NEW ZEALAND CENTRE FOR PUBLIC LAW
Te Wānanga o ngā Kaupapa Ture ā Iwi o Aotearoa

New Zealand Journal of Public and International Law

VOLUME 12 ▪ NUMBER 1 ▪ SEPTEMBER 2014

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TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI
VICTORIA
UNIVERSITY OF WELLINGTON

NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW

Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand

September 2014

The mode of citation of this journal is: (2014) 12 NZJPIL (page)

The previous issue of this journal was volume 11 number 3, December 2013

ISSN 1176-3930

Printed by City Print Communications, Wellington

Cover photo: Robert Cross, VUW ITS Image Services

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The **New Zealand Journal of Public and International Law** is a fully refereed journal published by the New Zealand Centre for Public Law at the Faculty of Law, Victoria University of Wellington. The Journal was established in 2003 as a forum for public and international legal scholarship. It is available in hard copy by subscription and is also available on the HeinOnline, Westlaw, Informit and EBSCO electronic databases.

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NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW

NEW ZEALAND CENTRE FOR
PUBLIC LAW
TE WĀNANGA O NGĀ KAUPAPA TURE Ā IWI O AOTEAROA

The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

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The Unearthing New Zealand's Constitutional Traditions Conference at which preliminary versions of these articles were originally presented was hosted by the New Zealand Centre for Public Law and was made possible with the generous support of the New Zealand Law Foundation.

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"THIS IS MY BODY": CONSTITUTIONAL TRADITIONS IN NEW ZEALAND

Andrew Sharp*

This paper mixes argument with historical reconstruction in the light of proposals to reform New Zealand's constitution. It opens with an account of ancient constitutionalist thinking in early modern England interspersed with some remarks on tradition in general. That section is designed to show how the tradition of the common law was idealised so as to present the constitution as immemorial, legitimately transmitted through time, the repository of all wisdom, and so well adapted to its times as not to be meddled with by ignorant rationalists. It is then suggested that it could equally be seen as none of those things, and that a thorough "unearthing" of its history would demonstrate its origins and changes to be much more complicated, and probably best not enquired into in any search for constitutional rationality or legitimacy. It is next shown that one set of changes to the "ancient" and "customary" constitution – the awkward grafting of the idea of legal sovereignty onto it – was adopted in New Zealand, which again presents the possibility of further unearthing in the light of history and reason. But that undertaking is laid aside so that there is space to show that similar unearthings of other constitutional traditions in New Zealand could also be undertaken. These others are identified as the Māori tradition, the whakapapa tradition and the universalist tradition. It is suggested that all have their weaknesses, but that they should not be too carelessly dismissed as irrational or unhistorical because certain specific people deeply believe in them. It is lastly argued that it would, with stronger reason, be unwise to think of codifying a constitution into a summary document that is in some way supposed to represent the consensus of the people. In the course of the paper the 17th century spectre of the "constitutive power of the people" is raised as a danger to all constitutionalist thinking.

* Emeritus Professor of Political Studies, University of Auckland. The author wishes to thank the Law Foundation and the University of Waikato for travel funding and research costs, and Professors Tony Smith and Claudia Geiringer, together with Drs Mark Bennett and Joel Colon-Rios for their help, hospitality and organisation of the conference for which the paper was designed.

I

It is traditional that the argument of a paper should be stated at the outset; but there is another tradition of beginning in the middle of things. It is the latter – older and now weaker – tradition that I shall follow. My point of departure will be early modern England from about 1600 until Edmund Burke published his *Appeal from the New to the Old Whigs* in 1791.[1] It was there and then that the idea of the English constitution as customary and traditional emerged and reached its most eloquent expression in Burke. In writing of this tradition, of some of its competitors, and of what this might mean for New Zealand, I should state that the scholarly world learned much about these matters from one of the most distinguished of New Zealand scholars, Professor JGA Pocock, in his *Ancient Constitution and the Feudal Law* (1957). In New Zealand he transmitted his developing thoughts face–to–face when he was a university teacher at Otago and Canterbury until 1966; he has continued to observe and comment on his country from Missouri and Maryland, USA.[2]

In Roman law *traditio* was a person's handing over something to another. That act could register the transfer of ownership with legal validity,[3] but under only certain circumstances. The mere act of "delivery" transferred title only when there was "just cause" that it should. Delivery without "title" was void in law.[4] Since then, the idea of tradition has taken on multiple meanings. The metaphor of handing on, delivering or presenting has been greatly elaborated. It is applied to the means by which not only individual physical things are transferred by and to individual private persons (as in much of Rome's history) but to collections of things and persons; it is applied to the handing down of single ideas and to collections of them; it is applied within the ambit of arts, sciences, disciplines and other mysteries; it is applied to the inheritance of customs, manners and laws by cultures and nations as a whole, so that, for instance, tikanga Māori can be seen as custom or tradition – as a compound of practices and understandings handed down through the generations.

It is sometimes a cause of contentment that particular traditions should be as they are. Among many traditions tikanga Māori is a case in point; tika very often just means "right". To give another

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1 Edmund Burke *Appeal from the New to the Old Whigs* (M Mills, Dublin, 1791).

2 JGA Pocock *The Ancient Constitution and the Feudal Law: a Study of English Historical Thought in the Seventeenth Century: a Reissue with a Retrospect* (Cambridge University Press, Cambridge, 1987); JGA Pocock "The Treaty Between Histories" in Andrew Sharp and Paul McHugh (eds) *Histories, Power and Loss: Uses of the Past – a New Zealand Commentary* (Bridget Williams Books, Wellington, 2001) 75; and JGA Pocock *The Discovery of Islands: Essays in British History* (Cambridge University Press, Cambridge, 2005). His opening lectures on the history of western political thought at Canterbury are especially apposite here in an essay the title of which does not immediately indicate its relevance: "Ritual, Language, Power: an Essay on the Apparent Meanings of Ancient Chinese Philosophy" in JGA Pocock *Politics, Language and Time: Essays in Political Thought and History* (University of Chicago Press, Chicago, 1989) 42.

3 I use the idea of validity as in HLA Hart *The Concept of Law* (Oxford University Press, Oxford, 1961).

4 William Alexander Hunter *A Systematic and Historical Exposition of Roman law in the Order of a Code* (Sweet & Maxwell, London, 1903) at 283–288.

but more equivocal example, lawyers in New Zealand attend to lines (or multiple traditions) of cases which they take to be authoritative in the appropriate field of application. Very often they tend to think that what is lawful is also "right": that is, legitimate and just. In contexts like these, tradition guides or even demands particular judgments and actions. On the other hand, traditions are sometimes bitterly resented by those who wish to throw off their "shackles". Certain Englishmen in the seventeenth and eighteenth centuries wished to throw off the "Norman Yoke" of kingly, priestly and oligarchical government. They argued that the régime they found themselves living under was indelibly stained by its origins in conquest and its continuance in unjust domination.[5] Such talk is not unknown among Māori New Zealanders.[6]

Traditions, then, even while they flourish, may encounter opposition. They may also be born, decline and die, as did the counter-tradition of the Norman Yoke which never became hegemonic.[7] But traditions are not always thought to have identifiable beginnings. Today we know that they can be deliberately invented as well as emerge into light at particular times, deliberately invented or not.[8] Even so some traditions not only have been but still are held to be "immemorial". They are thought to have existed since a time "beyond which the memory of no man goeth". As Pocock shows, one of these traditions was implicit in an early exposition of why the English should be content with their constitutional arrangements.[9] In his 1612 dedication of his *Irish Reports* to Lord Chancellor Ellesmere, Sir John Davies took time to spell out why:[10]

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5 Christopher Hill "The Norman Yoke" in *Puritanism and Revolution* (Secker & Warburg, London, 1958) 58.

6 Andrew Sharp "History and sovereignty: a case of juridical history in New Zealand/Aotearoa" in Michael Peters (ed) *Cultural Politics and the University in Aotearoa/New Zealand* (Dumore Press, Palmerthon North, 1997) 159. But, for Māori support of the Crown, see Lindsay Head "The Pursuit of Modernity in Maori Society: the conceptual bases of citizenship in the early colonial period" in Andrew Sharp and Paul McHugh (eds) *Histories, Power and Loss, Uses of the Past – a New Zealand Commentary* (Bridget Williams Books, Wellington, 2001) 97.

7 See the suggestive remarks in Jean and John Comaroff *Of Revelation and Revolution. Christianity, Colonialism and Consciousness in South Africa* (University of Chicago Press, Chicago, 1991) vol 1 at 22–27 and elsewhere.

8 EJ Hobsbawm and TO Ranger (eds) *The Invention of Tradition* (Cambridge University Press, Cambridge, 1983).

9 What now follows on Davies through Burke is largely taken from Pocock *The Ancient Constitution*, above n 2, at chs 2, 3 and 7; and his "Burke and the Ancient Constitution – A Problem in the History of Ideas" (1960) 3 The Historical Journal 125 reprinted in Pocock *Politics Language and Time*, above n 2. In his article "Sir John Davies, the Ancient Constitution, and Civil Law" (1980) 23 The Historical Journal 698, Hans S Pawlisch has rightly noted that Davies in fact appealed to civil as well as common law, but this does not detract from Pocock's overall case regarding his theorisation of the common law tradition.

10 John Davies "Dedication" in *Irish Reports: Les Reports des Cases & Matters en Ley, Resolves & Adjudges en les Courts del Roy en Ireland* (London, 1674) as cited in Pocock *The Ancient Constitution*, above n 2, at 32–33.

> For the *Common Law of England* is nothing else but the *Common Custome* of the Realm: and Custome which hath obtained the force of Law is always said to be *Jus non scriptum*: for it cannot be made or created either by Charter, or by Parliament, which are Acts reduced to writing …. For a Custome taketh beginning and groweth to perfection … when a reasonable act once done is found to be good and beneficiall to the people, and agreeable to their nature and disposition, then do they use it and practice it again and again, and so by often iteration and multiplication of the act it becometh a *Custome*; and being continued without interruption time out of mind, it obtaineth the force of *Law*.

In Davies's view, nothing was a law in England but tried and tested custom subsequently discovered and declared to be a law by those in authority. He therefore imagined the law as a whole to be "so framed and fitted to the nature and disposition of this people, as we may properly say it is co-natural to the Nation, so as it cannot possibly be ruled by any other Law".[11] The law represented the "wit and reason and self-sufficiency" of the people; there was no need to borrow from the lawyers and philosophers of Greece or Rome.[12] It was the "peculiar invention of this Nation,[13] and delivered over from age to age by *Tradition* (for the common law of this Nation is a *Tradition*, & learned by *Tradition* as well as by Bookes)."[14]

Chief Justice Sir Edward Coke, one of the same generation of common lawyers, could not but also observe, with Davies, that many statutes which had "injudiciously altered the common law" had had to be repealed. This led him to the further thought that custom, now specified to be judge–discovered, was much more to be relied upon than any law made by an act of any present generation. In *Calvin's Case* in 1608 he famously declared:[15]

> … we are but of yesterday … and had been ignorant (if we had not received light and knowledge from our forefathers) and our days upon the earth are but as a shadow, in respect of the old ancient days and times past, wherein the laws have been by the wisdom of the most excellent men, in many successions of ages, by long and continual experience, … fined and refined, which no man, (being of so short a time) … could ever have effected or attained unto.

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11 Pocock *The Ancient Constitution*, above n 2, at 33.

12 At 33.

13 It should be noted here that Davies was energetic in replacing the Brehon law in Ireland with English common law. See Hans S Pawlisch *Sir John Davies and the Conquest of Ireland* (Cambridge University Press, Cambridge, 1985).

14 Pocock does not quote this piece on "tradition": see John Davies "Dedication" in *Le primer report des cases et matters en ley resolues & adiudges en les courts del roy en Ireland* (2nd ed, Company of Stationers, London, 1628) available at <eebo.chadwyck.com>.

15 *Calvin's Case* (1608) 7 Co Rep 1a at 4a, 77 ER 377 (KB) at 381 as cited in Pocock *The Ancient Constitution*, above n 2, at 35.

No man therefore ought to "imagine himself … wiser than the laws".[16] The "artificial reason" of the law was more to be trusted than the "natural reason" of the individual or even of an assembly; one source of the authority of judges was their wisdom; they relied on "artificial reason" rather than their own "imaginations".

The law was immemorial yet – perhaps – also constantly changing. To a modern mind this might seem a paradox, but it was one resolved by the idea that any alleged changes embodied in parliamentary statutes were, like the findings of other courts, simply declaratory judgments of what the law already was. During the seventeenth and eighteenth centuries it was constantly insisted that Magna Carta, "the great charter of the liberties of England", was not the creation of a single act in 1215. It was simply the summing up of what was already there, as were its thirty-odd "confirmations" down through time. The *lex terrae* – the "law of the land" – was an "inheritance". It was the product of no living person or institution. It was to be owned by all and ought to govern all.[17]

The law was an indivisible whole, and so Coke was able famously to say that "Magna Carta is such a fellow as will have no sovereign".[18] For his part Davies stated that no King made his own prerogative, no Judge and court of parliament made the rules and maxims they followed, and no subjects created the liberties they enjoyed.[19] The *lex terrae* had precedence not only in time but in moral weight over all governing institutions as well as the current generation of people. It was to be found in the enormous body of documentation contained in the records of the Tower of London.[20] But emergencies demanded from time to time that it be summarised and shaped for present purposes. In 1642 the Greco-Roman-Venetian formula that England was a "mixed monarchy" made up of the three "estates" – King, Lords and Commons – was adopted to describe and prescribe for the relationships among the three great contending institutions. This description – inconveniently for those who supported them – forgot the ancient "estate" of bishops and suppressed an older teaching

16 *Calvin's Case*, above n 15, at 381 as cited in Pocock *The Ancient Constitution*, above n 2, at 35.

17 For later examples of the genre see *Fundamental law, the true security of sov'reign dignity, and the peoples liberty* (John Kidgell and Thomas Malthus, London, 1683); and *A letter to a member of the high and honorable court of Parliament, concerning the British monarchy proving it not to be despotical and arbitrary, but limited and moderated by Parliamentary government, and the fundamental laws of the nation. And that the oath of allegiance is due to their most serene majesties, the present king and queen, notwithstanding any former oath made to the late king. Licens'd according to order* (London, 1689).

18 (17 May 1628) 3 GBPD HC 900.

19 Pocock *The Ancient Constitution*, above n 2, at 41.

20 See, in addition to Pocock, JC Holt *Magna Carta* (2nd ed, Cambridge University Press, Cambridge, 1992); and JW Gough *Fundamental law in English Constitutional History* (FB Rothman, Oxford, 1955). See the remarkable labours of a common lawyer described in William M Lamont *Marginal Prynne, 1660–69* (Routledge and Kegan Paul, London, 1963).

that the king was "head" of the estates not just one among the three.[21] Another summary expression of the relations between the great governing powers was the theory promulgated by such as Montesquieu and de Lolme that there was a "division" between the executive, legislative and judicial functions of government in England that mapped onto separate institutions. This was highly inaccurate both as to legal fact and political norm, though it did point to the legal reality that the King held "prerogative" rights, that the two houses of Parliament shared the legislative power with him and that the Lords held the supreme judicial power. However it was presented though, the ancient constitution was not easily thought to harbour a single sovereign power whose will was law.[22] This mixed and balanced constitution – duly analysed, critically-examined, and often misunderstood – was the one much admired in the rebellious Thirteen Colonies, and in Europe well into the next century.[23]

But whether the ancient constitution was theorised in such summary ways or known in the fullest possible detail, appeal to it during the civil wars and the other crises of the seventeenth and eighteenth centuries proved in fact to provide no solution to disputes over the lawful power of final determination within the constitution. Histories and theories abstracted from a variety of times and places were developed to show that sovereignty lay either in the King or else the Houses (or one house) of Parliament. But thoughts of sovereignty were never comfortable ones to entertain. There was widespread abhorrence of the idea that any of those institutions should be the "final arbiter" in their contentions, and so the idea of a customary constitution that knew no sovereign kept its grip.[24] Thomas Hobbes, the greatest theorist of sovereignty lodged in a single institution, fled to France when it became clear to him that he had chosen the wrong (royalist) side to argue for.[25] The Petition of Right of 1628 asserted the inherited legal rights and duties of all; kingship was restored in 1660 in the name of the ancient and mixed constitution; the Bill of Rights of 1689 was hammered together as a political solution to an insoluble constitutional breakdown and framed so as to appear to be no more than a statement of inherited law. In a pious fiction, it asserted that James II had

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21 Corinne Comstock Weston *English Constitutional Theory and the House of Lords, 1556–1832* (Routledge & K Paul, London, 1965).

22 MJC Vile *Constitutionalism and the Separation of Powers* (Oxford University Press, London, 1967).

23 HJ Hanham *The Nineteenth Century Constitution, 1815–1914: Documents and Commentary* (Cambridge University Press, Cambridge, 1969) at 1–5; and Bernard Bailyn *The Ideological Origins of the American Revolution* (Cambridge University Press, Cambridge, 1967).

24 Andrew Sharp *Political Ideas of the English Civil Wars, 1641–1649: a collection of representative texts with a commentary* (Longman, London, 1983) especially the introduction. Compare, for an unsuccessful attempt to import into England a notion of sovereignty from civil law, Andrew Sharp "Alberico Gentili's obscure resurrection as a royalist in 1644" in *Alberico Gentili L'ordine internazionale in un mondo a più civiltà, Atti del Convegno Decima Giornata Gentiliana, San Ginesio, 20–21 settembre 2002, a cura di Centro Internazionale Studi Gentiliani* (Giuffré, Milano, 2004) 285.

25 Oliver Lawson Dick (ed) "Thomas Hobbes" in *Aubrey's Brief lives* (David R Godine, Boston, 1999) 147.

abdicated rather than been frightened off by the threat of armed force, and that the actions of the unconstitutional Convention Parliament were designed only for preservation of the "ancient rights and liberties" of the people. Burke did not have a difficult task to show all this in his *Appeal from the New to the Old Whigs*.[26] He argued that the Old Whigs of 1689 were common law traditionalists; the New Whigs of the 1780s who spoke of natural rights were, like the French revolutionaries, mere theorists dangerously ignorant of the reality of things. In Pocock's gloss they were "middle class intellectuals, tempted to believe that they c[ould] proclaim governments illegitimate without anyone getting hurt in the process".[27] They had claimed that men had natural rights and could be governed only when they had contracted to put themselves under a government the limits of which were set by their rights and the existence of which depended on their own continuing consent. They thought they had the right to "cashier governments". They had forgotten the wisdom of their ancestors. It was only in the face of "necessity" that the Old Whigs had removed their King and violated the ancient constitution, and in doing so they had reasserted, not their right to have done that: only their determination to live in the future according to their ancient laws and liberties.

In his more famous *Reflections upon the Revolution in France* of 1790 Burke had put a similar line of thought in a more baroque fashion. He orchestrated a counterpoint of themes in which the magnificent order of the inherited constitution was given body: ancestral wisdom, inherited law, individual prejudice, the complexity of the organs of the state, the present danger of anarchy, and the duties laid on men by Divine and natural law before time began were combined in a masterpiece of political rhetoric. "You will see", he tells his reader:[28]

> … that Sir Edward Coke, that great oracle of our law, and indeed all the great men who follow him, to Blackstone, are industrious to prove the pedigree of our liberties. They endeavour to prove, that the antient charter, the Magna Charta of King John, was connected with another positive charter from Henry I and that both … were nothing more than a re-affirmance of the still more antient standing law of the kingdom. In the matter of fact, for the greater part, these authors appear to be in the right; … but if the lawyers mistake in some particulars, it proves my position still the more strongly; because it demonstrates the powerful predisposition to antiquity, with which the minds of all our lawyers and legislators, and of all the people whom they wish to influence, have been always filled; and the stationary policy of this kingdom in considering their most sacred rights and franchises as an *inheritance*.

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26 Most conveniently see Edmund Burke *Further Reflections on the Revolution in France* (Liberty Fund, Indianapolis, 1992) at ch 4.

27 JGA Pocock "The Significance of 1688: Some Reflections on Whig History (1991)" in *Discovery of Islands: Essays in British History* (Cambridge University Press, Cambridge, 2005) 114 at 121.

28 Francis Canavan (ed) *Select Works of Edmund Burke: Reflections on the Revolution in France* (Liberty Fund, Indianapolis, 1999) vol 2 at 81.

Burke understandably therefore saw jurisprudence as the "pride of the human intellect": it nurtured, adapted and transmitted man-made law. But its "method of proceeding" was also in accord with Divine or Natural Law, the general principles of which were interpreted and applied through time to the specific needs of England. Jurisprudence, "with all its defects, redundancies and errors, is the collected wisdom of the ages, combining the principles of original justice with the infinite variety of human concerns", and so:[29]

> Our political system is placed in a just correspondence and symmetry with the order of the world, and with the mode of existence decreed to a permanent body of transitory parts; wherein, by a disposition of stupendous wisdom, moulding together the great mysterious incorporation of the human race, the whole, at one time, is never old, or middle-aged, or young, but in a condition of unchangeable constancy, moves on through the varied tenor of perpetual decay, fall, renovation, and progression.

Thus, we preserve, he says, "the method of nature in the conduct of the state".[30]

Only necessity – Burke may conclude this line of thought for us – can justify violating this state of things; and that is "the first and supreme necessity only, a necessity that is not chosen but chooses, a necessity paramount to deliberation, that admits no discussion, and demands no evidence".[31] He echoed Sir Matthew Hale's *History of Common Law* of 1675: one should "approach to the faults of the state as to the wounds of a father, with pious awe and trembling solicitude".[32]

II

Where rites and ceremonies, the nature and purposes of which are not verbalised, are handed down they are likely to be longer-lasting than verbal traditions. With words come the possibilities of observing ambiguity and contradiction in traditions and of realising that there are aspects of things they do not speak to. The more energetic inheritors of traditions typically attempt to suppress, reconcile or accommodate these embarrassments and so bring about evident changes to the whole. When, by way of an additional challenge, traditions are passed on in the written (not just the spoken) word, the truth of their factual bases and their normative force and reach become even more vulnerable to appraisal, modification, criticism and rejection. Like Pocock, my other main authority on tradition, Professor Edward Shils, notes these recurrent phenomena when traditions are formulated for explication and defence.[33]

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29 At 82.

30 At 82.

31 At 120.

32 At 120.

33 Pocock "Ritual, Language, Power", above n 2; and Edward Shils *Tradition* (University of Chicago Press, Chicago, 1981) at 45–46. The source of Shils' interest in tradition may also be found in Edward Shils *The Intellectual Between Tradition and Modernity: the Indian Situation* (Mouton, The Hague, 1961).

Now, clearly the ideas expressed in defence of the ancient constitutionalist tradition were a complex series of propositions formulated in words: predominantly English, together with law French and Latin, translated where necessary. They were also propositions formulated in the midst of contestation as to their truth and moral weight and designed to deny other accounts of what the constitution was or ought to be. But much of this would have been lost to those who saw and heard those words and were convinced by them. Shils might have been contemplating how ancient constitutionalist thinking in England presented itself to its hearers and readers when he remarked, though with more general reference:[34]

> The tradition – the thing presented – as it appears at the moment of presentation is a telescoped, foreshortened picture, from which the history of its past career has been washed away. The naked eye can only see it as at the moment in the here and now; it does not see the layers of past experience and perception, and past reflection which shaped it throughout its history. The picture at the moment is the precipitate or composite made up of many successive presentations and receptions and representations over many points in time. The individual who acquires the idea takes his place in the sequence of those whose minds were taken into possession by what they saw before them.

As Professor Paul McHugh has argued, it was exactly in this foreshortened way that the great jurist, Albert Venn Dicey, characterised in 1885 the constitution of the United Kingdom that New Zealand had inherited in 1840. Constitutional thought having been modified to encapsulate a new, liberal-Whig, consensus, Dicey was now in a position to understand history and law to be separate disciplines. There was no need of historical understanding to get a grip on the two "pillars", of the British constitution. It was, like the Old Whig constitution, a tissue of common law arrangements; but it was now unequivocally thought to be protected, sustained and where necessary modified by the legislating sovereign will of the Crown-in-Parliament – a Hobbesian sovereign in essence, even if legal sovereignty was shared among institutions and not located in a single natural person. The legal validity of any claim under the constitution was to be found in exploring the acts of Crown-in-Parliament and the decisions of the courts.[35]

There was no need intrinsic to the discipline – it might be observed – for the constitutional lawyer to understand the uncertain and contested origins of the constitution and the conflicts that had led to the successive development of ideas of mixture, balance and separation of powers. There

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34 Shils *Tradition*, above n 33, at 43.

35 Among other places, McHugh argues this in PG McHugh "Constitutional Voices" (1996) 26 VUWLR 499 at 513–514; PG McHugh "Tales of Constitutional Origin and Crown Sovereignty in New Zealand" (2002) 52 UTLJ 69; and PG McHugh "A History of Crown Sovereignty in New Zealand" in Andrew Sharp and Paul McHugh (eds) *Histories, Power and Loss: Uses of the Past – a New Zealand Commentary* (Bridget Williams Books, Wellington, 2001) 189. On the difficulty of conceiving an actual Hobbesian sovereign in any form of lawful government though, see Preston T King *The Ideology of Order; a Comparative Analysis of Jean Bodin and Thomas Hobbes* (George Allen & Unwin, London, 1974).

was no need to recall royalist, parliamentarian, sectarian puritan, Whig, Tory or Jacobite assertions that the origins of the constitution lay in the will of the King, or, contra-wise, in an agreement of the people, or to examine critically the proposition that authority in origin implied authority in current practice. There was no need to examine closely the mentality of the architects of the Glorious Revolution, or the ways in which "influence" and "party" were thought from the late seventeenth century to threaten the rule of law and undergird "arbitrary government" by one or a few men.[36] There was no need to consider the demolition of foundations of the constitution by Jeremy Bentham at his most rationalist and analytical: one of his disciples revivified the theory of legal sovereignty placing it in parliament; others transposed the problem of the people's power over the constitution by seeing it as one answered by their better representation in it, under the law.[37] Dicey did indeed consider the inescapable power of the population of the state at some length; the people held "political sovereignty" – the determinative *de facto* power in the country – but that power created no valid law. Most significantly for New Zealanders who inherited this tradition there was no gainsaying the right and power of the Crown-in-Parliament to make law, and no way of questioning the process by which ideals of majoritarian democracy and liberalism came to modify the location of the supreme legislative power. Dicey's view of the constitution clearly and most spectacularly governed the minds of those who abolished the Legislative Council in New Zealand in 1951. It may be that it was the Prime Minister and Cabinet who then as now dominated government, but their constitutionalism put it otherwise: Governments ought to represent the people; the Legislative Council did not; there was therefore no need for a second chamber of Parliament. The doomed chamber was stacked with compliant members and engaged in the valid process of its own abolition; the royal consent was a mere formality.[38] The statutory reforms of the constitution beginning in the 1970s breathed the same spirit of confidence in a representative sovereign legislature even though the spirit of ancient constitutionalism remained active in other areas of law and continued to add its

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36 Betty Kemp *King and Commons, 1660–1832* (Macmillan, London, 1957); and JAW Gunn *Factions No More: Attitudes to Party in Government and Opposition in Eighteenth-century England* (Frank Cass, London, 1972).

37 See, for example Jeremy Bentham *A Fragment on Government* (T Payne, P Emily and E Brooks, London, 1776); Jeremy Bentham *The Book of Fallacies: from Unfinished Papers of Jeremy Bentham* (John and HL Hunt, London, 1824); and John Austin *The Province of Jurisprudence Determined* (John Murray, London, 1832). For his followers on liberal democracy see Richard W Krouse "Two concepts of democratic representation: James and John Stuart Mill" (1982) 44 Journal of Politics 509.

38 See Harshan Kumarasingham *Onward with Executive Power – Lessons from New Zealand 1947–57* (Victoria University of Wellington, Wellington, 2010) at ch 4. The British had had a much harder time cutting back the powers of the Lords in 1911 because of the continued balancing power of the Lords and the vulnerability of the King to blame for hindering the reform: see GHL Le May *The Victorian Constitution: Conventions and Contingencies* (Duckworth, London, 1979) at ch 7.

weight to the idea that the sovereign should be checked and balanced or, as has been put more famously in New Zealand, "bridled".[39]

Equally demonstrative of the workings of the two pillars, the "principles of the Treaty of Waitangi" were "incorporated" into the constitution in the combined embrace of acts of the sovereign Representative Assembly and the judicial application of statute and common law. Dr Matthew Palmer's book, *The Treaty of Waitangi in New Zealand's Law and Constitution*, relates the recent story and its outcome.[40] But Māori concerns had also been dealt with in another way from the beginning of their relationship with the Crown. The Crown used its ancient prerogative power to authorise its servants to negotiate with Māori to address unsettled business whether under the Treaty or otherwise; and Māori, as well as undertaking legal proceedings were very capable of negotiating with or petitioning whoever had the power to help them. What happened was not always justiciable but was allowed for in the legal constitution of things. What Dr Hickford has called "political constitutionalism", so as to indicate a wide range of relations among negotiators, was the main mode of government–Māori interaction. In the last resort though, interaction was ultimately controlled by parliament.[41]

III

Today the *Cabinet Manual* expertly and pithily advises ministers and other interested parties on how the constitution works. It could hardly have been done better.[42] However, it is one thing to give an up–to–date and practical account of the law and working of the constitution. It is another to understand what a foreshortened constitutional tradition expresses and suppresses about its own history and reasonableness when it is mobilised not to yield a summary of, but to legitimate, present arrangements. That second kind of understanding would be one kind of "unearthing" of a tradition. It would be one that revealed a mass of detail and critique, not all of it compatible with an easy acceptance that the constitution is simply what, happily, we inherit. One would go to the past, not like a lawyer to find authority for a current distribution of rights and duties, but to create a convincing image of the complexity of what happened. One *might* well ask what caused the legal

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39 Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand Government under MMP* (Oxford University Press, Auckland, 1997); and Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford University Press, Auckland, 2004).

40 Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008).

41 Mark Hickford *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, Oxford, 2011); and David Williams *A Simple Nullity: The Wi Parata Case in New Zealand Law and History* (Auckland University Press, Auckland, 2011) at 235–237.

42 Cabinet Office *Cabinet Manual* (Department of Prime Minister and Cabinet, 2008) available at <www.cabinetmanual.cabinetoffice.govt.nz>.See for commentary Andrew Sharp "Why Constitutionalism Matters" in Raymond Miller (ed) *New Zealand Politics in Transition* (2nd ed, Oxford University Press, Auckland, 1997) 387.

authority to be, and how currently–authorised distributions came about, but equally one might criticise the whole tradition as far too constrained to speak to the complexity and actual weight of felt past realities. One would certainly not produce "juridical histories" aimed at shaping the past for purposes of advocating present cases.[43]

But rather than unearthing our official constitution in this kind of way, I intend to bring to view a series of *other* constitutional traditions that also inform debate in Aotearoa New Zealand. I propose to unearth three of these so that they, too, are potentially available for critique. The three are the Māori tradition, the whakapapa tradition and the universalist tradition. I can here present them only in a rough semblance of their true shapes and masses though in other places I have previously tried to untangle them rather more.[44] The subtle accretions of the real world that cling to them as they are lifted into the light of observation will obscure their internal subtleties and their symbiotic connections with each other. Unearthing and separating is a messy and sometimes arbitrary business. I intend to introduce nothing new in surveying the scene. All that will perhaps be unfamiliar will be that at certain points in the exposition I will substitute the idea of the "constitutive power of people" for what we sometimes call in New Zealand (among other meanings indicated by their usage) "sovereignty", "mana" or "rangatiratanga". It is the power which in England was thought of as the power to constitute and cashier not this or that governing power, but governing power as a whole and governing powers in general.[45]

IV

Māori constitutionalism, of uncertain time of origin but formed largely in counterpoint to the constitutionalism of European colonisers, asserts the ancient existence of a people, now called Māori, who came to unnamed islands with their customs and traditions. They modified their view of the world through time to adapt to their new homeland in ways that can be known in some detail

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43 Andrew Sharp "Recent juridical and constitutional histories of Maori" in Andrew Sharp and Paul McHugh (eds) *Histories Power and Loss: Uses of the Past – a New Zealand Commentary* (Bridget Williams Books, Wellington, 2001) 31. A variety of the uses of history are considered in this volume.

44 Especially in Andrew Sharp *Justice and the Maori: the philosophy and practice of Maori claims in New Zealand since the 1970s* (2nd ed, Oxford University Press, Auckland, 1997). See also Andrew Sharp "Blood, custom and consent: three kinds of Māori groups in New Zealand and the challenges they present to government and the constitution" (2002) 51 UTLJ 9; Andrew Sharp "Traditional authority and the legitimation of 'urban tribes': the Waipareira case" (2003) 6 Ethnologies Comparées available at <www./alor.univ–montp3.fr>; and Andrew Sharp "The Treaty in the real life of the constitution" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi revisited: perspectives on the Treaty of Waitangi* (Oxford University Press, Auckland, 2005) 308.

45 See Julian Franklin *John Locke and the Theory of Sovereignty: Mixed Monarchy and the Right of Resistance in the Political Thought of the English Revolution* (Cambridge University Press, Cambridge, 1978) at 23 and 64–76, for the imported term "constitutive power".

through oral tradition in matauranga Māori.[46] Often the ideals they harboured in this ancient world view have been summarised in lapidary form as including the principles of rangatiratanga, kaitiakitanga, whanaunatanga and so on: principles which governed their leaders, their protective relationship with nature, and their ties of kin. From a constitutional point of view the fundamental point is that the people brought with them both their customs and their constitutive power: the right to erect a government of their own and/or to federate themselves with a government not originally theirs, in ways they alone might decide. And so in 1835 they were entitled to declare their independence from all other peoples and powers and to begin a process of constructing a government for themselves. In 1840, in the Treaty of Waitangi, they similarly exercised their constitutive power so as to co-create a form of government guaranteed the protection of Queen Victoria. According to the terms of a contract with the Crown they retained their rights to govern themselves in their own groups, in their own localities and according to their own ways of seeing and doing things. They were to retain proprietary control of their localities as long as they wished. This was their contract – often called a "sacred compact" to emphasise its obligatory nature in Christian ideas as well as in older tikanga. The Treaty was in *constitutive* truth the "foundation" of the New Zealand constitution. To call it the "foundation" is not simply a form of words to show the great weight of the Treaty in the body of law; it contained their mana, translatable in this context as their constitutive power. The foundation in turn was rooted deep in the ground. As tangata whenua, "the people of the land", the Māori retained the constitutive power to ensure that the foundation which they built should be preserved and developed in ways they themselves chose. It was no Roman *lex regia* whereby the population ceded their constitutive power to the emperor.[47]

Many variations on Māori constitutionalism have been developed on this foundation, largely depending on the relationship it has been and is thought that Māori ought to have with "the Crown"– however the Crown was and is conceived. The variations run the gamut from the claim to complete Māori independence, through elaborated schemes of power–sharing at strategic central and local sites of authority, through adjustments to the detail of arrangements regarding local and tribal government over a range of issues and resources. As official-Dicean constitutionalism has proved capable of absorbing all external traditions, so has Māori constitutionalism. It has absorbed many of the values of liberalism and democracy. It has found in rangatiratanga, kawa and tikanga the

46 Although he says the story he tells is not to be taken as a constitutional narrative, Judge JV Williams provides one very like one in the Introduction to Waitangi Tribunal *Ko Aotearoa Tēnei. A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) vol 1.

47 For some remarks on the use of the *lex regia* elsewhere see Sharp "Alberico Gentili's obscure resurrection as a royalist in 1644", above n 24, at 285–346.

principles of good governance of commercial institutions and of the many other kaupapa (or voluntary) organisations that Māori join. It has absorbed international human rights law into its ambit, including the Declaration of Rights of Indigenous Peoples.[48] The most influential author and transmitter of such teachings has been the Waitangi Tribunal but many other organisations and persons, Pakeha as well as Māori, transmit them. A recent demonstration of some of the variety within the tradition is contained in a collection of essays called *Weeping Waters*, designed partly to address the issues raised – and suppressed – in the current process of constitutional review.[49] It would be no surprise to find a visitor to the country thinking that Māori constitutionalism is the governing paradigm of the constitution.[50] It is certainly a firmly–settled tradition of understanding. It is at least as dominant in public consciousness as the official constitutionalism which is the constitutionalism of the legal specialist.

By beginning my paper with an account of the English tradition of constitutionalism and then moving to what I know far less about I have inevitably modelled my understanding of traditions and constitutions on European understandings. A leading Māori constitutionalist, Moana Jackson, is surely right though to insist from within the Māori tradition that reflections on constitutionalism should begin instead with understanding kawa:[51]

> For me a constitution is just a kawa or the rules that people make to govern themselves. The kawa of the marae is the constitution of a marae; it's the rules that govern how people should behave on a marae.

Where I have found myself conjuring up a fragment of a picture whereby the customs of the people of England, produced among the anonymous people of the localities, were absorbed and modified by a unitary government and then dispersed through the three kingdoms to the colonies and ex-colonies of the United Kingdom, Jackson asks his audience to imagine a constitution that begins with the kawa of a marae. That kawa governs both its internal and external relations, and is to be imagined extending to cover the whole of Aotearoa: all the marae and all the people. In fact, he argues, this has partly happened, despite the obstacles it has faced: "tikanga reality", as he calls it, is as much a reality as legal reality, and ideally tikanga reality should provide the groundwork of constitutional debate. Māori retain their constitutive right in the constitution, and he finds it hard to

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48 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007).

49 See for example Hohaia Collier "A Kaupapa–based Constitution" in Malcom Mulholland and Veronica Tawhai (eds) *Weeping Waters: the Treaty of Waitangi and Constitutional Change* (University of Hawaii Press, Wellington, 2010) 305 at 314–315

50 Though Veronica Tawhai does not: see Veronica Tawhai "Citizenship and Education" in Malcom Mulholland and Veronica Tawhai (eds) *Weeping Waters: the Treaty of Waitangi and Constitutional Change* (University of Hawaii Press, Wellington, 2010) 287 at 296–300.

51 Malcom Mulholland and Veronica Tawhai "Constitutional Transformation: an Interview with Moana Jackson" in *Weeping Waters: the Treaty of Waitangi and Constitutional Change* (University of Hawaii Press, Wellington, 2010) 325 at 325.

see why that should be overridden by Pakeha traditions as to how Māori rights, powers and liberties might be suppressed, diverted or extinguished in the pursuit of *their* folk-ways. Kawa ought to guide the modification – perhaps even the even transformation if necessary – of Māori rights, powers and liberties. The "constitutional conversation" of which the State speaks should take place on that turangawaewae – that foundation ground – not the Crown's.[52]

I must, however, continue to speak as a mangai for the tradition that has me (as Shils puts it) "in its grip".[53] So far as I can see, the tradition of Māori constitutionalism lacks a conception of a single sovereign power intrinsic to government. It envisages no locatable authority whose right it is to pronounce with the force of final judgment on what is to be done, none which is thought to represent (in the sense to speak and act for) the peoples it governs, none the authority of which is not subject to constitutive right retained by its subjects. This rejection of a Hobbesian sovereign is obvious enough in normal Māori understandings of their constitutional relationship with "the Crown". But I think that recoil from the idea of sovereignty is equally obvious *within* what used to be called "Māoridom" itself – so obvious and so much in tension with the Māori tradition as to deserve thinking of as a separate tradition: as whakapapa constitutionalism.

Many attempts have been made by Māori to express mana Māori motuhake and kotahitanga in a variety of collective organisations, but in none has the constitutive authority of the separate members been irrevocably ceded to the organisation. The iwi, the hapū and the whanau retain their right to secede as well as their rights to represent themselves and their taonga in the councils of their shared creation. In the heart of Māori constitutionalism lie life–giving capillaries which impart life to the whole. In this constitutional tradition the ties of blood and consent mingle in complex ways depending on the collective action in question. As Dr Apirana Mahuika, one of my authorities on this, has put it: "the principles of fusion and fission are very much alive today".[54] The tradition is that iwi, hapū and whanau come together for certain purposes and go their own ways for others. Whakapapa constitutionalism is, like Māori constitutionalism, an expression of kawa and tikanga but it stresses rather more the rights and duties of whakapapa: the mana-transferring genealogy of particular lines. It finds indissoluble fusion, if anywhere, only in the whanau (or perhaps the hapū) and its family marae.[55] This is doubtless disputable as an analysis, but in this way of thinking it is not the tradition of being Māori that matters so much as the tradition of being descendants of a

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52 Malcom Mulholland and Veronica Tawhai "Constitutional Transformation: an Interview with Moana Jackson", above n 51. See also Moana Jackson "Brief of Evidence to the Waitangi Tribunal" (13 September 2010) Wai 1040 [*Te Paparahi o Te Raki Inquiry*] Doc#D2.

53 Shils *Tradition*, above n 33, at ch 1.

54 Apirana Mahuika "A Ngāti Porou Perspective" in Malcom Mulholland and Veronica Tawhai (eds) *Weeping Waters: the Treaty of Waitangi and Constitutional Change* (University of Hawaii Press, Wellington, 2010) 145 at 152.

55 At 145–163.

particular ancestor. The fundamental group of the whanau or hapū retains a constitutive power to join and recede from other collectives; so do the individuals who usually belong to more than one. Whakapapa groups are the fundamental constituents of any Māori authority. No external judge may discover and pronounce on their ways.

The fourth and final tradition of constitutionalism in New Zealand might be called the universalist. It is best understood as the modern attempt to find and apply a *ius gentium* – a law to govern peoples generally and not just those of a single state or people. This – a tradition stemming from Greek Stoics and the Roman law holds – can be accepted both because most peoples in fact agree on the broad principles which express its content and also because the principles are reasonable: that is, they are discoverable by reason, and if applied, tend to the benefit of all. In its modern form *ius gentium* prescribes "human rights" rather than the natural duties of the Burkean tradition, and speaks of the rights of all rather than those of individuals or groups specified in the detail of the municipal laws of states. The civil war Levellers, Tom Paine, the French and American revolutionaries and since the middle of last century the Declarations of Rights promulgated by the United Nations are informed by some such notions. So too are the ideas of those who would have a Bill of Rights in New Zealand, a Human Rights Commission and a "written constitution". The main thrust of this tradition is first to counter the grip of local traditions on peoples so as to free them from the invidious distinctions they make between classes, castes, religions, races, genders and so on. It is secondly to invoke the power of human reason to understand and reject the invidious differences and injustices irrationally transmitted down through time to the unthinking present. It has not been received uncritically.[56] It is opposed for instance in China and India and in many Muslim states as an attempt to impose western ideas on ancient societies who feel their own traditions sufficient for themselves. But many states have proved capable of absorbing and domesticating it. The Declarations of social and economic rights were long thought, even in the west, to be of too particular application to apply to peoples as a whole and as too subversive of private property rights, but they can be and have been drawn within the ambit of human rights. So has the Declaration of Rights of Indigenous Peoples. It sits uneasily with the tradition of liberal-democratic constitutionalism because while its principles propose benefits universally to indigenous peoples, they do not do the same for all peoples generally, and so governments in New Zealand took some time to accommodate it. On the other hand Māori were at first uncomfortable with its treating their unique case as tangata whenua as only one case among many others in the world. Still, the Declaration has been accommodated and is spoken of as expressing Human Rights and not just special rights in a unique state.

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56 Andrew Sharp "An Historical and Philosophical Perspective on the Proposal for a Bill of Rights" in Andrew Sharp and others *A Bill of Rights for New Zealand* (Legal Research Foundation, University of Auckland, Auckland, 1985) 3.

V

I have lived in London for the past seven years and feel somewhat out of touch with those whom I used to know and talk with face-to-face, and so the conclusion I will reach will be somewhat like a letter home to those I share a lot of assumptions with, but assumptions modified in me by time and distance and in them by time.[57] Because of this distance I am most grateful to have been invited to speak, and, being home, I feel I must, as is customary, draw a practical conclusion. I shall therefore end as I began, in the middle of things: but now not in England in 1612 but in Wellington in 2013.

New Zealanders inherit and embrace a number of constitutional traditions. Each implies different constitutions: different distributions of authority among the governing institutions and different distributions of the rights of citizens and particular groups of them. Different conceptions of justice are sustained in the traditions and different attitudes to the constitutive power of the people. I have no doubt that dialogues among them and truth-telling in conditions of stability and safety, are called for.[58] But to know traditions and to treat them all with respect is not an easy thing; it requires a very large amount of knowledge and a very cautious application of the critical tools of history, philosophy and political nous. Enlightenment can be a dangerous condition. For myself I very much doubt that the current "constitutional conversation" should lead to any more than its own continuation. I would be very cautious of embracing any idea that to consult the people on their constitutional preferences is in any way to recognise their constitutive power; I would be even more chary of the least thought that that power might be set free by referendum to legitimise any new constitution.

Why be cautious?

To put it one way, traditions are traditions among fairly definite, finite, groups of people. The traditions they believe in have them in their grip. To put it another way there are separate "interpretive communities" carrying on conversations, each with their own authorities whom they defer to and quote, their own interpretations of things, their own perhaps esoteric languages and

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57 See pregnant with thoughts for constitutionalists: Peter Laslett "The face to face society" in *Philosophy, politics and society : a collection* (Blackwell, Oxford, 1956) 157.

58 Andrew Sharp *Justice and the Maori: Maori Claims in New Zealand Political Argument in the 1980s* (Oxford University Press, Auckland, 1990) at 285–287; and Andrew Sharp "What is the constitution of 'The Spirit of Haida Gwaii'? Reflections on James Tully's *Strange Multiplicity: Constitutionalism in an Age of Diversity*" (1997) 10 History and Anthropology 241. For a slightly different point of view, see PG McHugh "Constitutional Voices" (1996) 26 VUWLR 499 and the optimistic tone of much of Ken S Coates and McHugh (eds) *Te Kokiri Ngatahi/Living Relationships: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998). I think that future conversation might usefully take a form suggested in Nicole Roughan "The Association of State and Indigenous Law: a Case Study in 'Legal Association'" (2009) 59 UTLJ 135.

maybe their own agendas too.[59] And so the dialogue might be imagined to be between communities not among a people. But I think that members of each of our constitutional communities might well put it yet another way. They might say of their idea of a constitution, "this is my body", and emphasise each of those words in turn as they repeat the phrase four times. This is very evident in the cases of Māori and whakapapa constitutionalism. The imagery of iwi and hapū and whanau exactly expresses the inescapable reality that each individual is an embodiment of them. His or her "identity" (as we rather clumsily say) takes its form and meaning from placenta, birth and bone. Because of a long history of living in a disenchanted world of many competing traditions, official imagery speaks with less living force of "the constitution", the "body of the law", of "heads" of departments, of "members" of organisations and so on; but it is nevertheless a manifest reality that the officers of government and those who interpret their legally-valid directions think themselves the embodiment of the ideals they hold and think of themselves as responsible for the lives of the people they govern and serve. They are part of a body, too, expressed in the idea of a "nation".[60] By contrast it is evident that the tradition of *ius gentium* in its domestic application seeks somewhat to deny or suppress such thoughts. Perhaps with good reason: because what the body imagery must surely bring to mind is that constitutional conversations are not mere trifling with words. We are not in a post-modern moment where anything goes and meanings can be constructed and deconstructed without consequences; nor even in a liberal one where people do not take arguments personally. Meanings come embodied in persons; we are dealing with real bodies – real presences – not just abstract human beings. "Conversations" among embodied people can lead to quarrel and a breakdown of peace which is the precondition of justice and all the other civic virtues. But all human beings, as the *ius gentium* insists, must be protected, not just nations and peoples, and so the emphasis must go on our common humanity.

Hobbes – seldom a hero of constitutionalists, but whose *Leviathan* he intended to protect and nurture all[61] – put it this way, pointing to features of human existence denied in none of our unenlightened traditions, and which make civil constitutions necessary:[62]

> In the nature of man, we find three principal causes of quarrel. First, competition; secondly diffidence [fear]; thirdly, glory.

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59 Stanley Fish "Interpreting the Variorum" in *Is There a Text in this Class? The Authority of Interpretive Communities* (Harvard University Press, Cambridge, 1980) 147.

60 Andrew Sharp "Representing *Justice and the Māori*: or why it ought not to be construed as a post-modernist text" (1992) 4 Political Theory Newsletter 27.

61 Thomas Hobbes *Leviathan: Reprinted from the edition of 1651 with an Essay by the Late WG Pogson Smith* (Clarendon Press, Oxford, 1909). See especially the Frontispiece.

62 Hobbes, above n 61, at ch 13.

> The first maketh men invade for gain; the second, for safety; and the third, for reputation. The first use violence, to make themselves masters of men's persons, wives, children and cattle; the second, to defend them; the third, for trifles, as a word, a smile, a different opinion, and any other sign of undervalue, either direct in their persons or by reflection in their kindred, their friends, their nation, their profession, or their name.

Accepting this bleak appraisal of humankind, I do not think that discussions that raise issues of sovereignty, the constitutive power of the people, and the importance of people's customs to them should be pursued to a definite conclusion, especially in an abbreviated written (or "rigid")[63] constitution. At best the product would be a single constitutional document that left out too much of reality; it would almost certainly risk injury and insult to those who felt themselves disrespected. Respect for other people and their traditions, whether generated in fear or love, demands that we approach the constitution like an ailing father, "with fear and trembling solicitude".

To approach policy and organisational problems one by one wherever it seems convenient is a different matter. New Zealanders often castigate themselves for the pragmatism with which they approach constitutional as well as other questions. That pragmatism is ancestral, and ought to be current, wisdom. It is wise to attend to the arrangements of society piecemeal,[64] in every local and specific case, and nationally when that must be done. It is not wise for the leaders of the teams of action in the country to engage in grand constitutional theorising, ignoring the "the wit reason and self-sufficiency" of the population. Most people do not care to examine what constitution they have inherited, what constitution they would rather have, and how either might be legitimised. The clerisies – the bodies of experts – who *do* care cannot agree on a grand scheme. Where is the benefit in searching for one? Is there a necessity that cannot be denied? Let community and government leaders continue in a tradition of "political constitutionalism", and let us, with FW Maitland insist on not worrying too much about reducing any account of the constitution exclusively and misleadingly to evident legalities.[65] The point is to continue the political conversation as open-endedly as possible on particular issues, and to use all customary and accepted avenues to do that. This is why, to enter the realm of pragmatic reform, I would commend to your attention the disturbing findings on the truncating of parliamentary debate recently made public by Claudia Geiringer, Polly Higbee and Elizabeth McLeay. Their book, *What's the Hurry? Urgency in the New Zealand Legislative*

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63 As discussed in James Bryce "Flexible and Rigid Constitutions" in *Studies in History and Jurisprudence* (Oxford University Press, Oxford, 1901) 124.

64 Karl R Popper *The Open Society and its Enemies* (Routledge, London, 1945) This was written in Christchurch. See also Karl Popper *The Poverty of Historicism* (Routledge, London, 1957).

65 FW Maitland *The Constitutional History of England* (Cambridge University Press, Cambridge, 1931) at 526–539.

Process,[66] is a sober and measured account of a greater threat to New Zealand's constitutional culture than the lack of a "written" constitution.

66 Claudia Geiringer, Polly Higbee and Elizabeth McLeay *What's the Hurry? Urgency in the New Zealand Legislative Process* (Victoria University Press, Wellington, 2013).