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The New Zealand Constitution

Introduction

The sources of New Zealand's constitution are very diverse and, since the nature of the constitution is fundamental to the way Governments behave, it is important to understand those sources.

What is the New Zealand constitution?

New Zealand does not have a "written constitution" which has the status of superior law, governing all other law and requiring procedures (such as binding referenda or a two thirds majority in the legislature) for amendment¹.

New Zealand is one of only three countries in the world which do not have a written constitution, the others being the United Kingdom and Israel². However, like those countries, New Zealand does have a constitution. It is composed of some documents together with various unwritten components including the common law and conventions. All these are capable of being altered by statutes passed by the New Zealand Parliament. The constitutions of the Australian states are similar to that of New Zealand. This is in contrast to the Commonwealth of Australia which has a written constitution.

The fragmented nature of New Zealand's constitution (like that of the United Kingdom and, more so, those of the Australian states) comes from its evolution over time³. The elements of the constitution are often defined by important Court judgments under the common law (which is the law declared or "created" by judges) and under statutes.

The components of the New Zealand constitution are:

- New Zealand and certain United Kingdom statutes (called "Imperial"⁴ statutes);
- the prerogatives of the Crown;
- the conventions of the constitution;
- international conventions which apply to New Zealand; and increasingly
- the Treaty of Waitangi.

¹Section 268 of the Electoral Act 1993 provides that certain provisions (such as: the term of Parliament; and the definition of "adult" for the purposes of elections) may not be repealed or amended unless the proposal for the amendment or repeal is passed by a majority of 75 percent of all the members of the House of Representatives; or it has been carried by a majority of the electors in New Zealand. But section 268 could itself be amended or repealed by a simple majority in Parliament.

²Philip A. Joseph, *Constitutional and Administrative Law in New Zealand*, Brookers, Wellington, 2nd Ed., 2001, p. 13.

³State Services Commission, *The Constitutional Setting*, State Services Commission, 1995.

⁴contained in *New Zealand Statutes*, Reprint Series, Volume 30.

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New Zealand statutes

The most important New Zealand constitutional statute is the *Constitution Act 1986*⁵. This provides that no Act of the United Kingdom Parliament passed after the commencement of that Act shall apply to New Zealand.

The Constitution Act 1986 consolidated a number of statutes, and declared the (already existing) institutions of government and the allocation of their powers. These are as follows:

- *The Sovereign* or Head of State who is always the reigning British monarch. When a Sovereign dies the successor is determined in accordance with the Act of Settlement 1700 (see page 3 below). The Governor-General, being the Sovereign's representative in New Zealand, can exercise the Sovereign's powers on their behalf.
- *Ministers of the Crown* who must be appointed from Members of Parliament only⁶.
- *Parliament* which consists of the Sovereign (or the Governor-General) and members of the House of Representatives. Parliament is formally summoned, prorogued (i.e. suspended), and dissolved by the Governor-General. Only Parliament may make laws, and no taxes may be levied, loans raised or public money spent without the consent of Parliament. The consent of the Sovereign or the Governor-General is required for the valid passing of any law.
- *Judges of the High Court and the Court of Appeal (the Judiciary)* whose statutory independence is established through protection against arbitrary removal from office and against any reduction in salary whilst in office.

Another significant New Zealand statute is the *New Zealand Bill of Rights Act 1990*. This statute has very limited legal effect. Under Section 4, no Court may "hold any provision of [an] enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective" (*Section 4(a)*) or to "decline to apply any provision of the enactment" (*Section 4(b)*) "by reason only that the provision is inconsistent with any provision of this Bill of Rights". However, the Courts must apply the Act in interpreting statutes (*Section 6*). For, example, the Court of Appeal found that a decision under the Films, Videos and Publications Classification Act 1993⁷ to classify certain material involving sexual activity with children as indecent did not take into account the New Zealand Bill of Rights Act. For example, Section 14 of that Act provides that "Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind or form."

There are many other New Zealand statutes with constitutional significance including: the *Official Appointments and Documents Act 1919*; the *Royal Titles Act 1974*; the *Ombudsmen Act 1975*; the *Public Finance Acts 1977 and 1989*; the *Treaty of Waitangi Act 1975*; the *Seal of New Zealand Act 1977*; the *Flags, Emblems and Names Protection Act 1981*; the *Official Information Act 1982*; the *State Sector Act 1988*; the *Electoral Act 1993*; and the *Human Rights Act 1993*. A more recent statute is the *Constitution Amendment Bill 2005* (in relation to the Crown's right to veto money bills,

⁵ *New Zealand Statutes*, 1986, No. 114.

⁶ *Constitution Act 1986*, Section 6.

⁷ *Moonen v. Film and Literature Board of Review*, CA42.99 (Court of Appeal), Elias CJ, Richardson P, Keith J, Blanchard J, Tipping J, 17 December 1999; [2000] 2NZLR 9.

Imperial statutes

the lapsing of bills on the dissolution of Parliament and the right of the next Parliament to reinstate them).

The following are some of the more than 50 Imperial statutes⁸ which apply in New Zealand and which have constitutional significance:

- *Magna Carta 1297*: This provides that "no freeman shall be taken or imprisoned, or be disseised (i.e. deprived) of his freehold or liberties or free customs, or be outlawed or exiled, or any otherwise destroyed ... but by lawful judgement of his peers or by the law of the land".
- *Bill of Rights 1688*: The provisions of this statute include Section 1 which states: "That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of Parliament is illegal". This was applied in the case of *Fitzgerald v. Muldoon* [1976] 2NZLR 615 where an announcement by the then Prime Minister suspending the superannuation scheme established by the New Zealand Superannuation Scheme Act 1974 was declared to be illegal as a pretended power of suspension of a law by regal authority under Section 1 of the Bill of Rights Act 1688.
- *Act of Settlement 1700*: This Act provides for the order of succession of monarchs and, amongst other things, provides that no person may become sovereign who is " ... reconciled to, or shall hold communion with, the See or Church of Rome, or shall profess the Popish religion, or shall marry a Papist ..."⁹

The prerogatives of the Crown

The prerogative powers (i.e. the rights) of the Sovereign (or the Governor-General) derive from the common law. Most of these powers are unwritten and their limits have been defined by the Courts. The Sovereign formally appoints or dismisses members of the Executive Council which is composed of the Prime Minister and all ministers of the Crown and is the formal body to give effect to Government decisions. Ministers are agents of the Crown.

Most of the prerogative powers are exercised by the Governor-General as the Sovereign's local representative, although the Sovereign retains a number of powers, including the conferment of some honours. The Governor-General may, for instance, pardon or reprieve an offender, under Clause 11 (providing for a prerogative of mercy) of the *Letters Patent Constituting the Office of the Governor-General of New Zealand 1983*. The *Letters Patent* constitute and define the Governor-General's office and the Executive Council. They are issued by the Sovereign. Ministerial powers derive from the common law powers of the Crown (including the prerogative powers) and from statutes of Parliament.

Conventions of the constitution

Constitutional principles derive from the various elements of the constitution. The conventions have evolved in the course of making those principles work.

Conventions are binding understandings or customs that guide conduct and relationships. They may govern how formal constitutional provisions are exercised. For instance, although the Governor-General appoints Ministers through the exercise of the Sovereign's prerogative powers, in practice and by convention, appointments are made in accordance with the advice of the

⁸ Imperial Laws Application Act 1988, Section 3(1) and Schedule.

⁹ Act of Settlement 1700, 12 and 13 Will. 3, c. 2, *New Zealand Statutes*, Reprint Series Vol. 30, p. 51.

Prime Minister. Also a Governor-General's ability to act, or indeed their personal preference, is constrained by the convention that the Governor-General accepts the advice of Ministers. In other words, a Governor-General's powers to withhold the Royal assent to Bills (essential for legislation to be enacted) has been rendered ineffective by convention. Another example is the convention that Parliament will not retrospectively reverse judicial decisions or, in other words, Parliament should not deprive successful litigants of the "fruits of their victory" (although Parliament will usually act to deprive other persons of the opportunity to take advantage of such judicial decisions). The conventions of the constitution are nevertheless not the law in the sense that they are enforceable by the Courts¹⁰.

International conventions

International conventions describe norms of behaviour agreed to by States. There also exists international law based on customary principles or "the comity of nations" (i.e. from the accepted practice of states). International conventions apply to countries which have in some manner adopted them¹¹. Those countries may, by so doing, have agreed to subject themselves to the adjudication of international courts or tribunals. However, the New Zealand Parliament may legislate contrary to the "comity of nations" and international covenants¹². New Zealand's courts will generally not enforce international conventions but there is now a well established practice in New Zealand whereby the courts treat them as part of the background to be considered in the interpretation of legislation and in the judicial review of executive decisions¹³. International conventions become law and will be enforced by the courts when their provisions are included in a statute. For example, New Zealand is a signatory to the International Covenant on Civil and Political Rights (1978) and the provisions of that convention have influenced much of our rights legislation such as the *Human Rights Act 1993* and the *New Zealand Bill of Rights Act 1990*.

Treaty of Waitangi

The legal status of the Treaty of Waitangi was examined by the Privy Council in the 1941 case of *Hoani Te Heu Heu Tukino v. Aotea District Maori Land Board*¹⁴. The Treaty was stated (via. Viscount Simon LC) to be:

- a valid treaty of cession;
- unenforceable of itself in the New Zealand Courts except to the extent that it had been given effect to by statute.

Viscount Simon said:

"It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the Courts, except insofar as they have been incorporated in municipal law. ... So far as the appellant invokes the assistance of the Court, it is clear that he cannot rest his claim on the Treaty of Waitangi, and that he must refer the Courts to some statutory recognition of the right claimed by him."

¹⁰ John McGrath QC, *The Crown the Parliament and the Government*, 7 *Waikato Law Review*, [1999], p. 1 at 19-22.

¹¹ The New Zealand Parliament has asserted a more prominent role in the adoption of international conventions : see: Report of the Foreign Affairs, Defence and Trade Committee, Inquiry into Parliament's Role in the International Treaty Process, Report, 1997, Report I. 4A; Report of the Foreign Affairs, Defence and Trade Committee, Review of the International Treaty Examination Process, 1999, Report I. 4E.

¹² Philip A. Joseph, *Constitutional and Administrative Law in New Zealand*, Brookers, Wellington 2nd ed., 2001, p. 504.

¹³ *Van Gorkham v. Attorney-General* [1977] 1 N.Z.L.R. 535.

¹⁴ [1941] NZLR 590

This "orthodox" view of the Treaty is not without challenge¹⁵. But the Courts have not yet deviated from Viscount Simon's approach.

The Treaty, therefore, has legal significance when it is referred to in a statute. The most important example of such a treaty reference is found in the State-Owned Enterprises Act 1986. Section 9 of that statute states:

"Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi".

The Court of Appeal in *New Zealand Maori Council v Attorney-General* [1987] 1NZLR 641 had to consider what the principles of the Treaty were and decided that a key principle was that of "partnership". The Court held that Section 9 placed on the Crown certain obligations or duties under the Treaty of Waitangi and that protections and guarantees must be afforded to Maori in the transfer of Crown land to State-Owned Enterprises. As a result of this decision protections for Maori were provided in the *Treaty of Waitangi (State Enterprise) Act 1988* (in respect of land of the Crown transferred to State-owned enterprises), the *Crown Forest Assets Act 1989* (in respect of Crown forests), the *Railways Corporation Restructuring Act 1992* (in respect of railway land), the *Education Act 1989*, and other statutes

Treaty references are found in many other statutes, including the *Fisheries Act 1983* (which gave rise to the *Maori Fisheries Act 1993* and was relevant to the Sealord deal), the *Conservation Act 1987*, the *Maori Language Act 1987*, the *Education Act 1989* and the *Resource Management Act 1991*.

The Courts have also stated that the Treaty has legal significance in the area of statutory interpretation. They will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty of Waitangi. Cooke P. affirmed in the *New Zealand Maori Council* case, however, that the Courts must accept and enforce any unambiguous enactment of Parliament which overrides the principles of the Treaty of Waitangi¹⁶.

*John McSorley B.A. LL.B. Legislative Analyst
Parliamentary Library
For more information please contact John at Ext.
9626.*

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¹⁵ Richard Boast, Andrew Erueti, Doug McPhail, and Norman F. Smith, *Maori land Law*, Butterworths, Wellington, 1999, pp. 272-274; Philip A. Joseph, *Constitutional and Administrative Law in New Zealand*, Brookers, Wellington, 2nd ed., 2001, pp. 61 - 77.

¹⁶ *New Zealand Maori Council v. Attorney-General* [1987] 1NZLR 641 at 655-656 per Cooke P. and Somers J.