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The Place of the Judiciary in the Constitutional Culture of New Zealand

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Abstract

New Zealand constitutional culture is dominated by the political branches of government: representative democracy and parliamentary sovereignty are perhaps the two most fundamental New Zealand constitutional norms. The judiciary has historically occupied an inferior, residual role with a relatively inaudible voice in constitutional dialogue. Against this context the paper explores the position of the judiciary in contemporary New Zealand constitutional culture. It concludes that it would take a striking judicial decision, consistent with public opinion, against government action, to invigorate popular support for the judicial branch of government. The normative prescription for the institutional health of the judicial branch is to do its job without fear or favour.

I Introduction

I am worried about the place of the judiciary in New Zealand’s constitutional culture. The judiciary is important. It is the bulwark of the rule of law. It is the primary external and independent check against the abuse of power by the political branches of government. New Zealanders usually appear to accept and respect judges and courts as a necessary and desirable part of our system of government. But I have a normative concern about how deeply that acceptance and respect is rooted in our constitutional culture. The less firmly entrenched in popular perception is the role of the judiciary, the less of a check they will be on the operation of New Zealand’s political constitution consistently with the rule of law.

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In this paper I make a start on trying to assess the place of the judiciary in New Zealand’s current constitutional culture. What are the popular views of the power of the judiciary and of the rule of law? What are the views of the political branches? What are the views of judges themselves? What are the circumstances in which the judiciary has been prepared to raise its voice to the other branches of government? And in what future circumstances is it likely to do so? Finally, I attempt to formulate normative advice to the New Zealand judiciary on how to maintain and enhance their institutional position on a sustainable basis in the future.

II New Zealand Constitutional Culture

A Constitutional Culture

In considering matters constitutional lawyers tend generally to focus primarily on institutions, procedures and particular cases, consistent with our training. Our understanding of the role of culture in a legal or constitutional system is underdeveloped. There are some, perhaps an increasing number, of attempts to grapple with the implications of culture. But the most useful theorizing about the nature of culture still tends to be based in sociological or political theory, interpretive anthropology and philosophical hermeneutics – such as by Pierre Legrand, Geert Hofsted1 – and/or treats the interaction between culture and law – such as James Tully or Will Kymlicka.2 The legal academy tends to stick with the focus on the interaction between law and culture. There seem only to be a few “cross-overs” between conventional constitutional scholarship and the law and culture movement – and they tend to be in Canada e.g. Ben Berger, Jeremy Webber, David Schneiderman as well as Hannah Pitman.3 The 1990s flirtation with social norm theory in the United States

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does not appear to have developed its potential in relation to culture and constitutions, though perhaps the rash of recognition by senior US constitutional scholars of the unwritten elements of the US constitution is an implicit step in that direction.

I have claimed elsewhere that taking culture seriously adds an important dimension to our understanding of a constitution. I suggest that the importance of culture is at both a positivist level and a normative level. We need to understand how culture shapes a national constitution in order to understand how the constitution works. And if we want to reform any constitutional matter we need to understand the culture that underlies it – whether a constitutional reform runs with or against the grain of constitutional culture will likely determine how successful it will be.

B New Zealand Constitutional Culture

In two previous papers I have written about New Zealand constitutional culture. Here, I summarise and update this account as context for examining the place of the judiciary in New Zealand’s constitutional culture today. For the purposes of this paper, as with those, I use a concept of “culture” that refers to a general understanding of a group of people – their collective mindset or way of thinking about the world. I find Hofstede’s definition helpful: “the collective programming of the mind which distinguishes the members of one group or category of people form another.” This

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8 Hofstede at 5.
resonates with Stanley Fish’s concept of an interpretive community which has been recognised but similarly under-employed in relation to law.\textsuperscript{9}

It is important to note that culture exists within any group; and groups overlap with each other at all levels of society. My focus is on New Zealand national culture, which is not to deny the importance of examining the large number and varieties of cultures that overlap and nestle within New Zealand. In particular, the aspects of Maori culture that intersect with the New Zealand constitution have a separate and important existence that is not the subject of this inquiry but deserves its own treatment – as Mamari Stephens has recently demonstrated so ably.\textsuperscript{10} It is the national level which is the focus here - the amorphous but recognisable “culture” across New Zealand which eddies in and out of overlapping and subsidiary cultures but retains its own discernible current of how New Zealanders as a collective group view the exercise of public power.

Culture is inherently constitutive – it defines and distinguishes “us” as a group from the “others”. How much more relevant to a constitution can you get? New Zealand constitutional culture is New Zealanders’ collective mindset or set of attitudes that relate to the exercise of public power. That mindset contains a series of key norms that “constitute” New Zealand’s national government in a more enduring but ultimately flexible manner than any institutions, procedures or cases.

To some extent any characterisation of one culture is relative to others – how do you understand one mindset unless you can compare it with another? This is, of course, the value of comparative analysis. In seminar presentations I have similarly attempted to characterize the key tenets of constitutional culture in Canada, the United States and Hong Kong. I would like to do so with Australia – but fear I understand it less easily than these others. Perhaps this forum will provide an opportunity to learn more – to foreshadow that question: what are the key Australian cultural attitudes to


\textsuperscript{10} Mamari Stephens A loving excavation: uncovering the constitutional culture of the Maori demos (2013) 25 NZULR 820.
the exercise of public power and what is the place of the judiciary in those attitudes? But, here, I traverse New Zealand constitutional culture.

I suggest that there are four key New Zealand cultural attitudes to the exercise of public power which are at the heart of its constitutional culture. Three of these find expression in recognisably core aspects of New Zealand constitutional doctrine:

- Egalitarianism in representative democracy;
- Authoritarianism in Parliamentary sovereignty;
- Pragmatism in the unwritten nature of the constitution.

I outline each of these dynamic duos in turn – each aspect of New Zealand cultural attitude that bears on the exercise of public power, combined with its corresponding aspect of New Zealand’s constitution. I then explore in more depth the fourth New Zealand cultural attitude I identify to the exercise of public power - fairness – along with its possible linkage to the rule of law and judicial independence.

C Egalitarianism – Representative Democracy

New Zealand’s tall poppy syndrome is often remarked on – particularly by New Zealanders returning from overseas and has been from an early stage of New Zealand’s settler society. Tall poppies must be cut down to size. Jack and Jill are as good as their “master”. Team spirit is what matters. In Maoridom the interests of the collective unit – the iwi or hapu or whanau – dominates; in early settler pakeha society it was the cohesiveness of the crew that was crucial. New Zealand is a fundamentally egalitarian society.

Perhaps this aspect of New Zealand culture is changing. There seems to me to be more individualism in New Zealand society now than there used to be, associated with a celebrity-oriented international culture: Eleanor Catton winning the Booker Prize, Lydia Ko as the top-ranked world amateur women’s golfer, Lorde reaching number 1 on the US pop charts. Even the attention paid to Richie McCaw, Kieran

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11 Stephens’ article is consistent with this in suggesting that the two observable Maori attitudes to the exercise of civic decision-making power involve such power ought to be exercised as a means of meeting collective obligation for civic ends, and ought to be carried out in a way which provides for substantive group participation and public input. Stephens at 842.
Reid and Dan Carter individually rivals that paid to the All Blacks collectively. Celebrity culture focuses on individual politicians in a more Presidential way than it used to too. Labour’s adoption and use of a primary system of selecting its leader, sidelining the caucus, may well accentuate this in future. But my unscientific assertion is that the underlying egalitarian foundation of New Zealand culture still subsists. And it underlies and reinforces what I regard as the strongest constitutional norm in New Zealand: representative democracy.

The demand for representative government was the natural expectation for a settler society conceived in the era of the Great Reform movement of 1830s Britain. That demand was pushed, hard, by the nascent provincial centres around New Zealand who, in the first two years of New Zealand’s Parliament, demanded that Ministers be appointed from and responsible to the House of Representatives. They succeeded. Maori voting in 1867, all European male voting in 1879, women voting in 1893, the abolition of plural voting in 1889 – all indicate that the ballot box was seen as the means of giving groups a stake in settler society. The biggest constitutional change in twentieth century New Zealand was the introduction of Mixed Member Proportional representation in 1993. As Neil Atkinson states “it is clear that the act of voting is still deeply rooted in the collective [New Zealand] psyche”.12

The central position of representative democracy in New Zealand’s constitution today is cemented by constitutional convention. The confidence element of collective responsibility requires the Government to have the confidence of the House of Representatives in order to govern. The Governor-General may only ignore his or her ministerial advisers if they have lost the confidence of the people’s representatives. The only provisions in New Zealand law entrenched against amendment by a simple majority of the House are certain provisions relating to electoral law. Perhaps the most authoritative description of New Zealand’s constitution, Sir Kenneth Keith’s introduction to the Cabinet Manual, states “Democracy is the fundamental principle of our constitution. It associated the people of the country with their own Governments, treating each member of the people equally.”

D  Authoritarianism – Parliamentary Sovereignty

New Zealanders like strong leaders: Julius Vogel, King Dick Seddon, Michael Joseph Savage, Peter Fraser, Farmer Bill Massey, Norman Kirk, Rob Muldoon, Helen Clark. Settler society always looked to the state rather than away from it – as long as it was the state chosen by locals rather than London (which is why I put this norm second to egalitarianism/representative democracy). Whether it was advancing settler interests against Maori, building national infrastructure in the 1870s, creating the welfare state in the 1890s or 1930s, mantling or dismantling economic protectionism in the 1940s or 1980s, or leading New Zealanders to war in the 1900s, 1910s and 1940s – New Zealanders have expected government to solve their problems and look after their interests. This is where the contrast with American constitutional culture is at its highest. The separated and equilibrated powers of the US constitution directly reflect the distrust of the state into which that nation was born. New Zealand never had or wanted a revolution. We wanted efficient government that could do things for us, as it would.

The search for authority found an ideal instrument in the doctrine of Parliamentary sovereignty. Irrespective of questions over its historical existence, Parliamentary Sovereignty has never been seriously questioned in New Zealand since New Zealanders seized the reins of Parliament in 1858. New Zealand appears to be the last outpost where citizens appear content to dice with Dicey – Parliament can still make or unmake any law whatever.

It is worth noting that, in relation to this norm and for understandable reasons, Maori attitude is much more ambivalent – often preferring the more disinterested and distant English over the very interested local pakeha majority. And there has been a major modification to who holds the bridle of Parliamentary sovereignty, in the introduction of MMP as noted below. But, so far, a turn to judicial authority to counterbalance politicians’ sovereignty has not found favour with most New Zealanders.

E  Pragmatism – an Unwritten Constitution

I identify the third leg of the stool of New Zealand constitutional culture to be pragmatism. Grand theorising is suspicious, as academics know, unless it relates to
something concrete. Problems should be fixed as they appear, preferably with number 8 fencing wire after tinkering in the constitutional shed. We just get on with it – and “it” is preferably something practical rather than theoretical. We do value innovation in our pragmatic tinkering – and are not averse to, and rather proud of, doing something no one else has ever done (whether or not there were good reasons for that).

It is this pragmatic element of New Zealand culture that appears to lie behind our determined assertion that New Zealand has, and should have, an unwritten constitution. I have noted elsewhere that it is not clear why we assert this and have appeared to do so since the 1860s.\(^\text{13}\) We have always had a constitution of some sort, whether a Charter, the unrequited 1846 Imperial Act, the long-lasting 1852 Imperial Act or the patriated Constitution Act 1986. Those Acts do not appear significantly different in nature to those of Canada or Australia or other former British colonies. Yet through it all New Zealand constitutional discourse has insisted that we had an unwritten constitution. This may have reflected the formative invocation of the importance of constitutional convention regarding responsible government in 1850s. Perhaps also it is related to the early exit of the ability of the judiciary to strike down legislation, which was cemented in place with the abolition of the pesky provinces in 1877. If Parliament is sovereign to the extent that it can unmake any (constitutional) law whatever without restraint by the judiciary how could you think you had anything but an unwritten constitution? But the enduring nature of this assertion seems to me to be connected with New Zealanders’ cultural aversion to tying their hands in the future; we much prefer presentism to originalism.

Periodic suggestions that we should write down our key constitutional rules are still greeted with suspicion. And this does seem to me to be consistent with Maori constitutional values – our constitutional tikanga privileges flexibility and pragmatic evolution. That suspicion is greater if a proposal for a written constitution appears to transgress norm numbers one or two by installing the judiciary as enforcers.

III Fairness, the Judiciary and the Rule of Law

\(^{13}\) Palmer, Constitutional Culture at 590-591.
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**Fairness and the Judiciary**

Historian David Hackett Fischer makes a persuasive case for an abiding concern fairness and natural justice being a core animating ideal of New Zealand culture, at least in comparison with the US focus on freedom, and even if fairness is understood differently by different people and at different times:  

New Zealanders are consciously a free people, yet few of them have anything like the American obsession with living free. Americans often speak of fairness. Many try to be fair, and most wish to be treated fairly, but they have nothing to compare with New Zealanders’ highly developed vernacular ideas of fairness as the organizing principle of their open society.

Hackett suggests that the New Zealander vernacular concept of fairness has both a procedural and substantive dimension, both of which are familiar to lawyers but not usually conceived by lawyers as pertaining to popular attitudes:  

In its substantive meaning, the idea of fairness entails the *virtue of not taking undue advantage of others*. It operates as a restraint on power in all its forms. It asks no more – and no less – from ourselves than we would ask of others. In substantive terms, fairness means fair shares, which are not necessarily equal shares. It is the idea of an outcome that is proportionate to what one deserves.

That idea in turn inspires *the virtue of reciprocity*, which in its ethical meaning is akin to the Golden Rule. Fairness is about doing unto others as we would have them do unto us. It also means that we can ask no more of others than we would have them ask of us. In its procedural meanings, the idea of fairness means *the practical virtue of playing by the rules*. It is about settling differences by mutually accepted processes that are thought to be honest and impartial. More than that, fairness is about *the practical virtue of fair play*, which means something more than playing by the rules. It is about acting in a spirit that aspires to right conduct, straight dealing, honest talk, and impartial judgment. Most of all, fair play is an attitude, as well as an act. In all of these ways, substantive and procedural, the idea of fairness is about *the practical virtue of decency* in the ways that we treat others and expect to be treated.

I agree with Professor Hackett. I do think fairness is an animating value of New Zealand culture that bears on our attitudes to the exercise of public power. I have previously flirted with the notion that fairness reinforces the fourth constitutional norm I identify in New Zealand of the rule of law and judicial independence. Initially I thought not because “Valuing the notion of giving people a fair go does not

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15 At 486 (emphasis in the original).
necessarily require that you value the judiciary giving it to them”.16 I cited regular examples of behaviour by governments that breach the rule of law. While I endorsed the normative value of the rule of law supported by judicial independence I warned the legal establishment that New Zealanders may not currently understand the rule of law or, in a crunch, necessarily stand by it – characterising it as a vulnerable constitutional norm in New Zealand. These comments were subsequently endorsed by Justice Priestley of the High Court who agreed that “the constitutional importance of the judicial arm of government and its independence are imperfectly understood and not deeply entrenched in New Zealand’s culture”.17 So how are the judiciary regarded in New Zealand?

It is significant that, when New Zealanders were most exercised about the deficiencies of their political constitution, they turned not to the judiciary but to political parties. The most significant inroad into New Zealand authoritarian attitudes to the exercise of public power came with the introduction of MMP in 1993-96. I have analysed this elsewhere as a reaction to the significant breaking of promises by both of the two major parties under FPP.18 But it is telling that the chosen means of restructuring power was found in the primary constitutional norm – representative democracy – rather than the US style separation of powers by placing trust in the independent, and unelected, judiciary.

This is consistent with another pattern I discern in New Zealand’s legal development. In law reform we have demonstrated over the past fifty years a reasonably consistent preference for administrative discretion over judicial decision-making. Some examples:

- New Zealand was the first Commonwealth country, in 1962, to adopt an Ombudsman - with a brief, immune from judicial challenge,19 to investigate complaints about the operation of executive government judged against the

16 Palmer, Constitutional Culture at 588.
19 Ombudsmen Act 1975 ss 13(6) and 25.
yardstick of fairness. This can be seen as a rejection of the courts and legal process as an effective means of resolving accountability concerns within executive government. Fifty years later the Ombudsmen have grown in mana and effective, if not legal, power and are cemented into New Zealand’s constitutional arrangements as an Officer of Parliament.  

- In 1972 New Zealand abolished the tort of negligence for personal injury in favour of an administrative system of no-fault compensation. No other country has done this. Again this represents a turn to administrative rules and discretion over judicial decision-making and legal process. New Zealanders now don’t appear to know or care that courts are largely uninvolved in civil disputes over personal injury.

- In 1975 the Waitangi Tribunal was established as a body to make recommendations about what to do about breaches of the Treaty of Waitangi. In 1985 its jurisdiction was made retrospective to 1840. In 1988 it was given binding powers which it has largely refused to exercise. Again this is a non-legal or a-legal means of persuasion of politicians of whether claims are valid.

- In 1988 the Independent Police Complaints Authority (since 2007 the Independent Police Conduct Authority) was established to investigate complaints about the actions of the Police. Although chaired by a former judge its process relies on recommendations and transparency – an appeal to political accountability mechanisms.

- In 1993 the Fiscal Responsibility Act entrenched principles of fiscal responsibility through transparency and reliance on political incentives rather than any judicial intervention with executive government power.


The Human Rights Act 1993 and Privacy Act 1993 and Health and Disability Commissioner Act 1994, and Childrens Commissioner Act 2003 all set up separate administrative complaints regimes in relation to those areas of fundamental concern. The 2001 Amendments to the Human Rights Act did make complaints of breaches of freedom from discrimination under the New Zealand Bill of Rights Act 1990 justiciable. But they provided for such complaints to lie at first instance with the Human Rights Tribunal and determinedly pursued mediation as the approach to resolution of human rights complaints.

Modern New Zealand law reform that considers the resolution of disputes regarding public power seems to me to have taken a fundamentally a-legal turn. Perhaps this is understandable – government, whether politicians or public servants, have an instinctive aversion to courts “interfering” with their business. Polite if firm suggestions by independent, but expert administrators is much less threatening. But what does this say about law reformers’ attitudes to judicial decision-making? Nothing good I think.

B Perceptions of the Judiciary

Oddly, given the picture above, (or perhaps, understandably, because of the picture above?) public opinion polls still seem to indicate that, on balance, the courts do not fare too badly in terms of the confidence of the people – certainly they do better than politicians. UMR’s Mood of the Nation surveys given an interesting set of trends. In 2012, 47% of New Zealanders had a “great deal” or “quite a lot” of confidence in the Courts compared to 49% having “some” or “a little” confidence – placing them 11th out of 18 institutions (the Police being first on 70%, Parliament being 16th on 29%).

Yet this is a relatively high point of confidence for the Courts since 2001, with scores fluctuating between 34% and 47%, with an average of 41% over that period. There were small and steady increases from April 2001 to June 2006 from 41% to 47%, then a sharp drop to 38% and 34% in 2007 and 2008, followed by another rise to 38-40% in 2009-2011 and a jump to 47% in June 2012. Of course, it seems possible that an

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22 What might have caused this drop between June 2006 and April 2008?
assessment of confidence in the courts in such a survey might be dominated by views of how “well” courts do in sentencing criminals. (The Ministry of Justice was at 40%). But such perceptions still matter in terms of the legitimacy of institutions.

Relationships between the judiciary and the political branches of government have been rocky on an intermittent basis. Much of this is subterranean, in private meetings and reactions between judicial heads of bench and Ministers or senior officials. Occasionally, however, tensions surface publicly - most notably, the exchange between Chief Justice Elias and then Deputy Prime Minister Michael Cullen regarding the existence and extent of Parliamentary sovereignty was in 2003-2005.23

Perhaps the most interesting signals of perceptions of judicial power (or, at least, perceptions of perceptions) have been in the periodic examinations of whether it should be increased. The seminal New Zealand event to question this was the 1985 Bill of Rights White Paper proposal of the enactment of a Bill of Rights and Treaty of Waitangi as supreme law - which led to the enactment of the New Zealand Bill of Rights Act 1990 as ordinary law. The Select Committee heard 438 submissions up and down and New Zealand over two years.24 As Paul Rishworth said, “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.”25

In 2005 another select committee of the House had the opportunity to review this situation. It concluded:26

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

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26 “Inquiry to review New Zealand’s existing constitutional arrangements: Report of the Constitutional Arrangements Committee” [2005] AJHR 1.24A at para 6. I should note that I was involved as an expert adviser to the Committee, as was Claudia Geiringer and Nicola White from Victoria University of Wellington.
consensus required for significant reform. We think that public dissatisfaction with our current arrangements is generally more chronic than acute.

It did note that that view was not shared by Maori. In relation to such issues as the relationship between Parliament, the executive and the courts, the Committee considered that “at present we will initially benefit from ongoing debate and consideration, rather than from hastily developed reform proposals. They are questions about our national identity and the way in which we want power to be organized in our country. They are questions that need to be mulled over slowly and carefully by all New Zealanders.”

C The Constitutional Advisory Panel Report 2013

On 5 December 2013, the Constitutional Advisory Panel’s report was published. The Panel was set up as a result of a deal between the National Party and the Maori Party in the context of a support agreement for the purposes of confidence and supply. Expectations varied between those who said the report was a stalking horse for entrenchment of the Treaty of Waitangi into law and those who dismissed it as a worthless paper exercise. The Panel was appointed to stimulate public debate and provide Ministers with an understanding of New Zealanders’ perspectives on current constitutional arrangements. The Panel pursued a public engagement strategy, issued material to inform conversations, and attended supported and encouraged over 120 hui, community meetings and independent events throughout New Zealand. Its Facebook page received 6,400 likes 5,259 submissions were provided to the Panel. This is a valuable and current source of information about New Zealanders’ views about constitutional issues. This paper examines what it has to say about the constitutional norms touched on above, and about the role of the judiciary in particular.

In recording the common themes on the conversations reported on, the Panel notes that “People talked not just about pragmatic solutions to what they saw as today’s challenges, but also the values and relationships that should be the touchstones for

27 At para 8.
28 At para 49.
any government and for the building of the nation.”30 It seems to me to be consistent with the norms discussed above that the Panel identified justice and fairness as a strong theme, and that effective representation and meaningful participation are key factors in giving people a voice in the running of the country.31 Interestingly, however, in its overview on checks and balances the Panel reported:32

Many submissions and conversations touched on the nature and strength of the restraints on power, including whether the existing checks and balances are right. Participants agree power should be separated, but did not agree on the roles of each branch of government. They also agreed the exercise of public power should be subject to effective limits and accountability, but disagreed about what those limits should be and how they should be enforced.

In particular, many people expressed unease- and surprise – that Parliament can pass laws which are contrary to the New Zealand Bill of Rights Act 1990 or the Treaty of Waitangi. The concept that limits on some rights might be justifiable in a free and democratic society was not universally understood. Amending fundamental legislation with a simple majority in Parliament was also noted as a concern, along with the significance of the Executive’s majority power within Parliament.

The more detailed account of people’s perspectives reports this:

New Zealand’s Parliament can make laws about anything if a majority of MPs support the proposal. A ‘supreme’ written constitution would define the limits on Parliament’s law-making power, and could empower the Judiciary to ‘strike down’ or invalidate any legislation that does not fall within those limits. Alternatively, the courts might have the power to declare legislation to be inconsistent with the constitution without rendering that legislation invalid.

This potential impact on parliamentary sovereignty appeared to be a crucial factor for many submitters. Submissions that rejected a written constitution often raised concerns about judges being unelected and therefore unaccountable to the voters. This group suggested that judges have no mandate to assess whether legislation meets constitutional standards.

There was no significant support for a supreme fully entrenched written constitution, which empowers judges to strike down legislation and that can only be amended through specified processes. Support appears to lie, for now, with contested issues being decided in Parliament through the legislative process or other negotiated processes rather than by the courts.

There may be support for a single written constitution which sets out a short and simple set of standards, but without additional judicial powers. This would leave the Executive and Parliament flexibility to decide which policies, within those standards, best suit the circumstances of the day.

30 At p 9.
31 At p 12.
32 At p 13.
Contrary to the 2005 Committee, “The Panel does not support the view that constitutional change should and can only be forced by a crisis, or when the constitution is ‘broke’”. The Panel recommends that the Government “notes that although there is no broad support for a supreme constitution, there is considerable support for entrenching elements of the constitution”.

The Panel’s most activist recommendations relate to the Bill of Rights Act but, interestingly, baulked at the prospect of increased judicial power. The Panel found:

Across the Conversation the New Zealand Bill of Rights Act 1990 was seen as a fundamental and enduring part of our constitutional arrangements.

One grouping of participants felt the effectiveness of the Act could be improved. Perspectives of those participants included:
- the Act is not comprehensive enough, so important rights are not being protected, respected or fulfilled
- it is too easy to pass legislation that is inconsistent with the Act
- the Act is too easy to change.

Another grouping felt the Act was working satisfactorily and should be left as it is to avoid the risk of uncertainty. They believe human rights in New Zealand are protected, respected and fulfilled appropriately.

In relation to whether increased judicial power should be pursued to address concerns about the vulnerability of rights and freedoms in the Bill of Rights Act the Panel reported:

Reasons for supporting greater judicial powers over legislation with rights impacts included that the courts:
- are independent, impartial and fair decision-makers
- are better at protecting minority rights than majoritarian parliaments
- have expert knowledge about human rights issues
- provide an independent check on Parliament.

Arguments against the Act being supreme law were generally based on the understanding the courts would have a power to strike down legislation. They included:
- Parliament is accountable to and representative of voters, and so is best placed to decide what limits on rights are justifiable in a free and democratic society
- a perceived risk of politicising judicial appointments: the appointing government might try to influence the approach of the courts by choosing people of particular political views.

33 At p 14.
34 At p 16.
35 At p 50.
36 At p 55.
The Panel’s own reflection on this was:\textsuperscript{37}

Granting courts the power to strike down legislation has support but is explicitly rejected by a significant grouping. Support can be seen for exploring increased judicial powers that preserve parliamentary sovereignty, new means of public participation and improving parliamentary scrutiny to ensure legislation is consistent with the Act.

Accordingly, the Panel recommends that the Government:

Sets up a process, with public consultation and participation, to explore in more detail the options for amending the [New Zealand Bill of Rights Act 1990] to improve its effectiveness such as:
- adding economic, social and cultural rights, property rights and environmental rights
- improving compliance by the Executive and Parliament with the standards in the Act
- giving the Judiciary powers to assess legislation for consistency with the Act
- entrenching all or part of the Act.

\textit{D} Constitutional Dialogue

So, if the judiciary is not generally trusted by New Zealanders as a significant constitutional actor, how does it get on when it does assert itself? Following the literature on constitutional dialogue in Canada stemming from the 1997 Hogg and Bushell article\textsuperscript{38} I have previously identified particular examples of constitutional dialogue in New Zealand.\textsuperscript{39} These are particular judicial decisions regarding significant constitutional issues of moment. The “dialogue” consists of the following iterations of consideration by the judgment by the executive and legislative branches of government. Significant such judgments, and their aftermath, are “constitutional” in New Zealand’s politicised constitution just as much as Charter cases and legislative responses are in Canada. As Justice McGrath of the Supreme Court has stated that a court has a “constitutional responsibility” to uphold legislation that is inconsistent with the New Zealand Bill of Rights Act but also to identify the inconsistency and he suggested “a reasonable constitutional expectation” on Parliament to reappraise its means and objectives where the court does so.\textsuperscript{40}

\begin{itemize}
  \item At p 56.
  \item Peter W Hogg and Allison A Bushell “The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)” (1997) 35 Osgoode Hall L J 75.
  \item Palmer, Constitutional Dialogue at 55-56.
  \item \textit{Hansen v The Queen} [2007] NZSC 7, [2007] 3 NZLR 1 at [254] and [259].
\end{itemize}
I identified four particular judgments as sparking constitutional dialogue:

- **the SOEs case** in 1987: the seminal Court of Appeal interpretation of a reference to the Treaty of Waitangi in legislation including the meaning of the Treaty.\(^{41}\) As the court invited, the executive proceeded to negotiate with the Maori Council over a regime to safeguard Maori interests. The deal was implemented by Parliament in enacting the Treaty of Waitangi (State Enterprises) Act 1988, giving the Waitangi Tribunal binding power to order the resumption of land owned by SOEs. No such resumptions have been ordered.

- **Baigent’s Case** in 1994: the Court of Appeal found that public law damages were potentially available as a remedy for breach of the Bill of Rights Act despite that not being explicit in the Act (and that having been considered in the formulation of the Act).\(^{42}\) The Law Commission advised against legislative action and the Executive government initiated none. Damages awards have been relatively rare and relatively slight.

- **Moonen** in 2002: the Court of Appeal, or at least some judges of it, found that the Court had the power to declare legislation to be inconsistent with the New Zealand Bill of Rights Act, though it did not do so and has not done so since. On the basis of an advisory report from legal experts, the Executive government decided to initiate legislative amendment to provide for such declarations in relation to the right to freedom from discrimination. Parliament did so in the Human Rights Amendment Act 2001.

- **Ngati Apa** in 2003: The Court of Appeal found, in response to a case stated at the initiative of the Attorney-General, that it was within the jurisdiction of the Maori Land Court to examine Maori claims of customary rights to the foreshore and seabed. The Executive reacted swiftly, initiating legislation to overturn the Court’s judgment and to provide for a lesser form of title or right to be negotiable between Maori and the Crown. Parliament accordingly passed the Foreshore and Seabed Act 2004. But a new political party was formed and the Marine and

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\(^{41}\) *New Zealand Maori Council v Attorney-General (the SOEs Case)* [1997] 1 NZLR 641 (CA).

\(^{42}\) *Simpson v Attorney-General (Baigent’s Case)* [1994] 3 NZLR 667 (CA).
Coastal Area (Takutai Moana) Act 2011 was passed by a new government and Parliament, overturning that legislation and providing for negotiation over rights or title with scrutiny by the courts. (Interestingly, the 2011 Act includes in its preamble one of only 4 legislative references to the rule of law – as having been transgressed by the 2004 legislation).

Examining these four examples of constitutional dialogue, the judicial branch of government hasn’t come off too badly. In three of the four instances its decisions have stuck and the other branches of government have decided not to react. In the fourth, kneejerk reaction by the political branches engendered its own further political reaction, which could be seen as moving further back towards the Court’s decision.

However, the most striking aspect of the identification of the above examples of constitutional dialogue is that they all involved the Court of Appeal and occurred before the Supreme Court was established. I need to consider this further; comments are welcome. Can it really be that, since it started operation in 2004, the Supreme Court of New Zealand has not ventured into areas of significant constitutional controversy or initiated constitutional dialogue? Perhaps so – given that the circumstances of the creation of the Court and the appointment of its initial bench were fraught with political controversy. Perhaps that beginning has deterred constitutional adventurism. Perhaps the cases have not arisen that could have tempted the Court to “go there”.

The only Supreme Court case which immediately springs to mind as an instance of significant constitutional moment since 2004 is this year’s Water judgment – the Maori Council challenge to the part-privatisation of Mighty River Power on the grounds that Maori Treaty claims would not be sufficiently protected.43 This judgment gives cause for hope for the judicial enterprise at the highest level in New Zealand. On the face of it, it represents a loss for Maori – and has generally been taken that way in the media. However I consider that it represents the most sophisticated judgment I have yet seen from the Supreme Court in terms of judicial politics. It rejects the Crown’s surprisingly legalistic arguments and effectively puts

43 New Zealand Maori Council v Attorney-General (the Water Case) [2013] NZSC 6, [2013], 3 NZLR 31.
the circumstances here on all fours with the previous Treaty jurisprudence – with the implication that privatisation should not proceed unless there is sufficient protection in place for Treaty claims. But then it distinguishes these circumstances from the earlier jurisprudence on the basis of the positive progress in resolving Treaty claims that has been made and the Crown’s undertakings, which are formally recorded in the judgment, to continue that progress in relation to claims to water. The Court says:

. . . It appears from the policy initiatives and from the assurances given in the litigation that the message that there is need for action on these claims has been accepted.

[149] As is apparent, we are prepared to accept that privatization may limit the scope to provide some forms of redress which are currently at least theoretically possible. But in assessing whether this amounts to “material impairment”, regard must be had to (a) the assurances given by the Crown, (b) the extent to which such options are substantially in prospect, (c) the capacity of the Crown to provide equivalent and meaningful redress, and (d) the proven willingness and ability of the Crown to provide such redress.

[150] For the reasons given, we are not persuaded that a material impairment arises from the proposed sale of shares.

And, in relation to costs, the last line of the Court’s judgment says “While the appellants have failed as to the ultimate result, they nonetheless succeeded on an important point of principle, namely that the Crown was bound to comply with the principles of the Treaty before deciding to sell the shares.”

The Court’s judgment avoids any suggestion of a counter-majoritarian difficulty that would undoubtedly have been made if the Court had ruled against the Crown. (Although it would have been interesting to see how such a suggestion would have played out given the majority view that appears to exist in New Zealand against asset sales). It seems to me to represent judicial jujitsu – where the Court has turned the force of the Crown’s arguments back on the Crown. The Court has held the Crown to its word, made clear its expectation that water claims will be resolved by negotiation, and laid the ground for a further challenge to be successful if they are not. I see this as a fine display by the New Zealand Supreme Court of Alexander Bickel’s passive
virtues of judicial decision-making. Such a decision is truly an exercise of judicial power and should not be mistaken for its absence. In Bickel’s words:

. . . it is no small matter, in Professor Black’s term, to “legitimate” a legislative measure. The Court’s prestige, the spell it casts as a symbol, enable it to entrench and solidify measures that may have been tentative in the conception or that are on the verge of abandonment in the execution.

The Supreme Court here sidesteps the power of the Crown’s democratic mandate to set ground rules for future negotiations between the Crown and Maori. And it preserves its ability to rule otherwise in future if those rules are not followed. Again, as Bickel said:

One of the chief faculties of the judiciary, which is lacking in the legislature and which fits the courts for the function of evolving and applying constitutional principles, is that the judgment of courts can come later, after the hopes and prophecies expressed in legislation have been tested in the actual workings of our society; the judgment of courts may be had in concrete cases that exemplify the actual consequences of legislative or executive actions.

It is difficulty to assess the strength of the judicial voice in constitutional dialogue if it does not engage in any. But not engaging can itself have effect.

E Fairness and the Rule of Law

So does the New Zealand affinity for “fairness” support the constitutional norm of the rule of law? In summary, I think it could, but it doesn’t now.

The Constitutional Advisory Panel report disappointingly reinforces the previous conclusions I have come to that New Zealanders do not wish to significantly increase judicial power. However it also indicates some uneasiness about the potential of Parliament to act inconsistently with the fundamental rights and freedoms in the New Zealand Bill of Rights Act. I suspect there may also be some uneasiness about the potential of Parliament to act inconsistently with the rule of law. In a recent paper I have proposed an operational definition of the rule of law as follows:

The rule of law requires that the meaning of law is:

49 At 129.
• Independent from those who make the law.
• Independent from those who apply the law.
• Independent from those to whom it is applied.
• Independent from the time at which it is applied.

That paper attempted to assess particular bills considered or passed by Parliament against that definition of the rule of law and mark them out of 10. Since that paper was written I have had the opportunity of trying to convince political parties, on behalf of a client, to amend a Bill that retrospectively validated rating decisions by a local body that my client had challenged by way of judicial review before the Bill was introduced. The Bill was passed by the House of Representatives on 4 December 2013 – the day before the Constitutional Advisory Panel Report was issued. The resulting Kaipara District Council (Validation of Rates and other Matters) Act 2013 overrides key aspects of my client’s judicial review challenge. There was no interest from the major political parties in excepting the proceedings from the scope of the Bill. A Supplementary Order Paper by New Zealand First proposing to do so garnered the additional support of only the Hon Peter Dunne. My clients, the Mangawhai Ratepayers and Residents Association, are outraged. They may well try to entice the Court into making declarations about what Parliament has done. If their visceral outrage is anything to go by, New Zealanders are indeed offended by egregious breaches of the rule of law when they are personally affected by them.

And this is my point. The general New Zealand cultural predilection for fairness may well, in the right circumstances felt directly by New Zealanders, translate into support for the rule of law. In such circumstances, they may well turn to the Courts as their last bastion of defence. If that happens often enough to generate a national groundswell of opinion, we may well see fairness reinforcing the rule of law as a constitutional norm and supporting an increase in the power of the judiciary to check Parliamentary sovereignty. But there are two key points about that. First, I don’t think we’re there yet. Second, it depends crucially on public opinion. New Zealand public opinion has, in the past, found it difficult to get exercised about the exercise of

government power. Lord Cooke’s safety line to the potential judicial overriding of Parliamentary sovereignty has never had to be firmly gripped.\(^{52}\) Ultimately, the strength of the rule of law as a constitutional norm in New Zealand depends on whether the judiciary’s decisions supporting the rule of law against Parliamentary sovereignty have the support of public opinion over the long term. In this, the judiciary and Parliament “bargain” in the shadow of the people.\(^{53}\)

IV A Prescription for Judicial Institutional Health

It is time to sum up the key points made in this paper so far:

1. Fairness and natural justice is a core animating ideal of New Zealand culture, as per David Hackett Fischer. But this does not necessarily mean that we look to judges to provide it. When frustrated with the working of its political constitution, New Zealand opted for a political rather than a judicial fix, in the turn to MMP. This is consistent with a tendency towards a-legal law reform initiatives over the past 50 years.

2. Public confidence in the New Zealand judiciary is reasonable and certainly better than that in Parliament. But when the question was asked in 1985 and 2005 whether judicial power should be increased, two select committees answered in the negative.

3. This month, the Constitutional Advisory Panel has reported that there is no significant public support for a supreme written constitution which empowers judges to strike down legislation. Yet the Panel recommends a review of the New Zealand Bill of Rights Act 1990 to explore, among other things, “giving the Judiciary powers to assess legislation for consistency with the Act”.

4. In instances of significant constitutional dialogue the judiciary has not come off too badly. It has not engaged significantly in constitutional

\(^{52}\) Taylor v New Zealand Poultry Board [1984] 1 NZLR 394, 398 (CA).

\(^{53}\) Palmer, Constitutional Dialogue at 73-75.
dialogue since the highest court relocated from London to Wellington in 2004. However, in the one clear case where it has, the Supreme Court has adroitly navigated the political shoals.

The general New Zealand cultural predilection for fairness may well, in the right circumstances felt directly by New Zealanders, translate into support for the rule of law. But it does not yet, and to do so would depend on whether public opinion favours judicial decisions supporting the rule of law over Parliament’s decisions.

So what advice can be offered to the judiciary about their place in the constitutional culture of New Zealand? My main suggestion is: don’t take that place for granted. New Zealanders constantly reassess their views of their public institutions, as the public opinion polls illustrate. The judiciary needs to maintain its commitment to high quality judicial decisions that are, and are seen to be bounded by the traditional parameters of precedent and conservatism. So the judiciary needs to keep on doing its conventional job. It should not seek out constitutional adventures unless it is sure of its ground. The Supreme Court’s Water decision illustrates what can be done using a sophisticated approach to the judicial function.

But neither should the judiciary shy away from hard decisions. The judicial function must be exercised, and seen to be exercised, without fear or favour. In particular, of course, government or political opposition is not a reason to for timidity. And it is likely to be in the cases of difficult constitutional issues where the views of Parliament may not be consistent with the rule of law, that the value of the judiciary is likely to be proved most effectively to New Zealanders.