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**INCLUSIVE CONSTITUTION-MAKING:
LESSONS FROM ICELAND AND IRELAND
FOR AOTEAROA NEW ZEALAND**

LAWS 520: Constitutionalism

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Abstract

New Zealand's constitutional journey has been revived in recent years through three expert-led dialogues on more certain, formalised and new constitutionalism: the Constitutional Advisory Panel (2013), *Matike Mai Aotearoa* (2016) and *Constitution Aotearoa* (2017). This paper advocates that any constitution-making in New Zealand should follow inclusive processes to uphold democratic legitimacy and facilitate deliberation. There are three key elements of inclusive constitution-making. First, the people should have ownership over important parts of the process. Second, there should be a citizen-led representative drafting body—a constituent assembly without the power to make ordinary law and comprised of politically independent delegates. Third, there should be public oversight of the process to ensure transparency and provide for meaningful consultation. This paper undertakes a comparative exercise, analysing recent inclusive constitution-making experiences in Iceland and Ireland, to offer proposals for inclusive constitution-making in Aotearoa New Zealand. New Zealand's most significant challenge in terms of ownership is considering the proper role for experts and balancing the power of political elites in a climate of constitutional apathy. In terms of representation, the most significant challenge for New Zealand is how to represent the interests of Māori as tangata whenua and how to represent traditionally marginalised voices in politics, such as those of women, ethnic minorities and youth. In terms of public oversight, the biggest challenge is how we can use digital democracy in constitution-making.

Key words: constitution-making; inclusive constitution-making; New Zealand; constituent assembly; participation; representation; ownership; public oversight

The text of this paper comprises approximately 14,983 words (excluding abstract, glossary, footnotes and bibliography).

Glossary

He Whakaputanga	The Declaration of Independence 1835
Kawa	local protocol
Kāwanatanga	governorship
Kōrero	conversation, dialogue
Mana	prestige, authority, power, influence
Manuhiri	visitors
Rangatahi	young person/youth
Rangatira	chief, leader
Rangatiratanga	chieftainship, leadership, the right to exercise authority
Tangata tiriti	people who immigrated to New Zealand, permitted to do so by Te Tiriti
Tangata whenua	people of the land
Taonga	treasured things
Te ao Māori	the Māori world
Te reo Māori	the Māori language
Te tino rangatiratanga	ultimate chieftainship
Te Tiriti o Waitangi	The Treaty of Waitangi 1840
Tika	correct, right
Tikanga	the correct way of doing things, customary values and practices embedded in the social context
Whenua	land

I Introduction

The word “constitution” comes from the Latin *constituere*, which means founding together or creating jointly.¹ That is apt: there is now near “universal acceptance that the authority for a Constitution must derive ... from the people of the state concerned”.² This paper focuses on the process of constitution creation. It argues that any future constitution-making process in New Zealand should be as inclusive as possible, and that any new (written) constitution should be drafted by a constituent assembly comprised of citizens. Such a process upholds democratic legitimacy and facilitates deliberation.

Within New Zealand in the last five years, discussions about formalised or new constitutionalism have been led by the Constitutional Advisory Panel, the Independent Working Group on Constitutional Transformation (*Matike Mai*), and Sir Geoffrey Palmer and Andrew Butler (*Constitution Aotearoa*).³ This paper adopts a comparative analysis, drawing particularly on Iceland’s and Ireland’s recent constitution-making experiences to explore how New Zealand could and should best achieve inclusive constitutionalism.

Inclusive processes are underpinned by participation. However, inclusion encompasses more than participation. This paper argues that an inclusive constitutional process has the following three elements:

- (1) ownership of the process by the people;
- (2) representation; and
- (3) public oversight (transparency and consultation).

* The author would like to extend thanks to Joel Colón-Ríos for his supervision and laughter along the way and to Matthew McMenamin for his support and knowledge of the appropriate adage for every occasion.

¹ Andreas Kalyvas “Popular Sovereignty, Democracy and the Constituent Power” (2005) 12 *Constellations* 223 at 235.

² Silvia Suteu “Developing democracy through citizen engagement: the advent of popular participation in the United Kingdom’s constitution-making” (2015) 4 *CJICL* 405 at 406–407; Cheryl Saunders “Constitution-making in the 21st century” (2012) 4 *Intl Rev of Law* 1 at 2–3.

³ Constitutional Advisory Panel/Te Ranga Kaupapa Ture “New Zealand’s Constitution: A Report on a Conversation – he Kōtuinga Kōrero mō Te Kaupapa Ture o Aotearoa” (New Zealand Government, November 2013); The Independent Working Group on Constitutional Transformation “He whakaaro here whakaumu mo aotearoa: The Report of Matike Mai Aotearoa” (2016) (herein referred to as *Matike Mai Aotearoa*); Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016).

The concept of inclusive constitution-making is introduced in Part II of the paper. That Part also assesses its legal and normative foundations. There is no clear legal consensus regarding standards for inclusive constitution-making. Rather, political norms develop through cumulative practical experiences.

Parts III, IV and V of the paper address the three elements of inclusivity (ownership, representation and public oversight) respectively. In respect of each of these topics, the paper adopts a comparative approach to analyse case studies of citizen-led constitution-making in other jurisdictions, primarily Iceland and Ireland. It adapts lessons from those case studies and applies them to New Zealand's historical, social and political context to offer proposals for a New Zealand inclusive constitution-making journey. It notes, however, that New Zealand is unique and differs from Iceland and Ireland in that we have a large minority indigenous population that has been historically excluded from power and widespread constitutional apathy. The most important questions relating to procedural design in New Zealand are: the proper role for experts; how to balance the power of political elites in a climate of constitutional apathy; how to ensure representation of Māori as tangata whenua; how to ensure representation of minorities; the proper method of selecting representatives; and the ways in which to use technology to ensure public oversight of any process and to enable consultation and transparency.

II Inclusive Constitution-Making

A Terminology

In modern constitutionalism, the “constituent power” is the body of people that jointly create the institutions of government.⁴ As Kalyvas says:⁵

Constituent politics might be seen as the explicit, lucid self-institution of society, whereby the citizens are jointly called to be the authors of their constitutional identity and to decide the central rules and higher procedures that will regulate their political and social life.

Classic theorists such as Schmitt and Sieyès hold that constituent power includes the residual power to re-constitute the political and governance institutions. On that theoretical understanding, constituent power is unlimited. It exists outside of the ordinary system and

⁴ Mark Tushnet “Constitution-Making: An Introduction” (2013) 91 Texas Law Rev 1983 at 1986.

⁵ Kalyvas “Popular Sovereignty, Democracy and the Constituent Power”, above n 1, at 237.

cannot be limited by existing rules or procedures.⁶ The institutions created by the constituent power then have “constituted power”.

In participatory constitutionalism, the people accept a constitution as valid “only if the act that created it complies with the immanent principles of participation and inclusion”.⁷ The constitution derives its legitimacy from being created and accepted by the constituent power.⁸

B Models of Constitution-Making

The inclusive constitution-making model differs from traditional constitution-making in the level of public participation at each stage of the process. The three main stages of constitution-making are: debate about the need for a new constitution, drafting, and ratification. In what follows, the stages of each model are explained.

1 Traditional model

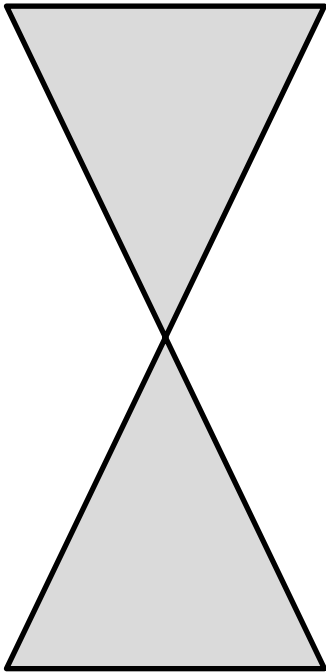
The traditional constitution-making model can be imagined as an hourglass: there is upstream and downstream public input into the process but the drafting itself is characterised by secrecy.⁹

⁶ See Renato Cristi *Carl Schmitt on Sovereignty and Constituent Power* (1997) 10 Can J L & Juris 189 at 198; David Landau “Constitution-Making Gone Wrong” (2013) 64 Ala L Rev 923 at 927–928; and Kalyvas, above n 1, at 226–230.

⁷ Kalyvas, above n 1, at 236–239, especially 238.

⁸ Kalyvas, above n 1, at 238. Note that some constitutions were not created by a participatory method yet are still accepted by the people, for example, New Zealand’s current unwritten constitution.

⁹ See Jon Elster “The Optimal Design of a Constituent Assembly” in Hélène Landemore and Jon Elster (eds) *Collective Wisdom: Principles and Mechanisms* (Cambridge University Press, Cambridge, 2012).



Upstream public input includes, at least, public debate about the need for a new constitution. Upstream public input is important for democratic legitimacy as well as for practical reasons—a constitution-making process will not gather political momentum unless the people want change.

Drafting is traditionally the most secretive part of the process. Secrecy is thought to induce bargaining among the drafters and reduce arguing in the public sphere.¹⁰ It is important that the drafters can deliberate freely and reach compromises without political cost.

Downstream public input usually involves ratification via referenda. The traditional model holds that public ratification is more important than participation at other stages of constitution-making: new binding higher law will only be considered valid if the people accept it.

2 *Inclusive model*

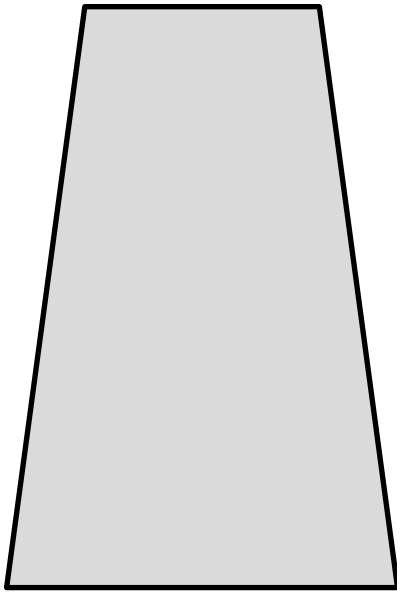
In contrast, inclusive constitution-making maximises public input throughout the entire process. An inclusive constitution-making model can be visualised as a pyramid with a flat top.¹¹

Most importantly, the drafting stage is expanded. Drafting is broken down into two parts: selection of the drafters, which this paper refers to as “selection of representatives”; and the drafters’ public consultation during drafting, which this paper refers to as “public oversight”.¹² Public input in drafting is achieved by having a citizen-led constituent assembly.

¹⁰ See Jon Elster “The Optimal Design of a Constituent Assembly”, above n 9.

¹¹ Hélène Landemore “Inclusive Constitution-Making: The Icelandic Experiment” (2015) 23 *Journal of Political Philosophy* 166 at 167.

¹² See different terminology for these stages in Justin Blount “Participation in Constitutional Design” in Tom Ginsburg and Rosalind Dixon (eds) *Comparative Constitutional Law* (Edward Elgar, Cheltenham, 2011) at 41–48 and Joel Colón-Ríos “Notes on Democracy and Constitution-Making” (2011) 9 *NZJPIL* 17 at 34.



Upstream public input in inclusive constitution-making will include public input into the process, for example the use of value-setting forums in Iceland and Chile,¹³ as well as public debate about the need for a new constitution.

In drafting, both the selection of representatives and public oversight engage public participation. Expansion of the traditionally secret drafting process is justified to achieve key democratic ideals of popular participation and openness.¹⁴

Inclusive constitution-making also requires ratification by the people, again usually through referenda.

The preferred drafting body in inclusive constitution-making is a citizen-led constituent assembly.¹⁵ A constituent assembly is the unequivocal embodiment of the peoples' constituent power.¹⁶ The rarity of constitution-making and its goal of longevity means the people must be included throughout for the process to have democratic legitimacy. Furthermore, the constituent assembly should not have legislative power. The conflation of constituent power and constituted power may tempt a legislative constituent assembly to entrench their own power under the guise of democratic legitimacy.¹⁷ In contrast, a constituent assembly has no need to entrench their own power, as the constituent assembly is dissolved after it has completed its drafting tasks.¹⁸ Finally, constituent assemblies may be either partisan or non-partisan. Partisan assemblies carry the risk that existing institutions carry relating to entrenchment of current power structures. Non-partisan assemblies, and having politically independent delegates, increase the scope for members

¹³ See Landemore "Inclusive Constitution-Making: The Icelandic Experiment", above n 11; Joel Colón-Ríos "Multi-Stage Constitution-Making: From South Africa to Chile?" in Dixon and Rioux (eds) *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Influence* (Cambridge University Press, Cambridge, forthcoming 2018) at 8.

¹⁴ Colón-Ríos "Notes on Democracy and Constitution-Making", above n 12, at 34.

¹⁵ Cf existing political institutions, see generally Joel Colón-Ríos *Weak Constitutionalism: Democratic legitimacy and the question of constituent power* (Routledge, New York, 2012) at 156–160.

¹⁶ Blount, above n 12, at 44. See also Colón-Ríos, above n 12, at 27.

¹⁷ Colón-Ríos, above n 12, at 28. See also Jon Elster "The Optimal Design of a Constituent Assembly" (paper prepared for the colloquium on "Collective Wisdom", Collège de France, May 2004) at 11.

¹⁸ Landau "Constitution-Making Gone Wrong", above n 6, at 930.

to deliberate.¹⁹ Given that a constitution is enduring and should be above the interests of any political parties,²⁰ assembly delegates should be non-partisan. Going forward, this paper uses the term “constituent assembly” to mean a citizen-led body without power to make ordinary law and which consists of non-partisan delegates.

C Inclusion and Participation

Inclusion is more than mere participation. It requires that participants have power to affect the outcome through their participation at various pressure points in the process. Participation in constitution-making is laudable but must be carefully designed so that the process is also inclusive.²¹ Careful design should involve consideration of the broader elements of ownership, representation and public oversight.

The three-pronged conception of inclusiveness used in this paper stems primarily from two main authors. Landemore argues that inclusiveness can be achieved through direct popular participation throughout the constitution-making process, descriptive representativeness where direct participation is not possible, and transparency.²² Suteu argues that inclusiveness can be achieved through representation (by quasi-randomly selecting delegates to a drafting body), maintaining responsiveness at all stages of the process (through the peoples’ participation), and ensuring oversight (through transparency).²³ This paper adopts a conceptual framework of three elements of inclusiveness: (1) ownership; (2) representation; and (3) oversight. These are explored in Parts III, IV and V below.

D Foundations of Inclusive Constitution-Making

An inclusive constitution-making process has both legal and normative foundations.

¹⁹ Constitutional Arrangements Committee *Inquiry to Review New Zealand’s Existing Constitutional Requirements* (10 August 2005) at 5.

²⁰ Palmer and Butler *A Constitution for Aotearoa New Zealand*, above n 3, at 23.

²¹ For example, see Rwandan example where minorities could participate but were not “included”: Angela Banks “Expanding Participation in Constitution Making: Challenges and Opportunities” (2008) 49 William and Mary Law Review 1043 at 1055–1067. See also Eoin Carolan “Ireland’s Constitutional Convention: Behind the hype about citizen-led constitutional change” (2015) 13 ICON 733 and Suteu “Developing democracy through citizen engagement”, above n 2.

²² Landemore, above n 11, at 168: “descriptive representativeness” means statistical representation in of the population according to gender, age and geographic location.

²³ Silvia Suteu “Constitutional Conventions in the Digital Era: Lessons from Iceland and Ireland” (2015) 38 BC Intl & Comp L Rev 251 at 275.

1 Legal

The claim that participatory constitution-making is necessary for New Zealand's constitutional journey is based on two foundational human rights treaties that New Zealand has ratified. The International Covenant on Civil and Political Rights (ICCPR) provides in art 25 that “every citizen shall have the right and the opportunity... to take part in the conduct of public affairs, directly or through freely chosen representatives”.²⁴ The Universal Declaration of Human Rights (UDHR) provides in art 21 that “everyone has the right to take part in the government of his country, freely or through freely chosen representatives”.²⁵

The term “public affairs” in art 25 of the ICCPR includes constitutionalism. The United Nations Committee on Human Rights (UNCHR) has noted that peoples “enjoy the right to choose the form of their constitution or government”.²⁶ This interpretation makes sense: people have a democratic right to participate in government and public affairs and that right ought to extend to constitution-making because a constitution is the basis of governance.²⁷

The meaning of the phrase “take part in” in art 25 of the ICCPR and art 21 of the UDHR, is not clear.²⁸ In *Marshall v Canada*, the UNCHR ruled that each State is to determine participation mechanisms according to its laws and constitution.²⁹ Prescription of constitution-making processes at international law would ironically undermine the rights it seeks to protect: that peoples can choose their own constitutional arrangements. Given this conundrum, Hart proposes that the meaning of “take part” is better developed as a political norm by building a body of practical experience.³⁰

²⁴ International Convention on Civil and Political Rights (ICCPR) 999 UNTS 171, [1978] NZTS 19 (opened for signature 16 December 1966, entered into force 23 March 1976, ratified by New Zealand 28 December 1978), art 25(a).

²⁵ Universal Declaration of Human Rights GA Res 217 A, A/Res/217(III) (10 December 1948), art 21(1).

²⁶ United Nations Human Rights Committee *CCPR General Comment No 25: Article 25 (Participation in Public Affairs and the Right to Vote)* CCPR/C/21/Rev1/Add7 (1996) at [2]; applied in *Marshall v Canada* (1991) CCPR/C/43/D/205/1986 (UNCHR) at [5.2]–[5.3].

²⁷ Vivien Hart “Constitution Making and the Right to Take Part in a Public Affair” in Laurel Miller (ed) *Framing the State in Times of Transition* (USIP Press, Washington, 2010) at 21. See also Abrak Saati “Participatory Constitution-Making as a Transnational Legal Norm: Why does it “Stick” in Some Contexts and Not in Others?” (2017) 2 UCIL Intl, Transnatl, and Comp L 113 at 120.

²⁸ Saati “Participatory Constitution-Making as a Transnational Legal Norm”, above n 27, at 117 and 122.

²⁹ *Marshall v Canada*, above n 26, at [5.4].

³⁰ Hart “Constitution Making and the Right to Take Part in a Public Affair”, above n 27, at 31.

2 Normative

In a democratic regime, such as New Zealand, “the legitimacy of the fundamental norms and institutions depends on how inclusive the participation of the citizens is during the extraordinary and exceptional moment of constitution making”.³¹ Participatory constitution-making is rooted in participatory democratic theory, which holds that the legitimacy of government is connected to affected parties’ participation in decision-making.³² Extending this to constitutionalism, constitutional legitimacy stems from citizens’ full participation at all stages of constitution-making. Te ao Māori also emphasises that power must be bestowed by the people to be legitimate. The legitimacy of rangatiratanga was “always from and for the people” and “it was for the people to determine how and when [power] would be exercised”.³³ This aligns with the democratic ideal of constitution-making with the people and for the people.

Democratic legitimacy is achieved through all three elements of inclusive constitution-making. Ownership of the process achieves the democratic ideal that people affected by decisions should be able to participate meaningfully in them. Representation of a wide variety of interests is central to the principle that all people have an equal right to participate in constitution-making.³⁴ Public oversight of the establishment and operation of a constitution-drafting body achieves democratic legitimacy by recognising that all citizens should be able to understand how the process works and their role in it, although not all citizens may want to participate directly.

Deliberation is important for the realisation of the “power” dimension of inclusive constitution-making. Deliberative democratic theory holds that interests (views on a constitutional issue) are dynamic and can be transformed.³⁵ Commitment to a process which transforms interests is better than one that aggregates positions (preconceived preferred views) because the decision-making body will come to reasoned conclusions rather than ones simply based on majority rule.³⁶ Deliberation is achieved predominantly

³¹ Kalyvas, above n 1, at 237.

³² Banks “Expanding Participation in Constitution Making”, above n 21, at 1043.

³³ *Matike Mai Aotearoa*, above n 3, at 86.

³⁴ See Ann Sullivan “Minority Indigenous Representation” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010).

³⁵ Banks, above n 21, at 1048.

³⁶ Joanne Wallis “How Important is Participatory Constitution-Making? Lessons from Timor-Leste and Bougainville” (2016) 54 *Commonwealth & Comparative Politics* 362 at 365. See also Banks, above n

through representation. A representative group undertaking deliberative processes will be able to consider a broader range of perspectives. Majority groups' interests may well be transformed by the wider perspectives of the representative group.

III Ownership of the process

Ownership is the first element of inclusivity this paper will examine. It relates to the peoples' power to determine the process of constitution-making. That power is influenced by existing rules for constitutional revision, the roles given to (or taken by) experts and political elites, and the structure prescribed for enactment. To examine the role of ownership in constitution-making, this paper considers the experiences of Iceland and Ireland before analysing the lessons for New Zealand.

A Iceland

Iceland's constitutional experience was unique in that grassroots organisations began constitutional change. An organisation called the "Anthill" organised a "National Forum" of 1500 Icelanders to articulate core values for constitutional renewal. Political momentum from this movement led to the Althingi (the Icelandic Parliament) initiating a process of constitutional revision. Democratic institutions responded to the demands of civil society.³⁷ The constitution-making process followed art 79 of the pre-existing Constitution. Article 79 provides that amendment must be passed by two Parliaments, without amendment by the second Parliament, and a general election must take place in the middle. Additionally, the draft must be confirmed by the President.³⁸ To enhance democratic legitimacy, Iceland's 2012 constitution-making process also proposed two citizen referenda, one either side of the general election.

The Althingi appointed a seven-member academic expert group called the Constitutional Committee to facilitate the process of constitutional revision. The Committee had three main tasks: to randomly select participants for a second, official National Forum; to administer an election of delegates to the constitution-drafting body; and to analyse the existing constitution and Iceland's international commitments as a starting point of

21, and Christopher Zurn "Judicial Review, Constitutional Juries and Civic Constitutional Fora: Rights, Democracy and Law" (2011) 58(127) *Theoria* 63 at 67–69.

³⁷ Landemore, above n 11, at 172.

³⁸ Constitution of the Republic of Iceland 1944, art 79.

information for the constitution-drafting body.³⁹ Iceland's process did not switch dramatically from grassroots to institutional leadership. Rather, shared leadership can be seen in the co-organisation of the second National Forum between the Anthill and the Constitutional Committee. It is generally considered the Committee achieved its tasks, but it has been criticised as going "slightly, and rather innocently, beyond its legal mandate" suggesting the incorporation of specific phrases into the constitution.⁴⁰

The process of establishing the drafting body also had mixed citizen and elite ownership. To start with, the Constitutional Committee held elections for the drafting body. This demonstrated the peoples' ownership of the process: the people chose representatives to write a new constitution. However, the peoples' ownership was undermined, and power shifted from the people to the existing political institutions, when the Supreme Court annulled the elections based on technicalities such as the shape of the voting booths. This annulment was politically controversial and unsuccessfully contested in court.⁴¹ Parliament responded by appointing the previously elected delegates to a newly titled constitution-drafting body called the Constitutional Council.

The Constitutional Council engaged extensively with the public throughout the four-month drafting process. The draft text was endorsed by a non-binding citizen referendum.⁴² Following that referendum, a Parliamentary committee engaged experts to make the draft internally consistent and compliant with international obligations. Problematically, the experts substantively changed the draft without the Council's approval. This undermined the peoples' ownership of the draft text.⁴³

Ultimately the Althingi did not approve the draft.⁴⁴ Critically, the Speaker of the Althingi was not required by law to put the constitutional text to a Parliamentary vote. If voted on, the citizen-drafted constitution would have most likely passed as it would have been

³⁹ Katrin Oddsdottir "Iceland: The Birth of the World's First Crowd-sourced Constitution?" (2014) 3 CJICL 1207 at 1213.

⁴⁰ Thorvaldur Gylfason *Constitution on Ice* (Centre for Economic Studies and Ifo Institute, Working Paper 5056, Nov 2014) at 8.

⁴¹ To understand this political controversy, see Gylfason *Constitution on Ice*, above n 40, at 10–11.

⁴² Iceland Review "Final Results of the Constitutional Referendum: 'Yes' to All Questions" *Iceland Review* (online ed, Iceland, 30 January 2014) <<http://icelandreview.com>>.

⁴³ Gylfason, above n 40, at 17; Landemore, above n 11, at 187–188; Suteu "Constitutional Conventions in the Digital Era", above n 23, at 271.

⁴⁴ See Björg Thorarensen "Why the making of a crowd-sourced constitution in Iceland failed" (24 February 2016) Constitution Making & Constitutional Change <www.constitutional-change.com>.

politically untenable for the Althingi to reject a draft endorsed by 67 per cent of citizens.⁴⁵ As the Althingi did not vote on the draft, only the first referendum occurred. Iceland's experience illustrates the difficulty of citizens overcoming the power of existing political institutions without buy-in from those institutions.

B Ireland

In 2012, the new Irish Government established a Constitutional Convention, following electoral pressure for citizen involvement in political and constitutional reform.⁴⁶ Power was shared between citizens and elites throughout the Irish process, particularly in relation to membership of the Convention and the Convention's mandate.

The Convention comprised 66 randomly selected citizens, 33 politicians and an independent chair. Two ownership issues arose around membership of the Convention. First, commentators believed that politicians would unduly influence the outcome.⁴⁷ That fear never transpired and Ireland's hybrid citizen-politician constitutional body was considered successful.⁴⁸ Second, random selection of members was facilitated by a polling company enlisted by the Government. As discussed in Part IV, the polling company failed to do so by allowing people it had already selected as delegates to nominate other delegates.

The Government determined the Convention's terms of reference but left it with an open-ended mandate to consider "such other relevant constitutional amendments that may be recommended by it."⁴⁹ The Government was obliged to debate each of the Convention's recommendations in the Oireachtas (the Irish Parliament) and, if it accepted a recommendation, to put it to a referendum. Ultimately, only two of the Convention's 18 recommendations were accepted by the Oireachtas and put to referendum.⁵⁰

⁴⁵ Gylfason, above n 40, at 19.

⁴⁶ Suteu, above n 23, at 265. See *We the Citizens: Speak up for Ireland* (2015) <www.wethecitizens.ie>.

⁴⁷ Carolan "Ireland's Constitutional Convention", above n 21, at 739.

⁴⁸ David Farrell "Constitutional Convention 'brand' is in jeopardy: The Convention produced nine reports. Four of these have yet to be debated in the Oireachtas" *Irish Times* (online ed, Dublin, 17 March 2015) <www.irishtimes.com>.

⁴⁹ See Constitution "Convention – Terms of Reference" (July 2012) *An Coinbhinsiún ar an mBunreacht/The Convention on the Constitution* <www.constitution.ie>.

⁵⁰ Harry McGee "Only two proposals for Constitution referendum" *Irish Times* (online ed, Dublin, 26 January 2015) <www.irishtimes.com>. See "Same-sex Marriage Referendum" *Irish Times* (online ed, Dublin, 23 May 2015) <www.irishtimes.com>: 62 per cent of voters endorsed same-sex marriage; 26 per cent of voters endorsed lowering the age of eligibility for presidential candidates.

Ireland's successful experience of deliberative democracy and public ownership of the Convention spurred the 2016 establishment of a Citizen's Assembly to consider political and constitutional issues facing Ireland.⁵¹ The Assembly comprises 99 randomly selected Irish citizens and no politicians and, unlike the 2012 Convention experience, the Government has not committed to referenda on accepted recommendations.

Like the Icelandic experience, the hurdle to substantive change in Ireland was that final power lay with existing political institutions. Comparing Iceland and Ireland, it seems that a process will more likely lead to enactment if the process involves political elites. However, Ireland's comparative success may turn on its approach of issue-by-issue reform rather than wide-scale constitutional replacement.

C New Zealand

Drawing on lessons from Iceland and Ireland, New Zealand faces four issues which relate to public ownership of the process: existing legal and political requirements for constitution-making; the role of experts; the role of politicians; and the hurdle of getting any proposed constitution enacted. The further issue of constitutional apathy also arises for New Zealand.

1 Existing requirements for constitution-making

New Zealand's flexible and unwritten constitutional arrangements do not provide for formal binding constitutional amendment procedures, except for amendment of certain "reserved provisions" in the Electoral Act 1993.⁵² Such written parts of the current constitution are neither supreme nor entrenched; Parliament can amend them using the ordinary legislative processes.⁵³ While there is no standard method of significant constitutional reform, all changes to legal aspects of the constitution thus far have been made by Parliament.⁵⁴ Constitutional reform has sometimes been incremental, through developing constitutional conventions, and other times relatively quick, for example the New Zealand Bill of Rights Act in 1990 and the adoption of the mixed-member

⁵¹ An Tionól Saoránach/The Citizens' Assembly "Establishment of the Assembly" (2016) <www.citizensassembly.ie>. Constitutional issues: fixed term Parliaments, the way referenda are held.

⁵² Section 286 of the Electoral Act 1993 entrenches s 17(1) of the Constitution Act 1986 and ss 28, 35, 36, 74, 168 and related definitional sections of the Electoral Act 1993.

⁵³ Palmer and Butler, above n 3, at 13.

⁵⁴ See Scarlett Roberts "Constitution Aotearoa—Hopeless Dream or Possible Reality? An Analysis of the Hurdles Facing Major Constitutional Law Reform in the New Zealand Context" (LLB (Hons) dissertation, Victoria University of Wellington, 2016) at 10.

proportional electoral system (MMP) in 1993.⁵⁵ Rather than proposing that Parliament engages in constitution-making, this paper proposes a constituent assembly as the central body in an inclusive constitution-making process.

The role for existing political institutions does not cease simply because there is no prescribed reform process. A constituent assembly cannot convene itself, and the ordinary institutions of government have a role in beginning the process of constitution-making.⁵⁶ Beginning that process in practice will also likely require the establishment of rules for the selection of delegates to the constitution-drafting body. Public input into that decision is needed for democratic legitimacy. Given that Iceland's and Ireland's experiences were critiqued for lack of public input into procedural design, New Zealand would be wise to be guided by public input and should begin any inclusive constitution-making process with citizen-led value elucidation.⁵⁷

2 *The role of experts*

As stated by one of Iceland's Constitutional Council members, constitution-making is a “political declaration of principle ... a constitution can say whatever its framers want it to say”.⁵⁸ This is important to note, as there is a risk that experts may overshadow the peoples' voices. However, as a constitution is the highest legal document, there is a tempered role for legal experts in its creation. As the Council member also wrote:⁵⁹

Constitution makers do not need to be experts in law or anything else for that matter just as MPs do not need to be experts. The key is to have democratically elected, and well-intentioned representatives with good access to experts as well as to other citizens as needed.

The question of who initiates the process influences who has ownership of it.⁶⁰ In New Zealand, current constitutional dialogue has been initiated by experts and existing political constitutions. *Constitution Aotearoa* and *Matike Mai Aotearoa* were constitutional kōrero led by experts, and the Constitutional Advisory Panel was appointed by the Government.⁶¹

⁵⁵ The New Zealand Bill of Rights Act 1990 was the product of a Government White Paper and MMP was the product of the Royal Commission on Electoral Reform.

⁵⁶ Colón-Ríos, above n 12, at 36.

⁵⁷ For a good example of how value elucidation might occur, see *Matike Mai Aotearoa*, above n 3.

⁵⁸ Gylfason, above n 40, at 22.

⁵⁹ Gylfason, above n 40, at 22.

⁶⁰ Abrak Saati “Different Types of Participation in Constitution Making Processes: Towards a Conceptualisation” (2016) 2(2) Southern African Journal of Policy and Development 18 at 24.

⁶¹ Constitutional Advisory Panel “FAQ” (2013) <www.ourconstitution.org.nz>.

Even though expert-led deliberation appears workable, it undermines public ownership of the process. Moreover, elite discussions or deliberations provide a “narrow focus” whereas participatory decision-making provides “innovative solutions and approaches” because the diverse group of citizens may have a wider “variety of experience and knowledge”.⁶² Expert-led processes also rub against the general international trend that democracy requires public participation in constitution-making. As Saati claims:⁶³

The once deeply-rooted idea that constitution-making should be limited to the smoke-filled chambers of political elites, lawyers and policy-makers is no longer the dominant understanding, no matter how technically sound the constitutional content of such an elite-driven process may be.

New Zealand ought to strike a balance between impartiality, utility, transparency and the amount of power given to experts. Experts are useful because they inform the constituent assembly, thus increasing its capability for deliberation. Conversely, experts that have too much power undermine the constituent assembly’s power and decrease democratic legitimacy. The most appropriate roles for experts at different stages of the constitution-making process are outlined below:

(a) Upstream

Given the current lack of public impetus for constitutional change in New Zealand, experts should educate the public about our existing constitution and potential reform. However, expert-led public education does not negate the need for upstream public input into procedural design.

(b) Drafting

Experts in statistics can facilitate the fair selection of representatives.⁶⁴ An independent body, with a clear legal mandate, should oversee the selection of representatives. In New Zealand, that independent body could be Statistics New Zealand or the Electoral Commission.

⁶² Banks, above n 21, at 1050.

⁶³ Saati “Participatory Constitution-Making as a Transnational Legal Norm”, above n 27, at 120.

⁶⁴ See Part IV on the best way to select representatives.

Legal and constitutional experts could and should advise the constituent assembly throughout its drafting process. Experts could help delegates digest potentially complex constitutional issues, as they did in Ireland.⁶⁵ Experts could also advise the constituent assembly about compliance with international law. An advisory role for experts aligns with the normative basis of inclusive constitution-making because it upholds the peoples' ownership (democratic legitimacy) and enhances deliberative democracy.⁶⁶

Experts can help throughout the drafting itself to ensure the constitutional text is framed in a practical and workable manner. The corollary of including as many voices as possible in constitution-making is that the output may be less likely to be cohesive. Lawyers' technical skills can be useful in ensuring the functionality of the created governance system.⁶⁷ However, there is a risk that post-drafting amendments could be more than technical, as they were in Iceland,⁶⁸ and that they may undermine the drafting body's deliberative compromises. To avoid these risks, a New Zealand constituent assembly should have expert legal input throughout the process rather than after the draft text is finalised.

(c) Downstream/Ratification

As seen in Iceland, giving experts a prominent role after the constituent assembly has finished drafting (and not referring any changes back to the assembly) will diminish democratic legitimacy. If experts are utilised throughout drafting, there should be no need for expert input after drafting is complete. The peoples' "political declaration of principle" should not be subject to experts' edits before being ratified in a referendum.

3 Political elites

Some academics consider that the danger of participatory constitution-making lies in its susceptibility to manipulation by existing political elites.⁶⁹ According to these academics, the most important procedural design consideration is controlling the ability of powerful individuals or temporary majorities from entrenching their power and imposing a

⁶⁵ Jasmina Čolić *Constitutional Reform in Ireland: Legal Memorandum* (Public International Law and Policy Group, February 2014) available at <www.mreza-mira.net> at 16–18.

⁶⁶ Suteu, above n 23, at 272.

⁶⁷ Tushnet "Constitution-Making: An Introduction", above n 4, at 1995–1996.

⁶⁸ Gylfason, above n 40, at 17; Landemore, above n 11, at 187–188; Suteu, above n 23, at 271.

⁶⁹ See for example David Landau "The Importance of Constitution-Making" (2012) 89 Denv U L Rev 611; Landau "Constitution-Making Gone Wrong", above n 6; William Partlett "The Dangers of Popular Constitution-Making" (2012) 38 Brook J Intl L 193; William Partlett "The Elite Threat to Constitutional Transitions" (2016) 56 Va J Intl L 407.

constitution.⁷⁰ Partlett uses post-Communist constitution-making in Central and Eastern Europe and Landau uses Venezuela in 1999 as examples of leaders unilaterally entrenching authoritarian regimes through constituent assemblies. This risk is low in New Zealand, given it is already a democracy.

Another dangerous situation, perhaps more likely in New Zealand, is that political elites can undermine the peoples' ownership of the process by using their power to alter the peoples' decisions. This occurred in Iceland where the politically-appointed Supreme Court annulled the elections on technicalities. The independence of the New Zealand judiciary means New Zealand is unlikely to face that issue.⁷¹ However, New Zealand has faced a comparable situation where political power was used to override constitutional protections (albeit consistent with parliamentary sovereignty). Parliament exercised its supremacy to enact the Foreshore and Seabed Act 2004, thereby removing the jurisdiction of the Māori Land Court to investigate customary title in the foreshore and seabed, despite the Court of Appeal in *Ngati Apa v Attorney-General* finding that the Māori Land Court did have such jurisdiction.⁷² This example illustrates Parliament's willingness to respond to politically controversial matters against a strong minority that had a constitutional ruling in its favour. The risk of Parliament overriding the peoples' ownership is not so slight that it can be ignored. As discussed below, parliamentary sovereignty in ordinary politics and democratic legitimacy in constitution-making may converge to require ratification of a constituent assembly's new constitution by both Parliament and a referendum.

It can be hard to strike the proper balance between limiting the role for political elites (to strengthen democratic legitimacy) and not alienating them (to increase the likelihood of enactment).⁷³ Excluding politicians enhances the likelihood of long-term thinking, which is necessary for constitution-making. Moreover, excluding politicians makes it easier to de-politicise difficult or controversial issues. Constituent assemblies may be able to progress this *kōrero* when ordinary politics cannot.⁷⁴ However, total exclusion from citizen-led constitution-making would be unattractive to politicians and detrimental, if not fatal, if Parliament retains the power of ratification. Including politicians is a "strategic

⁷⁰ Landau, above n 6, at 935.

⁷¹ Constitution Act 1986, ss 23–24.

⁷² Foreshore and Seabed Act 2004, s 12; *Ngati Apa v Attorney-General* (2003) NZCA 117, [2003] 3 NZLR 643.

⁷³ Suteu, above n 23, at 273.

⁷⁴ Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 345–347.

consideration more so than a principled one, although not entirely”.⁷⁵ There is still some instrumental benefit of including politicians in a constitution-drafting body. Just as inclusive constitution-making educates citizens, it also educates those who will be implementing the constitution and therefore are interested in its workability. Including politicians does not limit the constituent assembly’s power to reconfigure or recreate the constituted institutions; rather, it brings a reality-check from people with national governance experience.

In our constitution-making journey, we should remember that constitution-making is inevitably a political process (albeit distinct from ordinary politics) and that there may need to be power trade-offs between different institutions (such as the constituent assembly and pre-constituted powers) to enact a new constitution. Part IV of this paper ultimately proposes that the constituent assembly should be comprised of some reserved seats and other seats for which participants are randomly selected. The need to achieve buy-in during the drafting stages from the people with existing power to enact the newly drafted constitution is a good reason for reserving seats for politicians.

4 Enactment

The main consideration when it comes to enactment is whether the constituent assembly is sovereign (it has power to independently enact the constitution) or whether the constituent assembly is simply a drafting body and does not have power to enact their drafted constitution.

(a) A non-sovereign constituent assembly

Risks arise from having a sovereign constituent assembly: without being subject to extra checks by the people or from existing political institutions, the constituent assembly may use its power to diverge from what would otherwise be acceptable to the people and existing institutions. One way to decrease that risk, while ensuring that ownership remains with the people, is to enact the constitution via referendum.⁷⁶ The merits and drawbacks of referendum are discussed below.

Lessons from Iceland and Ireland teach that despite a constituent assembly in theory being extra-legal, it still exists and operates within the political context. In Iceland, the social movement pressuring the Althingi to embark on constitutional revision was extra-legal, but

⁷⁵ Suteu “Developing democracy through citizen engagement”, above n 2, at 420.

⁷⁶ Tushnet, above n 4, at 1994.

ultimately the social movement ran out of steam and the Althingi simply did not vote on a draft that two thirds of the voters ratified.⁷⁷ In political terms, the process was extra-legal to start with and the peoples' power was so strong that existing political institutions created bodies to implement the peoples' will. In formal terms, the existing Icelandic process for constitutional amendment was followed and the establishment of citizen-led bodies can be characterised as consultation by Parliament. Even though New Zealand's constitutional structure does not require that any formal amendment or replacement process be followed, it would be entirely unrealistic in times of peace and without a regime change to remove constitution-making entirely from ordinary politics. In a similar vein to getting buy-in from politicians during drafting, it is also important that the process benefits from the political strength and validity of acceptance by the existing institutions in a democracy.

(b) Justifying the use of referenda for ratification

Referenda are the democratic mechanism by which the wider public can directly accept or reject the newly drafted constitutional text.⁷⁸ Referenda have been criticised as a “blunt and crude device” and face three main criticisms.⁷⁹ First, they can be easily controlled and manipulated by elites. Second, they severely simplify complex issues to a yes or no vote, which reduces deliberative potential. Third, they pose a majoritarian danger and inherently lack safeguards to protect interests of minorities and dissenting individuals.⁸⁰

The first objection, the elite threat, applies equally to other democratic exercises. Potential manipulation by elites can be seen in the democratic deficit that arises from incomplete separation of powers and delegated law-making power to the executive branch of government. This threat also exists in parliament, exacerbated by the adversarial nature of modern politics, partisan loyalty and the whip system.⁸¹ Given that these threats apply across democracy, we should not reject referenda on this basis. Rather, we should try and mitigate these risks, which can be done through other aspects of inclusive constitution-making processes, for example by having an independent body facilitate the process of selecting delegates for the constituent assembly.

⁷⁷ Iceland Review “Final Results of the Constitutional Referendum: ‘Yes’ to All Questions” *Iceland Review* (online ed, Iceland, 30 January 2014) <<http://icelandreview.com>>.

⁷⁸ Stephen Tierney *Constitutional Referendums: The Theory and Republican Deliberation* (Oxford University Press, Oxford, 2012) at 19.

⁷⁹ Royal Commission on the Electoral System “Towards a Better Democracy” [1986–1987] IX AJHR H3 at [7.30].

⁸⁰ See Tierney *Constitutional Referendums: The Theory and Republican Deliberation*, above n 78, ch 2.

⁸¹ Tierney, above n 78, at 25–27.

The second objection, severe oversimplification, can be mitigated by practical considerations. In ordinary referenda, the risk of oversimplification arises from the precise wording of a complex matter. However, a ratification referendum is likely to be a straightforward question, something like: “Do you wish the Constituent Assembly’s draft to be the new constitution?” The most significant risk of oversimplification in constitutional referenda relates to the controversial issues being conflated in a single yes or no question. The risk is that the entire text may be voted down. This risk is particularly dangerous in New Zealand given our high levels of public apathy. To generate a meaningful answer, the public will need to be informed and to have already deliberated in the preceding public debate. However, the risk still should be mitigated.

Iceland and Ireland mitigated this risk by asking separate questions. In Iceland’s case, the referendum contained six questions. The first question asked whether the voter wished the Constitutional Council’s proposals to form the basis of a new draft Constitution. The following five questions addressed politically controversial issues, such as ownership of natural resources, in the framework of “Would you like to see [Council’s specific recommendation enacted]?”⁸² In Ireland’s case, only two recommendations were put to referenda. Hypothetically, more referenda could have followed. This raised a further risk of referenda fatigue. Furthermore, if comprehensive rather than piecemeal reform is undertaken, multiple referenda may undermine compromises made by the deliberative constituent assembly. Iceland’s process could provide a useful template if a New Zealand constituent assembly was concerned that a single ratification question would oversimplify politically controversial constitutional issues and might lead to the entire text being rejected.

The third objection, majoritarian danger, is less relevant in relation to ratification referendum. The primary reason is that majoritarian support is essential for enactment in the interests of democratic legitimacy. Additionally, the danger of majoritarian democracy would have been mitigated by earlier parts of the constitution-making process, namely a representative constituent assembly undertaking deliberation.

Despite such criticisms, referenda are a worthwhile final hurdle for the New Zealand inclusive constitution-making process. There is arguably a constitutional convention in

⁸² Law Institute of the University of Iceland “The ballot paper” (20 October 2012) Referendum Saturday 20 October 2012 <www.thjodaratkvaedi.is>.

New Zealand that constitutionally significant issues be put to a referendum.⁸³ As Colón-Ríos argues, referenda add a layer of control of the constituent assembly by the people generally, thus enhancing democratic legitimacy.⁸⁴ Constitution-making is episodic and rare and the nature of creating higher law necessitates greater input from the public.

(c) Proposed ratification requirements

This paper proposes a requirement of double ratification—by the majority of Parliament and of voters in a popular referendum (separately by the general electoral roll and by the Māori electoral roll). There is a practical reason for proposing a double ratification requirement; as Tushnet states, “political stability requires at least acquiescence from nearly all groups that have significant power, whether political, cultural or economic”.⁸⁵ A requirement of double ratification aims towards durability of the final product and ensures that drafters make the necessary compromises to ensure full inclusion of all relevant actors.

This paper’s proposal of requiring ratification by *both* Parliament and the people is different from existing formal procedures for amending reserved provisions in the Electoral Act 1993. The existing procedure requires a 75 per cent majority of the House of Representatives *or* a majority (50 per cent) of voters in a popular referendum to amend or repeal the reserved provisions.⁸⁶ However, such constitutional amendment or repeal is to be distinguished from constitution-making. Constitution-making can change the big-picture status quo and can re-write the relationships between citizens and state. Therefore, requiring ratification by both citizens and the state (represented by the currently sovereign Parliament) would accord with the democratic legitimacy interest in buy-in from all affected parties.

The adoption threshold for any new text created by the inclusive constitution-making process need only be a 50 per cent vote. There is no reason to require a Parliamentary majority of 75 per cent majority given that any outcome of the proposed inclusive constitution-making process would have been written by the people and subject to a popular referendum.

⁸³ Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (2nd ed, Lexis Nexis, Wellington, 2014) at 324. Previous constitutional referenda: the 1967 and 1990 Parliamentary term referenda and the 1992/1993 MMP referenda.

⁸⁴ Colón-Ríos, above n 12, at 35.

⁸⁵ Tushnet, above n 4, at 1992.

⁸⁶ Electoral Act 1993, s 268.

There should be two popular referenda—one for voters on the general electoral roll and one for voters on the Māori electoral roll. The exercise of Māori constituent power in Te Tiriti means that further Māori political power is necessary for any constitutional change that would alter the original fundamental political decisions contained in Te Tiriti.⁸⁷ The reasons for needing separate mechanisms to measure Māori political will for change are outlined below in Part IV.

5 *Public apathy*

Public impetus is essential to constitution-making. Constituent power can only exist if there are enough people who want to exercise their inherent constitution-making power to change the status quo.⁸⁸ Lack of public impetus for constitutional transformation is likely to be New Zealand’s stumbling block in terms of ownership of the process (and igniting the process itself).

Constitutional apathy may arise for many reasons. First, people may feel alienated and disempowered by the current political system because they feel they lack power to change it. Constitutional change may be a low priority for people suffering from poverty and ill-health for example.⁸⁹ The system does not work for these people, but their energy is spent surviving rather than seeking large-scale systemic reform. Second, apathy may stem from widespread lack of general knowledge about New Zealand’s current constitutional arrangements. Debate about constitutional change first assumes that the people understand the topic of debate, yet our constitutional arrangements are largely inaccessible and accessing the basic material is “both arduous and frustrating”.⁹⁰ A related reason for constitutional apathy may be lack of specific reform proposals to engage with. As Sir Geoffrey Palmer and Andrew Butler suggest, “the desultory nature of New Zealand’s constitutional dialogue on change is caused in part ... by the lack of any specific proposal with which to engage”.⁹¹ While specific proposals make constitutional change easier to debate, general education about New Zealand’s current constitution may itself engender public impetus for change. As the Independent Working Group noticed in the 252 hui and 70 wānanga it carried out over four years as part of the *Matike Mai Aotearoa* report, people

⁸⁷ Jessica Orsman “The Treaty of Waitangi as an exercise of Māori constituent power” (2012) 43 VUWLR 345 at 368.

⁸⁸ Colón-Ríos, above n 12, at 36.

⁸⁹ *Matike Mai Aotearoa*, above n 3, at 15–16.

⁹⁰ Palmer and Butler, above n 3, at 10.

⁹¹ Palmer and Butler, above n 3, at 12.

instinctively grasped the constitutional matters discussed because they understand the language of powerlessness.⁹² A final reason for constitutional apathy, unique to New Zealand, may stem from our generally pragmatic culture. Palmer describes New Zealand's constitutional culture as ad hoc pragmatism in the sense that we fix things that need fixing without relating them to any grand philosophic scheme.⁹³ With this culture, New Zealanders may be reluctant to discuss constitutionalism—inevitably a grand philosophic scheme.

As seen by the experience of the Independent Working Group, expert-led engagement with the public goes some way towards increasing civic education and desire for constitutional change. Similarly, through *Constitution Aotearoa* Sir Geoffrey Palmer and Andrew Butler aim to start a conversation about New Zealand's constitutional arrangements.⁹⁴ Citizen education may lead to support for an inclusive constitution-making process. This goes both ways: an inclusive constitution-making process further educates the citizenry. Citizens educated about the democratic process and content of the constitution are less likely to be apathetic and can better hold the government accountable under any new constitutional arrangements.⁹⁵

Often the public impetus necessary for constitution-making arises in times of crisis. On review of the practice of constitution-making, Elster notes that “new constitutions are almost always written in the wake of a crisis or exceptional circumstances of some sort”.⁹⁶ However, constitution-making during a crisis is likely to be urgent, leading to rushed procedural design, which may ultimately diminish the process's democratic legitimacy and remove opportunity for deliberation. The ideal conditions for inclusive constitution-making are sufficient public dissatisfaction with the status quo (to generate political will for constitutional change) without that dissatisfaction escalating to a crisis level or resulting in civil conflict. Given comparisons with constitution-making processes in Iceland and Ireland, and New Zealand's current constitutional apathy, it may be too optimistic to hope that New Zealanders can generate the necessary political pressure for constitution-making without experiencing a major crisis that erodes trust in government.

⁹² *Matike Mai Aotearoa*, above n 3, at 15–16.

⁹³ M Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution*, above n 74, at 280.

⁹⁴ Palmer and Butler, above n 3, at 25.

⁹⁵ Blount, above n 12, at 39. See also Wallis “How Important is Participatory Constitution-Making?”, above n 36, at 367 and more generally, Saunders “Constitution-making in the 21st century”, above n 2.

⁹⁶ Jon Elster “Forces and Mechanisms in the Constitution-Making Process” (1995) 45 Duke LJ 364 at 370.

IV Representation

A Iceland

In Iceland's 2012 constitution-making experience, citizens led two formal constitution-making bodies: the National Forum (950 people randomly selected to articulate values for constitutional renewal) and the Constitutional Council (25 ordinary citizens elected to draft the constitutional text).

The Constitutional Act prescribed the process of selecting National Forum participants as needing to have “due regard to a reasonable distribution of participants across the country and an equal division between genders, to the extent possible”.⁹⁷ The Constitutional Committee complied with this requirement and approached around 3000 people to create a group of 950 participants, a group that was statistically representative the Icelandic population in terms of age, gender and geographic origin.⁹⁸

The election of the Constitutional Council generated an assembly of 15 men and 10 women. The Althingi had a pre-set requirement of 40 per cent women. They would have instituted a quota if that requirement was not met, and would have added up to six extra women (those with the highest votes) to fulfil the quota.⁹⁹ The delegates included university professors, a farmer, a pastor, a journalist and media presenters, a theatre director, a consumer spokesperson, a teacher and a lawyer.¹⁰⁰ Overrepresentation of academics was a concern but it was nevertheless helpful because the academics made access to experts easier and they could grapple with the complexity of the task.¹⁰¹ Another concern related to the lack of rural representation. Only three delegates elected to the Council, as compared with a third of the national population, lived outside Reykjavik.¹⁰²

Iceland's experience illustrates the nature of elections and the resulting possibility of underrepresentation of minorities. However, this was not severe in Iceland due to the homogeneity of its population.¹⁰³ The same may not be true in heterogeneous societies such as New Zealand.

⁹⁷ Act on a Constituent Assembly (no 90/2010, 16 June 2010), art 29.

⁹⁸ Landemore, above n 11, at 177.

⁹⁹ Landemore, above n 11, at 178–179.

¹⁰⁰ Landemore, above n 11, at 178.

¹⁰¹ Gylfason, above n 40, at 10: eight delegates were professors and three were junior academics.

¹⁰² Landemore, above n 11, at 179.

¹⁰³ Central Intelligence Agency “The World Factbook: Iceland” (18 July 2017) <www.cia.gov>.

B Ireland

The Convention was made up of 66 ordinary citizens (randomly selected to achieve statistical representation in terms of age, gender and geographic origin), 33 political representatives, and an independent chairperson. Four of the politicians (one nominee from each of the political parties) were from Northern Ireland to provide perspective and recognise the Irish history of religious conflict.¹⁰⁴ The other 29 politicians were nominated by their parties based on those parties' representation in the Oireachtas.¹⁰⁵

Possible representation issues in the Irish experience related to representation generally, rather than representation of minorities. This was because the polling company responsible for achieving statistical representation allowed already selected delegates to nominate other people to the body.¹⁰⁶ This diminished the equal opportunity of citizens to participate and undermined the Convention's legitimacy. Furthermore, allowing nominations of spouses and friends meant that members shared interests and attitudes in a way that randomly selected delegates probably would not. This lessened cognitive diversity and weakened the Convention's deliberative potential.¹⁰⁷

C New Zealand

The Icelandic and Irish experiences demonstrate that statistical representation is a good way to achieve inclusion and thus legitimacy.¹⁰⁸ An important difference between Iceland and Ireland and New Zealand is our ongoing legacy of colonialism by the British Crown over the indigenous Māori minority population. In theory, the constituent power can create a new fundamental rule inconsistent with obligations assumed by the constituted power, even where doing so will have important political consequences.¹⁰⁹ This means that the constituent assembly could ignore the Crown's Treaty obligations.

The following questions arise for New Zealand:

- (1) How is the special position of Māori as tangata whenua to be realised?
- (2) How are minorities to be given a voice?
- (3) What is the best way to achieve representation?

¹⁰⁴ Carolan, above n 21, at 739.

¹⁰⁵ Constitution "Convention – Members" (July 2012) An Coinbhinsiún ar an mBunreacht/The Convention on the Constitution <www.constitution.ie>.

¹⁰⁶ Carolan, above n 21, at 742.

¹⁰⁷ See Hélène Landemore "Deliberation, Cognitive Diversity, and Democratic Inclusiveness: An Epistemic Argument for the Random Selection of Representatives" (2013) 190 *Synthese* 1209.

¹⁰⁸ Landemore, above n 11, at 172.

¹⁰⁹ See, for example, as noted in Colón-Ríos, above n 12, at 40.

1 *Tangata whenua*

Constitutional kōrero in New Zealand must be founded upon an understanding of the relationship between Māori as tangata whenua and the Crown, based on He Whakaputanga (the Declaration of Independence 1835) and Te Tiriti o Waitangi (the Treaty of Waitangi).¹¹⁰ This paper does not delve into the Crown narrative of acquisition of sovereignty,¹¹¹ nor into differences between the English and te reo Māori texts of Te Tiriti,¹¹² nor into the substantive place of Te Tiriti in constitutional reform.¹¹³ Rather, this paper focuses on the relationships relevant to constitution-making.

The first relevant relationship in constitution-making is the one between the Crown and tangata whenua. That relationship forms the basis of the second relevant relationship for constitution-making: between tangata whenua and tangata tiriti (the people who came to Aotearoa by virtue of Te Tiriti). The second relationship is the most important one because constitution-making is the exercise of constituent power (the people), rather than the exercise of constituted power (the Crown). Moreover, relying on the Crown's existing constituted power accepts the status quo, which was established in colonial times, and continues to marginalise Māori voices. Before analysing how those relationships could operate in an inclusive constitution-making process, this paper explains the legacy of colonisation in New Zealand. As Max Harris recently said, “our politics will only be legitimate in the eyes of everyone when we have reckoned with our past”.¹¹⁴

¹¹⁰ This paper uses “Te Tiriti” throughout to refer to the agreement first signed between the Crown and some Māori chiefs on 6 February 1840. For international law rules on treaty interpretation, see Ulf Linderfalk *On the Interpretation of Treaties: The Modern International Law and Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer, the Netherlands, 2007) at 284.

¹¹¹ On this, see Waitangi Tribunal *He Whakaputanga me te Tiriti = The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki inquiry* (Legislation Direct, WAI 1040, 2014) <www.waitangitribunal.govt.nz>.

¹¹² See Philip Joseph “The Treaty of Waitangi: A Text for the Performance of Nation” (2004) 4 Oxford U Commw LJ 1 at 2–5; and *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 32 per Cooke P.

¹¹³ See M Palmer, above n 74, ch 6; and Nicholas Smith “Constitutional Reform in New Zealand” (2017) NZLJ 270.

¹¹⁴ Max Harris “A New Politics for New Zealand” (Michael King Memorial Lecture, Auckland Writers Festival, 2017) <www.writersfestival.co.nz> at 14.

(a) The colonial legacy

Māori have historically been treated by the Crown as the less equal partner of the Treaty relationship. The colonial Crown dispossessed indigenous peoples of their lands, cultural taonga and reo. The historical marginalisation of Māori has created structural racism which means that Māori continue to have worse health, education and justice outcomes today than the majority Pākehā population.¹¹⁵ During the four-year consultation for *Matike Mai Aotearoa*, the Independent Working Group saw widespread “genuinely held belief that the existing system continues to disempower our people”.¹¹⁶

The beginning of active decolonisation is one of the necessary preconditions for an inclusive constitution-making process in New Zealand.¹¹⁷ As Moana Jackson explains, “you can’t honour the Treaty until colonisation is ‘settled’.”¹¹⁸ Decolonisation requires the redistribution of power to remedy colonial power imbalances. Decolonisation requires that Pākehā take ownership of their history and listen to and re-centre indigenous voices in constitutional kōrero.¹¹⁹

(b) Tangata whenua-Crown relationship

Analysis of the Māori-Crown relationship requires an understanding of what Māori assented to in signing Te Tiriti. In the 2014 report *Te Paparahi o te Raki*, the Waitangi Tribunal found that the rangatira who signed Te Tiriti “did not cede their authority to make and enforce law over their people or their territories. Rather, they agreed to share power and authority with the Governor”.¹²⁰ That agreement can be understood as a political exercise of Māori constituent power.¹²¹ The agreement to share power created an equal

¹¹⁵ For example, on the mass imprisonment of Māori, see Just Speak “Māori and the Criminal Justice System: A Youth Perspective” (2012) and Stats NZ/Tatauranga Aotearoa “Prison and community-sentence population tables” (18 January 2017) <nzdotstat.stats.govt.nz>. See also Geoffrey Palmer *New Zealand’s Constitution in Crisis: Reforming Our Political System* (McIndoe, Dunedin, 1992) at 77.

¹¹⁶ *Matike Mai Aotearoa*, above n 3, at 26.

¹¹⁷ Palmer and Butler, above n 3, at 221.

¹¹⁸ In an interview with Max Harris, recorded in *New Zealand Project* (Bridget Williams Books, Wellington, 2017) at 103.

¹¹⁹ For detailed discussion see Ani Mikaere *He Rukuruku Whakaaro: Colonising Myths, Māori Realities* (Huia Publishers, Wellington, 2013).

¹²⁰ Waitangi Tribunal *He Whakaputanga me te Tiriti* WAI 1040, above n 111, at xxii.

¹²¹ See Orsman “The Treaty of Waitangi as an exercise of Māori constituent power”, above n 87.

relationship between Treaty partners while preserving each partner's power over their different "spheres of influence".¹²²

In our existing political constitutional arrangements, the Crown-tangata whenua relationship manifests in a fundamental way through reserved seats for Māori political representation in Parliament. The prevailing view of many Māori and academics, and the view adopted in this paper, is that reserved Māori seats in Parliament symbolically and practically reflect that Māori hold a unique place in New Zealand's constitutional framework as the indigenous people of Aotearoa.¹²³

Understanding the Treaty relationship as one of partnership between equals reflects the Māori understanding of political independence and whakapapa-based interdependence as articulated in He Whakaputanga (The Declaration of Independence 1835) and as existed between different Māori polities before British colonisers arrived. An analogy to kawa (local protocol) on a marae serves to illustrate te ao Māori understanding of mana and rangatiratanga: the manuhiri (visitors) accept the tangata whenua's jurisdiction and the rangatira of the manuhiri is expected to monitor his peoples' behaviour. Manuhiri have their own rules but abide by local kawa while visiting another marae.¹²⁴ The relationship between kāwanatanga and te tino rangatiratanga reflects the ongoing right of Māori to make their own decisions, which was an inherent part of how Māori constitutionalism operated before 1840.

(c) Tangata whenua-tangata tiriti relationship

Focusing on the tangata whenua-tangata tiriti relationship aims to foster a culture of mutual respect, based on consent rather than oppression.¹²⁵ The Treaty relationship goes beyond Māori and the Crown; it is contextualised by "other" New Zealanders.¹²⁶ A broad understanding of Treaty-based relationships is useful because it values "everyone on a whakapapa or relationship kaupapa rather than just a Crown one".¹²⁷ Fundamentally, Te Tiriti is about relationships, including those between Māori and all people who immigrated

¹²² Waitangi Tribunal *He Whakaputanga me te Tiriti* WAI 1040, above n 111, at xxii.

¹²³ Andrew Geddis "A Dual Track Democracy? The Symbolic Role of the Māori Seats in New Zealand's Electoral System" (2006) 5(4) *Election Law Journal* 347 at 356; M Palmer, above n 74, at 257.

¹²⁴ *Matike Mai Aotearoa*, above n 3, at 51.

¹²⁵ Carwyn Jones "A constitution 'sourced in two streams'" (2 February 2017) *A Constitution for Aotearoa New Zealand* <www.constitutionaotearoa.org.nz>.

¹²⁶ M Palmer, above n 74, at 312.

¹²⁷ *Matike Mai Aotearoa*, above n 3, at 76.

to Aotearoa, whether their ancestors came in the 19th century or whether they arrived in the 21st century.¹²⁸ In the sense that all immigrants are permitted to live in Aotearoa because of the political exercise of Māori constituent power in Te Tiriti, “Te Tiriti is their immigration visa”.¹²⁹ Inclusivity in constitution-making and representation of tangata tiriti minorities could foster a sense of collective nationhood that every immigrant is tangata tiriti.

As noted above, under classic constituent power theory, tangata tiriti could ignore Te Tiriti. However, strict classical theory will not play out in New Zealand’s constitution-making context for numerous reasons. First, tangata tiriti are permitted to be here by the exercise of Māori constituent power in Te Tiriti. Second, the Crown-tangata whenua relationship established a model of relationships based on partnership, which continues to be the model for tangata whenua-tangata tiriti relationships. Finally, a process that excludes traditionally marginalised groups fundamentally fails to be inclusive.

(d) Proposal for Māori representation

Representation in the New Zealand context will likely require participation of Māori both in drafting and, separately, in enacting. This section of the paper addresses representation in drafting. Representation in enacting has been discussed in Part III of this paper, in relation to ownership and requirements for ratification. New Zealand’s colonial legacy means that Māori should have a central role in Aotearoa’s constitution-making journey, to acknowledge their position as tangata whenua, and as a means of ensuring democratic legitimacy.¹³⁰ The pre-colonial Māori understanding of constitutionalism as maintaining independence yet enabling interdependence between different groups will likely be useful to understand how the special position of Māori as tangata whenua could be represented in an inclusive constitution-making process.

One possible solution promoted by this paper is to reserve 20 per cent of the seats on a constituent assembly for representatives of Māori. The number of reserved seats should

¹²⁸ See Margaret Mutu “Constitutional Intentions” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010).

¹²⁹ *Matike Mai Aotearoa*, above n 3, at 76.

¹³⁰ See Hohaia Collier “A Kaupapa-Based Constitution” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) at 317.

reflect the population demographics of the country. In 2015, 15 per cent of New Zealand's population were Māori. However, the Māori share of the total population is predicted to increase to 20 per cent in 2038, stemming from high Māori birth rates and a younger age structure than the remainder New Zealand's population.¹³¹ The forecast population growth of Māori should be part of the equation in the interests of long-term democratic legitimacy and constitutional stability. The Independent Working Group has set a timeline goal of 2040 for some form of constitutional transformation in New Zealand.¹³² An inclusive constitution-making process will probably not get off the ground until that kōrero is complete, and therefore it is appropriate to use a population estimate for around that time.

In accordance with te tino rangatiratanga, Māori should themselves choose how to appoint delegates to the reserved seats. Someone randomly chosen to fill a Māori reserved seat may lack the mana to do so, thus decreasing effectiveness of reserving such seats in the first place. Perhaps nominations could be accepted by the body tasked with selecting the representatives. Alternatively, an existing body could appoint consensually nominated delegates to the constituent assembly. Such bodies include the Iwi Chairs Forum or the Independent Working Group (should they continue to have a role in listening to and leading kōrero about Māori constitutionalism). This paper cannot shed light on how those decisions choosing representatives for a constituent assembly might be made across the country, except to say that is likely to be based on hapū groupings rather than, as imposed by the Crown in Treaty settlement negotiations, "large natural groupings", which are not the central unit of Māori society.¹³³ There should not be a prescribed method for choosing delegates as each hapū or iwi across the country will have its own way of doing so, according to local tikanga. Self-determination of selection method for the constituent assembly avoids the criticism that Māori Parliamentary seats face of failing to guarantee representation of the collective voice of hapū and iwi. It also provides for the collective voice to more accurately represent Māori social groupings and authority than the existing seven Māori electorate boundaries, which do not necessarily reflect those critical elements of Māori social life.

2 Minorities or side-lined social groups

This paper uses the term "minorities" to refer to groups traditionally side-lined in politics.

¹³¹ Stats NZ/Tatauranga Aotearoa "How is our Māori population changing?" (17 November 2015) <www.stats.govt.nz>.

¹³² *Matike Mai Aotearoa*, above n 3, at 11.

¹³³ For the damaging effect of Crown strategy, see Malcolm Birdling "Healing the Past or Harming the Future? Large Natural Groupings and the Waitangi Settlement Process" (2004) 2 NZJPI 259.

(a) Rationale for including minorities

Minority representation helps to realise the normative bases for inclusive constitution-making, namely democratic legitimacy and enhancing deliberation. Inclusive processes are most successful when equal participation is the collective democratic goal rather than when representation of minorities is viewed as tokenism or as providing an opportunity for a minority group.¹³⁴ In terms of democratic legitimacy, as Tushnet states, “[r]eal representation ... is the contemporary mechanism for ensuring that a constitution actually is an exercise of constituent power”.¹³⁵ Representation secures greater buy-in for the whole community; when people feel they have the ability to affect the outcome of a decision, they are more likely to support that outcome. In terms of enhancing deliberation, minority representation (and hence the inclusion of traditionally marginalised perspectives) “reveals blind spots” and exposes the deliberative group to views they may not have otherwise considered.¹³⁶ There was unanimous support among people consulted by the Independent Working Group “for the idea of equity and the need to protect all minorities to enable everyone to benefit from Te Tiriti relationship”.¹³⁷ Fair representation and good relationships between all peoples is needed for Tiriti-consistent and inclusive constitution-making.

(b) Which groups should be specifically included?

This paper argues that New Zealand should consider particular provision for gender equity, representation of ethnic minorities and for youth. These groups have been selected because people in these groups will bring different perspectives to constitution-making, connected to their different identities.

On the ground that women bring different experiences and perspectives to men, specific inclusion of women can be expected to lead to greater cognitive diversity thereby strengthening the constitution-making body’s ability to deliberate. Inclusion of women, who make up slightly over half of the population, also enhances democratic legitimacy.¹³⁸ Given that this paper ultimately proposes random selection as the best mechanism for

¹³⁴ Catherine Powell “How Women Could Save the World, If Only We Would Let Them: From Gender Essentialism to Inclusive Security” (2017) 28 Yale Journal of Law and Feminism 271 at 312–324.

¹³⁵ Tushnet, above n 4, at 2000.

¹³⁶ Tushnet, above n 4, at 2000.

¹³⁷ *Matike Mai Aotearoa*, above n 3, at 79.

¹³⁸ See Powell “How Women Could Save the World, If Only We Would Let Them”, above n 134.

guaranteeing representation of traditionally side-lined views, we do not have to confront the potential widespread cultural opposition to gender quotas in New Zealand.¹³⁹

A representative constitution-making body will need to be multi-ethnic to reflect New Zealand's ethnic diversity and, particularly, immigration from Asia. In the last seven years, 15.6 per cent of new migrants came from China and 13.6 per cent from India.¹⁴⁰ The most recent census calculated that 24 per cent of people ordinarily resident in New Zealand were born overseas, with nearly a third of that group born in Asia.¹⁴¹

Youth have also been traditionally underrepresented in politics. The narrative of disaffected and unengaged youth is supported by statistics that only 62 per cent of enrolled 18-30 year olds voted in the 2014 election.¹⁴² However, youth have a particular stake in constitution-making as they are the future generations that will inherit (and administer and implement) the resulting constitution. The Independent Working Group found that “age did not affect the enthusiasm or depth of discussion”.¹⁴³ The rōpū rangatahi (youth branch) organised 70 wānanga across 13 regions to discuss and learn about constitutional issues, and created a report devoted to constitutional values. They had four national training hui and presented their report in youth organisations, schools, universities, marae and a prison. The significant focus on rangatahi by the Independent Working Group showed that youth do care about constitutionalism, once educated about it.

3 *Method of selecting representatives*

In Iceland, delegates were elected to the Constitutional Council. In Ireland, delegates were randomly chosen from the electoral roll the basis of statistical representation. New Zealand could adopt either of these methods or use a different hybrid model. These options will be explored in turn below. The normative goals of democratic legitimacy and enhancing deliberative potential should be at the centre of that decision.

¹³⁹ For debate on gender quotas in business and governance, see Amelia Langford “How sexist is New Zealand politics?” *Radio New Zealand* (online ed, New Zealand, 30 October 2015) <www.radionz.co.nz>; Dan Satherley “John Key: Gender quota for Cabinet ‘stupid’ idea” *Newshub* (online ed, New Zealand, 26 November 2016) <www.newshub.co.nz>.

¹⁴⁰ New Zealand Immigration Statistics (January 2017) <www.migrationstats.com>.

¹⁴¹ Stats NZ/Tataraunga Aotearoa “2013 Census – New Zealand as a village of 100 people” (3 December 2013) <<http://m.stats.govt.nz>>.

¹⁴² While the special votes results were released 7 October 2017, the youth turnout statistics for the 2017 General Election were not available when this paper was due. Toby Manhire “7pm: A hot take on the youthquake” *The Spinoff* (online ed, New Zealand, 23 September 2017) <<https://thespinoff.co.nz>>.

¹⁴³ *Matike Mai Aotearoa*, above n 3, at 18.

(a) Elections

We use elections in ordinary politics and they are an obvious form of direct democracy. However, elections are not an end in themselves. Elections for a constitution-drafting body are different from ordinary political elections in two main ways: the delegates do not face re-election, and (as proposed in this paper) delegates are not aligned to political parties.

The difference between ordinary and constitutional elections means that the accountability benefit of ordinary elections does not extend to elections in the constitution-making context. Accountability via re-election is considered the ultimate form of democratic citizen power to endorse or reject the delegates' actions every three years. Delegates in a constituent assembly do not face re-election as the assembly is wound up after the text is drafted. While lack of re-election may reduce accountability, that accountability can be achieved in other ways. In Iceland's experience, the originally elected Constitutional Council was publicly accountable through the wide variety of transparency and open government mechanisms adopted, such as open meetings, and ability for the public to comment online on the Council's iterative drafts. Rather than discounting elections on the basis of reduced accountability, New Zealand could design alternative transparency requirements to achieve accountability and still use elections.

The fact that delegates of a constitution-making body are not politically aligned may make it hard for voters to choose between them in elections: how would one separate oneself from the pack? If not based on political party membership, election preferences may be based on delegates' proposed positions on particular constitutional issues. However, positional-based campaigning is problematic because it leads to entrenched positions. There is political cost involved in delegates transforming their views and that cost undermines the deliberative potential of the constituent assembly.

A disadvantage of elections in achieving representation is that they work on a majoritarian basis and therefore can lead to underrepresentation of minorities.¹⁴⁴ Elections tend to aggregate views rather than systematically represent a variety of knowledge.¹⁴⁵ Even scholars who doubt the power of participatory constitution-making emphasise that electoral rules should be structured to achieve diversity.¹⁴⁶ Underrepresentation of minorities on the elected Council was considered a failure even in Iceland, where the population is largely

¹⁴⁴ Blount, above n 12, at 42.

¹⁴⁵ Elster "The Optimal Design of a Constituent Assembly", above n 17, at 22.

¹⁴⁶ Landau, above n 6, at 963.

homogenous. New Zealand's society is more diverse and so underrepresentation of traditionally side-lined voices would be more serious.

Constitutional elections may be susceptible to elite manipulation, for example through setting electoral rules, locations of voting stations or drawing electoral boundaries.¹⁴⁷ One proposed answer to the concern of setting electoral rules was used in Iceland, where the Constitutional Committee was specifically created to establish the electoral rules and run the elections to reduce the Althingi's power. In New Zealand, the Electoral Commission could fill this role. Unlike Iceland, the transparency and the political neutrality of existing administrative bodies in New Zealand has not been called into question. A proposed answer to skewed implementation of electoral boundaries is getting rid of geographic electoral boundaries for non-Māori altogether. Colón-Ríos suggests a single electoral district, in recognition that constitution-making is episodic and that interests transcend geographic boundaries.¹⁴⁸ However, that proposal would probably undermine diversity of delegates and may lead to overrepresentation of people from urban areas. In New Zealand, geographic interests are important. For example, farmers as compared to city-dwellers might have very different views on Sir Geoffrey Palmer's and Andrew Butler's proposed environmental rights.¹⁴⁹ Moreover, geographic interests are central in Māori culture because Māori constitutional interests derive from their iwi and hapū and relate to their whenua.

Finally, elections require candidates to initially select themselves for candidacy. This is both an advantage and a disadvantage. Self-selected candidates are willing to engage and less likely to get reform fatigue. A further requirement of community nomination of candidates would increase democratic legitimacy. For example, in Iceland 522 candidates were supported by between 15,660 and 26,100 citizens (which equates to seven to eleven per cent of the population).¹⁵⁰ However candidates self-selecting may further marginalise the already marginalised, who are both unlikely to nominate themselves for national elections and are unlikely to get voted in on a majoritarian basis.

¹⁴⁷ Blount, above n 12, at 42.

¹⁴⁸ Colón-Ríos, above n 12, at 31.

¹⁴⁹ *Constitution Aotearoa*, art 105.

¹⁵⁰ Gylfason, above n 40, at 9; Oddsdottir "Iceland: The Birth of the World's First Crowd-sourced Constitution?", above n 39, at 1214.

(b) Random selection based on statistical representation

Landemore argues that random selection is the best way to achieve “descriptive representation”, which she defines as statistical representation across age, gender and geographic origin.¹⁵¹ The goal is to have delegates on the constituent assembly in roughly the same demographic proportions that exist generally in society. As Elster states, the epistemic value of representativeness is that the decision-maker incorporates a variety of individuals’ knowledge of “where the shoe pinches”.¹⁵² Advantages of descriptive representation include cognitive diversity, which makes the group better at decision-making,¹⁵³ and enabling ordinary people, rather than only professionals, to take a central role.

A disadvantage of random selection is that selected participants may be unwilling or unable to participate. This disadvantage was evident in the Constitutional Committee’s random selection of Icelandic citizens for the second National Forum. Three thousand people were approached to ultimately create a group of 950 participants.¹⁵⁴ This disadvantage of random selection could be mitigated by paying participants travel costs or compensating them for time spent doing civic duties, perhaps as is done for jurors, or as is proposed in Ackerman and Fishkin’s “Deliberation Day”, where a public holiday is held and each citizen paid \$150 for one day’s deliberation.¹⁵⁵ Ireland navigated this problem by randomly selecting people and offering them a position on the Constitutional Convention. In Ireland, delegates were not given monetary incentives to participate, although their travel expenses were covered. In addition, a “shadow” panel of a further 66 citizens were randomly selected in the same way to back-up the core panel, much like an understudy in theatre.¹⁵⁶

Random selection based on statistical representation can be criticised as mirroring society too directly, with the consequence that minority voices are still side-lined.¹⁵⁷ This critique is greater if the assembly makes majoritarian, rather than consensus-based decisions.¹⁵⁸

¹⁵¹ Landemore, above n 11, at 176.

¹⁵² Elster, above n 17, at 20.

¹⁵³ See Landemore “Deliberation, Cognitive Diversity, and Democratic Inclusiveness”, above n 107.

¹⁵⁴ Landemore, above n 11, at 177.

¹⁵⁵ Bruce Ackerman and James Fishkin *Deliberation Day* (Yale University Press, New Haven, 2004) at 3.

¹⁵⁶ Behaviour and Attitudes “Constitutional Convention – Members of the Public Recruitment Process” (August 2012) An Coinbhinsiún ar an mBunreacht/The Convention on the Constitution <www.constitution.ie>.

¹⁵⁷ Suteu “Developing democracy through citizen engagement”, above n 2, at 414.

¹⁵⁸ Suteu “Constitutional Conventions in the Digital Era”, above n 23, at 274.

The Icelandic Council used consensus-seeking procedures whereas the Irish Convention used majority-voting, with the chairperson deciding in case of a tied vote. If the assembly is randomly selected and makes majoritarian decisions, the method of selecting representatives fails to be inclusive because it allows participation of minorities but does not give them power to affect the outcome. A further concern of mirroring society directly in a country with quite rapidly changing demographics is that future generations may believe the constituent assembly failed to adequately represent their demographic and this may affect the durability of the new constitution.

4 A representative constituent assembly for New Zealand

This paper proposes a hybrid selection method for a future New Zealand inclusive constitution-making process. Some seats on the constituent assembly should be reserved for Māori and for politicians. The remainder of delegates should be randomly selected by an independent body such as Statistics New Zealand or the Electoral Commission, to achieve statistical representation based on age, gender, geographic region and ethnicity. The New Zealand constituent assembly should have around 100–120 seats. In contrast, Iceland's elected Council had 25 members and Ireland's randomly selected Convention had 100 members. New Zealand has a similar population to Ireland. The size of the constituent assembly should be large enough that random selection based on statistical representation can be meaningful and is not so large that the assembly is divided into sub-groups and risks deadlock.¹⁵⁹ This paper now explores the hybrid delegate selection model for a possible New Zealand constituent assembly in greater depth.

(a) Reserved seats

Having reserved seats in legislatures and constitution-making bodies is not uncommon. Countries reserve seats through different mechanisms. New Zealand's seven reserved Māori seats in Parliament (which amount to 5.8 per cent of Parliament) can be compared to Belgium's entirely reserved Senate (with proportionally reserved seats for Dutch and French linguistic groups, and one seat reserved for the delegate of the German-Speaking Community Parliament) and to power sharing settlements in Bosnia (one third each of

¹⁵⁹ Blount, above n 12, at 45. Cf Palmer's suggestion of having 140 seats, with two candidates from each electorate: M Palmer, above n 74, at 345–347. Cf also Ghosh's system of constitutional juries composed of 200 randomly selected citizens: Eric Ghosh "Deliberative Democracy and the Counter-majoritarian Difficulty: Considering Constitutional Juries" (2010) 30 *Ox J L S* 327 at 346.

Croats, Serbs and Bosnians).¹⁶⁰ In some states, reserved seats have been successful in ending conflict, for example, in Bosnia, yet in others power sharing between ethnic groups has failed to end the conflict, as in Cyprus.¹⁶¹ In Uganda's 1994 constitution-making experience, one quarter of the constituent assembly seats were set aside for women, people with disabilities, youth, political leaders, members of the military and members of trade unions. The rest of the seats were determined by direct election.¹⁶²

This paper has already proposed that twenty percent of the seats on a constituent assembly should be reserved for Māori. Democracy does not mean that majority views must always prevail over minority views, nor that indigenous rights may be ignored simply because the indigenous people are a numerical minority.¹⁶³ Kymlicka argues that liberal democracies must respect certain specific groups' rights to rectify past injustices.¹⁶⁴ This paper has canvassed above that Māori have suffered injustices at the Crown's hand. Thus, it is both justified and important to commit to rectify those injustices and redress power imbalances to dismantle the possible colonial legacy of any future constitution-making process.¹⁶⁵ The representation of Māori collective voice is "seen as crucial if the constitution [is] to be tikanga and Tiriti-based".¹⁶⁶ Reserving seats for Māori would recognise their special position as tangata whenua.

Reserving seats for Māori in a constituent assembly may be politically controversial, and should be managed carefully to preserve race relations. Māori seats in Parliament continue to be a political issue. New Zealand First's Māori Affairs Policy is that Māori seats are tokenism and that Te Tiriti should not expand the separate rights of Māori.¹⁶⁷ Reserving seats for Maori could increase racial tensions. In 1992 Sir Geoffrey Palmer noted that "[d]isguised racial prejudice is never far from the surface in New Zealand" in debate on

¹⁶⁰ Andrew Reynolds "Reserved Seats in National Legislatures: A Research Note" (2005) 30 Leg Stud Q 301 at 305. See also Belgian Senate "The composition of the Senate" (2017) <www.senate.be>.

¹⁶¹ Reynolds "Reserved Seats in National Legislatures", above n 160, at 309.

¹⁶² Blount, above n 12, at 42.

¹⁶³ Sullivan "Minority Indigenous Representation", above n 34, at 256–259.

¹⁶⁴ Will Kymlicka *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, New York, 1995) at 68.

¹⁶⁵ For further reading, see Harris *New Zealand Project*, above n 118, ch 5.

¹⁶⁶ *Matike Mai Aotearoa*, above n 3, at 93.

¹⁶⁷ New Zealand First "Policies: Maori Affairs" (2017) <www.nzfirst.org.nz>; see also Anna Bracewell-Worrall and Jenna Lynch "NZ First promises referendum on Māori seats, reducing Parliament to 100 seats" *Newshub* (online ed, New Zealand, 16 July 2017) <www.newshub.co.nz>.

Māori matters.¹⁶⁸ However, twenty-five years later, as historic Treaty settlements are close to being finalised, and with a radically changed ethnic demography, that racial prejudice may have diminished.

Finally, as proposed above,¹⁶⁹ some seats should be reserved for politicians. Despite the constituent assembly being non-partisan, inclusion of political elites is necessary for buy-in throughout the process to enhance likelihood of enactment by Parliament. This paper proposes that ten per cent of the constituent assembly seats should be reserved for politicians. This would be enough to give perspective on workability, create buy-in, and decrease risks of elite domination of the assembly. There are different options for deciding which political interests should be represented. One option is to divide the reserved seats based on current levels of proportional representation in Parliament. Such a method of appointing politicians reflects the peoples' choice of law-makers but could be problematic because it crystallises one political moment. There may also be differences between ordinary and constitutional politics that mean people may choose different representatives if doing so for a constituent assembly rather than for Parliament. The better option may be to appoint the Justice and Electoral Select Committee to the constituent assembly. This option would represent a balance of political parties, with a majority of members from the Government. While it would also crystallise a particular political moment, it would probably be as acceptable way as any for choosing which politicians should be represented on the constituent assembly.

(b) As to the remainder of the seats: random selection

Seventy per cent of seats on the constituent assembly remain to be filled. Random selection based on statistical representation is a better mechanism than elections to select delegates for a constituent assembly because it better advances the normative reasons for inclusive constitution-making. Random selection is sufficient to represent the traditionally marginalised voices that are important in constitution-making; reserving seats is not necessary to meet that goal. Unlike selecting delegates to represent Māori interests as *tangata whenua*, which requires consideration of the delegate's mandate to represent Māori, any randomly selected minority representative provides cognitive diversity and enhances the assembly's deliberative potential.

¹⁶⁸ Palmer *New Zealand's Constitution in Crisis*, above n 115, at 74.

¹⁶⁹ See Part III(C)(3).

The starting point of categorising people for random selection in New Zealand could be to follow Iceland and Ireland in categorisations based on age, gender and geography. As outlined above,¹⁷⁰ it is important to include young people in a constituent assembly. Usually, participants are selected from the electoral roll, which only includes people aged over 18 years. However, there is good argument that citizens as young as 16 should be able to vote (and the corollary that they should be able to be selected for a constituent assembly). A lowered voting age would help to ingrain a culture of youth voting and work against youth political apathy.¹⁷¹ Equal representation of women is important for democratic legitimacy as women comprise half of the population. Geographic representation is also important in New Zealand: we rely on primary industries as a major part of our economy; Auckland is a super-city and has one quarter of the national population; and Māori identity stems from whakapapa, which also connects people with the whenua. Lastly, ethnic representation will also be important to reflect New Zealand's cultural and ethnic diversity and growing ethnic-Asian population groups. While adding more categories of statistical representation makes the selection process less random, this proposed process still upholds democratic legitimacy in the sense that every person on the electoral roll has the opportunity to be selected.

(c) Potential criticisms of this model

This model could be criticised as undermining constituent power. In theory, the constituent power exists outside the existing legal structures and therefore is unconstrained. Reserved seats would constrain how the constituent power organises itself. Nevertheless, reserved seats can be justified to enable effective participation and representation of those affected by the decision, which is essential for democratic legitimacy.¹⁷²

This model could be further criticised as lacking accountability because the public cannot remove delegates. However, the fact that a constituent assembly is one-off and its members not subject to election (or re-election) does not make them unaccountable. Importantly, the constituent assembly wants the citizenry to accept their proposed constitution in the ultimate referendum,¹⁷³ and so will necessarily be responsive to the citizen's views as

¹⁷⁰ See Part IV(C)(2).

¹⁷¹ See Jimmy Ellingham "Lowering the voting age to 16 must happen soon" *Stuff* (online ed, New Zealand, 10 March 2017) <www.stuff.co.nz>; Saeran Maniparathy "Voting age may be lowered" *Salient* (online ed, Wellington, 13 March 2017) <<http://salient.org.nz>>.

¹⁷² Orsman, above n 87, at 352.

¹⁷³ Colón-Ríos, above n 12, at 30.

expressed in the open drafting and consultation phases. Moreover, transparent processes can be used as an alternative method of ensuring accountability.

Finally, the hybrid model's reservation of seats for Maori could be politically controversial and could bring racial tension to light. Even if there is underlying racial tension and despite a potential to polarise social groups, participatory constitution-making has been used successfully in post-conflict societies as a means of mediating racial or ethnic tensions. Wallis argues that we should accept that citizen voices may be contradictory, however, the important part of the process is that all voices are heard and that all feel that their concerns were considered.¹⁷⁴ Reserving seats has been shown to reduce group alienation. In South Africa, descriptive representation of minorities in the constitution-making process helped to reduce violence and enhance social cohesion.¹⁷⁵ In the Ugandan experience, the hybrid model led to high levels of public support for the constitution.¹⁷⁶ Wallis writes that engaging with local voices through a constituent process can “de-imperialise” constitution-making.¹⁷⁷ Therefore, even if reserving Maori seats in a constituent assembly highlights political division, a deliberative constituent process goes some way to ultimately reducing it.

V Public Oversight: Transparency and Consultation

Public oversight is achieved through transparency and by consultation. Transparency is important because it leads to better deliberation—one of the normative foundations of inclusive constitution-making.¹⁷⁸ Consultation enables all citizens' participation in constitution-making. Public oversight is essential for democratic legitimacy because it allows citizens to be political equals by giving all people the opportunity to engage with the process.¹⁷⁹

A Iceland

Overall, Iceland is an example of highly successful public oversight of the constitution-making process. Iceland's political revolution stemmed from a strong desire to end political

¹⁷⁴ Joanne Wallis *Constitution-Making During State Building* (Cambridge University Press, Cambridge, 2014) at 38.

¹⁷⁵ Reynolds, above n 160, at 302.

¹⁷⁶ Blount, above n 12, at 42.

¹⁷⁷ Wallis *Constitution-Making During State Building*, above n 174, at 39.

¹⁷⁸ Suteu, above n 23, at 275.

¹⁷⁹ See general discussion of democratic legitimacy as political equality in Zurn “Judicial Review, Constitutional Juries and Civic Constitutional Fora”, above n 36, at 67 and 80.

secrecy. Transparency was therefore a key goal in constitution-making.¹⁸⁰ This goal was achieved through upstream value-setting in National Fora and through the openness of the Council's drafting process. The Council engaged in an iterative drafting process. Each iteration was published online and developed further, in accordance with public input. This created a unique feedback loop between the drafters, representatives of the constituent power, and the large body of people that comprised the constituent power. Additionally, the Council held open meetings which were live-streamed online. Transcripts of those meetings were published online. The least open procedural aspect was that minutes of the Council's sub-group meetings were published, rather than transcripts. Presumably this was done to enable free deliberation among the group. This transparent and largely open process successfully allowed greater public input into the draft text. For example, the proposal for the right to the internet came from the crowdsourcing process.¹⁸¹ The high level of public oversight hypothetically gave every person an equal opportunity to engage with the constitution-making process.

Nevertheless, the Supreme Court's annulment of the election of Council members has been criticised as excluding public oversight at a critical point.¹⁸² Notwithstanding the Supreme Court decision, the Althingi appointed those would-be elected delegates to a new drafting body. The public did not determine what should happen after the election was annulled and the decision-making process has been criticised as lacking public oversight on this basis. This concern may be overstated. Despite the procedural failure, the substantive outcome was the same as all people elected to the first body were then appointed to the new drafting body.

B Ireland

Transparency lessons from the Irish experience relate to procedural design. The biggest critique of the Convention was that the exercise of its open-ended mandate was not transparent. While the Convention did actively garner public input about possible reform issues, there were no clearly outlined criteria by which public submissions would be judged.¹⁸³ The Convention selected only two further issues in its exercise of its open-ended mandate: Parliamentary reform and socio-economic rights. Socio-economic rights were not

¹⁸⁰ Landemore, above n 11, at 180; Oddsdottir, above n 39, at 1210.

¹⁸¹ Landemore, above n 11, at 180. See Stjórnlagaráð, a Constitutional Council "A Proposal for a new Constitution for the Republic of Iceland" (2012) <www.stjornlagard.is>, art 14.

¹⁸² Landemore, above n 11, at 186.

¹⁸³ Carolan, above n 21, at 744. See also An Coinbhinsiún ar an mBunreacht/The Convention on the Constitution "Ninth Report of the Convention on the Constitution: Conclusions and final recommendations" (March 2014).

the most common issue raised in public submissions and they featured more prominently in specific civil society groups' submissions than in other submissions. The Convention's choice of socio-economic rights was criticised as possibly biased because the Convention chairperson previously headed an organisation in this sector of civil society.¹⁸⁴ Ultimately, the "inequality of access and influence of the Convention's agenda" stemming from its lack of transparency was criticised as significantly undermining "its descriptive and deliberative legitimacy".¹⁸⁵

Despite the early lack of transparency around the formation of the Convention and its agenda-setting, the latter stages of Ireland's constitution-making process were transparent. The Convention's meetings were streamed online and minutes were published on the Convention's website. The Convention's delegates travelled throughout Ireland, much like the roadshow consultation sometimes undertaken by New Zealand select committees.¹⁸⁶ The Convention sought public submissions on the substantive content of its recommendations and published them on its website. The Convention's final recommendations recorded summaries of the expert testimony and submissions received by the Convention, voting records, and reasons for the Convention's recommendation on each issue.¹⁸⁷ Publishing this information in the final recommendations as well as publishing all submissions online enhanced public oversight of the Convention's decision-making process.

C New Zealand

Transparency or open government has been a constitutional principle in New Zealand at least since the 1980s and is recognised as such by all three branches of government.¹⁸⁸ New Zealand has been successful in implementing this principle and is one of the least corrupt countries in the world.¹⁸⁹ This bodes well for a highly transparent inclusive constitution-making process. If New Zealand is to reap the benefits of inclusive constitution-making, we can learn from Iceland and Ireland about the necessity of transparency in constitutional

¹⁸⁴ Carolan, above n 21, at 744.

¹⁸⁵ Carolan, above n 21, at 745.

¹⁸⁶ For example, the Health Select Committee Enquiry into Euthanasia/Voluntary Assisted Suicide, and the Foreign Affairs, Defence and Trade Select Committee on the Trans-Pacific Partnership Agreement.

¹⁸⁷ Čolić *Constitutional Reform in Ireland*, above n 65, at 28–29.

¹⁸⁸ See Kenneth Keith "New Zealand's Constitution: Is it Brilliant or Odd?" in Geoffrey Palmer (ed) *Reflections on the New Zealand Law Commission* (LexisNexis, Wellington, 2007) at 44. See also Official Information Act 1982, s 5.

¹⁸⁹ Transparency International New Zealand "Corruption Perceptions Index" (2017) <www.transparency.org.nz/>.

design. The process should be clear from the outset and agreed to by key actors. The following questions remain to be considered in the New Zealand context:

- How do we determine the constituent assembly's mandate?
- What is the best approach to consultation?
- What is the role of the internet? What is the role of the media? What forums should we use for consultation and transparency?

1 Mandate

New Zealand is unlikely to face the mandate problem that Ireland experienced if it undertakes a broad constitution-making process rather than a disaggregated piecemeal approach to constitutional reform. A New Zealand constituent assembly should be left open to revise and re-shape our constitutional arrangements in any way that it sees fit. A New Zealand constituent assembly should not be limited as to topics under consideration (more like the Icelandic Council than the Irish Convention). This is closer to the exercise of true constituent power. A further reason for a broad constitution-making process in New Zealand stems from the unwritten nature of our existing constitutional arrangements. In Ireland, the Government determined the Convention's terms of reference. In contrast to Ireland, New Zealand's constitutional arrangements are unwritten, flexible, and largely unknown by the public. Having the constituted powers (whether Government or Parliament) determine a constituent assembly's terms of reference in the New Zealand context would be unacceptable because it would give the constituted power too large a role in shaping the constitution-making process and thus undermine democratic openness and participation.

2 The political approach to consultation

Blount identifies two approaches to consultation: technical and political.¹⁹⁰ An example of technical consultation is *Constitution Aotearoa*, whereby public feedback is sought on an elite draft. However, technical consultation lends itself more to the risk that consultation is not meaningful. It has potential to be more focussed on educating the public or on gathering conclusions rather than the underlying reasons for those conclusions. The resulting consultation may not substantively inform the experts' views. In contrast, political consultation is more likely to take citizen input seriously, partially because the drafters lack elite expertise and therefore need broad public input to inform their deliberations. The benefit of political consultation is that it involves information gathering as well as information dissemination. The danger of political consultation is that the constituent

¹⁹⁰ Blount, above n 12, at 46–47.

assembly may prefer the deliberative compromises they reach over suggestions made by the public. It will be important in New Zealand's inclusive constitution-making journey to gather information from the public to inform the constituent assembly's deliberations, as well as engage in civic education.

3 *Digital democracy*

Digital democracy is one way to increase public oversight of the political process. Different methods exist for public input into and oversight of a constitution-making process. The most foundational level is civic education so that citizens understand the decision-making processes and know how to hold decision-makers accountable. As used in Iceland, value-based forums are a good mechanism for upstream public consultation. Websites are widely used for education, consultation and transparency. Apps are becoming more prominent in civic education and consultation. Facebook Live, alongside radio and television, are used for transparency. Online voting could be used for a ratification referendum. This paper will now assess the seriousness of concerns regarding digital democracy before considering its benefits and how it could be employed in New Zealand.

(a) Concerns

There are some valid concerns about the use of digital platforms in political (and constitutional) processes. First, social media can insulate users and surround them with their own world view. This is dangerous because it reduces the likelihood of transforming user's views and undermines deliberative potential in the public arena. This was evident in the 2016 United States Presidential election in which social media algorithms created echo chambers by feeding back to the user ideas with which they already engaged.¹⁹¹ This concern cannot easily be mitigated but can be balanced by using other forms of digital media alongside social media to educate the public and elicit engagement.

Second, online engagement may lead to discrete submissions but does not necessarily facilitate deliberation. Either submissions are made directly on the website or comments are made on social media. Comments on social media can easily lead to aggregated views, as more people "like" certain comments. Moreover, the more "liked" comments are elevated in prominence and comments not so widely supported can easily be lost in the multitudes of comments. Social media also tends to lead to debate based on pre-determined positions rather than open-minded discussion of views. This concern is valid but may not

¹⁹¹ Alex Hern "How social media filter bubbles and algorithms influence the election" *The Guardian* (online ed, United Kingdom, 22 May 2017) <www.theguardian.com>.

be too detrimental for inclusive constitution-making. One of the main purposes of having a representative body is that it can deliberate after hearing as many views as possible. Participation at the macro-level, as between citizens, may be enough, provided that the micro-level, the constituent assembly, engages in deliberative practices. Institutionalised deliberation at the macro-level is probably too impractical, unless we were to have something like a “Deliberation Day” public holiday, as proposed by Ackerman and Fishkin.¹⁹² Of course, the public could deliberate through non-digital democracy, such as by engaging in public debates in public venues, before making submissions. Here, the distinction between normative justifications for inclusive constitution-making is important. Democratic legitimacy is achieved by all people affected by the decision having an equal opportunity to participate in it. Deliberation is achieved by the constituent assembly having cognitive diversity and by delegates transforming their views. It is acceptable that online engagement may not lead to deliberation if it still upholds democratic legitimacy by enabling more people to participate.

A third concern stems from the sheer amount of engagement that online forums can elicit. More submissions may lead to a wider variety of views being expressed, which in turn may involve broader or more extensive negotiations within the constituent assembly. While worthwhile from a deliberative perspective, more input can be an administrative burden. Unless the constituent assembly has sufficient time to address all views raised, their drafting may not fully reflect the public’s comments.¹⁹³ In South Africa, the constituent assembly received over two million submissions.¹⁹⁴ In Brazil, consultation was so widely undertaken that it was inefficient.¹⁹⁵ New Zealand’s constituent assembly is unlikely to have the scale problem that South Africa or Brazil did, given our small size. Moreover, provided the constituent assembly has sufficient time and access to experts to help with technical details and to ensure consistency, this concern can be mitigated.

Furthermore, technology may not deliver on its promise to ensure that the voices of traditionally underrepresented groups (for example, youth) are heard. Iceland’s experience demonstrated that traditionally side-lined groups did not engage online in greater proportions than offline. In Iceland, most commentators who utilised technology were

¹⁹² Ackerman and Fishkin *Deliberation Day*, above n 155, at 3.

¹⁹³ Blount, above n 12, at 40.

¹⁹⁴ Saunders, above n 2, at 8.

¹⁹⁵ Blount, above n 12, at 47.

between 40 and 65 years of age. Men comprised 77 per cent of the online submissions, women comprised 13 per cent and organisations comprised 10 per cent.¹⁹⁶

Finally, New Zealand may lack technological capacity for widespread digital democracy. Data from the 2012 census showed that only 80% of households in New Zealand had some form of internet connection.¹⁹⁷ The World Internet Project New Zealand and the Auckland University of Technology research the internet behaviour of New Zealanders. Of the 1377 participants they surveyed in 2015, 91 per cent were “active internet users”.¹⁹⁸ That study found that non-users tend to be older and have lower income.¹⁹⁹ Reasons for not using the internet included lack of interest or perceived uselessness, lack of knowledge how to use it, lack of device, lack of internet connection, and cost.²⁰⁰ This is a concern because we cannot rely on technology to reach the constituent power if we lack technological capacity to do so as a country.

(b) Proposals for New Zealand

Digital platforms are most useful at the upstream public input and drafting (consultation) stages of constitution-making.²⁰¹ We should aim to use technology to educate and elicit general political will as part of the upstream process as well as to engage citizens in consultation throughout the drafting stage. This was achieved in Iceland, where the crowdsourced drafting process transitioned into “an exercise in open democracy and transparency”.²⁰²

Some local governments regularly use digital engagement tools in the pre-engagement phase to involve the public in design and value-setting.²⁰³ Additionally, online pre-election engagement can serve as a model for upstream public input. Some political tools voters

¹⁹⁶ Oddsdottir, above n 39, at 1216–1217.

¹⁹⁷ Stats NZ/Tatauranga Aotearoa “Household Use of Information and Communication Technology: 2012” (22 April 2013) <www.stats.govt.nz>.

¹⁹⁸ Charles Crothers, Philippa Smith, Poutasi Urale and Allan Bell *The Internet in New Zealand in 2015* (Auckland University of Technology, April 2016) at 2.

¹⁹⁹ Crothers, Smith, Urale and Bell *The Internet in New Zealand in 2015*, above n 198, at 35.

²⁰⁰ Crothers, Smith, Urale and Bell, above n 198, at 37.

²⁰¹ See discussion in Part II(B).

²⁰² Bjarki Valtýsson “Democracy in Disguise: The Use of Social Media in Reviewing the Icelandic Constitution” (2014) 36 *Media, Culture & Socy* 52 at 63.

²⁰³ Ruth Lepa “Innovations in digital engagement” *NZ Local Government Magazine* (online ed, Wellington, 10 July 2017) <localgovernmentmag.co.nz>.

could use to determine who they should vote for in the 2017 General Election include “On The Fence” and “Policy”.²⁰⁴ Rather than tools which simply place voters on a “compass” or equivalent, these tools centred on users’ views on policy. This is beneficial because it explores reasons rather than conclusions and thus facilitates deliberation. On The Fence uses a non-binary sliding scale and gets users to state their views on certain issues, for example, how much should tertiary education be government funded versus self-funded? At the end, the user’s results are mapped out and compared to each party’s stance on each question. Policy presents users with each party’s policies on a particular issue and accumulates a list of their “favourited” policies to present the user with a proportional analysis of the parties backing the user’s favourite policies.

An important part of this proposed constituent assembly is that delegates are non-partisan. Online engagement tools could be adapted to uphold this goal. For example, On the Fence could be adapted to measure users’ views on constitutional values. The disadvantage of such a proposal is that experts would probably set the sliding scale and that brings risks of manipulation by elites (possibly more fatal at the value-setting stage than any other stage) and undermines public ownership of the process. This tool may be better used after citizen-led value-setting forums have been held to get more public input into the forum’s proposals.

Online consultation could take many forms, such as the methods currently used by select committees,²⁰⁵ by the authors of *Constitution Aotearoa*,²⁰⁶ and the Law Commission in their DNA in Criminal Proceedings Project.²⁰⁷ In summary, these online consultation methods include an option to request appearing before the select committee; video and textual information to inform the user before asking for their views; linked pages between related issues; and the option to make a submission on the spot or upload a prepared one. Each method would also be useful in constitution-making. Additionally, equivalent tools to Policy or On the Fence could be specifically designed for input into drafting. Policy could be adopted to determine levels of public support for different options proposed by the constituent assembly (rather than different political policies in the ordinary political election). These more traditional online submissions and data gathering from tools similar

²⁰⁴ Design+Democracy Project and Springload “On The Fence” (2017) <www.onthefence.co.nz>; The Spinoff “Policy: Election 2017” (2017) <<https://policy.thespinoﬀ.co.nz>>.

²⁰⁵ New Zealand Parliament/Pāremata Aotearoa “Make a submission” (2017) <www.parliament.nz>.

²⁰⁶ A Constitution for Aotearoa New Zealand “Feedback” (September 2016) <<https://constitutionaotearoa.org.nz>>.

²⁰⁷ New Zealand Law Commission/Te Aka Matua o Te Ture “DNA and Crime” (2017) <<https://dnareview.lawcom.govt.nz>>.

to On the Fence and Policy could be used as a means of consultation by the constituent assembly on their draft reports (if New Zealand were to undertake an iterative process in the way Iceland did).

The intended impact of consultation should be clear for members of the public from the outset. This was critiqued in Ireland where the Convention was not initially transparent about determining its open-ended mandate.²⁰⁸ A constituent assembly cannot make any promises about what they will do with the submissions. Ideally, they will honour their people-bestowed power and the submissions will influence the proposals. However, prescribing that in advance at more than a principled level would be an undue limit on the constituent assembly and an unknowable burden before submissions were even made.

Finally, digital democracy should be used to enhance transparency. New Zealand should follow Iceland and Ireland's lead in publishing all submissions online, something that New Zealand select committees already do. Similarly, the constituent assembly's meetings could be live-streamed online and minutes published.

4 Non-digital mechanisms of democracy

Digital democracy does not mean other methods of consultation and transparency can be ignored. Ignoring traditional forms of public oversight may alienate some citizens, either because they might lack computer literacy or access to the internet. The South African constitution-making process in the 1990s provides a comprehensive example of non-online engagement.²⁰⁹ For example, a radio channel was created and it reached around 10 million listeners. Educative advertisements were published on bus stops. The same should happen in New Zealand. Further, public roadshows will be important because some rural communities remain relatively isolated and it can be unaffordable and impractical to travel to a major city just for constitutional consultation. The Independent Working Group has already demonstrated both the scale and value of the work, through the 252 hui held across the nation as part of their consultation.²¹⁰

Both digital and non-digital platforms should be used and neither can be ignored. Technology remains a very useful source of widespread engagement and consultation and

²⁰⁸ Suteu, above n 23, at 276.

²⁰⁹ For a comprehensive analysis of participation in South Africa's constitution-making experience see Heinz Klug "Participating in the Design: Constitution-Making in South Africa" (1996) 3 Rev Const Stud 18.

²¹⁰ *Matike Mai Aotearoa*, above n 3, at 7.

we are now in the age where online engagement is expected, as demonstrated in party leaders' use of Facebook Live videos during the general election so that people watching from home can ask questions in real-time.

VI Conclusion and Summary of Recommendations

New Zealand's constitutional journey has been revived by three expert-led constitutional dialogues which included substantial attempts to involve the public. Our future constitutional journey must be inclusive—the people should have ownership of important parts of the process, there should be a citizen-led representative drafting body, and there should be public oversight to ensure transparency and provide for meaningful consultation. We can learn from recent inclusive constitution-making experiences in Iceland and Ireland about successes and failures of inclusive processes.

This paper has examined the main lessons for New Zealand as to the procedural design of any future constitution-making process. In summary:

- The process should uphold democratic legitimacy and facilitate deliberation.
- Democratic legitimacy requires that the constitution-drafting body be comprised of citizens rather than experts. Experts best serve to advise the body and educate the public.
- Politicians should be strategically included in the constitution-drafting body. Alienating politicians may potentially lead to the text not being enacted.
- Both Parliament and the people (via a referendum) should ratify the text. There should be two peoples' referenda—one for the Māori electoral roll and one for the general electoral roll.
- Constitutional apathy will need to be reduced before any inclusive constitution-making process can really begin. This is currently our biggest hurdle.
- Representation of Māori is one of the most significant issues because it is part of the necessary task of decolonising New Zealand and respecting the place of Māori as the indigenous people of Aotearoa.
- The tangata whenua-tangata tiriti relationship is the most important relationship in constitution-making because it reflects the constituent power. Constitutional relations with Māori must preserve independence and autonomy (te tino rangitiratanga) while facilitating interdependence between Māori and tangata tiriti.
- A constituent assembly, separate from existing constituted institutions, should draft the constitution.

- There should be a hybrid method of choosing representatives for the constituent assembly. Twenty per cent of the seats should be reserved for Māori (who will themselves decide how to appoint these positions). Ten per cent of the seats should be reserved for politicians on the Justice and Electorate Select Committee, to secure buy-in from political elites. The remaining seventy per cent of seats should be filled by random selection to achieve statistical representation mirroring the current New Zealand demography, based on categories of gender, age, geographic location and ethnicity. This process should be overseen by an independent body, perhaps the Electoral Commission or Statistics New Zealand and mathematical expertise should be sought.
- Delegates on the constituent assembly should be non-partisan (with the necessary exception of politicians).
- New Zealand should continue to cultivate transparent governance in a constitution-making process.
- Digital platforms should be utilised to ensure transparency and elicit public consultation. Other more traditional types of consultation such as radio debates and roadshows to rural places should not be ignored.

A focus on these applied lessons will guide New Zealand's constitutional journey to uphold democratic legitimacy and enhance deliberation in an inclusive constitution-making process.

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