eg Robert C Ellickson, *Order without Law: How Neighbors Settle Disputes* (1991) and Eric Posner, *Law and Social Norms* (2000) .

19 See James H Liu, Marc Stewart Wilson, John McClure and Te Ripowai Higgins, "Social Identity and the Perception of History: Cultural Representations of Aotearoa/New Zealand" (1999) 29 European Journal of Social Psychology 1021 (finding that, in surveys asking participants to identify the ten most important events in New Zealand history, while both Māori and Pākehā put the Treaty of Waitangi as the most important event, there was little agreement on the others).

20 Thurman W Arnold, *The Symbols of Government* (1935) 33.

III. NEW ZEALAND'S CONSTITUTIONAL CULTURE

A. The Pragmatism of New Zealand Constitutional Theory

New Zealand constitutional thinking has always been impelled towards ad hoc pragmatism by our cultural inclinations, our constitutional history, and the English roots of our intellectual paradigms.[21] We inherited, apparently through osmosis, the authoritative views of the nature of a constitution of Professor Albert Venn Dicey of nineteenth century England:[22]

> Constitutional law, as the term is used in England, appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power of the state.

Dicey's characterisation of constitutional law endures: that it is made up of two distinct sets of principles – the law of the constitution in the strictest sense of statutes and common law, and the conventions of the constitution.[23] Sir Ivor Jennings made the implications of this clear: [24]

> A constitution, in anything more than a formal sense, is only an organisation of men and women. Its character depends upon the character of the people engaged in governing and being governed. In this respect it is a transient thing, changing like the colours of the kaleidoscope; and an examination of its working involves an examination of the social and political forces which make for changes in the ideas and desires and habits of the population and its various social strata. A public lawyer will not understand his constitution unless he understands these aspects of it.

John Griffiths (over)stated the proposition more provocatively:[25]

> The constitution of the United Kingdom lives on, changing from day to day for the constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened, that would be constitutional also.

Academic legal scholarship in New Zealand fixed on this perspective and adapted it pragmatically. Perhaps the most distinguished New Zealand legal scholar who thought most deeply about the jurisprudential nature of law and constitutions was Sir John Salmond.[26] One hundred years after his appointment as the first Professor of law at Victoria University we are beginning to assess his contribution to the constitutional theory and history of New Zealand.[27] Paul

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21 I mean to use "pragmatism" in its ordinary (pragmatic) sense, rather than as a term of philosophical art such as in reference to the work of John Dewey or Richard Rorty.

22 A V Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885) 24.

23 Ibid, 24.

24 W I Jennings, *The Law and the Constitution* (3rd ed, 1943) xv.

25 J A G Griffith, "The Political Constitution" (1979) 42 Modern Law Review 1.

26 See Alex Frame, *Salmond: Southern Jurist* (1995).

27 See the papers from Victoria University's 2006 Salmond Symposium, to be published in a forthcoming issue of the Victoria University of Wellington Law Review, in particular P G McHugh, "Sir John Salmond and the moral agency of the state" (2007) 38 VUWLR (forthcoming) and Mark Hickford, "John Salmond and Native Title in New Zealand: Developing a Crown theory on the Treaty of Waitangi, 1910-1920" (2007) 38 VUWLR (forthcoming).

McHugh characterises Salmond's work as a New Zealand example of the functionalist school of thought that Martin Loughlin identifies in the late nineteenth and early twentieth century in reaction to Austinian formalism in the United Kingdom and that can be associated with the American legal realists somewhat later.[28] Certainly the first edition of Salmond's text *Jurisprudence: or the Theory of the Law,* published in 1902, contained a remarkably "realist" sounding definition of law:[29]

> The law is the body of principles recognised and applied by the state in the administration of justice. Or, more shortly: The law consists of the rules recognised and acted on in courts of justice.

Salmond's summary of the nature of a constitution in the first edition, below, survived unaltered through the seven editions he edited and the five further editions edited by others for over forty years after Salmond's death:[30]

> The constitution as a matter of fact is logically prior to the constitution as a matter of law. In other words constitutional practice is logically prior to constitutional law. There may be a state and a constitution without any law, but there can be no law without a state and a constitution. No constitution, therefore, can have its source and basis in the law. It has of necessity an extra-legal origin. For there can be no talk of law, until some form of constitution has already obtained *de facto* establishment by way of actual usage and operation. When it is once established, but not before, the law can and will take notice of it. Constitutional facts will be reflected with more or less accuracy in courts of justice as constitutional law. The law will develop for itself a theory of the constitution, as it develops a theory of most other things which may come in question in the administration of justice.

Compare this with the view in 2005 of the Constitutional Arrangements Committee of the House of Representatives, quoting a submission to them by New Zealand's most distinguished jurist, Lord Cooke of Thorndon:[31]

> We consider it appropriate to sound a note of caution. There is a natural tendency to want to open up reform discussions – change is always more interesting for the policy community and politicians than the status quo. But embarking on a discussion of possible constitutional change may itself unsettle the status quo and undermine established understandings of our current constitution, and there may be disagreement about whether this is a good thing or a bad thing. In this regard, the following comments made by Lord Cooke in his submission are worth noting:

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28 P G McHugh, "Sir John Salmond and the moral agency of the state" (2007) 38 VUWLR (forthcoming) and see Martin Loughlin "The Functionalist Style in Public Law" (2005) 55 University of Toronto Law Journal 361.

29 John W Salmond, *Jurisprudence: or the Theory of the Law* (1902) 11. By the seventh edition, published in the year of his death, this had changed to the less snappy and more stuffy: "In its widest sense the term law includes any rule of action; that is to say, any standard or pattern to which actions (whether the acts of rational agents or the operations of nature) are or ought to be conformed.": Sir John Salmond, *Jurisprudence* (7th ed, 1924) 19.

30 John W Salmond, *Jurisprudence: or the Theory of the Law* (1902) 203 and P J Fitzgerald, *Salmond on Jurisprudence* (12th ed, 1966) 84.

31 Constitutional Arrangements Committee, *Inquiry to Review New Zealand's Existing Constitutional Arrangements* [2005] AJHR I 24A para 50. I should disclose that I was a primary adviser to the Committee, as Director of the New Zealand Centre for Public Law, working with Claudia Geiringer and Nicola White.

> "Nevertheless, there is an arguable case on different grounds for constitutional change in two major respects. . . . First, New Zealand does lag behind international standards and suffers by comparison with other developed democracies in the absence of a fully enforceable bill of human rights. As against this, it may be said that the present partially enforceable Bill of Rights works tolerably well, and that in practice human rights are not in the main in serious jeopardy. Secondly, the principles of the founding document, the Treaty of Waitangi, are not incorporated and entrenched as part of a formal constitution. Against this it may be said that in about the last quarter of a century much greater public sensitivity to the importance of the Treaty has developed and that an attempt to constitutionalise it further would create (exploitable) discord and confusion. So, in both these two major respects, the status quo may be the wiser option at the present time."

B. New Zealand Constitutional History

New Zealand lacks a comprehensive modern analysis of our constitutional history.[32] In the United States Bruce Ackerman posits that rare but significant "moments" can be identified in the US where transformative popular movements were responsible for enduring constitutional change.[33] Using this framework, a similar analysis has been suggested for the United Kingdom.[34] A similar analysis for New Zealand could identify constitutional moments essential to understanding our constitutional culture. As a rough and ready provocation I would suggest that six key transformative moments in the reality (rather than formality) of modern New Zealand constitutional history stand out:

- The signing of the Treaty of Waitangi and assertion of sovereignty by the British Crown 1840-43;
- Establishing representative and responsible settler government, 1852-57;
- Abolishing the provinces for a unitary state, 1875;
- Creating the welfare state, 1890s;
- Founding the executive Paradise, 1932-48; and
- Checking executive power, 1984-93;

But this is provocation indeed; a modern comprehensive, scholarly analysis of New Zealand's constitutional history still waits to be written. For the "moment" I assert only that the prevailing spirit that has been consistently

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32 N A Foden, *The Constitutional Development of New Zealand in the First Decade* (1938) and A H McLintock, *Crown Colony Government in New Zealand* (1958) are partial and dated. Paul McHugh ponders the sense of historicity developed in the New Zealand constitution in P G McHugh, "Tales of constitutional origin and Crown sovereignty in New Zealand" (2002) 52 University of Toronto Law Journal 69.

33 Bruce Ackerman, *We the People 1: Foundations* (1991) and Bruce Ackerman, *We the People 2: Transformations* (1998): the Founding, the post-Civil War Reconstruction, and the New Deal. Ackerman's conception of these moments may have been partially influenced by a New Zealander, J G A Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (1975).

34 Elizabeth Wicks, *The Evolution of a Constitution: Eight Key Moments in British Constitutional History* (2006) (identifying: the Glorious Revolution of 1688; Union in 1707; the shift from monarchical to prime ministerial power; the Reform Act of 1832; the Parliament Act of 1911; the European Convention on Human Rights; the European Communities Act; and Devolution).

present in New Zealand's constitutional history is that which is also reflected in much of our constitutional scholarship – general contentment with ad hoc pragmatism.

New Zealand constitutional history can easily be seen as a series of ad hoc pragmatic responses to the reality of negotiating difficult situations, right from the outset: the attempted prophylaxis of the Declaration of Independence by James Busby and the United Tribes of New Zealand in 1835; the linguistic sleight of hand involved in the drafting and signing of the Treaty of Waitangi itself; the outrageously pragmatic suspension of the imperial New Zealand Constitution Act of 1846; and the political struggle to force the introduction of responsible government culminating in 1856.[35] It also seems true of some of the key constitutional milestones since then: the enduringly temporary creation of the Māori seats in 1867; the domestic political manoeuvering that led to New Zealand becoming the first country to enfranchise women in 1893; the politics of delaying formal independence from Britain until 1947; the abolition of the Legislative Council in 1950; the introduction of the office of Ombudsman in 1962; the compromise on the status of the New Zealand Bill of Rights Act 1990; and the almost-accidental introduction of MMP in 1996.

As the Constitutional Arrangements Committee of the New Zealand House of Representatives stated in 2005:[36]

> Although the characterisation of New Zealand's constitutional history did not come easily to us, we rapidly agreed on the characteristic qualities of New Zealand's approach to constitutional change through its modern history. We adopted the tag of "pragmatic evolution". By this we mean New Zealanders' instinct to fix things when they need fixing, when they can fix them, without necessarily relating them to any grand philosophical scheme. Occasionally, there will be a push to reform a more fundamental or comprehensive part of our constitutional arrangements – the move to MMP is one such example. But in general, New Zealand's approach to constitutional change has been cautious. Some submitters see this approach as reflecting a history of colonialism and having the effect of constraining the indigenous people within a colonially based framework. Other submitters simply see the approach as pragmatic.

The constitutional history of New Zealand that needs to be written will be important to a fuller account of its constitutional culture. In the meantime I suggest that the following historical as well as geographic, demographic and economic factors are generally relevant to identifying New Zealand's constitutional culture:

- Temperate geographical isolation, creating initially a nation of Polynesian and then also European sea-farers,[37] and now mitigated by technological and communications change;

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35 For a summary of New Zealand constitutional milestones since 1835 see Constitutional Arrangements Committee, *Inquiry to Review New Zealand's Existing Constitutional Arrangements* [2005] AJHR I 24A Appendix B.

36 Constitutional Arrangements Committee, *Inquiry to Review New Zealand's Existing Constitutional Arrangements* [2005] AJHR I 24A para 26.

37 J G A Pocock, *The Discovery of Islands: Essays in British History* (2005) chs 11-13.

- Original settlement by indigenous Māori inhabitants, joined by planned settlements of a relatively narrow and unstratified slice of British (particularly English and Scots) society in the mid-nineteenth century;
- A relationship between Māori and the Crown articulated initially in the Treaty of Waitangi and subsequent quasi-diplomatic relations,[38] and "clarified" through armed conflict in the nineteenth century;
- A resurgence of Māori culture and historical Māori political forms in the last quarter of the twentieth century, now impacting appreciably on New Zealand national culture;
- A significant minority population of Pacific Islanders and historical and colonial links with Pacific Island nations;
- Historical reliance on government to build its economy;
- Economic reliance on international trade;
- Inheritance of British institutions and structures of government, including the common law system and the development of an independent and non-corrupt public service, legal profession and judiciary;
- Reaction against the over-enthusiastically streamlined power of executive government in the 1980s, that ultimately resulted in checks on government through reform of the electoral system;
- Historical reluctance to cut the colonial apron-strings with mother Britain until she moved to Europe in the 1970s and the evolution of an independent foreign policy that is symbolised by a refusal to accept visits by (even US) nuclear-powered or armed ships; and
- An important factor for the future is the impact of demographic change – in particular the young, and rapidly growing, proportion of the population that is Māori, Pacific Island or Asian.[39]

These factors, each of which could and should be expanded at great length, seem to me to combine to give New Zealand a distinctively ambivalent attitude to the use of public power, which I think is at the heart of its constitutional culture. This ambivalence is explored below.

C. New Zealand Constitutional Culture

On the one hand, New Zealanders expect and demand governments to exercise power, firmly, effectively and fairly – to enable settlement, to resolve conflict, to build economic infrastructure and create the welfare state. New Zealand's colonial history is a story of looking to government to fix things (while often resenting them for being able to do so). Government of some sort was necessary to the establishment of the settler state and, once it existed, was found to be useful in a variety of ways. Once the power of the Colonial Office had been wrested from London, the New Zealand government became the

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38 Richard Boast, "Recognising Multi-Textualism: Rethinking New Zealand's Legal History" (2006) 37 VUWLR 547.

39 Based on current birth rates the pākehā population of New Zealand is projected to grow by five per cent from 2001 and 2021, the Māori population to grow by twenty-nine per cent and the Pasifika population by fifty-nine per cent. If immigration trends continue, the Asian population would grow by 145 per cent. On these projections pākehā would still be the largest ethnic group, comprising seventy per cent of the population in 2021, down from seventy-nine per cent in 2001. See Statistics New Zealand, *Demographic Trends 2005* (2006).

focus for political demands. In a young colony, this effectively meant also economic, social and cultural demands. Māori too would turn to the government for protection and redress. The New Zealand governments regulated the development of land from its inception, directed (and mis-directed) land wars against the Māori in the 1860s, instituted the first national welfare state in the 1890s and developed it even more comprehensively in the 1930s, completely regulated the economy and then completely deregulated it in the 1980s and 1990s. Our trust in, and expectations of, government runs deep. We respect strong individuals with initiative – Governors and Prime Ministers such as Sir George Grey, "King Dick" Seddon, Michael Joseph Savage, Peter Fraser, Norman Kirk, Rob Muldoon, Helen Clark. We take pride in our military accomplishments, including those of Māori both for and against the Crown. There is a still strong streak of *authoritarianism* in New Zealand constitutional culture.

Yet there is also a marked ethos of social equality or *egalitarianism***.** This can be seen in the operation of Māori tribal dynamics. As the Waitangi Tribunal has noted, with attribution to Sir Hugh Kawharu: "A chief who persistently flouted majority opinion committed political suicide."[40] It is also evident in the attitudes of the British settlers who arrived in the nineteenth century with a sceptical view of the "majesty" of British government.[41] This attitude, and the great New Zealand knocking machine that is applied with relish to tall poppies, demands that government, and those who operate it, must not see themselves as "superior" to the governed. We support the underdogs, as long as they don't get above (or up) themselves. Everyone is as good as each other. "Team spirit" prevails over individual brilliance, in rugby as in politics. The New Zealand electorate places a high value on political party unity and is suspicious of vocal dissidents.

And finally, as noted at length already, New Zealand culture values *pragmatism*. We expect politicians to fix problems as they appear and expect them to fashion world-leading innovations with number eight wire after tinkering in the constitutional shed. The dominant New Zealand culture has little articulated sense of history, especially our own (and this is a source of tension with the deep historical awareness of Māori).[42] New Zealand culture tends to be uncomfortable with high-flown rhetoric in case it seems pretentious. We don't do the vision thing, let alone have a dream.

As Charlotte Macdonald commented at the constitutional conference of 2000:[43]

> A constitution is unlikely to gain a popular hold without connecting to some of these [cultural] currents. Abstraction has little tradition of popular following in

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40 Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, Wai 9 (1987) para 3.4, citing I H Kawharu, *Māori Land Tenure: Studies of a Changing Institution* (1977) 58.

41 G R Hawke, *The Making of New Zealand: An Economic History* (1985) ch 6.

42 See J G A Pocock, *The Discovery of Islands: Essays in British History* (2005) and Andrew Sharp and Paul McHugh (eds), *Histories, Power and Loss: Uses of the Past – A New Zealand Commentary* (2001).

43 Charlotte Macdonald, "What Constitutes Our Nation? How Do We Express Ourselves?" in Colin James (ed) *Building the Constitution* (2000) 87.

> Aotearoa/New Zealand. Institutionally, we have tended to favour the simple, accessible and pragmatic.

There is an undercurrent in tension with this aggressive modesty. New Zealanders do value innovation, and take quiet pride in leading the world in climbing Mt Everest or (I was going to say) rugby or sailing. Our pragmatism is so determined as to be undeterred by the untried. This can lead, almost by accident, to innovative world-leading changes – for example, women's right to vote, the welfare state, accident compensation, the Waitangi Tribunal, or economic deregulation. New Zealand's innovative brand of pragmatism is not necessarily conservative as to radical change. But it does favour flexibility over coherence.

The great thing about New Zealand's scale is that it still allows determined individuals to make a difference, including to the constitution. My own father, Geoffrey Palmer, has probably made the most concerted attempts at constitutional reform in New Zealand in recent times – in particular by securing passage of the New Zealand Bill of Rights Act 1990 and in establishing the Royal Commission on Electoral Reform that became the basis for the subsequent move to proportional representation. Yet my perception is that his impatience with the pace of New Zealand constitutional change, and the relatively radical constitutional reforms he sponsored, have not yet succeeded in creating a new New Zealand constitutional ethos that values coherent or consistent frameworks of analysis. The character of our constitutional development is still something of a random walk, with which most New Zealanders seem not uncomfortable. As former Governor-General and Judge, Dame Sylvia Cartwright, observes:[44]

> It has been noted by a number of commentators that constitutional change in New Zealand is often the result of a pragmatic and practical response to events. It is often unheralded and sometimes even slips in almost by the back door. Change is incremental and gradual, and frequently the result of emerging consensus on an issue. Future changes are likely to occur in a similar way – New Zealand's constitutional development has always been based on consensus, never revolution.

Some support for my intuitions about this ambivalent New Zealand cultural attitude to power can, perhaps, be detected in the cross-national studies of culture that are now appearing. For example, in Hofstede's study New Zealander middle managers surveyed stood out as less expecting and accepting of unequal power distribution than those in any other country except Austria, Israel and Denmark.[45] In the more recent and comprehensive GLOBE study, New Zealanders surveyed thought that New Zealanders were less oriented to the future, less assertive, more collectivist in institutions, and more concerned about orderliness and consistency than other "Anglo" nationals thought they

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44 Dame Siliva Cartwright, *The Role of the Governor-General* (NZCPL Occasional Paper, 2001) 15.

45 Hofstede's generalized description of the implications of a low "power distance" culture for attitudes to the state resonates powerfully with my personal perception of New Zealand's constitutional culture: Geert Hofstede, *Cultures and Organizations: Software of the Mind* (1991) 39.

were.[46] This provides some (arguable and qualified) support for my intuitions about New Zealand cultural attitudes to public power – our constitutional culture.

In summary, I suggest that the salient aspects of New Zealanders' constitutional culture are: authoritarianism; egalitarianism; and pragmatism. Such contradictions; yet they are the stuff of constitutions.

IV. NEW ZEALAND'S CONSTITUTIONAL NORMS

A. Identifying New Zealand's Constitutional Norms

It is difficult to crystallise norms out of the relatively nebulous notion of constitutional culture. Although the help available from other jurisdictions is limited, it is interesting to note the principles or norms identified as key for the Canadian and United Kingdom constitutions.

Professor Dicey suggested there were three "guiding first principles" of the nineteenth century United Kingdom constitution:[47] the legislative sovereignty of Parliament; the rule or supremacy of ordinary law; and (though more speculatively) the dependence of constitutional conventions on the law of the constitution. That all these are still relevant to, and present in, New Zealand marks the slow pace of the evolution of constitutional culture.

In its *Reference re the Secession of Quebec* the Canadian Supreme Court offered a clear identification of both the nature and content of four "fundamental and organizing principles" of the Canadian constitution:[48]

> 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.

The Court identified the four principles important in Canada as: federalism; democracy; constitutionalism and the rule of law; and respect for minorities. New Zealand abolished federalism in 1875. It is not committed to constitutionalism of the judicialised Canadian sort, and its respect for minorities is questionable.

It is striking how little New Zealand constitutional scholarship focuses on fundamental principles. Ex-patriate academic New Zealander J G A Pocock

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46 Robert J House, Paul J Hanges, Mansour Javidan, Peter W Dorfman, Vipin Gupta (eds), *Culture, Leadership, and Organizations: The GLOBE Study of 62 Societies*, (2004). The New Zealanders surveyed also thought that New Zealanders should be more obedient to authority than they are, and less sensitive to others' views – which might be (weak, qualified) support for the norm of egalitarianism diminishing in power and the norm of authoritarianism increasing. A notable feature of the New Zealand responses was the divergence in New Zealanders' perceptions of what our cultural values are and what they thought those values should be – which perhaps illustrates a typical New Zealand unhappiness with who we (think we) are. Also see Jeffrey C Kennedy, "Leadership and culture in New Zealand" in Jagdeep S Chhokar et al, *Culture and Leadership Across the World: The GLOBE Book of In-depth Studies of 25 Societies* (2007).

47 A V Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885) 34.

48 [1998] 2 SCR 217, para 32.

calls for a conscious consideration, or imagining, especially by Pākehā, of the nature of their identity and political authority.[49] Paul McHugh offers philosophical and historical legal analysis of New Zealand's constitutionalism as "a discourse about the character of governance".[50] Yet New Zealand academics in New Zealand, especially in the discipline of law, are reluctant to appear too metaphysical. This likely reflects the prevailing New Zealand cultural suspicion of such things, and those who deal in them. Popular interest in constitutional culture in New Zealand is likely only to be aroused, pragmatically, by a constitutional crisis.[51]

Under the heading "The New Zealand Constitution: Its Main Features" Sir Kenneth Keith's *Introduction to the Cabinet Manual* states:[52]

> The New Zealand constitution is to be found in formal legal documents, in decisions of the courts, and in practices (some of which are described as conventions). It reflects and establishes that New Zealand is a monarchy, that it has a parliamentary system of government, and that it is a democracy. It increasingly reflects the fact that the Treaty of Waitangi is regarded as a founding document of government in New Zealand. The constitution must also be seen in its international context, because New Zealand governmental institutions must increasingly have regard to international obligations and standards.

A chapter considering "the Foundations of the Constitution" in Philip Joseph's leading text on constitutional law traces New Zealand's constitutional development in examining whether New Zealand has a local *grundnorm*, or ultimate principle, or one inherited from the United Kingdom.[53] But it does not suggest what the ultimate principles of New Zealand's current constitution actually are. Similarly, Jock Brookfield purports to search for the Kelsenian *grundnorm* of New Zealand's legal system in his book on the Treaty of Waitangi, but appears to be satisfied with finding that the basic norm of the New Zealand legal system survived the revolution of the British Crown's assertion of power in New Zealand and the movement of paramount power from London to Wellington.[54] Alex Frame has more temerity in identifying three "ultimate legal principles" in contemporary New Zealand, using Salmond's terminology, which must be right, if not particularly instructive: "Acts are a source of law; common law or customary law is a source of law; and the first principle prevails over the second."[55]

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49 J G A Pocock, "The Treaty between Histories" in Andrew Sharp and Paul McHugh (eds) *Histories, Power and Loss: Uses of the Past – A New Zealand Commentary* (2001) 75.

50 P G McHugh, "Constitutional Voices" (1996) 26 VUWLR 499-529.

51 This has occurred in Canada, eg Jeremy Webber, *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (1994).

52 Sir Kenneth Keith, "On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government" in Cabinet Office, *Cabinet Manual 2001* (2001).

53 Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) ch 13.

54 F M (Jock) Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (updated ed, 2006).

55 Alex Frame, *Grey and Iwikau: A Journey into Custom – Kerei raua ko Iwikau: Te Haerenga me nga Tikanga* (2002) 69.

There is scant New Zealand judicial consideration of the underlying principles of New Zealand's constitution. Sir Robin Cooke (as he then was) offered extra-judicial thoughts, at least in relation to the principles underlying the New Zealand common law:[56]

> My submission is that the modern common law should be seen to have a free and democratic society as its basic tenet and, for that reason, to be built on two complementary and lawfully unalterable principles: the operation of a democratic legislature and the operation of independent courts.

In terms of formal judicial statements the situation is still as Sir Robin described in a Court of Appeal judgment in 1993: "the subject of the foundations of the New Zealand constitutional system remains unargued, except that occasionally (as in the present case) it has been lightly touched on".[57]

It would be helpful if the patriated New Zealand Supreme Court were to divert its time and attention in this direction, though their judgement would not be dispositive and it is possible that our constitutional culture may even see it as self-interested. In the absence of that help, as yet, I identify the following key foundational constitutional norms in New Zealand. I draw on the principles identified in similar jurisdictions and by others in New Zealand, and on my view of New Zealand's constitutional history, constitutional scholarship and constitutional culture.

I suggest that there are four norms that are essential to the character of the New Zealand constitution:

- Representative democracy;
- Parliamentary sovereignty;
- The rule of law and judicial independence; and
- The constitution as an unwritten, evolving way of doing things.

B. Representative Democracy

Representative democracy is one of the fundamental generic means by which western constitutions meet the challenge of constraining the abuse of the coercive power of the state. The aim of representative democracy is to allocate to all those in society, or at least a majority of them, the ability to select those who should be entrusted to wield the coercive powers of government. By allocating this power to those who would be susceptible to exploitation or abuse by government, the idea is that exploitation or abuse would be curtailed.

Belief in representative democracy runs deep in New Zealand's constitutional history, consistent with our cultural value of egalitarianism. The colonists were often direct participants in mid-nineteenth century whig politics. Certainly, the New Zealand Company's colonisation plans were developed in a Britain of the 1830s that was convulsed by pressure groups leading to extension of the electoral franchise in the Great Reform Act of 1832

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56 Rt Hon Sir Robin Cooke, "Fundamentals" (1988) NZLJ 158, 164. He also noted that "On historical grounds it is arguable that there is a third such principle, the existence and functioning of the Crown." and speculated that there may be implicit rights and freedoms that limit legislative power.

57 *Te Runanga o Wharekauri Rekohu v Attorney-General* [1993] 2 NZLR 301.

and further Acts in 1835 and 1836. The New Zealand Constitution Act of 1846, passed by the British Parliament, was suspended on the advice of Governor Grey. One reason was the potentially disastrous Māori reaction that would be likely to result from the New Zealand franchise being restricted by language – thereby excluding Māori.[58]

The first two years of the life of New Zealand's Parliament, 1854-56, was dominated by a debate about democracy which took the form of a struggle for responsible government – for the Ministers of executive government to be appointed from and responsible to the democratically elected representatives of Parliament.[59] The New Zealand Parliament's first substantive exercise of its power to amend most provisions of its own Constitution Act, in 1858, saw the enactment of new legislation governing elections. New Zealand was the first nation to extend the franchise to women, in 1893. In the 1990s, public dismay at their electoral choice between the two major political parties led not to giving power to judges, as had recently occurred in Canada, but to electoral reform – the restructuring and decentralization of political power through the introduction of MMP. Neil Atkinson suggests that "it is clear that the act of voting is still deeply rooted in the collective [New Zealand] psyche" and, in the conclusion of his history of the vote in New Zealand states:[60]

> By granting the right to vote to Māori males in 1867, to all European males in 1879, and to women in 1893, and by abolishing plural voting in 1889, New Zealand led the world in the democratisation of government.

There are, of course, imperfections in particular systems of democracy. In particular, if you rely on majority rule to elect your rulers, how do you prevent abuse of minorities? This is the stuff of constitutional design. It explains the deep level of challenge that the Treaty of Waitangi poses to New Zealand constitutional culture in symbolising the accordance of a special constitutional status to Māori.

As Paul McHugh argues:[61]

> Until the mid-1970s it could be said that the orthodox accounts of Crown sovereignty over New Zealand were complacent and apron-strung to an

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58 Governor Grey's despatch to London of 3 May 1847 feared that war would result from the constitution's grant, with respect to the Queen's New Zealand subjects, to "a small fraction of her subjects of one race the power of governing the large majority of her subjects of a different race." (Governor Grey to Earl Grey, 3 May 1847 (1847-48) GBPP Cmd 892, 44). However, there are also suggestions that Grey was motivated by the Constitution Act's diminution of the Governor's powers – see Edmund Bohan, *To Be a Hero: Sir George Grey 1812-1898* (1998) 91 and A H McLintock, *Crown Colony Government in New Zealand* (1958) ch XIII. Ironically, the 1852 Constitution Act didn't do much better for Māori, due to the dependence of the electoral franchise on individuated title to land – ongoing concerns about which played a part in the "temporary" creation of the Māori seats in 1867, in association with debate about the electoral franchise of gold-miners, see M P K Sorrenson, "A History of Māori Representation in Parliament" in *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (1986).

59 A H McLintock, *Crown Colony Government in New Zealand* (1958) ch XVIII.

60 Neill Atkinson, *Adventures in Democracy: A History of the Vote in New Zealand* (2006) 10 and 235.

61 P G McHugh, "Constitutional Voices" (1996) 26 VUWLR 499, 512-513.

> Anglocentric tradition which emphasized the growth of the representative institutions of governance. That Whig tradition was itself an historic phenomenon which had been transplanted into a New Zealand setting almost without prethought as part of the epistemic baggage naturally accompanying the colonial Anglo-settler state. That is, the Anglo-settler polity brought with it an explanation or narrative of state power – a way of knowing governance – which was directly associated with mid- to late-nineteenth century English discourse. Dealing with that legacy has become a major theme of contemporary political life in New Zealand.

Perhaps the best formal indicator of the special place of democratic principle in New Zealand law is the fact that the only provisions legislatively "entrenched" against easy amendment by Parliament relate to elections.[62] It is no surprise that democracy is the only "underlying principle" noted by Sir Kenneth Keith in the *Introduction to the Cabinet Manual.* As the Royal Commission on Electoral Reform stated: "Democracy is the fundamental principle of our constitution. It associates the people of the country with their own Governments, treating each member of the people equally".[63]

C. Parliamentary Sovereignty

The second norm that underlies New Zealand's constitution is parliamentary sovereignty. I put it second only because I think that it is contingent on the sovereign parliament being inhabited by democratically elected representatives of the people.

We inherited the doctrine of parliamentary sovereignty from Westminster. Yet, as a unitary state with no supreme law, no federalism, no written constitution and no membership of a supra-national body that binds domestic laws as does the EU, New Zealand now manifests this doctrine in an even purer form than the United Kingdom. It is one of the internationally distinctive aspects of our constitution. In comparing land claims negotiations with indigenous peoples in Canada, Australia and New Zealand, Christa Scholtz notes the relative strength of the "norm" of parliamentary sovereignty which:[64]

> ordered policy-makers' underlying preferences for negotiation over other outcomes, such as litigation and arbitration. This is a particularly concrete example of how political culture affects actors' preferences over policy outcomes.

Our history makes sense of this. New Zealand constitutional culture still reflects the strong role of, and reliance on, the state in its formative years as a colony and nation. So it is unsurprising that the doctrine of Parliamentary sovereignty has been fully embraced as lying at the core of New Zealand's constitutional arrangements.[65] Historically, the doctrine of parliamentary

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62 Section 268 of the Electoral Act 1993 entrenches provisions that relate to: the term of Parliament; the Representation Commission; the division of New Zealand into (general, not Māori) electoral districts; the five per cent margin for adjustment of size of general electorates; the minimum voting age of eighteen; and the method of secret voting.

63 *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (1986) para 14.

64 Christa Scholtz, *Negotiating Claims: The Emergence of Indigenous Land Claim Negotiations Policies in Australia, Canada, New Zealand and the United States* (2006) 75.

65 For an accessible outline of the doctrine of Parliamentary sovereignty see Matthew S R Palmer, "Parliamentary Sovereignty" in *Inquiry to review New Zealand's existing*

sovereignty developed in the seventeenth century in the United Kingdom in reaction, and opposition, to the power of the Crown.[66] The classic statement, again, is that of Albert Venn Dicey:[67]

> 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.

As Paul McHugh notes:[68]

> The inability of lawyers to generate a convincing explanation of Crown sovereignty responsive to the political circumstances of New Zealand from the late 1970s was an intellectual legacy of generations of political development in England half a globe away.

New Zealand courts themselves have adhered closely to the doctrine of parliamentary sovereignty. However, a strand of judicial authority and opinion gives a tentative indication that the doctrine might not be recognised by all courts as always complete in all circumstances. In a series of unnecessary but powerful comments in judgments in the Muldoon era of New Zealand government successive Court of Appeal Presidents, Sir Owen Woodhouse and Sir Robin Cooke, speculated that there might be limits to the doctrine of parliamentary sovereignty. This line of authority culminated in Cooke's statement in *Taylor v New Zealand Poultry Board* that:[69]

> I do not think that literal compulsion, by torture for instance, would be within the lawful powers of Parliament. Some common law rights presumably lie so deep that even Parliament could not override them.

There is now a significant academic literature on this point, in New Zealand and the United Kingdom, that I do not propose to canvass here. From the perspective of constitutional realism, whether a judiciary would actually take such a step, of refusing to enforce a legislative provision, would depend significantly on the surrounding political circumstances – and in particular on their expectations of popular reaction to such a move. Would the people be with the judges or the politicians? If the former, then, in reality, such judicial "activism" would likely end up victorious. In such ways does our constitution evolve. Normatively at present, in my view, it makes sense to have a line of judicial authority, disputable and disputed, that can be reeled in if necessary in the future.

The prospect of judicial hauling on Cooke's line and sinker seems relatively distant in New Zealand at present, though American experimentation with torture as a response to terrorism illustrates that that may not always be

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constitutional arrangements: Report of the Constitutional Arrangements Committee (2005) Appendix F.

66 Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (1999).

67 A V Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885) 36.

68 P G McHugh, "Constitutional Voices" (1996) 26 VUWLR 499, 514.

69 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398 (CA).

so. Ironically, the United States also provides the paradigmatic illustration of the potential assertion of power of the judiciary. The US Supreme Court famously has the ability to strike down legislation as being unconstitutional. Yet that power exists nowhere in the written text of the US Constitution. Rather it was found, by the Supreme Court itself, to be implied by the text and continues to exist, as a matter of constitutional culture, as a US constitutional norm.

In New Zealand in 2004 Dicey's statement was still the starting point in considering Parliamentary sovereignty for New Zealand's most constitutionally expert then Supreme Court judge.[70] Yet fears about whether and when the judiciary might make use of Cooke's authority occasionally run rampant in political circles. In the same year, in a series of speeches the Deputy Prime Minister of New Zealand, Hon Dr Michael Cullen, maintained a stout defence of parliamentary sovereignty:[71]

> Under our current system those respective roles [of parliament and the judiciary] are quite clear. Parliament proposes, debates and enacts laws, and appoints from its own elected members an Executive to administer those laws and perform the functions of government. The role of the Courts is to apply the law to individual cases, which may include ordering the Executive to modify any exercise of power that is ultra vires. Where the law is found to be ambiguous, the Courts must interpret the statute to the best of their abilities, taking into account the intent of Parliament in passing the law. Where such ambiguities are uncovered, the deficiencies of the law should be brought to light and examined. However, it remains the prerogative of Parliament to make new law or to amend existing law to clarify its intent.

And:[72]

> In our tradition the Courts are not free to make new law. It is fundamental to our constitution that lawmakers are chosen by the electorate and accountable to them for their decisions. MPs are accountable. Judges are not; they are in fact independent, and that is essential to their role in society.
>
> We need their impartial rulings on what the law says and how it applies in individual cases; but if they begin to express views on what the law should say they enter dangerous territory. It is dangerous not only for the case at hand, but also because it means the public begin to perceive the judiciary as politicized.

It is this sort of view that lies behind the curious enactment of section 3(2) of the Supreme Court Act 2003: "Nothing in the Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament." This formulation was devised in the select committee consideration of the Supreme Court Bill amid concern at the potential of a patriated Supreme Court

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70 K J Keith, "Sovereignty at the Beginning of the 21st Century: Fundamental or Outmoded?" (2004) 63 Cambridge Law Journal 581.

71 Hon Michael Cullen, "Parliament: Supremacy over Fundamental Norms?" (2005) 3 NZJPIL 1. See also Hon Michael Cullen, "Parliamentary Sovereignty and the Courts" [2004] NZLJ 243.

72 Hon Dr Michael Cullen, *Address to Otago District Law Society* (8 April 2004), available online at <http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=19406> (last accessed 20 October 2007).

to engage in dreaded "judicial activism".[73] It is, characteristically, a pragmatically ad hoc indication of Parliament's view of what principles are particularly essential to New Zealand's constitution. Opinion on the effect of such parliamentary opining is mixed.[74] In my view, the provision is a useful, if not necessary, justification for the Supreme Court to examine the meaning, and limits, of these concepts. But I doubt that the Court would feel impelled to do so any earlier than it would in the absence of the provision.

An alternative possibility to judicial evolution of limits to parliamentary sovereignty is legislative evolution of such limits. In 1986, soon after Canada patriated and judicialised its constitution in 1982, New Zealand was faced squarely with the same proposition.[75] In a White Paper issued in 1985, the Government advocated entrenching a Bill of Rights, together with the Treaty of Waitangi, both of which would have the status of supreme law along similar lines to the Canadian Charter of Rights and Freedoms.

The Justice and Law Reform Select Committee of the House of Representatives conducted consultations about the White Paper over two years.[76] Four hundred and thirty eight submissions were received and hearings were conducted throughout the country. A significant proportion of submissions were against the proposal: "Several distinct strains of objection emerged, but foremost among them was that a constitutional bill of rights would elevate judicial power over parliamentary power, and be anti-democratic."[77] I believe that New Zealanders were, and still are, fundamentally suspicious of judges. At that time the highest court was composed of judges who were not even New Zealanders and who sat in London (in the Privy Council). More importantly, judges are unelected, elite, former lawyers.

Politicians may be trusted even less, but at least they can be ejected from government every three years. In 1988 the Justice and Law Reform Committee reported its conclusion that, while misconceived, New Zealanders did not like the idea of such a supreme law.[78] Section 4 of the New Zealand Bill of Rights

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73 Penelope Nevill, "New Zealand: The Privy Council is Replaced with a Domestic Supreme Court" (2005) 3 International Journal of Constitutional Law 115, 126.

74 Richard Cornes, "How to Create a New Supreme Court: Learning from New Zealand" (2004) Public Law 59 (the section may require the Supreme Court to be more explicit than previously about its understanding of these concepts). However, a founding member of the Court itself suggested, extra-judicially, that section 3(2) could claim to be no more than a savings provision: K J Keith, "Sovereignty at the Beginning of the 21st Century: Fundamental or Outmoded?" (2004) 63 Cambridge Law Journal 581.

75 For a comparison of New Zealand's and Canada's moves in this regard see Matthew S R Palmer, "Constitutional Realism about Constitutional Protection: Indigenous Rights under a Judicialized and a Politicized Constitution" (2006) 29 Dalhousie Law Journal 1. The characterisation of the New Zealand situation here is drawn from this account.

76 *A Bill of Rights for New Zealand* [1985] AJHR A6. See Geoffrey Palmer and Matthew Palmer, *Bridled Power: New Zealand's Constitution and Government* (4th ed, 2004) 319; and Paul Rishworth, "The Birth and Rebirth of the Bill of Rights" in G Huscroft and P Rishworth, *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (1995) 29.

77 Paul Rishworth, "The New Zealand Bill of Rights" in P Rishworth et al, *The New Zealand Bill of Rights* (2003) 7.

78 Justice and Law Reform Select Committee, "Final Report on a White Paper on a Bill of Rights for New Zealand" [1988] AJHR I8C.

Act 1990 that was eventually passed is fulsome in subjecting itself to other legislation:[79]

> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
>
> (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
>
> (b) Decline to apply any provision of the enactment—
>
> by reason only that the provision is inconsistent with any provision of this Bill of Rights.

Public polling data on occupational reputation still does not allocate a particularly privileged position to judges. At 6.64 on a ten-point scale in 2004, judges ranked seventh of eighteen occupations in terms of respect – behind nurses, doctors, teachers, police, dairy farmers and sheep farmers.[80] However, lawyers (at 5.46) ranked sixteenth of the eighteen occupations and politicians (at 4.09) dead last.

My instinct is that New Zealanders' potential trust in judges to exercise public power may have risen slightly, but not significantly, since 1986. The primary reasons I suspect a change are the patriation of the highest court to New Zealand (at least they're now New Zealanders!) and experience with more decentralised government decision-making under MMP. The example of Canada suggests that astute leadership of the judiciary, conducted with awareness of the importance of public reputation, can assist the development of such a public preference. But such a change, if it exists, in New Zealand is latent and potential. It may not even be realisable before the conferral of such power. In 2008, Parliamentary sovereignty seems to me still to be an ultimate principle of New Zealand's constitution. Suspicion of judges' ability to frustrate the will of a democratically elected government taps into a deep root in the New Zealand national constitutional culture. The egalitarian and apparently democratic ethic remains strong in New Zealand.

D. The Rule of Law and Judicial Independence

I suggest that the third ultimate principle underlying New Zealand's constitution is the rule of law, supported by the independence of the judiciary. "The rule of law" conveys an intuitively appealing meaning but is notoriously difficult to define.[81] In Anglo-American legal theory the most formative period

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79 The New Zealand judiciary has, nevertheless, found that they are able to "declare" another enactment inconsistent with the Bill of Rights Act, even if doing so has no "legal" effect – see *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9. In a subsequent amendment to the Human Rights Act 1993 Parliament has explicitly conferred this power to make declarations of inconsistency on the courts in relation to the right to freedom from discrimination. Note also that section 6 of the Act requires that "wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning."

80 UMR Research, *Mood of the Nation Report: New Zealand 2004*, available online at <http://www.umr.co.nz/Reports.php> (last accessed 19 October 2007).

81 See eg Brian Z Tamanaha, *On The Rule of Law: History, Politics, Theory* (2004).

of the notion of the rule of law was in seventeenth century Britain.[82] This was the time of the battle between the different branches of British government for supremacy: the King in executive government, the Parliament, and the judiciary. This reflects the role of the rule of law in constraining the exercise of government's coercive power and its inherent relationship to the notion of the separation of powers. While the seminal definition in constitutional law is still that of Dicey, the concept has suffered from the attention of a multitude of diverse perspectives, conceptions and disagreements that seem uninterested in finding consensus.[83]

My conception of the rule of law involves taking seriously the words of the phrase itself. Underlying almost every definition of the rule of law, and core to the ordinary meaning of the phrase itself, is the notion that there is some distinctly separate or objective meaning to law that has independent existence. It must possess certainty and freedom from arbitrariness in its application. This requires that the meaning of a law must, to some extent, be independent: independent of those that make the law, independent of those who apply it, independent of those to whom it is applied, and independent of the time at which it is applied. Such independence of meaning is inherent, given changes in actors, subjects, and contexts over time, but is also necessary to the rule of law. It is law itself, given such independent meaning, that rules, and that should rule.

Using this conception, it becomes clear that the separation of powers is a necessary (though not sufficient) condition for the rule of law. Law exists independently of the lawmaker once it takes on its own written expression. Yet if the lawmaker has the unilateral and untrammelled power to change the law, or to apply it in a particular case, then the law has no expression independent of the intention of the lawmaker. Law, in those circumstances, does not exist and cannot rule. The rule of law is only upheld when the lawmaker is not free to apply, and thereby determine the meaning of, the law in a particular case.

This is basic separation of powers theory. Not only must law be made by democratic government, but it must be made and applied by different bodies within government. Inherent to that is interaction between different branches of government, or constitutional "dialogue" – a succession of considerations of what the law is and should be by the law-makers and the law-interpreters.[84] In the unending struggle to clarify what sort of coercion we want government to impose in a society, lawmakers make laws, the words of which are interpreted by law-interpreters, the results of which can be scrutinised by lawmakers and changed if desired, to then be interpreted anew. Here lies the importance of the existence of different branches of government – and the dialogue between them over the meaning of law.

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82 Geoffrey De Q Walker, *The Rule of Law: Foundation of Constitutional Democracy* (1988) ch 3.

83 Albert Venn Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885) lectures V-VII.

84 Matthew S R Palmer, *The Languages of Constitutional Dialogue: Bargaining in the Shadow of the People* (Laskin Annual Lecture, Osgoode Hall Law School, Toronto, 2007), available online at <http://www.works.bepress.com/matthew_palmer/> (last accessed 19 October 2007).

In twenty-first century New Zealand the rule of law and independence of the judiciary is another principle inherited from Westminster and treated as integral by our legal system. It is reflected in section 3(2) of the Supreme Court Act 2003. There is no doubt that it is firmly ensconced in New Zealand's legal system as far as lawyers and judges are concerned. There are any number of judicial statements and academic legal texts affirming its importance.

In reality in New Zealand the rule of law is sometimes used as a political catchphrase. It clearly has some general public support. But the lack of clarity in its meaning, even in the academic literature, means that it is difficult to know what that support means. Philip Joseph notes that the phrase has been used by the Muldoon government to mean law and order in relation to the 1981 Springbok Tour, and against the Muldoon government to mean non-reversal of judicial decisions by legislation.[85] One of the best known legal cases seen to stand for the rule of law was *Fitzgerald v Muldoon* where the Chief Justice declared that the Prime Minister had breached the Bill of Rights of 1688 by purporting to suspend Parliament's law without its consent.[86]

My intuitive hesitation about the rule of law as an ultimate principle of the constitution, and the reason I put it third behind representative democracy and parliamentary sovereignty, is a concern about how well entrenched the rule of law is in popular understanding and support. To the extent that it requires valuing the role and voice of the judiciary compared to elected politicians then the above commentary suggests it is not well entrenched in New Zealand constitutional culture.

It has been suggested to me that the notion that New Zealand culture values giving people a "fair go" might reinforce the rule of law. But it is not obvious to me that this cultural value infuses New Zealand attitudes to public power. The examples that might point to giving people a fair go might include the development of principles of administrative law, and the various extensions to the electoral franchise noted above, including the move to MMP. But administrative law is developed by judges themselves. And the extensions to the electoral franchise all go to the norm of representative democracy. Perhaps that is the norm that is supported by the culture of the fair go. Valuing the notion of giving people a fair go does not necessarily require that you value the judiciary giving it to them. It is not clear to me that the norm of the rule of law and judicial independence is reinforced by New Zealand constitutional culture.

There are regular examples of behaviour by governments that could be characterised as breaches of elements of the rule of law. Recent examples include:

- The Foreshore and Seabed Act 2004 that removed an avenue for Māori to argue in court for enforceable property rights;
- The Electoral Amendment Act 2004 that retrospectively validated Harry Duynhoven's membership of Parliament; and
- The Appropriation (Parliamentary Expenditure Validation) Act 2006 that vitiated a live legal challenge to the legality of that expenditure.

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85 Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 196.

86 *Fitzgerald v Muldoon* [1976] 2 NZLR 615.

In each of these examples, aspects of the rule of law were trumped by constitutional norms that run more deeply in New Zealand constitutional culture. Application of the law irrespective of to whom it is applied was trumped:

- In the Foreshore and Seabed Act 2004, by parliamentary sovereignty reinforced by egalitarianism and authoritarianism;
- In the Electoral Amendment Act 2004, by parliamentary sovereignty in the context of representative democracy reinforced by authoritarianism and pragmatism;
- In the Appropriation (Parliamentary Expenditure Validation) Act 2006 by parliamentary sovereignty in the context of representative democracy, reinforced by authoritarianism and pragmatism.

While the legal and judicial establishment is a forceful source of support for the constitutional principle of the rule of law, to a realist, its power is ultimately dependent on popular understanding and support.[87]

In my view the rule of law, supported by the principle of judicial independence, is and *should be* a cornerstone of New Zealand's constitution. In terms of my formulation of the notion, it is a key constitutional instrument by which the coercive powers of the state can be contained. But I sound a word of warning to the legal establishment. I am not confident that New Zealanders currently understand the rule of law or, in a crunch, would necessarily stand by it as a fundamental constitutional norm. The other three constitutional norms I characterise as fundamental are each reinforced by a salient dimension of New Zealand constitutional culture: representative democracy by egalitarianism; parliamentary sovereignty by authoritarianism; and an evolving unwritten constitution by pragmatism. The rule of law and judicial independence is *not* reinforced by a New Zealand cultural value. Neither is this surprising given its lack of academic and legal articulation. Without academic and judicial clarification of the meaning and importance of the concept of the rule of law and judicial independence, and some concrete event or debate that generates public appreciation and regard for it, I believe the rule of law is a vulnerable constitutional norm in New Zealand.

E. An Unwritten, Evolving Constitution

The vulnerability of New Zealand's constitution to change points to what I believe is the fourth ultimate principle of the constitution: its nature as an unwritten, evolving set of understandings.

New Zealanders like dealing with concrete things. Yet we have no single document labelled a "Constitution" that we can hold in our hands or point at. We are told we have an "unwritten" constitution. Many New Zealanders are surprised even to be told that we have a constitution at all. We have a collection of different legal instruments and customary understandings that, together, "constitute" the way in which New Zealand government works. Our constitution continually exists in the actions, understandings and inter-

87 In US constitutional culture, by contrast, the rule of law seems to be perhaps the best entrenched constitutional norm or "deepest political myth": Paul W Kahn, *The Reign of Law: Marbury v. Madison and the Construction of America* (1997) xi and Paul Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (1999).

relationships of those who operate it. As such, a constitution inherently evolves over time. Again we inherited this concept from British constitutional theory. Yet it also seems inherent in Māori practice. As Alex Frame suggests of Māori customary law, drawing on the distinction analysed by Bernard Hibbitts, the New Zealand constitution is better seen as rooted in performance culture, where laws and actions are coincident, than in a writing culture where law exists apart from, and above, individuals.[88] Here, again, we find a New Zealand cultural force in tension with the rule of law as discussed above.

Of course, "unwritten" does not properly capture the qualities of New Zealand's constitution. The American constitutional scholar, Larry Kramer, suggests that the term "customary" constitution is a better adjective than "unwritten".[89] A natural British term to use would be "common law" constitution.[90] But there is value in the term "unwritten". True, most of the components of our unwritten constitution have been written, if not all in one place or at the same time. But what distinguishes it from written constitutions is that the essence of the New Zealand constitution is not comprehensively and systemically "constructed" under one framework. Its components, including its most important structural and procedural elements, have each evolved, over time, in response to their context. It is the ultimate expression of our cultural value of pragmatism. The label "unwritten" conveys that.

Was it always this way? Westminster passed constituting legislation for New Zealand as it did for other former British colonies. Yet the first of these, the New Zealand Constitution Act 1846 (UK), was stillborn as noted above. It was formulated in London without an adequate appreciation of local context, and was successfully resisted by Governor Sir George Grey and others in New Zealand. Alex Frame suggests this "must surely be one of the most extraordinary acts of disobedience by a civil servant to a Statute of the Imperial Parliament duly assented to by Queen Victoria."[91] Another way of seeing this is as an early, dramatic example of New Zealanders' willingness to ignore theoretical frameworks imposed on them in favour of their own pragmatic perceptions of the realities of life on the New Zealand ground. And Grey did not act illegally, as it turned out. His arguments were successful with his Colonial Office superiors and in 1848 the UK Parliament suspended the Act.

The New Zealand Constitution Act l852 (UK) was more durable in form than its predecessor. Over time, the New Zealand willingness to innovate led to significant changes to it. Eventually its operative provisions were so

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88 Alex Frame, *Grey and Iwikau: A Journey into Custom – Kerei raua ko Iwikau: Te Haerenga me nga Tikanga* (2002) 69; and Alex Frame and Paul Meredith, "Performing Law: Hakari and Muru" in Tui Adams et al, *Te Mātāpunenga: A Compendium of References to Concepts of Māori Customary Law* (2003) 62-64, available online at <http://lianz.waikato.ac.nz/PAPERS/Occasional%20Papers/TMOP-8.pdf> (last accessed 22 October 2007); see Bernard Hibbitts, "'Coming to Our Senses': Communication and Legal Expression in Performance Cultures" (1992) 41 Emory Law Journal 873.

89 Larry D Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004) 13.

90 Eric Barendt, "Fundamental Principles" in David Feldman (ed), *English Public Law* (2004) 7.

91 Alex Frame, "Lawyers and the Making of Constitutions" (2002) 33 VUWLR 699, 703.

scattered that a whole new Act was passed by Parliament, in a bi-partisan spirit, to bring some coherence to core legislative provisions governing New Zealand's constitutional structure. The resulting Constitution Act 1986 is our current constitutional framework. This Act does not purport to "be" New Zealand's constitution. The summary of its contents in its long title is almost hostile to rhetoric:

> An Act to reform the constitutional law of New Zealand, to bring together into one enactment certain provisions of constitutional significance, and to provide that the New Zealand Constitution Act 1852 of the Parliament of the United Kingdom shall cease to have effect as part of the law of New Zealand.

Yet the puzzle is not why New Zealanders have an "unwritten" constitution. The puzzle is why New Zealand constitutional discourse stopped referring to the 1852 Act, and why we didn't start referring to the 1986 Act, as our "constitution" – as the Canadians and the Australians did and do. The 1852 Act was similar in form and substance, and incompleteness, to the Commonwealth of Australia Constitution Act of 1900 and the British North America Act of 1867 – which both Australia and Canada referred to, and still refer to, as their "constitutions". New Zealanders could easily do the same, in the same sense. The Australian and Canadian constitutions are just as "unwritten", in the sense of being contained in scattered statutes, judgments and constitutional conventions, as New Zealand's.

The primary difference from Australia and Canada is that the New Zealand Act is not "supreme" in a legal sense. It is no more difficult to amend than an ordinary statute and, without federalism since 1875, provides no textual basis on which legislation can be struck down. Perhaps it was the evolution of these features of the New Zealand Constitution Act, its lack of entrenchment and supremacy, that led New Zealand discourse to drop the phrase "the constitution". K J Scott suggests that this change occurred around 1860 and speculates that perhaps it was due to the acquisition by the New Zealand Parliament of the power to amend most of the Act itself in 1857.[92] After all, its use of this power in 1858 focused on the electoral provisions regarded as particularly fundamental as noted in relation to the first constitutional norm of democratic representation. Perhaps also the elephant of the Treaty of Waitangi was taking up too much of the available space in the constitutional room of the 1840-60s, and the 1980s, to allow easy throwing around of constitutional labels.

In any case, as I have noted above, the distinction between unwritten and written constitutions can be over-emphasised. Constitutional realism suggests that all jurisdictions have an underlying "complete" constitution even where,

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92 K J Scott, *The New Zealand Constitution* (1962) 2.

as in the US, the term is captured by a written document.[93] As Karl Llewellyn noted:[94]

> Every living constitution is an institution; it lives only so far as that is true. And the difference between a "written" and an "unwritten" constitution lies chiefly in the fact that the shape of action in the former case is somewhat influenced by the presence of a particular document, and of particular attitudes toward it, and particular ways of dealing with its language.

The lack of a single focus of constitutional authority in New Zealand is unhelpful in some ways. It means that it is more difficult for New Zealanders to identify, or identify with, the core principles of our constitution. Citizens of other countries, like the United States since 1787, or Canada since 1982, or South Africa since 1996, can use their constitutional documents as a rallying point in the search for national identity. In New Zealand the word "constitutional" has a pejorative connotation of arcane, abstract, mystery, which only pointy-headed lawyers and academics need to care about and which is divorced from the pragmatic reality of life. Perhaps we don't see the need to rally in search of a national identity, or can't agree on the location of the rallying point.

If we were to launch a search for our national identity we probably wouldn't look to meet in "Constitution Alley". "If it ain't broke, don't fix it" was the main message heard by the Parliamentary Select Committee appointed to inquire into the nature of New Zealand's constitutional arrangements in 2005, which said in its report:[95]

> Although there are problems with the way our constitution operates at present, none are so apparent or urgent that they compel change now or attract the consensus required for significant reform. We think that public dissatisfaction with our current arrangements is generally more chronic than acute.

To be clear, I am personally perfectly comfortable with an unwritten constitution. I like its flexible nature that can evolve to meet and adapt to new circumstances and that trusts the judgement and sensibilities of its citizens. While an avowedly written constitution can serve to focus public awareness of citizens' fundamental rights and freedoms, it can also have the disadvantage of pretending that the constitution is a thing (a document), rather than a way of doing things. A written constitution can also privilege some rules for the exercise of power, defined as "constitutional" at a particular point of time, and relegate other rules that may prove to be more important at a later point of a nation's history.

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93 Matthew S R Palmer, "Using Constitutional Realism to Identify the Complete Constitution: Lessons From an Unwritten Constitution" (2006) 54 American Journal of Comparative Law 587; and see Benjamin L Berger, "White Fire: Structural Indeterminacy, Constitutional Design, and the Constitution Behind the Text" (2008) Journal of Comparative Law (forthcoming) and Ernest A Young, "The Constitution Outside the Constitution" (2007) Yale Law Journal (forthcoming).

94 Karl N Llewellyn, "The Constitution as an Institution" (1934) 34 Columbia Law Review 1, 17-18.

95 Constitutional Arrangements Committee, *Inquiry to Review New Zealand's Existing Constitutional Arrangements* [2005] AJHR I 24A para 6.

I am also conscious of the peculiar vulnerability of an unwritten constitution – vulnerability to the determination and idiosyncrasies of prejudiced populists or radical reformers whether in politics, the public service or the law. While I am comfortable with having an unwritten constitution, I am ready to disagree with aspects of our constitutional design. For example, I think the arrival of MMP in 1996 introduced a valuable representativeness into our previously over-streamlined and over-efficient version of Westminster government. I also think that, in terms of national identity, it was past time in 2003 that we should have mostly New Zealanders sitting on our highest court, appointed by other New Zealanders, and that they do so in Wellington rather than London. I suspect that similar arguments of national identity may pose an even more difficult constitutional challenge in the future, on the death of the Queen of New Zealand, Queen Elizabeth II. At that point, if New Zealand wishes its next Sovereign to be a New Zealander, it may have to reconsider the unwritten nature of its constitution. Given the importance of that status as a norm of New Zealand's current constitutional culture, that would be a difficult debate indeed. The pursuit of national identity, reinforced by the cultural value New Zealanders put on innovative pragmatism, might be the only force strong enough to break through our value of an unwritten evolutionary constitution.

While I am comfortable with living with an unwritten constitution I am very concerned that we pay attention to what it is. It may be harder to change aspects of an unwritten constitution if they exist only in implicit practices which are not articulated as "constitutionally" important. More importantly, having our constitution located in many different elements is that it is easier for those elements to change, and for some groups of people to consciously change them, without serious public discussion, or even awareness, that a change is contemplated. It is worth briefly considering, in the section below, this vulnerability to over-efficient constitutional change created by the unwritten and evolutionary nature of our constitution.

V. Constitutional Change in New Zealand

Constitutional change occurs continuously in New Zealand. Examining the dates associated with what I have identified to be New Zealand's constitutional elements suggests that the vast majority of them are regularly updated.[96]

There are some typical methods by which the statutory elements of New Zealand's constitution change. In my view by far the majority of changes to New Zealand's constitutional statutes are seen as deliberate and worthy but boring and receive a similar level of attention to that routinely devoted to statutory changes. The Crown Entities Act 2004 is an example. Although the Bill that resulted in this Act made significant changes to the accountability frameworks for a significant proportion of New Zealand statutory

96 Matthew S R Palmer, "What is New Zealand's Constitution and Who Interprets it? Constitutional Realism and the Importance of Public Office-holders" (2006) 17 Public Law Review 133. Of fifty-nine constitutional elements that are formally associated with a date, only twelve of them retain a date of promulgation prior to 1940 and seven of those are inherited Imperial statutes. Forty-two of them postdate 1970. The common law, which is not so easily associated with a specific year of enactment, is also constantly updated by the courts, though not as transparently.

organisations, it rarely made the news headlines and impacted little on the national consciousness. One of New Zealand's most fundamentally constitutional statutes, the Constitution Act 1986, was enacted in this same way. In 1985, after a constitutional and political crisis, a working group of officials reported on changes to bring together and clarify (and in some instances change) key constitutional provisions scattered around the statute book. A bill was introduced in April 1986, reported back from a select committee in September 1986 in a bipartisan spirit, then passed through its second reading, committee stages and third reading in one evening in December 1986. One opposition member, Hon Doug Kidd, noted in the third reading debate that "there can be few countries that in this way, in the course of an evening, more or less by agreement, and certainly without division by way of votes, change their constitution…".[97]

Constitutional conventions can change in a similarly deliberate but low-key way. The nature of a convention requires that a change in both practice and theory be considered for rather longer than a change to statute or other instrument of government. An example of a significant change in the reality of one of New Zealand's constitutional conventions concerned the changes to the convention of collective responsibility in 1999. The unanimity element of the doctrine of collective responsibility is a long established constitutional convention that requires cabinet ministers to support Cabinet decisions in public. The 1999 coalition agreement of the Labour/Alliance government included a mechanism by which the two parties could agree to disagree over issues that were important to the parties' identity.[98] This was reflected in the revision to the 2001 Cabinet Manual and has remained ever since, over two further Labour-led administrations. It has been used very rarely but is an accepted safety-valve for disagreement between parties, though not within parties. If the change to the Cabinet Manual is also adopted by a future National-led government it will surely constitute an accepted and important substantive modification to the unanimity element of the constitutional convention of collective responsibility, if it does not do so already.

There are also a number of constitutional changes that fall into the category of unheralded, apparently technical, reforms that simply slip quietly through the system. Changes to the rules of court, the Cabinet Manual, and Standing Orders of the House of Representatives usually fall into these categories. Occasionally changes to constitutional statutes can also slip through, unheralded and unnoticed. Sometimes, these changes can be significant. A worrying example of this was the amendments to the Constitution Act 1986 that were made in 2005:

- The Standing Orders Committee of the House, in one of its regular reviews of the Standing Orders, recommended to government in December 2003 that two changes be made to the Constitution Act.[99] One amendment would change the requirement that it is the outgoing Parliament, before a General

97 476 NZ Parliamentary Debates 5860.

98 See Jonathan Boston and Andrew Ladley, "The Efficient Secret: The Craft of Coalition Management" (2006) 4 NZJPIL 55.

99 Standing Orders Committee, *Review of Standing Orders* [2003] AJHR I18B 4.

Election, that decides which business of the previous Parliament would be carried over or reinstated in the new parliamentary session (by enabling the additional statutory possibility that an incoming Parliament might make that decision – to which the committee recommended the House agree in a subsequent change to Standing Orders). The other amendment repeated a 1995 Committee recommendation that would remove the requirement that any bill for the appropriation of public money must be recommended by the Crown (the Crown's financial initiative).

- The Committee's recommendations were made by consensus with the support of members representing the overwhelming majority of the House. They stated that although their recommendation on the Crown's financial initiative was being made to reflect the current situation, "we question whether the protection of the rights and prerogatives of the Crown should continue to be a potential ground for vetoing legislation that otherwise has the support of the House. We consider this is a significant constitutional issue that should be reviewed in the context of our proposed amendments to the Constitution Act 1986."[100]
- A Statutes Amendment Bill is a vehicle for non-controversial miscellaneous legislative changes which "should be unrelated to the implementation of a particular policy objective".[101] The Minister in charge of the Statutes Amendment Bill (No 4) asked the leaders of all non-government parties whether they would object to amendments to the Constitution Act, as recommended by the Standing Orders Committee, being included in the No 4 Bill. None did.
- The government therefore introduced a Supplementary Order Paper to the Committee to make these, and other, amendments to the Statues Amendment Bill No 4. The Committee called for and received six submissions and heard four of them for twenty minutes. It reported the Bill as amended back to the House unanimously, without comment.
- The government apparently had further thoughts, and introduced two new Supplementary Order Papers changing the substance of both sections substantively and significantly. [102] The second of these, introduced after the Second Reading of the No 4 Bill, and apparently the subject of negotiation with opposition parties,[103] completely repealed the section in the Constitution Act on the Crown's financial initiative, rather than only

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100 Standing Orders Committee, *Review of Standing Orders* [2003] AJHR I 18B 66.

101 See Standing Order 261(1)(e).

102 In the second reading debate the Associate Minister of Justice, Hon Rick Barker, in charge of the Bill, flagged that an SOP might be introduced, and that it had "been subject to intense discussion between Dr Cullen [the Leader of the House and Deputy Prime Minister and member of the Standing Orders Committee] and the Clerk of the House" and had been discussed in the Standing Order Committee that day. To objections from the opposition about the procedure being used, the senior government whip, Jill Pettis, interjected "There are no votes in these bills. It's like swallowing dead rats.": (5 April 2005) 624 NZ Parliamentary Debates 19592.

103 See speeches of Dail Jones and Hon Rick Barker (10 May 2005) 625 NZ Parliamentary Debates 20386.

redrafting it. Although that part of the Bill would have been struck out if any member single had objected, the House passed it.[104]

To a constitutional formalist this series of events could be considered to be completely outrageous. A constitutional realist, however, might question whether this was actually a change to the reality of New Zealand's constitution. If it simply tidied the law up, to accord with established practice and principle as understood by all participants and observers, then perhaps the process is not constitutionally outrageous.

Personally, I am inclined to agree that the amendments were sensible. The pragmatic course, that was followed, would be simply to grab the nearest passing vehicle of enactment. But these amendments are substantive and significant to the exercise of power. They are not only formal. One amendment changed who it is that decides on the agenda of a newly elected Parliament. The other abolished statutory reference to the Crown's financial initiative on the basis that it is better covered in the Standing Orders of the House, which change from time to time. This change, in particular, reflects a long-standing understanding forged in Westminster in struggles between the King and Parliament. Even to a realist the rapid passage of these constitutional changes, after Government changed its "mind" several times, and without the opportunity for public comment on the versions finally proposed by Government, *was* constitutionally outrageous! It was also completely consistent with the pragmatic nature of New Zealand constitutional culture and the unwritten, evolutionary nature of the constitution.

VI. CONCLUSION

This article attempts to take seriously the impact of national culture on New Zealand's constitution. It offers a view of the nature of New Zealand culture and suggests that three aspects of New Zealanders' attitudes to the exercise of public power are salient: authoritarianism, egalitarianism, and pragmatism. These reinforce three key norms of the New Zealand constitution: representative democracy; parliamentary sovereignty; and the constitution as unwritten and evolving. Lawyers, judges and, occasionally, politicians and the media also insist that there is a fourth key norm – the rule of law and the separation of powers. I agree that such a norm should exist, but I worry about its vulnerability, that stems from its relatively shallow roots in New Zealand national culture.

The most internationally distinctive of New Zealand's constitutional norms is the unwritten and evolving nature of our constitution. The unwritten or flexible or customary nature of our constitution is a comfortable kiwi compromise that has become so ingrained as to be one of the fundamental norms of the New Zealand constitution. It meshes with our identity as a nation in at least three ways. First, in remaining one of two or three nations without a written constitution New Zealanders can see ourselves as standing out from most of the rest of world, consistent with our national cultural pride in pragmatic innovation. Second, we also stand simultaneously consistent with

104 The amended law is reflected in David McGee, *Parliamentary Practice in New Zealand* (3rd ed, 2005) 112, 165-166 and 446-451.

the constitutional common law tradition of "mother" England, even if the United Kingdom has moved away from that tradition in its slide towards Europe.

Finally, the unwritten, evolving nature of our constitution resonates well with the role of custom, norms and oral tradition in Māori society. While warning that Māori words are sometimes made to do more work than they are meant to, Bishop Bennett defined tikanga as "doing things right, doing things the right way, and doing things for the right reasons".[105] The nature of tikanga is principles rather than rules; and it is not static.[106] In 2001, on the basis of expert Māori advice, the Law Commission discussed in a legal context how tikanga Māori can be understood as the "the Māori way of doing things – from the very mundane to the most sacred or important fields of human endeavour."[107] Perhaps Māori values have infused New Zealand national constitutional culture more than either pākehā or Māori acknowledge. In any case, these views of the nature of tikanga resonate well with my view of the nature of New Zealand's constitution.

The reality of the New Zealand constitution is that we do not really have, or yet want, "a constitution" like any other country does. Our constitution is not a thing, it is a way of doing things. We have constitutional tikanga.

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105 Nena B E Benton, "Te Pū Wānanga: Some Notes from the Seminars and Consultations with Māori Experts" in Tui Adams et al, *Te Mātāpunenga: A Compendium of References to Concepts of Māori Customary Law* (2003) 27, 32 (and see discussion of tikanga at 32-35), available online at <http://lianz.waikato.ac.nz/PAPERS/Occasional%20Papers/TMOP-8.pdf> (last accessed 22 October 2007).

106 Ministry of Justice, *He Hīnātore ki te Ao Māori: A Glimpse into the Māori World* (2001) 10, available online at <http://www.justice.govt.nz/pubs/reports/2001/maori_perspectives/maori_perspectives.pdf> (last accessed 22 October 2007).

107 New Zealand Law Commission, *Māori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001) para 71.