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JOERG NACHTWEY

TWO KINDS OF CONSTITUTION –

A COMPARISON BETWEEN GERMANY AND NEW ZEALAND

LLM RESEARCH PAPER
MASTERS LEGAL WRITING (LAWS 582)

LAW FACULTY
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ABSTRACT

This paper compares the German Basic Law and New Zealand's constitutional framework. The author does not deal with the contents of both 'constitutions', but rather sets the focus on two other issues. First, why does New Zealand still have an unwritten constitution whereas Germany and most other 'western' democracies are governed by a written and entrenched constitution with supreme law status, and second, what approach to realize constitutional principles is preferable?

It is argued that the reasons for the current 'constitutional' situation in both countries are mainly based in their constitutional history. In contrast to New Zealand, Germany's history is marked or influenced by several wars and major revolutions, which all resulted in the desire for a "fresh start" and therefore in a reorganization of the state order. In contrast to New Zealand, Germany has, at least until World War I, always been in the centre of world policy and intellectual development. As a consequence, it is not surprising that New Zealand never had to reconsider its constitutional framework significantly. Just as the historical reasons, this paper considers the different characteristics of Germans and New Zealanders as important factors influencing the constitutional development of both countries.

Reflecting on the major principle of constitutionalism of *limited government* and evaluating advantages and disadvantages of both approaches, the author finally concludes that a written entrenched constitution with supreme law status is favourable.

To understand both approaches to constitutionalism, this paper begins with a general introduction to the meaning of constitutions and the development of constitutionalism until the enactment of the Constitution of the United States in 1787. Additionally, the author portrays briefly the most crucial events in Germany's and New Zealand's constitutional history.

Word Length

The text of this paper (excluding contents page, footnotes, bibliography and appendix) comprises approximately 13067 words.

I INTRODUCTION

In general, constitutionalism is regarded as the political idea that all state organs, including the Head of State, are bound by certain provisions of law.[1] At first glance, the major difference between New Zealand's and Germany's constitutions is that New Zealand is governed by an unwritten and Germany by a written constitution in the classical sense. Although this seems to be only a formal distinction, it rather mirrors in this case that Germany's constitution in contrast to New Zealand's is entrenched and has the status of a supreme law. Therefore, a comparison of the German and the New Zealand constitution means a comparison between two completely different approaches to the realization of the concept of constitutionalism, especially of the interpretation of the term *bound*.

The comparison between the German and the New Zealand constitution is particularly interesting because of two grounds. Firstly, the German as well as the New Zealand legal system are based on the European cultural environment and its development during the last two millenniums. European scholars and philosophers and the European understanding of democracy and constitutionalism have influenced both countries to a similar extent. Nevertheless, they have developed for some reasons two different kinds of constitutions.

The second reason is that after 140 years of largely constitutional 'apathy', the discussion about the establishment of a 'real' constitution in New Zealand became again very topical after the constitutional crisis in 1984 that eventually resulted in the enactment of the Constitution Act 1986. Additionally, the ratification of the International Covenant on Civil and Political Rights in 1978 contributed to the discussion significantly. This is because it is questionable whether New Zealand can fulfil its legal obligations in terms of Human Rights with the enactment of the Bill of Rights Act 1990 (BORA).[2] Are Human Rights really protected sufficiently by such a 'constitution'? In 2000, the discussions

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[1] Konstitutionalismus (Constitutionalism) <http://www20.wissen.de/xt/default.do> (last accessed 31 October 2002).

[2] The BORA is regarded as an element of the constitution but is nevertheless amendable by a simple majority in Parliament.

about the New Zealand constitutional framework culminated temporarily in the "Building the Constitution" conference that animated further disagreements rather than provided an acceptable solution. Consequently, the constitution and possible reforms or changes are still very topical in New Zealand.

Regarding the structure of the paper, a comparison of different constitutions or rather a comparison of different ways to realize the ideas of constitutionalism requires first of all an introduction to constitutionalism and the meaning as well as the development of constitutions in general. After this, the author will illustrate Germany's constitutional history from the *Goldene Bulle* in 1356 to the German Basic Law of 1949 (BL). The description of New Zealand's constitutional history begins with the signing of the Treaty of Waitangi in 1840 and ends with the enactment of the Constitution Act 1986.

As the main difference between the German and the New Zealand constitution is that the BL is entrenched legislation with supreme law status, the focus of the examination is set on the question why New Zealand, in contrast to Germany (and many other countries), has never enacted such an entrenched supreme law. How is it possible to differ from one another on such a legally fundamental question, even the legal roots of both countries are in Europe? This paper attempts to find an answer by evaluating the historical development of both countries. Further, the author considers the issue whether a written and entrenched constitution is preferable.[3] As among the more than 100 democratic states in the world, only the constitutions of the United Kingdom, New Zealand and Israel are unwritten and not entrenched,[4] this question has to arise.

However, the first conclusion can be drawn at the beginning of the paper. A constitution is compulsory in order to govern the relationship between the state and its citizens if democracy and the rule of law are favoured.

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[3] It has to be stressed at this point that the distinction between entrenched and non entrenched constitutions is not equivalent to the distinction between written and unwritten constitutions. Although unwritten constitutions are never entrenched, it is possible for a written constitution to be not entrenched. The relationship between unwritten constitutions and constitutions with supreme law status is similar. Unwritten constitutions never have the status of supreme law, whereas almost every written and entrenched constitution is conferred supreme law status. C F Strong (ed) *Modern Political Constitutions* (3 ed, Sidgwick & Jackson, London, 1949) 65.

[4] United Nations Development Programme *The Constitution and its Relationship to the Legislature* <http:magnet.undp.org/Docs/parliaments/Constitutions.htm> (last accessed 31 October 2002).

> Man's unending search for the widest freedom to pursue his own ends within ordered society explains his acceptance of government. He tolerates gentle fetters from the State to escape the heavy chains of anarchic chaos and to gain the opportunities for collective action and division of labor that, in the modern world, are available only within the State. Yet, a State powerful enough to maintain order may also be strong enough to suppress liberty. Because of his fear that Leviathan might become a Frankenstein monster, Man equips the machinery of government with brakes as well as a motor.[5]

II WHAT IS A CONSTITUTION?

We must first explain some general features of constitutions. What are constitutions and what are their essential elements?

A Different Meanings of the Term 'Constitution'

The English word *constitution* derives from the Latin expression *constitutio*, meaning establishment or ordinance by the emperor.[6] In order to find a general definition of the term *constitution*, an encyclopaedia is a good place to start. This provides three meanings of constitution:[7]

- ➔ Political – sociological meaning
  A constitution is the mode in which a state is constituted or organized. Characteristic therefore are firstly the location of the sovereign power (as a monarchical, oligarchic, or democratic constitution) and secondly, the methods of administration as well as the legal status of the citizens

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[5] William G Andrews (ed) *Constitutions and Constitutionalism* (1 ed, D van Nostrand Company, New York, 1961) 9.
[6] Homepage of the University of New England <http://www.une.edu.au/~arts/Politics/constit.htm> (last accessed 31 October 2002).
[7] Verfassung (Constitution) <http://www20.wissen.de/xt/default.do> (last accessed 31 October 2002).

➔ Meaning of *constitution* in terms of its legal content

All legal norms referring to the constitution in the above definition, including customary law. This definition describes the term *constitution* as the whole area of constitutional law.

➔ Technical meaning of *constitution*

A system or body of fundamental principles according to which a nation, state, or body politic is constituted and governed. This is most frequently a written constitutional charter that encompasses the whole constitutional law.

As this paper compares different ways of realizing the ideas of constitutionalism, it is not necessary to examine the differences between these three meanings in detail. Most relevant for this paper is the technical meaning of the term *constitution* because neither the form of government nor the contents of the constitutions are compared. It is therefore sufficient to bear in mind the following definition, which encompasses both the German and New Zealand system:

> The term *constitution* in a broad sense refers to the rules by which government is conducted. It is the means by which the whole system of central government is established: it is the source from which the functions and powers of government derive; furthermore, it regulates the functions of government. It also establishes the rights of citizens, and describes the relationship between the state and the individual.[8]

Or shorter: [9]

> Fundamental principles of government in a nation, either implied in its laws, institutions, and customs, or embodied in one fundamental document or in several.

The New Zealand constitution falls under the first category, customary and unwritten constitutions, whereas the German constitution meets the requirements of the second category, as it is embodied in one fundamental document, the BL.

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[8] Morag McDowell and Duncan Webb (eds) *The New Zealand Legal System* (2 ed, Butterworths, Wellington, 1998) 98.

[9] Infoplease.com *Constitution* <http://www.infoplease.com/ce6/history/A0813343.html> (last accessed 31 October 2002).

As entrenchment and supreme law status are issues relevant to the implementation of constitutional ideas, these rather general definitions encompass neither of them.

B Elements of a Constitution

Although constitutions are, according to the given definition, supposed to contain only the fundamental principles of government, their scope varies from country to country. The official constitution of Norway, for example, consists of only 25 pages, whereas India's constitution of 1950 encompasses 250 pages. Although this might mislead one into thinking that the scope of constitutions is connected with the population of the respective country, there are other reasons for this discrepancy. Among all existing constitutions one dividing line can be drawn between countries that regard their constitution primarily and almost exclusively as a legal document in which there is room for rules of law only; and countries, like India, that think of their constitution as a kind of manifesto, which comprises, besides the mentioned fundamental principles, a confession of faith and a statement of ideals. These countries regard their constitutions more as a charter of the land.[10]

Notwithstanding the *writtenness*[11], supreme law status or entrenchment of a constitution, the following elements have become essential parts of *every* constitution (at least in democratic states).[12]

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[10] Kenneth Clinton Wheare (ed) *Modern Constitutions* (2 ed, Oxford University Press, London, 1966) 32.

[11] This term has been taken from: Homepage of the Stanford University *Constitutionalism* <http://plato.stanford.edu/entries/constitutionalism> (last accessed 31 October 2002).

[12] United Nations Development Programme *The Constitution and its Relationship to the Legislature* <http:magnet.undp.org/Docs/parliaments/Constitutions.htm> (last accessed 31 October 2002).
As the BL includes all these elements, the respective Articles are cited underneath.

- ➔ A preamble, which contains mostly a short introduction to the country's governing principles.[13]
- ➔ A chapter that comprises fundamental rights and freedoms of individuals (social rights as well as political)
  (Articles 1-19, 20 para 4, 33, 38 BL)
- ➔ A part dealing with the division of powers or systems of checks and balances within the nation's governing institutions, as well as between central government and its states or provinces
  (Articles 20 paras 2/3, 28 BL)
- ➔ A description of the structure of the governing institutions, including all constitutional obligations of the legislative, judicial and executive branches.
  (Articles 38 – 104 BL)
- ➔ A commitment to a political party system or alternative system and an outline for the selection of government officials.
  (Articles 21, 62-69 BL)
- ➔ Provisions explaining the procedures and circumstances for amending, revising or suspending the constitution.
  (Articles 79, 146 BL)

According to the definition given above, New Zealand provides most of these fundamental elements in its laws, institutions and customs. A compilation of all elements of New Zealand's constitutional framework will be supplied later in this paper.

III CONSTITUTIONALISM AND THE DEVELOPMENT OF CONSTITUTIONS IN GENERAL

Having illustrated the meaning of constitutions in general, it is further of interest how constitutionalism and constitutions have developed.

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[13] All relevant provisions of the BL are provided in the Appendix, Part A.

The term *constitutionalism* is fairly recent in its origin, although the idea can be traced back to the ancient Greeks.[14] To provide a definition, constitutionalism is regarded as:

> [t]he political idea that firstly government can and should be legally limited in its powers by a 'fundamental' law, or set of laws, beyond the reach of the individual government to alter, and secondly, that the authority of the government depends on its acting in compliance with these limitations.[15]

As constitutionalism encompasses both libertarian and procedural aspects, these limitations concern first the relationship between government and its citizen, and second, the relationship between government authorities.[16] Constitutionalism became the counterpart of Absolutism and Restoration in the 18th century caused by the doctrine of the separation of powers by Locke and Montesquieu as well as by the idea that human rights have to be transferred into basic rights conferred by the state.[17]

In this chapter the author will describe the origins and preconditions of constitutionalism as well as its historical development until the establishment of the Constitution of the United States, which is regarded as the first important written constitution and served as a model for a vast number of subsequent constitutional documents.[18]

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[14] According to the *Oxford English Dictionary*, the term 'constitutionalism' was first used in 1832. Others assert that the word was coined in America during the Revolution 1776. Some scholars allege that the adjective 'constitutional' was a novelty even in the mid-eighteenth century, but the noun 'constitution, with a political meaning, came into use during the English debates that led to the outbreak of the Civil War in 1642. The *Oxford English Dictionary* reports uses of that word sense as early as the 12th century, but it was the English debates of the Civil War period, and after the Glorious Revolution of 1688, that firmly established 'constitution' and its cognates as elements of the modern political vocabulary.
Scott Gordon (ed) *Controlling the State – Constitutionalism from Ancient Athens to Today* (1 ed, Harvard University Press, London, 1999) 5.

[15] Homepage of the Stanford University *Constitutionalism* <http://plato.stanford.edu/entries/constitutionalism> (last accessed 31 October 2002).

[16] William G Andrews (ed) *Constitutions and Constitutionalism* (1 ed, D van Nostrand Company, New York, 1961) 14.

[17] Konstitutionalismus (Constitutionalism) <http://www20.wissen.de/xt/default.do> (last accessed 31 October 2002).

[18] The Constitution of the United States was written in 1787 and ratified in 1789.

A Natural Law and Constitutionalism

The roots of constitutionalism are based in the awareness and assuredness of the existence of a higher law, the so–called natural law. However, constitutionalism cannot be equated with natural law, as it is but one of its aspects.[19] The legal institute of natural law had and still has much more influence on modern thinking and legal understanding, but a deeper evaluation of this is beyond the scope of this paper.

1 The Ancient Greeks and the Stoics of Greece and Rome

The Ancient Greeks and their famous philosophers (Socrates, Sophocles, Plato, Aristotle, Heraclitus) built the key concepts of natural law in the consciousness of European people. Heraclitus, for example, contributed to the emergence of a divinely inspired, universal, immutable and eternal natural law by stating that there has to be one law, which sustains all human laws and is infinitely strong.[20] Plato's theory of the ideal human law, which exists only in the world of ideas expressed the same view.[21] However, Aristotle has contributed the most to the creation of a natural law with his theory of knowledge and his Metaphysics. He can therefore be regarded as the 'father of natural law'.[22] Notwithstanding these approaches, the idea of a natural law remained a hypothesis and was regarded as an intellectual standard not serving as an instrument for juridical decisions.[23] Nevertheless, the idea of the existence of a paramount law that governs all social existence was born.

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[19] Andrews, above, 15.
[20] Heinrich A Rommen (ed) *The Natural Law* (1 ed, Vail-Ballou Press, New York, 1947) 6.
[21] Sheldon Garrett Ward (ed) *The History of Political Theory – Ancient Greece to Modern America* (1 ed, Peter Lang, New York, 1988) 23.
[22] Rommen, above, 16.
[23] Sir Paul Vinogradoff (ed) *Outlines of Historical Jurisprudence (Vol. II) – The Jurisprudence of the Greek City* (1 ed, Oxford University Press, London, 1922) 42.

The Stoics in Greece and later in Rome developed the idea of a natural law on this philosophical base further and conferred upon natural law binding authority and sanctions.[24]

2 *The Scholastics and Thomas Aquinas*

In the middle ages, the Scholastics (9th to 15th century) and Thomas Aquinas (1225-1274) regarded the natural law as divine in its origins and rationally determined as far as it concerned God's rational creatures (human beings). Thus, natural law was the participation of eternal law in human beings. As natural law was present in all of God's creatures, and men tended, understandably, to act in conformity with their nature, they were automatically obliged to obey the natural law.[25] In so doing, the Scholastics brought natural law and God closer together.[26]

This interpretation of natural law corresponded to the common understanding of the relationship between God and human beings in the Christian theology in these times. However, despite the fact that the rise of Christianity had displaced the Stoics, the existence of a natural law was never doubted.

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[24] Marcus Tullius Cicero (106–43 B.C.) recapitulated the views of the Stoics and stated the following:

> There is in fact a true law – namely, right reason – which is in accordance with nature, applies to all men, and is unchangeable and eternal. By its commands this law summons men to the performance of their duties; by its prohibitions it restrains them from doing wrong. … To invalidate this law by human legislation is never morally right, nor is it permissible ever to restrict its operation, and to annul it is impossible. Neither the senate nor the people can absolve us from our obligation to obey this law, and it requires no Sextus Aleius to expound and interpret it. It will not lay down one rule at Rome and another at Athens, nor will it be one rule today and another tomorrow. But there will be one law, eternal and unchangeable, binding at all times upon all peoples; and there will be, as it were, one common master and ruler of men, namely God, who is the author of this law, its interpreter, and its sponsor. The man who will not obey it will abandon his better self, and, in denying the true nature of a man, will thereby suffer the severest of penalties, though he has escaped all the other consequences which men call punishment.

Taken from: William Einwechter *Natural Law – A Summary and Critique* <http://www.natreformassn.org/statesman/99/natlawcrit.html> (last accessed 31 October 2002).

[25] Thomas Aquinus *Summa Theologica* (1a 2ae, quae. 91, art. 1 and 2).
Translation has been taken from: Alessandro Passerin d'Entreves (ed) *Natural Law – An Introduction to Legal Philosophy* (2 ed, Hutchison University Library, London, 1970) 43.

[26] Heinrich A Rommen (ed) *The Natural Law* (1 ed, Vail-Ballou Press, New York, 1947) 47.

3 *From Grotius and Hobbes to Locke and Rousseau*

With increasing disbelief in the omnipotence of the church during the Renaissance, the view of the Scholastics became questionable. Hugo Grotius (1583–1645) and Samuel Pufendorf (1632–1694) extracted God from natural law and thus created the theoretical basis of the modern, secular and constitutional State.[27] They were convinced that theology no longer possessed the power required to be the basis of social existence and made, at least in terms of natural law, the existence of God superfluous.[28] Thomas Hobbes (1588–1679) added in his pioneering work *Leviathan* (1651) another feature of natural law arguing that the primordial state of human beings is to be at war with one another.[29] Therefore state power is essential in order to protect men against themselves.[30]

As a consequence of these new approaches, the individual and the reasonable exercise of state power was centred in the considerations of the jurists. In the late 17th century the concept of natural law was restructured by John Locke (1632–1704), and was regarded as a set of natural rights of the individual. As a result of these natural rights, Locke defined the extent of natural law limits on government in its relationship with individuals.[31] In addition to this libertarian aspect of constitutionalism, he postulated procedural regularity. The relationship between the institutional components of government had to be based on natural law principles as well.[32]

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[27] William G Andrews (ed) *Constitutions and Constitutionalism* (1 ed, D van Nostrand Company, New York, 1961) 17.

[28] "Etiamsi daremus non esse Deum".
Passerin d'Entreves, above, 53.

[29] Thomas Hobbes *Leviathan*:

> During the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war as is of every man against every man

Taken from: <http://www.xrefer.com/entry/248580> (last accessed 31 October, 2002).

[30] "Homo homini lupus est".
Howard Warrender (ed) *The Political Philosophy of Hobbes* (1 ed, Oxford University Press, London, 1957) 48.

[31] Homepage of the Stanford University *Constitutionalism* <http://plato.stanford.edu/entries/constitutionalism> (last accessed 31 October 2002).

[32] William G Andrews (ed) *Constitutions and Constitutionalism* (1 ed, D van Nostrand Company, New York, 1961) 18.

The two principles of proscribed power and prescribed procedures are the two pillars modern constitutionalism was built upon.[33]

The last relevant progressive thinker towards constitutionalism was Jean–Jacques Rousseau (1712–1778), who created the idea of a s*ocial contract* (1762) between the people and the state. He developed Locke's theory by Hobbes' method further and conferred sovereignty to the people.[34]

4 Conclusion

The first intellectual achievement of natural law was the cognition that there is a paramount order, which governs the social existence of all human beings. Due to this precondition, Pufendorf, Grotius and Locke were able to develop the idea of natural individual rights. The second intellectual achievement leading to constitutionalism was that State power was regarded as essential to enable the people to exercise their individual rights unhindered.

Considering the notation of constitutionalism as *the limitation of government*, it has been developed by both approaches to a similar extent. Government and state power are necessary to guarantee the greatest possible exercise of individual rights. In turn, both have to be limited by the greatest possible exercise of individual rights.

> In all government there is a perpetual intestine struggle, open or secret, between Authority and Liberty, and neither of them can ever absolutely prevail in the contest. A great sacrifice of liberty must necessarily be made in every government; yet even the authority which confines liberty can never, and perhaps ought never, in any constitution to become quite entire and uncontrollable. … It must be owned that liberty is the perfection of civil society, but still authority must be acknowledged essential to its very existence.[35]

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[33] John Locke *Second Treatise* Chapter 4, Para 21:

> Freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power vested in it; a liberty to follow my own will in all things, when the rule prescribes not, and not to be subject to the inconstant, unknown, arbitrary will of another man.

Taken from: <http://www.constitution.org/cs_basic.htm> (last accessed 31 October, 2002).

[34] Kenneth Clinton Wheare (ed) *Modern Constitutions* (2 ed, Oxford University Press, London, 1966) 33.

[35] David Hume (1711-1776), Scottish philosopher, historian and national economist.
Taken from: Scott Gordon (ed) *Controlling the State – Constitutionalism from Ancient Athens to Today* (1 ed, Harvard University Press, London, 1999) V.

B Consensus and Constitutionalism

The development of natural law has paved the way for modern constitutionalism. However, as natural law, as understood by Locke and Rousseau, regarded the people as the original and actual authority in each state, the establishment of a new state order governed by a constitution in the modern sense required consensus among the people in this regard.[36]

As a consequence, the workability of constitutionalism demands three areas of consensus.[37] Firstly and most important, the people have to agree on the establishment of state power in general. They must share the view that the state is supposed to promote or protect the common interests of the members of a political community and is preferable to any other alternative. If the desirability of the survival of the State breaks down, a civil war or a revolution is the likely result.[38] Secondly, consensus on the respective form of the institutions, procedures and general aims of society is required. In the end, agreement must exist on the desirability of the rule of law as the basis of the respective government.

The new sovereign, replacing the competing centres of power of the middle ages and the absolute monarchs of the 17th and 18th century, was the people. Therefore, the proper functioning of constitutions and the feasibility of constitutionalism are dependent on the agreement of the people.[39] This was, in turn, a result of the development of natural law.

C Constitutions and Constitutionalism

The step from constitutionalism to the first constitutions was not significant anymore. As a result of the transfer of authority to the people by natural law, the mass of the governed gained new self–confidence. The American

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[36] A W Bradley and K D Ewing (eds) *Constitutional and Administrative Law* (11 ed, Longman, London, 1993) 3.

[37] William G Andrews (ed) *Constitutions and Constitutionalism* (1 ed, D van Nostrand Company, New York, 1961) 12/13.

[38] For example the United States in 1776, France in 1789 and in Russia 1917.

[39] Suri Ratnapala *The Idea of a Constitution and Why Constitutions Matter* <http://www.cis.org.au/Policy/Summ00/Summ00-1.pdf> (last accessed 31 October 2002).

Revolution in 1776 and the French Revolution in 1789 were the most obvious indications of the fact that the people were no longer willing to accept absolutist state order.[40]

By the time they had overthrown the old totalitarian rule, it became useful to inscribe the limits and procedures believed by them to be imposed by natural law on the governors. The first constitutions were intended to make the directives of the governed to the governors concrete and explicit, as well as to provide standards against which the governors had to measure their performance and could be measured by the governed.[41] Thus, the *writtenness* of the first constitutions can partly be explained by practical reasons.

The first constitutions embodied in one single document emerged in some states of the United States of America.[42] Nevertheless, the Constitution of the United States was and is always regarded as the first constitution in the modern sense. The next state that set in force a constitution was France, after the French Revolution in 1789. Due to the confusion in France during the aftermath of the revolution, there were enacted several successive constitutions in the 1790's.[43] Constitutionalism became widely accepted at the beginning of the 18th century and many European states, with the exception of England, moved on to enact constitutions.[44]

IV CONSTITUTIONAL HISTORY OF GERMANY AND NEW ZEALAND

This chapter illustrates both the German and New Zealand path to their current constitutions. The term *constitutional history* is often used in a misleading way, as according to the general development of constitutions and constitutionalism, one cannot speak of constitutions in a narrower sense before the establishment of the United States' constitution in 1787. Admittedly this

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[40] Kenneth Clinton Wheare (ed) *Modern Constitutions* (2 ed, Oxford University Press, London, 1966) 34.
[41] William G Andrews (ed) *Constitutions and Constitutionalism* (1 ed, D van Nostrand Company, New York, 1961) 21.
[42] Konstitutionalismus (Constitutionalism) <http://www20.wissen.de/xt/default.do> (last accessed 31 October 2002).
[43] C F Strong (ed) *Modern Political Constitutions* (3 ed, Sidgwick & Jackson, London, 1949) 35/36.
[44] Konstitutionalismus (Constitutionalism), above.

statement is more relevant to Germany than New Zealand, as the constitutional history of New Zealand only began with the signing of the Treaty of Waitangi in 1840. Nevertheless, many predecessors of the BL in German legal history referred to the first two meanings of *constitutions* provided above.

A *The Path to the German Basic Law of 1949*

German legal history can be traced back to the law of the Roman Empire.[45] Because one can only speak of constitutional law where state organization and/or individual rights are concerned, the first relevant documents date from the 14th century. As individual rights were not yet developed and intended to become part of constitutions only in the late 17th century,[46] the earliest documents concerning constitutional law all dealt with the organization of certain parts of the state.

1 Legal sources in the Holy Roman Reich of German Nations

The first legal sources of German constitutionalism can be found in the Holy Roman Reich of German Nations, which began with the coronation of Otto I in 962 and ended with the abdication of Franz II in 1806.[47] Noteworthy also is the so–called *Sachsenspiegel*[48], which summarized the then existing commonly approved law.[49] Although it was only a legal book and not law, it contributed significantly to the development of rules for the king's election, which were formally enacted in the *Goldene Bulle* of 1356.[50] The *Goldene Bulle* was the first

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[45] It has to be mentioned that the term 'Germany' has never been the official name for the different political communities in the 'German' history. To simplify matters, the author will nevertheless use this term for the rest of the paper..

[46] See above.

[47] Anke Freckmann and Thomas Wegerich (eds) *The German Legal System* (1 ed, Sweet & Maxwell, London, 1999) 5.

[48] Written by Eike von Repgow around 1220.

[49] A comprehensive evaluation of the *Sachsenspiegel* is provided in: Karl Gottfried Hugelmann (ed) *Stämme, Nation und Nationalstaat im Deutschen Mittelalter (Tribes, Nations and National States in the German Middle Ages)* (1 ed, W Kohlhammer, Würzburg, 1955) 14-23.

[50] Hermann Conrad (ed) *Deutsche Rechtsgeschichte – Frühzeit und Mittelalter (German legal history – The Early Times and the Middle Ages)* (1 ed, C F Müller, Karlsruhe, 1954) 306.

relevant document and laid down for the first time the principles of the *Königswahlrecht*[51] in a written body of law. It remained the authoritative basis of the king's election and was the most important *constitutional* law until the end of the Reich in 1806.[52]

Over the following centuries the power of the German emperor declined more and more as his sovereignty was gradually transferred to the different *Landesherren*[53]. Furthermore, with the Renaissance, humanism and the Reformation, the state system's basis of medieval understandings of the relationship between the church and the state, became questionable.[54] Consequently the *constitutional* order of the Holy Roman Reich of German Nations had to be challenged. Both the *Augsburger Religionsfrieden*[55] and the *Westfälischer Frieden*[56] reorganized parts of the German state order, and could therefore be regarded as the next relevant predecessors of the BL.

The Peace of Augsburg acknowledged the Lutheran and Catholic religions as being equal and introduced the important principle of *cuius regio eius religio*, which meant that each national sovereign was entitled to determine his subject's religion in his territory, and that followers of other religions had the right to leave the respective territory unharmed.[57]

The Peace of Westphalia formally terminated the Thirty Year War. Besides the fact that this peace treaty is regarded as the source of modern international law,[58] it contained some *constitutional* amendments. Firstly, it confirmed explicitly the provisions of the Peace of Augsburg relating to the equality of both religions. Secondly, the right of non alignment was granted to

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[51] Provisions for the law of succession to the throne

[52] Dietmar Willoweit (ed) *Deutsche Verfassungsgeschichte – Vom Frankenreich bis zur Wiedervereinigung Deutschlands (German constitutional history – From the Salic-Frank empire to the reunification of Germany)* (3 ed, C.H.Beck, München, 1997) 71.

[53] National sovereigns of vassals of the Reich.

[54] Gerhard Oestreich (ed) *Neostoicism & The Early Modern* State (1 ed, Cambridge University Press, Cambridge, 1982) 140 et sqq.

[55] Peace of Augsburg (1555).

[56] Peace of Westphalia (1648).

[57] Germany – A Country Study *The Peace of Augsburg* <http://memory.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+de0018)> (last accessed 31 October 2002).

[58] Alfred Verdross and Bruno Simma (eds) *Universelles Völkerrecht (Universal International Law)* (3 ed, Duncker & Humboldt, Berlin, 1984) 20.

the *Reichsstände*[59], and thirdly the institute of *itio in partes*[60] in religious affairs was recognized, which led to the division of the *Reichstag*[61] into a Catholic and a Protestant assembly, and to the requirement of consent of both assemblies before passing a resolution.[62]

As the Holy Roman Reich of German Nations lasted more than 900 years, this paper has examined only the most important *constitutional* documents of the era. It is not necessary to understand their contents or political impact, but it must be borne in mind that parts of the state organization were governed by written documents from 1356 onwards.

2 *The constitutions of the 'Länder'*

In the aftermath of the French Revolution and the break-up of the Holy Roman Reich of German Nations, Germany entered a phase of political upheaval.[63] After the victory over Napoleon, the Congress of Vienna (1815) redrew the map of Europe. The *Deutscher Bund*[64] was established, which was a

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[59] The *Reichsstände* were several important groups in society, like the *Markgrafen, Pfalzgrafen* or bishops, which had the right to sit and vote in the Reichstag and consequently participate in royal resolutions.
Anke Freckmann and Thomas Wegerich (eds) *The German Legal System* (1 ed, Sweet & Maxwell, London, 1999) 8.

[60] *Itio in partes* means that the respective religious groups negotiated separately in the *corpus catholicorum* and the *corpus evangelicorum*. The decisions reached had to be discussed afterwards.
Heinrich Richard Schmidt *Absolutismus und Aufklaerung – Vom christlichen Fundamentalismus zum Vernunftglauben (Absolutism and Enlightenment – From Christian fundamentalism to the believe in common sense)* <http://www.hist.unibe.ch/schmidt/veroeffh/chronik.htm> (last accessed 31 October 2002).

[61] The *Reichstag* (Imperial Diet) was the representation of the *Reichsstände* and was involved in the process of legislation in the Holy Roman Reich of German Nations.
Reichstag (Imperial Diet) <http://www20.wissen.de/xt/default.do> (last accessed 31 October 2002).

[62] Dietmar Willoweit (ed) *Deutsche Verfassungsgeschichte – Vom Frankenreich bis zur Wiedervereinigung Deutschlands (German constitutional history – From the Salic-Frank empire to the reunification of Germany)* (3 ed, C.H.Beck, München, 1997) 145.

[63] Germany did strictly speaking not exist at this stage of the German history. After the breakup of the Holy Roman Reich of German Nations the *Rheinbund* (Confederation of the Rhine) was created on 12 July 1806, to which ultimately 16 German states adhered.
Hans Planitz and Karl August Eckhardt (eds) *Deutsche Rechtsgeschichte (German legal history)* (2 ed, R. Spies & Co, Wien, 1961) 282-283.

[64] The German Confederation.

loose association of the individual sovereign *Bundesstaaten*.[65] Despite the increasing number of national states in Europe, the hopes of many Germans for a free, unitary nation–state were not fulfilled.[66] However, in relation to the development of constitutions, the Congress of Vienna can be seen as a crucial trigger, as it adopted in the *Wiener Bundesakte*[67] an obligation upon all German States to pass their own constitutions.[68] Consequently, the first written constitutions in accordance with the ideas of constitutionalism emerged in the respective German States after the Congress.

Between 1814 and 1832 eighteen German States introduced a constitution.[69] Although the legitimacy of the monarchy was not questioned, the government was now legally bound by these constitutions. All of them contained basic rights, the separation of powers, a two–chamber system and elected representatives. Furthermore, the principles of *Grundsatz der gesetzmässigen Verwaltung*[70] and *nulla poena sine lege*[71] were enacted. In relation to individual rights, the rights of liberty as expressed in both the American Constitution and the French Declaration of Human and Political Liberty had been partly inserted, whereas the principle of equality was omitted.[72]

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[65] Federal States.
As the German Confederation was a confederation and not a federal state the term *Bundesstaaten* is misleading. The exact notation would have been 'Member state of the German Confederation'.
Homepage of the University of Freiburg *Der Deutsche Bund (The German Confederation)* <http://www2.ruf.uni-freiburg.de/philfak3/daf/projekte/wagner/wagn503.html> (last accessed 31 October 2002).
To simplify matters, the term 'German States' will be used in the following.

[66] Homepage of the German embassy in Washington DC *History of Germany* <http://www.germany-info.org/relaunch/info/facts/facts_about/02_05.html> (last accessed 31 October 2002).

[67] Federal File of Vienna.

[68] Anke Freckmann and Thomas Wegerich (eds) *The German Legal System* (1 ed, Sweet & Maxwell, London, 1999) 20.

[69] For example: Nassau (1814); Bavaria, Baden, Hanover (1818); Württemberg (1819); Hesse-Darmstadt (1820); Saxony, Kurhesse (1831); Braunschweig (1832).
Hannsjoachim Wolfgang Koch (ed) *A constitutional history of Germany* (1 ed, Longman Group, Essex, 1984) 3.

[70] The principle of lawful administration.

[71] No penalty without law.

[72] The acknowledged rights of liberty in the mentioned documents were the following: personal freedom (abolition of slavery), freedom of property (abolition of lord manor's power) freedom of settlement (dissolution of corporate bindings), freedom of commerce and economy (abolition of the obligation to be in guilds), abolition of the right to banish tradesman), freedom of marriage (abolition of marriage restrictions), freedom of faith and of conscience, freedom of press and associations.
Anke Freckmann and Thomas Wegerich (eds) *The German Legal System* (1 ed, Sweet & Maxwell, London, 1999) 22.

3 The German Reich Constitution of 1849 ('Frankfurter Paulskirchen– Verfassung')

The next important step was the *Paulskirchenverfassung* of 1849, which was drafted as a consequence of the so–called *1848 revolution* in Germany.[73] After the foundation of the German Confederation in 1815, reactionary forces came to the fore again and hampered movements of the German population towards a unified German state and its long–lasting struggle for liberty, equality and participation in the law-making process. In contrast to the revolution of 1789, the French revolution of February 1848, and the proclamation of the French Republic, triggered immediate responses in Germany. In March, there were uprisings in all states that forced many concessions from the stunned national sovereigns.[74]

Apparently, constitutionalism could not be held back anymore. The *Deutsche verfassungsgebende Nationalversammlung*[75] was elected by each male, adult, independent citizen, and was intended to arrange a German constitution for a unified Germany resting on the idea of liberty and equality.[76] The National Assembly was composed of approximately 700 deputies from all German States and convened for the first time at St. Paul's Church in Frankfurt/Main on 18 May 1848.[77] After some hard bargaining, a democratic constitution was submitted on 28 March 1849, which attempted to combine old and new ideas. According to this constitution, Germany was intended to be a federal constitutional monarchy with a monarch who was responsible to Parliament. Furthermore, this constitution contained a catalogue of individual rights.[78] Due to the complex political situation and the fact that the National Assembly had never been

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[73] Germany – A Country Study *The Revolutions of 1848* <http://memory.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+de0024)> (last accessed 31 October 2002).
[74] Dietmar Willoweit (ed) *Deutsche Verfassungsgeschichte – Vom Frankenreich bis zur Wiedervereinigung Deutschlands (German constitutional history – From the Salic-Frank empire to the reunification of Germany)* (3 ed, C.H.Beck, München, 1997) 234.
[75] German Constituent National Assembly.
[76] Marc Phillip *Analyse und Vergleich der deutschen Wahlsysteme zwischen 1800 und 1949 (Analysis and Comparison of German election systems between 1800 and 1949)* <http://www.hausarbeiten.de/rd/archiv/politologie/pol-text404.shtml> (last accessed 31 October 2002).
[77] Hannsjoachim Wolfgang Koch (ed) *A constitutional history of Germany* (1 ed, Longman Group, Essex, 1984) 58.
[78] Elmar M Hucko (ed) *The Democratic Tradition – Four German Constitutions* (1 ed, St. Martin's Press, New York, 1987) 12 et seqq.

conferred the power to enforce the *Paulskirchenverfassung*, it never became effective.[79]

The *1848 revolution* failed in terms of enacting a state order based on the ideas of constitutionalism.[80] Nevertheless, the first *real* German constitution had an important influence on future constitutional discussions and was in some respects more progressive than its direct successor, the *Bismarck'sche Reichsverfassung*. As the members of the National Assembly were democratically elected and the turnout was about 60 per cent, the *Paulskirchenverfassung* was democratically even more legitimate than all three of its successors.[81]

4 *The Bismarck'sche Reichsverfassung of 1871*

In the following years, Prussia was able to enlarge its position in the German Confederation for two main reasons. Firstly, the downturn of Austrian influence in Germany and secondly, the clever politics of the chancellor, Otto von Bismarck (1815–1898).[82] After several wars,[83] the disbanding of the German Confederation and the short existence of the *Norddeutscher Bund*,[84] Bismarck achieved his main aim, the unification of all German States. In 1871, the

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[79] One major problem of this time the National Assembly has never resolved was whether Austria should be attached to the German Reich (the question of a *greater* or *little* Germany). Sabine Michalowski and Lorna Woods (eds) *German Constitutional Law* (1 ed, Dartmouth Publishing Company Limited, Aldershot, 1999) 3.

[80] A comprehensive analysis of reasons for the failure of the *1848 revolution* is provided in: Koch, above, 73-77.

[81] Dietmar Willoweit (ed) *Deutsche Verfassungsgeschichte – Vom Frankenreich bis zur Wiedervereinigung Deutschlands (German constitutional history – From the Salic-Frank empire to the reunification of Germany)* (3 ed, C.H.Beck, München, 1997) 237/239.

[82] www.ammermann.de *Gründung des Norddeutschen Bundes (Foundation of the North German Confederation)* <http://www.ammermann.de/norddeutscherbund.htm> (last accessed 31 October 2002).

[83] German Confederation–Denmark 1864; Austria–Prussia 1866; Germany–France 1870/71.

[84] North German Confederation.
It existed between 1867-71 and was an alliance of 22 German States north of the Main River. Dominated by Prussia, it replaced the German Confederation and included the states that had supported Prussia in the Austro-Prussian War (1866). The South German states, notably Bavaria, Baden, Württemberg, and the grand duchy of Hesse, though excluded from the confederation, were nevertheless closely bound to it through several alliances guaranteeing mutual protection. www.fundus.org *1862 – 1871 Von Bismarck/Preussen forcierte Reichseinigung (1862 – 1871 The unification of the Reich pushed by Bismarck/Prussia)* <http://www.fundus.org/pdf.asp?ID=8777> (last accessed 31 October 2002).

Deutsches Reich[85] was eventually founded without Austria and a predominant position of Prussia.[86]

Although the *Bismarck'sche Reichsverfassung* of 1871 is often regarded as the second important German constitution, this constitution is based completely on the constitution of the North German Confederation.[87] This constitution was created by Bismarck and designed for his political ideas for the future of the German Reich.[88] The *Bismarck'sche Reichsverfassung* was only a lightly amended version of the constitution of the North German Confederation and came into force on 4 May 1871.[89]

The *Paulskirchenverfassung* and the *Bismarck'sche Reichsverfassung* differed on some significant points. The latter only regulated the organization of the state and did not contain a catalogue of basic rights.[90] Additionally, it was not drafted by a constituent National Assembly like its predecessor of 1848, but rather by the Imperial Diet, which, though it was democratically legitimated, was not so to a comparable extent. Of further interest is that the *Bismarck'sche Reichsverfassung* established the German Reich of 1871 as a Federal State consisting of 25 Federal states and consequently accomplished the longed for German unity. However, the unity never came about by popular decision *from below* but rather by a treaty between national sovereigns *from above*.[91]

For the reasons explored, Bismarck's constitution is often regarded as a step backwards in German constitutional history. Bismarck succeeded in suppressing progressive forces by political means, legally justified by *his* constitution. Unfortunately, a cruel war had to occur to push German constitutional development once again.

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[85] German Empire.

[86] For example: Prussia's king was the hereditary emperor and his appointed prime minister was acting as the *Reichskanzler* (Imperial Chancellor).
Elmar M Hucko (ed) *The Democratic Tradition – Four German Constitutions* (1 ed, St. Martin's Press, New York, 1987) 28 et seqq.

[87] This constitution was accepted by the Imperial Diet on 16 April 1867.
Hannsjoachim Wolfgang Koch (ed) *A constitutional history of Germany* (1 ed, Longman Group, Essex, 1984) 113.

[88] Anke Freckmann and Thomas Wegerich (eds) *The German Legal System* (1 ed, Sweet & Maxwell, London, 1999) 19.

[89] Koch, above, 122.

[90] Sabine Michalowski and Lorna Woods (eds) *German Constitutional Law* (1 ed, Dartmouth Publishing Company Limited, Aldershot, 1999) 3.

[91] Homepage of the German embassy in Washington DC *History of Germany* <http://www.germany-info.org/relaunch/info/facts/facts_about/02_05.html> (last accessed 31 October 2002).

5 *The Weimarer Reichsverfassung of 1919*

After the German Reich had been defeated in World War I (1914–1918) and allied governments had refused to enter peace negotiations with the German Emperor Wilhelm II, he declared his abdication and the Weimar Republic was proclaimed on 9 November 1918. Monarchy had eventually lost all credibility in Germany and the way was paved for the *Weimarer Reichsverfassung*. A new National Assembly was elected in January 1919 and convened for the first time in Weimar on 6 February 1919 in order to draft a new constitution and thus prevent a further political deadlock.[92]

Finally, the *Versailler Friedensvertrag*[93] empowered Germany to reform its internal relations and the *Weimarer Reichsverfassung* was passed within the Reichstag on 31 July 1919. This constitution contained both a catalogue of basic rights and a part dealing with state organization in the broadest sense. It laid down the political system of a parliamentary federal republic with, in comparison to the *Bismarck'sche Reichsverfassung*, a large emphasis on the centralization of political power.[94] Interesting, especially for New Zealand, is the introduction of a proportional electoral system, whose main features were adopted by the Federal Electoral Law of 1956 and served as the basis of New Zealand's Mixed–Member–Proportional System (MMP) first applied in the 1996 election.[95]

At that time, the *Weimarer Reichsverfassung* was one of the most progressive constitutions, but its progressiveness was unfortunately one of the reasons for the ruin of the Weimar Republic after only 14 years.[96] The new constitution did not provide the necessary means to cope with post-war economic

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[92] Henry M Pachter (ed) *Modern Germany – A Social, Cultural, and Political History* (1 ed, Westview Press, Boulder, 1978) 90.

[93] Peace Treaty of Versailles.
It was signed on June 28, 1919, by Germany and by the Allies (save Russia) and formally terminated World War I. Besides many other points, the treaty placed responsibility for the war on Germany and its allies and imposed on Germany the burden of the reparations payments. Germany – A Country Study *World War I* <http://memory.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+de0028)> (last accessed 31 October 2002).

[94] Sabine Michalowski and Lorna Woods (eds) *German Constitutional Law* (1 ed, Dartmouth Publishing Company Limited, Aldershot, 1999) 3.

[95] This election marked New Zealand's a first major departure from the Westminster system. Geoffrey Palmer and Matthew Palmer (eds) *Bridled Power* (3 ed, Oxford University Press, Auckland, 1997) 11.

[96] Elmar M Hucko (ed) *The Democratic Tradition – Four German Constitutions* (1 ed, St. Martin's Press, New York, 1987) 56.

misery, the oppressive terms of the Treaty of Versailles[97] or the world economic crisis of 1929, because it was in some ways too liberal and in other ways too easy to manipulate.

Two important characteristics of the constitution exemplify this allegation. The first feature was the unlimited admission of political parties to the Reichstag: the constitution did not provide any threshold. As unemployment, general recession and domestic instability generated the upcoming of radical parties, many right and left wing parties emerged and obtained seats in the Reichstag. In consequence, the Reichstag consisted of too many different parties, obstructing its workability significantly, and the development and spread of radical parties was further supported.[98] The inability of the Reichstag to act led inevitably to the second important feature of the constitution, as this incapacity was more and more compensated by Article 48(2). This provision conferred the *Reichspraesident*[99] the right of emergency decrees if public peace and order or public security were threatened. As the decision to act was a matter of Presidential discretion, the democratic factor was almost completely removed, and the exercise of state power became manipulable. According to many scholars, this particular combination of constitutional provisions enabled non–democratic parties and politicians to misuse the system and therefore prepared Germany for fascistic catastrophe and the Nazis.[100] This conclusion is of course simplified and the breakdown of the Weimar Republic resulting in the Third Reich was caused by many other components as well. However, a stricter constitution would have preserved the workability of the Reichstag and perhaps the Weimar Republic might have been able to cope with the existing problems without sliding into radicalism.

In German constitutional history, the ideas of constitutionalism reached their peak in the *Weimarer Reichsverfassung*. Unfortunately, the constitution did not provide the means to cope with the circumstances. From today's perspective,

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[97] See above, n 93.

[98] Marc Phillip *Analyse und Vergleich der deutschen Wahlsysteme zwischen 1800 und 1949 (Analysis and Comparison of German election systems between 1800 and 1949)* <http://www.hausarbeiten.de/rd/archiv/politologie/pol-text404.shtml> (last accessed 31 October 2002).

[99] German President.

[100] Anke Freckmann and Thomas Wegerich (eds) *The German Legal System* (1 ed, Sweet & Maxwell, London, 1999) 26.

the Weimar Republic was not ripened for its liberal constitution as well as the challenges of the 1920's and therefore should be regarded as a "republic without republicans".[101] Notwithstanding its failure, the *Weimarer Reichsverfassung* is today considered the most liberal constitution Germany ever had.

6 *The German Basic Law of 1949*

After World War II and 12 years of complete disregard for basic rights and constitutional principles, the occupying powers governed Germany from 1945 to 1949.[102] Their aims were the abolishment of National Socialism, the full disarming of Germany and the re-establishment of a constitution so the country could resume responsibility for its affairs.[103] In many respects, Germany was faced with the same problems as it was 25 years ago after World War I. The new German constitution was supposed to have taken into account the mistakes of its predecessor and therefore be able to cope with the difficult circumstances.

(a) The development of the German Basic Law

Due to the fact that the Western Allies[104] and the USSR pursued different objectives in relation to Germany, it became clear that a re–establishment of *one* Germany consisting of all four zones of occupation was not realizable. The policies of the Allies in order to reorganize Germany in their zone resembled those of the Peace of Augsburg (*cuius regio, eius religio*), as each occupying

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[101] Homepage of the German embassy in Washington DC *History of Germany* <http://www.germany-info.org/relaunch/info/facts/facts_about/02_05.html> (last accessed 31 October 2002).

[102] As between 1933 and 1945 Germany ceased to be a democratic and constitutional state, this part of German legal history is not relevant for the constitutional development at all. The only contribution of the Nazis to both German constitutionalism and the development of the BL was that each following constitution had to avoid such a catastrophe by all means.

[103] Homepage of the German embassy in Washington DC, above.

[104] USA, United Kingdom and France.

power pursued its own aims and only the Western Allies were able to find a compromise.[105]

In 1948, the Western Allies authorized the Minister Presidents of the newly established 11 West German *Länder*[106] to convene a constituent Parliamentary Council consisting of members of the Federal states Parliaments.[107] A committee of experts on constitutional questions[108] submitted a draft for a new constitution to the Parliamentary Council in August 1948 and finally, on 1 September the Parliamentary Council convened for the first time in Bonn.[109] This draft aimed mainly at avoiding the mistakes of the *Weimarer Reichsverfassung* firstly by restraining the powers of the head of state, secondly by establishing a constitutional court, and thirdly by emphasizing the federal structure of the state.[110] After tough negotiations between the members of the Parliamentary Council and the Allied Powers, a compromise was eventually found in April 1949 and on 23 May the BL came into force.[111] It was partly similar to the *Paulskirchenverfassung* and the *Weimarer Reichsverfassung* containing individual basic rights and constitutional civil rights. It organized the state according to constitutional principles.[112]

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[105] Elmar M Hucko (ed) *The Democratic Tradition – Four German Constitutions* (1 ed, St. Martin's Press, New York, 1987) 63.

[106] Federal states. As Germany was supposed to become a Federal State, the term 'Federal states' was this time justified.

[107] Hannsjoachim Wolfgang Koch (ed) *A constitutional history of Germany* (1 ed, Longman Group, Essex, 1984) 338.

[108] Herrenchiemsee Constitutional Convention.

[109] Elmar M Hucko (ed) *The Democratic Tradition – Four German Constitutions* (1 ed, St. Martin's Press, New York, 1987) 67.

[110] Klaus Kroeger "Die Entstehung des Grundgesetzes (The Development of the Basic Law)" (1989) 42 Neue Juristische Wochenschau 1318, 1319.

[111] Sabine Michalowski and Lorna Woods (eds) *German Constitutional Law* (1 ed, Dartmouth Publishing Company Limited, Aldershot, 1999) 5.

[112] The Basic Law of the German Democratic Republic (GDR) became effective on 7 November 1949 and was based on completely different principles. As the eastern part of Germany fell under the occupation of the Soviet Union, the GDR was established as a socialist state under a socialist legal and constitutional order. Although it is doubtless that the GDR is one of the most important parts of German history, its constitution did not contribute anything to the BL because of its socialistic background. It can therefore be neglected in this context. After signing the *Einigungsvertrag* (Treaty of Reunification) in 1990, the GDR joined the Federal Republic of Germany under Article 23 BL, and its constitution was abrogated.
Dietmar Willoweit (ed) *Deutsche Verfassungsgeschichte – Vom Frankenreich bis zur Wiedervereinigung Deutschlands (German constitutional history – From the Salic-Frank empire to the reunification of Germany)* (3 ed, C.H.Beck, München, 1997) 425.

(b) The provisional character of the German Basic Law

Another interesting feature of the BL is its provisional character. After World War II and several indications that Germany would be divided into two parts, the authorized Minister Presidents[113] were reluctant to create a *real* constitution for West Germany. In their opinion, a constitution specific to West Germany would have enhanced the partition of Germany. Accordingly, they tried to emphasize the provisional character of the West German State by creating only a provisional *basic law* rather than a constitution. The BL was only supposed to be an interim solution until Germany was unified again.[114] As the BL fulfilled all requirements of a *real* constitution, it was in the end only a formal distinction.[115] However, the idea of the creation of a mere provisional basic law generated a significant lack of democratic legitimisation of the BL.[116] Originally, the Western Allies wanted the Minister Presidents to convene a freely elected constitutional assembly and not a parliamentary council. Likewise, in order to emphasize the provisional character of a West German constitution, the Minister Presidents convinced the Western powers that it would be more appropriate to avoid the *classical* way of creating a constitution and, least of all, make the enactment of a constitution subject to a referendum.[117]

In terms of democratic legitimisation, the BL was less in accordance with constitutionalism than its predecessor or the *Paulskirchenverfassung*. Perhaps the *Fathers of the Basic Law* feared another disaster and did not believe the German people capable of creating a reasonable constitution in a democratic way.

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[113] See above.
[114] Hannsjoachim Wolfgang Koch (ed) *A constitutional history of Germany* (1 ed, Longman Group, Essex, 1984) 339.
[115] Regarding the contents of the BL, only three provisions showed this provisional character and were amended after the German Reunification in 1990 (Preamble, Article 23, Article 146).
[116] Donald P Kommers (ed) *The Constitutional Jurisprudence of the Federal Republic of Germany* (1 ed, Duke University Press, Durham and London, 1989) 36.
[117] Sabine Michalowski and Lorna Woods (eds) *German Constitutional Law* (1 ed, Dartmouth Publishing Company Limited, Aldershot, 1999) 4.

(c) Conclusion

Given the genesis of the BL and the fact that it had never been subject to the legitimisation of the people, some thought that after the reunification the time had come for the German people to give themselves, according to the old Article 146 BL, a legitimised constitution. However, the majority of the Federal Parliament was opposed to such a project and therefore the appointed Constitutional Commission only made recommendations of amendments of the existing BL.[118] Consequently, the BL remained in force even after the reunification Germany. This means that the provisional character of the BL has come to an end and that it can now be regarded as the permanent constitution of the German state.[119]

7 Conclusion

As illustrated in this chapter, the BL is the result of almost 800 years of constitutional history in Germany. Though denouncing its lack of democratic legitimisation, it has proved a reliable, durable and stable source for the last 53 years coping with all social changes. It has incorporated historical experiences of all its predecessors and is today regarded as a constitution, conferring a maximum of individual rights combined with a state organization that allows a high level of workability. The well–balanced relationship between state and individual provided by the BL has converted conceptions of constitutionalism in a rather successful way.

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[118] Dietmar Willoweit (ed) *Deutsche Verfassungsgeschichte – Vom Frankenreich bis zur Wiedervereinigung Deutschlands (German constitutional history – From the Salic-Frank empire to the reunification of Germany)* (3 ed, C.H.Beck, München, 1997) 426.
[119] Michalowski/Woods, above, 6.

The future development of the BL, especially regarding the European Union and the relationship between European law and German domestic law, remains to be seen.[120]

B The Development of New Zealand's Unwritten Constitution

In 1840, the British Crown and Maori signed the Treaty of Waitangi[121] that established New Zealand as a British colony and was therefore the foundation of sovereignty of the British Crown. It makes sense to refer to this signing as the starting point of New Zealand's constitutional history because the gaining of sovereignty entails, besides other things, the abolishment of all previous structures.[122] However, it has to be stressed that all previous customs or rules applied by the Maori were, as far as they were relevant, part of the Treaty, which is today regarded as a part of the New Zealand constitution.[123]

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[120] At the summit meeting of the Heads of State of the European Union Laeken (Belgium) on the 14th/15th December 2001 the creation of a European Convention was decided. It is supposed to propose a new framework and structures for the European Union, which are geared to changes in the world situation, the needs of the citizens of Europe and the future development of the European Union. Under the chairmanship of Valery Giscard d'Estaing the Convention submitted a draft of a European Constitution on 28 October 2002 provided in the Appendix, part F.
Taken from: Homepage of the European Convention <http://european-convention.eu.int/bienvenue.asp?lang=EN> (last accessed 31 October 2002).

[121] Treaty of Waitangi will be abbreviated in the following to 'Treaty'.

[122] As 'European New Zealand' is a product of European development the English constitutional history prior 1840 can be regarded as part of the constitutional history of New Zealand as well. Nevertheless, this paper begins its examination of New Zealand's constitutional history with the signing of the Treaty because of the incisive effect of the gaining of sovereignty.
Regarding the relevance of the English constitutional history prior 1840, compare:
F M Brookfield (ed) *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (1 ed, Auckland University Press, Auckland, 1999) 85 et seqq.
A general description of the impact of the gaining of sovereignty on constitutional issues will be provided in the following chapter.

[123] Geoffrey Palmer (ed) *Unbridled Power* (2 ed, Oxford University Press, Auckland, 1987) 20.

1 Establishment of British sovereignty

From the landing in New Zealand by James Cook and his declaration of possession in 1769[124] to the arrival of first British settlers in the 1820's, the Crown had no interest in New Zealand and refused to intervene in the settlement and affairs of the country at all. The Crown acknowledged this view in several statutes, passed in 1817, 1823 and 1828, which regarded New Zealand as being "not within His Majesty's dominion".[125] When New Zealand became attractive to foreign traders and conflicts occurred between Maori and British settlers, the Crown became willing to become involved in New Zealand affairs. The Crown appointed James Busby as British Resident in 1832 who, unfortunately, was not able to reduce the violence between Maori and British settlers. In order to avoid the painful experiences in other colonies caused by lawlessness and to get in ahead of the French, who also had an intention to annex New Zealand, the Crown decided in January 1839 to acquire sovereignty over New Zealand on the basis of consent with the Maori.[126]

The first step towards this aim was through the Letters Patent issued on 15 June 1839 purporting to extend the boundaries of New South Wales to include "any territory which is or may be acquired ... within that group of islands ... known as New Zealand".[127] This Letters Patent did not have any legal effect, and in July 1839, Captain William Hobson was appointed Lieutenant–Governor over New Zealand and commissioned to negotiate with Maori for recognition of Crown sovereignty.[128]

Hobson arrived in the Bay of Islands on 29 January 1840. After only eight days, he and some 50 northern Maori chiefs signed the Treaty on 6

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[124] Actually, James Cook was not the first European who discovered New Zealand. It was rather the Dutch Abel Tasman who discovered New Zealand already in 1642. As he did not put ashore or made any symbolic act towards claiming New Zealand in the name of the Netherlands, today James Cook is regarded as the discoverer of New Zealand.
Homepage of the Ulster Museum Magni *Captain Cook and the discovery of New* Zealand <http://www.ulstermuseum.org.uk/gardenflora/cook.htm> (last accessed 31 October 2002).
[125] Claudia Orange (ed) *The Treaty of Waitangi* (1 ed, Allen & Unwin, Wellington, 1987) 8.
[126] N A Foden (ed) *New Zealand Legal History (1642 to 1842)* (1 ed, Sweet & Maxwell, Wellington, 1965) 17.
[127] Morag McDowell and Duncan Webb (eds) *The New Zealand Legal System* (2 ed, Butterworths, Wellington, 1998) 102.
[128] Philip A Joseph (ed) *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 36.

February. After the Treaty was circulated around New Zealand for further signatures, Hobson issued on 21 May 1840 two proclamations of British sovereignty over New Zealand. Sovereignty over the North Island was proclaimed by way of cession and over the South Island on the grounds of Cook's discovery. On 2 October 1840, the British government ratified and gazetted the proclamations and it is this date the New Zealand courts have acknowledged as the date the British acquired sovereignty over New Zealand. Although Britain would probably not have established British rule without the free consent of Maori, New Zealand was in the following years treated more as a colony acquired by settlement than one by cession.[129]

In order to illustrate the importance of the gaining of sovereignty to the constitutional development of a country, the following general definition of sovereignty is worth considering. Sovereignty means, in international law terms, that the holder of sovereign power is entitled to absolute power (to make and to enforce laws). It also means that any changes to those powers can only be exercised by the holder of sovereign power. Finally, it means that the right to ownership of the respective territory is imported.[130] Consequently, British laws became directly applicable to New Zealand and it was therefore Imperial Legislation[131] that left its mark on the first centuries of New Zealand's constitutional history. Thus, the establishment of British sovereignty was crucial to the development of New Zealand's constitutional system and has set the course even until today.

2 Government between 1840 and 1852

Letters Patent ('the Charter') of 16 November 1840 established a constitutional framework in New Zealand. Most important was the creation of a Legislative Council, which was an appointed body and was conferred the power

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[129] Philip A Joseph "The Legal History and Framework of the Constitution" in Colin James (ed) *Building the Constitution* (1 ed, Brebner Print, Wellington, 2000) 168, 176.
[130] Alfred Verdross and Bruno Simma (eds) *Universelles Völkerrecht (Universal International Law)* (3 ed, Duncker & Humboldt, Berlin, 1984) 29.
[131] Imperial legislation includes statutes of the Parliaments of Great Britain, England and the United Kingdom. The abbreviation 'Imp' after the name of an Act indicates that the statute is Imperial legislation.

to make "[l]aws and Ordinances as may be required for the Peace, Order and good Government of New Zealand". Nevertheless, the Legislative Council was restricted, as any legislation had to be in conformity with Imperial legislation, submitted to the Imperial Parliament, and subject to royal affirmation. Therefore, the final control remained in Great Britain. Hobson was officially appointed as Governor of New Zealand on 24 November 1840. Due to the distance from London, it became apparent that the Governor had considerable autonomy and, despite the existence of the Legislative Council, he, in negotiation with the British Colonial Office, ran the colony.[132]

In the following years, the autocratic style of government and disputes over sales of Maori land became an issue of concern for the settlers and led them to petition the British government to make further provisions for the government of New Zealand. In response to these petitions, the Imperial Parliament passed in 1846 the Act of the Constitution of Government in the New Zealand Islands (Constitution Act 1846 (Imp)), which established representative institutions but required the then Governor George Grey to bring it into effect.[133] Unfortunately, Grey did not believe that settlers should be accorded this degree of self–government and consequently, he failed to adapt the system of representative government.[134] Quite the contrary, he petitioned the Secretary of State in London to suspend the new Charter and the Act was repealed in 1848. Thus, the Legislative Council was revived and autocratic rule continued until 1852.[135]

3 Establishment of responsible government

Notwithstanding the repeal of the Constitution Act 1846 (Imp), constitutional ideas could no longer be stopped. In 1852, the British Parliament

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[132] Morag McDowell and Duncan Webb (eds) *The New Zealand Legal System* (2 ed, Butterworths, Wellington, 1998) 103.
[133] Philip A Joseph (ed) *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 114.
[134] Actually, Governor Grey refused to adapt the system, as he always wanted to strengthen the authority of the Executive.
P G McHugh "The Historiography of New Zealand's Constitutional History" in Philip A Joseph (ed) *Essays on the Constitution* (1 ed, Brookers, Wellington, 1995) 344, 350
[135] McDowell/Webb, above, 104.

passed the New Zealand Constitution Act 1852 (Imp).[136] As this statute brought together some important constitutional issues such as the implementation of a representative Parliament, a description of the relationship between the respective state institutions and a measure of superior law status, it can be regarded as New Zealand's first constitution.[137]

Nevertheless, as this act still depended in some respects on Imperial legislation, full legal independence from the Crown was not yet achieved. The General Assembly, for example, was granted the power to make laws and ordinances for the peace, order and good government of New Zealand, but on the condition that no such laws were repugnant to the laws of England.[138] Another example of this dependence was the limited superior law status of the Act, which meant that certain amendments required assent from the Crown. However, although large parts of the 1852 Act were repealed, it remained the basis of New Zealand's constitution until 1986.[139]

After this, the bond to the Crown and Imperial legislation was more clearly defined by the adoption of the English Laws Acts 1854, 1858, and 1908 (NZ). These Acts stated that all laws in existence in England on 14 January 1840 were to be applied in New Zealand. Thus, New Zealand inherited not only aspects of the British legal and constitutional systems, but also common and statute law. The Colonial Laws Validity Act 1865 (Imp) eventually granted some limited legal independence, as colonial Parliaments were allowed to pass laws inconsistent with British laws as long as these laws were not incompatible with an Imperial statute that was specifically applicable to a particular colony.[140] Despite all independence, the New Zealand Parliament was clearly legally subordinate to the Crown until 1947.[141]

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[136] Geoffrey Palmer *The Legal History and Framework of the New Zealand Constitution* <http://www.chenpalm.co.nz/cpopinion4.asp?mID=17> (last accessed 31 October 2002).
[137] McDowell/Webb, above, 104.
[138] Raymond Douglas Mulholland (ed) *Introduction to the New Zealand Legal System* (10 ed, Butterworths, Wellington, 2001) 34.
[139] The requirement of assent by the Crown to amend the Act was altered in 1857, when the General Assembly was given limited powers to amend it without referring to the Crown. However, full legal autonomy was not yet achieved.
Geoffrey Palmer and Matthew Palmer (eds) *Bridled Power* (3 ed, Oxford University Press, Auckland, 1997) 4.
[140] Peter Spiller, Jeremy Finn, Richard Boast (eds) *New Zealand Legal History* (2 ed, Brookers, Wellington, 2001) 76.
[141] Geoffrey Palmer "The Legal Framework of Constitution" in Colin James (ed) *Building the Constitution* (1 ed, Brebner Print, Wellington, 2000) 182, 187.

4 *Moves towards legal and constitutional independence*

In 1931, the Statute of Westminster (Imp) granted the parliaments of Australia, New Zealand, Ireland and Newfoundland full power to create statutes having extra territorial effect, and repealed the Colonial Laws Validity Act 1865 (Imp) formally. Furthermore, section 2 of the Statute stated that no Act passed by the parliament of a dominion could be deemed void because it was repugnant to the laws of England.[142] Finally, Britain showed a willingness to separate itself from the legal affairs of its colonies. Regarding New Zealand, two further provisions were of importance. First, section 8 of the Statute expressly confirmed the New Zealand Constitution Act 1852 (Imp) and all subsequent amendments, which meant that, due to the entrenched provisions, the New Zealand General Assembly was precluded from altering their *constitution* unless it would invoke the request and consent procedure provided by the Statute of Westminster 1931. In addition, the Statute was not to apply in New Zealand without being adopted by the New Zealand Parliament.[143]

Because of the loyalty of both New Zealand and Australia to the British Empire, they were generally reluctant to implement Britain's offer of legal autonomy, and it was only in 1947 that New Zealand adopted the Statute of Westminster through the enactment of the Statute of Westminster Adoption Act 1947.[144] In the same year the British Parliament was requested, by s 8 of the Westminster Statute 1931, to grant to the New Zealand Parliament full power to repeal and amend its constitution in the New Zealand Constitution Amendment (Request and Consent) Act 1947. In response, the New Zealand Constitution (Amendment) Act 1947 (Imp) enabled the New Zealand Parliament to amend, suspend and repeal at any time all or any provisions of the Constitution Act 1852. The passage of the Statute of Westminster Adoption Act 1947 and the New Zealand Constitution Amendment (Request and Consent) Act 1947 marked the formal transition of New Zealand to full independence and finally, it attained

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[142] Mai Chen and Geoffrey Palmer (eds) *Public Law in New Zealand* (1 ed, Oxford University Press, Auckland, 1993) 182.
[143] F M Brookfield "Kelsen, the Constitution and the Treaty" (1992) 15 NZULR 163, 171.
[144] Australia adopted the Statute of Westminster 1931 in 1942.
Homepage of the University of Würzburg <http://www.uni-wuerzburg.de/law/as04000_.html> (last accessed 31 October 2002).

legal autonomy and full constituent powers.[145] However, the Imperial Parliament was still able to legislate for New Zealand by request and consent. This was the last barrier to complete legal and constitutional autonomy and was abolished by the Constitution Act 1986.[146]

5 *The Constitution Act 1986*

Between 1852 and 1986, the originally existing 82 provisions of the Constitution Act 1852 were reduced to twelve. Although the Constitution Act 1852 only ruled state organizations, and did not include a catalogue of basic rights, it became more and more obvious that these twelve provisions were not sufficient to organize the state reasonably. Sir Geoffrey Palmer commented on this lack quite accurately: "[t]he 1852 Constitution Act was a relic, harmless, but also useless".[147]

The 1984 constitutional crisis exposed major uncertainties in New Zealand's constitutional law as well as its obsoleteness. Arguably, the New Zealand Government would have continued to function adequately, but nevertheless, this crisis generated a revision of New Zealand's constitutional laws. Therefore, a committee to review New Zealand's constitutional provisions was created to collect the most important ones into one statute and finally, the Constitutional Act 1986 was enacted.[148] It repealed formally the Constitution Act 1852 and, although it did not provide many significant changes to the existing constitutional arrangements, it is important because it *patriated* the New Zealand

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[145] Geoffrey Palmer and Matthew Palmer (eds) *Bridled Power* (3 ed, Oxford University Press, Auckland, 1997) 3.

[146] Geoffrey Palmer *The Legal History and Framework of the New Zealand Constitution* <http://www.chenpalm.co.nz/cpopinion4.asp?mID=17> (last accessed 31 October 2002).

[147] Geoffrey Palmer *The Legal History and Framework of the New Zealand Constitution*, above.

[148] After the Labour Government was elected in 1984, the outgoing National Prime Minister, Sir Robert Muldoon, refused to devalue the dollar on the instructions of the new Government. Doubts arose whether, in law, an opposition party, which had won elections, could immediately form a government and take responsibility for necessary measures (in their view).
R C Mascarenhas *The New Zealand Civil Service* <http://www.indiana.edu/~csrc/mascar4.html> (last accessed 31 October 2002).

constitution. It placed the basis of the New Zealand constitution within New Zealand.[149]

6 Current constitutional situation in New Zealand

After depicting the constitutional history of New Zealand, it has to be stressed that although the New Zealand Parliament has enacted *Constitutional* Acts (1852/1986), these statutes did or rather do not fulfil the requirements of constitutions within the meaning of modern constitutionalism. Both govern(ed) only certain parts of state organization and are/were therefore not regarded as the *constitutions* of New Zealand.[150] As mentioned before, the unwritten New Zealand constitution consists of several laws and customs, which are embodied in both written and unwritten material. Due to the limited scope of this paper, the elements will only be listed and further reading will be recommended in footnotes.

- ➔ Rule of law[151]
- ➔ Legislation[152]
- ➔ Constitutional Conventions[153]
- ➔ Letters Patent of the Governor-General[154]
- ➔ Treaty of Waitangi[155]

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[149] Geoffrey Palmer and Matthew Palmer (eds) *Bridled Power* (3 ed, Oxford University Press, Auckland, 1997) 4.

[150] Although New Zealand never had a constitution in the classic meaning, two draft written constitutions are worth mentioning:

1. Draft of the Constitutional Society for the Promotion of Economic Freedom and Justice in New Zealand (Inc.) submitted in 1961.
2. Dr D E Paterson's draft for consideration by the New Zealand Section of the International Commission of Jurists submitted in 1977.

[151] Raymond Douglas Mulholland (ed) *Introduction to the New Zealand Legal System* (10 ed, Butterworths, Wellington, 2001) 19,20.

[152] Legislation that is important from a constitutional point of view is provided in the Appendix, part B.

[153] Homepage of the State Services Commission *The Constitutional Setting* <http://www.ssc.govt.nz/display/document.asp?NavID=82&DocID=1813> (last accessed 31 October 2002).

[154] Morag McDowell and Duncan Webb (eds) *The New Zealand Legal System* (2 ed, Butterworths, Wellington, 1998) 104.

[155] Philip A Joseph (ed) *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 42,43.

➔ Imperial enactments in force in New Zealand[156]

All these elements are relevant parts of the unwritten constitutional framework of New Zealand and establish together the constitutional body that governs the country. Nevertheless, constitutional change since 1986 has been directed at the development of a truly autochthonous constitution for New Zealand. This process is not yet complete and future constitutional change may include, for example, the abolition of the Privy Council, the establishment of New Zealand as a Republic, clauses addressing the status of the Treaty of Waitangi and the enactment of a written constitution.[157]

C Conclusion

In relation to the constitutional history of both countries, Germany's seems more 'eventful'. The reason for this is, of course, the longer and more varied history of Germany or Europe as a whole.[158] On the other hand, 'eventful' meant, besides significant intellectual achievements, many wars and revolutions without whom the realization of constitutionalism would not have been possible. New Zealand was able to bring most ideas of constitutionalism into effect without any significant bloodshed. Today, similar constitutional approaches govern both countries and the question remains why New Zealand has never enacted a written entrenched supreme law.

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[156] The Imperial Laws Application Act 1988 identifies clearly which Imperial enactments and Imperial subordinate legislation remain in force in New Zealand.
A list of some of these statutes is provided in the Appendix, part C.

[157] Geoffrey Palmer and Matthew Palmer (eds) *Bridled Power* (3 ed, Oxford University Press, Auckland, 1997) 311-316.

[158] Referring to the length and variety of German constitutional history as a reason for a more 'eventful' history is strictly speaking not correct because, as mentioned before, 'European New Zealand' is a product of European development and therefore the, of course, longer English constitutional history can be regarded as part of the constitutional history of New Zealand also. This argument only makes sense if New Zealand's constitutional history is limited to the time after the Treaty (see above, n 122).
A brief description of the constitutional history of the UK is provided by:
Kenneth Clinton Wheare (ed) *Modern Constitutions* (2 ed, Oxford University Press, London, 1966) 9 et seqq.

V A COMPARISON BETWEEN TWO APPROACHES OF REALIZING CONSTITUTIONALISM

This chapter compares the approaches of Germany and New Zealand, examining written and unwritten constitutions in general as well as the historical development in both countries. Although there are some differences in terms of content, the author will examine the characteristics of *writtenness*, supreme law status and entrenchment only.

A Writtenness and Entrenchment Introduced

W*rittenness*, entrenchment and supreme law status are not equivalent. Nevertheless, in the case of Germany and New Zealand the general rule fits, stating that written constitutions are entrenched and have obtained supreme law status, whereas unwritten constitutions are not entrenched and have no supreme law status. First a general description will be provided.

1 Differences between Written and Unwritten Constitutions

A classification of constitutions on the basis of whether they are unwritten or written is strictly speaking not correct.[159] What is meant by this common distinction is that written constitutions are embodied in one document and unwritten constitutions are, as mentioned before, made up of several laws and customs that do happen to be *written down* in a series of documents. Besides this formal difference and the generally entrenched character of written constitutions, some more general distinctions can be found.

While unwritten constitutions have developed gradually, written constitutions are either granted by the ruler or ordained by the people. Besides the executive and legislative branches of government, the courts, rulers, people,

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[159] Joseph Raz "On the Authority and Interpretation of Constitutions" in Larry Alexander (ed) *Constitutionalism – Philosophical Foundations* (1 ed, Cambridge University Press, Cambridge, 1998) 152, 154.

usages as well as legal theory contribute to the constant development of unwritten constitutions. Consequently, an unwritten constitution is more a process of growth and a written constitution may best be described as a creation or product, which is always newly made and set forth. This leads to another difference as the creation of written constitutions is influenced by the history of a country, whereas unwritten constitutions are not only defined by history, but also embody and mirror history themselves.[160]

Another difference between both kinds of constitutions is that written constitutions are often regarded as supreme law. This means firstly that the constitution has to be obeyed by every individual.[161] Secondly, all statutes, institutions and governmental activities have to be in accordance with the constitution and, in the event of inconsistency, may be declared unconstitutional and consequently void.[162] Thirdly, the constitution can normally only be amended by a special procedure and be abrogated by the people who created it.[163] In contrast, unwritten constitutions may, as a rule, be altered or abolished by the lawmaking power at any time and in any of their details.[164] This fact results in the incapability of further growth or expansion of written constitutions, which are always fixed and final, whereas unwritten constitutions are able to expand and develop and therefore meet changing public opinion and political theory.[165]

The last point mirrors the entrenchment of most written constitutions and the link between entrenchment and supreme law status.

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[160] Second Amendment Foundation *Written and Unwritten Constitutions* <http://www.saf.org/pub/rkba/books/BlacksConstitutionalLaw.htm> (last accessed 31 October 2002).

[161] Homepage of the Stanford University *Constitutionalism* <http://plato.stanford.edu/entries/constitutionalism> (last accessed 31 October 2002).

[162] Suri Ratnapala *The Idea of a Constitution and Why Constitutions Matter* <http://www.cis.org.au/Policy/Summ00/Summ00-1.pdf> (last accessed 31 October 2002).

[163] Kenneth Clinton Wheare (ed) *Modern Constitutions* (2 ed, Oxford University Press, London, 1966) 15.

[164] C F Strong (ed) *Modern Political Constitutions* (3 ed, Sidgwick & Jackson, London, 1949) 65.

[165] O Hood Phillips and Paul Jackson (eds) *O Hood Phillips' Constitutional and Administrative Law* (7 ed, Sweet & Maxwell, London, 1987) 25.

2 *Entrenched legislation*

In light of the differences between written and unwritten constitutions and especially the status of supreme law, all of these distinctions seem to come down to the issue of entrenchment. Therefore, the true ground of division, by virtue of the nature of the constitution itself, is whether it is flexible or rigid.[166]

(a) What is entrenchment?

In general, entrenchment or *self–embracing sovereignty* is the process of enabling Parliament to make it more difficult for a law to be amended or repealed, thereby restricting future Parliaments from exercising their supreme powers by means of the establishment of specially prescribed procedures.[167] Thus, entrenchment can involve a stricter vote requirement for the passage of legislation[168] or even enacting legislation, which is impossible to amend by succeeding Parliaments. If a provision that prescribes restraints to the amendment of certain other provisions is among these protected provisions, one talks about *double entrenchment*. On the other hand, *single entrenchment* is given if the prescribing provision is not explicitly protected and can therefore be amended or repealed, for example, by a single majority of the members of Parliament.[169] The aim of entrenchment is to enshrine law or at least to exempt certain indispensable provisions from purely partisan decisions in Parliament, as the entrenched provisions can only be altered by a joint agreement of the major parties.[170]

Because the issue of entrenchment mostly affects alterations of constitutions, the proposed distinction between flexible and rigid constitutions

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[166] This classification stems from Lord Bryce and is expounded by him in:
James Bryce (ed) *Studies in History and Jurisprudence Vol 1* (1 ed, Clarendon Press, Oxford, 1901) 145-254.
[167] Morag McDowell and Duncan Webb (eds) *The New Zealand Legal System* (2 ed, Butterworths, Wellington, 1998) 126.
[168] For example, a two–thirds–vote of Parliament.
[169] Philip A Joseph (ed) *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 16.
[170] Alan McRobie "The Electoral System" in Philip A Joseph (ed) *Essays on the Constitution* (1 ed, Brookers, Wellington, 1995) 312, 317.

makes sense. Rigid constitutions contain provisions, which may not be altered at all or at least not in the ordinary way, whereas a flexible constitution does not prescribe any special procedure and can therefore be altered by simple majority of Parliament.[171] The following section juxtaposes the constitutions of Germany and New Zealand in relation to the question of entrenchment.

(b) Entrenchment in New Zealand

Based on Dicey's principle that the Parliament is sovereign with complete powers to alter any constitutional provision, and that it cannot be bound by the actions of its predecessors,[172] New Zealand was always critical of entrenched legislation.[173] However, this principle contains the paradox that, although Parliament obtains unlimited powers of legislation, it cannot, in any way, limit the powers that it has.[174] This paradox led to a reinterpretation of the sovereignty of Parliament, according to which Parliament may successfully bind its successors as to the procedures of law–making but not the substance or pith of legislation.[175] In this context, Parliament adopted the Electoral Act 1956 (repealed) with its entrenching section 189.[176]

Its successor, section 268 of the Electoral Act 1993, is today New Zealand's only example of constitutional entrenchment.[177] Apparently, single entrenchment by means of imposing certain procedural limitations on future

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[171] Joseph, above, 14.

[172] Albert Venn Dicey (1835-1922) was a jurist of great distinction. His classic treatise *Introduction to the Study of the Law of the* Constitution is still regarded as authoritative.
Scott Gordon (ed) *Controlling the State – Constitutionalism from Ancient Athens to Today* (1 ed, Harvard University Press, London, 1999) 45/46.

[173] Kenneth John Scott (ed) *The New Zealand Constitution* (1 ed, Clarendon Press, Oxford, 1962) 9 et seqq.

[174] Joseph, above, 16.

[175] Kenneth Clinton Wheare (ed) *The Constitutional Structure of the Commonwealth* (1 ed, Oxford University Press, Wellington, 1960) 86/87.

[176] Although section 189 of the Electoral Act 1956 reserved certain provisions in that Act from repeal or amendment, it was not itself reserved because it was thought that such an attempt would be legally ineffective.
Geoffrey Palmer "Chapter 20: Parliament" in Sir Robin Cooke (ed) *The Laws of New Zealand* (1 ed, Butterworths, Wellington, 1996) 4 Fn 7.
Section 189 of the Electoral Act 1956 is provided in the Appendix, part D.

[177] Like its predecessor, section 268 of the Electoral Act 1993 is still not among the reserved provisions and can therefore be amended or repealed by a simple majority.
Section 268 of the Electoral Act 1993 is provided in the Appendix, part D.

Parliaments is now accepted.[178] Notwithstanding the "swelling voices" [179] that demand or recommend double entrenchment, the Government did not enact this. However, the fact that there has never been any attempt to ignore or subvert section 268 of the Electoral Act 1993 suggests that it has moral or conventional status. Thus, it seems that New Zealand has a very flexible constitution.[180]

(c) Entrenchment in Germany

According to Article 79(2) BL[181], an amendment of the BL requires a two third majority of the members of the *Bundesrat*[182] and a two third majority of the votes of the *Bundestag*[183]. Furthermore, pursuant to Article 79(3), certain provisions and principles of the BL are legally unalterable.[184] Therefore Article 79(3) is called the *perpetuity clause*[185]. However, Article 79(3) is itself not among the unalterable provisions and can therefore, formally, be changed by a two–thirds majority. If the *ratio legis*[186] of Article 79(3) is recognised, it must be interpreted as being among the saved provisions as well. The only way to abolish these provisions and principles is to enact a completely new constitution that, according to Article 146, has to be concluded freely and uninfluenced by the German people.

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[178] For the sake of completeness, it shall be mentioned that any proposal for the entrenchment of an Act in New Zealand must itself be carried in a committee of the whole House, by the majority ordinarily required for the amendment or repeal of the provision to be entrenched.
Geoffrey Palmer "Chapter 20: Parliament" in Sir Robin Cooke (ed) *The Laws of New Zealand* (1 ed, Butterworths, Wellington, 1996) 101.

[179] Mai Chen and Geoffrey Palmer (eds) *Public Law in New Zealand* (1 ed, Oxford University Press, Auckland, 1993) 67.

[180] Note for the discussion in New Zealand about which parts of the electoral law should be entrenched and which not:
Alan McRobie "The Electoral System" in Philip A Joseph (ed) *Essays on the Constitution* (1 ed, Brookers, Wellington, 1995) 312, 342 et seq; Chen/Palmer, above, 66 et seqq.

[181] This provision applies to all Articles of the BL.

[182] Federal Council.

[183] Federal Parliament.

[184] Article 79(3) BL refers to the basic principles of federalism, to Article 1 (human dignity) and Article 20 (basic state principles e.g. democracy, republic, social state, rule of law).
Bruno Schmidt-Bleibtreu and Franz Klein (eds) *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland* (6 ed, Luchterhand, Dortmund, 1983) 855.

[185] Heinz Dieter Bulka and Susanne Luecking (eds) *Facts about Germany* (4 ed, Lexikon-Institut Bertelsmann, Guetersloh, 1985) 96.

[186] *Ratio legis* means the objective sense of a certain provision.

As Article 79(2) is itself only alterable by a two-third majority, the German constitution is double entrenched. Adding the fact that certain provisions cannot be amended at all, the BL can be regarded as a very rigid constitution.

3 Conclusion

Considering the general meanings of *writtenness*, entrenchment and supreme law status, the initially mentioned approaches to constitutionalism in Germany and New Zealand become more clear. As Germany is governed by a comparatively rigid constitution and New Zealand's constitutional framework only contains one single entrenched provision, all three characteristics highlight significant differences in these frameworks.

B Advantages and Disadvantages of Both Approaches

This chapter examines the respective advantages and disadvantages of the characteristics of these two kinds of constitution. Being aware of the fact that advantages on the one side result in disadvantages on the other side, this paper will nevertheless try to provide a meaningful partitioning. To simplify matters, the following chapter uses the terms *written* and *unwritten* to refer to supreme, written, and entrenched constitutions on the one hand, and unwritten non entrenched on the other hand.

1 Disadvantages of written constitutions

Written constitutions can be reproached for being inflexible. In comparison to unwritten constitutions, they establish iron rules which, when found inconvenient, are difficult to change. This leads inevitably to two advantages. First, they enable the state to react reasonably and effectively in the event of a constitutional crisis, and second, they are conferred a degree of resilience to

subversion.[187] However, this lack of flexibility can be seen as an obstacle for legal developments necessary in a growing or changing society. Written constitutions account for different new customs only after years and are therefore often antiquated and not up to date.[188]

Unwritten constitutions' treatment of short-term matters can sometimes be even more rigid than that of written ones in respect of long-standing social rules and conventions. Each elimination, alteration or re-interpretation of such rules typically requires widespread changes in traditional attitudes, beliefs and behaviour, which probably lasts decades.[189]

Another disadvantage of written constitutions is that they can hardly meet the high expectations they are supposed to fulfil. It is sometimes very difficult to express the solemn principles of constitutionalism in words without taking on too much at once when drafting the constitution. Additionally, written constitutions run the risk of invading the domain of *ordinary* legislation, instead of being restricted to fundamental rules.

2 *Advantages of written constitutions*

Many advantages of written constitutions just mirror the other side of the coin, or in other words, advantages of unwritten constitutions are actually interpreted as advantages of written ones.

In contrast to the advantageous flexibility of unwritten constitutions, the inflexible written constitutions in turn guarantee more stability. They are not subject to perpetual change at the will of the lawmaking power, as any amendment requires an exacerbated process. The only security against instability and precipitate changes of unwritten constitutions is the conservatism of the

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[187] Antoine Clark *The Case for Written Constitutions: Even Broken or Bad Promises Are Better in Writing* <http://www.libertarian.co.uk/lapubs/legan/legan024.pdf> (last accessed 31 October 2002).
[188] Raymond Douglas Mulholland (ed) *Introduction to the New Zealand Legal System* (10 ed, Butterworths, Wellington, 2001) 28.
[189] Homepage of the Stanford University *Constitutionalism* <http://plato.stanford.edu/entries/constitutionalism> (last accessed 31 October 2002).

lawmaking power and its political responsibility to the people.[190] But is this a reliable factor in terms of *limited government*? The more difficult and time-consuming an amendment of the constitution is, the less likely it is that a moral panic will sustain the credulity of the public long enough for subversion to be achieved. Arguably, an entrenched constitution hampers beneficial reforms as well, but *good things take time* - good intentions acted upon hastily may not be desirable.

Another significant advantage of written constitutions is one of a practical nature. One text that contains the sum of what state authority consists of, describes how state power is constituted and how it is used and, last but not least, provides a catalogue of basic rights, gives clarity and legal security (another essential part of constitutionalism).[191] Further, the fact that a written single document is available for everybody, both inhabitants and visitors of the respective country, provides trust in the state.

3 Conclusion

A final answer to the question of which approach is preferable has to take into account the original meaning and purpose of constitutionalism, the *limitation of government*. It is the author's opinion that entrenchment and supreme law status are indispensable elements of a constitution and compulsory requirements of the very possibility of constitutionally limited government. If a Government were entitled, at its pleasure, to change the very terms of its constitutional limitations, there would, in reality, be no such limitations at all. This statement shows the paradox of all-embracing parliamentary sovereignty from a different perspective and clarifies that New Zealand's constitutional framework does not meet the requirements of constitutionalism. If state power can be limited by *customs*, there is no certainty of law at all because any custom is

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[190] Second Amendment Foundation *Written and Unwritten Constitutions* <http://www.saf.org/pub/rkba/books/BlacksConstitutionalLaw.htm> (last accessed 31 October 2002).

[191] Antoine Clark *The Case for Written Constitutions: Even Broken or Bad Promises Are Better in Writing* <http://www.libertarian.co.uk/lapubs/legan/legan024.pdf> (last accessed 31 October 2002).

broadly interpretable. Defining custom as compromise necessary between current public opinion and the government's sense of virtue leaves room for various abuses of state power. Unfortunately, it is not reasonable to believe that democracy could be preserved by *radical* democratic means nowadays.

Apart from this major advantage of written constitutions, they also enable all citizens to have access to the basis of the political system. This fosters at the same time an awareness of democracy and civic rights, as well as duties among the citizens. In the case of an unwritten constitution, only a few acquire a broad knowledge as to be capable of interpreting and understanding the whole constitutional framework and the respective interrelations. The widespread unawareness of all features of an unwritten constitution might even allow minor violations to be unnoticed by the public.

With respect to the alleged lack of flexibility and adaptability of written constitutions, the question arises how much flexibility and adaptability is really necessary. As a constitution is only supposed to contain fundamental principles, it is likely that these principles will not change within short spans of time. It took, for example, more than 2,000 years to evolve basic rights and principles of democracy to their current status. If social changes are incisive, each written constitution will be able to adapt to the new situation reasonably. It must not be forgotten that state power is, according to Locke, conferred by the people and if the people agree on abolishing the current state order, nobody can or is entitled to avoid it. Arguing from the other side, no written constitution can provide absolute protection from change. However, there is no reason to oppose any change when the nature of a future society cannot be accurately predicted.

The most significant advantage of supreme law status is that the legislative power is controllable and limited by a *superior* court.[192] The Federal Constitutional Court is regarded as the *Hüter der Verfassung*[193] and ensures that all state action is in compliance with the BL. Its rulings are binding for all other constitutional organs of the Federation or the *Länder*, as well as for all courts and public authorities.[194] The United States Supreme Court's authority is even

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[192] For example the *Bundesverfassungsgericht* (Federal Constitutional Court) in Germany, the Supreme Court in the United States or the High Court of Australia.
[193] Guardian of the constitution.
[194] Howard D Fisher (ed) *The German Legal System and Legal Language* (3 ed, Cavendish Publishing, London, 2002) 18.

extended to private law in cases where the parties in dispute are citizens of different states.[195] On the other hand, as superior courts are entitled to strike down legislation and are independent in their decisions, it can be argued that they are too powerful and that too much depends on the quality of these courts. Furthermore, their composition is understandably a matter of concern to the politicians of the Parliament and it is difficult to create a selection procedure, which is in accordance with the principles of democracy and *checks and balances*.[196] As a last resort, the superior courts would be placed in the position of legislator, usurping the vote of Parliament.

However, an additional state organ controlling the legislature restrains the power of Parliament by all means, even if the judges are politically biased. Judge's independence or quality is never guaranteed, but the moral binding effect of a written constitution should not be underestimated and each law-abiding society should be believed to be capable of appointing trustworthy and competent judges. Thus, it is the author's opinion that a supreme law guarded by a supreme court fulfils the demands of the *checks and balances* more appropriately than all-embracing parliamentary sovereignty.

A final feature of written constitutions is that they might serve as a basis for a whole society everybody can refer to, as a document that serves the people by creating a uniting institution they are proud of.[197] In conclusion, after a thorough consideration of all arguments, the author strongly supports the written constitution approach.

C Reasons for New Zealand's Apathy towards a Written Constitution

Many reasons for New Zealand's unwillingness to enact a written constitution in the United States' or German style stem from the legal

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[195] Donald P Kommers (ed) *The Constitutional Jurisprudence of the Federal Republic of Germany* (1 ed, Duke University Press, Durham and London, 1989) 3.

[196] The Federal Constitutional Court, for example, consists of two senates each of them being composed of eight professional judges. In order to stay in compliance with democratic principles and the *checks and balances*, these judges are elected by the *Bundestag* and the *Bundesrat* equitably.
Sabine Michalowski and Lorna Woods (eds) *German Constitutional Law* (1 ed, Dartmouth publishing Company Limited, Aldershot, 1999) 37.

[197] A well known example is the American Constitution.

understanding of parliamentary sovereignty and entrenched legislation, the inherited common law system or from the other above listed arguments contra written and pro unwritten constitutions.[198] Notwithstanding these various explanations, the main reason is most evidently provided by a comparison of New Zealand and German constitutional history.

1 Constitutional continuity in general

Constitutional and historical continuity are the decisive keywords in this context. According to Sir Kenneth Clinton Wheare, the origin of all modern constitutions lies in the people's desire to make a fresh start, which means to break with the legal past and begin again by proclaiming and creating a new order.[199] Catalysts for enacting a (new) constitution may be the wish to unite under a new government,[200] when communities had been released of dependencies as the result of a war,[201] a revolution,[202] or defeat in war.[203] Breaks in the legal and historical continuity of states always generated the necessity of the establishment of a new order. With the upcoming constitutionalism in the United States and Europe, the respective political communities were inspired to symbolize this new order in a readily identifiable and quotable constitutional document.[204]

2 Constitutional continuity in Germany

The German history, in contrast to New Zealand, is marked with several legal and historical breaks and all of them were followed by significant constitutional changes. The Peace of Augsburg put an end to the riots and unrests

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[198] See above.
[199] Kenneth Clinton Wheare (ed) *Modern Constitutions* (2 ed, Oxford University Press, London, 1966) 6.
[200] E.g. United States in 1787, Australia in 1901.
[201] E.g.: Austria, Hungary, Czechoslovakia after World War I 1918.
[202] France in 1789, Russia in 1917.
[203] Germany in 1919 and 1949, France in 1875 and 1946.
[204] Philip A Joseph (ed) *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 121.

in the course of Martin Luther's Reformation. The Peace of Westphalia terminated the Thirty Year War. The constitutions of the *Länder* in the 1820's and 1830's were a result of the Congress of Vienna that in turn was supposed to restructure Europe after Napoleon's wars. The *Paulskirchenverfassung* was drafted after the *1848-revolution*. The constitution of the North German Confederation came into effect after Prussia's war against Austria. The *Bismarck'sche Reichsverfassung* established the German Empire after the German–French War in 1870/71. Finally, the *Weimarer Reichsverfassung* and the BL came into effect after World War I and World War II, respectively.

3 Constitutional continuity in New Zealand

In New Zealand, only two incidents have disturbed constitutional continuity. The first was the war between Maori and British forces in the 1860's that triggered the first independence movements of the settlers in New Zealand. After the end of the war in 1872 and after economic prosperity had overtaken the depression of the 1880's, nationalistic feelings subsided again.[205] The second occasion when New Zealand reconsidered its destiny was the proposed union with the Australian colonies in the 1880/90's. However, New Zealand refused to join a Federation, as it would have lost "its political identity, its independence, its right to nationhood".[206] Apart from these brief periods, New Zealand's development from Crown colony to an independent sovereign State was rather 'uneventful'.[207] Actually, New Zealand was very reluctant to gain full legal independence because of the strong ties to the United Kingdom. Even after New Zealand had acceded dominion status in 1907, its leaders turned down dominion nationalism and emphasized the indivisible unity of the British Empire.[208] After the peaceful gaining of legal autonomy in 1947, New Zealand has also never

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[205] A more comprehensive description of this war is provided in:
James Belich (ed) *The New Zealand Wars – and the Victorian interpretation of racial conflict* (1 ed, Auckland University Press, Auckland, 1986).
[206] Keith Sinclair (ed) *A destiny apart – New Zealand's Search for National Identity* (1 ed, Allen & Unwin, Wellington, 1986) 119.
[207] Compare chapter IV/B "The development of New Zealand's unwritten constitution".
[208] J B Condliffe (ed) *The Welfare State in New Zealand* (1 ed, Unwin Brothers, London, 1959) 327 et seqq.

experienced anything that might have caused the State to break with its legal past.[209]

4 Conclusion

Reflecting on reasons for New Zealand's apathy, the facts are self–explanatory. New Zealand never needed a "fresh start" as a result of a war or a revolution, and its evolvement towards sovereignty took decades. Germany, on the other hand, experienced several moments in its history where it needed a "fresh start". Consequently, the most interesting question is why these constitutional 'incidents' or phases have never occurred in New Zealand but have in Germany. Why was Germany's way to its modern constitutional system so different from New Zealand?

One reason could be the shortness of New Zealand's constitutional history,[210] which is, admittedly, a weak argument as Germany had four "fresh starts" since 1840. Nevertheless, it is a point that should not be underestimated. A more appropriate ground for the long-lasting and peaceful process towards sovereignty is that in contrast to Europe and Germany, the gaining of independence has obviously never been a significant issue in New Zealand.

This was due to two reasons. Firstly, Britain has never exercised its Imperial power in the way it did in the United States, which might have generated stronger independence movements. Quite the contrary, it was the Crown that fostered independence, and not its New Zealand colony that was a bit 'in a huff' and felt betrayed of this policy in the beginning because of the close relationship with the United Kingdom. New Zealand never had to fight for its independence, "because the Americans had done that for them".[211] Secondly, from first settlement on, the settlers and pioneers in New Zealand were of a very special character. Due to the fact that they needed to settle new land and develop fresh resources, they were seldom interested in dealing with doctrines, theories

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[209] Philip A Joseph (ed) *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 123.
[210] See above, n 122.
[211] Keith Sinclair "The native born: The origins of New Zealand nationalism" (1986) Occasional Publication No. 8, Massey Memorial Lecture 11.

and national introspection. As a consequence of this, the people's nature tended more towards pragmatism, practical solutions and adaptation to physical environment, which in turn induced a preoccupation with economic development issues.[212] The people who left Europe in order to migrate to New Zealand had other problems than, for example, the Germans in the 19th century, and as long as the Crown did not intervene in their activities, they did not incline to change the constitutional system at all. This attitude towards way of life to New Zealand and to the Crown, became something like a political tradition among New Zealanders. Two examples illustrate this more vividly. New Zealand's change from a 'colony' to 'dominion' in 1907 failed to attract public attention just as the gaining of legal autonomy in 1947 did. Even the bill leading to the Constitution Act 1986 received only a paltry eight submissions after being introduced and referred to the select committee.[213] In the author's opinion, the close relationship with the United Kingdom and its policy towards New Zealand's independence on the one hand, and the described political tradition were and are the main contributors to New Zealand's apathy in constitutional matters.[214]

With regard to German constitutional 'incidents', one has to distinguish between revolutions and upheavals on the one hand, and wars on the other.

The only German revolution was the *1848 revolution*. It was at last triggered by the French Revolution of 1789, which can be regarded as the major change from monarchical thinking to democracy in Europe. Without the preparatory work of the Frenchmen, the *Paulskirchenverfassung* would never have been drafted, at least not in 1848. It is probable that a revolution like the French revolution would not have been possible in Germany at all due to its decentralized state organization, but it was only a matter of time until the revolution would have swept over to Germany. The example of the French Revolution and its effects on Germany leads inevitably to one reason for Germany's and New Zealand's different development. Even if Germany has never been the final trigger of major upheavals, it was, in contrast to New

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[212] Alexander Brady (ed) *Democracy in the Dominions* (3 ed, OUP, London, 1958) ch 20.
[213] Philip A Joseph (ed) *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 126.
[214] Sinclair, above, 11:

> Doctrines of 'extraterritoriality' and 'repugnancy' stirred neither public interest nor passion in the Kiwi breast. Certainly they aroused no thoughts of revolution

Zealand, always in the centre of world affairs, geographically and idealistically. At least until World War I, all world powers were European countries and therefore Europe was the melting pot of world policy. Located between France and the UK in the west, and Austria-Hungary and Russia in the east, Germany was coercively involved in each major conflict, whereas New Zealand was an island with only one major neighbour (Australia) that was an English colony as well.

However, the three following German constitutions were enacted after wars - wars, for whose breakout Germany was either fully responsible (Bismarck's wars, World War II) or at least partly responsible (World War I). One reason is certainly again Germany's geographical location and its position in the structures of world power during the last 200 years, but another approach is worth mentioning as well. Just as the New Zealand temperament and attitudes partly explain New Zealand's apathy in constitutional matters, typical German characteristics have, at least, facilitated Germany's tendency towards war. These typical German characteristics can briefly be described as absolute loyalty to the authorities and the need for strong leadership.[215] To clarify this, the Germans were never hungry for war, but they were willing tools in the hands of charismatic leaders like Bismarck in the war against France (1870/71), Hindenburg and Ludendorff in World War I and Adolf Hitler in World War II. The German *soul* tended apparently to accept what it was told. Arguably, the reasons for this are based in historical, political and sociological circumstances of the last 600 years and are not as easy to explain as the New Zealand tendency towards pragmatism. However, it is nevertheless questionable that the Germans have never had any serious revolution and always followed their authority into war.

The illustrated differences between both countries provide a vivid explanation for New Zealand's apathy on the one hand and the eventful constitutional history of Germany on the other hand. Although the term *apathy* has a slightly negative connotation, it has to be admitted that New Zealand's way was much more peaceful. Even if the author favours the current German

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[215] An interesting evaluation of this point of view is provided in:
Heinrich Mann (ed) *Der Untertan (The Subject)* (1 ed, Kurt Wolff Verlag, Leipzig, 1918).

constitution, the question remains unanswered whether the price for this achievement was too high.

D Conclusion

Considering the listed advantages and disadvantages of written constitutions as well as historical factors, the final answer to the question, whether the German or New Zealand system is preferable, comes down to the question of what amount of control is necessary to guarantee a peaceful social existence of human beings.

The principles of limited government were not developed without reason in Europe. Hobbes' Leviathan, for example, emerged in the setting of the devastating Thirty Year War. European history proved that *homo homini lupus est* was not fiction but rather an alarming reality. Apparently, Europe and Germany needed more constitutionalism than New Zealand in order to guarantee a peaceful status quo. Although this has not deterred several European countries from ending up in revolutions or in war, it was obviously necessary to define the relationship between the state and its citizens in the described way. Finally, who can presume to know what would have happened without, for example, Germany's different constitutions?

Without supporting anarchical ideas, it is (unfortunately) essential to organize social co-existence of human beings by enacting state power. The consistent realization of constitutionalism has proved to be able to govern states properly. The German constitution is the more consequential realization of *limited government*, in comparison to New Zealand's constitutional framework that leaves much more space for arbitrariness and abuse of power. As long as reasonable people govern New Zealand, there will not be any problems, but who can predict the future?

One 'popular' example for the insufficiency of New Zealand's constitutional framework is the BORA. As it is not entrenched, it currently has only the status of an ordinary statute, and can further even be overridden by other Acts according to s 4. Lord Cooke of Thorndon has been cited for commenting that the BORA "is regarded internationally as one of the weakest affirmations of

human rights."[216] This fact raises the question whether the BORA is compatible with the principles of *limited* government and international legal obligations.[217]

Although New Zealand is a successful and peaceful country and there is no urgent cause for enacting a written constitution, an entrenched written and supreme constitution is apparently the more appropriate way to govern New Zealand in accordance with constitutional principles and to comply with its international obligations.

VI CONCLUSION

This comparison between the German and New Zealand constitutional history has served to clarify why both approaches to constitutionalism are so different. The author has come to the conclusion that written constitutions are generally preferable, even if the constitutional framework of New Zealand has served to govern the country reasonably.

Nevertheless, New Zealand scholars are equally divided in supporting a written entrenched constitution with supreme law status and maintaining the basic principles of its constitutional framework. Equally contentious is the question of New Zealand's system of government. Should New Zealand become

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[216] Ministry of Justice *Re-evaluation of the Human Rights Protections in New Zealand* (Wellington, 2000) para 51 <http://www.justice.govt.nz/justicepubs/reports/2000/hr_reevaluation/part_2.html> (last accessed 31 October 2002).

[217] The UN Human Rights Committee released a damning statement on the Bill of Rights Act 1990 when commenting on New Zealand's third periodic report on the implementation of the International Covenant on Civil and Political Rights in 1995, which echoed Lord Cooke's concerns:

> The Committee regrets that the provisions of the Covenant have not been fully incorporated into domestic law and given overriding status in the legal system. Article 2, paragraph 2, of the Covenant requires states parties to take such legislative or other measures which may be necessary to give effect to the rights recognized in the Covenant. In this regard the Committee regrets that certain rights guaranteed under the Covenant are not reflected in the Bill of Rights and that it does not repeal earlier inconsistent legislation and has no higher status than ordinary legislation. The Committee notes that it is expressly possible, under the terms of the Bill of Rights, to enact legislation contrary to its provisions and regrets that this appears to have been done in a few cases.

in: Concluding Observations of the Human Rights Committee: New Zealand (3 October 1995) CCPR/C/79/Add. 47, para 176.
A comprehensive description of this problem area is provided in:
Paul Rishworth "The Rights Debate: Can We, Should We, Adopt a Written Constitution Including a Bill of Rights" in Colin James (ed) *Building the Constitution* (1 ed, Brebner Print, Wellington, 2000) 400-413.

a republic or retain a parliamentary monarchy in the Commonwealth?[218] However, it is without any doubt that due to the constitutional crisis in 1984, the unclear fulfilment of international legal obligations by the BORA and the changing legal status of the Treaty, the constitutional framework of New Zealand is at the moment subject of interest.

Resulting from the broadly acknowledged necessity of a change or at least a reform, the Institute of Policy Studies agreed in 1997 to run a conference. The *Building the Constitution* conference was held on 7-8 April at Parliament in Wellington and was intended to evaluate different issues for reform. More than 40 papers were submitted from widely varying perspectives and were considered at the conference by more than 100 people of widely different backgrounds.[219] Unfortunately the conference failed in initiating any common understanding of New Zealand's constitutional future.[220] Quite the contrary, the gap between the opposite parties was even increased and it became quiet obvious that the discussion on the constitution will continue.

> It is social, economic, cultural, and political debate that underlies any constitution. … New Zealand will come face to face with its own constitutional destiny. We should seek a uniquely New Zealand identity for our system of democratic government. What form that will take will depend, ultimately, on what sort of society we think we are.[221]

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[218] In the view of one prominent New Zealand constitutional scholar:

> New Zealand, like Australia, though a constitutional monarchy in form, is a de facto republic with the Governor-General functioning virtually as a President appointed by an elected Prime Minister.

F M Brookfield "Republican New Zealand: Legal Aspects and Consequences" (1995) NZ Law Rev 310, 310.

[219] A thematic summary of the discussions and a compilation of the papers is provided in: Colin James (ed) *Building the Constitution* (1 ed, Brebner Print, Wellington, 2000)

[220] Philip A Joseph (ed) *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 128.

[221] Geoffrey Palmer and Matthew Palmer (eds) *Bridled Power* (3 ed, Oxford University Press, Auckland, 1997) 316.
This book also contains a proposal for a Constitution Act of New Zealand, which is provided in the Appendix, part E.

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VIII APPENDIX

A Relevant Provisions of the German Basic Law

Preamble (original version):

The German People
In the Länder of Baden, Bavaria, Bremen, Hamburg, Hesse, Lower Saxony, North-rhine-Westphalia, Rhineland-Palatinate, Schleswig-Holstein, Württemberg-Baden and Württemberg-Hohenzollern,
conscious of their responsibility before God and men,
animated by the resolve to preserve their national and political unity and to serve the peace of the world as an equal partner in a united Europe,
desiring to give a new order to political life for a transitional period,
have enacted, by virtue of their constituent power, this Basic Law for the Federal Republic of Germany.
They also have acted on behalf of those Germans to whom participation was denied.
The entire German people are called upon to achieve in free self-determination the unity and freedom of Germany.

Preamble (current version):

Conscious of their responsibility before God and man,
Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law
Germans in the Länder of Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Lower Saxony, Mecklenburg-Western Pomerania, North-Rhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein, and Thuringia have achieved the unity and freedom of Germany in free self-determination. This Basic Law thus applies to the entire German people.

Article 23 Jurisdiction of the Basic Law (original version)

For the time being, this Basic Law shall apply in the territory of the Länder of Baden, Bavaria, Bremen, Greater Berlin, Hamburg, Hesse, Lower Saxony, North Rhine Westphalia, Rhineland-Palatinate, Schleswig-Holstein, Württemberg-Baden, and Württemberg-Hohenzollern. In other parts of Germany it shall be put into force on their accession.

Article 79 Amendment of the Basic Law

(1) This Basic Law may be amended only by a law expressly amending or supplementing its text. In the case of an international treaty respecting a peace settlement, the preparation of a peace settlement, or the phasing out of an occupation regime, or designed to promote the defense of the Federal Republic, it shall be sufficient, for the purpose of making clear that the provisions of this Basic Law do not preclude the conclusion and entry into force of the treaty, to add language to the Basic Law that merely makes this clarification.

(2) Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat.

(3) Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

Article 146 Duration of validity of the Basic Law (original version)

This Basic Law shall cease to be in force on the day on which a constitution adopted by a free decision of the German people comes into force.

Article 146 Duration of validity of the Basic Law (current version)

This Basic Law, which since the achievement of the unity and freedom of Germany applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect.

B New Zealand Statutes that Embody Constitutional Principles

Legislature Act 1908
Judicature Act 1908
Evidence Act 1908
Official Appointments and Documents Act 1919
Acts Interpretation Act 1924
District Courts Act 1947
Crown Proceedings Act 1950
Geneva Conventions Act 1958
Continental Shelf Act 1964
Race Relations Act 1971
Local Government Act 1974
Ombudsmen Act 1975
Treaty of Waitangi Act 1975
Human Rights Commission Act 1977
Official Information Act 1982
Acts Interpretation Amendment Act 1983

Parliamentary Service Act 1985
Constitution Act 1986
State-Owned Enterprises Act 1986
State Sector Act 1988
Imperial Laws Application Act 1988
Foreign Affairs Act 1988
Public Finance Act 1989
Acts and Regulations Publication Act 1989
Bill of Rights Act 1990
Electoral Act 1993
Privacy Act 1993
Human Rights Act 1993
Fiscal Responsibility Act 1994

C Relevant English and United Kingdom Statutes

Magna Charta 1297
Habeas Corpus Acts 1640, 1679, 1816
Bill of Rights 1688
Act of Settlement 1700
Statute of Westminster 1931

D New Zealand Legislation containing entrenching provisions

Section 189 Electoral Act 1956 (Repealed)
Restriction on amendment or repeal of certain provisions

(1) This section applies to the following provisions (hereinafter referred to as reserved provisions), namely:

(a) Section 17(1) of the Constitution Act 1986, relating to the term of Parliament:
(b) Section 15 of this Act, relating to the Representation Commission:
(c) Section 16 of this Act, and the definition of the term **General electoral population** in subsection (1) of section 2, relating to the division of New Zealand into General electoral districts after each census:
(d) Section 17 of this Act, relating to the allowance for the adjustment of the quota:
(e) Section 39 of this Act, and; the definition of the term **adult** in subsection (1) of section 2 of this Act, and paragraph (e) of section 99, so far as those provisions prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote:
(f) Section 106 of this Act, relating to the method of voting.

(2) No reserved provision shall be repealed or amended unless the proposal for the amendment or repeal

(a) Is passed by a majority of 75 percent of all the members of the House of Representatives; or
(b) Has been carried by a majority of the valid votes cast at a poll of the electors of the [General] and Maori electoral districts:

Provided that this section shall not apply to the repeal of any reserved provision by a consolidating Act in which that provision is re-enacted without amendment and this section is re-enacted without amendment so as to apply to that provision as re-enacted.

(3) Repealed by s79 of the Electoral Amendment Act 1990.

Section 268 Electoral Act 1993

(1) This section applies to the following provisions (hereinafter referred to as reserved provisions), namely:

(a) Section 17(1) of the Constitution Act 1986, relating to the term of Parliament:
(b) Section 28 of this Act, relating to the Representation Commission:
(c) Section 35 of this Act, and the definition of the term **General electoral population** in section 3(1), relating to the division of New Zealand into General electoral districts after each census:
(d) Section 36 of this Act, relating to the allowance for the adjustment of the quota:
(e) Section 74 of this Act, and; the definition of the term **adult** in section 3(1) of this Act, and section 60(f) of this Act, so far as those provisions prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote:
(f) Section 168 of this Act, relating to the method of voting.

(2) No reserved provision shall be repealed or amended unless the proposal for the amendment or repeal

(c) Is passed by a majority of 75 percent of all the members of the House of Representatives; or
(d) Has been carried by a majority of the valid votes cast at a poll of the electors of the General and Maori electoral districts:

Provided that this section shall not apply to the repeal of any reserved provision by a consolidating Act in which that provision is re-enacted without amendment and this section is re-enacted without amendment so as to apply to that provision as re-enacted.

E A Proposed Constitution Act of New Zealand

An Act to institute a Constitution as the supreme law of New Zealand

WHEREAS

(1) New Zealand is a democratic society based on the rule of law and on principles of freedom, equality and the dignity and worth of the human person;

(2) New Zealand does not have a Constitution enjoying the Status of Supreme Law and it is desirable to change that situation and adopt a Constitution;

(3) The Maori, as tangata whenua o Aotearoa, and the Crown entered in 1840 into a solemn contract known as Te Tiriti o Waitangi or the Treaty of Waitangi, and it is desirable to recognize and affirm the Treaty as Part of the Supreme Law of New Zealand;

(4) New Zealand in 1978 ratified the International Covenant on Civil and Political Rights;

(5) It is desirable to guarantee the human rights and fundamental freedoms of all the people of New Zealand without discrimination;

BE IT ENACTED by the Parliament of New Zealand as follows:

1. Short title and commencement

(1) This Act may be cited as the Constitution of New Zealand

(2) This Act shall come into force on 1 January 2000

PART I

GENERAL PROVISIONS

2. Entrenchment

No provision of this Constitution shall be repealed or amended unless the proposal for the repeal or amendment –

(a) Is passed by a majority of 75 percent of all the members of the House of Representatives; or

(b) Has been carried by a majority of the valid votes cast at a poll of all electors eligible to vote in New Zealand.

3. Legal effect of Constitution

(1) Wherever a law can be given a meaning that is consistent with the Constitution, that meaning must be preferred to any other meaning.

(2) Where there is an inconsistency between any law and the Constitution, the Constitution must prevail.

PART II

The Treaty of Waitangi/Te Tiriti o Waitangi

4. The Treaty of Waitangi/Te Tiriti o Waitangi

(1) The rights of the Maori people under the Treaty of Waitangi/Te Tiriti o Waitangi are hereby recognized and affirmed.

(2) The Treaty of Waitangi/Te Tiriti o Waitangi shall be considered as always speaking and shall be applied to circumstances as they arise so that effect may be given to its spirit and intent.

(3) The Treaty of Waitangi/Te Tiriti o Waitangi means the Treaty as set out in Maori and English in the Schedule to this Act.

5. Court appointment of *amicus curiae*

In any proceedings in which the question of consistency with the Treaty of Waitangi/Te Tiriti o Waitangi is in issue, the court may appoint an *amicus curiae* to represent any party who, in the opinion of the court, should be represented and who, but for the appointment of the *amicus curiae*, would be unrepresented.

PART III

The Sovereign

6. Head of State

(1) The Sovereign in right of New Zealand is the head of State of New Zealand, and shall be known by the royal style and titles proclaimed from time to time.

(2) The Governor-General appointed by the Sovereign is the Sovereign's representative in New Zealand.

7. Exercise of royal powers by the Sovereign of the Governor-General

(1) Every power conferred on the Governor-General by or under any Act is a royal power which is exercisable by the Governor-General on behalf of the Sovereign, and may accordingly be exercised either by the Sovereign in person or by the Governor-General.

(2) Every reference in any Act to the Governor-General in Council or any other like expression includes a reference to the Sovereign acting by and with the advice and consent of the Executive Council.

8. Regency

(1) Where, under the law of the United Kingdom, the royal functions are being performed in the name and on behalf of the Sovereignty by a Regent, the royal functions of the Sovereign in right of New Zealand shall be performed in the name and on behalf of the Sovereign by that Regent

(2) Nothing in subsection (1) of this section limits, in relation to any power of the Sovereign in right of New Zealand, the authority of the Governor-General to exercise that power.

9. Demise of the Crown

(1) The death of the Sovereign shall have the effect of transferring all the functions, duties, powers, authorities, rights, privileges, and dignities belonging to the Crown to the Sovereign's successor, as determined in accordance with the enactment of the Parliament of England entitled The Act of Settlement (12&13 Will. 3, c.2) and any other law relating to the succession to the Throne, but shall otherwise have no effect in law for any purpose.

(2) Every reference to the Sovereign in any document or instrument in force on or after the commencement of this Act shall, unless the context otherwise requires, be deemed to include a reference to the Sovereign's heirs and successors.

10. Ministers of Crown to be members of Parliament

(1) A person may be appointed and may hold office as a member of the Executive Council or as a Minister of the Crown only if the person is a member of Parliament.

(2) Notwithstanding subsection (1) of this section,

(a) A person who is not a member of Parliament may be appointed and may hold office as a member of the Executive Council or as a Minister of the Crown if that person was a candidate for election at the general election of members of the House of Representatives held immediately preceding that person's appointment as a member of the Executive Council or as a Minister of the Crown but shall vacate office at the expiration of the period of 40 days beginning with the date of the appointment unless, within that period, that person becomes a member of Parliament; and

(b) Where a person who holds office both as a member of Parliament and as a member of the Executive Council or as a Minister of the Crown ceases to be a member of Parliament, that person may continue to hold office as a member of the Executive Council or as a Minister of the Crown until the expiration of the 28th day after the day on which that person ceases to be a member of Parliament.

11. Power of member of Executive Council to exercise Minister's powers

Any function, duty, or power exercisable by or conferred on any Minister of the Crown (by whatever designation that Minister is known) may, unless the context otherwise requires, be exercised or performed by any member of the Executive Council.

12. Appointment of Parliamentary Under-Secretaries

(1) The Governor-General may from time to time, by warrant under the Governor-General's hand, appoint any member of Parliament to be a Parliamentary Under-Secretary in relation to such Ministerial office or offices as are specified in that behalf in the warrant of appointment.

(2) A Parliamentary Under-Secretary shall hold office as such during the pleasure of the Governor-General, but shall in every case vacate that office within 28 days of ceasing to be a member of Parliament.

13. Functions of Parliamentary Under-Secretaries

(1) A Parliamentary Under-Secretary holding office as such in respect of any Ministerial office shall have and may exercise or perform under the direction of the Minister concerned such of the functions, duties, and powers of the Minister of the Crown for the time being holding that office as may from time to time be assigned to the Parliamentary Under-Secretary by that Minister.

(2) Nothing in subsection (1) of this section limits the authority of any minister of the Crown to exercise or perform personally any function, duty, or power.

(3) The fact that any person holding office as a Parliamentary Under-Secretary in respect of any Ministerial office purports to exercise or perform any function, duty, or power of the Minister concerned shall be conclusive evidence of that person's authority to do so.

The Legislature

14. House of Representatives

(1) There shall continue to be a House of Representatives for New Zealand

(2) The House of Representatives is the same body as the House of Representatives referred to in section 10 of the Constitution Act 1986

(3) The House of Representatives shall be regarded as always in existence, notwithstanding that Parliament has been dissolved or has expired.

(4) The House of Representatives shall have as its members those persons who are elected from time to time in accordance with the provisions of the Electoral Act 1993, and who shall be known as 'members of Parliament'.

15. Oath of allegiance to be taken by members of Parliament

(1) A member of Parliament shall not be permitted to sit or vote in the House of Representatives until that member has taken the Oath of Allegiance in the form prescribed in section 17 of the Oaths and Declarations Act 1957.

(2) The oath to be taken under this section shall be administered by the Governor-General or a person authorised by the Governor-General to administer that oath.

16. Election of Speaker

The House of Representatives shall, at its first meeting after any general election of its members, and immediately on its first meeting after any vacancy occurs in the office of Speaker, choose one of its members as its Speaker, and every such choice shall be effective on being confirmed by the Governor-General.

17. Speaker to continue in office notwithstanding dissolution or expiration of Parliament

A person who is in office as Speaker immediately before the dissolution or expiration of Parliament shall, notwithstanding that dissolution or expiration, continue in office until the close of polling day at the next general election unless that person sooner vacates office as Speaker.

Parliament

18. Parliament

(1) There shall continue to be a Parliament of New Zealand, which consists of the Sovereign in right of New Zealand and the House of Representatives.

(2) The Parliament of New Zealand is the same body as that which was established by section 14 of the Constitution Act 1986.

19. Power of Parliament to make laws

Subject to this Constitution the Parliament of New Zealand continues to have full power to make laws.

20. Royal assent to Bills

A Bill passed by the House of Representatives shall become law when the Sovereign or the Governor-General assents to it and signs it in token of such assent.

21. Term of Parliament
The term of Parliament shall, unless Parliament is sooner dissolved, be 3 years from the day fixed for the return of writs issued for the last preceding general election of members of the House of Representatives, and no longer.

22. Summoning, proroguing, and dissolution of Parliament
(1) The Governor-General may by Proclamation summon Parliament to meet at such place and time as may be appointed therein, notwithstanding that when the Proclamation is signed or when it takes effect Parliament stands prorogued to a particular date.
(2) The Governor-General may by Proclamation prorogue or dissolve Parliament.
(3) A Proclamation summoning, proroguing, or dissolving Parliament shall be effective
    (a) On being gazetted; or
    (b) On being publicly read, by some person authorised to do so by the Governor-General, in the presence of the Clerk of the House of Representatives and 2 other persons,
    whichever occurs first.
(4) Every Proclamation that takes effect pursuant to subsection (3)(b) of this section shall be gazetted as soon as practicable after it is publicly read.

23. First meeting of Parliament after general election
After any general election of members of Parliament, Parliament shall meet not later than 6 weeks after the day fixed for the return of the writs for that election.

24. Carrying over of Parliamentary business
Where the House of Representatives resolves that any Bill, petition, or other business before it or any of its committees be carried over to the next session of Parliament (whether the same Parliament or not), that Bill, petition, or other business shall not lapse upon the prorogation or dissolution or expiration of the Parliament in being when that resolution is passed but shall be carried over accordingly.

Parliament and Public Finance

25. Bills appropriating public money
The House of Representatives shall not pass any Bill providing for the appropriation of public money or for the imposition of that charge has been recommended to the House of Representatives by the Crown.

26. Parliamentary control of public finance
It shall not be lawful for the Crown, except by or under an Act of Parliament-
    (a) To levy a tax; or
    (b) To raise a loan or to receive any money as a loan from any person; or
    (c) To spend any public money.

The Judiciary

27. Protection of Judges against removal from office
A Judge of the High Court shall not be removed from office except by the Sovereign or the Governor-General, acting upon an address of the House of Representatives,

which address may be moved only on the grounds of that Judge's misbehaviour or of that Judge's incapacity to discharge the functions of that Judge's office.

28. Salaries of Judges not to be reduced
The salary of a Judge of the High Court shall not be reduced during the continuance of the Judge's commission.

PART IV
BILL OF RIGHTS
General Provisions

29. Bill of Rights
(1) The rights and freedoms contained in the Bill of Rights are guaranteed.
(2) The provisions of this Part of this Act shall be known as the Bill of Rights.

30. Justified limitations
The rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

32. Other rights and freedoms not affected
An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right of freedom is not included in this Bill of Rights or is included only in part.

33. Application to legal persons
Except where the provisions of this Bill of Rights otherwise provide, the provisions of this Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons.

Life and Security of the Person

34. Right not to be deprived of life
No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

35. Right not to be subjected to torture or cruel treatment
Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

36. Right not to be subjected to medical or scientific experimentation
Every person has the right not to be subjected to medical or scientific experimentation without that person's consent.

37. Right to refuse to undergo medical treatment
Everyone has the right to refuse to undergo any medical treatment.

Democratic and Civil Rights

38. Electoral rights
Every New Zealand citizen who is of or over the age of 18 years –

(a) Has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and
(b) Is qualified for membership of the House of Representatives.

39. Freedom of thought, conscience, and religion
Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.

40. Freedom of expression
Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

41. Manifestation of religion and belief
Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

42. Freedom of peaceful assembly
Everyone has the right to freedom of peaceful assembly.

43. Freedom of association
Everyone has the right to freedom of association.

44. Freedom of movement
(1) Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.
(2) Every New Zealand citizen has the right to enter New Zealand.
(3) Everyone has the right to leave New Zealand.
(4) No one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under a decision taken on grounds prescribed by law.

Non-Discrimination and Minority Rights

45. Freedom from discrimination
(1) Everyone has the right to freedom from discrimination on the grounds of colour, race, ethnic or national origins, sex, marital status, religious or ethical belief, disability, age, political opinion, employment status, family status or sexual orientation.
(2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of colour, race, ethnic or national origins, sex, marital status, religious or ethical belief, disability, age, political opinion, employment status, family status or sexual orientation do not constitute discrimination.

46. Rights of minorities
A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, or profess and practice the religion, or to use the language, of that minority.

Search, Arrest, and Detention

47. Unreasonable search and seizure

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

48. Liberty of the person

Everyone has the right not to be arbitrarily arrested or detained.

49. Rights of persons arrested or detained

(1) Everyone who is arrested or who is detained under any enactment-

(a) Shall be informed at the time of the arrest or detention of the reason for it; and

(b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and

(c) Shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.

(2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.

(3) Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.

(4) Everyone who is-

(a) Arrested; or

(b) Detained under any enactment-

for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

(5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of that person.

50. Rights of person charged

Everyone who is charged with an offence-

(a) Shall be informed promptly and in detail of the nature and cause of the charge; and

(b) Shall be released on reasonable terms and conditions unless there is just cause for continued detention; and

(c) Shall have the right to consult and instruct a lawyer; and

(d) Shall have the right to adequate time and facilities to prepare a defence; and

(e) Shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than 3 months; and

(f) Shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance; and

(g) Shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court.

51. Minimum standards of criminal procedure

Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

(a) The right to a fair and public hearing by an independent and impartial court;
(b) The right to be tried without undue delay;
(c) The right to be presumed innocent until proved guilty according to law;
(d) The right not to be compelled to be a witness or to confess guilt;
(e) The right to be present at the trial and to present a defence;
(f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution;
(g) The right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty;
(h) The right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both;
(i) The right, in the case of a child, to be dealt with in a manner that takes account of the child's age.

52. Retroactive penalties and double jeopardy

(1) No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.
(2) No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried of punished for it again.

53. Right to justice

(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
(2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

PART V

Miscellaneous Provisions

54. Enforcement of Constitution

(1) Any person may seek a declaration in the High Court that any of the following are inconsistent with the Constitution-

(a) Any law;
(b) Any action by the sovereign, legislative, executive or judicial branches of the government of New Zealand;

(c) Any action by a 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.

(2) Where any law or action has been held by any court to be inconsistent with the Constitution, the court may make such orders as are fair and reasonable in the circumstances in order to remedy any person adversely affected by the action.

55. Involvement of Attorney-General in proceedings

In any proceedings in which the questions of consistency with any part of the Constitution is raised, the Attorney-General may be joined as a party, and if not joined may intervene.

56. Interpretation

In this Act, unless the context otherwise requires,

'Constitution' means the provisions of this Act.

'Law' means any enactment in force at the commencement of this Act, any enactment made after the commencement of this Act, and any rule of common law.

57. Repeals

(1) The Constitution Act 1986 is repealed.

(2) The New Zealand's Bill of Rights Act 1990 is repealed.

SCHEDULE

Te Tiriti o Waitangi/The Treaty of Waitangi

(Text is provided in Maori and in English)

F Preliminary Draft of a Constitutional Treaty

The aim of this text is to illustrate the possible articulation of a treaty. The inclusion (or non inclusion) in Part I of some articles, and the exact content of others, will depend on the Convention's proceedings. Their treatment in this text is in no way intended to prejudge the result of the Convention's debates.

This draft was drawn up by the Praesidium and presented by the President at the Plenary session on 28 October 2002.

TREATY ESTABLISHING A CONSTITUTION FOR EUROPE

Part One: Constitutional Structure

Preamble

Title I: Definition and objectives of the Union

Article 1

- Decision to establish [an entity called the European Community, European Union, United States of Europe, United Europe].

- A Union of European States which, while retaining their national identities, closely coordinate their policies at the European level, and administer certain common competences on a federal basis.

- Recognition of the diversity of the Union.

- A Union open to all European States which share the same values and commit themselves to promote them jointly.

Article 2

This article sets out the values of the Union: human dignity, fundamental rights, democracy, the rule of law, tolerance, respect for obligations and for international law.

Article 3

Objectives of the Union

This article establishes the general objectives, such as:

- protection of the common values, interests and independence of the Union
- promotion of economic and social cohesion
- strengthening of the internal market, and of economic and monetary union
- promotion of a high level of employment and a high degree of social protection

- a high level of environmental protection
- encouragement for technological and scientific progress
- creation of an area of liberty, security and justice
- development of a common foreign and security policy, and a common defence policy, to defend and promote the Union's values in the wider world.

These objectives shall be pursued by appropriate means, depending on whether competences are allocated wholly or partly to the Union, or exercised jointly by the Member States.

Article 4
Explicit recognition of the legal personality of the [European Community/Union, United States of Europe, United Europe]

Title II: Union citizenship and fundamental rights

Article 5
This article establishes and defines Union citizenship: every citizen of a Member State is a citizen of the Union; enjoys dual citizenship, national citizenship and European citizenship; and is free to use either, as he or she chooses; with the rights and duties attaching to each.

The article sets out the rights attaching to European citizenship (movement, residence, the right to vote and to stand as a candidate in municipal elections and elections to the European Parliament, diplomatic protection in third countries, right of petition, right to write to, and obtain a reply from, the European institutions in one's own language).

The article establishes the principle that there shall be no discrimination between citizens of the Union on grounds of nationality.

Article 6
The wording of this article will depend on the proceedings of the Working Group on the Charter.

It could be modelled on Article 6 of the Treaty on European Union.

It could:
- either refer to the Charter;
- or state the principle that the Charter is an integral part of the Constitution, with the articles of the Charter being set out in another part of the Treaty or in an annexed protocol;
- or incorporate all the articles of the Charter.

Title III: Union competence and actions

Article 7
This article sets out the principles of Union action, which must be carried out in accordance with the provisions of the treaty, within the limits of the competences conferred by the treaty, and in compliance with the principles of subsidiarity and proportionality.

Article 8
This article establishes the principle that any competence not conferred on the Union by the Constitution rests with the Member States.

It establishes the primacy of Union law in the exercise of the competences conferred on the Union.

It would set out the rules for effective monitoring of subsidiarity and proportionality. The role of National Parliaments in this respect would be mentioned.

It determines the rules governing the adaptability of the system (Article 308).

It sets out the obligation of loyal cooperation of Member States vis-à-vis the Union, and the principle that the acts of the Institutions are implemented by the Member States.

Article 9
This article lists the categories of Union competence.

Article 10
This article indicates the areas of exclusive Union competence.

Article 11
This article indicates the areas of competence shared between the Union and the Member States. It establishes the principle that, as and when the Union takes action in these areas, the Member States may act only within the limits defined by the Union legislation.

Article 12
This provision indicates the areas in which the Union supports or coordinates action by the Member States, but does not have competence to legislate.

Article 13
In certain areas the Member States may define and pursue common policies, within the Union framework and according to specific rules. This article indicates these areas.

Title IV: Union institutions

Article 14
This article:

- establishes that the Union has a single institutional structure;

- stipulates that this structure shall ensure the consistency and continuity of the policies and activities carried out in order to attain the Union's objectives – activities both in the areas of competence allocated wholly or partly to the Union and in those areas in which competence belongs to the Member States and is jointly exercised by them;

- lists the institutions of the Union;

- establishes the principle whereby each institution acts within the limits of the powers conferred upon it by this treaty, in accordance with the procedures and under the conditions and for the purposes laid down in this treaty in each area;

- enjoins the Institutions to provide and promote open, effective and unostentatious administration;

- establishes the principle of loyal cooperation in relations between the institutions.

Article 15
This article defines the European Council, its composition and its tasks.

Article 15 bis
When the Convention has discussed it, this article could establish the term of office and appointment procedure for the Presidency of the European Council, its role and responsibilities.

Article 16
This article establishes the composition of the European Parliament, the members of which are elected by direct universal suffrage.

It lists the powers of the European Parliament, and provides for the possibility of the European Parliament introducing a motion of censure on the activities of the Commission, and the procedure and consequences of such a motion.

Article 17
This article lists the composition and the duties of the Council, and would refer to the Council's formations.

Article 17 bis
This provision establishes the rule governing the appointment of the Presidency of the Council, its role, responsibilities, and term of office.

Article 18
This article would contain the provisions governing the composition and duties of the Commission (including monopoly of initiative). According to the future deliberations of the Convention, it would envisage the Commission either as a small college or as a larger body, and would set out its decision-making rules.

Article 18 bis
This article would establish the role and appointment procedure for the Presidency of the Commission.

Article 19
This article would raise the possibility of establishing a Congress of the Peoples of Europe, determine its composition and the procedure for appointing its members, and define its powers. (It would be drafted in the light of the Convention's work.)

Article 20
This article sets out the composition and powers of the Court of Justice, and the Court of First Instance, and the principal grounds for bringing action in the Court.

Article 21
This provision sets out the composition and powers of the Court of Auditors, and its mandate.

Article 22
This article would define the composition and tasks of the European Central Bank, as well as the composition of its Governing Council and Executive Board.

Article 23
This provision should establish that the European Parliament, the Council and the Commission will be assisted by an Economic and Social Committee and a Committee of the Regions, organs acting in an advisory capacity.

Title V : Implementation of Union action

Article 24
This article lists the different instruments available to the Union's institutions for the exercise of their competences.

Article 25
Clear description of the legislative procedures of the Union: procedures for the adoption of laws and framework laws, etc.

Article 26
Clear description of the procedures for the adoption of decisions, etc.

Article 27
Description of implementing procedures in respect of the instruments listed at Article 24, and how their operation is to be monitored.

Article 28
This article should define the procedures for the implementation of supporting actions (including programmes) and the arrangements for monitoring them.

Article 29
This article would set out implementing procedures in the sphere of common foreign and security policy.

Article 30
This article would set out implementing procedures in the sphere of common defence policy.

Article 31
This article would set out implementing procedures for policies on police matters and against crime.

Article 32
This provision should establish:

- the conditions for undertaking enhanced cooperation within the framework of the Treaty;

- if necessary, areas of the Treaty excluded from enhanced coooperation;

- the principle of applying the relevant provisions of the Treaty in adopting the acts necessary for implementing enhanced cooperation;

- the obligations of states participating in enhanced cooperation, and of those not so participating.

Title VI : The democratic life of the Union

Article 33
This article establishes the principle that all Union citizens are equal vis-à-vis its institutions.

Article 34
This article sets out the principle of participatory democracy. The Institutions are to ensure a high level of openness, permitting citizens' organisations of all kinds to play a full part in the Union's affairs.

Article 35
This provision would refer to a protocol containing provisions for elections to the European Parliament by a uniform procedure in all Member States.

Article 36
This provision establishes the rule that the legislative debates of the European Parliament and of the Council in its legislative form shall be public.

Article 37
This provision would establish the voting rules of the Union's institutions, including the definition of qualified majorities, and the implementation of the possibility of "constructive abstention" and its consequences.

Title VII: The finances of the Union

Article 38
This provision states that the Union budget is fully financed by own resources and sets out the procedure for establishing the system of own resources.

Article 39
This provision should contain the principle that the budget should be in balance, as well as provisions concerning budgetary discipline.

Article 40
This article should:
- specify that all Union revenue and expenditure should be the subject of forecasts for each financial year and should be entered in the budget;
- describe the procedure for adopting the budget.

Title VIII: Union action in the world

Article 41
This provision should set out who represents the Union in international relations, taking account of competences already exercised by the Community.

In the light of the Convention's future work, it would define the role and future rank of the High Representative for Common Foreign and Security Policy.

Title IX: The Union and its immediate environment

Article 42
This article could contain provisions defining a privileged relationship between the Union and its neighbouring States, in the event of a decision on the creation of such a relationship.

Title X: Union Membership

Article 43
This article establishes the principle that the Union is open to all European States which share its values and wish to pursue them jointly, which strictly respect fundamental rights, and which accept the Union's rules of operation.

Article 44
This article establishes the procedure for accession of new member states to the European Union.

Article 45
This article establishes the procedure for suspension of Union membership rights if a Member State violates the principles and values of the Union.

Article 46
This article would mention the possibility of establishing a procedure for voluntary withdrawal from the Union by decision of a Member State, and the institutional consequences of such withdrawal.

Part Two: Union Policies and their Implementation

This part would contain the legal bases. For each area it should specify the type of competence (Title III) and the acts and procedures (Title V) to be applied, in line with what is decided for Part I. Technical amendments will be necessary to ensure that Part II correctly matches Part I.

Part Three: General and Final Provisions

Final Title:

Article x
Repeal of previous treaties. Legal continuity in relation to the European Community and the European Union.

Article x + 1
Territorial application.

Article x + 2
Protocols: the protocols annexed to the treaty form an integral part of it.

Article x + 3
Procedure for revision of the constitutional treaty.

Article x + 4
Adoption, ratification, and entry into force of the constitutional treaty.

Article x + 5
Duration: the treaty is concluded for an unlimited period.

Article x + 6
Languages: in which the Treaty is drawn up and which are authentic.

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