6. Constrained Parliamentarism: Australia and New Zealand compared[1]

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Introduction

It has been an eternal quest to limit the powers of the executive. In the 'new Westminsters'[2] of the Commonwealth, the Montesquieuan model of separation of powers was theoretically influential and yet practically avoided, as in the UK. Aside from the US and Westminster models, Bruce Ackerman has argued of a third model of democratic governance in the wake of the Second World War: constrained parliamentarism. This model sits between the presidentialist American form of Montesquieu and the parliamentary sovereignty that affords the British executive a near elective dictatorship. Constrained parliamentarism 'rejects the US separation between executive and legislature and grants broad powers to the governmental coalition that gains parliamentary support. It rejects Westminster by insulating sensitive functions from political control' (Ackerman 2007). This framework of Ackerman's has mainly been confined to public law scholars.[3] Applying this model to the field of comparative politics, Power has examined this both theoretically and through the example of Australia (Power 2010, 2012), which placed the earlier writings of Ackerman (2000) at its centre. Recently, we have also used this approach on New Zealand (Kumarasingham and Power 2013). In the penultimate section of this chapter, we briefly consider the reasons why we — unlike virtually all other students of comparative governance — have found Ackerman so central. This consideration may open some new perspectives on comparative studies of regimes. According to Ackerman, there are 'three legitimating ideals' informing his approach to constrained parliamentarism:

> The first ideal is democracy. In one way or another, separation [of branches of governance] may serve (or hinder) the project of popular self-government. The second ideal is professional competence. Democratic laws

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1   The New Zealand sections of this chapter are drawn from our article, Kumarasingham and Power 2013.
2   This term was used by Kumarasingham 2010a and 2013 to describe states that had taken the Westminster system and adapted it from Britain.
3   A recent examination found that all but four of 69 references to the Ackerman essay were in law journals.

remain purely symbolic unless courts and bureaucracies can implement them in a relatively impartial way. The third ideal is the protection and enhancement of fundamental rights (Ackerman 2000, p. 640)

Ackerman then goes on to consider a number of institutional specifics that he contended best furthered these legitimating ideals; eight were already in existence in some regimes around the world.

In seeking to employ this framework in the development of a theory of fiducial governance, Power has adapted and modified it. In particular, he has shaped a different approach to strategic constitutional reform issues. In this chapter, we step back to consider an important question in the comparative study of governance: the assessment of the regimes of Australia and New Zealand in the context of the original Ackerman framework. For our project, it is important to ask which of these regimes conforms more closely to the ideals of constrained parliamentarism?

Australia and New Zealand compared

Australia and New Zealand, in creating their own states, evoked Britain and transplanted the system they knew best: the Westminster System (Patapan, Wanna and Weller 2005). This legacy was critical for executive power. The legacy of Royal Prerogatives travelled to the Antipodes also for the use of the local executive. Power became just as centralised as Westminster with few institutional restraints and the focus clearly on the executive. Dissipation of power was neither sought nor encouraged.

> Royal tradition helps to explain other characteristics. It is hierarchical; participants look to the leadership for guidance and assume a degree of authority: not quite the Stuart version of divine right, but sometimes a level of obeisance that comes close. Prime ministers can appoint; prime ministers can fire. Power is centralised; it may have moved from the monarch to the prime minister or cabinet, but power-sharing comes hard even within the traditions of collective government (Rhodes, Wanna and Weller 2009, p. 49).

This bequest meant that in new Westminsters such as Australia and New Zealand, there was a 'legacy of vague accountabilities and fertile ground for Executive dominance' (Kumarasingham 2013). Australasian adaptions also meant both states are distinct not only from Britain, but from each other. However, New Zealand and Australia have enough resemblances at the executive level of the 'first among equals' variety perennially to draw attention to the substantial powers of the centre operating in a well-established parliamentary environment. In the

Westminster tradition, conventions surround these executives with flexibility and opacity, which promotes expectations and evasions of how power should and should not be used. It is in this context that we compare and assess these two Australasian countries.

With the the six features shared by the two regimes shown first, the eight enacted institutional specifics identified by Ackerman are:

- parliamentary democracy;
- professional public service;
- independent judiciary;
- securing human rights;
- integrity of major institutions;
- serial referenda;
- federal structure; and
- strong upper house.

On any mechanistic assessment, Australia would clearly conform more closely to the constrained parliamentarism institutional specifics, for it has a federal system, and most of its jurisdictions possess bicameral legislatures. However — and the raising of this question challenges one of the key premises of the Ackerman approach — does this mean that the legitimating ideals are therefore more fully realised in Australia than in New Zealand? Whatever our answer to this first question, we go on at the end of this chapter to consider the use of the modified Ackerman framework for the comparative study of governance regimes. We do this by comparing it with the very different framework proposed by the Canadian scholar Alan Siaroff, in his impressive work, *Comparing Political Regimes* (2009).

In approaching these questions, we shall naturally build on the work already done on Australia. In particular, we shall rely on Power's use of the recent work of Sawer et al., *Australia: The state of democracy* (2009), for on most of the Ackerman specifics they provide instructive assessments of the strengths and weaknesses of the Australian regime. In what follows, we shall provide summaries of the treatment of each of the eight institutional specifics in the Power monograph. As we proceed down the list, we shall make some comparisons with the New Zealand experience on each institutional specific.

Parliamentary democracy

Reviewing the comprehensive listings by Sawer et al. of the 27 strengths and 32 weaknesses of the Australian system, Power has focused on the ways in which long-established interests have continued to be still largely unchallenged. He

attributed this dominance primarily to the heavy constraints imposed by the nation's constitution. In contrast, governing elites in New Zealand have been less heavily constrained in adapting to changing times. Thus there has been, in recent years, much stronger representation of women in Parliament in New Zealand than in Australia (Siaroff 2009, p. 165), and indigenous minorities have also enjoyed stronger representation. One important benchmark for estimating the strength of the legislature is the relative strength of its committee systems (Halligan, Miller and Power 2007). While in recent years there has been a considerable strengthening of the influence of committees in the Australian Parliament, the influence of their New Zealand counterparts remains stronger.

New Zealand's adoption of the mixed member proportional (MMP) electoral system in time for the 1996 general election changed the nature of its democracy. The two-party system and with it the majoritarian manner of politics, which had been the mainstay of much of modern New Zealand politics, was replaced by a proportional system that emphasised representation and multiparty coalition. MMP ushered in new conventions of democracy (Palmer and Palmer 2004). Not only did new parties come into the Parliament, but also more women, Maori, ethnic groups and political viewpoints. After decades of one party cabinets, the governing elites had to contend with making coalition agreements beyond their party and often without pre-election agreements. However, the executive itself in 'its day-to-day functioning has changed relatively little', nor has MMP altered the principal fact that in New Zealand 'executive power is [still] concentrated in a Cabinet that is founded, in general, upon convention, not law' (Boston and Bullock 2009). Indeed, the Key Cabinets from 2008 to the present have been like the cabinets of first past the post (FPP) days in having only one party represented, since the support party ministers sit outside Cabinet. The multi-party governing arrangements that have characterised the post-FPP era, whether labelled or typified as coalitions or minority governments with outside support, has not altered the formal powers of the executive and MMP has not provided any new institutional constraints upon it. The New Zealand regime adopted the German MMP electoral system without importing the other aspects of German polity, which provide 'veto players' or constraints on the executive and institutions, such as its Constitutional Court, federal system, European Union, written constitution, and the Bundestag's power of 'constructive' votes of no-confidence (Helms 2000). New Zealand's institutional closet remains bare compared to the German constitutional structure whose electoral system it chose to emulate.

Professional public service

In attempting to explain the steady politicisation of Australian public services in recent decades, Power attributed considerable importance to the disappearance

of senior collegial bodies (such as public service boards). Without these traditionally important constraints, the offices of public service commissioners have been marginalised in modern managerialist times.

The public service reforms of the mid-1980s in New Zealand were arguably the most radical in the Commonwealth (Prebble 2010). Some of those reforms were the separation of the government's trading interests from its non-commercial activities (establishing state-owned enterprises, in sectors from rail to telecommunications, required to return dividends to the Crown), the restructuring of departments to a smaller, more market-orientated design where roles such as policy and operations were split, the introduction of output budgeting, and the reallocation of responsibility of employment decisions from a central public service commission to the heads of departments (now called chief executives). The chief executives themselves were now placed on short-term contracts and employed by the statutory State Services Commissioner, but were free to employ their own staff. These structural reforms have not been without controversy, with many public servants losing their jobs due to the restructuring and privatisation. However, most commentators contend that the public service is now 'more efficient and performance orientated'. Like Australia, the public service has been forced to surrender its monopoly of providing advice to ministers with use of consultants and advisors increasing by creating 'contestability in the market for policy advice' (Shaw 2006). These developments have caused one seasoned commentator to ask whether the public service is still capable of looking after the longer-term public interest (James 2009). Indeed, with the campaign to reduce public expenditure in the public services, there is a rumour that even the institution designed to represent and guard the interest of professional public service, the State Services Commission, could itself face abolition as some of its functions have already been transferred elsewhere (*Dominion Post*, 31 May 2011).

Independent judiciary

In the words of a former Chief Justice of the High Court (of Australia), the Court has 'an uneasy and ill-defined relationship with the other arms of government' (Mason in Patapan 2000, p. viii). The principal reason for this unsatisfactory state of affairs has been the court's clear recognition in recent years of the political dimension of much of its work. By discarding the apolitical mask, the Court has, of course, laid itself open to the claims of the underprivileged, as was most recently illustrated in the November 2010 decision (*Plaintiffs M61 and M69 of 2010 v Commonwealth of Australia*), which drove a large hole in the Commonwealth's border protection arrangements. (It is difficult to believe that the New Zealand judiciary would be so assertive vis-à-vis its political executive). The discarding of one orthodoxy has, however, not yet been followed by a

coherent statement of the nature and boundaries of the form of politics with which the judiciary is now grappling. In the absence of such an understanding, we find that some attorneys-general are now refusing to play the traditional roles of defenders of the judiciary when they face political attack.

New Zealand's judiciary also has a difficult relationship with the executive. In 2003, the government ended appeals to the London-based Privy Council without a referendum and established the Supreme Court as the highest appellate court. The government has openly quarrelled with the Supreme Court, especially over questions about Indigenous land rights and prison policy. In recent years the Supreme Court has consistently been told to 'stick to the bench'. New Zealand attorneys-general and other related ministers have openly criticised the judiciary in Parliament and the press. This was especially apparent with the controversy surrounding the *Seabed and Foreshore Act 2004* (Stockley 2006). As Chief Justice Dame Sian Elias recently commented, 'In New Zealand the independence of the judiciary from other sources of state power is fragile.' Unlike the UK, Canada and Australia, administrative autonomy is not held by the judges, but by the executive through the Ministry of Justice (Elias 2011).

Securing human rights

In Australia, as elsewhere in many regimes in the British Commonwealth (including the UK and New Zealand), discourse on this topic in recent years has been dominated by the 'charter' approach (for a recent important example, see Australian Human Rights Commission 2009). In regimes adopting this approach (which in Australia have included Victoria and the Australian Capital Territory), the ultimate formal sovereignty of the Parliament is not questioned. However, the judiciary is empowered to refer back to the Parliament and the government any conflicts it might perceive between statutorily recognised human rights, on the one hand, and measures in proposed legislation, on the other. In such cases, it is then up to the Parliament to determine what to do. One defect in all the current charter arrangements has been noted by Power (2010, pp. 39–40). Although they are all supposed to stimulate greater dialogue between the branches of government, there has been a lack of a suitable collegial body through which such dialogue could be conducted. The councils of state proposed by Power would supply such a suitable institutional site (Power 2010, pp. 52 ff.).

For New Zealand, the 1840 Treaty of Waitangi holds a central symbolic and political place in the human rights of the nation. This treaty between Maori and the Crown was initially viewed by a nineteenth-century Chief Justice as a 'simple nullity' and it is still denied general effect by a single statute and does not have any overriding effect. However, it has moral force and is given specific legal effect in particular pieces of legislation. The Treaty is also used

by the Waitangi Tribunal in its recommendations on claims against the Crown and to aid the interpretation of statutes in the courts. Former President of the Court of Appeal Lord Cooke of Thorndon ruled in 1993 that 'the Treaty created an enduring relationship of a fiduciary nature akin to partnership. Each party [Maori and Crown] accepting a positive duty to act in good faith, fairly, reasonably, and honourably towards each other'. Cooke referred to it as 'simply the most important document in New Zealand's history', a far cry from the opinions of his predecessors on the New Zealand bench. Though it is not entrenched, it is a strong influence and the 'Cabinet Manual' requires Cabinet papers to identify any implications of proposed policies in terms of the Treaty and executive proposals for legislation must demonstrate their consistency with Treaty principles (Palmer and Palmer 2004, pp. 336–348).

Along with the Treaty of Waitangi, New Zealand has placed high importance on human rights since it helped draft the UN Declaration on Human Rights in 1948. The human rights commissioners are appointed by the Governor-General on the advice of the Minister of Justice and report to the Prime Minister over New Zealand's compliance with international human rights legislation. The Human Rights Commission also monitors and makes inquiries into infringements of human rights and often makes public statements on such issues. New Zealand has always believed it has led the world in human rights, with its status as the first country to legislate for women to vote, the introduction of old age pensions in the 1890s, and, as a recent report made by New Zealand to the United Nations on Human Rights states, 'The idea that everyone deserves an equal opportunity in life — "a fair go" — is an important part of New Zealand's national identity and approach to human rights on the international stage' (New Zealand National Universal Periodic Review 2010).

Integrity of major institutions

The starting point for any discussion under this heading must be the important National Integrity Systems Assessment report, which has called for each Australian jurisdiction to create a 'non-partisan' governance review council to coordinate the activities of the several bodies now concerned with issues of institutional integrity. It has also stressed the need for these councils to gain 'institutional champions' (Griffith University Institute for Ethics, Governance and Law and Transparency International 2005, p. 61; see also Head et al. 2008), and it is hard to see how political leaders could not be prominent among these champions.

The obvious place to start a search for such champions is the list of institutions provided by the report's mapping exercise. Here we encounter a most surprising omission, for there is no acknowledgement of the integrity role that is being played, or could be played, by the head of state. Both former Governor-General

Paul Hasluck, who introduced important innovations in this area, and former Victorian Governor Richard McGarvie, who emerged a few years ago as the latest champion of the Hasluck approach (McGarvie 1999), are ignored.

New Zealand's 1982 *Official Information Act* has been successful in promoting transparency and availability of information from the bureaucracy. Indeed, New Zealand has the enviable title of being the least corrupt country in the world (Transparency International 2013) and its public service has high standards of political neutrality in the Westminster tradition. However, institutions that administer the country are often weak against the powers of the executive. New Zealand's compact and centralised institutions are dominated by the executive. The head of state, House of Representatives, judiciary and other limited state institutions are either unable or unwilling to provide strong scrutiny of the executive. This has been shown throughout New Zealand history.

This occasionally elicits concern, with examples such as the *Environment Act* passed in May 2010, which sacked elected Environment Canterbury councillors and replaced them with government-appointed ones and delayed new elections until at least 2013 (*The Press*, 30 March 2010), or the September 2010 *Canterbury Earthquake Response and Recovery Act* which in the wake of earthquakes in the region gave the executive massive power to intervene by Order-in-Council, which cannot be challenged by the courts (New Zealand Law Society 2010). However, as part of the 2008 Confidence and Supply Agreement between the Maori and National parties, these actors have recently begun moves to establish a framework for the 'Consideration of Constitutional Issues' to examine New Zealand's constitutional arrangements, especially concerning the Treaty of Waitangi (Office of the Deputy Prime Minister of New Zealand 2010). How much this makes any progress for constitutional analysis or reform remains to be seen as the 2004–05 all party Constitutional Arrangements Committee had a similar brief, but achieved little.

Referenda

The Australian Constitution has proven extremely difficult to change, with only eight proposals (of 44) being approved in referenda during more than a century. It is now more than a decade since any referendum was put to the people. Australia is thus far away from Ackerman's preferred state — where the citizenry would regularly be accorded the opportunity to vote on major issues. Few commentators have considered the possibility that it has been the party system that has been responsible for many of the negative votes. While it has been widely recognised that bipartisan agreement has been a necessary prerequisite for success, few have pondered the implications of the observation of former Prime Minister John Howard that often even the securing of such

agreement might be counterproductive, in that the citizenry might have well-founded suspicions that anything that the major parties agreed on might well serve their shared interests rather than the public interest. Clearly, any reforms that improved the fiducial standing of the party system could improve the chances of referendum success, as would regular referendum experience for the citizenry.

Constitutional change in New Zealand is easier than overseas and has far fewer hurdles to surmount than Australia. However, this has not meant that referenda have been carriers of change to the New Zealand regime. Indeed, with the very notable exception of MMP, all the major constitutional changes to New Zealand's regime over the past 60 years have been delivered by the governing elite to the people without referenda. Referenda have been sporadic in New Zealand. Part of the reason for this is that unlike Australia, for example, there is no requirement to hold referenda on particular issues. Since 1993, New Zealanders have been able to initiate their own referenda and there have been almost 40 such citizen-initiated petitions. However, a successful petition needs the signatures of 10 per cent of the electorate, and only three petitions have satisfied this requirement and come to vote. In conjunction with the November 2011 general election, the New Zealand electorate was asked in a referendum whether to retain MMP. Almost 58 per cent of the voters favoured the retention of MMP. As stipulated by the *Electoral Referendum Act* (2010), the Electoral Commission held its own independent review of MMP. However, this review's findings, presented in October 2012, predictably did not advocate major institutional reforms, but instead provided suggestions for technical changes within the existing institutional framework (New Zealand Electoral Commission 2012).

Federal structure

The most recent review of the condition of Australian federalism (Fenna 2009, p. 155) concluded that there was little compelling reason to support the continuation of the system, for there 'has been the apparent absence of any sociological basis for divided jurisdiction in this country'. It could be, however, that there are other reasons — such as improvement in the quality of governance through a regime of serial referenda — that could still be persuasive. The best of the students of modern Australian federalism, Brian Galligan, has attempted to show how strong popular involvement has imparted republican legitimacy to the system.

Galligan searchingly uncovered and criticised a number of the premises that had long dominated thinking about the Australian constitutional system. His great accomplishment is to demonstrate that all the various proponents of responsible government have paid insufficient attention to the considerable constraints that have been placed on all our governments and their constituent branches

by our federal constitutional framework. These constraints are, in Galligan's view (1995, p. 14), appropriate and legitimate, because federation entailed a 'transformative act of the Australian people'. In this respect, he is aligning himself with one of the two traditions that have dominated Australia's 'dual constitutional culture': the federal (which Galligan favours), and parliamentary responsible government (Galligan 1995, p. 50). However, the blocking of full parliamentary responsible government carries considerable costs. As Sawer et al. (2009, p. 295) have recently observed: 'The system creates subnational "veto points" that can obstruct policy which a national government has been elected to enact and hence frustrates "the will of the people".'

This leads us to a problem: whether the contemporary citizenry will be satisfied that it has participated sufficiently in the shaping of the Australian constitutional framework for it to be accorded full democratic legitimacy. Unlike Galligan, who has been quite content to contend that the necessary constitutional legitimation was achieved in Australia in the one founding moment more than a century ago, Ackerman (2007, p. 1800) explicitly considers the implications of long lapses in time: 'It is one thing for South Africans or Germans to follow a constitution handed down a decade, or a half-century, ago; quite another for Americans to cling to an antique text that fails to mark any of the nation's recent achievements.'

The issues raised by Galligan and others on the Australian state are interesting when compared with New Zealand. Martin (2001) has convincingly demonstrated that the federal movement enjoyed much stronger support from colonial political leaders in Australia than in New Zealand. New Zealand is unitary, unicameral, and continues with an unwritten constitution (Levine 2004). Because of the absence of the above, New Zealand lacks any sub-national 'veto points' that can frustrate 'the will of the people'. Again, unlike Australia, there are limited avenues for the 'will of the people' to be expressed other than at triennial national elections. New Zealand's parliamentary responsible government is not responsible in a deliberative democracy way, as there are few forums other than the executive dominated single house chamber for this to occur, and minimal conventions on consultation on policy and constitutional matters. Two recent events in local government demonstrate the centralising and unitary favouring nature of the New Zealand regime. From November 2010, Auckland became a 'super city' with the elimination of the regional council and the dis-establishment of seven city and district councils to make one powerful unitary 'super council' — the largest in Australasia (Royal Commission on Auckland Governance 2009). Perhaps this could make Auckland a sub-national veto point, but if so this will be at central government behest. The propensity for central interference was also seen in May 2010 when the elected Environment Canterbury councillors were sacked using legislation passed under urgency. The council members were

replaced by government-appointed ones and new elections were delayed until at least 2013, after disputes continued over Canterbury's water management (*The Press*, 30 March 2010).

Strong upper house

Bicameralism does not sit easily with Westminster regimes, but is nonetheless common in them. As the Abbe Sieyes observed long ago, if the governing party controls the upper house, much of what that house does is superfluous. If, on the other hand, the government of the day does not control the upper house, much of what it does will be obstructive (Uhr 2008, p. 13).[4] Upper houses retain their attractiveness, however, for the more consensually-minded democrats, for in most jurisdictions they have shown greater readiness than their lower house colleagues to become involved in policy development through committee activity (Halligan et al. 2007). In modern democratic times, the balance of power has shifted towards lower houses in most bicameral regimes. In the Australian states, for example, most upper houses have lost much of their blocking powers. Contemporary theorising has also followed this trend; thus Ackerman's framework of constrained parliamentarianism envisages an upper house with only 'half' powers.

Although Ackerman (2000, pp. 671 ff.) gives some consideration to federalism as one of the constraints in his framework, he does so in a curiously limited way. His discussion of federalism is devoted almost totally to the ways in which it can shape upper houses at the national level. In his advocacy of German-style 'half-house' upper houses, he gives insufficient attention to the optimal balance that should be struck between the powers of an upper house, on the one hand, and its effectiveness, on the other. The Australian experience suggests that a 'half-house' upper house might not be powerful enough to be properly effective and that greater powers might therefore be desirable, even though these powers might occasionally be misused. In addition, Ackerman's focus on the relation between federalism and his preferred 'one-and-a-half' legislature raises a serious problem that he does not consider. Upper houses in federal systems are more likely to be in serious political conflict with their lower houses than are upper houses in unitary systems (Tsebelis and Money 1997, p. 212).

There have been strong voices expressing a view contrary to that of Ackerman — that accountability should weigh more heavily than democracy. Consider, for example, some of the arguments recently advanced in the revealingly entitled volume *Restraining Elective Dictatorship: The upper house solution*.

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4   An innovation in Singapore has shown how the review function so often associated with upper houses might in a unicameral regime be discharged by another institution — in the case of Singapore, none other than a directly elected presidency: see Tan 1997.

In the opening chapter of the volume, the editors make the important point that 'an institution with its own democratic credentials constitutes a far more substantial accountability hurdle than any creation of ordinary statute law' (Prasser et al. 2008, p. 6). They do not, however, go beyond the Parliament in their search for appropriate democratic mechanisms for holding the executive to account. Like the contributors that follow them, they do not directly address the problem caused by rigid party discipline. Instead, they seem to assume that the benefits of having an upper house that lacks a government majority will always outweigh the costs.

The Legislative Council of New Zealand was abolished in 1951 with alarming ease and was never replaced, though there have been several attempts to replace it. In its near 100 years of existence the non-elected Legislative Council did little to improve accountability or scrutiny of the executive (Jackson 1972; Kumarasingham 2010a). However, there have been numerous attempts and ideas first to reform and then to replace the Legislative Council; over 60 years on, the idea still has a few embers burning. The interest in bicameralism in New Zealand is in whether it could improve the institutional and deliberative performance of the state and act as a check on the executive, which still retains its hegemony despite MMP. Arguably many of the most controversial constitutional episodes since the abolition of the upper house could have been slowed at the very least with a renovated upper house in place. An upper house could have provided greater deliberation and accountability of such controversial events as the divisive 1951 waterfront strike and the government's draconian response to it, the divisive social policies and economic autarky of Muldoon, and the radical privatisation under the fourth Labour government, which were often enacted without electoral mandate (Kumarasingham 2010a and 2010b; Aroney and Thomas 2012).

Palmer and others have argued that select committees are New Zealand's answer to any need of an upper house (Palmer and Palmer 2004). The 1985 reforms designed to strengthen their powers and extend their jurisdiction were introduced to toughen the legislature's power to hold the executive accountable. Though MMP has changed the complexion of the committees so that more parties are represented, they are still simulacrums of parliamentary strength and therefore executive influence. Indeed, the Key government (and similar moves happened under Clark) has even appointed a Minister to head a select committee showing the limits of their democratic parliamentary ability to resist executive instruction let alone being able to robustly scrutinise and hold the executive to account.

Excursus? Two approaches to the comparative study of regimes: Ackerman and Siaroff compared

At first glance, the work of Siaroff (2009) appears to be closer than Ackerman (2000) to the central purposes of our governance project. He attends more closely to contemporary head of state functions. Indeed, his identification of the 13 regimes where the head of state plays a corrective role is a valuable update of earlier work that he had done.[5] Which brings us to the issue flagged at the outset: why has the Ackerman framework proven to be especially relevant to our concerns? In order to address this important question, we shall introduce a comparison of Ackerman with a more 'mainstream' student of comparative governance – Siaroff (2009). In his impressive work, *Comparing Political Regimes* (which, like all other mainstream works, ignores Ackerman), Siaroff suggests an original way of comparing New Zealand and Australia:

Table 1: Electoral System Centralism versus Localism

		Electoral system and election centralism *versus* localism	
		Lower	Higher
Supermajoritarianism	Higher	Australia	
	Lower		New Zealand

Source: Adapted from Siaroff 2009, Figure 8.1.

While this table strikingly suggests strong differences between the two regimes, we remain unsure of its heuristic standing. What, if anything, is the significance of Australia sharing a cell with Canada, Colombia, Comoros, India, Madagascar, Mauritania, Mexico, Micronesia, Palau, and the United States? What is the significance of New Zealand sharing a cell with Andorra, Estonia, Finland, Lesotho, Mauritius, Samoa, and San Marino?

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5 On his reading of this earlier work — Siaroff 2003 — Power had nominated only six such 'corrective' regimes where the heads of state played roles similar to that had been developed in Australia by Governor-General Hasluck (1979). The fuller list now supplied by Siaroff provides ample opportunities for the investigation of the ways in which heads of state around the world have managed the 'dual mandate' problem that has so vexed many Australian republicans: Power 2008. All 13 of the regimes identified are 'semi-presidential' — Elgie 2004; Elgie and Moestrup 2007, 2008 — i.e. they have a directly elected head of state confronting a head of government enjoying the confidence of the legislature: Bulgaria*, Croatia, Ireland*, Lithuania*, Macedonia*, Mongolia, Poland*, Portugal, Romania*, Taiwan, Timor–Leste, Turkey (whose head of state will first be directly elected only in 2014), and the Ukraine. (NB: those marked with * are those earlier selected by Power).

Of rather more interest in the current context is Siaroff's understanding of 'supermajoritarianism', for it represents a rather mechanical expression of Ackerman's constraints. We can most conveniently see this if we list the seven variables that Siaroff uses to construct his index of supermajoritarianism:

- existence of sub-national governments of some power;
- bicameralism in the national legislature;
- judicial review of legislation;
- office of head of state with some power;
- referenda;
- consociational democracy; and
- difficulty of amending the constitution.

This brief comparison indicates a conclusion that at first glance does not seem all that striking: the approaches of differing students of comparative governance are heavily shaped by their purposes. Siaroff's work is aimed at deepening our understanding of the key variables that underpin differing levels of performance of modern regimes. Ackerman, on the other hand, is more tightly focused on the openings for institutional reform offered by differing regimes. It is for this reason that we have found the Ackerman framework more useful for our project, for we are ultimately concerned with constitutional reform. While this concluding observation about differing purposes leading to different approaches and choices might seem commonplace enough, it is one that is seldom explicitly advanced in writings on comparative governance. It is time that it was.

Conclusion

This chapter strongly suggests that the concept of constraint is more nuanced and complex than we had thought when we began composing it. Conventionally, 'constraint' is typically used as a virtual synonym with 'restraint'. In order to correct this unduly negative conception, Power, following Ackerman, has contended that many constraints are better conceptualised as limits that support as they restrain. In our explorations, however, we have come to a somewhat different conclusion, for the nature of constraints varies considerably from one context to another. In general, constraints on executive power have been heavier and more rigid in Australia than in New Zealand, and are so experienced by members of political executives. Nothing constrains a political executive more heavily than the embedding of other political interests in long-established institutional structures (for example, those of a federal system).

In a unitary system such as New Zealand's, the constraints may be less heavy, but nonetheless substantial, if only because they have been more freely chosen. Since

the Second World War, New Zealand has probably provided more instructive reform lessons that any other nation. From the abolition of the upper house of Parliament by a conservative government in the 1950s, through the most radical restructuring of the public service by a Labour government in the 1980s, to the sweeping overhaul of its electoral system in the 1990s, New Zealand displayed an unquenchable thirst for reform. Unlike the Westminster regime from which it derived, it lacked a set of established constraints on executive power that had evolved over many centuries. Unlike the other 'dominions', it came to lack many of the other institutional constraints — federalism, bicameralism, and a written constitution — that had helped them compensate for the absence of many of these historical constraints. These changes bore heavily on the constraints operating on the national political executive. In some ways, these new patterns of constraint were more demanding of the political executive than were those operating on its counterpart across the Tasman.

This suggests that the main value of the framework of constrained parliamentarism is not that of facilitating comparisons between regimes, but rather that of providing some benchmarks for the systematic tracing of the overall constraining pattern in each regime. Australia and New Zealand need such benchmarks to meaningfully test the health of their democracy.

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