

# ADDRESS TO THE LEGAL RESEARCH FOUNDATION SEMINAR

## *Mapping the Common Law*

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## *Mapping the Constitutional*

[1] Walter Bagehot described the “great difficulty in the way of a writer who attempts to sketch a living Constitution”: the object is in constant change.<sup>2</sup> That is an unpromising thought with which start a discussion on “mapping the constitutional”. Constant change is however the least of the problems. After all, the common law is a method of change and the would-be taxonomist of any part of it must allow for development. The more difficult problem in mapping what is constitutional in a legal system is that the “constitutional” is not set aside from the other categories into which it is convenient for us to divide law. We may no longer hold to the former view that the constitution is all the laws, institutions and customs observed in a legal system,<sup>3</sup> but what we call the “constitutional” is written on a palimpsest in which the wider legal order and its history shows through. If some of the aims of legal taxonomy are to avoid overlapping categories and promote order, coherence, and symmetry in law, then the category of constitutional law is inherently untidy. That may be especially so in a legal system like that of New Zealand, lacking a substantial written constitution, but is so also in systems with more elaborate written allocation of government powers and constitutional values. No written constitutional text can be complete. What is “constitutional” in any legal system is contestable and often hotly contested. That is in part because the label itself stakes a claim to legitimacy and priority in the distribution of power in the legal order and so is inevitably ground of conflict.

[2] Despite the difficulties, mapping what is constitutional is essential responsibility for practising lawyers and academics. That is for all the usual reasons why such effort is indispensable in understanding the limits, the balances and the principles of any area of law. It hopes to fend off disorder of thought and make the concepts accessible. Mapping of law is necessarily an exercise in judgment and interpretation. It is fated never to be complete. Indeed, Stephen Waddams is surely right to say that the use of the mapping metaphor “owes its attraction partly to its indeterminacy”.<sup>4</sup> It is not possible

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<sup>1</sup> The Rt Honourable Dame Sian Elias, Chief Justice of New Zealand.

<sup>2</sup> Walter Bagehot *The English Constitution* (2nd ed, Cambridge University Press, Cambridge, 2001) at 193 (in Bagehot’s introduction to the second edition).

<sup>3</sup> Martin Loughlin *The Idea of Public Law* (Oxford University Press, Oxford, 2003) at 120.

<sup>4</sup> Stephen Waddams *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge University Press, Cambridge, 2003) at 3.

to reduce the whole to a catalogue. That early mapper of the law, Blackstone, emphasised that the business of mapping the law does not entail identifying “subordinate limits” or “the longitude and latitude of every inconsiderable hamlet”.<sup>5</sup> It is enough to look to the shape and outline of the country and its “greater divisions and principal cities”.<sup>6</sup> A sketch map then is the best we can attempt. And it is only an aid to analysis; it cannot supply answers.

[3] The constitutional is one area of law that has not suffered from the neglect of analysis that has galvanised the energies of modern taxonomers in other areas of law. Some of the great thinkers of the law have toiled here to produce analytical tools such as grundnorms<sup>7</sup> and rules of recognition.<sup>8</sup> Others have explained this area in terms of sweeping theories such as the sovereignty of parliament, the rule of law, the principle of legality, common law constitutionalism and the “third-source” doctrine of executive authority.<sup>9</sup> Indeed, constitutional law may be said to have suffered at times from too much organising theory. Perhaps it illustrates some of the pitfalls of taxonomy. Such pitfalls were well identified by Lord Goff to include the “temptation of elegance”; over-simplification (with its dangers of under-inclusion and failure to grasp the complexities and difficulties of a working constitution, stressed by Burke); “the fallacy of the instant, complete solution”; neglect of historical context; and “the dogmatic fallacy” of being unable to see the principles for the rules.<sup>10</sup>

[4] Constitutions define the institutions of government and how they operate. They are concerned with the allocation of public power. They include values which limit the powers conferred and provide measures by which the exercise of state authority is legitimised. Such rules and values are more readily identified in the case of states with written constitutions, but they are found in any state where power is organised. The constitutions of the United Kingdom and New Zealand are not exceptions, although they are often treated as if they are.<sup>11</sup>

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<sup>5</sup> William Blackstone *Commentaries on the Laws of England: Book the First* (Dawsons of Pall Mall, London, 1966) at 35.

<sup>6</sup> At 35.

<sup>7</sup> Hans Kelsen *Pure Theory of Law* (The Lawbook Exchange Ltd, Union, New Jersey, 2002) at 8–9.

<sup>8</sup> HLA Hart *The Concept of Law* (2nd ed, Oxford University Press, Oxford, 1997) at 100–123.

<sup>9</sup> The latter has been developed by Bruce Harris in: BV Harris “The Third Source of Authority for Government Action” (1992) 108 LQR 626; BV Harris “The ‘Third Source’ of Authority for Government Action Revisited” (2007) 123 LQR 225; BV Harris “Government ‘Third Source’ Action and Common Law Constitutionalism” (2010) 126 LQR 373.

<sup>10</sup> Robert Goff “Appendix: The Search for Principle” in William Swadling and Gareth Jones (eds) *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford University Press, Oxford, 2004) 313 at 318–320.

<sup>11</sup> Laurence Tribe observes that the US constitution also consists of both written and unwritten parts: see Laurence H Tribe *The Invisible Constitution* (Oxford University Press, New York, 2008) at 7–9.

[5] Constitutional mapping is often confined to a description of the institutions which share state power and identification of the sources of their authority. In our tradition these are overshadowed by the two general constitutional principles identified by AV Dicey: the sovereignty of Parliament and the rule of law.<sup>12</sup> Neither of these doctrines purports to include substantive values of the constitution. And the tenacity of this organising theory of the constitution is a reason why the area may provide a cautionary lesson for taxonomists. The world around us may contradict the theory, but it endures. It has left us with a disabling legacy in modern constitutional thinking.

[6] This cannot fairly be laid entirely at the door of Dicey. His great book is about general principles, not rules.<sup>13</sup> His conception of the sovereignty of parliament flows from law<sup>14</sup> and is to be contrasted with the more austere vision of Austin, that law flows from the sovereign.<sup>15</sup> Law is central in Dicey's work. His concept of the rule of law underlies modern public law. Under the rule of law rights may not be invaded except by law which is judged by the ordinary courts of the land.<sup>16</sup> The rule of law inevitably affects the sovereignty of Parliament. This is not only for the reasons advanced by Richard Latham – that ascertaining what institution exercises the sovereign power of the state and how it is validly exercised precedes valid law-making and that a condition of validity is inevitably a question of law.<sup>17</sup> It is also because the rule of law is pregnant with values.<sup>18</sup>

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<sup>12</sup> See AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan & Co Ltd, London, 1961) at 183–184.

<sup>13</sup> See Mark D Walters “Dicey on Writing the *Law of the Constitution*” (2012) 32 OJLS 21 at 33.

<sup>14</sup> Dicey, above n 12, at 411.

<sup>15</sup> As elaborated in John Austin *The Province of Jurisprudence Determined* (John Murray, Albemarle Street, London, 1832).

<sup>16</sup> Dicey, above n 12, at 195–196.

<sup>17</sup> RTE Latham *The Law and the Commonwealth* (Oxford University Press, London, 1949) at 522.

<sup>18</sup> See Tom Bingham *The Rule of Law* (Allen Lane, London, 2010) at 67. In this way, Lord Bingham has argued that human rights are part of the rule of law.

## **A sketch of the outlines of the New Zealand constitution**

[7] The New Zealand constitution, like the constitution of the United Kingdom, is partially written. It shares that characteristic with all states with written constitutions too (since a text can never capture the entire constitution). But, without a foundational text constitutive of the state in New Zealand (as in the United Kingdom), we have to look a little harder to discover the written bits and the other bits. I confine myself to a description of the New Zealand constitution, although there is overlap in terms of the imperial constitutional statutes in force in the United Kingdom and New Zealand. I do not attempt here anything as elaborate as the useful taxonomy undertaken by Matthew Palmer.<sup>19</sup>

[8] The Constitution Act 1986 prosaically recognises the Sovereign, the Executive, the legislature and the judiciary. The Parliament “continues” by s 15 of the Act “to have full power to make laws”. The parliamentary term of three years is entrenched in the Electoral Act 1993 (along with the reserved provisions of that Act dealing with voting) and can be amended only by a majority of 75 per cent of the members of the House of Representatives or by a majority of the votes cast at a poll of electors.<sup>20</sup> No other legislation bearing on the constitution is entrenched. And the Electoral Act provisions are not doubly entrenched and could be repealed by simple majority if the Act itself was repealed. Nevertheless the entrenchment of the Electoral Act has been observed for more than 50 years.<sup>21</sup>

[9] The judges are protected in their tenure of office and in their salaries by the Constitution Act, in re-enactment of the Act of Settlement provisions.<sup>22</sup> The Imperial Laws Application Act 1988 provides for the continuation in force in New Zealand of identified Imperial enactments and the common law of England (to the extent it was part of the laws of New Zealand immediately before the commencement of the Act).<sup>23</sup> It also identifies which of the Imperial Statutes have the status of “constitutional enactments”.<sup>24</sup> They include the part of the Statutes of Westminster the First which provides, “for the maintain of peace and justice”, “The King willeth and commandeth ... that common right be done to all, as well poor as rich, without respect of persons”,<sup>25</sup> an expression of the value of equality not to be found in the New Zealand Bill of Rights Act, although implicit in the rule of law (as the White Paper that preceded the Bill of Rights Act explained).<sup>26</sup> Magna Carta is also

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<sup>19</sup> Matthew SR Palmer “What is New Zealand’s constitution and who interprets it? Constitutional realism and the importance of public office-holders” (2006) 17 PLR 133 at 142–145.

<sup>20</sup> Electoral Act 1993, s 268(1)(a).

<sup>21</sup> See Electoral Act 1956 (repealed), s 189(1)(a).

<sup>22</sup> Sections 23 and 24.

<sup>23</sup> Imperial Laws Application Act 1988, schs 1 and 2 and s 5.

<sup>24</sup> In sch 1.

<sup>25</sup> See (1275) 3 Edw 1, c 1.

<sup>26</sup> Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” [1984–1985] I AJHR A6 at [10.81].

included, as is the Petition of Right, the Bill of Rights 1688 and the Act of Settlement 1700. These are the substantive provisions described in the 1988 legislation by the New Zealand Parliament as “constitutional”.

[10] Although it is only the imperial legislation that is described by Parliament as “constitutional” (and, of the legislation of the New Zealand Parliament, only the Electoral Act contains entrenched provisions, although not doubly entrenched provisions), most of the legislation I have mentioned is generally treated in texts and judgments as constitutional in character. In some cases it is expressed by Parliament in terms that suggest an elevated or overarching status. The Supreme Court 2003, for example, declares that nothing in that Act to patriate our final Court affects New Zealand’s “continuing commitment to the rule of law and the sovereignty of Parliament”.<sup>27</sup> The New Zealand Bill of Rights Act 1990 expresses substantive values as “fundamental”<sup>28</sup> and binds the legislative, executive and judicial branches of government<sup>29</sup> (while requiring the judicial branch to give effect to legislation that cannot be interpreted to conform with the Bill of Rights).<sup>30</sup>

[11] There is no definitive or authoritative list of statutes properly classified as “constitutional”. Sir Kenneth Keith, in his introduction to the Cabinet Manual,<sup>31</sup> has suggested in addition the State Sector Act 1998, the Judicature Act 1908 (recognising the inherent jurisdiction of the High Court), the Ombudsman Act 1976, the Official Information Act 1982, and the Public Finance Act 1989.<sup>32</sup> Philip Joseph<sup>33</sup> and Matthew Palmer<sup>34</sup> proffer additional suggestions. If legislation such as these Acts are accepted to be appropriately identified as “constitutional”, along with the statutes so labelled by Parliament, what we may be seeing is the development of a different status for such statutes. Such approach, similar to that suggested by Laws LJ in *Thoburn v Sunderland City Council*,<sup>35</sup> has implications for implied repeal and the doctrine of the sovereignty of parliament. Dicey, it will be remembered, was against any hierarchy of statutes as being inconsistent with parliamentary sovereignty. That seems contradicted by the approach taken by Parliament as well as commentators.

[12] Other sources of the constitution identified by Sir Kenneth Keith include the prerogative powers of the Queen, relevant decisions of the courts

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<sup>27</sup> Supreme Court Act 2003, s 3.

<sup>28</sup> See the New Zealand Bill of Rights Act 1990, Long Title.

<sup>29</sup> Section 3.

<sup>30</sup> Section 6.

<sup>31</sup> Sir Kenneth Keith “On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government” in Cabinet Office *Cabinet Manual 2008*.

<sup>32</sup> At 2.

<sup>33</sup> PA Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers Ltd, Wellington, 2007) at 21–34.

<sup>34</sup> Palmer, above n 19.

<sup>35</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151 at [60]–[70].

(in which he instances decisions upholding rights of the individual against the powers of the state, and determining the extent of those powers), and the Treaty of Waitangi (“which may indicate limits in our polity on majority decision making”).<sup>36</sup> The Treaty remains largely uncharted in our existing maps of constitutional law. Scarcely erased on the parchment on which we might attempt a new map of the constitution we can still see the words “a simply nullity”.<sup>37</sup>

[13] In the existing maps we have of constitutional law there is a large blank. It is occupied by the conventions of the constitution, which have traditionally been treated as lying outside the law, even though they contain some of the more significant checks on the institutions of state. Such checks, we were taught, are matters of political morality rather than law. As a result, constitutional lawyers have felt justified in largely ignoring them.

[14] Dicey, who was the first to adopt the terminology of “convention”,<sup>38</sup> described such legally unenforceable conventions as “understandings, habits, or practices which ... regulate the conduct of the several members of the sovereign power, of the Ministry, or of other officials”.<sup>39</sup> They are treated as including cabinet government (through which is achieved what Walter Bagehot in his breezy way called the “efficient secret” of the constitution – “the nearly complete fusion of the executive and legislative powers”).<sup>40</sup> Sir Ivor Jennings, so devastating in his rejection of Dicey’s doctrine of the sovereignty of Parliament, was content to adopt the role of non-enforceable (but obeyed) conventions of the constitution.<sup>41</sup> He thought they were a source of strength because they enabled the constitution to develop in step with society.<sup>42</sup> In New Zealand, Philip Joseph says of the conventions of the constitution that they are “the pre-eminent non-legal source of the Constitution”. They are rules of “political obligation” which evoke a sense of obligation as a rule of conduct and serve a “necessary constitutional purpose”. They facilitate constitutional development without formal or abrupt changes in the law. The main convention of the constitution is the convention around cabinet government “that the Crown exercises its powers on and in accordance with Ministerial advice”.<sup>43</sup>

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<sup>36</sup> Sir Kenneth Keith “On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government”, above n 31, at 2.

<sup>37</sup> *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 at 78.

<sup>38</sup> JS Mill had referred to “the unwritten maxims of the constitution” (John Stuart Mill *Utilitarianism, Liberty, Representative Government* (Everyman’s Library, London, 1910) at 229), and Sir William Anson had referred to “the custom of the constitution” in William Anson *The Law and Custom of the Constitution* (4th ed, Clarendon Press, Oxford, 1909) at 23.

<sup>39</sup> Dicey, above n 12, at 23.

<sup>40</sup> Bagehot, above n 2, at 11.

<sup>41</sup> Ivor Jennings *The Law and the Constitution* (4th ed, University of London Press, London, 1952) at 102.

<sup>42</sup> At 80–81.

<sup>43</sup> Joseph, above n 33, at 34.

[15] The evolution of the conventions of the constitution is controlled by those who are in on “the efficient secret” of government extolled by Walter Bagehot. Evolutionary change may be transformative: thus it is by convention (not as a matter of law) that the Queen and her representative, the Governor-General, act on the advice of the Prime Minister and cannot withhold assent from legislation. Cabinet government is sometimes said by the evolution of convention to have been replaced by government by the Prime Minister (distinguishable from a presidential executive because the Prime Minister is responsible to Parliament rather than to the electorate). Other developing habits may or may not have reached the status of convention. Sir Kenneth Keith in his “On the Constitution of New Zealand: An Introduction to the Cabinet Manual” says of the conventions of the constitution that they “in practice regulate, control and in some cases transform the use of the legal powers arising from the prerogative or conferred by statute”:<sup>44</sup>

The most important conventions arise from the democratic character of our constitution. Constitutional conventions are of critical importance to the working of the constitution, even though they are not enforceable by the courts. In 1982, the Supreme Court of Canada summarised the constitutional position in that country in an equation: constitutional conventions plus constitutional law equal the total constitution of the country.

[16] I wonder whether such evolution of constitutional fundamentals, under the radar, is self-evidently desirable in a representative democracy. It is to place a high value on change and informality over the stability and accessibility of the institutions and operation of the constitution. And it excludes those who are not insiders in government from participation in shaping the changes. More relevantly for present purposes, any adequate modern mapping of the constitution needs to confront this blank.

[17] In the first quarter of the 21st century the idea that the discretion of the institutions of state in their relations with each other and in the administration of the most important powers of government is outside the law, although subject to rules of political morality which constrain the choices available, is startling. It may be contrasted with the developments that in the last thirty years have brought under control prerogative discretion (itself often tempered by habits and practices conventionally followed).<sup>45</sup> The parallel between the control of the prerogative and constitutional conventions is one made by TRS Allan<sup>46</sup> in discussion of the 1982 Supreme Court of Canada

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<sup>44</sup> Sir Kenneth Keith “On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government”, above n 31, at 2.

<sup>45</sup> See, for example, *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 (HL) at 399 per Lord Fraser, 407 per Lord Scarman, 411 per Lord Diplock, 417 per Lord Roskill, and 424 per Lord Brightman; and in the New Zealand context *Burt v Governor-General* [1992] 3 NZLR 672 (CA) at 678 per Cooke P.

<sup>46</sup> TRS Allan “Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case” (1986) 45 CLJ 306.

decision about patriation of the Canadian Constitution.<sup>47</sup> It is difficult to believe that the gulf between law and constitutional convention conforms to public expectations and constitutional need. It is, as Allan remarks, “too dogmatic” and “obscures” the more modern and important question: “is the situation ... one which demands a legal remedy?”<sup>48</sup>

[18] In mapping what is “constitutional” and in addition to statutes and conventions, the taxonomies provided by Sir Kenneth Keith and Matthew Palmer point to important decisions of courts by which the legality of the exercise of government power by the executive (whether pursuant to statute or the prerogative) and of delegated legislation has been achieved.<sup>49</sup> Any adequate map of this control today however also needs to take account of the way in which public power is now distributed through bodies that are not part of the executive. This may well be the emerging challenge for modern constitutional law, as Michael Taggart suggested when drawing attention to the absence of parliamentary underpinning in much of the “out-sourcing” of state activity.<sup>50</sup>

[19] The diffusion of state activity raises with new urgency classification of the relationship and porous boundaries between public and private law. These problems are already upon us in the application of the New Zealand Bill of Rights Act. It attaches not only to the legislative, executive and judicial branches of government but also to “acts done ... by any person, or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law”.<sup>51</sup> Similar issues arise more generally in the case of judicial review.<sup>52</sup>

[20] An adequate map of the constitutional needs to confront the way in which government is delivered today. It will need to engage with Professor Bruce Harris’s theory of the third source<sup>53</sup> as well as with the outsourcing of government activities. This may well be an area the courts will be asked to consider. Lord Diplock made it clear that it is the responsibility of the courts to adapt their processes “to preserve the integrity of the rule of law despite changes in the social structure, *methods of government* and the extent to which the activities of private citizens are controlled by government authorities”.<sup>54</sup> As he explained in another case, the jurisdiction of the High

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<sup>47</sup> *Reference re Amendment of the Constitution of Canada* (1982) 125 DLR (3d) 1 (SCC).

<sup>48</sup> Allan, above n 46, at 312.

<sup>49</sup> Sir Kenneth Keith “On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government”, above n 31, at 2; Palmer, above n 19, at 143–145.

<sup>50</sup> Michael Taggart “From ‘Parliamentary Powers’ to Privatisation: The Chequered History of Delegated Legislation in the Twentieth Century” (2005) 55 *University of Toronto Law Journal* 575 at 626.

<sup>51</sup> New Zealand Bill of Rights Act 1990, s 3.

<sup>52</sup> See, for example, *Royal Australasian College of Surgeons v Phupps* [1999] 3 NZLR 1 (CA) at 11.

<sup>53</sup> See above n 9.

<sup>54</sup> *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL) at 639–640 (emphasis added).



Court to supervise for legality extends to new bodies possessing the “essential characteristics” upon which the supervisory jurisdiction of the High Court has been based.<sup>55</sup>

### **A false map**

[21] With the triumph of Parliament over the king (a struggle in which law, including claims of individual and inalienable rights, played a critical part), the power of Dicey’s analysis set up the conditions in which it came to be thought by some that our unwritten constitution was merely what the sovereign Parliament said it was. This paved the way for the view that the constitution is political, not legal. It was a climate in which a senior British politician could say “unconstitutional” is a term “applied in politics to the other fellow who does something that you do not like”.<sup>56</sup> The vision of a “political constitution”, as John Griffith thought the British constitution to be,<sup>57</sup> is as an engine of government. It is concerned with the description of power, rather than the structure of its distribution and the terms of its exercise. Such vision stresses efficiency in government and has political virtues. Uncontrolled, however, a political constitution in which the executive controls parliament gives rise to fears of the “elective dictatorship” famously described by Lord Hailsham.<sup>58</sup> Hailsham, it may be recalled, prescribed the remedies of a written constitution and a bill of rights, before a return to government changed his mind about the need for such safeguards.<sup>59</sup>

[22] Unlimited authority is not however the popular understanding of what any constitution permits. Nor does it accord with what we see all around us. The description and identification of the constraints on government contained in the New Zealand Cabinet Office Manual make no sense except as limitations on government. And, as Richard Latham pointed out, the rules for identifying who is the sovereign and how its laws are made are rules of law logically prior to the supremacy of its will.<sup>60</sup> All states have constitutions, more or less elaborate and more or less limiting of the authority of its institutions. And the divisions of functions and powers, the system of checks and controls are rules of law and must be observed.

[23] Maitland, Pennington, Loughlin and others have demonstrated how out of step with our history the view of unlimited parliamentary authority has

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<sup>55</sup> *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864 (CA) at 884.

<sup>56</sup> A remark attributed by Jennings to Austin Chamberlain: Ivor Jennings *Cabinet Government* (3rd ed, Cambridge University Press, London, 1959) at 13.

<sup>57</sup> JAG Griffith “The Political Constitution” (1970) 42 MLR 1.

<sup>58</sup> In his Dimpleby Lecture of 19 October 1976 and later in *The Dilemma of Democracy: Diagnosis and Prescription* (Collins, London, 1978).

<sup>59</sup> As noted by Ferdinand Mount *The British Constitution Now: Recovery or Decline?* (Heinemann, London, 1992) at 3.

<sup>60</sup> See Latham, above n 17.

been.<sup>61</sup> The assertion of the supremacy of the Imperial Parliament was a significant grievance in the movement for independence of the American colonies. The colonists insisted that parliamentary supremacy over the Crown did not mean parliamentary sovereignty over law and the constitution.<sup>62</sup> They invoked custom and claimed that Magna Carta and the Petition of Right were expressive of “reserv’d rights” that were antecedent to and therefore binding on Parliament.<sup>63</sup> It is not necessary to hanker after the old mediaeval Constitution (in which the notion of absolute power was impious as well as impossible) to recognise that the new constitution that followed the upheavals of the 17th century and the establishment of modern government in the 20th century (the “new despotism” Hewart fulminated against)<sup>64</sup> were equally and inevitably law.

[24] Loughlin attributes the loss of this sense of the constitutional to the triumph of the analytical approach of Dicey over the historical.<sup>65</sup> Bad mapping, in other words. By Lord Goff’s measures: too elegant, over-simplified, falling for the fallacy of the “instant complete solution”, neglecting historical context”, and committing the sin of the “dogmatic fallacy” of being blind to the operation of principle.<sup>66</sup> Now, I do not want to be too hard on Dicey, particularly after Mark Walters had done so much to rehabilitate him.<sup>67</sup> And I want to suggest myself that the twin and interlinked concepts of the sovereignty of Parliament and the rule of law remain important analytical tools (points of reference on the map) for constitutional lawyers. It seems to me that the problem lies in those who have used the doctrine as if it were not simply an aid to analysis but expressed an eternal truth. The damage caused by applying Dicey’s elegant doctrine in this way is that it has blunted our capacity for constitutional thought and inhibited development of a coherent theory of the constitution.<sup>68</sup>

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<sup>61</sup> Frederick Pollock and FW Maitland *History of English Law* (Cambridge University Press, Cambridge, 1898) at 182, as cited in Mount, above n 59, at 85; Kenneth Pennington *The Prince and the Law, 1200–1600: Sovereignty and Rights in the Western Legal Tradition* (University of California Press, Berkeley, 1993) at 288–290; Martin Loughlin *Public Law and Political Theory* (Clarendon Press, Oxford, 1992) at 151.

<sup>62</sup> John Phillip Reid *Constitutional History of the American Revolution: The Authority to Legislate* (University of Wisconsin Press, Madison, 1991) at 4–5, as cited in Jack P Greene *The Constitutional Origins of the American Revolution* (Cambridge University Press, Cambridge, 2011) at xviii.

<sup>63</sup> Greene, above n 62, at 59.

<sup>64</sup> See Lord Hewart *The New Despotism* (Ernest Benn, London, 1929).

<sup>65</sup> Loughlin, above n 3, at 133.

<sup>66</sup> See Goff, above n 10.

<sup>67</sup> In Walters “Dicey on Writing the *Law of the Constitution*”, above n 13.

<sup>68</sup> This point is made by Justice Thomas, who notes: “The single most debilitating influence on that more positive jurisprudence [in which the relationship of Parliament and the courts is in the nature of a fruitful partnership] has been the judiciary’s fulsome deference to the sovereignty of Parliament. With a grip of iron the concept has strangled the coherent development of the law.” See Justice EW Thomas “Centennial Lecture: The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium” (2000) 31 VUWLR 5 at 35.

[25] It may also have sidelined constitutional analysis in some of the adjustments generated through the political processes. In New Zealand, the adoption of the Bill of Rights Act and other laws by which the power of the state is now regulated have largely been driven by international obligations<sup>69</sup> and shifts in domestic social culture. The preoccupation with parliamentary sovereignty to the exclusion of so much else seems almost beside the point. We have moved in short order to proportional representation (something Dicey fulminated against<sup>70</sup> and which is itself a significant check on absolute and arbitrary power). We have adopted with enthusiasm openness in government. We have enacted a statement of individual rights in which the ultimate touchstone is what is justifiable in a “free and democratic society”.<sup>71</sup> And we have set up a final court of appeal under a statute that tempers its reference to parliamentary sovereignty with the rule of law, and identifies matters concerning the Treaty of Waitangi as being of public importance in the Court’s work.<sup>72</sup> Apart from legislation, decisions of the courts in cases such as *Factortame (No 2)*<sup>73</sup> in the United Kingdom and, more modestly, *Sellers v Maritime Safety Inspector*<sup>74</sup> in New Zealand look to a wider international context in which parliamentary sovereignty seems increasingly frayed.

[26] The task of today’s map-maker is to free us from such conceptual shackles as the doctrine of parliamentary sovereignty to think less barrenly about what Neil MacCormick called the “law-state”,<sup>75</sup> a state in which all live under the security of law. In such a state, the challenge for the constitution is not how to reflect popular will through representative government. That battle has been long won. It is not principally to maintain the freedom of action of a legislature with “full power to make laws”<sup>76</sup> or even prevent it from running amok – a most unlikely eventuality. It is to provide a framework to assist in close attention to the little ways in which things of value in our society may be lost if we do not have a shared sense of what is important. The White Paper, “A Bill of Rights for New Zealand”, published in 1985, spoke of the “continual danger” in our constitutional system that the executive is under “constant temptation” to make small incursions into rights.<sup>77</sup> As it said:<sup>78</sup>

In some instances there may be a plausible argument based on expediency. But each small step makes the next small step easier and more seductive. For many years the needs, or alleged needs, of

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<sup>69</sup> For example, the International Covenant on Civil and Political Rights.

<sup>70</sup> AV Dicey *Introduction to the Study of the Law of the Constitution* (8th ed, Macmillan, London, 1927) at lxx.

<sup>71</sup> New Zealand Bill of Rights Act 1990, s 5.

<sup>72</sup> Supreme Court Act 2003, s 13.

<sup>73</sup> *R v Secretary of State for Transport ex parte Factortame Ltd* [1990] 2 AC 85 (HL).

<sup>74</sup> *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA).

<sup>75</sup> Neil MacCormick *Institutions of the Law* (Oxford University Press, Oxford, 2007) at 205.

<sup>76</sup> Constitution Act 1986, s 15.

<sup>77</sup> Palmer “A Bill of Rights for New Zealand: A White Paper”, above n 26, at 27.

<sup>78</sup> At 27.

implementing a host of policies – or still worse of administrative convenience – had pressed against personal rights and freedoms.

A principal virtue of cultivating a sense of what is constitutional is to provide shared and accessible values against which to measure government action and proposed change so that liberties and rights are not imperceptibly eroded.

[27] A constitution provides a framework for the work of legislators (and in a system of proportional representation their work may well be the most effective protection for constitutional values). A constitution provides the shelter of law under which officials are free to do what is right. It aids the culture of law-mindedness that is observed by people who never see the inside of a courtroom. It facilitates participation in the enterprise of government. And that is an enterprise for which we should be ambitious.

[28] The example of the United States Constitution has had an extraordinary influence on the way others think about their own societies. It has been the model for very many constitutions, including that of Australia. It exerts a significant and authentic pull on individuals who want to believe that they live in a society in which there are structural checks against the exercise of arbitrary power and in which citizens are valued equally and treated fairly in accordance with fundamental laws beyond removal by ordinary legislation. Such balances, admired in the British constitution of the eighteenth century by observers such as Montesquieu and Madison, emphasise what Ferdinand Mount has called the “subordinate, secondary and instrumental role of governments”.<sup>79</sup> The security of a constitution is also a shelter in which those with aspirations for a measure of plurality can be accommodated without imperilling the whole. In modern federal states and those which accept some supranational restraints, sovereignty is not monolithic and can be shared. In the United Kingdom, post-Europe and post-devolution, the notion of an omnipotent Parliament at Westminster seems increasingly divorced from the world as it is. It cannot be revolutionary to suggest that the same is true in a unitary state like ours which is committed to the rule of law. If we are to make headway in addressing the constitutional issues of our times, not the least of them being the status of Maori under the Treaty of Waitangi, we need a better map of the constitutional than we have had.

### **A more modest constitutional principle of the sovereignty of parliament**

[29] Parliamentary supremacy is acknowledged in judicial decisions,<sup>80</sup> but in its most uncompromising version is simply doctrine pushed to its logical

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<sup>79</sup> Mount, above n 59, at 78.

<sup>80</sup> See for example *McKinlay v The Commonwealth* (1975) 135 CLR 1 at 24 per Barwick CJ; *Jackson v Attorney-General* [2005] UKHL 56 at [9] per Lord Bingham; *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 (PC) at 732 per Lord Reid. See also Sir Owen Dixon “The Law and the Constitution” reprinted in Sir Owen Dixon *Jesting Pilate* (2nd ed, William S Hein & Co Inc, New York, 1997) at 38.

extreme. Sir Kenneth Keith has challenged us to consider whether we really understand what we are talking about in referring to sovereignty.<sup>81</sup> He questions whether it is truly useful. He urges us to look at it afresh.

[30] A fresh look might start with Sir Anthony Mason's suggestion that the doctrine of parliamentary sovereignty, a creation of the common law, is "not the master but the servant of the constitution".<sup>82</sup> With that thought, perhaps some reconciliation of doctrine can be attempted through acceptance of a more modest doctrine of legislative supremacy in law-making.

[31] Parliamentary sovereignty has two aspects: legislative competence and legislative supremacy. Sir Anthony Mason makes the point that even in jurisdictions such as the United States, where the legislature is neither omnicompetent nor supreme as law-maker, there are echoes of the idea of legislative supremacy in deference to legislative judgment, as is appropriate in a representative democracy.<sup>83</sup>

[32] In New Zealand's representative democracy there is no rival for legislative supremacy. Parliament has untrammelled power to make law within the scope of its authority under the constitution. Enactments within its competence bind all other institutions and individuals. This is not deference but obedience. The constitution is concerned with legislative competence, not the supremacy of laws made within competence. The task of constitutional theory in a law-state is to plot the limits of parliamentary competence. That is necessarily a predictive exercise in states with written constitutions as it is in states without written constitutions.

[33] In some quarters the notion of limits to parliamentary competence is still regarded as heresy. But for reasons I have expressed elsewhere and do not rehearse again here, I do not think that Parliament ever was sovereign in the absolutist and unlimited sense. And I am not in the camp that thinks that if Parliament loses power, someone else gains it – probably some unelected judge. I am not concerned with the subsequent questions of what happens if parliamentary competence is exceeded (to which there are a range of responses). I am trying to get beyond the conceptual roadblock that suggests that questions of legal competence cannot arise. I think we should let it go. In real life it is almost impossible to imagine that action which sought to override the constitutional balances would consciously be taken by a democratic parliament. Is it then only juridical fundamentalism that prevents us from making the position plain and recognising unmistakably that the constitution is law observed by Parliament, as by everyone else, not as a matter of grace but as a matter of obligation?

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<sup>81</sup> KJ Keith "Sovereignty at the Beginning of the 21<sup>st</sup> Century: Fundamental or Outmoded?" (2004) 63 CLJ 581 at 604.

<sup>82</sup> Sir Anthony Mason "One Vote, One Value v The Parliamentary Tradition – the Federal Experience" in Christopher Forsyth and Ivan Hare (eds) *The Golden Metwand and the Crooked Cord: Essays in Public Law in Honour of Sir William Wade QC* (Oxford University Press, Oxford, 1998) 333 at 335.

<sup>83</sup> At 333.

[34] I proceed on that basis, to attempt a rough sketch of how a working constitution which is properly respectful of parliamentary authority, might look. Such map is highly contestable, but that is equally true for states with written constitutions as it is for one like ours.

### **The New Zealand constitution now**

[35] The “working parts” of the Constitution are mapped by the Constitution Act 1986. They are the Queen, the Executive, the Legislature and the Judiciary. The language is declaratory rather than constitutive, alluding silently to sources of authority derived from or affirmed by both the common law and important statutes (such as the Electoral Act 1993, establishing the basis of voting, and the Judicature Act 1908, recognising the inherent jurisdiction of the High Court). These must rank as fundamental law. To these must be added the conventions of the constitution which must be observed and which have therefore hardened into law. They include, for example, the obligation of the Queen to assent to legislation properly passed. The lines are not entirely clear. They should be mapped because these are the core elements of the constitution.

[36] No doubt identification would have to be attempted in any case before the courts where the question of legitimacy of power arises unmistakably because, as John Marshall asserted, it is the responsibility of the judicial branch to say what the law is.<sup>84</sup> And that responsibility is equally imposed on courts operating under an unwritten constitution as under a written one.

[37] It is only the High Court that determines its own jurisdiction. That authority goes with the inherent jurisdiction of the Court and underpins the rule of law. It is a rule of the constitution that is easily missed in our present system and which is fragile. It is arguable that removing the jurisdiction of the High Court to say what the law is, including by determining its own jurisdiction, is beyond the competence of parliament because it would appropriate the judicial power of the state, as Lord Cooke suggested.<sup>85</sup>

[38] It is important for the legislature, legal taxonomists and everyone else to keep refining our ideas of what comprise the rules of competence of those who exercise constitutional power. Perhaps a start might be to attach to the Constitution Act a schedule of legislation which bears on those questions of competency (in imitation of the First Schedule to the Imperial Laws Application Act 1988).

[39] Unmapped territory (in respect of which it might be sensible to include a warning about dragons) includes the status of the Imperial legislation recognised in the Imperial Laws Application Act as “constitutional”.<sup>86</sup> Are

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<sup>84</sup> *Marbury v Madison* 5 US 137 (1803) at 137.

<sup>85</sup> Sir Robin Cooke “Fundamentals” [1988] NZLJ 158 at 164.

<sup>86</sup> Imperial Laws Application Act 1988, sch 1.

these ancient charters, which may add substantive content to the rule of law, limiting of the authority of the state and therefore beyond the competence of the supreme legislature? Further presently uncharted territory in any map of the constitution where there may be possible limitations on the powers of the state (and therefore on the supreme law-maker) may yet be found in the Treaty of Waitangi, as the Cabinet Manual appears to leave open.<sup>87</sup> Before that possibility is dismissed out of hand, we should remember that in the United Kingdom there have been repeated claims, including from Scottish judges, that the powers of the Westminster Parliament are limited by the terms of the Treaty and Act of Union.

[40] There may be further substantive limits inherent in the very distribution of authority among the state actors and the form of government adopted in New Zealand. Sir Anthony Mason has suggested that even the Parliament of the United Kingdom could not undermine the system of democratic government the doctrine of parliamentary sovereignty “is designed to serve”.<sup>88</sup> Such limitation on parliamentary competence was, Sir Anthony thought, necessary because “legislative competence is a legal doctrine which secures pre-eminence to the enactments of the legislature”.<sup>89</sup> He thought that the case for limitation in support of the system of representative government was more compelling than the case for such limitations based on human rights. Lord Cooke of Thorndon opened the door a little further when he said that honesty compelled the admission that “the concept of a free democracy must carry with it *some* limitation on legislative power” by rights and freedoms implicit in the concept of a free democracy.<sup>90</sup> The concept of a “free and democratic society”<sup>91</sup> might bring other fundamental values such as human rights which may be more controversial if implied into the constitution simply from the division of powers under the constitution, at least in 2012.

[41] It may be then that there is a hierarchy not only between rules that are “constitutional” and those that are not but within the category of rules we might designate as “constitutional”. On this classification, limitations necessary to protect the operation of the system of government, such as are illustrated in the voting value cases in Australia and Canada, may be thought to be prior to valid law-making and in a class of their own, as Sir Anthony Mason argued.<sup>92</sup> In the same way, the judicial power of the state may be beyond the competence of the supreme legislator by reason of the constitutional allocation of powers and the rule of law. Whether the foundations of the state from which its powers are derived, such as the Treaty of Waitangi or the great charters we acknowledge to be constitutional, are a source of other restrictions on the state or whether they are values of the constitution of a different order are problems for the next wave of would-

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<sup>87</sup> Keith, above n 31, at 2 and 5.

<sup>88</sup> Mason, above n 82, at 334–335.

<sup>89</sup> At 335.

<sup>90</sup> Cooke, above n 85, at 164.

<sup>91</sup> New Zealand Bill of Rights Act 1990, s 5.

<sup>92</sup> Mason, above n 82.

be map-makers. I raise these possibilities not to indicate any view on their strength but to suggest that in considering what is constitutional, the basic distribution of power and the purpose of the system of government may impose limitations on the institutions which exercise the authority of the state.

[42] As the discussion of the working parts of the constitution indicates, the system of government and its allocation of powers among the institutions of state seem to me to be the key to understanding of the law of the constitution. Lord Diplock said that “it cannot be too strongly emphasised that the British Constitution, though largely unwritten, is firmly based on the separation of powers”.<sup>93</sup> He has been criticised for saying so. Indeed, it is not unusual to read assertions that the doctrine of the separation of powers is alien to our constitutional system and that Montesquieu had an imperfect understanding of the 18th century English constitution when he praised it.<sup>94</sup> That is something of an exaggeration. Montesquieu, who was writing before the rise of parties and the domination of Parliament by the executive, was an acute political observer. And as James Madison pointed out, he did not insist on an absolute distinction between the branches of government.<sup>95</sup> His point, which was adopted in the American Constitution, was that if the whole power of one branch was in the hands of those exercising the whole power of another branch it was likely to lead to tyranny. That accords with historical experience. And that historical experience of threat to liberty is the reason why in the American constitution separation of powers was considered essential, as can be seen in the remarkable Federalist Papers.

[43] The separation of powers supports institutional respect and is useful compass for map-makers, including judges. In a constitution which divides up the powers of the state, as ours does, the implications to be taken from such division include two general principles: the supremacy of Parliament in law-making; and the rule of law. Both principles are identified in the statute of the Supreme Court.<sup>96</sup> Respecting all acts of the legislature requires the courts to apply loyally legislation properly enacted. But legislation beyond the competence of the Parliament, should it ever be enacted, is not law and it would be the responsibility of the courts to say so. The area of competence is huge and within it parliament’s powers are plenary. We may hope that it is never exceeded. But respectable analysis requires any adequate map of the constitution to provide for the possibility.

[44] As I have indicated, the position is less clear when the suggested limits to competence arise not out of the nature of government in a representative democracy and the distribution of powers under the constitution. Dicey of course denied that there was any distinction between

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<sup>93</sup> *Duport Steels Ltd v Sirs* [1980] 1 All ER 529 (HL) at 541.

<sup>94</sup> See, for example, O Hood Phillips and Paul Jackson *O. Hood Phillips’ Constitutional and Administrative Law* (7th ed, Sweet & Maxwell, London, 1987) at 13.

<sup>95</sup> J Madison “Number XLVIII” in A Hamilton, J Jay, J Madison et al *The Federalist and other Constitutional Papers* (Scott, Foresman & Co, Chicago, 1898) 273 at 273.

<sup>96</sup> Supreme Court Act 2003, s 3(2).



constitutional and non-constitutional laws.<sup>97</sup> While that pass is I think one that is no longer defensible, if it ever was, it is necessary to be more cautious in relation to constitutional values and rules that might properly be classified as “constitutional” or “fundamental” but which arise out of statements of human rights or, like the important value of equality before the law, arise out of the rule of law itself.

[45] With the enactment of the New Zealand Bill of Rights Act, human rights values are now recognised as fundamental to our legal system by adoption through the democratic processes. So problems of indeterminacy and identification are greatly reduced (although not eliminated because the statement of what is fundamental does not purport to be exhaustive).<sup>98</sup> The legislative solution adopted in New Zealand however requires legislation which breaches rights to be given effect.<sup>99</sup> Parliament is expressed to be bound by the Act,<sup>100</sup> but the implication is that it is competent to legislate in a way which is inconsistent with it. A map of the constitutional needs to observe this boundary, established however as a matter of the exercise of legislative authority and not doctrine. It is therefore a boundary that is not immutable.

[46] Such boundaries do not deprive constitutional values of efficacy. Nor do they make engagement with and further exploration of those values less important. A constitution is inescapably concerned with rights as well as power. And the conflict between them is the field of constitutional law. The fact that there are differences of opinion as to the values of a constitution should not obscure their importance in law or politics. Strong presumptions apply to interpretation of statutes that affect human rights and common law values which are fundamental.<sup>101</sup> The New Zealand Bill of Rights Act confirms and strengthens that approach.<sup>102</sup> The techniques of interpretation and remedy are important aspects of any adequate analysis of the constitution.

[47] Working out the values, rights and duties that are “truly fundamental” is necessary for an adequate map of the constitution. Perhaps ultimately (as Lord Cooke thought) these are not duties that can be avoided by judges. But judicial determination may not be inevitable. Better analysis of the scope and reach of constitutional values is however necessary to make this area more accessible. The identification of fundamental human rights and freedoms by the legislature in the Bill of Rights is map-making of this sort, and all the better for being undertaken through the democratic processes of government.

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<sup>97</sup> Dicey, above n 12, at 195–203.

<sup>98</sup> New Zealand Bill of Rights Act 1990, s 28.

<sup>99</sup> Section 4.

<sup>100</sup> Section 3(a).

<sup>101</sup> Francis Bennion *Bennion on Statutory Interpretation* (5th ed, LexisNexis, London, 2008) at 822–859.

<sup>102</sup> New Zealand Bill of Rights Act 1990, s 6.

## Conclusion

[48] The doctrine of absolute sovereignty of parliament defined away much of the proper subject of constitutional law. The new map is less certain, more open both to further exploration and the insight that our constitutional history did not start and end with an abstract theory. A constitution contains rules, principles and values which benefit, like any body of knowledge, from organisation and system. The task of modern constitutional lawyers is to move beyond preoccupations with absolute and indivisible sovereignty and to explain a coherent system which can take the strain between power and rights and claims for plurality in a representative democracy. It must be capable of cross-reference and interaction with wider principles in the legal order. Maitland's view was that the constitution of a country can be discerned only from its general law and only as a snapshot at any particular time remains valid:<sup>103</sup>

A classification of legal rules which suits the law of one country and one age will not necessarily suit the law of another country or of another age. One may perhaps force the rules into the scheme that we have prepared for them, but the scheme is not natural or convenient. Only those who know a good deal of English law are really entitled to have any opinion as to the limits of that part of the law which it is convenient to call constitutional.

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<sup>103</sup> FW Maitland *The Constitutional History of England* (Lawbook Exchange, United States, 2007) at 526.