

1986

(Electoral Commission, 2007)

Civil and political rights in

In New Zealand, civil and political rights are defined and upheld in a variety of ways.

An unwritten constitution

Page 187

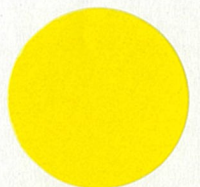
A **constitution** is a code of rules, both written and unwritten, which outlines the functions, powers and duties of the various institutions of government, regulates the relationship between them, and defines the relationship between the state and the public. The balance between the written (legal) and unwritten (constitutional conventions and practice) varies from country to country, but most countries have a mix of the two. It is common that at least some of these rules are set out in a document or documents that are considered 'constitutional'.

The word constitution is also used, perhaps more commonly, to describe a single, sovereign, authoritative document known as **the Constitution** – like the Constitution of the United States, or Australia, or Canada. Such a constitution is often called a **written** constitution, even though it is usually supplemented by unwritten conventions. The better term is **codified**. More important is the **status** of the document as the ultimate, superior law of the land. As such it is usually enforced by the courts using the doctrine of judicial review (which may be applied to the legislature along with other parts of government). It is **entrenched**, which also makes it difficult to change.

An entrenched constitution often includes a bill or charter of rights. These constitutional documents protect people's individual rights and freedoms and so define and protect people's civil rights. Both Canada and the United States have a statement of rights as a part of their constitution, while Australia does not.

New Zealand is one of only three countries in the world with an uncoded, 'unwritten' constitution (Israel and the UK are the others). This is a

3rd



flexible, organic construction that changes over time. Parts of it are written, but it is not found in any one document. It is not entrenched, and Parliament (rather than the constitution) is sovereign. Most experts agree that the courts do not have the power of judicial review.

However most of New Zealand's civil and political rights are found in our 'constitution'. Finding them all presents a challenge since our constitution is spread among many written and unwritten sources:

Treaty of Waitangi 1840

The Treaty is regarded as the founding document of New Zealand. As such it establishes the founding partnership between Maori and the Crown and is considered by many to be the cornerstone of New Zealand's constitution. It was not always treated that way and was largely ignored for much of New Zealand's history. Today it derives its legal authority from its incorporation into various legal instruments, for example, the Treaty of Waitangi (State Enterprises) Act 1988.

Constitution Act 1986

This replaced the Constitution Act 1852 which Keith Jackson labelled as 'perhaps the shortest and most ridiculous constitution of any nation in the world'. The fourth Labour Government established a committee to rectify those deficiencies and to modernise New Zealand's constitution act. This resulted in the Constitution Act 1986, a short document which confirmed and consolidated existing constitutional practices rather than significantly reforming them. The Act outlines the roles, responsibilities and limits on the sovereign, the executive, the legislature and the judiciary. Most of the document is not entrenched, and is therefore subject to amendment or repeal by a simple majority in the House of Representatives. It is not fundamental law; Parliament is sovereign, and the Constitution Act is best described as a framework.

There is one exceptional section of the Constitution Act 1986. Section 17, which sets the maximum term limit of Parliament at three years, is entrenched. Any changes to this section require a

supra-majority: either a majority of 75% of all members of the House of Representatives, or a simple majority of valid votes cast in a national referendum. This provides added protection to Section 17, although it is worth noting that the entrenchment clause, found in Section 268 of the Electoral Act, is not itself entrenched and can be removed with a simple majority in the House.

Electoral Act 1993

This Act is included in any discussion of New Zealand's constitution for two key reasons. Firstly, because of the importance of the subject matter – elections and the electoral system: It is wide in scope including how elections are to be run, who is responsible for running elections, persons qualified to vote, qualification of candidates and members, voting procedures, vote counting, and offences at elections. Secondly, this Act is also considered constitutional because some of its sections are entrenched. The entrenched sections include:

- ✓ Section 17: the term of Parliament
- ✓ Section 28: the Representation Commission
- ✓ Section 35: the division of New Zealand into electorates
- ✓ Section 36: the allowance of the adjustment of the quota of electorate size
- ✓ Section 74: the voting age qualification
- ✓ Section 168: the method of voting.

As is the case with the Constitution Act 1986, the entrenchment clause, Section 268 of the Electoral Act 1993, is not itself entrenched.

Bill of Rights Act 1990

In 1985 the Labour Government released a discussion paper proposing an entrenched Bill of Rights. Modelled on the Canadian Charter of Rights and Freedoms, it was to have the status of superior law. The draft Bill included the Treaty of Waitangi, and protected various democratic and civil rights, non-discrimination and minority rights, rights to life and liberty for the individual, and rights in the legal process. The Justice and Law Reform Select Committee travelled the country hearing submissions, which were overwhelmingly opposed

to the draft Bill of Rights.

Opposition to the Bill fell into three main categories:

- ✓ New Zealand did not need an entrenched bill of rights. It was argued that New Zealand's record of protecting rights was good, and better than many countries, like the United States, which have an entrenched bill of rights. These submissions could be summarised as, 'If it ain't broke, don't fix it'.
- ✓ Opposition to judicial review. It was argued that the switch from parliamentary sovereignty to judicial review would have the effect of transferring power to unelected, unaccountable, unrepresentative judges. It was also feared that it would lead to the 'Americanisation' and politicisation of the courts. There were complaints that the rights of the rich would be better protected because they could afford good lawyers.
- ✓ Opposition to the wording of the draft Bill. Different submitters objected to the inclusion of various parts of the Bill, including the incorporation of the Treaty of Waitangi, the protection of private property, and the right to join a trade union.

The Select Committee recommended against the introduction of the draft Bill of Rights. Labour's Minister of Justice, (later Sir) Geoffrey Palmer, did introduce a softened version of the bill which was adopted as the Bill of Rights 1990. It differs from the earlier version in several significant ways:

- ✓ The Treaty of Waitangi is not included in the Bill of Rights 1990.
- ✓ The Bill of Rights is neither entrenched nor superior law; it is not enforceable by judicial review.
- ✓ Instead, clause 6 states that 'whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning should be preferred to any other meaning'.
- ✓ Clause 7 puts the onus on the Attorney General to bring to the attention of the House any bills in conflict with the Bill of Rights.

The Bill of Rights Act 1990 has a lesser legal status than the Bill proposed in the 1985 White Paper. But is it effective in protecting New Zealanders' rights? While the Bill of Rights Act 1990 may provide weaker constitutional protection than Palmer wanted, its impact has been significant on the behaviour of both governments and the courts. Its power has come from its persuasive force. Governments want to avoid passing new bills that conflict with the Bill of Rights Act 1990. As a result, the provisions of the Bill of Rights are taken into account when policy is drafted. Its impact therefore is strong, but largely invisible to the public. Similarly, the courts have been receptive to interpreting new legislation in a way that complements, rather than conflicts with, the Bill of Rights.

Constitutional conventions

Not mere custom or habit, these are recognised as binding by those subject to them – including cabinet ministers, the prime minister, and Governor General. Because of their antiquity, conventions have taken on a normative, binding quality. Even countries with written, entrenched constitutions use constitutional conventions to supplement the written document. Conventions are organic and change over time. They are often used to keep a constitution fresh and modern. In some cases, such as the role of the Governor General in Canada, the constitutional conventions are more important than what is written in the constitution. New Zealand relies heavily on constitutional conventions. Some of the most important ones include: the Governor General does not refuse assent; the government resigns when defeated on a vote of confidence; and the Governor General dissolves Parliament on the advice of the Prime Minister.

Quasi-constitutional statutes

Many ordinary laws have constitutional importance, often because they define and protect rights. Some of the more important ones include:

- ✓ Treaty of Waitangi Act 1975
- ✓ Ombudsmen Act 1975

- ✓ Official Information Act 1982
- ✓ State-Owned Enterprises Act 1986
- ✓ Maori Language Act 1987
- ✓ State Sector Act 1988
- ✓ Public Finance Act 1989
- ✓ Privacy Act 1993
- ✓ Human Rights Act 1993
- ✓ Citizens Initiated Referenda Act 1993.

Principles of common law

Common law is the law based on the accumulated decisions of the courts; for example, the principle of habeas corpus, a cornerstone of our legal system, is part of the common law. The Rt Honourable Sir Robin Cooke, former President of the Court of Appeal, caused a constitutional stir when he stated that 'some common law rights presumably lie so deep that even Parliament could not override them'. With this statement he implied for the courts the right of judicial review. This is not the common interpretation. A more common view is that parliamentary sovereignty means statutes passed by Parliament take precedence over common law.