

3081

As a supporter of Amnesty International and their ongoing campaigns, I write to add my voice in support of its submission to the current constitutional conversation.

I am concerned that all our human rights are not adequately protected in New Zealand law. It has already been shown that the current government does not follow international law by the eroding of our labour protections and this adds to my concern.

For example, our Bill of Rights Act 1990 only incorporates civil and political rights. Yet, it is widely recognised that human rights are interrelated, interdependent and indivisible; this means that one set of rights cannot be enjoyed in a meaningful way if the other set of rights is not also adequately protected and respected too.

I believe civil and political rights, such as the right to life, equality under the law, etc. and these cannot truly be achieved without the equal right to work, accessible health care, protections for workers and adequate housing and education, which are enshrined in the concepts of economic, social and cultural rights.

Despite having ratified the International Covenant on Economic, Social and Cultural Rights in 1978, successive New Zealand Governments have failed to fulfill their obligations to respect, promote and fulfil these human rights.

While the Government says economic, social and cultural rights are currently protected by subject specific statutes, current issues involving these rights, such as child poverty, show that the current system is not working to adequately protect our rights. The maze of laws and policies around economic, social and cultural rights make it difficult for New Zealanders to understand and access their rights.

Without a clear framework to guide legislation and policy it also makes it difficult to see if laws policies are actually working to recognise New Zealanders rights. In addition many human rights in New Zealand lack avenues to remedies if they are breached, which limit New Zealanders access to justice-- an essential right of victims of all human rights violations.

I therefore submit the following recommendations:

- The incorporation of economic, social and cultural rights into the Bill of Rights Act 1990;
- The entrenchment of the Bill of Rights Act 1990 so that the weight and importance of these rights is adequately recognised;
- The explicit inclusion of the power for judges to provide remedies when the Bill of Rights Act is violated;
- That New Zealand ratify the Optional Protocol for International Covenant of Economic Social and Cultural Rights, including opting in to its inquiry and inter-state mechanisms, so that New Zealanders have access to an international remedy;
- The establishment of a Human Rights Select Committee to ensure that the impact of legislation on human rights is sufficiently considered;
- The requirement of all levels of Government to take a human rights approach to addressing human rights issues; and
- Increased human rights education initiatives to increase awareness of economic, social and cultural rights.

I believe these recommendations will provide for stronger protections within our constitutional framework for economic, social and cultural rights.

Taking these measures will ensure a strong legal framework in which all rights are equally protected. It will ensure that the Government can take a rights-based approach to addressing rights issues in New Zealand such as child poverty.

New Zealand has an obligation to take steps to progressively realise such rights as the rights to health, education, and adequate housing. Ensuring they are explicitly protected in New Zealand law is a significant step in ensuring that New Zealand is a place where human rights are protected, respected and fulfilled.

Andy Hipkiss  
Auckland  
New Zealand

3673

**From:** <webmaster@ourconstitution.org.nz>  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 18/07/2013 3:34 a.m.

Sent from The Constitution Conversation #link:<http://www.ourconstitution.org.nz/>.

Full Names: Cosmo Hiron Organisation Name: Email: Phone:  
Postal AddressA: Postal AddressB: Postal City: Auckland Postal Region: North Shore  
Postal Post Code: Postal Country: New Zealand Submission: 1) Do you think our  
constitution should be written in a single document? Why?

No. It's a bit late for that. The population is too diverse, and the nation is as rapidly evolving as ever. Might as well keep is unwritten and fluid as it has been all these years. It ain't broke, and I don't want to encourage a vote on us becoming a republic, because I know how that would end.

2) Do you think our constitution should have a higher legal status than other laws (supreme law)?

In part. It would be nice to have certain pieces, such as the NZBORA, entrenched.

Why?

As much as I enjoy our Parliament's rampant power, it would be cool to have a little bit of safety and stability in regards to a few of the more important matters. Pretty much anything that deals with fundamental rights.

3) Who should have the power to decide whether legislation is consistent with the constitution: Parliament or the Courts? Why?

Isn't this why we have courts? Separation of powers and all that. As much as I would like to believe the ol' section 7 reports really mean anything, I would feel safer if the courts had some more power in this regard. I am more inclined to trust a SC Judge than an elected official.

Submitted on the 18 July 2013 at 03:33

345

**From:**  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 15/04/2013 8:36 a.m.  
**Subject:** <http://www.ourconstitution.org.nz/> form submission

Sent from The Constitution Conversation #link:<http://www.ourconstitution.org.nz/>.

Full Names: Erica Joyce Hiscock Organisation Name: Email:  
Phone: Postal AddressA: Postal AddressB: Postal City:  
Tokoroa Postal Region: South Waikato Postal Post Code: Postal Country: New Zealand  
Submission: As a person born in nz with Mario blood I believe that all people that live here are new  
zealanders as we all should be treated the same. The Mario race have had so much money given to  
them and yet they always want more but what are they doing with all  
that money as so many of them need help as they are still living below the poverty line, not doing well  
in school, and getting into trouble with the law. they always seem to have their hand out for more  
money, help and special treatment in all walks of life.  
They have their own health system etc and yet still use nz health system and wins and school  
system. That makes me feel like I am not important to nz except to earn money working and pay taxes  
so more money can be handed over to the Mario and that money is  
not helping all of the iwi that it is going to but only helps the few to be even richer.

If you live in nz by birth or chose we all should be treated the same. Same chance for a good  
education, good health system and govt. help if needed.

Stop treating one part of the people in this land and more important than everyone else. I get no help  
from the Mario blood in me I work and pay my taxes I have raised my family who also either work still  
or are off work at the moment to raise their children  
and it is very hard to get ahead as the govt is treating one part of the people as more important no  
matter how silly their demands are now getting. Like owning water, sea shore, etc what next the air  
we breathe. Why should everyone else have to use our tax  
dollars paying for these silly demands. We should be one people in one land working for a better life  
for all and making nz a better place in the world and a laughing stock in the world.

Thanks

Sent on the 15 April 2013 at 08:35



4582'

**From:** Amme Hiser  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 5/08/2013 8:21 a.m.  
**Subject:** Submission for constitutional review  
**Attachments:** Submission to NZ Constitutional review.docx

I am sorry this is late and short! but better late than never! I would have loved to write more however have just run out of time this time! good luck and I hope you get some amazing and forward thinking ideas for this incredible country!!! thank you for listening!

Yours sincerely,  
Amme Hiser

Submission to NZ Constitutional review.

I would be SOOOO happy to see New Zealand as an entirely self contained country.

For government to support local food and local and renewable energy. The government Needs to support and put money towards renewable energy and encourage the job market in renewables and give up on the digging up of fossil fuels and destroying our Pure reputation and environment! We have worked on this image for so many years and now are destroying it so quickly.

Encourage school gardens and healthy eating from local sources. ie organic apples from the farm down the road. Therefore giving a local farmer a local income source, providing the kids with healthy food maybe they can even go and pick them! And good non processed food! I would like to see the govt encouraging this through their legislation rather than making it more difficult for anyone small or the school due to regulation etc.

TO have a focus on local sustainable public transport. Setting up cycle paths, trains, free public transport through cities, and car share schemes as well as supporting intercity busses so they have more of an opportunity to flourish and private cars are not needed. If money and support went toward this angle of people movement we would not need to build more motorways!

I would like to see fuel restrictions and efficiency regulations on all cars and especially on imported cars! Currently there is not a fuel efficiency regulation on new cars and this is an obvious and easy change we can make now.

## Submission to the New Zealand Constitutional Advisory Panel 2013

As a supporter of Amnesty International, I write to add my voice in support of its submission to the current constitutional conversation.

~~I am concerned that all our human rights are not adequately protected in New Zealand law.~~

For example, our Bill of Rights Act 1990 only incorporates civil and political rights. Yet, it is widely recognised that human rights are interrelated, interdependent and indivisible; this means that one set of rights cannot be enjoyed in a meaningful way if the other set of rights is not also adequately protected and respected too.

I believe civil and political rights, such as the right to life, cannot truly be achieved without the equal right to work, accessible health care, adequate housing and education, which are enshrined in the concepts of economic, social and cultural rights.

Despite having ratified the International Covenant on Economic, Social and Cultural Rights in 1978, successive New Zealand Governments have failed to fulfill their obligations to respect, promote and fulfil these human rights.

While the Government says economic, social and cultural rights are currently protected by subject specific statutes, current issues involving these rights, such as child poverty, show that the current system is not working to adequately protect our rights. The maze of laws and policies around economic, social and cultural rights make it difficult for New Zealanders to understand and access their rights.

Without a clear framework to guide legislation and policy it also makes it difficult to see if laws policies are actually working to recognise New Zealanders rights. In addition many human rights in New Zealand lack avenues to remedies if they are breached, which limit New Zealanders' access to justice - an essential right of victims of all human rights violations.

I therefore submit the following recommendations:

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- The explicit inclusion of the power for judges to provide remedies when the Bill of Rights Act is violated;
- That New Zealand ratify the Optional Protocol for International Covenant of Economic Social and Cultural Rights, including opting in to its inquiry and inter-state mechanisms, so that New Zealanders have access to an international remedy;
- The establishment of a Human Rights Select Committee to ensure that the impact of legislation on human rights is sufficiently considered;
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Jessica Hitchcock  
Auckland  
New Zealand



2086.

**From:** <webmaster@ourconstitution.org.nz>  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 2/07/2013 8:07 a.m.  
**Subject:** <http://www.ourconstitution.org.nz/> form submission

Sent from The Constitution Conversation #link:<http://www.ourconstitution.org.nz/>.

Full Names: john hitchings Organisation Name: Email: Phone:  
Postal AddressA: Postal AddressB: Postal  
City: Postal Region: auckland Postal Post Code: Postal Country: New  
Zealand Submission: We should dispense with the Maori Electorates. People of Maori ethnicity are  
now well represented in parliament in general seats.

The term of parliament should stay at three years. Our checks and balances are few. Any reasonable government gets a second term so they have six years in office. Plenty of time.

Voting should remain a paper based system. Harder for it to be perverted.

Sent on the 2 July 2013 at 08:06

2030

**From:** <constitutionalreview@justice.govt.nz>  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 2/07/2013 4:28 p.m.  
**Subject:** CAP Submission

Dear Constitutional Advisory Panel,

I strongly disagree with a certain people or race of any kind being automatically allowed a seat in the government, we should abolish the whole idea before we end up becoming some type of apartheid.

Yours sincerely,  
Peter Hitchman

738

**From:**  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 3/05/2013 10:55 p.m.  
**Subject:** <http://www.ourconstitution.org.nz/> form submission

Sent from The Constitution Conversation #link:<http://www.ourconstitution.org.nz/>.

Full Names: Sarah Ho Organisation Name: Email: Phone:  
Postal AddressA: Postal AddressB: Postal City: Auckland Postal Region: Postal Post  
Code: Postal Country: New Zealand Submission: Yes the constitution should be in one  
document then all people would know what document to refer to if needing to know their rights.

I'm not sure if it should have higher legal status than other laws, I don't know enough about law to make that judgement. My intuition thinks yes but I'm not sure why.

The courts definitely should have the power to decide whether legislation is in line with the constitution, that's what lawyers do best. It is also fairer, based more on facts and degree in the courts rather than personal judgement of elected representatives whom people may not agree with.

Sent on the 3 May 2013 at 22:54

2361

**From:** Neville Hoare  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 3/07/2013 9:09 p.m.  
**Subject:** CAP Submission

Abolish maori seats

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1620

**From:** <  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 26/06/2013 2:39 p.m.  
**Subject:** Submission

Good afternoon

Thank you for the opportunity to contribute through The Constitution Conversation. I wish to make the following submissions for consideration.

#### Social Policy

The 1972 NZ Royal Commission on Social Policy took as an essential principle that society should aim "to ensure, within limitations that might be imposed by physical or other disabilities, that everyone is able to enjoy a standard of living much like that of the rest of the community and thus be able to enjoy a sense of participation in and belonging to the community".

I submit that this principle should be embodied somewhere in our constitution. Failure to realise such a standard of living disadvantages a significant proportion of people and is likely to lead to alienation, with increased levels of ill-health, violence, child abuse, family breakdown, crime, and various addictions.

An important measure towards achieving such a minimum standard of living would be the adoption of an Unconditional Basic Income. Amongst other things this would acknowledge the value to society of unpaid work which is so essential to the wellbeing of all.

#### Electoral Affairs

Political parties should not be able to bring in extra MPs if they fail to cross the 5% threshold, or whatever other level may have been set. If the present government does not adopt this rule in time for the 2013 general election it is imperative that a further opportunity be given then for the electorate to vote by referendum on this principle.

Yours truly  
Leo Hobbis

1687

**From:**  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 28/06/2013 12:10 p.m.  
**Subject:** Constitution

Sirs,

New Zealand does NOT need a written constitution and I strongly oppose any legislation or reference to the Treaty of Waitangi should one be drafted now or in the future.

From Eunice Hobbis

Tauranga

3928

**From:** <webmaster@ourconstitution.org.nz>  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 28/07/2013 11:44 a.m.  
**Attachments:** NZ Const Review.doc

Sent from The Constitution Conversation #link:<http://www.ourconstitution.org.nz/>.

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Full Names: THOMAS CHRISTIAN HOBDELL JACKSON & VICTORIA D'ENTRECASTEAUX  
JACKSON Organisation Name: Email: Phone:  
Postal AddressA: Postal AddressB: Postal City: NELSON Postal Region:  
Postal Post Code: Postal Country: New Zealand Submission: Submission Upload:  
NZ Const Review.doc

Submitted on the 28 July 2013 at 11:43





## **Responses to the questions posed in the topics for the Constitutional Review Consultation**

How many members of Parliament should we have? Why?

No more than 100, Unless the population of NZ increases dramatically, 100 MPs can both adequately represent the range of views and be sufficient to deal with the business of government. At present the NZ electorate are represented about three times as well as the UK electorate. To make this more workable the threshold for party representation should be 5% and there should be no 'coat-tail' representation. In addition, political parties should not be recognised without a much high membership threshold than at present.

How long should the term of Parliament be? Why?

4 or 5 years. The current three is too short for effective government, especially in a proportionally representative Parliament in which coalitions are the rule rather than the exception. For a government to implement effectively a range of policies, at least four years is really required. On the other hand, six years may be too long if a government and its policies become extremely unpopular. In addition, three year Parliaments encourage governments to rush through legislation to be seen to be accomplishing goals. This can lead to poorly drafted legislation and inadequate consultation and debate. There has been too much use of passage under 'urgency', precluding proper consultation, examination and debate. This practice should be limited to genuine crises or emergencies and should also require a higher threshold than a simple majority, possibly as high as 67%. There may be a case that less frequent elections might also increase voter participation.

How should the election date be decided? Why?

Fixed, unless the govt loses a series of confidence votes and clearly no longer has a working majority. The Governor General should then set a date for a new election.

What factors should be taken into account when the size and number of electorates are decided? Why?

Geography and demographics may influence the size of electorates, but there should be minima and maxima for electorate populations such that no electorate is more than say 30% larger than the smallest.

What should happen if a Member of Parliament parts ways with the party from which he or she was elected? Why?

Electorate MPs should continue if they wish.

List MPs should resign; they could become MPs for their new party if there is a list vacancy for the party they join, if not they should leave Parliament.

Electoral review, including wide-ranging consultation should take place every 20 years, conducted by a completely independent Review body, chaired by a high court judge. If the review body feels that its recommendations will make fundamental changes, the review

recommendations should be subject to a referendum. The results of the review and any referendum should be binding on Government.

How should Maori views be represented in Parliament? Maori views are represented by MPs of Maori ethnicity of whom there is approximately proportional representation to their numbers in the population. If numbers of Maori opting to vote in a Maori seat electorate falls below the minima proposed above, then the seat should be absorbed into the general electorate. There does not appear to have been any reluctance on the part of the general electorate of New Zealand to elect MPs of Maori or any other ethnicity.

How could Maori electoral participation be improved?

Maori participation in government at national level is already consolidated and the numbers of Maori MPs is broadly consistent with their numbers in the population. Their participation in local government appears to need improvement. Additionally, it is our perception that Maori are less likely to vote in all elections than other ethnicities. Only education and community involvement can make improvements with this issue, especially among urban Maori who may lack the support of Iwi and community structures.

How should Maori views and perspectives be represented in local government?

We do not support ethnically designated seats on any elected body, especially not if those seats are not subject to a democratic process. Certainly Iwi-appointed seats should not be adopted. Consultation through elected Maori local boards is certainly one way forward. It must be said, however, that in areas with high representation of other ethnicities, such as Pacifica, it could be argued that they too should have such boards. Indeed there are areas of Northland where it could be said that Pakeha should! Basically, New Zealand is pretty good at consultation and communication and has become progressively better over the years. We need structures for consultation on larger issues, oversight and accountability of our representatives and transparency in the actions taken by government and bureaucracy at all levels.

Does the Bill of Rights Act protect your rights enough? Why?

Probably not. It might be better if the Bill of Rights incorporated all the fundamental rights which are defended in other laws. If this were the case it might become an element of 'supreme law' upon which the courts could test other laws when challenged. However, whether it is realistic to have 'supreme laws' without a written constitution is questionable.

Do you think the Act should have a higher legal status than other laws (supreme law)? Why?

See above

Who should have the power to decide whether legislation is consistent with the Act: Parliament or the Courts? Why?

Courts, but only as a result of challenges. It is part of the checks and balances necessary in the legislation, execution and administration of our laws that legislators and executives should not be the judges of whether their own actions infringe the rights of the governed.



In order to make the option of challenging accessible to everyone, some balanced system of legal aid would be necessary, which supported the right of access to the law without encouraging frivolous or nuisance challenges.

What additional rights, if any, could be added to the act?

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Like many, we are concerned that in an age of computer data-gathering and analysis, both by private and governmental agencies, the individual's right to privacy is being undermined. This needs further protection under the law. Reasons of national security should not be a blanket excuse for governmental monitoring of individuals without their knowledge or consent. Open democratic societies will always be vulnerable to those who wish to attack or undermine their values, rights and legal protections. To some degree that vulnerability is the price of individual freedom and we must accept it and so must our elected leaders.

Do you think our constitution should be written in a single document? Why?

This is not necessary. The current legal basis of an un-written constitution allows for natural evolution to match that of social and political trends in our society. However it may be that certain principles could be established as supreme law by Parliament, requiring a much higher threshold of approval (possibly as high as 75%) for passage into law or for that matter for repeal. However, as indicated above this may be a flawed attempt to have our cake and eat it!

Do you think our constitution should have a higher legal status than other laws (supreme law)? Why?

Presumably this would and could only apply if we had a written constitution, which we would not advocate.

Who should have the power to decide whether legislation is consistent with the constitution: Parliament or the Courts? Why?

Courts. The courts are presumed to be independent of government and also less affected by anecdotal issues of the day and therefore more concerned with on-going legal principle than political expediency.

Thinking of the future, what role do you think the Treaty of Waitangi could have in our constitution?

Do you think that the Treaty should be made a formal part of the constitution? Why?

No, it should not be part of the constitution either un-written, as now, or in any written form. At present it constitutes a set of widely recognised principles which are applied in the formation and application of our laws and constitution. It would be impractical and contentious to take this status further.

**Tom and Vicky Jackson**





## Submission to the New Zealand Constitutional Advisory Panel 2013

As a supporter of Amnesty International, I write to add my voice in support of its submission to the current constitutional conversation.

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For example, our Bill of Rights Act 1990 only incorporates civil and political rights. Yet, it is widely recognised that human rights are interrelated, interdependent and indivisible; this means that one set of rights cannot be enjoyed in a meaningful way if the other set of rights is not also adequately protected and respected too.

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Jill Hobden  
Hamilton  
New Zealand

73

**From:**  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 30/03/2013 5:13 p.m.  
**Subject:** <http://www.ourconstitution.org.nz/> form submission

Sent from The Constitution Conversation #link:<http://www.ourconstitution.org.nz/>.

Full Names: Geoffrey John Hobson Organisation Name: Email:  
Phone: Postal AddressA: Postal AddressB: Postal City: Auckland Postal  
Region: Postal Post Code: Postal Country: New Zealand Submission: Ironically, I  
believe NZ is one of or maybe the only modern democracy to practice Apartheid. The very definition  
of the word means &quot;Separateness.&quot; This simply has to change. The Maori seats should be  
abolished forthwith and one law for all adopted asap.

What happened in the past, as in all countries, is sometimes regrettable, sometimes unjust. What is  
happening in NZ today is highly divisive and more and more ill feeling is being generated. Simply  
redraft a unitary, fair constitution, with no discrimination  
in favour of or against any particular group(s).

Sent on the 30 March 2013 at 17:12

73a

**From:**  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 24/04/2013 10:25 p.m.  
**Subject:** <http://www.ourconstitution.org.nz/> form submission  
**Attachments:** Submission to theconstitutional debate.doc

Sent from The Constitution Conversation #link:<http://www.ourconstitution.org.nz/>.

Full Names: Geoffrey John Hobson Organisation Name: Email:  
Phone: Postal AddressA: Postal AddressB: Postal City: Auckland Postal  
Region: Postal Post Code: Postal Country: New Zealand Submission:  
Submission Upload: Submission to the constitutional debate.doc

Sent on the 24 April 2013 at 22:25

### **Submission to the constitutional debate.**

I was quite shocked at a TV3 poll tonight following debate as to whether NZ is a racist society. About 75% of respondents thought it is racist. Like most media manipulated debates, though, the terms of reference of the debate were narrow and miss-leading to suit their own agenda.

Inherently, I don't believe NZ'ers wish to be racist and on a day to day basis I don't think they are any more racist, possibly less so, than most other countries in the world.

However, successive law makers and administrators of this country have, and continue to, ignore the groundswell of opinion, by entrenching Apartheid in NZ. This is no exaggeration, for what is the definition of Apartheid? It simply means "Separatism."

While we continue to have separate Maori seats in Parliament, have reserved and separate representation on Councils, special funding for Maori, separate Maori immersion schools, separate tax and common laws, separate health funding, etc. (the list is endless), then Apartheid certainly exists in NZ. Why Maori even have their own separate rugby team, the most iconic and certainly ironic form of separatism (or Apartheid) in this country - given the division and violence that erupted in 1981 against the Springbok tour. Imagine the outcry if a Pakeha or Chinese national team of any sort was created and encouraged the way the Maori All Blacks is.

Real or perceived injustices (and both exist) of the past, simply have to be forgotten after all this time. Constantly harking back to past grievances will, rather than enhance the lives of the so-called aggrieved, generate further ill feeling and discontent in NZ. All of us had injustices perpetrated on us or our ancestors at some time in the past. Trying to affect redress is simply unworkable, whether that injustice occurred 10 years ago, or 1,000 years ago.

As for the Treaty of Waitangi, it should not stubbornly be looked to as a part of any new constitution. There is too much controversy and lack of understanding about said document(s). We should start fresh, recognizing that all people of this country, whether they be say 8<sup>th</sup> generation, or 1<sup>st</sup> generation immigrant, have exactly the same right to be here and equal under the law.

The only way forward for NZ is a "one law for all" society where no one group has any less, nor any more rights or privilege than any other.

73b

**From:** "Geoff"  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 5/07/2013 7:58 a.m.  
**Subject:** CAP Submission

Definitely time to abolish Maori seats. The rest of the world is watching and starting to accuse NZ of practicing Apartheid.

Geoff Hobson

Phone:

Mobile:



267813

only 1 page received  
Page 1 of 2

**From:** \$HOBSON  
**Date:** 8/07/2013 11:47:01 a.m.  
**To:** 1  
**Subject:** Submission

Albany

8-7-13

I as a New Zealand citizen having grown up in a developed society in equality, fairness and comradeship oppose any laws which establish or promote racial distinction or division.

There should be one law for all.

I reject any reference to the Treaty of Waitangi or its principles in any constitutional document.

I ask that such references be removed from all existing legislation.

I would like to see this country move forward in peace and harmony.

ONE LAW FOR ALL is a good place to start.

Thank you

Sylvia Hobson

A PROUD NEW ZEALANDER



## Office of Hon Judith Collins

Private Bag 18041, Parliament Buildings, Wellington 6160, New Zealand. Telephone 64 4 817 6806. Facsimile 64 4 817 6506

received 15/7

To. \_\_\_\_\_

- |   |  |                                    |  |
|---|--|------------------------------------|--|
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Submission received in the Minister's office 11 July 13.

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Wellington

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**Submissions**

Secretariat, Constitutional Advisory Panel  
c/o Ministry of Justice  
DX SX10088  
Wellington

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**SUBMISSION IN FAVOUR OF EXISTING (AND FLEXIBLE)  
"CONSTITUTIONAL" ARRANGEMENTS**

I wish to make a limited submission to the Panel. I am a practising lawyer, but make this submission in an entirely personal capacity: it has not been raised with, and must not be thought of as representing any views of, my firm or my colleagues there.

Although perhaps unexciting for the proponents of the Panel's existence and role, my submission is for "no change" in relation to the Submission Guide's questions about New Zealand's "Constitution", and the Bill of Rights Act 1990. This extends to the questions about the Treaty of Waitangi insofar as those may envisage the Treaty becoming some "formal part of the constitution".

I make no submissions on the Panel's questions about Maori Representation, or Electoral Matters, except to observe that the widely accepted legitimacy of a parliamentary democracy is fundamental to the key governance principle of parliamentary sovereignty.

Rather than repeat my previously expressed reasoning and views on "constitutional" topics, including the Bill of Rights Act, and why our existing (and flexible) arrangements are best preserved, I **enclose** (in case the Panel's members or secretariat would be assisted by some elaboration) copies of the following items:

- my FW Guest Lecture from August 2011, reproduced in the Otago Law Review, volume 12, pages 627-644, in particular, Parts III and IV; and
- my remarks for a recent (April 2013) debate on "Human rights in the Constitution", subsequently broadcast on National Radio.

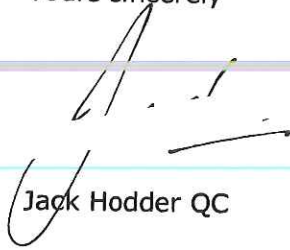
I also **enclose** a copy of an item by Professor Seidman of Georgetown University, "Let's give up on the Constitution", published in the New York Times op-ed pages (30 December 2012), which explains how an entrenched written constitution can undermine self-government.





I would be happy to discuss any of those topics with the Panel and/or its secretariat,  
if that would be helpful.

Yours sincerely



Jack Hodder QC



## CONSTITUTIONAL REVIEW – DEBATE IV (JEH, 29.iv.2013)

The title of this debate is "Human rights in the constitution". That might sound like it involves legal issues. It doesn't. It is really about politics. And I will keep coming back to that crucial point.

The publicity for this debate included four questions. To summarise my "sceptical" views, I start with the short answers to them:

*Q1: Should our Bill of Rights be entrenched and supreme law?*

A: No (for either the 1688 version or the 1990 version). The 1688 version establishes the supremacy of Parliament, and a foundation for political equality.

*Q2: Should we have a Bill of Rights at all?*

A: The 1990 version was unnecessary and flawed, but repeal is not a high priority. The 1688 version has real symbolic importance, and should stay.

*Q3: What other rights should be included? Or not?*

A: Assuming that it remains, the omission of property interests is one of the flaws of the 1990 version. The inclusion of "social" and "economic" interests (or the Treaty) would compound uncertainties. That would undermine the core features of the rule of law and of our democracy.

*Q4: What steps ought to be taken to protect our "human rights"?*

A: The interests of all of us are best protected by an informed and responsive representative democracy. The existing framework involves Parliamentary sovereignty and the rule of law. It is flexible and robust. We should protect and promote it.

In support of those answers, I offer five points of advice.

First, do not be distracted by the word "constitution". It is simply a label to describe a political system. A constitution is not something separate from (or more noble than) a political system. Political systems reflect the revolutions of history - and the evolution of cultures. Ours is different from that of Australia and the UK, let alone the USA, South Africa or India.

Second, be aware that "human rights" is a modern label used to describe just some of the interests in play in a political system. Invoking the rhetoric of a "human right" tells us nothing useful about



the appropriate political (and legislative) response to difficult political issues. What does referring to a "right to life" add when we consider such issues as capital punishment, anti-terrorism measures, abortion, euthanasia or coal mining regulations? It adds nothing.

Third, remember that our representative democracy is about responsiveness and compromise. That is reflected in our abortion legislation, our Waitangi Tribunal and Treaty settlement processes and our MMP electoral system. It is obviously easy to criticise Parliament and Ministers, but they can be voted out (peacefully) and replaced by a new lot. The new lot will favour different interests and different solutions, and will reach different compromises. This may involve stops, starts or U-turns.

Fourth, understand that "entrenching" human rights means the judicialisation of politics. In other words, the courts will have the last word on a range of controversial political issues. In addition to abortion, capital punishment and Treaty issues, these would include the scope of "marriage" (same sex, or polygamy), narcotics prohibitions, religious holidays or exemptions, gun controls or anti-terrorism measures. These issues generate passion, and political pressure, but cannot produce a single "correct" answer. But "correct" and consistent legal answers are what courts are expected to produce: they can't sensibly do compromises or U-turns.

Fifth, be aware that the judicialisation of politics will inevitably move us toward the politicisation of the judges. To a large degree, that is accepted and obvious in the USA, where the Senate reviews Supreme Court appointments, and some state judges are elected. It is less obvious or accepted (but still real) in Australia. But our judges are not supposed to be politically responsive (or politically criticised), nor can they be voted out.

So, the idea of "entrenching" some collection of "human rights" in a "(supreme) constitution" involves a massive shift in political decision-making. A shift from "trusting Parliamentary democracy" to "trusting the judges". The advocates of such a shift (mostly lawyers, you will note) are offering not only damage to our political system but also the undermining of our judicial system.

I understand that the status quo of voting for politicians seems unexciting. But the "entrenchment" idea amounts to voodoo politics. It deserves a prompt stake through the heart, and a very deep burial. Thank you.





## F W Guest Memorial Lecture: 10 August 2011

### Capitalism, Revolutions and Our Rule of Law

Jack Hodder SC\*

#### I Introduction

It is a very great privilege to be invited to deliver this Lecture. Although I have had no direct connection with Professor Guest, I have a long held admiration for the calibre of the Otago Law School and of this series of lectures.

In that context, I wish to pay brief tribute to one of this university's finest legal alumni, and the 1970 F W Guest memorial lecturer. Dr George Barton QC died recently in Wellington. For those of us who studied law at the Victoria University of Wellington in the 1970s, when he was professor and dean, and worked with him later, he was truly a model lawyer. He exemplified both the necessary connection between the practice of law and the study of law, and the courteous pursuit of excellence in each of those spheres.

I emphasise that link between the practice of law and the study of law. The practice of law takes many forms. Some seem remote from the work of professors or judges or legislators. However, my own experience in private and public litigation reminds me almost daily that I remain a student of law. More particularly, I mean a student of substantive laws, of legal theories and of legal processes and institutions.

The challenge attached to the invitation to deliver this lecture is to say something that is worth saying on such an occasion. That challenge is compounded when the invitee is, in most respects, a private practitioner rather than an academic; a generalist rather than a specialist; and, oversimplifying, a conservative rather than a radical. All of which may explain the breadth of what follows.

Your Dean, Professor Henaghan, was unhelpfully generous in indicating that my choice of topics was essentially unconstrained. I indicated that they might include "property rights" and "the rule of law". As it has developed, this lecture will address aspects of those topics. But there is a much wider context.

As it happens, Professor Guest's inaugural lecture, entitled "Freedom and Status", has provided something of a springboard. Speaking 50 years ago, he warned:<sup>1</sup>

Some claims to freedoms made today will seem as absurd 50 years hence, as some nineteenth century claims seem to us today. Amongst claims made today, many people give high priority to the exercise of the rights of

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<sup>1</sup> FW Guest "Freedom and Status" (1965-1968) 1 Otago LR 265 at 274.

private property, in spite of the fact that the law has already been forced to limit these rights. Yet there are people who are so certain that the light of reason reveals to them timeless truths that they are prepared to crystallise in a written constitution a concept which obtains its meaning and value and justification from its context in a changing environment.

Professor Guest was engaged in a pragmatic puncturing of a contemporary suggestion – that “property rights” be enshrined in a written constitution. That is not a suggestion I advance, but I infer that he would have disagreed with some significant parts of this lecture.

For reasons I will come to, I have recently spent some time considering the question of whether property interests require some form of legal reinforcement in New Zealand. In general, the protection of property interests might seem to be at the heart of conservative thinking. However, my interest has been engaged by the counter-intuitive idea that “property” lies at the heart of our revolutionary historical heritage.

History provides a useful reminder about humility. Most lawyers do not lack confidence. We are required to be articulate and to marshal arguments in favour of a particular result. We are critical of the work of legislators, judges, academics, and those who present another view. We persuade ourselves that our argument is more logical or better policy or simply commonsense when compared with the other arguments. As for non-lawyers, we assume that they fail to understand the breadth and beauties of the legal system and thus are intellectually impoverished.

Such thinking perhaps provides some explanation of the ancient and continuing phenomenon of anti-lawyer sentiment. I am not aware that this law school offers a course in anti-lawyer jokes. I am aware that that topic has been the subject of a serious study by Professor Marc Galanter of the University of Wisconsin Law School.<sup>2</sup> However, he is better known to some of us for his study of law firms. In particular, he developed and refined the metaphor of the “tournament” to explain career progression in large US law firms.<sup>3</sup>

I will get to the topic of law firms shortly. My immediate point is that lawyers are prone to a humility deficit disorder. And a subplot to this lecture is that legal processes and the lawyers involved in them have much to be humble about.

In particular, this lecture proceeds on the premise that the legal system is a mere subset of the political system, and that the political system is the product of historical forces in which the law and lawyers were usually peripheral.

So history matters. My favourite authority in support of that

<sup>2</sup> Marc Galanter *Lowering the Bar: Lawyer Jokes and Legal Culture* (University of Wisconsin Press, Madison (Wis), 2006).

<sup>3</sup> Most recently, Marc Galanter and William Henderson “The Elastic Tournament: A Second Transformation of the Big Law Firm” (2008) 60 *Stan L Rev* 1867.



proposition is George Santayana's dictum:<sup>4</sup>

Those who cannot remember the past are condemned to repeat it.

Less well known, but equally eloquent on the same point, just two sentences later, Santayana wrote:

This is the condition of children and barbarians in whom instinct has learned nothing from experience.

## II Capitalism (and large law firms)

The references to "capitalism" and "revolutions" in the title of this lecture may seem grandiose or obscure (or both). So I start with a profoundly practical topic: the New Zealand law firm.

Law firms represent the central tradition of the New Zealand legal profession. The geographical dispersal of our 19th century population meant that a fused profession – rather than a division between solicitors and barristers – was inevitable. The partnership mechanism was available, flexible and practical, and has remained so. Adding a partner created the opportunity for an expansion of the firm's intellectual capital, new and different personalities and skills, a form of additional peer review, and a degree of security and future proofing – all denied to the sole practitioner. That remains so.

In the case of our firm, Martin Chapman commenced practice on his own account in 1875 at the advanced age of 29. He had abandoned Dunedin for Wellington, apparently (in part) on account of the weather.<sup>5</sup> His first partner joined him in 1882 but died in 1888. Leonard Tripp joined him in partnership in 1889.<sup>6</sup> This year Chapman Tripp has a headcount in excess of 350, including at least 50 partners and 130 other lawyers.

That headcount represents a large number of households depending on the firm for income. And a significant number of young lawyers gaining skills and experience. So those of us with governance and management responsibilities make no apologies for dwelling on the continuing commercial success of the firm. For the most part, that is based on striving to recruit and utilise the best quality of lawyers to provide the best quality of legal services to major clients. Those clients are well able to choose among providers.

But there are always other factors to consider. To confirm that at least some lengthy articles from the USA's law schools may have practical relevance here, I mention one of several that I have read and discussed within our firm.

<sup>4</sup> George Santayana *The Life of Reason* (Scribner, New York, 1905) vol 1 at 284.

<sup>5</sup> Peter Spiller *The Chapman Legal Family* (Victoria University Press, Wellington, 1992) at 127.

<sup>6</sup> Ross Gore *Chapman Tripp & Co: The First 100 Years* (Chapman Tripp, Wellington, 1975) at 47.

The article is entitled "The Death of Big Law", by Associate Professor Larry Ribstein, published in the 2010 Wisconsin Law Review.<sup>7</sup> By "Big Law", Ribstein was referring to the largest US law firms. His primary thesis was that, after 50 years of rapid growth, the 21st century has seen low growth, downsizing and even some rapid disappearances within the ranks of "Big Law" firms.

Ribstein's analysis included the following points (that no one mentioned to me in law school):

1. large businesses need skilled and trustworthy lawyers to minimise legal risks to their operations and aspirations;
2. given the lack of transparency in relation to actual legal quality, such businesses purchase legal services on the basis of long-term reputation;
3. the large law firm's need to preserve its long term reputation causes it to monitor and support the work of lawyers within the firm of whom the client (at the outset) knows little or nothing;
4. large law firms have also provided an answer to a client's "peak load problem" in resourcing major dispute or transaction processes;
5. in other words, large law firms have provided reputational capital and "capacity insurance" to clients who are subject to information asymmetry;
6. the large law firm must maintain a firm-focussed culture of trust and cooperation to achieve those roles; but
7. only a limited class of clients and transactions require the large firm's "capacity insurance", and these are concentrating in (and across) global financial centres; and
8. there is difficulty in maintaining the necessary culture in a geographically dispersed firm across "different economic environments with different risks".

Ribstein predicted that uncontrollable forces – ratcheted client demands, increased competition between providers, international regulatory competition – are "likely to be the end of the major role large law firms have played in the delivery of legal services".<sup>8</sup>

He went on to predict that the "death of Big Law has significant implications for legal education". Those implications included reduced salaries for new lawyers hired by large law firms, and less "on the job" training being provided.<sup>9</sup>

From a different perspective, and as an example of contemporary trends, there have been recent reports of a "strategic alliance" being discussed between one of the Australia's leading law firms, and a leading Chinese law firm.<sup>10</sup> Those are very large firms: each is said to have

<sup>7</sup> Larry E Ribstein "The Death of Big Law" [2010] Wis L Rev 749.

<sup>8</sup> At 813.

<sup>9</sup> At 813-814.

<sup>10</sup> For example, Alex Boxsell "Mallesons Thinks Globally" *The Australian Financial Review* (Australia, 22 July 2011).



around 1,000 lawyers. The discussions are said to reflect the growing integration of the Australian and Chinese economies, two of the success stories of contemporary capitalism.

Irrespective of the outcome of those or similar discussions, such news is received by large law firms here in the context of other very recent developments. Those include: the growth of English-speaking legal support services providers in India; the arrival of leading English law firm brands in Australia; and the impetus for a "single commercial market" between Australia and New Zealand.

With such developments, modern capitalism offers us the prospect of "interesting times". However, I should misquote Mark Twain here, and emphatically: any rumour of the death of the large New Zealand law firm is greatly exaggerated.

The developments I have mentioned are of course part of the phenomenon of "globalisation": the modern, internationally connected and highly mobile form of capitalism.

In using the term "capitalism", I am generally following the description in Joseph A Schumpeter's classic text, *Capitalism, Socialism and Democracy*, first published in the 1940s. Writing from a critical perspective, Schumpeter did not describe capitalism as a "system". He saw it was "a method of economic change" that never is and never can be stationary.<sup>11</sup> Ultimately, he thought, capitalism would be killed by its economic successes. These would create an anti-capitalist social and political climate: an "atmosphere of almost universal hostility to its own social order".

The principal legacy of Schumpeter's text is the phrase "Creative Destruction". The ceaseless opening up of new markets, and deployment of organisational developments, amounted to a process of "industrial mutation". A process, he wrote:<sup>12</sup>

that incessantly revolutionizes the economic structure *from within*, incessantly destroying the old one, incessantly creating a new one. This process of Creative Destruction is the essential fact about capitalism. It is what capitalism consists in and what every capitalist concern has got to live in.

Thus, law firms can be thought of as, among other things, providers of services to the capitalist "revolutionaries". Being even-handed, law firms also provide services to those resisting the revolutionaries or embarking on some counter-revolution. The takeover battles of recent decades illustrate this. Yet the law firms themselves must work to survive within the process of creative destruction, mindful of the matters mentioned by Ribstein.

More importantly, "the law" itself provides a fundamental service

<sup>11</sup> Joseph A Schumpeter *Capitalism, Socialism and Democracy* (5th ed, George Allen and Unwin, London, 1976) at 82.

<sup>12</sup> At 83.

for capitalism. The protection of property interests, the recognition of voluntary transactions, the ability to incorporate (especially with limited liability), the orderly disposition of what remains on insolvency, and the impartial and uncorrupt administration of each of these, account for much of the legal system. All of this provides an essential framework for capitalism, and for the work of the large law firms.

Idealists or cynics may consider that all of this reinforces their prejudices, and that the "Big Law" firms are obsessed with the accumulation of wealth – by their clients, and by themselves. They would be wrong. The inhabitants of our large law firms take their professional values as seriously as anyone. Such values are a necessary foundation of the reputation of the firms and their lawyers. Those lawyers are more likely to be independent of commercial pressures on such values than small firms or sole practitioners.

More broadly, the lawyers in large law firms are able to, and do, make a difference in their communities. And their corporate clients (usually comprising talented and thoughtful people) are sufficiently well resourced to defend – and help define – the boundary between legitimate and overreaching exercises of public power.

I accept that a sceptic could think "well, he would say that, wouldn't he?" Nevertheless, I mention those matters because large law firms are an important but opaque part of our legal landscape. And because there are examples, overseas at least, of mischievous myth-making about law firms by other lawyers.<sup>13</sup>

The usual form of this is to portray the separate bar as having a monopoly on fearless and selfless values, in stark contrast to mercenary but craven law firms. This myth ought to be able to be ignored, but some echo of it appears to underpin the current Bill before Parliament to rename, and re-restrict eligibility for, the rank of Senior Counsel/Queen's Counsel.<sup>14</sup> A minor counter-revolution, perhaps.

### III Revolutions (and property rights)

If we remember history, we should remember that laws and lawyers are peripheral to the central contests of politics. Those contests in turn reflect economics, philosophies and geography – and perhaps technology. This is the field of revolutions – of great reversals of conditions and fundamental reconstructions.

Of course the results of those political contests are often recorded in a legal form. Such is the role of the legislative process, and the logic of parliamentary sovereignty, in our political system.

If we remember British history, we find that the foundations of not only parliamentary sovereignty but also modern capitalism owe much

<sup>13</sup> For example, James Allsop "Professionalism and Commercialism: Conflict or Harmony in Modern Legal Practice?" (2010) 84 ALJ 765.

<sup>14</sup> Lawyers and Conveyancers Amendment Bill 2010 (120-2).



to a bloody revolution.

The revolution is that of 1688. It is reflected in the continuation in our own statute book of the Bill of Rights Act 1688.<sup>15</sup> This includes the “politically incorrect” provisions for primogeniture, and against Catholics, in relation to our Head of State.

The “Glorious Revolution” was not limited to establishing parliamentary sovereignty. It involved a transformation to capitalism. This was achieved by the reining in of Crown privileges and arbitrary interventions and expropriations. It was entrenched by serious bloodshed, as explained by the Yale history professor, Steve Pincus, in his book, *1688: The First Modern Revolution*.<sup>16</sup>

In particular, the 1688 revolution involved the defeat of those interests with a natural law (and land-based) perception of property. Those interests were suspicious of trade as an international zero sum game, and considered monopolies the most effective way to advance the national interest – and their own. Hence James II’s protection of the East India Company and the Royal African Company.<sup>17</sup>

However, this Tory view of property and commerce was at odds with the Whigs’ much wider (and labour-based) conception of property interests. Hence the English merchant classes were significant funders of William of Orange’s invasion and regime.<sup>18</sup>

This is the context in which we may read John Locke’s second *Treatise on Civil Government* from the late 17th-century and Sir William Blackstone’s *Commentaries on the Laws of England* in the mid-18th century.

Blackstone explained the essence of the common law, and the civil liberties of the English, as comprising three important rights:<sup>19</sup>

... the right of personal security, the right of personal liberty; and the right of private property: because, as there is no other known method of compulsion, or of abridging man’s natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.

In other words, civil liberties or freedoms are comprehensively encompassed by the “rights” of personal security, of personal liberty and of private property. That is the common law tradition, including at least suspicion of new laws (and thus, of legislation) which might erode those rights. It remains so for personal security and liberty, but why was “property” regarded as so significant?

<sup>15</sup> By the Imperial Laws Application Act 1988.

<sup>16</sup> Steve Pincus *1688: The First Modern Revolution* (Yale University Press, New Haven (Conn), 2009).

<sup>17</sup> At 373-375.

<sup>18</sup> At 381-383.

<sup>19</sup> William Blackstone *Commentaries on the Laws of England* (Dawsons, London, 1966, a reprint of the 1st ed, Clarendon, 1765) vol 1 at 125.

Blackstone elaborated on what property meant:<sup>20</sup>

The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all acquisitions, without any control or diminution, save only by the laws of the land. The original of private property is probably sounded in nature ... but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived for society; and are some of those civil advantages, in exchange for which every individual has resigned as part of his natural liberty. The laws of England are therefore, in point of honour and justice, extremely watchful in ascertaining and protecting this right.

On this foundation of such "absolute rights", together with "auxiliary subordinate rights" such as access to the courts of justice, we find the essence of the Victorian rule of law, restated by Dicey and Bagehot, and imported into New Zealand by British immigrants: liberty under law.

Indeed, the late Lord Bingham has described the significance of 1688 as follows:<sup>21</sup>

The Britain which emerged from the Glorious Revolution was one where the rule of law, imperfectly and incompletely, held sway.

Having identified the 1688 Revolution as a source of much that we take for granted in contemporary New Zealand, it is necessary to mention that rather closer revolution in New Zealand in the 1840s.

In particular, I refer to the analysis of the 1840 revolution by Professor F M Brookfield, not least in his book, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation*.

His conclusion was that:<sup>22</sup>

The Queen on the advice of her ministers had asserted her sovereignty over the whole of New Zealand by acts of state that were revolutionary at least in relation both to the hapu of non-signatory chiefs and (on our consideration of the matter) those of the signatory chiefs also insofar as the absolute sovereignty claimed went beyond what they respectively had ceded. And, as with all revolutions, whatever ideological justification the revolutionaries may claim, the revolution must rest finally upon its success, upon what is 'done', rather than what is just or moral or legal (since the revolution is by definition illegal, in this case in relation to the customary legal orders of Maori.

...

[B]oth Maori autonomy and property rights suffered in the Crown's revolutionary seizure of a power greater than that ceded by the Treaty. The successive New Zealand legal orders at least historically based on that revolution (begun in 1840) have been deficient in legitimacy as a result,

<sup>20</sup> At 134-135.

<sup>21</sup> Tom Bingham *The Rule of Law* (Allen Lane, London, 2010) at 25.

<sup>22</sup> FM Brookfield *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 1999) at 35 and 171.



a deficiency only partly remedied, prescriptively by the passage of time and by certain benefits of Crown rule (as in the ending of slavery and in the rule of law as a means of limiting arbitrary power) that followed the revolutionary seizure.

I endorse the conclusion that the assumption of British sovereignty here was essentially "revolutionary". I understand the political desirability of a less brutal analysis, and the consequent attractions of some vague but ahistorical sense of collegiality in a Treaty "partnership".

As an aside, Brookfield does not rate the events in Britain of 1688 as a revolution, "merely a coup d'état within the monarchy".<sup>23</sup> I prefer Pincus' view that the English revolutionaries created a new kind of state; and a structural and ideological break from the previous regime.<sup>24</sup>

As mentioned, Brookfield observes that Māori "property rights" were adversely affected by the 1840 revolution. There is an interesting echo of that in the Waitangi Tribunal's recent "WAI 262" report, *Ko Aotearoa Tēnei*.<sup>25</sup> The Tribunal used the concepts of "Kupe's people" and "Cook's people" to describe with great eloquence the two waves of settlers of our islands, perhaps 500 years apart.<sup>26</sup> In those terms, Cook's people brought with them their revolutionary heritage (from 1688), and imposed another (in 1840).

The Tribunal prefaced its first chapter, on taonga works and intellectual property, with a quotation from John Locke:<sup>27</sup>

The great and chief end, therefore, of men's uniting into common-wealths, and putting themselves under government, is the preservation of their property.

On the preceding page, the Tribunal featured that part of the preamble to the Treaty of Waitangi recording Queen Victoria as being

anxious to protect [the tribes'] just Rights and Property.

However, as the Tribunal's presiding officer, Justice Joseph Williams, noted recently, Locke's concept of property rights involved an original labour component: a transforming of a natural resource. This did not readily recognise as "property" those things of value in a collective culture which largely co-existed with the surrounding natural resources.<sup>28</sup>

<sup>23</sup> At 85.

<sup>24</sup> Pincus, above n 16, at 1 and 31.

<sup>25</sup> Waitangi Tribunal *Ko Aotearoa Tēnei: A report into claims concerning New Zealand law and policy affecting Māori culture and identity* (Wai 262, 2011). At 1-17.

<sup>26</sup> At 1-17.

<sup>27</sup> At 26.

<sup>28</sup> Joseph Williams "Property or Interest, Private or Public?" (paper presented to New Zealand Law Society Administrative Law seminar, Wellington, 25 February 2011). My lecture is not a defence of Locke, but is concerned with the political and judicial significance of "property". For a detailed analysis of philosophies of property, see JW Harris *Property and Justice* (Oxford University Press, Oxford, 1996).



The Tribunal went on to explain that:<sup>29</sup>

There are two basic promises made to Māori in article 2 of the Treaty. In the English text, the promise is to protect Māori in the exclusive and undisturbed possession of their properties. In the Māori text, the guarantee is of 'teo tino rangatira o ratou taonga katoa' – Māori authority and control over all of their treasured things.

In one sense, although far from completely, the ongoing grievances of Māori derive from a failure of government – since 1840 – to protect their property interests. According to Locke, writing over 300 years ago, that is a recipe for civil unrest.<sup>30</sup>

The end of government is the good of mankind; and which is best for mankind, that the people should be always exposed to the boundless will of tyranny, or that the rulers should be sometimes liable to be opposed when they grow exorbitant in the use of their power, and employ it for the destruction, and not the preservation, of the properties of their people?

Yet, as mentioned at the outset, but only 50 years ago, Professor Guest thought that rights of private property were overstated, possibly absurdly so.

Much more recently, another distinguished New Zealand legal academic has observed that:<sup>31</sup>

the strength of the protection [of property rights] has undoubtedly waned in the course of the 20th century.

Professor Mike Taggart was writing in relation to his identification of a "rainbow" of judicial review, with less of a "hard look" at "non-rights" case, including those involving property interests.

Mention of judicial review is perhaps a key to this apparent relegation of property interests in our legal order. Judicial review is a modern response to the enormous growth in government activities and powers since, say, 1840. The interests of the public, as perceived through the political system and the legislature, have tended to prevail over earlier assumptions of inviolable private rights, especially "property rights".

Among other things, the 20th century also saw the development of planning laws. It was those which attracted attention in Professor Guest's inaugural lecture as undermining any claims of priority for the exercise of rights of private property.

More recently, we have experienced a judicial focus on the New Zealand Bill of Rights Act 1990, and concepts of "human rights". The NZBORA has no explicit mention of property rights, and it seems to have been this omission which, in our public law, has led to a downgrading of the value of protection of property interests.

<sup>29</sup> Waitangi Tribunal, above n 25, at 43.

<sup>30</sup> John Locke *Second Treatise on Government* (1690) at [229].

<sup>31</sup> Michael Taggart "Proportionality, Deference, *Wednesbury*" [2008] NZ L Rev 423 at 469.

Curiously as Professor Taggart noted, such waning of property interests protection had occurred without any real debate.<sup>32</sup>

the reason for cleaving rights and wrongs is in fact to ensure that in the borderland lawyers argue and judges articulate a clear and clearly reasoned position. If children's rights have now achieved fundamentality, or if property rights have slipped out of that charmed status, let the judges clearly say so and tell us why.

It is not surprising that some of us are asking "when" and "why" and "by whom" did it come to pass that, in Blackstone's language, the law ceased to be, in point of honour and justice, extremely watchful in ascertaining and protecting rights of property.

However, the protection of property interests has attracted some recent attention. It is a feature of the Regulatory Standards Bill which currently stands referred to a select committee. The Bill is almost unchanged from the draft included in the September 2009 report of the Regulatory Responsibility Taskforce.<sup>33</sup> I was one of the seven person (unanimous) Taskforce. Each of us operated in the private sector, and none of us had any difficulty in concluding that there was a case for improving the protection of property interests. In subsequent debates on the Taskforce's work and the Bill, it has been notable that the critics operate in the public sector or academia.

In any event, clause 7 of the Bill includes as one of the "principles of responsible regulation" a requirement that, subject to any incompatibility which is reasonably and demonstrably justifiable in a free and democratic society, legislation

should not take or impair, or authorise the taking or impairment of, property without the consent of the owner unless

- i) the taking or impairment is necessary in the public interest; and
- ii) full compensation for the taking or impairment is provided to the owner; and
- iii) that compensation is provided, to the extent practicable, by or on behalf of the persons who obtain the benefit of taking or impairment.

This is intended to be a constraint on expropriation. Remembering English history again, it reflects a concern articulated by Oliver Cromwell that a majority of "have nots" may legislate to dispossess the "haves". Forty years before the 1688 revolution, Cromwell is reported to have expressed his concern that:<sup>34</sup>

If they that have no goods and chattels make the laws equally with them that hath, they will make laws to take away the property of them that hath.

<sup>32</sup> At 470.

<sup>33</sup> Regulatory Responsibility Taskforce *Report of the Regulatory Responsibility Taskforce* (prepared for the Minister of Finance, 2009).

<sup>34</sup> As cited in Michael Foot *Aneurin Bevan 1899-1945* (Granada, London, 1975) at 99.



I will not address here the arguments about the merits of the Bill.<sup>35</sup> I will explore why it is that property interests have become a candidate for reinforcement.

In my lifetime and in this country, the protection of property interests has largely been taken for granted. There have been excitements at some of the margins such as police powers of entry, expansion (or not) of copyright, and specific legislative or executive decisions (on native forests or enforced access to telecommunications infrastructure, for example). There is also a much larger and longer story about the seabed and foreshore. But nothing has occurred to remind us that protection of property interests is a revolutionary inheritance.

I suspect that some contemporary relative neglect of property as an important legal value is attributable to two factors. First, a somewhat elitist distaste for commerce and capitalism, as anticipated by Schumpeter. Second, an uncritical embracing of the NZBORA's list as the truly important "rights" in the academy and the judiciary.

The first of those suspicions is inevitably impressionistic. It is indicated in part by the absence of any recent judicial articulation of the importance of property interests. Thus I have no recollection of any recent appellate statement in general support of such interests in New Zealand, nor of recent endorsement here of any interpretative presumption against interference with vested property rights.

Recent decisions of the High Court of Australia and the UK Supreme Court provide modern support for Bennion's interpretative presumption against doubtful penalisation and his sub-presumption against statutory interference with property or other economic interests.<sup>36</sup>

In New Zealand, this presumption is treated as all but neutered. In Burrows and Carter's text on statutory interpretation,<sup>37</sup> we do not find any clear statement that the exercise of property rights is a "fundamental" matter engaging any interpretative or judicial review protection.

This is especially curious when the protection of property interests of foreign investors in New Zealand is a matter of explicit importance in a number of bilateral investment treaties. The result is that, in some circumstances, overseas investors will have greater protection against expropriation of property in New Zealand than locals.<sup>38</sup>

<sup>35</sup> I have addressed these elsewhere. See Jack Hodder SC "Public Law, Public Rights and Principles for Legislative Quality" (paper for New Zealand Law Society Administrative Law seminar, Wellington, 25 February 2011).

<sup>36</sup> See *Fazzolari Pty Ltd v Paramatta City Council* [2009] HCA 12 at [40]-[43], cited with approval in *R (on the application of Sainsbury Supermarkets Limited) v Wolverhampton City Council* [2010] UKSC 20 at [11]. See also FAR Bennion *Bennion on Statutory Interpretation: A Code* (5th ed, LexisNexis, Wellington, 2002) at part XVII.

<sup>37</sup> JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009).

<sup>38</sup> See, for example, the New Zealand China Free Trade Agreement 2008, Chapter 11 (Investment), not least Article 145 (compensation for

As a further aside, it might be said that “the law”, and our modern judges, are not conspicuously solicitous of the needs of capitalism. Thus, for example, in relation to the essential role of the company and of limited liability, there has been a stream of cases ratcheting up the expectations of directors, and rather draining the “safe harbour” of reliance on external advisers and senior employees.<sup>39</sup> Yet there are important wider questions. What does this do for recruitment of company directors? Or the encouragement of entrepreneurs?

In terms of the long title of the Companies Act 1993, does this recognise the value of the company as a means of, among other things, “the spreading of economic risk; and the taking of business risks”?

In a different area, the recognition of voluntary transactions, it is difficult to praise the work of appellate courts. In the fundamental area of interpretation of contracts, for example, we continue to reap the rather incoherent consequences of the opening of Pandora’s box involved in purposive interpretation and the use of pre- and post-contractual materials.<sup>40</sup>

My second suspect in the erosion of property protection is the uncritical elevation of the NZBORA list of rights to some sort of quasi-constitutional or Premier League status, with the rest (including property) in the Second Division. This appears to be confirmed by much recent commentary on public law and the “rainbow” of judicial review. It is troubling for various reasons.

First, it involves a fairly blunt judicial rejection of political and legislative history. The NZBORA was pruned from its original “supreme law” aspirations in the absence of any political support for that (beyond a few in the ranks of the judiciary and academia). It was enacted as explicitly “declaratory” of some existing “rights”, and thus non-exhaustive.

Second, there is a mythology surrounding “human rights” which tends to obscure the political interests involved. As a Columbia history professor, Samuel Moyn, has recently explained, the concept of human rights only took off on an international scale in the late 1970s; and it is not, and was not developed as, the only answer of a post-World War 2 world to a repetition of the Nazi Holocaust.

In *The Last Utopia: Human Rights in History*, Professor Moyn explains that there is a confusion between two supposed and incompatible goals: catastrophe prevention, through minimalist norms; and building utopia, through maximalist political vision. In each case, the idea is that human rights transcend ordinary politics. However, as Moyn concludes, human

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expropriation).

<sup>39</sup> Most recently, *R v Moses and others* HC Auckland CIV-2009-004-1388, 8 July 2011.

<sup>40</sup> Most recently, David McLauchlan “Contract Interpretation in the Supreme Court: Easy Case, Hard Law?” (2010) 16 NZBLQ 229.



rights cannot be all things to all people.<sup>41</sup>

#### IV Our rule of law (and praise of an unwritten constitution)

The idea that “human rights” may somehow trump decisions emerging from the messy worlds of politics is understandable but dangerous. There is a rhetorical ring to “rights” which has a long history. Yet the lesson of history is that it is the messy worlds of politics that matter.

That is not to abandon the idea of constraints on politics and government. My contention is that the “rule of law”, not “rights talk”, is the most useful concept for consideration and support of such constraints. But the rule of law will reflect aspects of the particular political system. Hence the reference in my lecture’s title to “our rule of law”.

In recent times, the phrase “the rule of law” has featured in two significant statutes. The Supreme Court Act 2003 established a new court of final appeal, and ended New Zealand appeals to the Judicial Committee of the Privy Council. Section 3(2) provides that:

Nothing in this Act affects New Zealand’s continuing commitment to the rule of law and the sovereignty of Parliament.

More recently, section 4 of the Lawyers and Conveyancers Act 2006 requires that every lawyer providing legal services

must, in the course of his or her practice, comply with the following fundamental obligations:

- a) the obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand ...

This obligation is the distinguishing feature of lawyers as against conveyancing practitioners (who are also tasked with obligations of independence, fiduciary and care duties, and protecting clients’ interests).

In neither statute is there any elaboration of what is meant by “the rule of law”. That is not surprising. In his valuable book, *On the Rule of Law: History, Politics, Law*, Professor Brian Z Tamanaha of St John’s University Law School noted that almost all countries today assert support for the rule of law.<sup>42</sup> He included citations from political leaders of modern Russia, China, Zimbabwe, Indonesia, Iran and Mexico. And he observed that “no other single political ideal has ever achieved global endorsement”. (Note the phrase “political ideal” – not “legal concept”.)

Professor Tamanaha went on to explain that the price of such universal endorsement is a “rampant divergence of understandings”. In the end, he offered three themes: government limited by law; formal legality; and rule of law, not man.<sup>43</sup> Inevitably, much depends on context.

<sup>41</sup> Samuel Moyn *The Last Utopia: Human Rights and History* (Belknap Press, Cambridge (Mass), 2010) at 227.

<sup>42</sup> Brian Z Tamanaha *On the Rule of Law: History, Politics, Law* (Cambridge University Press, Cambridge (UK), 2004) at 2-3.

<sup>43</sup> At ch 9.



In our context, New Zealand in the early 21st century, I offer my own elaboration of key aspects of our rule of law:

1. A fundamental feature of our rule of law is the concept that rules which are enforceable through public agencies (in particular, the courts) must be accessible in advance so as to enable those expected to comply with such rules to shape their conduct accordingly.
2. A second fundamental feature of our rule of law is that the primary institutions engaged in changing publicly enforceable rules are the legislature; those who prepare and promote new or amending legislation; and those exercising delegated legislative powers to make secondary legislation. In various ways, those institutions are politically accountable.
3. A third fundamental feature of our rule of law is the independence of the judiciary from political pressures. This is reflected in a practical and traditional absence of political accountability of the courts for their performance in exercising judicial powers and an absence of overt political considerations in judicial appointments.
4. In the context of those features, the judicial role is that of maintaining and applying the rule of law in deciding cases which fall for determination. In so doing the judiciary maintains the political legitimacy of legal rules and of the exercise of judicial power.
5. While there are substantial areas of judge-made rules, and amendment of those by way of clarification and rational restatement is expected and legitimate, the judicial law-making role is necessarily modest. This precautionary approach is reinforced by the fact that any judicial law-making may be expected to have a range of consequences for a variety of persons not parties to the immediate dispute, by the necessarily narrow focus of the adversarial process; and by the related limits on the information available to judges.<sup>44</sup>

This elaboration owes much to my earlier but rather lengthy life as a producer of *The Capital Letter*, the weekly review of administration, legislation and law. My self-inflicted reading of tens of thousands of judgments, along with parliamentary bills, Hansards, regulations and Ministerial speeches, as well as legal and political analyses, was exhausting but informative. In particular, it left me with an appreciation of the virtues (in most instances) of the parliamentary process, and the limits (in most cases) of the judicial process, in changing legal rules.

As may be obvious, my view of our rule of law traverses the role of lawmakers. To use the language which irritates many judges, it asserts the case for "judicial restraint" and against "judicial activism".

It may be less obvious but my elaboration avoids any use of the word

<sup>44</sup> In the interests of full disclosure, if not plagiarism, this formulation is based on propositions I first advanced in "Employment Contracts, Implied Terms and Judicial Law-Making" in David Carter and Matthew Palmer (eds) *Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson* (2002) 33 VUWLR 895 at 898.

"rights". This reflects both the point that the concept of "rights" is generally unhelpful as an encouragement to judicialisation of what are really political debates, and the "judicial restraint" point.

To return to the concept of "creative destruction", this is applicable to the process of social change as well as economic change. It is a useful way to think about social and political changes in modern times.

If I take 1970 as a starting point, the year I became a law student, New Zealand has undergone quite remarkable changes.

In the area of "morality", mention may be made of "no fault" divorce, of abortion law changes, of matrimonial property sharing, and of decriminalising homosexual conduct.

In the "society" area, we have seen "no fault" accident compensation, a dramatic expansion of shop trading hours, a greater access to alcohol, a reduced age of "majority", and the end of compulsory unionism.

In the "government" area, we have seen "open government" requirements, the end of "first-past-the-post" voting (and single-party governments), Treaty of Waitangi reports and settlements, the "nuclear free" position, the severance of the Privy Council, and the corporatisation of many utilities and government departments.

Each of those changes could have been (and many were) described as "revolutionary", in a non-technical sense. And each of those changes resulted from the political system, culminating in Acts of Parliament.

Cumulatively, the social changes represented by those modern enactments are spectacular. For my current purposes, their primary relevance is as a demonstration of the responsiveness of our parliamentary democracy to perceived demands for change.

It may be noted that the NZBORA is not included in that list. The principal reason for its omission is that it was not intended to be revolutionary, merely declaratory. However, the over enthusiastic embracing of NZBORA by our courts, and in our law schools, is a useful warning at a time when the topic of a written constitution remains undead.

Indeed, only last week, the government announced the membership of a Constitutional Advisory Panel which is asked to report by late 2013.<sup>45</sup> It is to be "part of a long conversation" on that issue, along with the other usual suspects: the place of the Treaty; a Bill of Rights; and the size and length of Parliament.

In contemporary New Zealand, the idea of a written constitution is usually advanced for one of two reasons. First, that this is the way to enhance the rule of law. Second, that it is the way to properly recognise the Treaty of Waitangi.

I address the second reason only briefly. It involves a call for major

<sup>45</sup> Bill English and Pita Sharples "Constitutional Advisory Panel named" (press release, 5 August 2011).



political change. Our current political system is, unsurprisingly after 1840, Anglocentric. It rests on assumptions of individual autonomy and of equality of individuals' opportunities. Any reallocation of law-making power on the basis of ancestry would involve a truly revolutionary departure from those assumptions. And entrenching vagueness about Treaty "partnership" involves an abdication of intensely political questions to the judiciary. Further, insofar as the partnership parties are presented as "the Crown" and "Māori", a significant proportion of the electorate is likely to object to a form of double counting.

In any event, I repeat my view that all of that is a political issue, and is not transcended by the label "constitutional". If the political process yields such an outcome, so be it.

My remaining focus is on the first reason usually advanced for a written constitution: that it enhances the rule of law.

As will be evident, my conception of our rule of law incorporates a bias in favour of our unwritten constitution. For the same reasons that I advocate restraint in use of the term "rights", I advocate similar restraint in relation to the term "constitutional".

I do not of course suggest a necessary incompatibility between the rule of law and a written constitution. But countries such as the USA and Australia have arrangements which illustrate that history matters a great deal, especially in a federation of partly autonomous political entities on a continental scale. Our history gives us the choice, not available to others, of preserving a flexibility in our lawmaking which is responsive to ordinary politics.

With that choice, and repeating some points I made in 2000, I suggest that the idea of a written constitution is founded on two doubtful assumptions.<sup>46</sup> First, that we of today should presume to write down rules to bind generations to come; and, second, when difficult issues arise, our generation or later generations can be comfortable in leaving those to the wise determination of the judges of the day.

The problems inherent in the first assumption take us into the lessons of historical change, and of failed attempts to predict the future. Thus, for example, consider what might have been in a constitution written by the political elites of the day in:

- 1770 (pre-European);
- 1870 (provinces; Māori recognition denied); and
- 1970 (two-party legislature; reticent judiciary; Treaty still in eclipse).

And that brings me to at least partial agreement with Professor Guest. That is, agreement with his warning against those who are so certain of their "timeless truths" that they seek to have them crystallised in a

<sup>46</sup> Jack Hodder "Limits to and constraints on writing down a constitution of a small society used to informality in its politics" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) at 435-436.

written constitution.

## **V Some conclusions**

After so many words, and too many topics, I end with my "headline" conclusions:

1. We should beware of myths about large law firms.
2. We should remember history.
3. We should not ignore our revolutionary heritage.
4. We must expect creative destruction in our economic and social environment.
5. We should be humble about lawyers' contributions to social and political issues.
6. We should recognise the achievements of the "messy politics" of liberal democracy.
7. We should be very wary of "timeless truths" and constitutional reformers.

(4612)

The submitter included the following published material which was removed for copyright reasons:

- **New York Times** – 30/12/12, '*Let's Give Up on the Constitution*', by Louis Michael Seidman.
- 
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4015"

**From:** <webmaster@ourconstitution.org.nz>  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 29/07/2013 9:37 a.m.  
**Subject:** [RELEASED FROM QUARANTINE] [SUSPECT SPAM]

Sent from The Constitution Conversation #link:<http://www.ourconstitution.org.nz/>.

Full Names: David Hodges Organisation Name: Email:  
Phone: Postal AddressA: Postal AddressB:  
Postal City: Auckland Postal Region: Postal Post Code: Postal Country: New  
Zealand Submission: New Zealand signed the International Covenant on Economic, Social and  
Cultural Rights in 1968 and ratified it in 1978, however it has often been honoured as much in the  
breach as in the observance, for example the right to free tertiary education that  
New Zealanders had in 1978 but have long since lost.

The provisions of this treaty have not been incorporated into the Bill of Rights Act and in recent years,  
the National government has taken a disturbingly dictatorial, anti-democratic, anti-human-rights tack.

It has taken a cavalier attitude to democracy, civil liberties and the Bill of Rights Act, passing several  
laws that adversely affect these:

For example:

- \* retrospective legalization of police spying

- \* the April 2013 amendment to the Crown Minerals Act, widely known as the 'Anadarko Amendment'  
abolishing the right to protest at sea.

- \* the abolition of local democracy in Canterbury, with the sacking of Canterbury Regional Council in  
March 2010, with no elections promised until 2013 - and those subsequently postponed further until  
2016.

- \* the Canterbury Earthquake Response and Recovery Act 2010 which gave Gerry Brownlee, the  
Minister for Canterbury Earthquake Recovery almost unlimited power for 18 months.

- \* And most recently the GSCB Bill, which would effectively permit the GCSB to spy on all New  
Zealanders.

The Privacy Act should be strengthened to prohibit any government agency spying on any New  
Zealander citizen without a court order.

The Bill of Rights Act should be strengthened to include economic, social and cultural rights and the  
Privacy Act and Bill of Rights Act should both be entrenched into the constitution so that none of the  
rights in the act can be removed or modified without

a 2/3 majority in parliament. The Bill of Rights Act should take precedence over other acts where those acts conflict with the Bill of Rights Act.

The Constitution should incorporate provisions to prevent central government eroding local democracy, or abolishing it as they did in Canterbury. For example, the government should not be able to force amalgamation of local councils, unless a majority of voters in each council approves the merger in a referendum.

The Local Government Act 2002 Amendment Act 2012 removing local governments' mandate to provide for the "social, economic, environmental and cultural well-being of communities" should be repealed and the constitution should limit central government's ability to arbitrarily restrict local government from stepping in to the breach when central government is derelict in its duties (for example, the provision of low cost housing and regulation of genetically modified organisms).

The Constitution should clearly stipulate that any treaty signed by the government is not enforceable unless and until the treaty is ratified by a 55% majority of parliament.

There should be provision in the Constitution to limit the government's ability to sell state assets without public approval - perhaps all asset sales in excess of \$30 million should require majority approval in a referendum.

The Constitution should recognize that our natural environment is essential and fundamental to humanity's survival and that activities that seriously degrade our environment are inimical to the public good and must be prohibited. The Constitution should require all laws to give due consideration and respect to our environment, human rights and freedoms, democracy and the public good.

Submitted on the 28 July 2013 at 21:52

906

**From:** "John & Jenny Hodges"  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 24/05/2013 7:28 p.m.  
**Subject:** Constitutional Review.

Our submission regarding the New Zealand Constitutional Review is that we want NO CHANGE to New Zealand's unwritten constitution. It has served us well since the 1852 New Zealand Constitution Act was passed which was our founding document. It may require some alteration in the future, but we do not want a Constitution that is in any way race based. We want a New Zealand that is 'One Nation One People, and Equality for all'.  
John and Jenny Hodges, Katikati, New Zealand.

5148

**From:** <webmaster@ourconstitution.org.nz>  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 7/08/2013 4:23 p.m.

Sent from The Constitution Conversation #link:<http://www.ourconstitution.org.nz/>.

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Postal AddressB: Postal City: Auckland Postal Post Code: Postal  
Country: New Zealand Submission: Treaty of Waitangi needs not be part of any constitution.

Deal with it on the basis that it is settled as full and final prior and past.

Full Names: Anita Gay Hodgetts Organisation Name: personal Email:  
Phone: Postal AddressA:

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Submitted on the 13 June 2013 at 16:31



4203

**From:** <webmaster@ourconstitution.org.nz>  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 30/07/2013 2:57 p.m.

Sent from The Constitution Conversation #link:<http://www.ourconstitution.org.nz/>.

Full Names: Matthew Hodgetts Organisation Name: Email: n  
Phone: Postal AddressA: Postal AddressB: Postal  
City: Auckland Postal Region: Postal Post Code: Postal Country: New Zealand  
Submission: He Wakaputanga (the Declaration of Independence) and Te Tiriti o Waitangi (the Maori  
version of the Treaty of Waitangi) should be at the core of any constitution arrangements as they are  
the basis of just and honourable relationships between the Crown and  
Maori.

The Treaty is the founding document of Aotearoa/New Zealand and needs to be central as such in  
our constitution. The Treaty provides the framework for an ongoing relationship between Maori and  
others who came (and some are still arriving) to settle here.

The complete process for working out our constitution needs to be based on the Treaty. It should not  
be about fitting the Treaty into the constitution but making the entire constitution Treaty based.

As a Pakeha I understand that te Tiriti o Waitangi (the Treaty) provided the right for myself and others  
to settle here. Thus the treaty benefits all New Zealanders and provides the basis for just and  
honourable relationships between Maori and all New Zealanders  
and the entire constitution should be Treaty based.

New Zealand has supported the United Nations Declaration on Indigenous peoples so we need to  
commit to this by ensuring our constitution is treaty based.

Submitted on the 30 July 2013 at 14:55

4203a

**From:** <webmaster@ourconstitution.org.nz>  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 30/07/2013 3:27 p.m.

Sent from The Constitution Conversation #link:<http://www.ourconstitution.org.nz/>.

Full Names: Matthew Hodgetts Organisation Name: Email: m  
Phone: Postal AddressA: Postal AddressB: Postal  
City: Auckland Postal Region: Postal Post Code: Postal Country: New Zealand  
Submission: That we remain nuclear free and become more of a peacemaker and have a vast  
improvement in social, cultural and environmental justice.

That there are just and honourable relationships based on Te Tiriti o Waitangi.

That we uphold International human rights law with the Bill of Rights central to the constitution as well.

We need to have a longer period for a longer more in-depth conversation about a values based  
Treaty based constitution.

I would like to see the country run in a better way to reflect te Tiriti o Waitangi, international Human  
rights Law and ecologically sustainable development.

Everyone should be covered in the constitution to have basic human rights such as to have a roof  
over their head, civil rights, privacy, and children should not go hungry.

Submitted on the 30 July 2013 at 15:25

4203b

**From:** <webmaster@ourconstitution.org.nz>  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 30/07/2013 4:22 p.m.

Sent from The Constitution Conversation #link:<http://www.ourconstitution.org.nz/>.

Full Names: Matthew Hodgetts Organisation Name: Email  
Phone: Postal AddressA: Postal AddressB: Postal City: 1  
Howick Postal Region: Auckland Postal Post Code: Postal Country: New Zealand  
Submission: If it can be based on Te Tiriti o Waitangi and include all the protections of Civil and  
Human rights that United Nations declarations have and after a longer in-depth conversation it might  
be good to have it all set out in a single document.

The Courts should have the power to decide whether legislation is consistent with the constitution, because of the need for separation of powers.

The Constitution should have higher legal status than other laws it should be supreme law that is treaty based and incorporates United Nations declarations and human rights Covenants.

Submitted on the 30 July 2013 at 16:20

4203c

**From:** <webmaster@ourconstitution.org.nz>  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 30/07/2013 4:44 p.m.

Sent from The Constitution Conversation #link:<http://www.ourconstitution.org.nz/>.

Full Names: Matthew Hodgetts Organisation Name: Email: Postal AddressB: Postal  
Phone: Postal AddressA: Postal AddressB: Postal  
City: Auckland Postal Region: Postal Post Code: Postal Country: New Zealand  
Submission: No, the Bill of rights does not protect my rights enough, from experience it took about 10  
years to get to a settlement with the Crown over breaches to the Bill of Rights. It worked in the end but  
it took too long and justice delayed is to deny justice.

To protect people's rights properly the Bill of rights needs to become supreme law, that is above other  
Laws that can be overturned by a simple majority in Parliament.

It needs to be entrenched that is a 75% vote of parliament would be needed to alter it.

The Courts should decide when other legislation is consistent with the Bill of Rights as there needs to  
be a separation of powers as this critical human rights law needs to be protected.

The Bill of rights should cover other rights such as basic economic rights like the right to housing, and  
supreme law to stop kids from going hungry.

Submitted on the 30 July 2013 at 16:42



4203d

**From:** <webmaster@ourconstitution.org.nz>  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 30/07/2013 5:19 p.m.

Sent from The Constitution Conversation #link:<http://www.ourconstitution.org.nz/>.

Full Names: Matthew Hodgetts Organisation Name: Email: n  
Phone: Postal AddressA: Postal AddressB: Postal  
City: Auckland Postal Region: Postal Post Code: Postal Country: New Zealand  
Submission: In a way that reflects te Tiriti o Waitangi.

The Maori seats are at least part a reflection of this and should be retained.

Maori participation could be improved by History, Treaty and civics courses in schools.

Maori should have access to Maori seats on Councils representing the Treaty partnership.

Submitted on the 30 July 2013 at 17:18

4203e

**From:** <webmaster@ourconstitution.org.nz>  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 30/07/2013 6:29 p.m.

Sent from The Constitution Conversation #link:<http://www.ourconstitution.org.nz/>.

Full Names: Matthew Hodgetts Organisation Name: Email:  
Phone: Postal AddressA: Postal AddressB: Postal  
City: Auckland Postal Region: Postal Post Code: Postal Country: New Zealand  
Submission: We should have at least 120 MPs but more as the population grows ie. a number of  
MPs proportional to the population.

The term of Parliament should be 3 years as it is now giving the people more chance of removing bad governments.

The election date should be provided by Law so that the Prime Minister doesn't have the advantage over the opposition of setting the date.

The population should be how the size and number of electorates are made up, ie. more representatives as the country grows in population.

An MP should be able to go their own way if the party that elected them no longer represents their policies that they were elected on.

Submitted on the 30 July 2013 at 18:27

2434

**From:** "Adrian Hodgkinson"  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 4/07/2013 8:32 a.m.  
**Subject:** CAP Submission

Abolish. Have New Zealand seats, competitively gained.

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Regards, Adrian Hodgkinson



5202

**From:** <webmaster@ourconstitution.org.nz>  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 8/08/2013 11:46 a.m.

Sent from The Constitution Conversation #link:<http://www.ourconstitution.org.nz/>.

Full Names: Derrick Hodgson Email: Phone:  
Postal AddressA: Postal AddressB: Postal City: Auckland  
Postal Post Code: Postal Country: New Zealand Submission: The treaty is a nonsense  
considering there are two ways to read it depending on which side of the fence you are on. It is a  
document that was drawn up in 1860 and has absolutely no bearing on modern living as the Maori of  
today are very different brings

from the grass skirt wearing Maori of yesteryear. So what about today where they (the Maori) want  
want want but give back nothing. They fill our prisons, 3 out of every 5 is on one sort of benefit or  
another being our country to its knees with an ever increasing

benefit bill. They are like this through making bad decisions and they keep making bad decisions.  
Why should I help someone bring up their kids. I planned my family and I certainly didn't have kids  
until I could afford to have them. This so called 'contract'

called the treaty of waitangi is about being equal and being partners. That is not the case as Maori is  
costing the taxpayers of NZ and their contribution is negligible. Where is the partnership?

Submitted on the 10 June 2013 at 17:57

4812

**From:** <webmaster@ourconstitution.org.nz>  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 31/07/2013 4:20 p.m.

Sent from The Constitution Conversation #link:<http://www.ourconstitution.org.nz/>.

Full Names: Fiona Hodgson Organisation Name: Email:  
Phone: Postal AddressA: Postal AddressB:  
Postal City: Postal Region: Hawkes Bay Postal Post Code: Postal  
Country: New Zealand Submission: NO to Treaty of Waitangi being included in any constitution.

I think it should remain a separate document dealing only with historic issues.

NZ desperately needs to move forward as one people and including the Treaty into a constitution will only see ongoing separation and division occurring.

The treaty is now an aged document written at a time where today's world would never have been envisaged. Similar to some of the articles in the American constitution which has caused division (e.g. the right to bear arms which arises from an archaic document)

I feel we are best to start forward with a constitution which combines rather than divides our people.

Submitted on the 31 July 2013 at 16:19

4812

**From:** <webmaster@ourconstitution.org.nz>  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 31/07/2013 4:24 p.m.

Sent from The Constitution Conversation #link:<http://www.ourconstitution.org.nz/>.

Full Names: Fiona Hodgson Organisation Name: Email:  
Phone: Postal AddressA: Postal AddressB:  
Postal City: Postal Region: Hawkes Bay Postal Post Code: Postal  
Country: New Zealand Submission: In line with my submission re the treaty of waitangi I think that  
the initial reason Maori seats in Parliament were introduced is no longer valid.

There is no longer any barrier to Maori becoming involved in the political system and indeed many are  
outside the traditional Maori seats but still represent the people in other seats.

Local iwi are already listened to by all councils and a culture of inclusion exists so nothing further  
needs to be done in this respect.

Submitted on the 31 July 2013 at 16:23



4812a

**From:** <webmaster@ourconstitution.org.nz>  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 31/07/2013 4:28 p.m.

Sent from The Constitution Conversation #link:<http://www.ourconstitution.org.nz/>.

Full Names: Fiona Hodgson Organisation Name: Email:  
Phone: Postal AddressA: Postal AddressB:  
Postal City: Postal Region: Hawkes Bay Postal Post Code:  
Postal Country: New Zealand Submission: I would like to see the numbers of  
parliamentary members reduced - we have more than most much larger countries.

I would like to see a 4 year term between elections

I would like to get rid of the "coat tail" legislation for members of a small party who are elected into an electorate seat stopping them bringing in a disproportionate number of MPs with regard to their party vote.

I would like ALL list MPs to have their tenure in parliament tied to their party. If they leave the party during a term, they leave parliament and the party can replace them from their list.

Submitted on the 31 July 2013 at 16:27

**From:** <webmaster@ourconstitution.org.nz>  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 27/07/2013 10:43 a.m.

Sent from The Constitution Conversation #link:<http://www.ourconstitution.org.nz/>.

Full Names: Nolan Hodgson Organisation Name: Email:  
 Phone: Postal AddressA: Postal AddressB: Postal  
 City: Wellington Postal Region: Postal Post Code: Postal Country: New Zealand  
 Submission: I believe that the majority of New Zealanders are far too complacent. We trust the government to act in the best interests of the majority but this does not happen. We are far too wealthy for the implications of this corruption to become obvious as most of us do not encounter poverty on a daily basis. But the poverty is there. Not only the physical and emotional poverty experienced by many but I also think a growing poverty of community and certainly an enormous and growing poverty of replenishing environments.  
 We are all so fortunate to have access to clean drinking water yet we continue to pollute our waterways. Collectively, we are sacrificing our environment to exploit our country for minerals. We are greedy and if we want that surplus-driven, economic agenda to underlie our aspirations as a country then we should acknowledge that in a constitutional way. If all we are concerned about is our national debt or balance of payments or OECD rankings then that should be acknowledged.

Fortunately, I don't think this is the case and I do think we desperately need to have this constitutional conversation to force New Zealander's to examine our democratic structure and identity.

We need a constitution borne out of our own unique place in the world. One that enshrines the wellbeing of our entire planet as paramount. Not the wellbeing of the people on the planet, not the money in the bank accounts of those people but the wellbeing of every relationship which exists between all flora, fauna and the environment which support them.

Here in Aotearoa, we are incredibly privileged to be situated so close to Antarctica. Yet we exploit it for our national gain by opening fisheries there. The damage this causes to the local ecosystem and to our international relations as we are the instigators of exploiting this pristine area is enormous and we should be ashamed of it. To my mind there is no logical excuse for this behaviour. The ability to value long-term bio-diversity over short-term economic advantage is a necessary evolutionary step which we must all take together.

I don't necessarily believe we need a single document as a constitution and I think it would be extremely difficult to create one which overrides the Treaty of Waitangi.

I think the courts should have the power to decide whether legislation is consistent with the constitution as if parliament were to do so it would concentrate too much power in their hands as they pass the legislation in the first place. Issues with recent bills (involving the families of people with disabilities, the skycity convention centre and now the GCSB legislation) illustrates how comfortable parliament is in passing constitutionally questionable legislation.

For this reason I do think the constitution should have higher legal status than other laws.

Submitted on the 27 July 2013 at 10:42

1266

**From:** Anna Hoek-Sims <  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 11/06/2013 10:23 p.m.  
**Subject:** CAP Submission  
**Attachments:** constitution review submission.docx

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Hi there,

I have attached my submission for the Constitutional Conversation Review.

Thank you,

Kind regards,

Anna Hoek-Sims





Today, New Zealand faces the question of whether or not the Treaty of Waitangi should be entrenched in a written constitution. I argue that maintaining the Treaty's current status as an "unwritten"<sup>1</sup> part of our constitution and resisting efforts to entrench it will provide more opportunities to enhance Maori-Crown relationships. By retaining the Treaty as it is, application of the Treaty principles will remain more flexible, as opposed to taking on a fixed legal status.

The Treaty of Waitangi, signed in 1840,<sup>2</sup> has been described by Sir Robin Cooke as "simply the most important document in New Zealand history."<sup>3</sup> Despite this recognition, debate over interpretation and application of the Treaty continues today. Orange, Walker and Ward all discuss differences in translation between the three versions of the Treaty and raise questions regarding Maori signatories, particularly whether they fully understood the Treaty's import before signing.<sup>4</sup> Today, additional questions arise through alleged breaches of the Treaty by the Crown over the past 170 years, either through their actions, inactions or via legislation that ignores the Treaty articles and the Treaty principles.<sup>5</sup>

Currently, Te Tiriti is not entrenched in New Zealand law and is only incorporated in law when Parliament makes express reference to it in a clause incorporated in legislation.<sup>6</sup> For example, the Conservation Act 1987 "gives effect to the principles" of the Treaty.<sup>7</sup>

Presently, New Zealanders face a choice where they could either entrench the Treaty in a written constitution or maintain the status quo. Some, like Mathew Palmer, believe the Treaty should be entrenched with the Bill of Rights Act (BORA) thereby creating supreme law and the constitution.<sup>8</sup> However, I believe retaining the Treaty as an un-entrenched part of our constitution allows it to be incorporated into legislation where necessary, and avoids potential problems that could otherwise arise. For example, entrenching the Treaty in a constitution will lead to potential problems of

<sup>1</sup> Hayward, Janine. "The Treaty and the Constitution." In *New Zealand Government and Politics* (5<sup>th</sup> edition), edited by Raymond Miller, pages 105-113. Melbourne: Oxford University Press, 2010. Page 106

<sup>2</sup> Walker, Ranganui. *Ka Whawhai Tonu Matou: Struggle Without End* (Auckland: Penguin Books, 2004), page 94

<sup>3</sup> Hodder, J., Palmer, G., and Richardson, I. "Seminar - New Zealand's Constitutional Arrangements: where are we heading?" *New Zealand Law Society*. May, 2005. page 15

<sup>4</sup> Walker, Ranganui. *Ka Whawhai Tonu Matou*. Page 96

<sup>5</sup> For example, the Foreshore and Seabed Bill 2003 and Act 2004, both of which ignored the Waitangi Tribunal's ruling and the Treaty.

Hayward, Janine. "The Treaty and the Constitution." In *New Zealand Government and Politics*. Page 110

<sup>6</sup> *Ibid* page 108

<sup>7</sup> Palmer, Matthew. *The Treaty of Waitangi In New Zealand's Law and Constitution*. (Wellington: Victoria University Press, 2008). Page 182

<sup>8</sup> Matthew Palmer, "Treaty Debate 1 (2013): Finding a Place for the Treaty." Debate led by Claudia Orange.

*Radio New Zealand National*. At approximately 7.45min. Accessed on:

<http://www.radionz.co.nz/national/lecturesandforums/thetreatydebates> (accessed April 23, 2013)

interpretation, given the existing debate over interpretation of the three articles. It will also require a definition of what it represents;<sup>9</sup> such a definition will be confined to a current-day interpretation, will be subject to considerable dispute, and may lack the flexibility to anticipate future circumstances. In such a case, the Treaty definition may become unwieldy and difficult to change. By contrast, leaving the Treaty un-entrenched allows ambiguities to take a backseat, avoids differences between the articles dominating politics, and better enables progress to be made. Maintaining the Treaty's current position thus allows greater freedom for change, better representation of Māori in key policy areas, and the development of different institutes to resolve Māori issues.

#### **Freedom to alter legislation and provide for the future**

Maintaining the Treaty's current position provides greater freedom to change legislation, if statutes no longer represent or provide for Māori, than if the Treaty was entrenched. This flexibility is evident in the changes that occurred from the 1970s; in several court cases, judges developed Treaty principles that are now recognised by the Crown and Māori and affirmed in legislation. These changes began with the Treaty of Waitangi Act 1975 which identified the Treaty texts and gave the Waitangi Tribunal the power to resolve issues raised by any ambiguities.<sup>10</sup> In addition, the *Lands Case* summarised the key principles as "partnership...good faith...[and] active protection of Māori."<sup>11</sup> These principles have developed further as lawyers, politicians and scholars uphold the Treaty by emphasising the maintenance of Māori-Crown relationships; "the essence...of the Treaty...lies in the value of ongoing relationships."<sup>12</sup> Should the Treaty be entrenched, the flexibility in defining principles and their application would be restricted, and so would limit how Māori-Crown relations develop.

As stated above, the principles interpret the Treaty's essence rather than its specific words.<sup>13</sup> This focus on principles, not words, is yet another reason why entrenching the Treaty may create future difficulties. The fact New Zealand courts and Parliament have moved away from specific wording of the Treaty articles suggests the devised principles better represent what the Treaty means today, and more appropriately support Māori-Crown relations. Entrenching the Treaty as it stands would leave Parliament to work with a 170 year old document that is full of controversy and ambiguity.<sup>14</sup>

<sup>9</sup> Palmer, Matthew. *The Treaty of Waitangi in New Zealand's Law and Constitution*. Page 329

<sup>10</sup> *Ibid* page 148

<sup>11</sup> Hayward, Janine. "The Treaty and the Constitution." Page 109

<sup>12</sup> Palmer, Matthew. *The Treaty of Waitangi in New Zealand's Law and Constitution*. Page 150

<sup>13</sup> Hayward, Janine. *The Principles of the Treaty of Waitangi (Appendix)*. Accessed on 22 April [http://www.waitangi-tribunal.govt.nz/doclibrary/public/Appendix\(99\).pdf](http://www.waitangi-tribunal.govt.nz/doclibrary/public/Appendix(99).pdf)

<sup>14</sup> Durie, Edward (Justice). "The Treaty in the Constitution." In *Building the Constitution*, edited by Colin James.



To address this reduction in flexibility, a specific act for the Treaty principles could be developed; this would avoid entrenching the Treaty and so would maintain current understandings. However, even this compromise could still limit future interpretations of the principles as Maori-Crown relations continue to evolve. One Treaty Debate panellist described the treaty as “a journey”<sup>15</sup> which should not be prevented from mapping its future path. Further, enshrining the principles in legislation means the actual wording of the Treaty could become a matter of the past, and thus put the Treaty’s original provisions out of the nation’s mind, which may undermine the basis for the development of Crown-Maori relations.

Moreover, Sir Geoffrey Palmer states incorporating Treaty principles into legislation means Parliament has to give the Treaty “proper consideration” and that they cannot ignore it.<sup>16</sup> Although those in favour of an entrenched Treaty would argue the same, the fact Parliament and the executive branch of government have to consider which legislation the Treaty applies to suggests they are already bound to consider Maori needs. While more could be done, for example by incorporating Treaty provisions in the Health and Disability Services Act, providing local government obligations and accountability to Maori through delegated Crown powers in the Local Governments Act 2002, and the Education Amendment Act among others,<sup>17</sup> it is not clear that a Treaty entrenched in all legislation would offer advantages that offset the problems outlined above.

As a result, leaving the Treaty un-entrenched would allow for the development of possible future principles, reduce the likelihood of introducing new ambiguities, and promote Maori-Crown relations when devising legislation.

#### **Maori Representation in local authorities**

Representation is defined as symbolising Maori rights as a group, i.e., substantive representation. However, opposition to existing measures, such as Maori seats, exists. For example, Phil Joseph, without defining representation, argues Maori seats should no longer exist because they are not based on the Treaty and give Maori an unfair advantage over others.<sup>18</sup> However, his argument

Pages 201-204. Wellington: Brebner Print, 2000. Page 201.

<sup>15</sup>“Treaty Debate 2 (2013): The Constitutional Review.” Debate led by Kim Hill. *Radio New Zealand National*, at approximately 25minutes, accessed on:

<http://www.radionz.co.nz/national/lecturesandforums/thetreatydebates> (accessed April 23, 2013)

<sup>16</sup> Palmer, Geoffrey. *New Zealand’s Constitution in Crisis: Reforming our Political System*. (Dunedin: McIndoe, 1992)Page 83

<sup>17</sup> Durie, Mason. “A Framework for Considering Constitutional Change and the Position of Maori in Aotearoa.” In *Building the Constitution*, edited by Colin James, pages 414-425. Wellington: Brebner Print, 2000. Page 417

appears to be based solely on descriptive representation. Without Maori seats, political parties may compete more strongly for Maori votes, perhaps by paying more attention to Maori needs. Ironically, adopting Joseph's suggestion may create a "discriminatory privilege"<sup>19</sup> that affects the principle of democracy by giving more weight to a Maori vote, than would retaining the seats. Furthermore, Joseph neglects to mention the existing Maori seats do not have to be filled by a Maori person, but may instead be filled by a European.<sup>20</sup>

Before 1840, Maori had a right as a group to the expression of their mana and authority. Under Article 2 of the Treaty, the Crown has a duty of active representation of Maori land, forests and fisheries.<sup>21</sup> These Treaty principles, according to Justice McGechan, "impose a positive obligation on the Crown...to protect the position of Maori under the Treaty", "Maori seats are an expression of this obligation."<sup>22</sup> Thus, irrespective of views on descriptive representation, the substantive representation McGechan J outlines illustrates the importance of Maori seats.

Another "discriminatory measure...in Maori representation"<sup>23</sup> is that, unlike general seats, Maori seats are not entrenched, and can therefore be changed or abolished by a simple majority (50 percent).<sup>24</sup> Dr Maria Bargh argues for stages of change in Maori representation, starting with the entrenchment of Maori seats as a short term goal.<sup>25</sup> Matthew Palmer asserts this will maintain a Maori voice in New Zealand's "most powerful institution", give symbolic recognition to Maori, their "contribution to...the acquisition of sovereignty", and to the value of the Maori-Crown partnership.<sup>26</sup>

<sup>18</sup> Joseph, Philip. "The Maori Seats in Parliament." *New Zealand Business Roundtable*. May, 2008. Pages 17 and 18

<sup>19</sup> Joseph, Philip. "The Maori Seats in Parliament." *New Zealand Business Roundtable*. May, 2008. Page 14

<sup>20</sup> Parliamentary Library. "The Origins of the Maori Seats." *New Zealand Parliament*. May, 2009. <http://www.parliament.nz/en-NZ/ParlSupport/ResearchPapers/5/b/e/00PLLawRP03141-Origins-of-the-M-ori-seats.htm> (accessed April 23, 2013)

<sup>21</sup> Ministry for Culture and Heritage. "Read the Treaty." *NZ History Online*. <http://www.nzhistory.net.nz/politics/treaty/read-the-treaty/english-text> (accessed April 24, 2013)

<sup>22</sup> Justice McGechan in *Taiaroa v Minister of Justice* [1994], High Court: Wellington, CP 99-94, page 69 accessed on <http://www.parliament.nz/en-NZ/ParlSupport/ResearchPapers/5/b/e/00PLLawRP03141-Origins-of-the-M-ori-seats.htm>

<sup>23</sup> Walker, Ranganui. "The Māori People: Their Political Development", in *New Zealand Politics in Perspective*, edited by Hyam Gold. Accessed on: <http://www.parliament.nz/en-NZ/ParlSupport/ResearchPapers/5/b/e/00PLLawRP03141-Origins-of-the-M-ori-seats.htm>

<sup>24</sup> "The Origins of the Maori Seats." <http://www.parliament.nz/en-NZ/ParlSupport/ResearchPapers/5/b/e/00PLLawRP03141-Origins-of-the-M-ori-seats.htm> (accessed April 23, 2013)

<sup>25</sup> Dr Maria Bargh, "Debating the Constitution 2: Reforming Institutions." Debate led by Steven Price. *Radio New Zealand National*, at approximately 24.06 minutes, accessed on: <http://www.radionz.co.nz/national/lecturesandforums/constitutional-review> (accessed April 22, 2013)

<sup>26</sup> Palmer, Matthew. *The Treaty of Waitangi in New Zealand's Law and Constitution*. Page 324



In addition, Geddis proposes that to achieve true representation, Maori MPs should be elected directly by Maori and accountable only to them.<sup>27</sup> This approach would enable Maori seats to be a true substantive representation as they would "recognise and affirm" the right of a Treaty partner to "enter into and take part in the lawmaking process."<sup>28</sup>

Furthermore, as a panellist in a Treaty debate stated, "minority rights do not come at the cost of majority values."<sup>29</sup> Allowing Maori further representation should not lead the current majority to feel alienated. It would simply further acknowledge a Treaty partner and offer Maori a guarantee of their group representation.

Maintaining an un-entrenched Treaty will allow for more freedom either in entrenching Maori seats in legislation or in creating new ways of promoting substantive Maori representation. Entrenching Maori seats and opening the possibility for Maori MPs to be elected directly by the group they represent would thus recognise Treaty principles and partnership without the need for a written constitution.

#### **Maori's Place in Institutions**

Leaving the Treaty as an unwritten part of New Zealand's constitution creates a freedom that will allow for more consultation over Maori's place in institutions and society. The development of various structures in existing institutes and the re-creation of a tribunal could also be based on the current Treaty principles and to further Maori-Crown relations.

Matthew Palmer proposes a redevelopment of the Maori Affairs Committee,<sup>30</sup> which has been "sometimes effective."<sup>31</sup> He advocates its mandate could be extended if Parliament wants to examine "exactly how the Treaty should be recognised and respected in legislation."<sup>32</sup> Despite supporting an entrenched Treaty, Palmer offers insights that would also work with an un-entrenched Treaty. His approach could be useful in ascertaining current Maori thoughts and values, and the direction relations could and should take.

<sup>27</sup> Geddis, Andrew. "A Dual Track Democracy? The Symbolic Role of the Maori Seats in New Zealand's Electoral System." *Electoral Law Journal*, Vol 5, Issue 4. (2006): page 365

<sup>28</sup> Geddis, Andrew. "A Dual Track Democracy?" Page 365

<sup>29</sup> "Treaty Debate 2 (2013): The Constitutional Review." Debate led by Kim Hill. *Radio New Zealand National*, at approximately 35.15 minutes, accessed on:

<http://www.radionz.co.nz/national/lecturesandforums/thetreatydebates> (accessed April 23, 2013)

<sup>30</sup> A committee that considers matters relating to Maori affairs e.g. Maori language, wellbeing and health House of Representatives. "Maori Affairs." [http://www.parliament.nz/en-NZ/PB/SC/Details/MaoriAffairs/d/9/c/00DBHOH\\_BBSC\\_SCMA\\_1-Business-before-the-M-ori-Affairs-Committee.htm](http://www.parliament.nz/en-NZ/PB/SC/Details/MaoriAffairs/d/9/c/00DBHOH_BBSC_SCMA_1-Business-before-the-M-ori-Affairs-Committee.htm) (accessed April 25, 2013)

<sup>31</sup> Palmer, Matthew. *The Treaty of Waitangi In New Zealand's Law and Constitution*. Page 325

<sup>32</sup> Palmer, Matthew. *The Treaty of Waitangi In New Zealand's Law and Constitution*. Page 325

Another option was suggested at the Empower New Zealand conference 2012, where young people were asked to look at the Treaty and the New Zealand constitution. Delegates noted that MPs are required to “swear allegiance to...the Queen” but there exists no similar allegiance to New Zealand or to the Treaty.<sup>33</sup> Therefore, in recognition of Treaty principles, Maori-Crown relations and their partnership, Parliament could amend the Oaths and Declarations Act 1957 to include an acknowledgement of New Zealand and the Treaty of Waitangi. Tariana Turia has argued this point since 1996.<sup>34</sup>

Bargh suggests another point; councils could be improved by incorporating mana whenua representatives,<sup>35</sup> which would “reflect...individual iwi” in that particular area.<sup>36</sup> This would allow Maori to be substantively represented in their region and would also support the Crown’s duty of active protection of Maori under the Treaty. Bargh argues that achieving this outcome will require political motivation and education of both Maori and non-Maori about historical Maori-Crown relations.<sup>37</sup> I believe it is important first to ensure the entrenchment of Maori seats on a national level before focusing on regions but agree with Bargh that Maori representation on local government authorities is important, and the EBoP or the Auckland Independent Maori Statutory Board model should be adopted by councils nationwide for more effective Maori representation and participation. Furthermore, increasing education of Maori-Crown relations, either in schools or in the work place, is an essential aspect to furthering this relationship and recognising our past.

Furthermore, Matthew Palmer also raises the point that current Waitangi Tribunal rulings are not binding and can simply be ignored by the executive government.<sup>38</sup> He proposes the establishment of a Treaty of Waitangi Court to improve the Waitangi Tribunal and its function. Palmer suggests giving “clear and consistent authority” to an institution to rule on whether “Crown and Maori were abiding by the general...meaning of the Treaty” in its application.<sup>39</sup> Yet, it is possible to leave Te Tiriti un-entrenched and modify the Waitangi Tribunal to better suit the needs of Crown-Maori relations.

<sup>33</sup> McGuinness Institute. “Treaty Important, but not only Constitutional Conversation.” *Pacific.Scoop*. February 5, 2013. <http://pacific.scoop.co.nz/2013/02/treaty-important-but-not-only-constitutional-conversation/> (accessed April 22, 2013)

<sup>34</sup>Ministry of Justice. “Part D – Specific Oaths; 2.2 Matters to Consider.” *Ministry of Justice*. May, 2004. <http://www.justice.govt.nz/publications/global-publications/r/review-of-oaths-and-affirmations-a-public-discussion-paper-may-2004/part-d-specific-oaths#19> (accessed April 25, 2013)

<sup>35</sup> Maori territorial rights and authority over an area of land

<sup>36</sup> Dr Maria Bargh, “Debating the Constitution 2: Reforming Institutions.” at approximately 24.30minutes.

<sup>37</sup> Dr Maria Bargh, “Debating the Constitution 2: Reforming Institutions.” at approximately 25.20 minutes

<sup>38</sup> Palmer, Matthew. *The Treaty of Waitangi In New Zealand’s Law and Constitution*. Page 317

<sup>39</sup> *Ibid* page 333



For example, the Tribunal's rulings could be made binding so they are no longer ignored if they do not suit Crown purposes, as happened with the Foreshore and Seabed Bill 2003.<sup>40</sup> This would recognise the Treaty principles of partnership and active protection by preventing the Crown from breaching Maori proprietary rights and making them acknowledge their Treaty partner. It could also ensure issues, such as those in the Foreshore and Seabed Bill, do not recur.

Maintaining the status quo will provide greater flexibility to ascertain the public's views on Maori affairs than working from an entrenched, ambiguous document. The redevelopment of a Maori Affairs Committee will allow NZ to explore other opportunities to incorporate the Treaty more widely, such as swearing an oath to New Zealand as a country and to its founding document, educating students and workers about Crown-Maori relations and, most radically, re-creating the Waitangi Tribunal.

In conclusion, I believe it is important to maintain the status quo in order to keep the current flexibility we possess, which allows Treaty principles to be interpreted in the light of current events. Although some people are in favour of an entrenched Treaty, it would be very difficult to entrench it in its current form and would require creation of new legislation to encompass the Treaty's meaning. This process will likely be an enormous and contested task; there will be challenges in ascertaining public opinion and in attempting to define what the treaty actually means today. By keeping the existing principles, we protect the current freedom when legislating and allow for flexibility in amending statutes, should the need arise. Retaining the status quo also allows for better representation of Maori in parliament, as well as the development and creation of institutes that work to interpret the Treaty in the light of today's values. Overall, retaining the status quo provides a stronger basis for Maori-Crown collaboration.

Additional note:

#### **Maori Health**

Although Whanau Ora is yet to be seen as a successful (or unsuccessful) approach to Maori Health, it is vital that Maori health is incorporated into legislation on a **rights based** approach focused on **equal outcome** rather than equal opportunities. This should be based on Humpage and Fleras' model of social justice; recognitive justice. This theory targets collective social groups, aims to provide inclusion and collective authority and focuses on social systems, processes, policies and

<sup>40</sup> Hayward, Janine. "The Treaty and the Constitution." Page 110

institutional structures that unintentionally disadvantage a certain group. It acknowledges differences in groups, supports inclusion in decision making and advocates indigenous self-determination. It is important that this approach is taken because it will allow Maori to focus on the health issues most important to them and create their own solutions with the Crown to overcome the problem. Additionally, it will support Treaty principles and Maori-Crown partnership. If, instead, it was an equal opportunity approach, this would encompass distributive and retributive social justice theories, which simply focus on fixing the problem without finding a solution to the root cause, like Labour's Closing The Gaps policy. Furthermore, equal opportunity is based on comparing Maori with Pakeha and assessing Maori health on Pakeha standards and norms because people are judged as being the same, rather than being different. This is only going to lead Maori to fall further behind as the Pakeha-oriented approach will target various aspects unrelated to Maori and the health issues they suffer from.

Thus, Maori health needs to be consolidated through a recognitive social justice based approach, which will focus on equal outcomes and allow Maori to identify the issues they believe most important, will increase Maori participation in health and will allow better inclusion of Maori in decision making and society.

In relation to the Treaty, it is important to allow Maori to assess their own people's health with Crown support than solely by the Crown. By maintaining the current Treaty status, principles of participation and active protection can be fully utilised with the Crown working closely with Maori to establish a stronger Maori health community.



24335

**From:** <webmaster@ourconstitution.org.nz>  
**To:** <constitutionalreview@justice.govt.nz>  
**Date:** 31/07/2013 8:42 a.m.

Sent from The Constitution Conversation #link:<http://www.ourconstitution.org.nz/>.

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**Full Name:** T J Hookstra **Organisation Name:** **Email:** **Phone:**  
**Postal AddressA:** **Postal AddressB:** Totara Park **Postal City:**  
Upper Hutt **Postal Region:** Whanganui-a-tara **Postal Post Code:** **Postal Country:** New  
Zealand **Submission:** I want to see the Treaty of Waitangi, the founding document of Aotearoa,  
enshrined in the NZ Constitution. Without it, Maori people like me would have gone the way of the  
First Nation peoples in America, the Aborigine peoples in Australia and any other  
indigenous peoples who have been stomped on by Europeans in their lust for land and wealth. That  
is, we would be more marginalised, more segregated and beaten down, and slandered in the media  
and in the hearts and minds of white New Zealanders, than we already  
are. Ignore the Treaty at your peril.

Submitted on the 31 July 2013 at 08:41

3222

## Submission to the New Zealand Constitutional Advisory Panel 2013

As a supporter of Amnesty International, I write to add my voice in support of its submission to the current constitutional conversation.

---

I am concerned that all our human rights are not adequately protected in New Zealand law.

For example, our Bill of Rights Act 1990 only incorporates civil and political rights. Yet, it is widely recognised that human rights are interrelated, interdependent and indivisible; this means that one set of rights cannot be enjoyed in a meaningful way if the other set of rights is not also adequately protected and respected too.

I believe civil and political rights, such as the right to life, cannot truly be achieved without the equal right to work, accessible health care, adequate housing and education, which are enshrined in the concepts of economic, social and cultural rights.

Despite having ratified the International Covenant on Economic, Social and Cultural Rights in 1978, successive New Zealand Governments have failed to fulfill their obligations to respect, promote and fulfil these human rights.

While the Government says economic, social and cultural rights are currently protected by subject specific statutes, current issues involving these rights, such as child poverty, show that the current system is not working to adequately protect our rights. The maze of laws and policies around economic, social and cultural rights make it difficult for New Zealanders to understand and access their rights.

Without a clear framework to guide legislation and policy it also makes it difficult to see if laws policies are actually working to recognise New Zealanders rights. In addition many human rights in New Zealand lack avenues to remedies if they are breached, which limit New Zealanders' access to justice - an essential right of victims of all human rights violations.

I therefore submit the following recommendations:

- The incorporation of economic, social and cultural rights into the Bill of Rights Act 1990;
- The entrenchment of the Bill of Rights Act 1990 so that the weight and importance of these rights is adequately recognised;
- The explicit inclusion of the power for judges to provide remedies when the Bill of Rights Act is violated;
- That New Zealand ratify the Optional Protocol for International Covenant of Economic Social and Cultural Rights, including opting in to its inquiry and inter-state mechanisms, so that New Zealanders have access to an international remedy;
- The establishment of a Human Rights Select Committee to ensure that the impact of legislation on human rights is sufficiently considered;
- The requirement of all levels of Government to take a human rights approach to addressing human rights issues; and
- Increased human rights education initiatives to increase awareness of economic, social and cultural rights.

I believe these recommendations will provide for stronger protections within our constitutional framework for economic, social and cultural rights.

Taking these measures will ensure a strong legal framework in which all rights are equally protected. It will ensure that the Government can take a rights-based approach to addressing rights issues in New Zealand such as child poverty.

New Zealand has an obligation to take steps to progressively realise such rights as the rights to health, education, and adequate housing. Ensuring they are explicitly protected in New Zealand law is a significant step in ensuring that New Zealand is a place where human rights are protected, respected and fulfilled.

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