
What is New Zealand's constitution and who interprets it? Constitutional realism and the importance of public office-holders

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This article treats two, reasonably simple, questions: what is the New Zealand constitution and who interprets it? There have been few comprehensive attempts to identify, precisely and systematically, the elements of New Zealand's constitution. This account is derived from a theoretical perspective labelled "constitutional realism" that seeks the meaning of a constitution in the real-world understandings and actions of those people involved in the application and interpretation of the constitution. The article further identifies a certain set of public office-holders as having a significant, and under-appreciated, role in the reality of New Zealand constitutional interpretation in practice.

INTRODUCTION

New Zealand has an "unwritten" constitution. The constitution exists in a number of significant enactments and other instruments, in the common law, and in core principles and conventions. These elements are subject to change over time – in New Zealand's cultural tradition of "pragmatic evolution" (so labelled by the Constitutional Arrangements Committee of the New Zealand House of Representatives in 2005).¹ This means that New Zealand's constitution is both flexible in its ability to adapt to changing circumstances, and vulnerable to sudden, unanticipated or unintended shifts whether or not they have popular support.²

It is unsurprising, but somewhat disturbing, that there has been little academic interest in exploring the definition of New Zealand's constitutional content. The vague and ever-changing nature of the constitution has, perhaps naturally, dissuaded us from such an exercise. And the scope of the task is unnervingly broad. But it is important to know what is constitutional in New Zealand and what is not. If we don't know what is constitutional then our political and public discourse will not adequately debate constitutional changes, either prospectively or retrospectively. Our agents of constitutional change, including the executive, Parliament and the courts, may make changes with unidentified, unintended or unwanted effects on our constitution. We may not even be aware of who is making constitutional decisions.

This article has two aims, linked by a perspective. The first aim is to attempt, comprehensively, to identify the elements of New Zealand's constitution. The scale of the task, relative to the available space, means that an article-length attempt is necessarily abbreviated. However, the attempt is expressed in definitive and specific terms and identifies 80 elements to New Zealand's constitution. This account is offered because there have been few comprehensive attempts to identify New

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¹ Constitutional Arrangements Committee, *Inquiry to Review New Zealand's Existing Constitutional Arrangements: Report of the Constitutional Arrangements Committee I 24A* (House of Representatives, Wellington, 2005) p 26. (The author acted as Principal Adviser to the Inquiry).

² Constitutional Arrangements Committee, n 1, pp 27, 62-65.

Zealand's constitution. It is offered with the intent of generating debate and, eventually perhaps, a consensus over the definition of New Zealand's constitutional content.

In order to derive an analytically coherent view of what is constitutional, it is necessary to adopt a theoretical perspective. This article develops, from the school of legal realism, a perspective of "constitutional realism" that emphasises the real-world impact of the exercise of public power. According to this perspective the meaning of a law, or a constitution, exists in the understandings and actions of those people involved in the application and interpretation of that law or constitution.

Yet the perspective of constitutional realism suggests that even a comprehensive list of substantive "constitutional" rules is incomplete in defining New Zealand's constitution. A realist understanding of the constitution identifies not only the substantive elements of the constitution but also those who interpret and apply those elements, and the incentives to which those people are subject.

The second aim of the article is, therefore, to identify who interprets and applies the elements of New Zealand's constitution. In so doing, I suggest that there is a set of constitutional actors whose role is under-appreciated – public office-holders. Their significance to the reality of the interpretation and operation of New Zealand's constitution rivals the constitutional significance of both Parliament and the judiciary. The further task – to analyse the accountability frameworks and incentives operating on those who interpret and apply New Zealand's constitutional elements – remains as a research agenda for the future.

As reflected in the title, this article treats two, reasonably simple, questions in turn: What is the New Zealand constitution and who interprets it?

THE NATURE OF NEW ZEALAND'S CUSTOMARY CONSTITUTION

What is a constitution?

The United States Constitution purports to be a relatively coherent encapsulation in a single document (albeit with amendments) of the key levers by which national, if not imperial, power is exercised. As Chief Justice Marshall observed in 1819:

[A constitution's] nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. ... In considering this question, then, we must never forget that it is a *constitution* we are expounding.³

The beguiling simplicity of such a document has symbolic and rhetorical power which the United States Supreme Court has captured for itself in asserting its virtually exclusive monopoly on authoritative interpretation of that document – since *Marbury v Madison* 5 US 137 (1803); 1 Cranch 137 but more particularly since the much more modern development of a United States belief that *only* the Supreme Court could interpret "the Constitution".⁴ By doing so, the court has privileged legal argument about the use of words over more popular constitutional debate about the use of power. And it has obscured the real meaning of what a constitution is in the United States.

A constitution is about public power and how it is exercised. A constitution is not just a document. It is not even a document. To understand a constitution we need to understand the pathways of power that are more than merely documentary – what factors affect the exercise of power and how? A constitution may have certain normative design objectives, such as to create checks and balances on government action, or to ease the way for government action. But its nature is not limited to one document or several. A constitution is made up of the structures, processes, principles, rules, conventions and even culture that *constitute* the ways in which government power is exercised.

This conception of a constitution is historically familiar to a long line of Westminster theorists. As Professor Dicey himself stated: "Constitutional law, as the term is used in England, appears to include

³ *McCulloch v Maryland* 17 US 316 (1819); 4 L Ed 579 (1819) (emphasis, unusually, in the original).

⁴ Kramer LD, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, 2004).

all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state.”⁵ At any point in time it is fixed and, at least in theory, knowable. The conception of a constitution can exercise a powerful normative force on the future exercise of public power. But a constitution is a living entity; it changes. A constitution continually exists in the actions, understandings and inter-relationships of those who operate it. As such, a constitution inherently evolves over time. Sir Ivor Jennings, a great British constitutional lawyer, considered that:

A constitution, in anything more than a formal sense, is only an organisation of men and women. Its character depends upon the character of the people engaged in governing and being governed. In this respect it is a transient thing, changing like the colours of the kaleidoscope; and an examination of its working involves an examination of the social and political forces which make for changes in the ideas and desires and habits of the population and its various social strata. A public lawyer will not understand his constitution unless he understands these aspects of it.⁶

Elsewhere, in a North American context, I label the conception of a constitution advanced here the “complete” constitution (as opposed to the inherently incomplete written constitution).⁷ I label the perspective that underlies this “constitutional realism”, following the school of legal realism.⁸ The dimension of legal realism that I pick up is not the view that law is indeterminate,⁹ rather it is the view that the meaning of a law, or a constitution, exists in the understandings and actions of those people involved in the application and interpretation of that law or constitution. It is a reasonably “positivist” version of realism which seeks to identify the nature of a constitution, rather than itself to be the basis for normative arguments about what a constitution should be. This abstract view of a constitution is universally valid. Its validity is more easily recognised in New Zealand than most other jurisdictions as, in New Zealand, there is at least general recognition that we have an “unwritten” constitution.

What is an unwritten or customary constitution?

Few examples of “unwritten” constitutions exist in democracies such as the United Kingdom, New Zealand and Israel. The unwritten United Kingdom constitution is conventionally set up as the analytical counter-example to the written United States Constitution. Larry Kramer points out the unpersuasive nature of the term “unwritten”.¹⁰ The New Zealand constitution is not written in one place, but it is predominantly written in legislation and various other legal instruments examined below. Even the academic texts attesting to convention are “written” in some form or other.

A legally familiar alternative term might be “common law” constitution. But the lack of public understanding of the meaning of “common law” suggests that a change to this term would reduce rather than enhance clarity of the nature of New Zealand’s constitution. There is more attraction in the term “chimerical constitution” when you consider the different meanings of “chimera”, though perhaps these would give rise to undesirable cynicism.¹¹

⁵ Dicey AV, *Introduction to the Study of the Law of the Constitution* (10th ed, MacMillan, 1960) p 23.

⁶ Jennings WI, *The Law and the Constitution* (3rd ed, University of London Press, 1943) pp xv (in the preface to the first edition of 1933).

⁷ Palmer M, “Using Constitutional Realism to Identify the Complete Constitution: Lessons From an Unwritten Constitution”, *American Journal of Comparative Law* (forthcoming).

⁸ It is, for example, particularly consonant with Karl Llewellyn’s realist conception of a constitution, see Llewellyn KN, “The Constitution as an Institution” (1934) 34 *Columbia Law Review* 1.

⁹ Evans J, “Questioning the Dogmas of Realism” [2001] *NZ Law Review* 145 (for an attack on that other strand of realism).

¹⁰ Kramer, n 4, pp 12-15.

¹¹ Pearsall J (ed), *The New Oxford Dictionary of English* (Clarendon Press, 1998) p 318 includes in the definition of “chimera”: “any mythical animal with parts taken from various animals”; “a thing which is hoped or wished for but in fact is illusory or impossible to achieve”; and, particularly, “a DNA molecule with sequences derived from two or more different organisms, formed by laboratory manipulation”. I thank my colleague Joanna Mossop for this reference.

Kramer suggests the term “customary” constitution, which I propose in this article to test-drive.¹² This term better reflects the evolutionary nature of the New Zealand constitution and its existence in the changing behaviour of those who exercise power. But I wonder whether such terminology is sustainable. The great advantage of the term “unwritten” is that it inherently confronts you with the abstract nature of a constitution.

Turning to the content of a customary constitution, Sir Ivor Jennings was reasonably definitive as to what was constitutional and what wasn't – at least in rejecting the possibility of definition:

Some decision on questions such as these is reached; and that decision settles the matter – what is in the [written] constitution is “constitutional”, what is not in it is not “constitutional”. But where there is no such document it is quite impossible to make a distinction which is not purely personal and subjective.¹³

Perhaps such sentiments are also behind why there have been few attempts in New Zealand precisely to identify the elements of our constitution.

The standard New Zealand text by Philip Joseph asserts, without analysis, eight categories of sources of the constitution but tentatively notes that they “are not exhaustive”:¹⁴

- Imperial legislation;
- New Zealand legislation;
- common law including customary common law, judicial precedent and statutory interpretation;
- customary international law;
- prerogative instruments;
- the law and custom of Parliament;
- authoritative works; and
- conventions of the constitution.

In relation to legislation Joseph's text uncertainly traverses a “sample” of New Zealand statutes before reaching the somewhat passive aggressive conclusion that:

Many other statutes might have been included in the above sample. Most of the powers of modern government are derived from New Zealand Acts too numerous to list. It is a matter of personal judgment whether human rights legislation is considered “constitutional”.¹⁵

The latest edition of *Bridled Power*¹⁶ has a marginally less legalistic, and less expansively described, list but still indulges in the caution of making it inclusive rather than exhaustive:

- New Zealand and United Kingdom legislation (specified);
- instruments of the royal prerogative (“especially” the *Letters Patent 1983*);
- parliamentary law and procedures (“especially” Standing Orders);
- cabinet procedure (“especially” the *Cabinet Manual*);
- judgments of the courts (“especially the highest courts”);
- the *Treaty of Waitangi* and international law; and
- broader constitutional principles doctrines and conventions (with four examples).

In his “relating” of the structure and function of New Zealand government Bruce Harris characterises the constitution as “an eclectic collection of United Kingdom and New Zealand enacted statutes, common law (including the royal prerogative) developed in both the United Kingdom and

¹² Kramer, n 4, p 13, examines the fundamental or natural law roots of the British constitution with which the term “customary” resonates: “Put more simply the customary constitution was a framework for argument, in which historical accuracy was less important than analogical persuasiveness in maintaining over time an established balance between liberty and power despite new or changed circumstances.”

¹³ Jennings WI, *The Law and the Constitution* (5th ed, University of London Press, 1959) p 38.

¹⁴ Joseph PA, *Constitutional and Administrative Law in New Zealand* (2nd ed, Brookers, 2001) pp 17-31.

¹⁵ Joseph, n 14, pp 21-22.

¹⁶ Palmer G and Palmer M, *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford University Press, 2004) p 5. Of course, the whole book attempts to sketch the working of New Zealand's constitution – in principle and practice.

New Zealand courts, and non-justiciable constitutional conventions".¹⁷ More interestingly he identifies 35 "currently operative constitutional statutes"¹⁸ (a subject to which we will return).

The most elegant attempt to encapsulate the essence of New Zealand's constitution is still Sir Kenneth Keith's six-page introduction to the *1990 Cabinet Office Manual*, revised for the "2001 Cabinet Manual", titled *On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government*.¹⁹ The Constitutional Arrangements Committee of the House of Representatives accepted this as "the most authoritative current treatment of the sources of New Zealand's constitution".²⁰ As noted by the Committee, this document also now has the constitutional advantage of having been signed up to by successive executive governments of different political persuasions.²¹ In the current version, New Zealand's constitution is there described as "to be found in formal legal documents, in decisions of the courts, and in practices (some of which are described as conventions)".²² It identifies the *Constitution Act 1986* (NZ) as the "principal formal statement" and identifies that the "other major sources of the Constitution include":

- the prerogative powers of the Queen (with non-exhaustive examples);
- other relevant New Zealand statutes (with non-exhaustive examples);
- relevant English and United Kingdom statutes (with non-exhaustive examples);
- relevant decisions of the courts (with two "for instances" in terms of subject matter, but not specific cases);
- the *Treaty of Waitangi* ("which may indicate limits in our polity on majority decision-making" but "Policy and procedure in this area is still evolving"); and
- the conventions of the constitution (with examples given later in the document).²³

To make sense of the above taxonomies it is useful to recall their function: to set out the elements of New Zealand's constitution. According to the constitutional realist perspective advanced in this article a rule should be regarded as constitutional if it plays a significant role in influencing the generic exercise of public power – whether through structures, processes, principles, rules, conventions or even culture.

This distinction is similar to the first limb of the test proposed by Lord Justice Laws, in the United Kingdom case of *Thoburn v Sunderland City Council* [2003] QB 151, for whether a statute should be regarded as having constitutional status for the purpose of the application of the principle of legality.²⁴

Note the need for genericism – there are many structures and processes of government that are significant in the exercise of a particular governmental function that matters to a lot of people, such as

¹⁷ Harris BV, "The Constitutional Future of New Zealand" [2004] *NZ Law Review* 269 at 274.

¹⁸ Harris, n 17 at 279-80.

¹⁹ New Zealand Cabinet Office, *Cabinet Manual 2001* (Wellington, 2001) pp 1-6. The 1990 version was published in Keith Sir K, "On The Constitution of New Zealand" (1992) 44 *Political Science* 28. The latest version of the *Cabinet Manual* is published on the Cabinet Office website at <http://www.dPMC.govt.nz/cabinet/manual/index.html> viewed 9 February 2005.

²⁰ Constitutional Arrangements Committee, n 1, p 19.

²¹ Constitutional Arrangements Committee, n 1, p 19.

²² New Zealand Cabinet Office, n 19, p 1.

²³ See New Zealand Cabinet Office, n 19, pp 1-2.

²⁴ However, I do not adopt the alternative second limb of Laws LJ's test, a statute that "enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights". This second limb appears to me to be too self-referential to be useful and merely highlights a group of statutes that are already likely to be a subset of those caught under the first limb. However, it does illustrate the tendency, identified later in this article, of the judiciary to be most assertive of their constitutional authority in relation to human rights. For a useful examination of the implications of *Thoburn's case* for New Zealand, see Prebble R, "Constitutional Statutes and Implied Repeal: The *Thoburn* Decision and the Consequences for New Zealand" (2005) 36 *Victoria University of Wellington Law Review* 291.

the Liquor Licensing Appeal Authority. However, structures and processes that are not generic to the operation of government are not constitutional – either in an instinctive plain meaning sense or in terms of the definition proposed in this article.²⁵

An analysis of constitutional elements should be undertaken in light of their function in defining the generic exercise of public power. These rules can be expected to occupy varying spots on the continuum from formalism to informalism. As explained below, I suggest that the key elements of New Zealand’s constitution fall into four conceptual categories:

- constitutional conventions;
- the common law, including the common law of Parliament;
- the instruments of each branch of government; and
- the interpretations of the instruments of each branch of government.

First, at the deepest but most informal end of the spectrum lie constitutional principles and doctrines which may have crystallised into constitutional “conventions”. These norms are not legally enforceable, although they can be referred to by a court and a court may even examine their definition. I describe them elsewhere as “observed norms of political behaviour that are generally acknowledged to have attained a significance and status worthy of general acknowledgement”.²⁶ Conventions in the Westminster tradition are alive and well in New Zealand’s constitution as we shall see below. The recognition of their existence and normative power by all branches of New Zealand government, and academic and public commentators, are the most dramatic illustration of the customary nature of New Zealand’s constitution.

Second, the common law that relates to the exercise of public power²⁷ is a slightly less informal element of the New Zealand constitution. The common law originally developed in England as an expression by courts of the common customs that were and should be used to resolve disputes. It is formal in the sense that it is law enforced by the coercive power of the state. It is informal in its existence as principles that evolve over time by being defined by individual courts in decisions in different individual cases.

The line between convention and common law can sometimes be blurred, as courts which seek to uphold a constitutional principle that can be found in conventions may also describe the principle as one emanating from, underlying, or implicit in the common law. It is natural that convention and common law merge into each other because core to the concept of each is the notion of custom. However, the conceptual confusion between the two requires further examination in relation to particular constitutional doctrines as the formal distinction between a constitutional convention and a constitutional rule of the common law is that a court may not “enforce” the former, while it may enforce the latter.²⁸ But these matters are beyond the scope of this article.

Third, at the more formal end of the spectrum of elements of the constitution lie instruments deliberately constructed by each branch of government:

- legislation (Imperial and New Zealand statutes);
- Standing Orders of the House of Representatives;

²⁵ This distinction between generic and industry specific regulatory structures also distinguishes the view of what is constitutional in this article from that in the interesting but ultimately flawed suggestions of Eskridge W and Ferejohn J, “Super-Statutes” (2001) 50 *Duke Law Journal* 1215.

²⁶ Palmer MSR, “Towards an Economics of Comparative Political Organization: Examining Ministerial Responsibility” (1995) 11 *Journal of Law, Economics and Organization* 164 at 183.

²⁷ For the purposes of this article, the common law is considered to include the “common law of Parliament” also known as the “law and custom of Parliament”. See Blackburn R, Kennon A and Wheeler-Booth Sir M, *Griffith and Ryle on Parliament: Functions, Practice and Procedures* (Sweet & Maxwell, 2003) at 6-007 – 6-011. However I leave open the possibility that deeper analysis may suggest that parliamentary law and custom is a separate element of the constitution in its own right, given Parliament’s longstanding assertion of its own right to determine its own procedures.

²⁸ Of course a constitutional realist would suggest that even the notion of “enforcement” by a court is in the nature of a continuum. It is the executive branch of government that wields the force required to “enforce” a court’s decision. And there may be little practical difference in the politically normative force of a judicial opinion about the definition of a “unenforceable” convention and a court’s definition of an “enforceable” doctrine of the common law.

- international treaties;
- instruments of the royal prerogative;
- rules and procedures approved by Cabinet; and
- rules of court.

Such instruments are interpreted and applied to particular situations, creating bodies of precedent or practice that have less formal but still normatively persuasive constitutional effect. The nature of such interpretations will be explored further below. For the purposes of this article, the above taxonomy is simply a way of structuring the elements of New Zealand's constitution identified below.²⁹

Why does it matter whether an instrument or practice is “constitutional”?

My answer to this question resonates with the essential nature of a constitutional convention: it matters because people think it matters. The symbolism of the term “constitutional” seems to matter to the New Zealand public and to constitutional decision-makers in New Zealand. Whether a matter is “constitutional” can affect the behaviour and decisions of those able to make decisions in relation to that matter – politicians, officials and judges. And, relatedly, whether a matter is “constitutional” can also affect the public scrutiny that constitutional issues engender.

First, consider the effects of constitutional status on judicial behaviour and decisions. Whether a law is “constitutional” or not matters now to the judiciary, most directly in affecting their interpretation of statutes. It may matter even more in the future if New Zealand courts adopt the principle of legality.

No doubt, in part, judges are as alive to public sensitivities as are most other members of society and will take care to interpret “constitutional” issues with corresponding care. This is manifested most explicitly in the principles of interpretation that courts use in addressing constitutions and constitutional documents. These are interpreted in a broad, extensive manner according to their constitutional purpose. Lord Wilberforce in the Privy Council is frequently cited in this regard with respect to Bills of Rights, including by the New Zealand Court of Appeal,³⁰ in speaking of the need for: “a generous interpretation avoiding what has been called ‘the austerity of tabulated legalism’ suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.”³¹

The *Bill of Rights Act 1990* (NZ) is an example of a statute that is so self-consciously constitutional that, while s 4 makes clear that other legislation cannot be struck down by its application, s 6 calls for courts to interpret all other statutes consistently with its rights and freedoms, where possible. This reflects the long-held common law disposition to interpret legislation consistently with fundamental principles of law.³²

It is not too long a step from this to further developments that acknowledge the label of parliamentary sovereignty but challenge its effect. In particular, having inserted itself into the legal system of mother Westminster herself, the European principle of legality is making steady but inexorable progress into New Zealand law.³³ Baldly stated, the potential implication of the principle of legality is that some instruments may be found to be so constitutionally significant that they may not be the subject of implied repeal by a later statute – ie constitutional rules may not be overridden by

²⁹ The four-fold taxonomy of constitutional elements I offer above can no doubt be subjected to various analytical tests. The continuum from the formal to the informal could be pursued in more depth. Another continuum from the general to the specific nature of each set of elements could be added. The relationship between procedural and substantive rules could be added as a third dimension of the matrix. And patterns between all dimensions could be hypothesised and discussed. I leave such analysis to future academic articles.

³⁰ *Minister of Home Affairs v Fisher* [1980] AC 319 at 328.

³¹ Eg *Ministry of Transport v Noort* [1992] 3 NZLR 260 at 268 and 277.

³² See section 2 of the *Legislation Advisory Committee Guidelines on Process and Content of Legislation* (Legislation Advisory Committee, Wellington 2001) <http://www.justice.govt.nz/lac> viewed 10 April 2006.

³³ See Palmer M, *Parliamentary Sovereignty* Appendix F to the Inquiry to Review New Zealand's Constitutional Arrangements, Constitutional Arrangements Committee, n 1, pp 148-149.

Parliament unless Parliament is very explicit about what it is doing. Parliament is presumed not to intend to legislate inconsistently with such instruments without using very clear parliamentary language to evidence its contrary intent.³⁴

This is an attractive doctrine. Implied repeal rarely happens anyway, as courts strive hard to reconcile apparently conflicting statutes. But the principle of legality upholds the value of transparency. In the tradition of “manner and form” limitations on parliamentary sovereignty it sets out how Parliament is able to change certain laws. But it does not derogate from Parliament’s substantive ability to pass a subsequent statute that overrides an earlier one – as long as Parliament does that explicitly. At one level, this simply represents the continued assertion by the judiciary of its own authority to develop rules of statutory interpretation. At another level, indeed, these assertions are themselves constitutional; formulated and asserted by the judiciary.³⁵

There are a number of conceptual constitutional issues that require to be worked through in bringing the principle of legality into New Zealand law.³⁶ However, the logic of this approach by courts to their traditionally mundane task of statutory interpretation will eventually be as compelling to the New Zealand Supreme Court as it is in the House of Lords. There are cases where New Zealand courts have resisted the temptation of this path or noted that it is to date “unnecessary”, while keeping future options open.³⁷ There are also cases where New Zealand courts have edged up to adopting such an approach.³⁸ This may become increasingly tempting to a new Supreme Court that feels the legitimacy that patriation brings.³⁹ The Chief Justice of New Zealand has stated in this journal, reasonably enough in the author’s view:

Meanwhile, we can expect stricter interpretation of the powers conferred by legislation and closer scrutiny of executive action (both under legislation and what remains of the prerogative) against human rights standards. Where human rights and constitutional values (such as participation in the democratic process) are engaged, assumptions of legislative intent and deference to executive discretion may no longer be as potent. Such an approach too had implications for the doctrine of parliamentary sovereignty. It may mean that parliament will need to confront human rights implications directly and be clear in its expression where legislation impacts on rights. Acceptance of implied repeal may be a technique of construction the common law will not retain where human rights are affected. And when parliament legislates to confer powers upon the executive which may erode human rights, it can expect scrutiny of the exercise of those powers not in a deferential *Wednesbury* manner but in a manner which

³⁴ See *R v Secretary of State for the Home Dept; Ex parte Simms* [2000] 2 AC 115 at 131 (Lord Hoffman): “Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights ... The constraints on Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, through acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.”

³⁵ Lord Steyn acknowledges the principle of legality as a “presumption of general application operating as a constitutional principle”: *R v Secretary of State for the Home Dept; Ex parte Simms* [2000] 2 AC 115 at 130.

³⁶ See Butler A, “Implied Repeal, Parliamentary Sovereignty and Human Rights in New Zealand” [2001] PL 586; Prebble, n 24; Joseph PA, “Constitutional Law: Constitutional Statutes and Implied Repeal” [2003] *New Zealand Law Review* 387.

³⁷ *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154; *Cooper v Attorney-General* [1996] 3 NZLR 480 at 484.

³⁸ *R v Poumako* [2000] 2 NZLR 695; *R v Pora* [2001] 2 NZLR 37 (especially the judgment of Thomas J). See Butler P, “Human Rights and Parliamentary Sovereignty in New Zealand” (2004) 35 VUWLR 341.

³⁹ Elias Rt Hon Dame S, “Sovereignty in the 21st Century: Another Spin on the Merry-go-round” (2003) 14 PLR 148. This paper of the Chief Justice elicited an (overly) strong reaction by the Deputy Prime Minister and Leader of the House, and later Attorney-General, the Hon Michael Cullen: Cullen Hon M, *Address to Otago Law Society* (8 April 2004) <http://www.beehive.govt.nz> viewed 27 May 2005. The Deputy Prime Minister appears to have overlooked the long-established ability of judges always to make new law through evolution of the common law and statutory interpretation. See his further, more sophisticated, foray at the same conference at which this paper was given: Cullen Hon M, “Parliament: Supremacy over Fundamental Norms?” (2005) 3 *New Zealand Journal of Public and International Law* 1. His first speech as Attorney-General on the subject is *Address to Legal Research Foundation* (25 May 2005) <http://www.beehive.govt.nz> viewed 27 May 2005.

is commensurate with the legislative and international recognition of rights as constitutional in a broad sense.⁴⁰

If so, it will reflect a brave new legal effect of a judgment that a rule is “constitutional”.

Second, consider the effect on politicians – Ministers and Members of Parliament – of labelling a matter “constitutional”. In New Zealand political discourse use of the word “constitutional”, when approving or disapproving of a political position, can instantly elevate the political stakes, especially if used by a respected independent commentator. The odd politician has used the constitutional label to advantage and effect in political debate. Almost all Ministers and Members of Parliament and all officials, with whom I advised or interacted as a senior public servant, would behave differently if clearly advised against, or in favour, of a course of action on the grounds of its constitutional propriety. Perhaps they were simply aware of the derived political effect of public value accorded to the constitution but I like to think that they also perceived some value in the constitution themselves.

Third, the value placed by public perception and debate on matters constitutional is at the core of the behavioural effects of the “constitutional” label. This value is logical, given the reliance that our constitution places on public debate for its survival and even stability. The Constitutional Arrangements Committee considered that:

A key lesson that we have taken from our consideration of New Zealand’s constitution, and of overseas examples and reform processes, is that the enforcement and stability of a constitution depends on the extent to which it is accepted and supported by all branches of government and, most importantly, by the various groupings within that society.⁴¹

Public discourse has few sources of authority to guide it in coherently distinguishing between what is constitutional and what is not. For guidance on this the media turns to academic and other independent commentators for guidance. This is, consequently, a constitutionally important role. However, the pool of available academic, media and other public commentators is, first, a small one in New Zealand (given the inevitable conflicts of interest that arise) and, second, of variable quality.

Constitutional changes occur unnoticed in New Zealand – whether through the evolution of a convention, a decision of the common law, or a quiet statutory amendment. This can be so even when it is quite clear that a constitutional instrument is being altered. For example, who knew that s 21 of the *Constitution Act 1986* (regarding the Crown financial initiative) was repealed by way of a *Statutes Amendment Bill (No 4) 2005* (NZ)?

If we aren’t even sure what is constitutional, then our political and public discourse will surely not adequately debate constitutional changes, either prospectively or retrospectively. Two sets of “errors” could occur. First, the heightened degree of interest and analysis that should accompany proposals for constitutional change may not do so to the same extent. Changes to our constitution may be made that are unidentified, unintended or unwanted. Members of the Constitutional Arrangements Committee of the House of Representatives identified three examples of recent changes that may have altered “the overall balance between the branches of government in a way that is not necessarily foreseen or intended”.⁴² Second, some changes may be wrongly identified by commentators as “constitutional” and attract additional scrutiny and energy which could be better directed elsewhere. Both types of “error” directly hamper the value of constitutional discourse in New Zealand.

If we aren’t sure what is constitutional, we may also not even be aware of who is making constitutional decisions. We may not subject their decisions to appropriately close scrutiny. And we may not be sufficiently concerned to ensure that their accountability frameworks are appropriately drawn to fit the constitutional nature of their roles.

⁴⁰ Elias, n 39 at 162.

⁴¹ Constitutional Arrangements Committee, n 1, p 7.

⁴² Constitutional Arrangements Committee, n 1, p 12 at [27]. The three examples were “the conferring of powers of general competence on local government”; “the postulation of ‘principles of the *Treaty of Waitangi*’ in legislation and the judges’ role in elucidating them in the course of interpreting the phrase in the context of the particular statute”; and “the question whether state education is required to be secular”.

NEW ZEALAND'S CONSTITUTION DEFINED

As can be seen above, a number of different narratives can be used to describe the New Zealand constitution. In this section I offer an alternative cut at encapsulating New Zealand's constitution. I identify the specific elements that are "constitutional" because they significantly affect the generic exercise of public power. I identify the conventions, common law, statutes and other instruments of each branch of government that I consider have this status. (I do not detail the significant interpretations of those elements, such as in individual judicial decisions). The rules which have constitutional status should be subject to heightened public scrutiny, intensified political debate, more generous judicial interpretation and, potentially, future judicial application of the principle of legality.⁴³

My aim here is to attempt a comprehensive account of the elements of New Zealand's constitution. As the account could be developed at book length it is inevitably abbreviated and simplified here. For example, it may be that not all of the sections in the identified enactments deserve "constitutional" status. And there may be individual sections in other legislation that deserve constitutional status. The point of this article is that the elements detailed below are those that contain substantive constitutional rules.

The following section identifies the key elements of New Zealand's constitution according to a framework of seven categories that starts with the sovereign, moves to the democratic basis of the constitution, traverses each branch of government, and deals with protection of citizens from the state and then the limits on the power of national government. It is presented in tabular form in the Annex.

The sovereign

1. The *Constitution Act 1986* recognises a sovereign monarch as Head of State and the sovereign's representative.
2. The *Royal Titles Act 1974* (UK), *Act of Settlement 1700* (UK), *Royal Marriages Act 1772* (UK), and the *Accession Declaration Act 1910* (UK) identify the sovereign.
3. The common law of the royal prerogative outlines the extent of royal powers. The convention that the sovereign and Governor-General acts on the advice of his or her Ministers and the convention that the "reserve" powers may be exercised otherwise than on such advice governs the exercise of the powers of the sovereign and Governor-General.
4. The *Letters Patent 1983* constitutes the office and some powers and duties of the Governor-General.

Democracy

1. The *Electoral Act 1993* (NZ) provides for elections under the proportional representation system of MMP (Mixed Member Proportional), which means that it is unlikely that one political party will hold a majority of seats in the House of Representatives.
2. The *Electoral Act 1993* (singly) entrenches six key provisions in the *Electoral Act* (and one in the *Constitution Act*) so that amendment requires a 75% parliamentary majority or a 50% majority at a national referendum.
3. The confidence element of the convention of collective responsibility provides that a government must have the confidence of a majority of the House of Representatives.
4. The *New Zealand Bill of Rights Act 1990* (NZ) protects rights of political participation and the right to freedom of expression against infringement by government. The common law tort of defamation, amended by the *Defamation Act 1992* (NZ) and parliamentary privilege and the *Bill of Rights 1688* (UK) affects freedom of expression.
5. The *Official Information Act 1982* (NZ) and *Ombudsmen Act 1975* (NZ) affect the availability of official information to the public and the electoral process.

⁴³ Note that some of the rules included below as constitutional are not statutes but treaties, conventions, or even prerogative or parliamentary instruments. If the principle of legality was being applied by a court, there may be some judicial hesitation in applying it to instruments other than legislation, yet doing so is constitutionally logical according to a realist perspective of a constitution. Constitutional function must override legal form.

The executive

1. The *Constitution Act 1986* and *Letters Patent 1983* constitute executive government.
2. The conventions of individual ministerial responsibility and collective Cabinet responsibility provide that primary executive power is exercised (in order of priority) by the Cabinet and individual ministers who are responsible to Parliament. The caretaker convention provides how the government should run when ministers do not have the confidence of the House.
3. The *Cabinet Manual 2001* and occasionally significant *Cabinet Office Circulars* govern the procedure of Cabinet and its committees, and behaviour by Ministers and the public service.
4. The *State Sector Act 1988* (NZ), *Public Finance Act 1989* and the conventional corollaries to ministerial responsibility of political neutrality and loyalty provide for the political independence of the public service and its accountability structure. In addition, the *State-Owned Enterprises Act 1986* (NZ), and *Crown Entities Act 2004* (NZ) provide for the accountability of structures and processes for entities in the wider state sector.
5. The *Constitution Act 1986*, *Public Finance Act 1989* (NZ),⁴⁴ *Public Audit Act 2001* (NZ) and some Standing Orders of the House of Representatives provide rules for accountability within the executive and of executive to Parliament for public expenditure as well as the executive's right to initiate proposals for the appropriation of public money in Parliament.
6. The common law of judicial review of administrative action, supplemented by the *Judicature Amendment Act 1972* (NZ) and *Habeas Corpus Act 2001* (NZ), constrains the exercise of public power, including by the executive.
7. The *Crown Proceedings Act 1950* (NZ) governs the Crown's immunity from common law suit in tort and contract. Government departments and their chief executives also now have criminal liability under the *Crown Organisations (Criminal Liability) Act 2002* (NZ) for offences in relation to health and safety in employment and buildings.
8. The *Statutes Drafting and Compilation Act 1920* (NZ) provides for the drafting of legislation by an agency responsible to executive government, the Parliamentary Counsel Office, which is headed by the Chief Parliamentary Counsel. The *Legislation Advisory Committee Guidelines* (LAC Guidelines) are Cabinet-approved rules for the drafting of legislation by executive government.

Parliament

1. The *Constitution Act 1986* (and the *Legislative Council (Abolition) Act 1950* (NZ)) provides that the House of Representatives and sovereign together constitute Parliament.
2. The doctrine of parliamentary sovereignty, the *Statutes of Westminster the First* (UK), the *Magna Carta* (UK), the *Petition of Right 1627* (UK), and the *Bill of Rights Act of 1688* (UK), ascribe supreme power to Parliament to override other rules by legislation (and are law in New Zealand by virtue of the *Imperial Laws Application Act 1988* (NZ)).⁴⁵
3. The law and custom of Parliament, the *Bill of Rights Act of 1688* (UK), supplemented by the *Legislature Act 1908* (NZ) provide for parliamentary privilege and other matters governing the operation of Parliament.
4. The Standing Orders of the House of Representatives regulate the procedures of the House and constitute the Business Committee to make further decisions on procedure and Privileges Committee to make decisions on the application of parliamentary privilege.
5. The *Electoral Act 1993* (NZ) (including, when it was and might again be operating, the *Electoral (Integrity) Amendment Act 2001* (NZ))⁴⁶ provide rules for the composition of Parliament.

⁴⁴ The *Fiscal Responsibility Act 1993* (NZ) would also have been in this list, but was repealed and its provisions incorporated into Pt 2 of the *Public Finance Act 1989* (NZ) by virtue of the *Public Finance Amendment Act 2004* (NZ).

⁴⁵ Note that the first Schedule to the *Imperial Laws Application Act 1988* (NZ) lists 10 inherited British statutes (including these three, though with three statutory confirmations the Magna Carta counts as four of the ten) as "constitutional enactments".

⁴⁶ The *Electoral (Integrity) Amendment Act 2001* (NZ) implemented an unattractive sanction. MPs who left their political party were required to leave Parliament. The good news is that in accordance with its own sunset clause it expired with the 2005 General Election. The bad news is that the subsequently formed government reintroduced it and proposes to make it permanent! It is not counted separately as a constitutional element in this list.

6. The *Bill of Rights Act of 1688*, *Constitution Act 1986*, and *Public Finance Act 1989*, *Public Audit Act 2001* and some Standing Orders of the House of Representatives provide for parliamentary authority over the power of taxation, expenditure and borrowing.
7. The *New Zealand Bill of Rights Act 1990* requires the Attorney-General to draw the attention of the House to Bills that are inconsistent with the *Bill of Rights Act*.
8. The *Regulations (Disallowance) Act 1989* (NZ) and Standing Orders of the House provide for parliamentary scrutiny and disallowance of regulations made by the executive.
9. The Standing Orders of the House of Representatives provide for parliamentary scrutiny of executive government proposals to enter into international treaties.

The judiciary

1. The inherent jurisdiction of the High Court and the doctrine of the separation of powers as manifested in the principle of judicial independence provide for the independent power of the New Zealand judiciary. This is reinforced by the independent responsibilities of the legal profession under the *Lawyers and Conveyancers Act 2006* (NZ);
2. The *Constitution Act 1986*, *Judicature Act 1908* (NZ), *Supreme Court Act 2003* (NZ), *Te Ture Whenua Maori Act 1993* (NZ), and *District Courts Act 1947* (NZ) establish the court structure and powers in New Zealand, and provide for the existence of the Rules Committee to make rules of court procedure.
3. The common law principles of statutory interpretation, amended by the *Interpretation Act 1999* (NZ) (as itself interpreted by the judiciary) provides rules of statutory interpretation for the judiciary to use.
4. The *Constitution Act 1986*, *District Courts Act 1947* and *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ) provide for processes for complaints against, and ultimately removal of, judges.

Protections for citizens

1. The *New Zealand Bill of Rights Act 1990* protects a specified set of rights and freedoms from infringement by government, subject to “reasonable limits prescribed by law in a free and democratic society”. It may not be used to strike down legislation though it does require preference to be given to interpretations of other statutes that are consistent with it, and the courts have found themselves able to make declarations of inconsistency with the *Bill of Rights Act*⁴⁷ as well as to award public law damages.⁴⁸ The *Human Rights Act 1993* (NZ) is a non-discrimination law that applies to government as well as the private sector and constitutes the Human Rights Commission and Race Relations Commissioner to help enforce it.
2. A number of avenues of complaint to independent bodies are provided for, to Parliament by Standing Orders of the House of Representatives, and other bodies by the *Ombudsmen Act 1975*, *Protected Disclosures Act 2000* (NZ), *Privacy Act 1993* (NZ), and *Police Complaints Authority Act 1988* (NZ).
3. The *Treaty of Waitangi* in itself constrains executive government, through its historical moral authority, through consistent statements by governments of their intent to honour the Treaty,⁴⁹ through specific though scattered legislative provisions, and through administrative law and statutory interpretation (especially of scattered “treaty” clauses in various statutes). In addition the *Treaty of Waitangi Act 1975* (NZ) and *Treaty of Waitangi (State Enterprises) Act 1988* (NZ) constitute the Waitangi Tribunal to investigate and report on allegations of contemporary and historic breaches of the Treaty and make mandatory orders for redress in some circumstances.

⁴⁷ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.

⁴⁸ *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667.

⁴⁹ Eg *Legislation Advisory Committee Guidelines*, n 32, Ch 5.

4. The common law of aboriginal title and customary rights provides for property and related rights of Maori though many of these have now been extinguished and codified by legislation.⁵⁰
5. The *Letters Patent 1983* and the *Commissions of Inquiry Act 1908* (NZ) enable the appointment of independent Royal Commissions and Commissions of Inquiry into matters of public concern and provide for their powers.
6. The doctrine of the rule of law constrains government, as enforced by the courts (though their judgment can be overridden by Parliament).

The limits of national government

1. The *Local Government Act 2002* (NZ), *Local Government (Rating) Act 2002* (NZ), and *Local Electoral Act 2001* (NZ) provide for those spheres in which forms of local government have authority.
2. International law also provides a limit on New Zealand national government, though its nature and effect is worthy of treatment at least equivalent to this whole article. For the purposes of this article, I identify the key elements by which international law affects the exercise of power in New Zealand as existing in the royal prerogative under which the executive enters into international obligations, Standing Orders of the House by which Parliament scrutinises a portion of that, and the United Nations Charter under which New Zealand submits itself to that body's power. An array of international treaties affect the exercise of power in New Zealand.⁵¹ Based loosely on a general sense of the relative significance of their general impact on New Zealand domestic policy, I suggest that it is worth noting as constitutional for the purposes of this article, seven human rights treaties⁵² and two agreements on trade⁵³ as particularly significant, as well as the law of diplomatic and sovereign immunity which facilitates the very conduct of international relations.

Some implications of identifying the New Zealand constitution

The above list of the significant elements of New Zealand's constitution is a crude first cut. However, it contains interesting patterns. To help bring these patterns out I have constructed a database of all the constitutional elements in the above list that are underlined. (This is also presented in tabular form in Annex A). There are 80 elements in total, listed in the seven categories. Some of them appear in more than one category (eg the *Constitution Act 1986* and Standing Orders each appear seven times). If these are counted once each time they appear there are 108 elements altogether.

The first set of patterns to note concerns the nature of the elements. Legislation assumes the dominant proportion of constitutional elements in number: 45 of the 80 constitutional elements (or 56% of them) are Acts of Parliament. (Six of these 45 are Acts of the United Kingdom Parliament.) But this proportion is, perhaps, less than one might have thought. International treaties are the next most numerically significant type of elements of our constitution, amounting to 12 of the 80 elements (or 15%). Although the proportion of this particular type of element is most dependent on some relatively arbitrary assumptions about what is and is not constitutional, such a proportion does capture the increasing internationalisation of our constitution.

⁵⁰ There is a good argument that those statutes that extinguish or codify common law that has constitutional status themselves acquire constitutional status – eg the *Foreshore and Seabed Act 2004* (NZ). This point is not further explored here.

⁵¹ According to the *Legislation Advisory Committee Guidelines on the Process and Content of Legislation in 2001*, New Zealand was party to 900 multi-lateral and 1400 bilateral treaties. Even unincorporated treaties may have legal effect, however, see Geiringer C, "Tavita and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 *New Zealand Universities Law Review* 66.

⁵² The seven significant human rights instruments (and the year New Zealand ratified them) are: *Universal Declaration of Human Rights* (1948), the *Convention on the Elimination of Racial Discrimination* (1975), the *International Covenant on Civil and Political Rights* (and Optional Protocols) (1978), the *International Covenant on Economic, Social and Cultural Rights* (1978), the *Convention on the Elimination of Discrimination against Women* (and Optional Protocol) (1984), the *Convention against Torture* (and Optional Protocol) (1989), and the *Declaration of the Rights of the Child* (1990).

⁵³ *General Agreement on Tariffs and Trade* (1994) and *General Agreement on Trade and Services* (1995).

Dicey might be pleased⁵⁴ that it is also clear that the common law and constitutional conventions are still key effective operational elements of New Zealand's modern constitution. Nine of the 80 identified constitutional elements (11%) derive from the common law and eight (10%) are constitutional conventions. Furthermore, conventions such as the doctrines of the separation of powers, ministerial responsibility and the rule of law are fundamental to the constitution. It cannot be validly argued that New Zealand's constitution is comprised only of laws, strictly so called. Conventions are a core part of the constitution.

In addition there are three executive government instruments (*Cabinet Manual*, *Cabinet Office Circulars*, and the *LAC Guidelines*), a prerogative instrument (the *Letters Patent*), a legislative instrument (the Standing Orders of the House) and a constitutionally curious executive/judicial hybrid⁵⁵ (the rules of court). These proportions are reflected in Table 1 below.

TABLE 1 Proportions of constitutional elements

Nature of Instruments	Number of Elements	Proportion of Elements
Legislation	45	56%
Treaties	12	15%
Common Law	9	11%
Conventions	8	10%
Executive instruments	3.5	4%
Prerogative instruments	1	1%
Legislative instruments	1	1%
Judicial instruments	0.5	1%
Total	80	99%
		<i>Note: The total sum amounts to 99% because of rounding.</i>

The second set of patterns which is reasonably easy to discern from the identified constitutional elements concerns their timing. Of the 80 constitutional elements, 59 are associated with a year of enactment or promulgation (the statutes, identified treaties, *Letters Patent*, the *Cabinet Manual* and the *LAC Guidelines*). The decades in which these dates fall reflect the periods of constitutional activity as noted in Table 2.

TABLE 2 Periods of constitutional activity

Decade	Number of (dated) constitutional instruments created	Percentage of (dated) instruments created
2000-2006	13	22%

⁵⁴ Dicey, n 5, and see McGrath J, "The Crown, Parliament and the Government" (1999) 7 *Waikato Law Review* 1 at 2-3.

⁵⁵ Under section 51C of the *Judicature Act 1908* High Court Rules are made by the Governor-General in Council with the concurrence of the Chief Justice and two members of the High Court Rules Committee, at least one of whom must be a judge.

TABLE 2 *continued*

Decade	Number of (dated) constitutional instruments created	Percentage of (dated) instruments created
1990s	10	17%
1980s	12	21%
1970s	7	12%
1960s	0	0%
1950s	2	3%
1940s	3	5%
1930s	0	0%
1920s	1	2%
1910s	1	2%
1908	3	5%
19th century	1	2%
18th century	2	3%
17th century	2	3%
13th century	2	3%
Total	59	99%
		<i>Note: The total sum amounts to 99% because of rounding.</i>

There is a marked tendency for dates of most constitutional activity to be recent – 71% (42 of the 59) dated elements date from 1972. This either reflects an increasing rate of constitutional development or the continual updating of our constitution, or both. In any case, there is no doubt that New Zealand's constitution changes!

Another fascinating pattern is also evident from the dates. There is a very marked pattern that constitutional instruments are associated with the periods of Labour or Labour-led governments. Of the 47 dated constitutional instruments to be created from 1940 onwards, 70% of them (33) were created during a period of Labour or Labour-led government and 30% of them (14) were created during a period of National or National-led government. This pattern is even more startling considering that Labour was in office for 44% of the period (29 of the 66 years) and National was in office for 56% of the period (37 years).

WHO INTERPRETS THE NEW ZEALAND CONSTITUTION?

The main point of this part of the article is to examine the identity of those who are most important to the interpretation of the elements of the constitution identified above. In the realist tradition in which this article is written, the question of who interprets the constitution is just as important as what the constitution is.

A realist spin on constitutional interpretation

There is a large amount of international literature on the nature of interpretation in law – whether of legislation, constitutions, international treaties or contracts.⁵⁶ In order to get to grips with the implications of this literature for New Zealand’s constitution a fuller treatment of the philosophical and methodological aspects of interpretation is necessary than is possible in the limited space available in this article. For the purposes of this article, however, it is important to pause briefly to consider what “interpretation” is.

Most of the legal literature on interpretation is dominated by examining the judiciary’s enterprise of interpretation of legal instruments or documents. After all, interpretation is a large part of the role of the judiciary and the judiciary is a large part of the focus of lawyers. And in the United States, as noted earlier, the judiciary has asserted an expansive view of its exclusive role in interpreting the United States Constitution.⁵⁷

In New Zealand, as in other Westminster-based systems, there is more room to doubt the primacy of the judiciary in interpretation of the constitution. Here, consideration of who interprets the constitution tends to focus on either or both of the judiciary or Parliament. Since Dicey’s time the judiciary has been thought to have a special role, rooted in its inherent jurisdiction and the nature of the common law, to clarify a Westminster constitution.⁵⁸ And yet the Diceyan doctrine of parliamentary sovereignty had conventionally also reserved to Parliament the power of changing law, including constitutional law as interpreted by the judiciary.

No doubt there is an important constitutional point underlying the relative power of the judiciary and Parliament in constitutional interpretation. However, this article does not seek to enter the debate over this inter-branch competition.⁵⁹ Rather, I seek to pursue the implications of the realist spin on interpretation:

it is institutions which test whether there is still force in the Words, and how much force, and what that force is. It is institutions which validate the Words, not the Words which validate the institutions.⁶⁰

This account is consistent with Stanley Fish’s neo-pragmatic emphasis on the importance of the context of the interpreter – the “interpretative community” – to the task of interpretation.⁶¹ William Blatt argues in a United States context that accurate identification of the relevant community provides a normative guide to the appropriate application of techniques of statutory interpretation by the judiciary – and that this is the “missing element” in statutory interpretation.⁶²

The approach to interpretation in this article acknowledges the impact of the interpretative community on the process of interpretation. But it takes a step back from the assumption that that is relevant only to interpretation by judges. It deploys the realist emphasis on the practical exercise of

⁵⁶ In New Zealand, for example, see Burrows J, “The Changing Approach to the Interpretation of Statutes” (2002) 33 *Victoria University of Wellington Law Review* 981; McLauchlan DW, “Mistake of Identity and Contract Formation” (2005) 21 *Journal of Contract Law* 1; McLachlan C, “The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention” (2005) 54 *ICLQ* 279. For a nice treatment of a dimension of interpretation in New Zealand in theory and practice, see Bradley MT, “The Ambulatory Approach to the Bottom of the Cliff: Can the Courts Correct Parliament’s Failure to Update Legislation?” (2003) 9 *Canterbury Law Review* 1.

⁵⁷ Kramer, n 4.

⁵⁸ Allan TRS, “Legislative Supremacy and Legislative Intention: Interpretation, Meaning and Authority” [2004] 63 *CLJ* 685.

⁵⁹ For a valuable perspective on the debate in contemporary New Zealand see Joseph PA, “Parliament, the Courts, and the Collaborative Enterprise” (2004) 15 *Kings College Law Journal* 321. In (also valuable) contrast, see Goldsworthy J, “Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty” (2005) 3 *New Zealand Journal of Public and International Law* 7. The author’s views are summarily outlined in Palmer, n 33.

⁶⁰ Llewellyn, n 8 at 17.

⁶¹ Fish S, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Duke University Press, 1989) and from a New Zealand perspective Joseph P, “Beyond Parliamentary Sovereignty” (1989) 18 *Anglo-American Law Review* 91 at 113.

⁶² Blatt WS, “Interpretive Communities: The Missing Element in Statutory Interpretation” (2001) 95 *Northwestern University Law Review* 629.

power – and, informed by the above analysis of what New Zealand's constitution is, asks who, in reality, exercises practical power in New Zealand constitutional interpretation? In what follows I adopt the following meaning of constitutional “interpretation”: the determination, *authoritative in practice*, of what an element of the constitution means as applied to a particular instance of doubt or dispute.

The words “authoritative in practice” are important here. Consider a judge who interprets a statute in a case, stating his or her reasons for adopting a particular interpretation in a written judgment. Judgment is entered, a result declared, and the decision is enforced by the apparatus of the court system (part of executive government). If the judge's decision is defied by one of the parties to the litigation, the forces of executive government are employed to compel compliance. Given this enforcement system, for most practical purposes a New Zealand judge's interpretation of a statute is “authoritative in practice”.

Consider the array of constitutional elements identified in this article. It is theoretically conceivable that the New Zealand judiciary, probably the Supreme Court, could be asked to resolve disputes over the meaning of many of these constitutional elements. Yet, in reality, disputes over a number of important constitutional elements are rarely or never litigated before the courts. Disputes do arise and are resolved.

Who resolves disputes over constitutional issues that are not litigated? Sometimes it might be Parliament, by passing legislation. This might account for the relatively recent dates of our constitutional statutes. But legislation is too blunt an instrument to account for most acts of interpretation. To a constitutional realist, it is important to identify these other interpreters of New Zealand's constitution. I suggest that there is an important group of “public office-holders” who are the primary interpreters, authoritative in practice, of an important set of New Zealand's constitutional elements.

The question of exactly who is the primary interpreter of the remaining elements of New Zealand's constitution is difficult. There is usually a complicated and iterative interaction between individuals who provide advice and decisions. Often, but not always, public servants provide advice and Ministers make decisions. Sometimes certain officials make the decisions, often under exclusive statutory authority. And sometimes “advice” can be given that would be difficult not to follow, because of the identity of who provides the advice, the clarity and strength of the advice, the content of the advice, or how the advice is recorded or provided.

So, for example, if the Solicitor-General provides to Cabinet a lengthy and considered legal opinion that a particular course of action would be illegal and violate fundamental constitutional principles, then that advice will almost certainly determine Cabinet's decision. Unfortunately, the messy reality of constitutional issues is rarely as straightforward as that. It can be difficult to identify the separate contributions to decisions by adviser and decision-maker.

Consider the difficulties caused by outgoing Prime Minister Sir Robert Muldoon in refusing to properly hand over power after defeat at the 1984 election.⁶³ Sir Robert was the key decision-maker. His actions could be cited as evidence of the vulnerability of unwritten conventions to abuse and a willingness to ignore advice. The Deputy Prime Minister and Attorney-General, the Hon Jim McLay, in expressing the central tenets of the caretaker convention, simply offered advice. Yet the advice was, reluctantly, taken; standing in testament to the normative political power of following a constitutional convention.⁶⁴

⁶³ Palmer G and Palmer M, *Bridled Power: New Zealand Constitution and Government* (4th ed, Oxford University Press, 2004) Ch 3.

⁶⁴ Unsubstantiated reports have since suggested that McLay's advice may have been backed by a credible political threat to Muldoon's leadership.

In relation to advice to Ministers on the constitution, the relationship between the Solicitor-General and the Attorney-General is crucial and illustrative.⁶⁵ The Solicitor-General is the junior law officer of the Crown but the most senior professional, non-political lawyer. The Attorney-General is the senior law officer of the Crown but, apart from a ten-year experiment with a non-political Attorney-General (James Prendergast from 1865-1875, later Chief Justice)⁶⁶ the Attorney-General is also a politician and Minister and is not necessarily a lawyer.⁶⁷ On the one hand the Solicitor is thought to have constitutional obligations to defer to decisions by the Attorney. On the other hand, in extreme circumstances, the Solicitor's professional expertise and consequent authority carries with it real power.⁶⁸ Who is it, then, between these two office-holders who can be said to "interpret" constitutional elements? It could be either, or both, depending on the issue, the circumstances, and the personal characteristics and reputation of each office-holder.

In my experience, advice on the interpretation of a constitutional element by an experienced official with a deserved reputation for giving good advice will almost always be followed. John McGrath's discreet description of this aspect of the role of the Solicitor-General gives a good flavour of the dynamics of the giving and taking of official expert advice, in noting:⁶⁹

- that Cabinet accepted advice from the Solicitor-General and the Secretary of the Cabinet on the government's status as a caretaker government immediately after the 1993 general election;
- that the Privileges Committee of the House of Representatives accepted the advice of the Solicitor-General on the status of Mrs Kopu as an MP;⁷⁰
- his view of the status of the quorum rules for Cabinet under the *Cabinet Manual* and the *1996 Coalition Agreement* between National and New Zealand First, on which the Solicitor-General's advice was clearly sought and prevailed.

In relation to most constitutional disputes, it is usually clear which public office-holders are responsible for providing authoritative advice on the elements of New Zealand's constitution even if it is not guaranteed that that advice will always determine a constitutional dispute. And on the basis that the power to advise contains a significant, if not always determinative, element of authority to resolve a dispute, those public-office holders possess significant and under-appreciated powers to contribute to constitutional interpretation.

In the Annex, alongside what I have identified to be each element of the New Zealand constitution and its type and date, I offer my own view of who, primarily, interprets that constitutional element. Again, this is a broad-brush picture, offered in the conviction that there is value in understanding the whole of the landscape. What follows is, necessarily, asserted on the basis of personal observation based on my experience as an official in the Treasury and, for five years, as Deputy Secretary for Justice (Public Law) as well as on secondary sources.

⁶⁵ McGrath J, "Principles for Sharing the Law Officer Power" (1998) 18 NZULR 197 and Crown Law Office, *Briefing Paper for the Attorney-General* (Crown Law Office, 2002) pp 3-12; Edwards J LJ J, *The Attorney-General, Politics and the Public Interest* (Sweet & Maxwell, 1984).

⁶⁶ McGrath, n 65 at 199-200.

⁶⁷ Debate rumbled within the legal profession in 2005 on this point when the Deputy Prime Minister and Leader of the House, the Hon Michael Cullen was appointed Attorney-General until the General Election in September 2005. (See Patel NB, "A Layman as Attorney-General" [2005] *New Zealand Law Journal* 259.) Controversy was muted, perhaps, by the power of the office and the obvious competence of its holder (on which, see Cullen Hon Dr M, *The Courts, Government and the Role of Attorney-General* (Lecture to Legal Research Foundation, 25 May 2005). Dr Cullen was subsequently reappointed as Attorney-General in March 2006 on the resignation of Hon David Parker.

⁶⁸ McGrath, n 65 at 202.

⁶⁹ McGrath J, "The Crown, Parliament and the Government" (1999) 7 *Waikato Law Review* 1 at 5, 7-11, 14-19.

⁷⁰ Claudia Geiringer's excellent analysis of the second of these instances reveals something of the complicated interplay of different advisers and decision-makers, which included the Clerk of the House of Representatives, the Speaker, the Solicitor-General, the Privileges Committee, and the House itself. Geiringer C, "Judging the Politicians: A Case for Judicial Determination of Disputes over the Membership of the House of Representatives" (2005) 3 *New Zealand Journal of Public and International Law* 131.

Who interprets New Zealand's constitutional elements?

The Annex provides specific identification of exactly who I consider interprets, authoritatively in practice, New Zealand's 80 constitutional elements. Lawyers usually turn instinctively to judges for authoritative interpretations of the law. Yet I suggest that this is more true with respect to some areas of our constitution than others.

In relation to the sovereign, the Secretary of the Cabinet/Clerk of the Executive Council and the Solicitor-General play a dominant role in constitutional interpretation – most importantly, in practice, in relation to the functions and powers of the Governor-General. The courts' role in reality is limited (to occasional definition of the nature and extent of the royal prerogative).

In relation to the democratic elements of our constitution, the courts' interpretative role focuses on rights of political participation, freedom of expression and questions of legality as to who is appropriately elected as an MP. The bulk of the constitutional workings of the electoral system, the system of forming governments, and freedom of information are authoritatively interpreted by the Solicitor-General, Chief Electoral Officer, the Governor-General, the Secretary of the Cabinet/Clerk of Executive Council and the Ombudsmen.

The courts also have a relatively minor role in interpreting the constitution as it relates to the executive, being primarily confined to the common law of judicial review of administrative action and to the legal liability of government. More important to the constitution of the executive, the power and procedure of Cabinet and Ministers, the accountability and financial management of the public service and wider state sector, and the drafting of legislation are: the Solicitor-General, Clerk of the Executive Council/Secretary of the Cabinet, Prime Minister, State Services Commissioner, the Controller, Auditor-General, the Chief Parliamentary Counsel and the Secretary to the Treasury. Also playing a role are the Minister of Finance, the Speaker and the Clerk of the House.

In relation to the parliamentary element of our constitution, the courts' role is confined to resolving disputes over the status of MPs (though the courts also help to determine the limits of parliamentary sovereignty, in dialogue with Parliament as a collective institution). The main interpreters of the parliamentary constitution are the Clerk of the House, the Solicitor-General and the Speaker together with the Privileges Committee and Business Committee on matters of privilege and procedure. On parliamentary procedures involving public finance, the *New Zealand Bill of Rights Act*, regulations, and international treaties, others are also relevant: the Controller and Auditor-General, Minister of Finance and Secretary to the Treasury, Attorney-General and Solicitor-General and key select committees are also important: the Finance and Expenditure Committee, Regulations Review Committee, and the Foreign Affairs, Defence and Trade Committee.

Conversely, as might be expected, the judiciary interprets the constitution as it applies to the judiciary, except in relation to complaints against the judiciary where the Attorney-General, Solicitor-General and the new office of Judicial Complaints Commissioner play a role. It is also worth noting here the constitutionally unusual nature of the procedure and institutions for making High Court Rules, as a joint executive/judicial enterprise.⁷¹

The judiciary also plays a primary role in relation to interpretation of some constitutional protections for citizens and the limits of national government in relation to local government and international law. In relation to protections for citizens, the judicial role is supplemented by specific complaints agencies (the Ombudsmen, Privacy Commissioner, and Police Complaints Authority). In relation to international law, the executive branch of government, directed by the Cabinet, decides many points of interpretation and the increasing role of United Nations committees (especially those dealing with complaints by individuals), and other international (judicial) bodies such as the International Court of Justice are relevant. The latter development constitutes the rise of yet another source of (increasingly?) authoritative interpretation – the international judiciary.

Finally, note that there are two constitutional elements which I do not consider to have a sole interpreter: the doctrines of parliamentary sovereignty and rule of law, and the *Treaty of Waitangi*. The

⁷¹ Above n 55, and accompanying text.

interpretation of these elements seems to exist in interstices of the ongoing dialogue between the judiciary and Parliament and analysis of their interpretation deserves consideration in a separate article.⁷²

CONCLUSION: THE IMPORTANCE OF PUBLIC OFFICE-HOLDERS

This article has attempted to address two questions that should, on their face, be reasonably straightforward and simple: what is New Zealand's constitution, and who interprets it?

There are many possible points of dispute as to which rules and conventions are "constitutional" and which are not. But to date the debate on that question has been desultory in New Zealand. Debate on what is constitutional is important due to the symbolic function of the constitution and its relationship to public discourse, its political importance, and the potential legal implications of the answer. Further, it is not enough to address the question in an ad hoc manner in relation to particular rules or conventions as they arise in dispute. A responsible academy would seek to debate and determine the criteria by which a rule or convention should be adjudged "constitutional" for different purposes.

This article seeks to start that debate by putting forward a criterion and a corresponding view of what rules and conventions should be regarded as constitutional. In the realist tradition, it suggests that a rule should be regarded as constitutional if it plays a significant role in influencing the generic exercise of public power – whether through structures, processes, principles, rules, conventions or even culture. The article offers my identification of what those constitutional elements are.

It is interesting that once the attempt is made to identify the elements of New Zealand's constitution comprehensively, some notable patterns emerge. According to my account, most (56%) of New Zealand's constitutional elements are found in legislation, though international treaties, the common law and constitutional conventions are also significant. Most constitutional elements that are associated with a particular date of enactment are recently made, which may reflect increasing constitutional activity or the constant updating of our constitution. And, remarkably, 70% of the constitutional elements associated with a date since 1940 were created during a period of Labour government even though Labour was in power for only 44% of that time.

But to me, the most important aspect of considering what is identified above as "constitutional" lies in the identities of those who interpret our constitution. Remember the definition of "interpretation" offered here: the determination, authoritative in practice, of what a convention or rule means as applied to a particular instance of doubt or dispute.

The judiciary clearly has a key role in constitutional interpretation, though mostly with respect to those constitutional elements relating to:

- the limits of national government;
- protections for citizens against government;
- the role and powers of the judiciary;
- political participation and disputes of outcome in the democratic process; and
- legal liability of the executive;

In most respects Parliament as a collective institution does not play a significant role in constitutional interpretation. Its interpretative role is confined mainly to the constitutional elements of parliamentary law and is exercised through the Speaker and Clerk of the House and certain select committees. (It also, of course, can be said to be contributing to the interpretation of constitutional elements whenever it passes legislation amending them.)

But perhaps the most startling finding of the analysis above, as reflected more fully in the Annex to this article, is the salient role of a relatively small number of public office-holders in constitutional interpretation. These office-holders don't always solely determine constitutional interpretation, but they are responsible for making decisions or providing authoritative advice, and thereby contributing

⁷² Hogg PW and Bushell AA, "The Charter Dialogue between Courts and Legislatures" (1997) 35 *Osgoode Hall Law Journal* 75. Also see Joseph PA and Walker GR, "A Theory of Constitutional Change" (1987) *Oxford J Legal Stud* 155 at 173-180.

significantly to the interpretation of New Zealand's constitution. Ten public office-holders stand out as most significant in the extent and importance of their influence (in a rough order of importance and extent of interpretative powers):

- the Prime Minister;
- the Solicitor-General;
- the Secretary of the Cabinet/Clerk of the Executive Council;
- the Clerk of the House of Representatives;
- the Governor-General;
- the Attorney-General;
- the State Services Commissioner;
- the Controller and Auditor-General;
- the Speaker of the House of Representatives; and
- the Ombudsmen.

This suggests a clear research agenda to explore the aspects of each of these big ten. How are they appointed and dismissed? Is their accountability framework appropriate? How do they approach the constitutional dimensions of their roles? The New Zealand Centre for Public Law has been running for the last five years a Public Office-Holders Seminar Series in which incumbents in these and other positions give their own perspective of the role.⁷³ More such scrutiny is required.

My overall suggestion is that a significant part of New Zealand's constitutionalism is not judicial or legislative in nature, but could be characterised as "office-holders' constitutionalism". This resonates with the legal realist nature of the conception of a constitution advanced here. A constitution, like other law, can be conceived as "what officials do about disputes".⁷⁴

Annex

Constitutional element	Type	Year	Interpreted by
A The sovereign			
1. <i>Recognition of the sovereign</i>			
• Constitution	Act	1986	Solicitor General and Clerk of Executive Council
2. <i>Identification of the sovereign</i>			
• Royal Titles	Act	1974	Solicitor General and Clerk of Executive Council
• Act of Settlement	Act (UK)	1700	Solicitor General and Clerk of Executive Council
• Royal Marriages	Act (UK)	1772	Solicitor General and Clerk of Executive Council
• Accession Declaration	Act (UK)	1910	Solicitor General and Clerk of Executive Council

⁷³ Some of these are available as Occasional Papers on the Centre's website at <http://www.vuw.ac.nz/nzcpl> viewed 10 April 2006.

⁷⁴ "What these officials do about disputes is, to my mind, the law itself": Llewellyn KN, *The Bramble Bush: On Our Law and Its Study* (Oceana Publications, 1930) p 12 and see pp 8-10 qualifying and explaining this much-cited phrase. Again, for an account of legal realism applied to constitutions, see Llewellyn, n 8.

Constitutional element	Type	Year	Interpreted by
<p>3. <i>Royal Powers</i></p> <ul style="list-style-type: none"> royal prerogative Governor-General acts on the advice of ministers (except for the reserve powers) 	<p>common law</p> <p>convention</p>		<p>judiciary</p> <p>Solicitor General and Clerk of Executive Council</p>
<p>4. <i>Functions and powers of the Governor-General</i></p> <ul style="list-style-type: none"> Letters Patent 	prerogative	1983	Solicitor General and Clerk of Executive Council
B Democracy			
<p>1. <i>Electoral system</i></p> <ul style="list-style-type: none"> Electoral 	Act	1993	Solicitor-General and Chief Electoral Officer
<p>2. <i>Entrenchment of electoral system</i></p> <ul style="list-style-type: none"> Electoral 	Act	1993	Clerk of the House of Representatives
<p>3. <i>Responsibility to Parliament</i></p> <ul style="list-style-type: none"> collective responsibility 	convention		Governor-General and Secretary of the Cabinet/ Clerk of the Executive Council Solicitor-General
<p>4. <i>Rights of political participation and freedom of expression</i></p> <ul style="list-style-type: none"> New Zealand Bill of Rights tort of defamation Defamation parliamentary privilege Bill of Rights 	<p>Act</p> <p>common law</p> <p>Act</p> <p>common law</p> <p>Act (UK)</p>	<p>1990</p> <p>1992</p> <p>1688</p>	<p>judiciary</p> <p>Judiciary</p> <p>judiciary</p> <p>judiciary and Parliament</p> <p>judiciary and Parliament</p>

Constitutional element	Type	Year	Interpreted by
<p><i>5. Freedom of Information</i></p> <ul style="list-style-type: none"> • Official Information • Ombudsmen 	<p>Act</p> <p>Act</p>	<p>1982</p> <p>1975</p>	<p>Ombudsmen and judiciary</p> <p>Ombudsmen</p>
C Executive			
<p><i>1. Constitution of executive government</i></p> <ul style="list-style-type: none"> • Constitution • Letters Patent <p><i>2. Power of Cabinet and Ministers</i></p> <ul style="list-style-type: none"> • collective responsibility • individual ministerial responsibility • caretaker government <p><i>3. Cabinet procedure</i></p> <ul style="list-style-type: none"> • Cabinet Manual • Cabinet Office Circulars <p><i>4. Accountability of the Public Service and wider State Sector</i></p> <ul style="list-style-type: none"> • State Sector • political neutrality and loyalty of the public service • Public Finance 	<p>Act</p> <p>prerogative</p> <p>convention</p> <p>convention</p> <p>convention</p> <p>executive</p> <p>executive</p> <p>Act</p> <p>convention</p> <p>Act</p>	<p>1986</p> <p>1983</p> <p></p> <p></p> <p></p> <p>2001</p> <p></p> <p>1988</p> <p></p> <p>1989</p>	<p>Solicitor-General and Clerk of Executive Council</p> <p>Solicitor-General and Clerk of Executive Council</p> <p>Prime Minister</p> <p>Prime Minister</p> <p>Prime Minister</p> <p>Prime Minister and Secretary of the Cabinet</p> <p>Prime Minister and Secretary of the Cabinet</p> <p>State Services Commissioner and Solicitor-General</p> <p>State Services Commissioner and Solicitor-General</p> <p>Secretary to the Treasury and Controller and Auditor-General and Solicitor-General</p>

Constitutional element	Type	Year	Interpreted by
• State-owned Enterprises	Act	1986	Secretary to the Treasury and Solicitor-General
• Crown Entities	Act	2004	State Services Commissioner
<i>5. Public sector financial management system</i>			
• Constitution	Act	1986	Controller and Auditor-General, Speaker and Clerk of the House, and Solicitor-General
• Public Finance	Act	1989	Minister of Finance, Secretary to the Treasury and Controller and Auditor-General
• Public Audit	Act	2001	Controller and Auditor-General
• Standing Orders	legislative		Speaker and Clerk of the House of Representatives
<i>6. Constraints on exercise of public power</i>			
• judicial review of administrative action	common law		judiciary
• Judicature Amendment	Act	1972	judiciary
• Habeas Corpus	Act	2001	judiciary
<i>7. Government liability</i>			
• tort and contract	common law		judiciary
• Crown Proceedings	Act	1950	judiciary
• Crown Organisations (Criminal Liability)	Act	2002	judiciary
<i>8. Drafting of legislation</i>			

Constitutional element	Type	Year	Interpreted by
<ul style="list-style-type: none"> Statutes Drafting and Compilation 	Act	1920	Chief Parliamentary Counsel
<ul style="list-style-type: none"> Legislation Advisory Committee Guidelines 	executive	2001	Chief Parliamentary Counsel and Legislation Advisory Committee
D Parliament			
<i>1. Constitution of Parliament</i>			
<ul style="list-style-type: none"> Constitution 	Act	1986	Clerk of the House of Representatives and Solicitor-General
<ul style="list-style-type: none"> Legislative Council (Abolition) 	Act	1950	Clerk of the House of Representatives and Solicitor-General
<i>2. Parliament's power</i>			
<ul style="list-style-type: none"> parliamentary sovereignty 	convention		judiciary (in "dialogue" with) Parliament
<ul style="list-style-type: none"> Statutes of Westminster the First 	Act (UK)	1275	judiciary (in "dialogue" with) Parliament
<ul style="list-style-type: none"> Magna Carta 	Act	1215	judiciary (in "dialogue" with) Parliament
<ul style="list-style-type: none"> Petition of Right 	Act (UK)	1627	judiciary (in "dialogue" with) Parliament
<ul style="list-style-type: none"> Bill of Rights 	Act (UK)	1688	judiciary (in "dialogue" with) Parliament
<ul style="list-style-type: none"> Imperial Laws Application 	Act	1988	judiciary (in "dialogue" with) Parliament
<i>3. Parliamentary privilege</i>			
<ul style="list-style-type: none"> law and custom of Parliament 	common law		Parliament, the Speaker of the House of Representatives and the Clerk of the House of Representatives, Privileges Committee
<ul style="list-style-type: none"> Bill of Rights 	Act (UK)	1688	Parliament, the Speaker and the Clerk of the House

Constitutional element	Type	Year	Interpreted by
<ul style="list-style-type: none"> Legislature 	Act	1908	Parliament, the Speaker and the Clerk of the House
<i>4. Parliamentary procedure</i>			
<ul style="list-style-type: none"> Standing Orders 	legislative		The Speaker, Clerk of the House, Business Committee
<i>5. Composition of Parliament</i>			
<ul style="list-style-type: none"> Electoral 	Act	1993	judiciary
<i>6. Parliament's power of the purse</i>			
<ul style="list-style-type: none"> Bill of Rights 	Act (UK)	1688	the Speaker, Clerk of the House
<ul style="list-style-type: none"> Constitution 	Act	1986	the Speaker, Clerk of the House
<ul style="list-style-type: none"> Public Finance 	Act	1989	Controller and Auditor-General, Minister of Finance, Secretary to the Treasury
<ul style="list-style-type: none"> Public Audit 	Act	2001	Controller and Auditor-General, Minister of Finance, Secretary to the Treasury
<ul style="list-style-type: none"> Standing Orders 	legislative instrument		the Speaker, Clerk of the House
<i>7. Parliament's scrutiny of Bill of Rights consistency</i>			
<ul style="list-style-type: none"> New Zealand Bill of Rights 	Act	1990	The Speaker, Clerk of the House, Attorney-General, Solicitor-General
<i>8. Parliament's power over regulations</i>			
<ul style="list-style-type: none"> Regulations (Disallowance) 	Act	1989	Speaker, Clerk of the House, Regulations Review Committee
<ul style="list-style-type: none"> Standing Orders 	legislative instrument		Speaker, Clerk of the House, Regulations Review Committee
<i>9. Parliament's scrutiny of treaties</i>			

Constitutional element	Type	Year	Interpreted by
<ul style="list-style-type: none"> Standing Orders 	legislative instrument		Speaker, Clerk of the House, Foreign Affairs and Trade Committee
E The judiciary			
<i>1. Constitution and independence of the judiciary</i>			
<ul style="list-style-type: none"> inherent jurisdiction of the High Court 	common law		judiciary
<ul style="list-style-type: none"> doctrine of separation of powers and judicial independence 	convention		judiciary
<ul style="list-style-type: none"> Lawyers and Conveyancers 	Act	2006	judiciary
<i>2. Structure and powers of the courts</i>			
<ul style="list-style-type: none"> Constitution 	Act	1986	judiciary
<ul style="list-style-type: none"> Judicature 	Act	1908	judiciary
<ul style="list-style-type: none"> Supreme Court 	Act	2003	judiciary
<ul style="list-style-type: none"> Te Ture Whenua Maori 	Act	1993	judiciary
<ul style="list-style-type: none"> District Courts 	Act	1947	judiciary
<ul style="list-style-type: none"> rules of court 	judicial and executive instrument		judiciary and executive council
<i>3. Judicial power of statutory interpretation</i>			
<ul style="list-style-type: none"> statutory interpretation 	common law		judiciary
<ul style="list-style-type: none"> Interpretation 	Act	1999	judiciary
<i>4. Accountability of judges</i>			

Constitutional element	Type	Year	Interpreted by
• Constitution	Act	1986	Attorney-General, Solicitor-General
• District Courts	Act	1947	Attorney-General, Solicitor-General
• Judicial Conduct Commissioner and Judicial Conduct Panel	Act	2004	Attorney-General, Solicitor-General and Judicial Conduct Commissioner
F Protections for citizens			
<i>1. Civil and political rights</i>			
• New Zealand Bill of Rights	Act	1990	judiciary
• Human Rights	Act	1993	judiciary
<i>2. Avenues for complaint</i>			
• Standing Orders	legislative instrument		Speaker and Clerk of the House
• Ombudsmen	Act	1975	Ombudsmen
• Protected Disclosures	Act	2000	Ombudsmen
• Privacy	Act	1993	Privacy Commissioner
• Police Complaints Authority	Act	1988	Police Complaints Authority
<i>3. Maori</i>			
• <i>Treaty of Waitangi</i>	treaty	1840	Parliament (in “dialogue” with) the judiciary
• Treaty of Waitangi	Act	1975	Waitangi Tribunal
• Treaty of Waitangi (State Enterprises)	Act	1988	Waitangi Tribunal

Constitutional element	Type	Year	Interpreted by
<ul style="list-style-type: none"> aboriginal title and customary rights 	common law		judiciary
<p>4. <i>Inquiries</i></p> <ul style="list-style-type: none"> Letters Patent 	prerogative instrument	1983	Prime Minister and Cabinet
<ul style="list-style-type: none"> Commissions of Inquiry 	Act	1908	Prime Minister and Cabinet
<p>5. <i>Rule of law</i></p> <ul style="list-style-type: none"> rule of law 	convention		judiciary (in “dialogue” with) Parliament
G The limits on national government			
<p>1. <i>Local government</i></p> <ul style="list-style-type: none"> Local Government 	Act	2002	judiciary
<ul style="list-style-type: none"> Local Government (Rating) 	Act	2002	judiciary
<ul style="list-style-type: none"> Local Electoral 	Act	2001	judiciary
<p>2. <i>International treaties or conventions</i></p> <ul style="list-style-type: none"> royal prerogative 	common law		Prime Minister and Cabinet
<ul style="list-style-type: none"> Standing Orders 	legislative instrument		Speaker and Clerk of the House
<ul style="list-style-type: none"> <i>United Nations Charter</i> 	treaty	1948	Cabinet, judiciary and International Court of Justice
<ul style="list-style-type: none"> <i>Universal Declaration of Human Rights</i> 	treaty	1948	Cabinet, judiciary and UN Committees
<ul style="list-style-type: none"> <i>Convention on the Elimination of Racial Discrimination</i> 	treaty	1975	Cabinet, judiciary and UN Committees

Constitutional element	Type	Year	Interpreted by
• <i>International Covenant on Civil and Political Rights</i>	treaty	1978	Cabinet, judiciary and UN Committees
• <i>International Covenant on Economic, Social and Cultural Rights</i>	treaty	1978	Cabinet, judiciary and UN Committees
• <i>Convention on the Elimination of Discrimination against Women</i>	treaty	1984	Cabinet, judiciary and UN Committees
• <i>Convention against Torture</i>	treaty	1989	Cabinet, judiciary and UN Committees
• <i>Declaration of the Rights of the Child</i>	treaty	1990	Cabinet, judiciary and UN Committees
• General Agreements on Tariffs and Trade	treaty	1994	Cabinet, judiciary and World Trade Organisation
• General Agreement on Trade and Services	treaty	1995	Cabinet, judiciary and World Trade Organisation
• diplomatic and sovereign immunity	treaties and international custom		Cabinet and judiciary