1984 And All That

Hon Jim McLay[1]

New Zealand Ambassador and Permanent Representative to the United Nations

Opening Address

EmpowerNZ Workshop: Drafting a Constitution for the 21st Century

Beehive Banquet Hall, Parliament Buildings, Wellington
Tuesday 28 August, 2012; 8:30 AM

Introduction

After that warm introduction from Paul Goldsmith, I should immediately set the record straight and confess that I'm not a professional diplomat. I started out as a lawyer, but I found that wasn't very popular; so I became a politician, and found that wasn't very popular; so I became an investment banker (and we know how popular bankers are!).

It's 25 years - almost to the day – since I walked out of this place to discover if there is a life after politics; eventually, to emerge as New Zealand's Ambassador to the United Nations; a diplomatic assignment which basically requires me to do two things–

- First, to lead a team of experts – and, when I say "experts", I really mean experts – real specialists in international peace and security, disarmament (nuclear and conventional), human rights, development, environment, funding, legal, oceans,

---

[1] The opinions expressed in this address are mine alone and do not represent the views of the New Zealand Government or the Ministry of Foreign Affairs and Trade. I gratefully acknowledge the assistance of a number of friends and colleagues who either scrutinised and commented on early drafts of this address and/or offered specific comments for inclusion; notably, Marcy McLay, Denis McLay and Sir Geoffrey Palmer. All added greatly to the substance of this text. Any errors and omissions, however, remain solely my responsibility.

fisheries, and many other fields; experts who, every day represent you in complex negotiations critically important to New Zealand's wider interests.

- And, secondly, to lead the New York end of our campaign for election to a non-permanent seat for a two-year term on the United Nations Security Council – a Council on which we've served only three times since the UN was established in 1945.

Our domestic constitution – and its relevance to the UN

Why do we engage so actively at the UN?; why do we seek a seat at its "high table", the Security Council?; and why are today's discussions about our domestic constitution so relevant to both those objectives?

New Zealand was a founding member of the UN; we helped draft its Charter[2]; its commitments are at the heart of our commitment to multilateralism – that is, countries working together to resolve issues.

That Charter is the UN's "constitution".

It even begins with words of constitutional moment - words that might have been drafted by Thomas Jefferson: "We the peoples of the United Nations determined … to save succeeding generations from the scourge of war, … [and] to reaffirm faith in fundamental human rights …"; and so it goes on.

But, since that Charter was agreed, not only have the problems "We the peoples" wanted to address remained with us, they are now amplified. As flows of technology,

[2] New Zealand chaired the committee that wrote the Charter's Trusteeship chapter; and later (but less successfully) led the opposition to the veto given to the five permanent members of the Security Council.

information, media and people render national borders ever more porous, as inter-state conflicts become more intra-state, as atrocities such as Rwanda, Srebrenica and, most recently, Syria still occur, as issues become ever-more complex and global, it makes sense to participate in and extract benefit from multilateral institutions.

For a small country at the edge of the world, an international system based on the Rule of Law is vitally important; it reduces (but doesn't eliminate) opportunities for the strong to impose on the weak; it helps protect our sovereignty; it establishes norms which facilitate our trade and prosperity; it enables the free passage of goods by sea and air. In short: It allows us to participate in global discussions directly relevant to our interests – and the experience of the past 67 years confirms that New Zealand is more likely to advance its national interests by multilateral participation than by pursuing narrow self-interests.

For example, under the UN Convention on the Law of the Sea[3] we have a four million square kilometre Exclusive Economic Zone[4], the world's 4th largest. And, under the UN's extended continental shelf regime, our extended continental shelf covers 1.7 million square kilometres beyond the EEZ - six times the size of New Zealand; an outcome that could never have been achieved through bilateral negotiations.

The UN isn't the only multilateral forum; there as many others as there are problems[5] - the WHO, the IMF, the ILO, the FAO, to name just a few. All are important; all make a global contribution; but there's only one that's universal in membership and general in scope - the United Nations.

---

3 UNCLOS.

4 EEZ.

5 As well as the UN and its organs, multilateral institutions (some related to the UN, others not) deal with many global problems: the World Health Organisation (WHO); the International Monetary Fund (IMF); the International Labour Organisation (ILO); the Food and Agriculture Organisation (FAO). We've also seen the establishment of regional and other groups such as the European Union (EU), the African Union (AU) - and, importantly for New Zealand, APEC, ASEAN and the Commonwealth.

That universality gives the UN a legitimacy like no other organisation; indeed, at no other time in history have we had a body of such scope. Only the UN can assemble 193 States to debate almost any issue: Under its constitution, it's the world's principal peacekeeping body; it legitimises the use of force when international peace and security are threatened; and it's a forum through which conflicts can be ended.

If Winston Churchill was right when he said that "jaw-jaw is always better than war-war", then the UN is the place for that.

In this 21st century, many economic, security and environmental issues are so global that they can only be dealt with at the multilateral level; issues that pay no heed to nation-state borders - fisheries management, ozone depletion, rising sea levels and stopping the spread of weapons[6]. More and more, it's multilateral bodies that write the rules that open up trade, govern shipping and protect wildlife. All are crucially important to New Zealand; and, if we want to influence those rules and treaties, we must be at the table when they are made; the world is simply too big, too interconnected, for us not to be there. Even if we can't ourselves control many of the security, economic or environmental trends that will determine our future, we can still be part of the answer.

And it's in that context that New Zealanders can be proud of the way they are represented by our experts at the United Nations; and I say that, not to boast about what they do, but because the media takes so little interest in their vital work that someone has to say it.

Since 1945, we've established at the UN a record for fair-minded and principled action on peace and security, disarmament, environment, development, decolonisation, the Rule of Law and many other fields; we are held in high regard at the UN – and, again,

---

[6] Some of those have had to play out in other fora.

I say that, not to boast, but simply because it's too often ignored. Wendy McGuinness was spot on when she said that, "internationally, we have mana".

I'm not going to recount everything New Zealand does at the UN; suffice to say that our UN reputation results from 67 years of dedicated effort; and, as we campaign for a Security Council seat, that reputation, built by past generations of diplomats, will be our greatest asset.

Three key values

That UN record reflects three key values which New Zealand would also bring to the Council; values that are equally relevant to today's discussions, because they also form part of our constitutional culture and underpin much of what we do, domestically and internationally –

- First, is our commitment to fairness and independence.

  In a recently published book[7], Pulitzer Prize winner, David Hackett Fischer, compared New Zealand and the United States - two societies with much in common, but also many differences.

  Founded as English-speaking colonies, both are long-standing democracies, with mixed-enterprise economies, pluralist cultures, and concern for human rights and the Rule of Law. But, despite those basic similarities, they went different ways.

  They were founded at different times, one in the so-called "First British Empire", the other in a very differently motivated "Second Empire". America developed on its frontier; New Zealand in its bush; and Fischer compared our "parallel [but

[7] *Fairness and Freedom: A History of Two Open Societies: New Zealand and the United States;* David Hackett Fischer (Brandeis University).

different] processes of nation-building and immigration, women's rights and racial wrongs, reform causes and conservative responses, war-fighting and peace-making", and our respective global engagements. He described the dream of living free as "America's Polaris"; whereas "fairness and natural justice are New Zealand's Southern Cross".

And that's how we are and how we are seen at the UN; we listen to and respect the views of others – our "Southern Cross" … [of] "fairness and natural justice". He concluded that New Zealand's culture is focused on fairness; it's part of our national character.

We are not bound by political alliances, which might pre-determine our positions; and, as a result, New Zealand is regarded as independent, consistent, fair-minded, practical and constructive. And we have a consistent, bipartisan foreign policy which isn't subject to sudden swings.

- Secondly, New Zealand is known, at the UN, as a constructive partner. We work to solve problems, not to entrench them; we tackle difficult issues[8]; and we're regarded as "bridge-builders".

- And thirdly, New Zealand seeks practical solutions. Like the majority of UN members we are a small state[9]; so we know, at first hand, the problems of size, distance, limited resources, post-colonialism, and the need to right past wrongs. All are challenges for us, for our region and for other states; and, because we understand those challenges, we seek workable solutions (if there was a place for No. 8 Fencing Wire at the UN, we'd be it).

---

8 In many respects, New Zealand subscribes to Dag Hammarskjold's belief that we should "Never, 'for the sake of peace and quiet', deny [our] own experience or convictions".

9 103 UN member states have populations less than 10 million – the World Bank's commonly accepted benchmark for "small state" status.

Is it worth the effort?

In our UN electoral group, in October 2014, two non-permanent seats for 2015-2016, will be contested by three candidates: Spain[10] and Turkey[11] are our opponents; they are also our friends; both are strong contenders. Succeeding against such formidable opponents, will require much effort (every morning, as I take our Kiwi dog for a New York walk, I find myself thinking of "new ways to win").

But is even a successful outcome – a Council seat -worth all that effort? The answer is an unequivocal "**Yes**"; and that's because -

- New Zealand has a long record of a principled, fair-minded, practical, consistent and constructive approach to the UN and its agenda; and

- UN Security Council membership will continue that engagement – listening, working and adding value, wherever we can.

And something else will stand us in good stead: Our reputation as one of the world's oldest constitutional democracies; our reputation for fair, democratic representation of all interests; and our reputation for political and constitutional stability in an often unstable world.

Our constitutional attributes

Those constitutional attributes are recognised on a wider, multilateral basis; recently highlighted when Standard & Poor's re-affirmed our AA long-term foreign currency rating, citing not only our resilient economy, <u>but also</u> our "strong political and economic institutions …".

---

[10] Spain announced its candidature in 2005.
[11] Turkey announced its candidature in 2011.

Next year marks the 160th anniversary of our first Parliament[12]; the 160th anniversary of the constitutional democracy that, despite our size, has enabled us to speak to the rest of world with a firm, clear, representative voice, from the authority of a firm, clear, representative base. What Paul Goldsmith described as "our constitutional inheritance" - the history of how we came to govern ourselves, and the manner in which we do govern ourselves - is part of New Zealand's narrative; a narrative we should share among ourselves (particularly on occasions such as this); and a narrative we should also share with the world.

So, I compliment the McGuinness Institute on this initiative to "explore the future of New Zealand's constitution and contribute to the current Constitutional Review", and to "consider … what New Zealanders need, constitutionally, for the coming century and beyond …".

Getting some background

To provide some background to this address, I went to what's described as "the official website of the New Zealand Government"[13], expecting to find a comprehensive timeline of our constitutional developments. It begins with the Treaty of Waitangi and British sovereignty, followed, twelve years later, by a Westminster-style Parliament – making it the world's 8th oldest national parliament, pre-dating Canada and Australia[14]; in fact, ours is one of the world's oldest, continuous democracies.

But, then, I was disappointed. The sixteen listed constitutional milestones include such obvious events as Dominion status in 1907, adoption of the Statute of Westminster in 1947, and the introduction of MMP in 1996.

---

12 The first New Zealand Parliament met in Auckland in 1853.

13 http://www.beehive.govt.nz.

14 Canada's national parliament was established in 1867; Australia's national parliament was established in 1901.

But not the establishment of Māori seats in 1867 – giving voting rights to all indigenous males (long before other colonies – and twelve years before all Pakeha men got the same right) – one of the world's first modern[15] extensions of voting rights without any property qualification. And no reference to women getting the vote in 1893 – the first country in the world to do that; something of real international importance, all the more so because it was achieved without major social disruption.

There's no reference to establishing the Ombudsman in 1962 – the first outside Scandinavia – a constitutional precedent now widely followed. Nothing about establishing the Human Rights Commission in 1976.

And, no reference to the Official Information Act 1982, which fundamentally changed the relationship between a previously secretive government and those it governed; legislation that's been copied (sometimes, almost word-for-word) in other countries. Its guiding principle is that official information must be made available unless good reason exists under the Act for withholding it (a direct reversal of the old Official Secrets Act 1951, which made it an offence to release any official information). The Law Commission[16] has described it as "central to New Zealand's constitutional arrangements"; so why wasn't it listed?; but, then, as the Minister responsible for that legislation, I probably would ask that, wouldn't I.

In short: No acknowledgement that, within 53 years of formal European settlement – a single lifetime – New Zealand had established responsible parliamentary government, given the vote to all Māori males, and then to all other males without any property qualification, and then enfranchised all women; arguably making it the

---

15 The ancient Athenian Constitution gave voting rights to all adult male citizens.

16 *The Public's Right to Know: Review of the Official Information Legislation*: New Zealand Law Commission; NZLC R125; published 25 July 2012. The OIA was also described by the *New Zealand Herald* (Editorial; 30 July 2012) as having "played an important part in creating a more open society".

world's first true democracy, with an unrestricted, non-discriminatory adult franchise. And nothing to highlight our world-leading, precedent-establishing role in the 20th century, creating open, transparent and accountable government.

By comparison, a McGuinness Institute publication, *Nation Dates*[17], has a much more comprehensive timeline; as does the *Cabinet Manual*.

Why are we here?

Wendy McGuinness has told us why you are here: fifty-or-so young people, brought together to debate our constitutional future.

But, why am I here?; Why are you being addressed by someone who retired from Parliament fully a quarter of a century ago and, since he left, has only re-entered this building about a dozen or so times? It's because the McGuinness Institute remembered I was directly involved in what it describes as "New Zealand's last constitutional crisis", and, believing that experience might be relevant to your discussions, wants me recount my version of those events.

You've seen a documentary clip about that on the Institute's website; but I'm here to tell you what really happened - with apologies for the fact that this very personal account means far too many perpendicular pronouns! If you Google "New Zealand constitutional crisis", even without "1984", then, with varying degrees of accuracy, this is what you'll get.

1984 and all that

Let me briefly set the scene[18].

---

[17] Published September 2011.

It's 1984 - George Orwell's year of reckoning. Sir Robert Muldoon's National government had governed for nearly nine years; for six years, I'd been Attorney General and Minister of Justice, and, in March 1984, had been elected Deputy Prime Minister (but not, I should add, with Sir Robert's support!).

On the night of Thursday 14 June 1984, in quite extraordinary circumstances, Muldoon called an early election. That had an immediate impact on financial markets, which anticipated a Labour victory and, with it, a devaluation of the New Zealand dollar[19]. Reserve Bank and Treasury officials advised Sir Robert to respond with an immediate devaluation, but he declined[20]. Then, over the four weeks of the campaign, the dollar came under more pressure and officials again unsuccessfully advised Muldoon to devalue.

That's a very, very brief background to the events that followed.

What happened next?

Saturday 14 July, Election Day, was also Bastille Day (a coincidence not lost on the media); and the results quickly showed that Labour, led by David Lange, had won the election. The following Monday, Muldoon told his Cabinet colleagues that the officials had again recommended devaluation, but he still did not agree.

In my view, that was as far as the matter needed to be taken. The National cabinet would remain in office for about ten days (until final results were declared), but future policy was out of our hands; we were caretakers for a new administration; and, if they

---

18 For the purposes of this account, I have, inevitably, had to summarise what was a very complex and detailed series of events. A fuller account of these will have to await another occasion.

19 These were, of course, the days of fixed rather than floating exchange rates.

20 Sir Robert did not tell his Cabinet colleagues about that advice.

wanted to take urgent steps, so long as we remained technically in charge, we'd have to do it.

That evening's TVNZ news carried Lange's claim that Muldoon was refusing his advice to sort out the currency problem. Later, at 9.30 pm, TVNZ broadcast an interview with Muldoon who said he'd spoken to Lange, giving "some advice, which would have solved this problem", and then said, in quite unequivocal terms, "I am not going to devalue so long as I am Minister of Finance ...[21]".

I was astonished; in my view, even if it disagreed, an outgoing government had to act on the advice of the incoming administration. Others reacted similarly; and, within minutes, three senior ministers came to my office – one of them, Hugh Templeton, later wrote [22] that, "in anger … [he] raced over to the Beehive".

Obviously, we had to get to Muldoon, and get to him quickly; but first we had to be clear about the legal and constitutional position.

None of these colleagues were lawyers, but all accepted my view that, during the transition, we were caretakers, and should, if necessary, implement the wishes of the incoming government. But my quick research revealed no direct precedent for the problem we now faced; which meant we had to decide what to do without the benefit of precedent or any previous constitutional rule or convention. We all knew, however, that, if Sir Robert meant what he'd said[23], and if he really was refusing to act, then we faced a very serious situation.

---

21 Emphasis added.

22 Hugh Templeton, 1995, *All Honorable Men: Inside the Muldoon Cabinet*, 1975-84, Auckland University Press.

23 Sir Robert took pride in his careful use of language.

There was a further problem. The election outcome was clear; Labour had won decisively, and it was possible the Governor General, Sir David Beattie, might take his own action – in favour of the newly elected Labour government.

After a brief discussion, I could see only one possible way forward - Muldoon either had to comply with Lange's request or be replaced.

So we agreed we'd immediately contact him to clarify his stance, and to make clear our view that he had to respond to any Labour request; and that if he refused, we'd immediately force the issue with the Cabinet. If he still refused, then, as his deputy, I would advise the Governor General that Muldoon no longer had the confidence of Cabinet, that he should be dismissed, that I should be appointed as Prime Minister for the few remaining days of the National administration; and that we'd undertake no new policies and would implement any wishes of the incoming government.

Think about it: Here were four senior ministers, prepared to seek the removal of the Prime Minister who'd led their party for ten years - but to do so for constitutional rather than the more usual political reasons. It was a chilling moment: It would split the National Party – Muldoon's many loyalists would decry it as a "constitutional *coup d'état*". Certainly, my own political career would be at an end; recalling the venom heaped on the Australian Governor General, Sir John Kerr, after his 1975 dismissal of the Whitlam Labour government, I knew that those Muldoon's loyalists would be unrelenting in their attacks.

Later, it was incorrectly reported that, had Muldoon persisted, we planned to resign *en masse*, either leaving him on his own or creating Executive Council vacancies to be filled by senior Labour MPs. But that was never an option. No Labour MP could be appointed until final results declared them elected to Parliament; so a mass

resignation would leave Muldoon as the only Minister - able to do (or refuse to do) as he wished – and that certainly would have given us a constitutional crisis.

Having decided on our course of action, I then tried to call Muldoon at his official residence; but, for many reasons (some of them amusing), couldn't make contact. Having failed in that, we then tried to contact the Secretary of Treasury and the Governor of the Reserve Bank. We tracked them down at the annual dinner of the New Zealand Bankers Association (other attendees included the Governor General and the Head of the Prime Minister's Department).

They'd heard of Muldoon's statement, and were deeply concerned at its implications; and they stressed the seriousness of the economic situation if it wasn't immediately resolved. They'd had to retreat to the restaurant bathroom to discuss their concerns in private; and had reached a similar conclusion – Muldoon either had to comply with Lange's request or be replaced. From these comings and goings, the other guests knew something was amiss (and were offering not always helpful advice).

The group in my office finally broke up about 2 am; by which time, as Hugh Templeton later wrote, "The tumbrels were already rolling"; and I certainly didn't sleep much for what little remained of the night[24].

Among many other things, I was concerned that the Governor General might act; so, early that morning, I phoned his Official Secretary, asking him to tell Sir David that Muldoon's colleagues were "prepared to act to ensure that the wishes of the incoming

[24] I had no illusions about the implications of our planned action; and my wife, Marcy, and I determined that, if I became a very temporary Prime Minister, I'd immediately resign my Party's deputy leadership and would not contest or accept a leadership position in any ballot; for me, it would be the end. Two other Ministers who learned of that intention the following morning tried to dissuade me – but I saw no alternative.

government are respected". Contrary to some accounts, I didn't speak directly with Sir David – it was only later he told me he would have acted on my advice[25].

A very unpleasant meeting

I got to see Muldoon at 8 am. I won't recount the detailed discussion; it lasted about 15 minutes and, needless to say, was very unpleasant.

In summary, however, I told him of "deep concern about [his] statement … … that [he] would not devalue if requested by Lange"; and that, having lost the election, [he could] not reject Labour's request to devalue".

There followed a testy exchange in which we argued that view. Lange was wrong, he insisted; that, I responded, was no longer relevant; Labour had won the election and, with it, the right to make decisions. I cited – but with no great confidence - an Australian precedent of the previous year, where an outgoing government had devalued on the wishes of the new administration; and told him that, once defeated, there was a "constitutional convention" that we were only "caretakers", and that he must act as requested by the new government.

And I told him that, if he didn't respond, we'd have to force the issue[26].

Finally, he said that Lange's refusal to make a joint statement against devaluation meant it was now inevitable – a convenient way, I thought, of finally acknowledging he had to act, but without conceding any of the constitutional arguments.

---

[25] I also warned one senior public servant of the planned action; his response "that sounds to me like the only thing that can happen" gave some added confidence. Later, he told another senior official (who was acutely aware of the dangers of a public servant advocating the removal of a Prime Minister), "You're too late, the Attorney General is going to act".

[26] Muldoon did not respond to that "threat", although he certainly returned to it in an equally unpleasant discussion later that day.

When the Cabinet met shortly thereafter, Muldoon presented it as his own decision to act on Lange's advice, but later told the media that I'd explained the "constitutional position". As Templeton put it: "Only a few knew that his hand had been forced"[27].

The "Caretaker Convention"

I quickly issued a press statement outlining what became known as the "Caretaker Convention": That, having been defeated in an election, and during the transition period, an outgoing government should -

- undertake no new policy initiatives; and

- [should] act on the advice of the incoming government on any matter of such great constitutional, economic or other significance that cannot be delayed until the new government formally takes office - even if the outgoing government disagrees with that course of action.

These events have been described as both an "economic crisis" and a "constitutional crisis". There was certainly a serious economic problem; and Muldoon's statement that he was "not going to devalue so long as [he was] Minister of Finance" had equally serious potential constitutional implications.

But, was there really a full-blown "constitutional crisis"?

Had Muldoon persisted, we would certainly have faced a constitutional crisis; but the problem could be - and was - resolved within existing constitutional structures; Sir

[27] Templeton also wrote that, "Muldoon never forgave McLay for his role in this final crisis, engineered so typically in defiance of accepted norms, where we had to save him from himself". My relationship with Muldoon had never been good (he hadn't supported me for the deputy leadership), but these events made them toxic – but that's something to be recounted at some other time.

Robert's colleagues were prepared to act and, if we hadn't, the Governor General might have intervened. And so the matter never became a full-blown crisis. Geoffrey Palmer (Lange's deputy) later wrote that this had "all the ingredients of a first class constitutional crisis"[28]; but that "the apparent constitutional impasse was resolved" by my statement of constitutional principle. "All the ingredients"?; certainly; but, luckily, those ingredients were never finally mixed together.

And I must now confess that we did not play entirely "by the book". The senior public servants to whom I spoke that night were all Muldoon's advisers; we probably had no right to go to them, behind his back - but we also had no alternative. And, even as Deputy Prime Minister, it was probably improper for me to communicate (even indirectly) with the Governor General; but, again, I had no alternative[29].

And finally, was there really, as I had advised Muldoon and then the Cabinet (and subsequently declared in a press statement), a constitutional convention – a "Caretaker Convention" – that an outgoing government should "act on the advice of the incoming government on any matter … that cannot be delayed"?

Frankly, **No**; none of my research disclosed any such authority. In July 1984, there was, it's been said, "no clear rule"; almost certainly – and quite simply - because the issue had never previously arisen in precisely the terms we faced.

My "constitutional advice" was based on common sense and propriety; but I must now confess that, in July 1984, there was no established convention to that effect (and the Australian action of the previous year, while a useful, historical example, arose in a very different constitutional setting and wasn't a precedent for New Zealand). Geoffrey Palmer, researching the same issues at the same time, reached the same

---

28 Geoffrey Palmer; *Unbridled Power*; Oxford University Press, Second Edition, 1984.

29 At the beginning of his Vice-Regal term, Sir David Beattie wanted to meet with individual Ministers (over dinner, he suggested) to talk about their portfolios, but Muldoon blocked this, insisting the Governor-General could only deal with the Government through the Prime Minister.]

conclusion; and later wrote[30] that, "It can be argued that a constitutional convention was either restated or emerged[31] in the context of the events of 16 and 17 July … [and] thus [he said] the apparent constitutional impasse was resolved".

And so, as Palmer and others have said, before July 1984, there was no such constitutional convention.

Invented in the dark hours

If a convention did "emerge", then I can only adopt the original "Streaker's Defence": It seemed like a good idea at the time[32]. If a new constitutional convention was (to put it more colloquially) "invented", it was necessary in order to force Muldoon to do the right thing (to "force his hand"); and, even though I now acknowledge stretching things to achieve that outcome, I make no apology for that – it certainly seemed like a good idea at the time.

Later the law was changed[33], introducing procedures for quickly swearing in a new government; but the "caretaker" issue was not resolved by that legislation - and continues to be covered by an unwritten constitutional convention, still known as the "Caretaker Convention". Invented in the dark hours of Monday 16 July 1984, it remains as I told Muldoon that following morning, and is now an accepted part of our Constitution - formally set out in Paragraph 6.24 of the *Cabinet Manual*, in almost identical language to the press statement of 17 July 1984[34].

---

30 Geoffrey Palmer; *Unbridled Power*; Oxford University Press, Second Edition, 1984.

31 My emphasis.

32 The story goes that, when of the first streakers was prosecuted in Sydney, Australia, in the 1960s, and was asked by the Magistrate why he had done it, the young man mumbled that "It seemed like a good idea at the time".

33 The Constitution Act 1986.

34 Paragraph 6.24 of the New Zealand *Cabinet Manual* provides that "Where it is clear which party or parties will form the next government but Ministers have not yet been sworn in, the outgoing government should: a. undertake no new policy initiatives; and b. act on the advice of the incoming

An unwritten constitution

New Zealand is one of only three countries in the world that relies on a so-called "unwritten constitution"[35]. We do have a "constitution" but, rather than a single, supreme document, formally described as such, it is made up of various Acts of Parliament (including some entrenched provisions), treaties, Letters Patent, Orders-in-Council, court decisions and a number of non-legislative conventions.

The long-standing success of our constitutional democracy relies, at least in part, on the willingness of those "at the top" to abide by certain understandings and conventions – doing the right thing at the right time – and, I suppose, an occasional willingness to invent new conventions to meet new and unexpected situations. Muldoon's intransigence briefly upset that balance; as Templeton wrote, he'd gone "far beyond constitutional reality, let alone grace, in defeat".

New Zealand is, as I said earlier, one of the world's longest standing, continuous and most successful democracies. Never before had its constitutional underpinnings been so challenged, even if only briefly; and, I hope, never again.

But, those events never became a full-blown "constitutional crisis"; unlike Australia in 1975, a serious problem was averted.

Knowing the key players

---

government on any matter of such constitutional, economic or other significance that it cannot be delayed until the new government formally takes office - even if the outgoing government disagrees with the course of action proposed. Paragraph 6.25 notes, however, that, "Situations of this kind are likely to be relatively short-lived, as the Constitution Act 1986 enables a swift transition between administrations once the composition of the new government has been confirmed." It should be noted that, even today, New Zealand's "Caretaker Convention" provisions are much less comprehensive than, say, those of Australia.

35 The other two are the United Kingdom and Israel.

The reasons for that are many and various; but one was an interesting convergence of people who all “knew one another"; very much a consequence of our small and intimate democracy.

Although we were political opponents, I “knew" Geoffrey Palmer, and how he thought on constitutional issues, and I understood the solutions he’d be seeking, and the sort of advice he’d be giving his leader, David Lange. And I “knew" the Governor General, Sir David Beattie. He was a friend; I'd instructed him as a lawyer, and appeared before him as a Judge - and I had a good idea what he was likely to do. I "knew" how both would respond if I advised in a particular way; and, likewise, they both “knew” me. Later, both confirmed that thinking; but, at the time, and even without their explicit confirmation, it was really valuable to “know” the thinking of those who might also be key decision-makers.

A product of Victorian Britain

As I said, we do have a Constitution. It was very much the product of Victorian Britain, and its own reforms of that time; but also of the preceding 600 or so years of constitutional evolution, at least as far back as Magna Carta in 1215, through the Model Parliament of 1295, on to the struggle between King and Parliament, partly resolved by regicide in 1649 and then by the Glorious Revolution in 1688, and the same year’s Bill of Rights (which established Parliament’s lawmaking and taxation role and provided for free and regular elections), and then to the struggle to expand the voting franchise and make Parliament truly representative – the Reform Acts of the 1800s.

It was as that last struggle was in its final stages that Britain acquired sovereignty over and then "gave" New Zealand its parliamentary government; and much of our constitutional structure reflects that timing.

Having lost the American colonies as a convenient place to send criminals and Irish and Scottish "troublemakers", and having then, in 1788, "acquired" Australia for that same purpose, Britain had little interest in extending its reach to New Zealand; it was a reluctant coloniser, even in 1840.

Captain Hobson had received his instructions from Lord Normanby, British Secretary of State for War and Colonies, who wrote[36] that the British government had no pretension to seize or govern New Zealand; and wanted to avoid injury to Māori, "whose title to the soil and to the sovereignty of New Zealand [was] indisputable …"; and that, therefore, Britain "disclaim[ed] ... every pretension to seize ... New Zealand or to govern [it] ... unless the free and intelligent consent of the Natives, expressed according to their established usages shall first be obtained"[37]. If Normanby's sentiments were genuine, then Hobson had been sent on a mission set to fail; but, as we know, he had other ideas.

And, once the Treaty was signed, Britain was an equally reluctant colonial administrator – so much so that, in 1852, only twelve years after the Treaty, Westminster enacted a New Zealand Constitution Act, passing responsibility for parliamentary government to the colony itself[38].

Two types of constitution?

---

36 *Instructions from the Secretary of State for War and Colonies, Lord Normanby*; 14 August 1839. [*Speeches and Documents on New Zealand History*; edited by W D McIntyre and W J Gardener; Oxford 1971.]

37 Normanby added, with remarkable foresight, "I am not unaware of the difficulty by which a treaty may be encountered. The motives by which it is recommended are of course open to suspicion ...".

38 It had made an earlier attempt at this in 1846.

I'm not a constitutional theorist; but I have had to make our constitution work in practice (and not just with the events of July 1984); and, from that practical standpoint, I take the view that there are basically two types of constitution -

- There are those, such as the American Constitution, which I'd describe as "**Constitutions of Solutions**" – those in which (so their proponents believe) can be found solutions to all issues relating to governmental powers and functions – a truly supreme law. These Constitutions of Solutions remain central to governmental thinking and action, and can determine the constitutional validity – the rights and wrongs – of policies, even those enacted by an elected and accountable majority of political leaders and, perhaps, supported by a clear majority of citizens.

- And then, there are "**Constitutions of Presence**"; those that remain as a presence, but essentially in the background, always there to guide the principal actors, but not to dictate outcomes; particularly, not to dictate the rights and wrongs of policies that should, more properly, be decided by elected and accountable political leaders. Colloquially, these might be likened to a Shareholders' or Partnership Agreement; the sort of document (or unwritten constitution) that is only brought out and consulted in times of trouble - times of trouble, like July 1984.

No constitution is perfect

Let's be under no illusions: No constitution is perfect. Some Americans ascribe an almost God-given quality to their Constitution, some even seeing it as divinely inspired (and ascribing Old Testament prophet-like qualities to its Founding Father drafters).

But there are still differing views about its effectiveness: the late Gore Vidal cynically observed that, "Congress no longer declares war or makes budgets; so that's the end of the constitution as a working machine". And a less cynical commentator[39] recently wrote that, constitutionally, "The American presidency is designed to disappoint", and, "from the founding fathers' point of view, [that] protects the republic", because "they distrusted government in general and the office of the president in particular".

Although changes to constitutions should be rare, most are expected to adapt to their circumstances and times – to be "living and breathing". And those times and those circumstances can change.

A very old idea

We tend to regard constitutions as a consequence of the development of the Westphalian nation-state[40], and possibly, also, a product of the Enlightenment, as both evolved over the past 400-or-so years; but the idea of constitutions is much, much older.

Sparta's constitution (possibly the world's first) is sometimes attributed to the lawgiver Lycurgus in the 7th century BC. And, in the 3rd century BC, Aristotle studied about 158 ancient world constitutions; and, unlike my two, unsophisticated classifications of Constitutions of Solutions or Presence, he put them into six categories[41]. For him, a constitution wasn't a single, organised document (as with the

---

39 George Friedman; *The Election, the Presidency and Foreign Policy*; July 31, 2012.

40 We might tend to date all this from the 1648 Peace of Westphalia, which established the notion of territoriality. The Westphalian system is based on idea that the national interests and goals of states and nation-states) still go beyond those of any citizen or any ruler. However, long before that, states and nation-states structured their domestic affairs around some sort of "constitution".

41 Aristotle's major writings on constitutions are found in *The Nicomachean Ethics* and *Politics*.

US and most others); it was a collection of customs, rules and laws for the governance of the city-state (more like our "unwritten constitution").

All Greeks believed man must live in freedom, ruled by laws made by the political community, not by the arbitrary fiat of some man or god; and they understood that, when elevating someone to a ruling position, it was also necessary to urge restraint and self-control; they warned against the great folly of hubris – so much so that inscriptions on temples reminded citizens, "Nothing in excess". And, contrary to our commonly held view of Athenian democracy, Aristotle thought democracy - rule by the many - could be bad (he regarded Athenian democracy as demagogic); and, instead, urged combining aspects of democracy with strict laws about how rule should be exercised.

In Athens' Golden Age, while Pericles was alive, every male citizen was a member of the Athenian assembly, which agreed laws that established a constitution, and was the most democratic organ the world had yet seen. It had ultimate power and made all decisions by a simple, majority vote. Few offices were directly elected; terms were usually very short (often just one year, sometimes just one day). Athenians would not necessarily have seen elected representatives, appointments to important offices, unelected bureaucrats, or judicial life tenure as democratic; indeed, they might regard what we've created as the clear and deadly enemy of democracy[42].

[42] The legislative arm was the Athenian assembly or the ecclesia, in which all male citizens could participate; and, in the 450s, and during the life of Pericles, this would have amounted to between 40,000 and 50,000 men. Because much of what came before the assembly required a quorum, it is likely that at least 5,000 to 6,000 attended the sessions. The ecclesia had four fixed meetings a year as well as special meetings; and it met on a hill overlooking the agora not far from the Acropolis called the Pnyx. The ecclesia dealt with serious topics: approval or disapproval of treaties, declarations of war, assigning generals to campaigns, deciding what forces and resources they should command, confirming officials or removing them from office, deciding whether or not to hold an ostracism, questions concerning religion, questions of inheritance; in fact anything that anyone wanted to bring up in the assembly. Votes were by a simple majority after a full debate, determined by a show of hands. To help the assembly conduct its business a Council of Five Hundred was chosen by lot from all Athenian citizens. Its responsibility was to prepare legislation for consideration. The assembly could vote down a bill drafted by the council, change it, send it back with instructions or replace it.

Elected officials were limited to generals (who, if skillful, could be re-elected[43]), naval architects, some treasurers and the city water supply superintendent (even then, they understood the importance of water!). They filled most other offices by lot (or at random) and for a limited tenure of one term per man in each office[44]; all very much in accord with the Athenian belief in the democratic principle of equality (which held that any citizen who was capable could perform civil responsibilities), and its corollary which feared giving power, even to the able or experienced few.

Imagine going out to Riccarton Mall, Lambton Quay or Queen Street and choosing someone at random – a taxi driver, maybe, or a shopkeeper, or a doctor – and appointing him or her as Prime Minister for a year? Would we want to return to such an Athenian democracy?; probably not.

Some questions for the task ahead

Given this Workshop's mandate, the organisers have been wise to suggest that you might draft a <u>possible</u> New Zealand Constitution; but with the important caveat that this doesn't "suggest that [our] Constitution … must take written form" – rather, [it] allows "for a tangible, workable output" at the end of your deliberations.

Not unnaturally, having been exposed to the real-time working of our present constitutional arrangements, I have my views on this; but, given that it's your task (not mine) to deliberate on these matters, it would be inappropriate for me to suggest the direction of your discussions. I do, however, offer some thoughts, which you might keep in mind –

---

[43] Generals were elected to one-year terms; but, ten times a year, the assembly voted whether their military conduct was satisfactory.

[44] The exception being the Council of Five Hundred, where a man could serve twice in his life.

- First, long before you put pen to the drafting paper, you should ask where the problems lie. Indeed, are any problems so pressing that they require constitutional change?; or is it more a case of "if it ain't broke, don't fix it"?

  There are always those who'll argue that we face constitutional crises; for example, that "New Zealand's constitution suffers a profound crisis of democratic legitimacy … [because it] rests on rules and conventions that were not adopted by the people and … cannot be altered through democratic procedures"[45]; or that controversy over ownership of the foreshore and seabed, or of water, amounts to a "constitutional crisis". It's easy to use the word "crisis" to highlight a pet issue; so you've got to ask whether these matters really are of such great moment as to require constitutional change?

- Secondly, you will inevitably have to consider the constitutional role of the Treaty of Waitangi; and one of the problems with that will be that there is no national consensus regarding that role. On that, you could have no better adviser than Dr Claudia Orange.

- Next, even if our constitution remains "unwritten", should more of it be "entrenched" – only changeable by a Parliamentary super-majority (three quarters of all MPs) or by referendum?

  We already entrench requirements such as the three-year Parliament and MMP; but are other aspects also worthy of that protection? For example, Sir Geoffrey Palmer has argued that for his New Zealand Bill of Rights Act 1990. And, if the Official Information Act really is "central to New Zealand's constitutional arrangements", should we, at the very least, entrench its guiding principle – that official information must be made available unless good reason exists under the Act for

---

[45] *New Zealand's Constitutional Crisis*; Joel I **Colón-Ríos**, Victoria University of Wellington - Faculty of Law; December 1, 2010; New Zealand Universities Law Review, Vol. 24. No. 3, 2011.

withholding it? Are there other provisions that might be considered for entrenchment?

- Next, the current Constitutional Review begs the question whether we should formalise how we reconsider our constitutional arrangements.

  Hawaii, the American state that's closest to us, both geographically and culturally, undertakes periodic reviews of its State Constitution. Voters elect a Constitutional Convention, often choosing those who aren't politicians or members of political parties. Important changes can result: the 1978 Convention established term limits for elected officials, required a balanced State Budget and even established the basis for righting wrongs done to native Hawaiians following the overthrow of the Hawaiian monarchy in 1893.

  But, even if no major changes emerge, that doesn't detract from the process; rather, it confirms that, after intensive review, most existing arrangements were found to be satisfactory - if it ain't broke, they're not going to fix it – and an open, transparent review process provides all the more confidence in that view.

  Might we benefit from similar, regular reviews?; or is the fact that over (say) the past 30 years, we've made government information more available, enacted a Bill of Rights, and changed the way we elect our legislators (and reconfirmed that in a later referendum) – does all that show that, without any great formality, we already regularly review and (if necessary) update our constitutional arrangements?

- And should we look again at the parliamentary term - an issue we last seriously considered in 1967[46]? Might it be extended to four years?; or was Sir Keith Holyoake on the button when he said that "four years is far too short for a good government, and three years is far too long for a bad one"?

Conclusion

In addressing all these and other issues you might have regard to the Scottish jurist and statesman, Lord Brougham[47], who put the task of writing new laws in the most noble of terms –

> It was the boast of Augustus [he wrote] that he found Rome brick and left it of marble. A praise not unworthy of a great prince. But how much nobler would be our sovereign's boast when he shall [say]... that he found law dear and left it cheap; found it a sealed book, left it a living letter; found it the patrimony of the rich, left it the inheritance of the poor; found it the two-edged sword of craft and oppression, left it the staff of honesty and the shield of innocence.

That, surely, is similar to your challenge. Our constitution has served us remarkably well over nearly 160 years; whatever you do, or try to do to it, make sure that it's accessible to all (that's finding it "a sealed book" and leaving "it a living letter"), that it belongs to all the people (making it the "inheritance of the poor", not "the patrimony of the rich"), that it provides genuine protections for ordinary citizens ("the staff of honesty and the shield of innocence").

---

46 On 23 September 1967, a referendum on the length of the parliamentary term was conducted (in conjunction with a referendum on liquor licensing hours). 68.1 percent of those voting (on a 69.7 percent turnout) rejected a possible four-year term. A contemporary cartoon showed an inebriated referendum participant declaring he'd voted "to close Parliament at 6 pm, and keep the pubs open for four years".

47 Henry Brougham; Scottish jurist & politician (1778-1868).

But, just in case you get too carried away by Brougham's wonderful words, you might also reflect on those of Lord Eldon[48], who said that, like the Spartan lawgiver, anyone who propose new laws "should come publicly with a halter round his neck and adventure a hanging if he failed in his undertaking".

For those who might wish to "rewrite" our Constitution, in whatever form, or those who would confirm our existing constitutional arrangements, the challenge must always be to achieve Brougham's noble, Augustinian objectives - but, above all, to avoid Eldon's Spartan, hanging fate.

****

[48] John Scott, 1st Earl of Eldon; British barrister and politician; Lord Chancellor of Great Britain between 1801 and 1806 and again between 1807 and 1827.