

The New Zealand Legal System

By Fiona Crichton, LLB

This essay provides an overview of the New Zealand legal system, and was written specifically for the Auckland District Law Society website. It is designed for legal studies courses or for any member of the public wishing to understand the basis of the law and the working of the legal system in New Zealand.



Funding assistance for preparation of this essay was provided by the **New Zealand Law Foundation**. More information about the foundation can be found on their website at: <http://www.lawfoundation.org.nz/>



Brief Table of Contents

Introduction to the law	3
Introduction to the law	3
Sources of the law	4
Statutory law	8
Case law.....	12
Constitutional law	15
Court structure	23
Judges and Lawyers	32
NZ Law in brief	36

See an expanded table of contents overleaf

Expanded Table of Contents

Introduction to the law	3
Public sources of law.....	3
Private sources of law.....	3
Public international law	4
Sources of the law	4
Historical sources.....	4
Primary sources	6
Statutory law	8
Making a change.....	9
Effect on the common law	11
Case law.....	12
Glossary	12
The principles	13
Development of the law through case law.....	13
Constitutional law	15
The characteristics of the New Zealand's Constitution.....	15
Institutions of government.....	16
Historical legislation	17
Recent legislation.....	18
Treaty of Waitangi.....	21
Conventions	22
Letters Patent of the Governor-General.....	23
Court structure	23
Hierarchy of the Courts	23
The Supreme Court.....	24
Privy Council	24
Court of Appeal	25
The High Court	26
District Courts	26
Family Court	27
The Disputes Tribunal.....	28
The Youth Court	29
Maori Land Court	30
Employment Court.....	30
Environment Court	31
Administrative Tribunals	32
Judges and Lawyers	32
Judicial independence.....	32
Supreme Court Judges	33
Court of Appeal Judges	33
High Court Judges	34
Associate Judges.....	34
District Court Judges.....	34
Community Magistrates	34
Justices of the Peace.....	35
Disputes Tribunal Referees.....	35
Ombudsmen.....	35
Lawyers.....	36
Juries	36
NZ Law in brief	36
Contract law.....	36
Torts	37
Criminal law	38
Family law	38
Land law	39

Introduction to the law

Introduction

Although the law is multifaceted, in essence it provides a framework of rules upon which society is based.

The Law:

- Sets out that behaviour which is prohibited by society and for which a penalty will be imposed;
- Develops rules so that people can make their own arrangements, particularly in relation to property rights, business transactions and disposal of assets on death;
- Settles the system of government;
- Develops rules relating to obligations owed by government to its citizens and owed by one citizen to another;
- Provides a forum for settling disputes, enforcing obligations and determining whether a breach of rules relating to prohibited behaviour has occurred.

Categorising the law might be artificial and not always conclusive, but it can be a convenient method of providing an overview of the law as it exists within society.

Public sources of law

Administrative Law

Law dealing with the relationship between citizen and bureaucracy - law monitoring conduct of branches of government that enables judicial review of a decision of an administrative body.

Environmental Law

Law setting out the legal constraints regarding the use of the environment: Resource Management Act 1991.

Constitutional Law

Law describing the relationship between institutions of government: "Law about Law"

Revenue Law

Law relating to the application and interpretation of rules relating to the right of government to take money from its citizens in the form of taxation and revenue.

Criminal Law

Law setting out the obligations imposed by the state on its citizens - codified in statute e.g. Crimes Act 1961; Summary Offences Act 1981; Misuse of Drugs Act 1975

Private sources of law

Land Law

Law as it relates to rights of citizens in respect of land.

Torts

Law dealing with obligations between citizens: eg nuisance, defamation, negligence....

Industrial Law

Rules relating to contracts of employment: Employment Contracts Act 1991.

Property Law

Rules relating to rights of ownership and possession in relation to personal property both tangible (e.g. chattels) and intangible (e.g. intellectual property such as copyright and patent)

Family Law

Law dealing with rights and obligations in family relationships most particularly in relationships between husband and wife and parent and child.

Succession

Rules regarding the passing of property on the death of a citizen.

Company Law

Law in relation to rights and obligations in respect of corporate entities. RestitutionFlexible doctrine of law providing for remedies where a person has obtained some benefit at the expense of another where the benefit should not be retained.

Law of Trusts

Law in relation to trusts, trustees and beneficiaries of trusts.

Contract Law

Rules relating to whether agreements between individuals will be recognised at law.

Public international law

Rules regarding relationship between nations.

Sources of the law

Historical sources

A consideration of the sources of law will provide an insight into how the New Zealand legal system functions.

The Common Law: an English legacy

The common law evolved in England over many centuries and operates through the doctrine of precedent and the development of legal principles through cases and judgments. As a system of law the common law can be contrasted with other legal systems though out the world such as the civil law system in Europe which requires the precise exposition of its laws in statutory codes.

New Zealand, as a colony, inherited the common law system from Britain and the English Law Acts of 1854, 1858 and 1908 confirmed New Zealand as a common law country.

The Common Law: a glance at English legal history

The common law developed from a central justice system common to all of England, in contrast with local or provincial laws which might be unique to the region in which they applied. Mainly administered by the monarch and the Royal Courts the common law system developed gradually, assisted by the implementation of law reporting which allowed judgments of the Courts to be used for reference purposes. This reporting of Court decisions allowed the principles and rules which emerged in the course of one case to be applied in an analogous situation lending certainty and consistency to the application of the law throughout England.

As the common law system evolved it became characterised as harsh and inflexible. Relief for an action brought under the common law system was restricted to damages (monetary compensation), judicial precedent was strictly applied and the system of writs, the method by which a claim could be initiated, was restrictive in that not all just claims were able to be brought. The inevitable effect of such rigidity was that justice was often frustrated, leaving room for the development of a supplementary body of law to address these inequities.

The rise and rise of Equity: an overview

Equity evolved to counteract the injustices and harshness of the common law.

In the middle ages claimants who were unable to pursue an action in the common law courts, petitioned the King, who was the "fountain of all justice", to exercise his residual judicial function. These petitions were later referred to the Chancellor and eventually the Court of Chancery was set up as a specialist court to deal with such petitions. The Court of Chancery was more informal than the Common Law courts and was able to give effect to justice on the basis of the merits of the case. By the early seventeenth century equity was developing its own series of legal principles and procedures based on concepts of justice and fairness.

The influence of Equity

Equity has greater flexibility than the common law and is based on a set of general principles related to issues of fairness. An equitable remedy will only be granted to a claimant who has themselves acted fairly in relation to the issues leading to the Court action. This is embodied by such equitable principles as a "person who seeks equity must do equity" and "a person must come to equity with clean hands". Unlike the common law, where a remedy will follow if a claim is made out, in equity relief is discretionary and the Judge may decide not to grant a remedy.

The contribution of equity in providing a range of legal actions, principles and remedies is significant.

The law of trusts evolved from the equitable jurisdiction of the Courts and, put simply, relates to a situation where property is vested in a trustee who controls and manages the property for the benefit of a beneficiary. The trustee will be subject to certain enforceable equitable obligations owed to the beneficiary, in relation to the trust property. There are several different forms of trust including personal trusts, family trusts, constructive trusts and charitable trusts.

The scope of available remedies to a litigant has been expanded by the existence of equitable remedies. The common law in confining itself to the remedy of damages, monetary compensation for loss, created situations, which did not always equate to a just result. In contrast equity developed a variety of remedies which extended beyond monetary compensation including: specific performance (remedy requiring a party to fulfil a promise); injunctions (remedy preventing or requiring a party from acting in a certain way) and rectification (remedy adding terms agreed to but erroneously omitted from a written contract).

At a procedural level equity has contributed principles, such as discovery of documents (the disclosure of relevant and non-privileged documents to the opposing party in a Court action), which have made the process of litigation more equitable and efficient.

Equity today

In the mid nineteenth century there was a reformation of the English Court structure and as a result the old courts were abolished and integrated into a new framework. Under the new system English Courts and Judges had the jurisdiction to administer both bodies of law concurrently, and in cases of conflict between the common law and equity, equity was to have precedence.

In New Zealand the Courts have always had the jurisdiction to administer both equity and the common law system concurrently. As a system of rules and principles, equity works within the framework of the law with an overall objective of achieving justice between the parties.

Common law and Equity: operating side by side

The conventional view of common law and equity is that they operate as individual systems of law, on parallel paths that do not intersect. This view has been challenged in recent times and in New Zealand it seems there has been a certain amount of intermingling between the two systems so that, for example, a common law remedy of damages might be awarded for a breach of equitable obligations such as breach of professional duties. [Mouat v Clark Boyce[1992] 2 NZLR 559]. See also Julie Maxton "Some Effects of the Intermingling of Common Law and Equity" Canterbury Law Review 5(2) 1993:299-311.

Primary sources

Statutory law

Statutory law, the law which is passed by Parliament and set out in written form in published statutes, is the supreme law of New Zealand. Statute law may specifically overrule an established common law rule so that it will not now have any application within the law and can repeal a statute: (override or replace a previous statute so it no longer applies as law).

Legislation

The term legislation applies to any document passed with the authority of Parliament and includes:

- New Zealand statutes;
- Imperial statutes (by virtue of s3 Imperial Laws Application Act 1988 a number of English statutes continue to be in force in New Zealand today e.g.: Magna Carta (1297));
- Subordinate or delegated legislation (laws created by bodies with the power to create such laws, by virtue of an authority conferred by Parliament: e.g. bylaws created by local bodies);
- Provincial ordinances made by Provincial Councils created by the Constitution Act 1852 and abolished in 1876.

In contrast with case law the content of legislation is certain. Legislation has a definite form, should be very explicit in its language and can only be amended or repealed, by Parliament.

Types of statutes:

- Public Acts: Acts applicable to the general public: e.g. Land Transport Act 1988;
- Local Acts: Acts applicable to a defined region: e.g. Auckland City Council (New Market Land Vesting) Act 1988;
- Private Acts: Acts applicable to a specific person, corporation or group of people: e.g. Kirkpatrick Masonic Trust Empowering Act 1998

The Legislative Process

A Bill is legislation, which is yet to be passed and which must proceed through a specific legislative process before it will become an Act of Parliament.

The origins of legislation

- Legislation usually originates from the ruling government of the time and is generally the most effective way to implement governmental policy;
- Since the introduction of the Mixed Member Proportional (MMP) electoral system, legislation may arise from arrangements made between parties forming coalition governments.

- Legislation may emerge from a Private Member's Bill, but only a handful of such bills will be permitted introduction to the House of Representatives and ordinarily only one of these bills a year will survive the legislative process;
- Legislation may arise from ideas from a select committee or committees formed for a special purpose;
- Civil servants within governmental departments may advise and assist the Minister to which they are responsible, in relation to the composition of relevant policy and resultant legislation;

Specific bodies have been created to consider issues relating to law reform, such as the Law Reform Division of the Department of Justice, and on occasion temporary bodies such as Royal Commissions are formed to make inquiries into issues of social and legal importance and to make resultant recommendations.

The Law Commission was established in 1985 under the Law Commission Act 1985. The Law Commission is statutorily required:

- To continually review the law;
- to make recommendations regarding reform of the law;
- to advise governmental departments about their own reforms and
- to advise the Minister of Justice on ways to make the law as accessible and comprehensible as practicable (s5 Law Commission Act 1985);

Special interest groups may lobby parliament with some success, particularly if the organisation is large and represents valuable votes. Occasionally a private citizen has successfully campaigned to bring about legislative changes.

The legislative calendar

The Cabinet Legislation Committee makes the ultimate decision about whether a Bill will be placed on the legislative calendar. Submissions will be taken from interested Departments, Ministers and Members of Parliament and the Committee may then place the bill, in order of priority, on the calendar.

Drafting

The Parliamentary Counsel Office usually drafts the Bill. The draft while complying with instructions from the Minister or Department concerned must also comply with existing law and international obligations. It is in the drafting process that issues not previously considered may emerge and have to be resolved. The draft will be shown to other Departments affected and often to the Legislation Advisory Committee for feedback.

Approval for introduction

Following the drafting process, Cabinet will deliberate about whether or not to approve the Bill for introduction to the House of Representatives. The bill will also be considered by Caucus which will usually look at the form and content of the Bill. Traditionally once a bill is introduced into the House it will be voted on along party lines, with the expectation that governmental party members will support the bill. Occasionally this convention is flouted when a party member "crosses the floor" and votes against a government Bill.

The passage of a Bill

Introduction and first reading

A Government Bill will be introduced by the appropriate Minister, whilst a Member's Bill is introduced by the Member sponsoring it. Prior to 1995 an introductory speech, setting out the policy and objectives of the Bill, would have been delivered as part of the process of introduction but this is no longer required. There is no debate at this phase of the Bill's passage as this may be the first opportunity opposition Members of Parliament have had to actually see it. A motion to

introduce the Bill is put to the House of Representatives and in the event the vote to introduce is carried, it is deemed to be introduced and to have passed through the first stage of reading.

Second reading

At the time of the second reading a motion is put to the House that the Bill be read for a second time and the Minister moving the Bill will then make an introductory speech. Debate will follow the motion, usually focusing on the policy of the Bill, and the debate will be recorded in Hansard. The second reading may progress over several days and be subject to several adjournments.

Select Committees

Following the second reading, the Bill will be referred to select committee. A select committee is comprised of Members of Parliament from across the political spectrum, so that as far as is practicable a non-partisan report will be produced. Ministers do not sit on these committees. The committee will consider the Bill and invite submissions from the general public. The role of the committee is to report back to the house with recommendations as to how the Bill can be amended and improved.

Reporting back

Once the select committee process is concluded a written report will be presented to the House. The Bill is reprinted incorporating any suggested alterations and the House will vote as to whether the amendments recommended should be accepted.

Committee of the Whole House

The Committee of the Whole House debates the Bill further and amendments to the Bill may be made at this time.

Third reading

The third reading is the final stage of the process. Amendments are not made at this point while debate is limited and on some occasions is non-existent. Voting procedure is governed by Standing Orders, which are the rules devised by Parliament in respect of its own procedures. Once the Speaker has put a question to the House, a vote will be taken by voices and a calculation of the numbers of those who have voted aye and those who have voted no will be undertaken. If the result of the voice voting process is equivocal the leaders of the parties will be asked to cast a party vote, a vote for all their members. If the vote is a conscience issue rather than a party matter then a "personal vote" is taken. A personal vote can be requested by an individual Member of Parliament, which may happen when a member wishes to vote with an opposition party. Voting occurs by Members who agree with the motion leaving the floor of the house through the door on the right of the House and by Members who disagree with the motion exiting through the door on the left of the house. If a member wishes to vote against their party, they must "cross the floor" to vote. Personal votes are calculated by counting the number of Members exiting through each door. Once the motion is carried the Bill itself has passed the House.

Assent

The assent and signature of the Governor-General is required to complete the evolution of a Bill into an Act of Parliament. Even after assent there may be a delay between the passing of the Bill and the Act coming into force, this may be achieved by specifying a particular date upon which the Act will come into force.

Statutory law

Introduction

Legislation arising from the process of Parliament is the highest form of law. A statute can override the common law, judicial precedent and can repeal previous legislation. The enactment of legislation as supreme law allows Parliament to implement policy and effectively govern a nation.

In New Zealand there are literally thousands of current statutes covering a multitude of legal areas, unlike some countries where there is only one central legislative document known as a Code. The practical effect of such a vast number of statutes is that implementation of statutory law can be complicated by the fact that one area of the law may be contained in several different statutes. It may also be the case that it will not be clear how a statute actually works until it is judicially interpreted. The Court system is thus important to the workings of statutory law.

Making a change

A glance at Employment Law in New Zealand

On 13 March 2000 the Coalition Government tabled in Parliament the Employment Relations Bill, a bill designed to repeal the controversial Employment Contracts Act 1991, passed by the National government of the day. Despite indications that employers collectively feared the new Act would severely undermine the ability to operate a New Zealand workplace effectively and profitably, on 2 October 2000 the Employment Relations Act 2000 came into force relegating the Employment Contracts Act 1991 to the law of the past. Employment law in New Zealand has become an embodiment of how the policy objectives of a ruling government can significantly alter the law as it has previously stood and how the principle of parliamentary sovereignty, which operates on the premise that "parliament cannot bind its successors", works.

The Employment Contracts Act 1991

When The Employment Contracts Acts 1991 became law in 1991 it significantly altered the way in which employment law historically operated in New Zealand. The National Government, which was voted into power in 1990, took economic reform of the market place to a new level with the passing of the Employment Contracts Act 1991. The Act embodied an emerging trend developing internationally, particularly within Anglo-American countries, to deregulate labour markets and to focus on the impact of labour law at a macro-economic level rather than a micro-economic level.

A change in direction

Historically the principles, which had developed over some 100 years in regard to industrial relations in New Zealand, were based on 3 consistent principles:

- The encouragement and involvement of effective and accountable trade unions
- The concept that employment conditions were ideally to be determined by the collective involvement of workers
- That employment terms and conditions should apply uniformly across the entire work force.

The Employment Contracts Act 1991 saw a complete shift from these historical principles. No longer were employers required to recognise trade unions or to support a collective bargaining process. The change in position is highlighted by the objects clause contained within the Employment Contracts Act 1991, itself:

"An Act to promote an efficient labour market and, in particular,

(a) To provide for freedom of association:

(b) To allow employees to determine who should represent their interests in relation to employment issues:

(c) To enable each employee to choose either - i) To negotiate an individual employment contract with his or her employer; or ii) To be bound by a collective employment contract to which his or her employer is a party

(d) To enable each employer to choose - (i) To negotiate an individual employment contract with any employee; (ii) To negotiate or to elect to be bound by a collective employment contract that binds 2 or more employees; (e) To establish that the question of whether employment contracts are individual or collective or both is itself a matter for negotiation by the parties themselves..."

Origins

Policy

- Deregulation policies of 1990 National Government
- International change in focus regarding labour law
- Employment law seen as an important device within macroeconomic policy
- Perceived need for more flexibility within labour market and requirement to be more competitive on an international level

Influences

- Pressure groups promoting a new right economic agenda which supported the marginalisation of trade unions and the limitation of collective bargaining power within the workplace.

The Employment Relations Act 2000

As part of its 1999 election campaign the Labour and Alliance Parties promised that, if they were elected to Government, they would repeal the Employment Contracts Act 1991 and would instead introduce legislation returning to many of the industrial relations principles, that had been developed in the decades before the passing of the 1991 Act. To this end the Employment Relations Act 2000 came into force on 2 October 2000.

The overall objective of the Employment Relations Act 2000 is stated to: "build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship-"

- by recognising that employment relationships must be built on good faith behaviour
- by acknowledging and addressing the inherent inequality of bargaining power in employment relationships
- by promoting collective bargaining; by protecting the integrity of individual choice
- by promoting mediation as the primary problem-resolving mechanism
- by reducing the need for judicial intervention
- and to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association and Convention 98 on the Right to Organise and Bargain Collectively

Under the Employment Contracts Act 1991 the union movement had lost much of its power as there was no requirement that employers recognise trade unions or support a collective bargaining process. Under the Employment Relations Act 2000 trade unions will once again have a significant influence on employment relationships, as unions are statutorily empowered and recognised.

The Employment Relations Act 2000 :

- recognises the role of unions in promoting their members' collective employment interests
- provides for the registration of unions that are accountable to their members
- confers on registered unions the right to represent their members in collective bargaining
- provides representatives of registered unions with reasonable access to workplaces for purposes related to employment and union business

Conclusions

When The Employment Contracts Act 1991 was passed it repealed The Labour Relations Act 1987, which, for the most part, embodied the principles on which the industrial relations system had been based for nearly a century. It is a fundamental principle of Parliamentary Sovereignty that "Parliament cannot bind its successors" so new law can be created by statute which

overrides the law created by previous governments. The law is not static, dramatic change can be created by the passing of statutes such as the Employment Contracts Act 1991, which in many ways transformed labour relations in New Zealand, and that change can be nullified and further change created by the passing of a new Act such as the Employment Relations Act 2000. The Employment Relations Act 2000 is seen in many ways as a return to the principles of employment law developed prior to the 1991 Act. However a future government may be inclined to revamp employment legislation yet again. That's the way it works.

Effect on the common law

A statute may be enacted which overrides the common law. A statute may unambiguously abolish or abrogate a common law doctrine, in which case, in the event the statute is repealed, the doctrine will not resurface to again become part of the law: Interpretation Act 1999 s17(2).

In some cases the common law may lie dormant while a statute remains in force and be revived once that statute or part of that statute is repealed.

Case A: Queenstown Lakes District Council v Palmer [1999] 1NZLR 549

The Issue:

Whether s14(1) Accident Rehabilitation & Compensation Insurance Act 1992 precluded P from bringing a proceeding in negligence to recover compensatory damages at common law, in respect of mental injuries which he suffered after witnessing his wife's death in a rafting accident.

Court of Appeal finds:

- The purpose of the provision in the Accident Compensation legislation barring common law claims was designed to prevent persons who suffered personal injury being compensated twice over, once under the statute and then at common law and was not intended to prevent a person recovering any compensation at all.
- To the extent that statutory cover was extended so that compensation was available under the Act the right to sue for damages was removed, but if cover was withdrawn or contracted, so that compensation was not available under the Act, the right to sue at common law was revived
- The critical phrase in s14(1) was "personal injury covered by this Act"
- Unless the personal injury for which damages were sought was covered by the Act, the right to bring proceedings at common law remained
- s14(1) did not preclude P from bringing a common law proceeding to recover compensatory damages

Whether a statute abolishes a common law rule forever or simply displaces it while the statute remains in force is a question of construction of that statute. The Court may consider the language, object and scheme of the repealed statute or the question may be determined by looking at how fundamental the common law principle was or by considering the apparent need in the public interest to have a governing legal rule.

Case B: Vector Ltd (formerly Mercury Energy Ltd) v Transpower New Zealand [1999] 3 NZLR 646

Statute in issue:

Commerce Act 1986: statutory scheme providing for price control regarding the transmission of bulk electricity found in Part IV of the Act.

Common Law principle in issue:

Doctrine of Prime Necessity: That monopoly suppliers of essential services must charge no more

than a reasonable price for such services. *Vector Ltd v Transpower NZ* (CA 32-99 - 31 August 1999 -Richardson P, Gault, Thomas, Blanchard and Tipping JJ)

- Vector sues state-owned enterprise Transpower on the basis of the common law doctrine of prime necessity
- Transpower argues that doctrine is no longer part of the law of New Zealand

Court of Appeal finds:

- The common law doctrine of prime necessity had come to form part of the common law of New Zealand
- The doctrine was best viewed as a back stop common law remedy to be applied in the absence of other remedies as it gave no guidance as to how the doctrine was to operate to fix prices in the complex environment of a modern economy
- There was no room for the operation of the common law doctrine in relation to the transmission of bulk electricity by Transpower to Vector, because it was precluded by the effect of the Commerce Act. (This was reinforced by the State-Owned Enterprises Act 1986)
- The only price control provided for was within Part IV Commerce Act 1986 and was available only when the criteria in Part IV were satisfied

Conclusion:

The 1986 legislation had the effect of overriding the common law doctrine of prime necessity so that it could not be pleaded as a cause of action against Transpower.

Case law

Introduction

Case law is "Judge made law" which derives from the application of previous Court decisions through the doctrine of precedent. The operation of case law and precedent involves applying legal principles, decided in past cases, to new cases with similar facts. The fundamental philosophy behind case law is to ensure greater certainty and fairness within the law by treating analogous cases in the same way. Case law functions through a hierarchical Court system whereby Court decisions generated from a superior Court will be binding on a lower Court.

Glossary

Ratio decidendi (ratio)

principle of law upon which case was decided, - the legal rule of general application established by a case

Obiter dicta (obiter)

statements or observations made by the Judge about the law in a case, which are not strictly binding because they are only indirectly relevant to the decision

Distinguishing

process of showing that although a case might be similar to a case decided previously, the facts materially differed to the extent the rule of law established in the earlier case should not apply to the later case

Overruling

decision by Court in a higher echelon in the hierarchy or on an occasion, by a Court on an equal footing, in which it is considered that the ratio of an earlier case was wrong. The Court then overrules the earlier ratio decidendi, replacing it with its own ratio. From that point on the lower Courts will follow the new ruling and the overruled ratio will no longer have any application.

Persuasive cases

Decisions which are not binding on the Court in question but which are used for guidance in the process of delivering judgment.

Doctrine of Precedent (also known as stare decisis)

body of rules providing guidelines as to when a particular Court will be required to follow a decision of another Court and when it is able to disregard or overrule it. Based on the concept of consistency between cases the doctrine of precedent will apply when the ratio of an earlier case is applicable to a case before the Court. In essence a Court is obliged to follow a decision of a Court higher in the hierarchy and is not obliged to follow a decision of a lower level Court.

Hierarchy of Courts

arrangement of New Zealand Courts in a strict hierarchical structure thereby supporting the doctrine of precedent.

The principles

Case law may be created simply where Judges, looking solely at the facts of a case, develop a particular area of the law by consideration of analogous past decisions and by applying the principles articulated in those decisions.

Case law is also developed through statutory interpretation, where a Judge interprets and applies the law created by Parliament. A statute alone may not create absolute certainty about the state of the law as parliament intended it to stand and its application may not be clear until it is tested in Court.

Once a Court has reached a decision the doctrine of precedent will then apply so, for example, a Court of Appeal ruling will bind a lower Court in the hierarchy. Although the Court of Appeal will ordinarily follow its earlier decisions it may, on occasion, review, affirm or overrule its previous decisions.

In Courts where more than one Judge sits on the bench a decision may be delivered where each Judge gives an individual judgment. In some cases a judgment may disagree with the majority view and will be known as a dissenting judgment, which may, as the law develops, become persuasive at a later date. Determining the ratio decidendi in a case with multiple judgments can be difficult, particularly when Judges, although agreeing about the outcome of a case, have different reasons for reaching their conclusions.

Development of the law through case law

An example

Although the Employment Relations Act 2000 came into force on 2 October 2000, the employment law cases summarised below provide a neat illustration of how case law operates in relation to the interpretation of statutes and how the system of judicial precedent operates, notwithstanding the repeal of the governing statute.

The Statute

The Employment Contracts Act 1991 (since repealed by the Employment Relations Act 2000) Area of the law: The right to redundancy compensation when no redundancy provision was included in the employment contract.

The Cases

Brighouse v Bilderbeck [1995] 1 NZLR 158 (Court of Appeal)

The issue

Whether a failure to pay adequate redundancy compensation, when the employment contract did not contain a redundancy provision, could provide a basis for deciding that an employee's dismissal was unjustified.

Conclusion

In a 3:2 majority decision the Court of Appeal concluded that the concept of procedural unfairness in a redundancy situation could be extended to require payment of redundancy compensation, despite the absence of a redundancy clause in the employment contract. Majority decision delivered in 3 separate judgments by Cooke P, Casey J and Sir Gordon Bisson. Minority judgments delivered by Richardson J and Gault J. From 1995 the Employment Court applied the Bilderbeck decision as authority for the position that where procedural unfairness existed in relation to a redundancy situation, compensation for redundancy could be awarded when redundancy was not addressed in the employment contract

McGavin v Aoraki Corporation Ltd [1996] 2ERNZ 114 (Employment Court)

The Facts

M had been employed by AC, a computer software developer, for over 10 years when, along with 95 other employees, he was made redundant. M did not have a formal employment contract so contractual provisions in relation to redundancy were not in existence, although compensation equivalent to 3 months salary was paid out.

Employment Court findings

The Employment Court held, notwithstanding a finding that the redundancies were genuine and were for the most part justifiable, that the dismissal had been undertaken in an unfair manner. The dismissal was found to be unfair on the basis that

- The employer had failed to properly consult with the employee
- The employer had failed to properly explain why the respondent was made redundant in preference to other employees
- The employer had failed to provide an adequate compensation package when considering the M's age, seniority, length of service and absence of future career prospects. An adequate figure was considered to be the equivalent of 6 months' salary (\$87,688 awarded).

Aoraki Corporation v McGavin [1998] 3NZLR 276 (Court of Appeal)

In Aoraki Corporation Ltd v McGavin a full Court of Appeal bench consisting of 7 Judges considered the scheme of the Employment Contracts Act 1991 and took the unusual step of reconsidering its own five Judge decision in Brighthouse v Bilderbeck. Six of The Court of Appeal bench, including the 2 Judges (Richardson P and Gault J) who had delivered dissenting judgments in Bilderbeck, delivered a single decision whilst Thomas J gave a separate but concurring decision.

Reasons given to revisit Bilderbeck:

- The fact that Bilderbeck was a decision with multiple judgments meant it was hard to isolate a single ratio. Decision of the EC since Bilderbeck seemed to centre upon the decision of Cooke P, rather than on the other majority judgments
- As a result of Bilderbeck the Employment Court seemed to have developed a flexible concept of unjustified dismissal
- Redundancy was an important area of the law and "should lend itself to a short statement of governing principles drawn from a straightforward application of the 1991 Act"

Findings of Court of Appeal:

- The ordinary rules of contract were, in general, to be applied to employment contracts so that where a contract was silent as to redundancy the Courts were not empowered to order such a payment: "To do so would alter the substantive rights and obligations on which the parties agreed;

- it would change the economic value of their overall agreement;and it would erode the statutory emphasis on the free negotiation of employment contracts"
- Majority decision in Bilderbeck was erroneous on a number of fronts
 - Even when there were procedural irregularities in relation to redundancy, compensation would only be available for hurt and distress and not for actual loss of employment
 - Bilderbeck overruled · Appeal allowed - M's award reduced to \$15,000

Conclusion

The Aoraki decision highlights a number of features of case law. Primarily Aoraki demonstrates the supremacy of statutory law and the constraints on the judiciary not to create law that conflicts with current legislation. One of the reasons the Court of Appeal decided it must review its earlier decision in Bilderbeck was the concern that it was not in keeping with the governing statute, the Employment Contracts Act 1991. Because of the Employment Court's position in the hierarchy of Courts, the Employment Court was required to follow Bilderbeck until the Court of Appeal overruled it. Once the Court of Appeal in Aoraki overruled the Bilderbeck decision the Employment Court was required to follow the ratio of the new case, which provided that there was no power of the Court to award compensation for loss of employment in personal grievance proceedings, where the employment contract did not contain a redundancy clause.

Another feature of Aoraki is the consideration of the difficulties that can be presented in determining the ratio of a case when a decision such as Bilderbeck incorporates multiple judgments. The Court of Appeal listed as one of the reasons for revisiting the Bilderbeck decision the fact that it was hard to distinguish a single ratio in the case.

The development of case law through statutory interpretation is a very important part of New Zealand's legal process, particularly when considering the number of statutes within the legal system. A statute may need to be tested in the Court system before its meaning will be certain, particularly when a statute makes a dramatic change to previous law. Interestingly in December 2001 the majority of the Court of Appeal in *Coutts Cars Ltd v Bagueley* [2002] 2 NZLR 533 found that under the Employment Relations Act 2000 an employer's obligations in relation to redundancy did not radically differ from those referred to in Aoraki.

Constitutional law

Introduction

In a general sense the term "constitution" embodies the framework of rules by which government is conducted. It is from the constitution that the functions and powers of government are derived and regulated. The constitution outlines the relationship between state and citizen and establishes the fundamental rights of citizens within the structure of society.

Although New Zealand does not have a formal document or series of documents which can be described as a written constitution it does have a constitutional framework derived from a number of sources: legislation, conventions, rule of law, letters patent of the Governor General and the Treaty of Waitangi.

The characteristics of the New Zealand's Constitution

1. New Zealand is a constitutional monarchy with the British monarch, represented by the Governor-General presiding as the head of state and acting as the nominal source of all law.
2. Although the monarch is the head of state, New Zealand operates by virtue of a responsible and representative government, elected democratically, which establishes laws and advises the Crown.

3. A cornerstone of the New Zealand constitution is the Rule of Law, which in essence is a series of ideal principles, inherited from England, designed to protect citizens against arbitrary action by state authorities.
 - All citizens and government agents to be subject to law
 - Judiciary to be independent
 - Courts and other official proceedings to be conducted in public and in accordance with pre-determined procedure
 - Society to be free from arbitrary power

4. Westminster System

The structure of New Zealand parliamentary system is based on the Westminster system of Government inherited from England.

- Monarch is the head of the structure with only nominal power - Monarch acting on the advice of Ministers
 - Conventions dictating the relationships between government entities
 - Public Service responsible for advising ministers operating in accordance with legislation passed by elected assembly.
 - Independent Judiciary
 - Executive and Cabinet chosen from the majority party in the elected assembly - the central decision making body
 - Elected Assembly empowered to pass laws
5. New Zealand operates as a unitary state so the law derives from and is applied by a central government.

Institutions of government

The Legislature

The legislature is the lawmaking arm of Government and consists of Parliament, which includes the Governor-General and the entire House of Representatives, a representative body comprising all elected Members of Parliament.

The Executive

The executive is the administrative limb of Government and is made up of:

- The Governor-general
- The Prime Minister
- Cabinet: A body responsible for formulating the policy and legislative programme of the government, consisting of various Ministers of the Crown who have been allocated areas of responsibility, known as portfolios, and who are accountable to Parliament for policies and programmes initiated in relation to their areas of responsibility
- The Executive Council: An executive body formally constituted under letters patent, issued by the Queen and comprising all Ministers of the Crown and the Governor-General. The executive council does not make decisions but rather gives legal effect to decisions made in other forums
- Government Departments
- The Public Service
- Local Bodies
- State Owned Enterprises
- Various public organisations and statutory bodies (e.g. Privacy Commissioner)

The Judiciary

The judiciary in New Zealand maintains independence from the political branches of government and is responsible for the interpretation and application of the law of Parliament and the creation of case law. The judiciary consists of the hierarchy of Courts, presided over by Judges who are appointed by the Governor-General at the recommendation of the Attorney-General (High Court

Judges) or appointed by the Governor-General at the recommendation of the Minister of Justice (District Court Judges).

Historical legislation

New Zealand Constitutional Act 1852 (Imp)

- Divided New Zealand territory into 6 provinces: Auckland, New Plymouth, Wellington, Nelson, Canterbury and Otago
- Instituted a system of provincial government with authority to pass provincial legislation although Governor had a reserve power of veto and right reserved to Crown to disallow provincial Acts within 2 years of their passage
- Established two-house (bicameral) system of central government, involving the creation of a General Assembly which contained the Governor, an appointed Legislative Council, and an elected House of Representatives
- Power granted to General Assembly to make laws for the peace order and good government of New Zealand provided such legislation was not inconsistent with the laws of England
- Act remaining in force, with amendments and a diminishing practical status, until 1986 when it was supplanted by the Constitution Act 1986.

English Laws Acts 1854, 1858, 1908 (NZ)

- Confirmation of the application of English law in New Zealand so that all laws in existence in England on 14 January 1840 were to be applied in New Zealand

Imperial Enactments which are still part of New Zealand Law include:

Magna Carta 1297

Heralded as the beginning of English constitutional law the Magna Carta arose from a revolution by the baronage in 1215, which compelled King John to agree to a comprehensive schedule of liberties, predominantly dealing with the relationship between the Crown and the Church and the Crown and the common people. The Charter also referred to certain matters of individual liberty such as freedom of movement while identifying the concept of "majority rule" in decision making;

Bill of Rights 1688

The passing of the Bill of Rights 1688 was motivated by the desire to settle the succession to the throne. The Bill was founded on the Declaration of Rights and was passed during the reign of William the Orange. The Bill went further than setting out the relationship of the Crown to Parliament in that, in part, it identified the doctrine of parliamentary sovereignty. The Bill established the rights of citizens to petition the Crown; declared that the election of members of Parliament should be free and identified the notion of Parliamentary privilege, that freedom of speech in Parliament should not be questioned in any place out of parliament, effectively protecting Member's of Parliament from defamation proceedings

Petition of Right 1628

Petition of Right ensured that the Crown could not levy taxes without the consent of Parliament

Habeas Corpus Acts of 1640, 1679 and 1816

The right to bring a writ of habeas corpus to prevent arbitrary or unlawful detention is still alive today.

Statute of Westminster 1931(Imp)

- A law passed after the commencement of the Act, by a Dominion (A "Dominion" referred to those English colonies who were taking steps to establish independence) was not to be invalid on the basis it was repugnant to an Imperial statute or the common law
- Power to pass extra-territorial legislation given to Dominion Parliaments

- Imperial legislation would not extend to a Dominion without the explicit request and consent of that Dominion.

Statute of Westminster Adoption Act 1947 in conjunction with the New Zealand Constitution Amendment (Request and Consent) Act 1947

- Adoption of Statute of Westminster 1931
- Request and consent to Imperial Parliament passing legislation which would enable the New Zealand Parliament to amend and repeal its own constitution
- New Zealand achieving legal autonomy as now having the power to amend, suspend and repeal its own constitution

Legislative Council Abolition Act 1950

- Legislative Council abolished so that New Zealand became a unicameral (one-house) legislature

New Zealand Constitution Amendment Act 1973

- New Zealand Parliamentary power to pass laws of extra-territorial effect, affirmed

Recent legislation

Constitution Act 1986

Background

In the 1980s it became apparent that the statutory framework which provided a basis for New Zealand's constitution was in need of amendment. This was highlighted by what has become known as the 1984 constitutional crisis.

Following the 1984 general election, despite a landslide Labour victory, the outgoing National Prime Minister demonstrated a remarkable unwillingness to hand over the reins of power. Under the Constitutional rules at that time an outgoing government would be able to remain in power until the writs of election had been returned, which in practical terms meant a delay of some 10 to 14 days, and conventionally the outgoing government would act on the instructions of the newly elected government during this transitional period. After the election the incoming Labour government was being urgently advised by the Reserve Bank that the New Zealand dollar should be devalued to avoid a financial crisis, but Prime Minister Muldoon, flouting convention, refused to act in accordance with the instructions given to him by the incoming Labour government regarding devaluation. Although Prime Minister Muldoon eventually succumbed to pressure and acted on the instructions received, the event itself accentuated the potential for difficulty in the process of transfer of power from one government to another. As a result an Official Committee on Constitutional Reform was convened to review New Zealand's existing constitutional laws and in particular to consider the rules relating to the transfer of power following an election. Following 2 reports produced by the Committee the Constitutional Act 1986 was passed.

The features

- Central document in New Zealand's constitution
- Various branches of Government consolidated
- Composition and function of Government set out and powers partially defined

United Kingdom Enactments such as The New Zealand Constitution Act 1852 and The Statute of Westminster 1931 ceasing to have effect as part of the law of New Zealand
Existing New Zealand constitutional legislation repealed

- The ability of New Zealand Parliament to make laws for New Zealand, clarified
- Any residual rights of United Kingdom Parliament to legislate at New Zealand's request and consent, extinguished

The gaps

- No definition of individual rights and their relationship with the exercise of state power
- No definition of the relationship between various government organs
- No definition of the constitutional role of some vital institutions within New Zealand Government

A synopsis

Part I: The Sovereign

- Sovereign of the United Kingdom is the head of state in New Zealand and the sovereign's representative in New Zealand is the Governor General (s2)

Part II: The Executive

- Transfer of power following general election set out
- Ministers of the Crown and members of Executive Council to be, with minor limitations, Members of Parliament (s6)
- Power of member of Executive Council to exercise Minister's powers detailed (s7)
- Appointment of Parliamentary Under-Secretaries and their functions detailed (s8, s9)

Part III: The Legislature

The House of Representatives

- Existence and continuance of House of Representatives confirmed (s10)
- Oath of allegiance to be taken by members of Parliament (s11)
- Rules relating to the election of speaker and speaker's role upon dissolution or expiration of Parliament set out (s12, s13)

Parliament

- New Zealand to have a Parliament which shall consist of the Sovereign in right of New Zealand and the House of Representatives (s14)
- Parliament to have full power to make laws (s15)
- Term of Parliament to be 3 years unless sooner dissolved (s17)

Parliament and Public Finance

- Bills providing for the appropriation of public money or for the imposition of any charge upon public money not to be passed unless recommended to the House of Representatives by the Crown (s21)
- Not lawful for Crown, except by or under an Act of Parliament to levy a tax, to raise a loan from any person or to spend any public money (s22)

Part IV: The Judiciary

- Rules relating to protection of Judges against removal from office set out (s23)
- Salary of a Judge of the High Court not to be reduced during the continuance of the Judge's commission

Bill of Rights Act 1990

What is a Bill of Rights?

A Bill of Rights aims to protect the individual rights of citizens against abuses of State power.

A New Zealand Bill of Rights

The introduction of a Bill of Rights into New Zealand constitutional law was propounded as part of the election policy platforms of the 1984 Labour Government and in 1985 a white paper containing a draft Bill of Rights was released for public discussion and consultation.

The White Paper

The White Paper, released by the then deputy Prime Minister and Minister of Justice Geoffrey Palmer, contained some particularly controversial aspects, which sparked widespread debate.

Controversial Features of Proposed Bill of Rights

- The Bill of Rights was to become entrenched law so that it could not be amended or repealed without a 75% majority vote in the House of Representatives or a simple majority in a public referendum. The Bill of Rights was to therefore have status as supreme law, thereby causing some erosion to the doctrine of Parliamentary Sovereignty
- The Treaty of Waitangi was to be wholly incorporated within the Bill of Rights thus elevating the Treaty's status to that of supreme law
- A broad power was to be granted to the Judiciary to declare invalid any Act of Parliament, common law rule or official action which was contrary to the Bill of Rights

Recommendations of the Justice and Law Reform Select Committee

The proposed Bill of Rights met with such opposition from both academics and practising lawyers that The Justice and Law Reform Select Committee, who heard submissions regarding the bill, finally concluded that New Zealand was not yet ready for a Bill of Rights in the form outlined in the White Paper. The Committee recommended that the Bill of Rights be introduced as an ordinary statute, which would not have the status of superior or entrenched law.

New Zealand Bill of Rights Act 1990

The Act was passed as ordinary unentrenched legislation on 28 August 1990.

The New Zealand Bill of Rights Act 1990 is "An Act -

- (a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand
- (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights"

Although The Bill of Rights seeks to affirm, protect and promote fundamental freedoms it must be noted that the Act does not address certain economic and social issues such as the right to a sufficient standard of living, the right to adequate housing or the right to have access to satisfactory healthcare. It is incumbent upon the Attorney-General to report to Parliament where any Bill introduced into the House of Representatives appears to be inconsistent with the Bill of Rights, so Parliament must have regard to the Act when making law.

Application of the Bill of Rights (s3)

The Act applies only to acts done:

- By the legislative, executive, or judicial branches of the government of New Zealand

- By any person or body in the performance of any public function, power or duty conferred or imposed by or pursuant to law

It is the likely effect of s3 is that the Bill of Rights will only have application in respect of acts of the Crown or other public authority and will not be able to be invoked against a private citizen.

Civil and Political Rights protected by the Bill of Rights

Rights concerning the right to life and security

- Right not to be deprived of life (s8)
- Right not to be subjected to torture or cruel treatment (s9)
- Right not to be subjected to medical or scientific experimentation (s10)
- Right to refuse to undergo medical treatment (s11)

Democratic and Civil Rights Rights re manifestation of religion and belief (s15)

- Right to freedom of peaceful assembly (s16)
- Right to freedom of movement (s18)
- Right to Freedom of expression (s14)
- Right to Freedom of thought, conscience, and religion (s13)
- Right to freedom of association (s17)
- Electoral Rights for New Zealand Citizens over the age of 18 years (s12)

Non-Discrimination and Minority Rights

- Freedom from discrimination on the basis of Race, Colour, Ethnic or national origins, Religious or ethical belief, Sex, Marital status (s19)
- Rights of Minorities to enjoy their culture, profess or practise their religion or to use the language of that minority (s20)

Search, Arrest and Detention

- Right to be secure against unreasonable search and seizure (s21)
- Right not to be arbitrarily arrested or detained (s22) Rights of persons arrested or detained set out (s23)
- Rights of persons charged with an offence set out (s24)
- Minimum standards of criminal procedure set out (s25)
- Rules relating to retroactive penalties and double jeopardy set out (s26)
- Right to justice (s27)

Related websites

Human Rights Commission site> NZ Bill of Rights Act page -

<http://www.hrc.co.nz/home/hrc/abouthumanrights/humanrightsinnewzealand/billofrightst.php>

Treaty of Waitangi

The Treaty of Waitangi was signed on 6 February 1840 by Captain William Hobson, on behalf of the British Government, and by over 500 Maori chiefs. There are 2 versions (Maori and English) of the Treaty, although only 39 chiefs signed the English version. The existence of 2 versions of the Treaty has created difficulties in relation to interpretation. The English and Maori versions are not translations of each other and do not carry the same meaning.

The Treaty of Waitangi Te Tiriti o Waitangi

Article 1:

Sovereignty (kawanatanga) of the Maori people ceded to the British Crown.

Article 2:

Maori guaranteed: "tiro rangatiratanga" or chieftainship and authority and "the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession" subject to an exclusive right of pre-emption (see below).

Crown given: Sole pre-emptive rights to purchase land from Maori.

Article 3:

Crown extended to Maori the Queen's protection and imparted to them "all the rights and privileges of British subjects."

The Treaty of Waitangi, as a founding constitutional document, occupies a unique place in New Zealand's legal history while continuing to have an influence on current law. The legal status of the Treaty is continually evolving and is the source of some debate. Statutes have, over the past decade, increasingly referred to the principles of the Treaty and incorporated express reference provisions such as s9 State-Owned Enterprises Act 1986: "Nothing in this Act shall permit the Crown to act in a manner inconsistent with the Treaty of Waitangi". Despite increasing statutory reference to the Treaty, it has never been adopted in its entirety in any New Zealand statute. Although it was a white paper proposal that the Treaty be incorporated in the New Zealand Bill of Rights, this did not eventuate.

The **Waitangi Tribunal** set up under the Treaty of Waitangi Act 1975 has the power to consider claims made by Maori prejudicially affected by legislation, policy, or any act or omission of the Crown that is inconsistent with the principles embodied in the Treaty. The Tribunal is not a Court and recommendations it makes to the Crown may be rejected, yet findings of the Tribunal have had quite an impact on the way in which Maori and Treaty issues are treated both politically and legally.

The Treaty, as part of the "fabric of New Zealand society" (Huakina Development Trust v Waikato Valley Authority [1987] 2 NZLR 188), can be used as an aid to statutory interpretation both in regard to legislation that expressly refers to it and other New Zealand legislation.

The President of the Court of Appeal, as he then was, The Right Hon. Sir Robin Cooke commented in Introduction Special Waitangi Issue (1990) 14 NZULR 1, that the Treaty of Waitangi was "simply the most important document in New Zealand's history". The President stated further that the Treaty was "a document which in fact brought about the foundation of the state but may not hitherto have been accorded any special status in law, or indeed any status in law at all, [which has] become elevated into an approximation of a fundamental charter." (Page 6).

Related websites

Waitangi Tribunal website > Treaty of Waitangi pages - <http://www.waitangi-tribunal.govt.nz/treaty/>

Conventions

The New Zealand constitution also operates through a series of rules developed through custom and usage, known as "conventions". It is convention that controls relations between the legislature and the Executive. The New Zealand Cabinet system is based on convention, as is the procedure and practice of Parliament. Conventions are not enforceable at law but are followed for reasons of political expediency, as they allow for certainty and efficiency in the conduct of the political process.

Letters Patent of the Governor-General

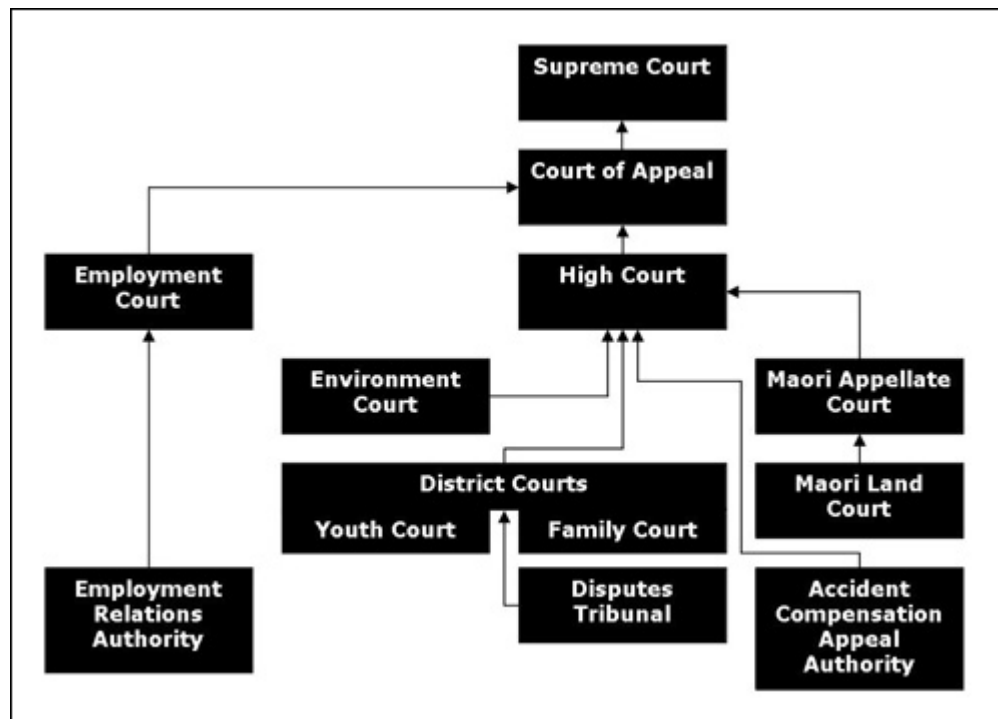
Letters Patent of the Governor-General are instructions as to constitutional protocol issued to the Governor-General by the Monarch, and as such are an important component of the fabric of the New Zealand constitution.

Court structure

Hierarchy of the Courts

What kind of Court Structure do we have in New Zealand?

In New Zealand the Court structure is hierarchical.



Why do we have a hierarchical structure?

There are sound reasons for New Zealand to maintain a Court hierarchy:

- The need to provide a right of appeal from the decision of an inferior Court
In New Zealand there is usually at least one right of appeal in respect of a decision made by a Court. This means that a decision of one Court may be tested in another Court. For an appellate system to work it is implicit that a Court empowered to over-rule the decision of another Court will be superior in status to that other Court.
- The doctrine of precedent
A hierarchical Court structure supports the doctrine of precedent which dictates that like cases should be treated alike and decisions of more senior Courts should be binding on lower Courts. This ensures that there is some certainty in the law. A case which is decided in a higher Court must be followed if a case with similar facts presents itself in a lower Court.
- Division of workload
To ensure that work loads are allocated efficiently, the Court system in New Zealand has developed so that certain Courts specialise in particular areas of the law, such as Family

Law and Employment Law whilst certain other Courts, such as the Court of Appeal, specialise in the hearing of appeals. The lower Courts and administrative tribunals, without tying up the time of the higher Courts, can therefore decide the more minor areas of the law such as traffic law.

Related websites

Courts of New Zealand - Ministry of Justice site: <http://www.courtsofnz.govt.nz/>

The Supreme Court

The Supreme Court, established by the Supreme Court Act 2003, is the court of final appeal and is comprised of New Zealand Judges. That the final court of appeal now operates from New Zealand, replacing the Judicial Committee of the Privy Council located in London, recognises the fact New Zealand is an independent nation with its own history and traditions, enabling important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history, and traditions.

The Supreme Court is presided over by the Chief Justice of New Zealand (the head of the New Zealand judiciary) and includes four other member Judges. Judges of the Supreme Court are also Judges of the High Court of New Zealand.

Privy Council

Until 1 January 2004 the Judicial Committee of the Privy Council was placed at the pinnacle of New Zealand's hierarchical Court structure.

The Privy Council, which is made up of mainly English and Scottish "Law Lords" (the most senior Judges in the United Kingdom), sits in London and is overseen by the head of the English judiciary, the Lord Chancellor.

Jurisdiction

The Privy Council can only hear appeals so it is not possible to initiate a case in this forum. The Privy Council's appellate jurisdiction is divided into civil and criminal areas.

Keeping the Privy Council: A legal debate

The Privy Council had been the final Court in the appellate system of many Commonwealth countries, although the right to appeal to the Privy Council had been abolished in a number of these countries, such as Canada, and the question of whether the Privy Council should remain as the ultimate appellate Court in the New Zealand legal system was a matter of some debate over a number of years

Some arguments against keeping the Privy Council.

- The Law Lords, as English Judges, are not likely to be terribly familiar with the workings of New Zealand society and its socio-legal conditions.
- Use of the Privy Council inhibits the independent development of law in Commonwealth countries and can be viewed as an interference with a country's power to regulate its own jurisdiction.
- It is expensive to pursue an appeal in England when the parties reside in New Zealand.
- Because of the distance between London and New Zealand and difficulties presented when a foreign Judge is asked to determine a matter outside his or her usual realm of

- knowledge, there can be substantial delays in the process of taking an appeal to the Privy Council
- There is a perceived infringement of national sovereignty in maintaining an appellate system which looks to England, for the final say on internal matters.
 - Litigation should be able to be brought to a reasonably fast conclusion. A two tier appellate system (Court of Appeal and Privy Council) can make the litigation process seem needlessly long.

Some arguments for keeping the Privy Council

- The law lords, who are experienced and learned Judges from a country not dissimilar to New Zealand, can give an objective analysis of New Zealand law without being influenced by local social and political pressures.
- The appeal process to the Privy Council can assist in maintaining a uniform approach to the law throughout the Commonwealth.

The Privy Council: A conclusion

In 1990 the Minister of Justice announced that the right to appeal to the Privy Council would be abolished, although this would not happen until a satisfactory second tier in the appeal system was set up.

The Supreme Court Act 2003 established the Supreme Court of New Zealand as the new court of final appeal, replacing the Privy Council. Hearings of the Supreme Court commenced on 1 July 2004, however the Privy Council may still determine appeals in certain existing proceedings including:

- appeals against a final judgment of the Court of Appeal made before 1 January 2004, or made after 31 December 2003 in a proceeding where the hearing was completed before 1 January 2004 and the matter in dispute on the appeal amounted to or was in the value of \$5,000 or upward; or the appeal involved, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of \$5,000 or upward
- appeals arising out of a successful application to a New Zealand court for leave to appeal to the Privy Council against a decision of the Court of Appeal made before 1 January 2004 or made after 31 December 2003 in a proceeding where the hearing was completed before 1 January 2004
- appeals arising out of a successful application to the Privy Council for special leave to appeal to it against a decision of the Court of Appeal made before 1 January 2004 or after 31 December 2003 in a proceeding where the hearing was completed before 1 January 2004

The parties to such an appeal may waive their right to appeal to the Privy Council if the Privy Council has not yet begun hearing the appeal and all parties agree in writing that an application should be made to the Supreme Court for leave to appeal to the Supreme Court against the decision concerned.

Court of Appeal

The Court of Appeal is New Zealand's principal intermediate appellate Court, hearing appeals from the decisions of other Courts and sometimes giving opinions about certain legal matters when asked to by the lower Courts.

The Court of Appeal is based in Wellington and is made up of the president of the Court of Appeal and 6 permanent Court of Appeal Judges.

The Judges of the Court of Appeal are also Judges of the High Court of New Zealand.

When an appeal is heard a minimum of 3 Judges must sit to decide the case and on matters of public importance 5 or even a full Court of Appeal of 7 Judges may preside.

Jurisdiction

The New Zealand Court of Appeal currently operates a Civil Appeals division and a Criminal Appeals division.

Civil Appeals

In civil appeals a majority verdict may determine the result of the appeal. Any judgment disagreeing with the majority decision (a dissenting judgment) will be presented alongside the majority judgment, and may become important at a later time as the law in that area develops.

Criminal appeals

In criminal actions the Court of Appeal will decide the appeal by unanimous verdict.

The High Court

The High Court is made up of a number of permanent Judges and the head of the judiciary (the Chief Justice).

Jurisdiction

The High Court has "all judicial jurisdiction which may be necessary to administer the laws of New Zealand" so the High Court has almost unlimited original jurisdiction, meaning that a wide array of legal actions can be commenced in the High Court.

Civil jurisdiction

In civil matters the High Court has jurisdiction to hear all civil matters outside the jurisdiction of the District Court and matters which have been transferred from the High Court to the District Court. In civil cases matters are generally heard before a Judge alone, although in some civil trials there is an option of electing a jury trial (e.g. defamation cases).

Criminal jurisdiction

In criminal matters the High Court hears serious (indictable) crimes and will pass sentence for those crimes even if the accused has pleaded guilty to the crime in a District Court. A criminal trial is almost always conducted before a jury of 12 people, although in rare cases, in matters of complexity (e.g. corporate fraud), a Judge alone may hear the case.

District Courts

District Courts are presided over by District Court Judges. Some minor criminal matters including preliminary hearings (depositions) and certain civil matters may be heard by 2 Justices of the Peace (lay persons not usually legally trained, appointed to the position by the Governor-General) sitting together.

Civil Jurisdiction

The District Court has jurisdiction to hear civil matters in respect of

- actions founded in contract, tort and statute where the amount claimed or the value of the claim was not more than \$200,000
- actions for the recovery of land where the yearly rent does not exceed \$62,500 or when there is no rent where the value of the land does not exceed \$500,00

- actions seeking remedies in equity with a monetary limit of \$200,000

Criminal Jurisdiction

The District Court had jurisdiction to hear the following criminal matters

- summary offences (historically known as misdemeanors) with no option but to be tried summarily (less serious criminal offences, tried by Judge without a jury or some-times by 2 Justices of the Peace)
- indictable offences (historically known as felonies) triable summarily (more serious offences including offences with an option to be heard by a Judge alone)
- summary offences triable indictably (less serious offences with jury trial option rights)
- the preliminary hearing of indictable offences (deposition hearing: a hearing to decide if there is enough evidence to put a person on trial.)

The hearing of appeals

The District Court can hear appeals from the Disputes Tribunal and certain other tribunals. Decisions taken by some statutory, local and administrative authorities may be appealed to the District Court.

Family Court

The Family Courts were established in 1981 and were implemented to provide a specialist forum for the resolution of family disputes. They are a division of the District Court.

The objectives

- The resolution of disputes without a Court hearing, by use of conciliatory resolution procedures (including counselling and mediation)
- To provide a "team approach" to the resolution of family disputes by providing appropriate support services (counsellors, social workers, child psychologists, psychiatrists)
- A pleasant physical environment with a relaxed and comfortable atmosphere
- Relative informality, with an emphasis on non-adversarial Court procedures
- Privacy (Family Court proceedings are not open to the public)
- Specialist Judges who have particular experience in the area of family law. (Family Court Judges are also qualified to preside over District Courts exercising other jurisdictions but spend almost all their time involved in Family Court work).

Jurisdiction

The Family Court has jurisdiction over such matters as

- marriage
- adoption
- guardianship
- custody and access
- separation
- dissolution of marriage
- relationship property
- maintenance
- paternity

Over the years, due to the success of the Family Courts, its jurisdiction has increased so that it now deals with issues previously dealt with in other jurisdictions, such as matters relating to child abuse and neglect.

Procedure

The overall aim of the Family Court process is to reach resolution by agreement.

The steps:

- parties referred to counselling
- If no agreement is reached then the parties may be referred to a mediation conference with a Family Court Judge sitting in the capacity of a mediator
- If no agreement is reached the matter may then proceed to a hearing for determination by a Family Court Judge

Where the issues involve a child, a lawyer may be appointed as counsel for the child, to separately represent the interests of that child

The Disputes Tribunal

The Disputes Tribunal (formerly known as the Small Claims Tribunal) offers an alternative means of dispute resolution which is designed to be quick, informal, private and inexpensive.

The Disputes Tribunal, although forming a separate division of the District Court, is not a Court. There is no direct involvement of lawyers or Judges. Referees, who are not required to have any specialised legal training or knowledge, hear disputes. The referee will attempt to facilitate an agreement between the parties by a process of negotiation and mediation. If agreement is not reached, the referee may determine the dispute by considering the relative merits of the case presented and then making a ruling. A referee's ruling is binding and can be enforced through the Courts if necessary.

Jurisdiction

The jurisdiction of the Disputes Tribunal:

- requires that a dispute exist
- extends to claims in contract, quasi-contract and tort (but only in respect to property, loss or damage) where the total amount sought is less than \$7,500, although this amount may be increased by consent of the parties to \$12,000.

Examples of disputes which could taken to the Disputes Tribunal

- Dispute about whether work has been properly completed, e.g. a building contractor fails to build a deck to specifications provided
- Dispute about the amount charged for services provided, e.g. a painter charges more than the quote for painting a house
- Dispute about damage to property, e.g. An acquaintance borrows your ladder and returns it broken or your car is damaged in an accident.
- Dispute over loss of property, e.g. A neighbour borrows your irrigation system and fails to return it.

Matters that may not be taken to the Disputes Tribunal: some examples

- Debt collection (there must be a dispute about what is owing, not just a refusal by one party to pay the debt).
- Matters relating to the collection of taxes.
- Disputes about parenting, care of children or matrimonial property.
- Disputes about ownership of land
- Disputes about wills.

Procedure

The procedure of the Tribunal is informal. Claim forms can be obtained through your nearest District Court or from a local Citizen's Advice Bureau. Claim forms are uncomplicated and inexpensive to lodge. Parties represent themselves, as there is no entitlement to have legal representation. The hearing process is non-adversarial and the normal rules of evidence do not apply. There is a right of appeal from a decision of the Tribunal to the District Court, although only in limited circumstances where the referee conducted proceedings in a manner which was unfair and which prejudicially affected the proceedings.

The Youth Court

The Children, Young Persons and Their Families Act 1989 is an innovative piece of legislation at the heart of the management of youth justice in New Zealand. Whilst prior to 1989 the principal way of dealing with young offenders was through the Court system, recourse to the Court is now viewed as a measure of last resort. Most matters of youth justice are dealt with by police warning, formal police caution or through the process of a Family Group conference, rather than by the Youth Court.

A matter of age

The age of criminal responsibility in New Zealand is 10 years old, but children under the age of 14 cannot be prosecuted unless charged with the offences of murder or manslaughter. A "young person" is a person between 14 and 17 years old.

The Family Group Conference

The operation of the Family Group Conference is crucial to the workings of the system of youth justice created by the Children, Young Persons and Their Families Act 1989. Most youth justice matters will involve Family Group Conferences, which are designed, where practicable, to keep the young offender out of the criminal system and used as a mechanism for the determination of how the young offender should be dealt with. The traditional Maori perspective of justice is embodied in the workings of a Family Group conference, which incorporates as part of its underlying philosophy the ideals of consensus, reconciliation and settlement involving the whole community.

Persons entitled to attend a Family Group Conference include the young person; his or her advocate; members of the young person's family group; the Youth Justice Coordinator, the victim(s) or their representative, supporters of the victim (when the victim attends the conference instead of a representative) and the police.

The purpose of the Family Group Conference is to consider the young person's offending and matters relating directly to the circumstances of that offending with a view to devising an appropriate alternative to criminal prosecution.

The Family Group Conference has the responsibility for formulating recommendations in relation to the appropriate course that should be taken with regard to the offender. It is part of the role of The Youth Justice Coordinator to convince the prosecuting authorities that the alternative to prosecution is the right decision. If no agreement is reached the matter will be referred to the Youth Court for determination.

The principles of Youth Justice

The principles of Youth Justice are set out in s208 Children, Young Persons and Their Families Act 1989 and include:

- The principle that, unless the public interest requires otherwise, children and young people should be kept out of the criminal justice system if there is an alternative way of dealing with the matter
- The principle that criminal proceedings should not be used for welfare purposes

- The principle that measures to deal with youth offending should be designed to strengthen the family, whanau, hapu, iwi and family group as well as fostering their ability to deal with offending by their children and young people
- The principle that a young offender should be kept in the community so far as that is practicable and in line with the need to protect public safety
- The principle that age is a mitigating factor in deciding whether or not to impose sanctions in respect of offending and in determining the nature of any such sanctions
- The principle that sanctions should promote the development of the child in the family and should take the least restrictive form that is appropriate in the circumstances
- The principle that due regard should be given to the interests of the victims
- The principle that children and young persons are entitled to special protection during any investigation relating to the commission or possible commission of an offence by that child or young person

The Youth Court

The Youth Court operates as a division of the District Court and has criminal jurisdiction. The Governor-General is responsible for the appointment of the Principal Youth Court Judge, who is required to be an existing District Court Judge. The Chief District Court Judge, on the recommendation of the Principal Youth Court Judge, is required to designate a sufficient number of District Court Judges as Youth Court Judges. A Youth Court Judge will be a person suitable to deal with matters within the jurisdiction of the Youth Court because of training, experience, personality and understanding of the significance and importance of different cultural perspectives and values.

The Youth Court is not open to the public and procedure is designed to be informal and consensual rather than adversarial in nature.

The Youth Court cannot make a disposition of the matter unless a Family Group Conference has been held. The Youth Court must take account of the plan and recommendations formulated in relation to the young offender following the Family Group Conference.

Findings and orders of the Youth Court may be appealed as of right to the High Court.

Maori Land Court

The Maori Land Court, originally established by the Maori Affairs Act 1953, continues to be a court of record under the Te Ture Whenua Maori Act 1993 (The Maori Land Act 1993). The Maori Land Court has jurisdiction in relation to matters affecting Maori land. The Court is presided over by a Chief Maori Land Court Judge, a Deputy Chief Judge and other Judges, appointed by the Governor-General from time to time as required.

Appeals from the Maori Land Court are heard by a specialist appellate Court, the Maori Appellate Court. Judges of the Maori Land Court are also Judges of the Maori Appellate Court, over which three or more Judges may preside.

The High Court is able to review decisions made in both the Maori Land Court and the Maori Appellate Court.

Employment Court

The Employment Court, established under s186 of the Employment Relations Act 2000, is recognised as the same Employment Court as was established by s103 of the Employment Contracts Act 1991. The role of the Employment Court in relation to Employment law in New Zealand must be considered alongside the role of The Employment Relations Authority, which was established under s156 Employment Relations Act 2000. The Employment Relations Authority is an investigative body with the role of resolving employment relationship problems by

establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.

The Employment Relations Authority is required, when carrying out its role to:

- comply with the principles of natural justice
- aim to promote good faith behaviour
- support successful employment relationships
- generally further the object of the Act
- act as it thinks fit in equity and good conscience and not to do anything that is inconsistent with the Act or with the relevant employment agreement

The Employment Court does not have a supervisory role in relation to the Authority and it is not a function of the Employment Court to advise or direct the Authority in relation to the exercise of its investigative role, powers and jurisdiction.

The Employment Court has exclusive jurisdiction

- To hear and determine elections from determinations of the Authority
- To hear and determine actions for recovery of penalties for breaches of any provision in the Act that provides for a penalty to be recovered in the Court
- To hear and determine questions of law referred to it
- To hear and determine applications for leave to have matters before the Authority removed into the Court
- To hear and determine matters removed into the Court
- To hear and determine applications brought by a union, a labour inspector, or a person regarding whether a person or group of people are:
Employees within the meaning of the Act
Workers or employees within the meaning of the Equal Pay Act 1972 or the Holidays Act 1981 or the Minimum Wage Act 1983 or the Volunteers Employment Protection Act 1973 or the Wages Protection Act 1983.
- To order compliance where any person has not complied with Part 8 of the Act concerning strikes and lock outs or with any order, determination, direction, or requirement made by the Court
- To hear and determine proceedings founded on tort and resulting from or related to a strike or lockout
- To hear and determine any application for an injunction regarding a strike or lockout
- To hear any determination for judicial review
- To issue entry warrants to labour inspectors
- To exercise its powers in respect of any offence against the Act
- To exercise such other functions and powers as are conferred on it by the Act or any other Act

The Employment Court is made up of one Judge called the Chief Judge and at least two other Judges to be called Judges of the Employment Court. The Judges of the Court are appointed by the Governor-General on the advice of the Attorney-General and must have held a practising certificate as a barrister or solicitor for at least seven years.

Where a party to any proceedings under the Employment Relations Act 2000 is dissatisfied with any decision of the Employment Court, other than a decision as to the construction of any employment agreement, that party may, with the leave of the Court of Appeal, appeal to the Court of Appeal against the decision.

Environment Court

The Environment Court, formerly the Planning Tribunal, is constituted under the Resource Management Act 1991 and is a court of record comprised of Environment Judges, who are also District Court Judges, and Environment Commissioners. The jurisdiction of the Environment

Court includes, amongst other things, the ability to hear and determine submissions relating to resource consent applications and to consider references about the content of local authority regional and district plans. The work of the Environment Court extends to consideration of such matters as water conservation issues, and the environmental effects of mining.

From the Environment Court there exists a limited right of appeal to the High Court, on points of law only.

Administrative Tribunals

In New Zealand there are a number of bodies that fulfil a quasi-judicial function to facilitate the efficient running of the legal system by providing a specialist forum for the hearing of specific matters.

An administrative tribunal is generally created by statute or statutory regulations, which set out the scope of that tribunal's jurisdiction and the extent of its authority. Decisions of a tribunal may, in some instances, be appealed to a specialist appellate body established for the specific task of hearing such appeals or, in some cases, may be appealed to the general Courts (District Court, High Court, Court of Appeal), usually on points of law only. There may also be jurisdiction for the general Courts to consider certain administrative decisions by way of judicial review.

The Waitangi Tribunal, Police Complaints Authority, Broadcasting Standards Authority and Commerce Commission are examples of Administrative Tribunals which are operating within the New Zealand judicial system.

Judges and Lawyers

Judicial independence

In New Zealand the judiciary operates as an independent branch of government which is purportedly free from political interference and influence from the remaining branches of government (legislature and executive).

In New Zealand the maintenance of judicial independence is achieved in a number of ways:

The separation of powers theory

The legislature, executive and judiciary are each responsible for separate and individual functions of government which should not impinge on the functions or powers of the other. Although the theory is not absolutely adhered to, in New Zealand the judiciary effectively operates separately from the remaining two branches of government

Non-political appointment procedures

Unlike the United States of America where Judges are appointed by the President with approval from the senate, on the grounds of political allegiance, in New Zealand judicial appointments are non-political. District Court Judges are appointed to the bench, by the Governor-General on the recommendation of the Attorney-General whilst High Court Judges are appointed to the bench, by the Governor-General on the recommendation of the Attorney-General. Although there are no formal control measures specifically designed to ensure that the process is not tainted by any covert political motive, some protection is afforded to the principle of judicial independence by both the operation of a convention which dictates that appointments are not to be made on the basis of political allegiance and by the existence of individual ministerial accountability which might result in Parliamentary questions being directed toward the Minister recommending the appointment. The only statutory requirement for judicial appointment is that the appointee must have been a practising barrister and solicitor for a minimum of 7 years

Protection against removal from office

A Judge of the High Court may only be removed from office by the Sovereign or the Governor-General acting upon an address from the House of Representatives. The only basis upon which such an address may be moved is on the grounds of a Judge's misbehaviour or of a Judge's incapacity to discharge the functions of judicial office (s23 Constitution Act 1986)

Prohibition against salary reduction

The salary of a Judge of the High Court shall not be reduced during the continuance of the Judge's commission (s24 Constitution Act 1986). Judicial salaries of Judges of the High Court are set by the Higher Salaries Commission, an independent apolitical body, which may have regard to salaries in other comparable occupations when making any judicial salary determination; e)

Conventions

A convention exists that members of Parliament should not make adverse comments or criticisms of members of the judiciary. This convention is supported by certain Standing Orders of The House of Representative designed to prevent members of Parliament making comment about matters pending or under adjudication in any Court (Standing Orders 115, 116) and from expressing opinions on decisions of the Court or regarding the impartiality or personal views of any Judge (Standing Orders 117)

Immunity from Civil Action

The judiciary is granted extensive immunity from civil prosecution in relation to the exercise of judicial function.

Supreme Court Judges

- A Judge of the Supreme Court is also a Judge of the High Court (s20 Supreme Court Act 2003)
- The Supreme Court comprises the Chief Justice (the head of the New Zealand judiciary) and 5 other Judges, appointed by the Governor-General as Judges of the Supreme Court (s17(1) Supreme Court Act 2003)
- The Chief Justice is the head of the New Zealand judiciary, and has seniority over the other Judges of the Supreme Court (s18(1) Supreme Court Act 2003)
- Other Judges of the Supreme Court have seniority amongst themselves according to their date of appointment (s18(2) Supreme Court Act 2003)
- Judges of the Supreme Court are senior to the Judges of the Court of Appeal, and to the Judges of the High Court who are not Judges of the Supreme Court (s18(4) Supreme Court Act 2003)

No person can be appointed as a Judge of the Supreme Court unless he or she was a Judge of the High Court immediately before being appointed as a Judge of the Supreme Court; or is appointed as a Judge of the High Court when appointed as a Judge of the Supreme Court (s20(1) Supreme Court Act 2003)

Court of Appeal Judges

- A Judge of the Court of Appeal is also a Judge of the High Court
- The Court of Appeal comprises a Judge of the High Court appointed by the Governor-General as a Judge of the Court of Appeal and as President of that Court; and 6 other Judges of the High Court appointed by the Governor-General as Judges of the Court of Appeal (s57 Judicature Act 1908)
- Any Judge may be appointed to be a Judge of the Court of Appeal either at the time of his appointment as a Judge of the High Court or any time thereafter (s57(3))
- Judges of the Court of Appeal to have seniority over all the Judges of the High Court (including any additional Judge of the Court of Appeal), except for the Chief Justice and

the other Judges of the Supreme Court - President of the Court of Appeal to have seniority over 6 Court of Appeal Judges - 6 Court of Appeal Judges to have seniority amongst themselves according to their date of appointment as Judges of the Court of Appeal (s57(6))

- Every Judge of the Court of Appeal shall hold office as a Judge of that Court so long as he holds office as a Judge of the High Court (s57(5))

High Court Judges

- Appointed pursuant to Judicature Act 1908
- Must have held a practising certificate as a barrister or solicitor for at least 7 years (s6)
- Age of retirement: 68 years old (s13)
- 1 Judge to be called the Chief Justice of New Zealand and provision made for appointment of 36 other Judges (s4(1))
- A Judge of the High Court shall not be removed from office except by the Sovereign or the Governor-General, acting upon an address of the House of Representatives, which address may be moved only on the grounds of that Judge's misbehaviour or of that Judge's incapacity to discharge the functions of that Judge's office (s23 Constitution Act 1986)
- Salary shall not be reduced during the continuance of the Judge's commission (s24 Constitution Act 1986)
- Appointed by the Governor-General on behalf of her Majesty (s4(2))
- Other than the Chief Justice, Judges to hold seniority in accordance with their dates of appointment (s4(3))

Associate Judges

Associate Judges of the High Court are Judges with limited and defined areas of jurisdiction. Associate Judges are appointed to the High Court pursuant to s26C to s26R Judicature Act 1908. The jurisdiction of an Associate Judge is almost exclusively civil in nature and is essentially directed towards routine and minor matters such as bankruptcy and insolvency.

District Court Judges

- Appointments made in accordance with s5 to s10 District Courts Act 1947
- Appointed by the Governor-General (s5(1))
- Number of judges not to exceed 120
- May be removed from office by Governor-General for inability or misbehaviour (s7) a)
- Must have held a practising certificate as a barrister and solicitor for at least 7 years **or** have been continuously employed as an officer of the Departments of Justice or Courts for at least 10 years and have been employed as the Clerk or Registrar for not less than 7 years and be a barrister or solicitor qualified for admission, or admitted to the bar for not less than 7 years.

Community Magistrates

The office of Community Magistrate was established in 1998 to facilitate the speedy disposal of criminal cases in the District Court and to increase community involvement in the legal process. The jurisdiction of Community Magistrates extends to hearing applications for bail and remand and to conducting the preliminary hearings of more serious charges. Community Magistrates are empowered, amongst other things, to impose sentences on persons who have entered a guilty plea in respect of certain summary offences. Although Community Magistrates do not have the power to sentence offenders to imprisonment they may impose various other sentences including community based sentences such as periodic detention. Community Magistrates are selected for their personal qualities and experience. Practising lawyers and police officers may not apply to become Community Magistrates

- Appointed by the Governor-General on the advice of the Minister of Justice (s11A(1) District Courts Act 1947)
- Empowered to carry out functions and powers conferred by certain enactments, more particularly the Summary Proceedings Act 1957 and the Summary Offences Act 1981 (s11B(2))
- Need not be legally qualified
- Qualified for appointment as a Community Magistrate only if:
 - (a) capable, by reason of that person's personal qualities, experience, and skills, of performing the functions of a Community Magistrate and;
 - (b) designated, in accordance with regulations, as a person qualified for appointment as a Community Magistrate
- May hold any other office and engage in any other employment or calling that, in the opinion of the Governor-General, would not impair the proper discharge of the functions of a Community Magistrate (s11B(1))
- May not, inter alia, hold a current practising certificate or hold office as a member of the police or be a social worker within the meaning of s2(1) Children, Young Persons, and Their Families Act 1989 (s11B(2))

Justices of the Peace

Justices of the Peace are appointed by the Governor-General under the Justices of the Peace Act 1957. The functions and powers of a Justices of the Peace include the power to take oaths and declarations under the provisions of the Oaths and Declarations Act 1957 and the ability to carry out functions and powers specifically conferred by the Summary Proceedings Act 1957. Justices of the Peace are appointed for life and there is no retirement age. Justices of the Peace do not usually hold qualifications in law.

- Appointed by the Governor-General under the Justices of the Peace Act 1957
- Power to take oaths and declarations under the Oaths and Declarations Act 1957
- A Court presided over by 2 or more Justices of the Peace has jurisdiction in respect of a summary offence in the following cases, namely:
 - (a) In any case where the enactment creating the offence expressly provides that jurisdiction may be exercised by a Court presided over by a Justice or Justices
 - (b) In any case where by any enactment jurisdiction is expressly given to a Justice or Justices
 - (c) In any case where the offence is an infringement offence["Infringement Offence" means any offence under any Act in respect of which a person may be issued with an infringement notice e.g. a notice issued under s42A Transport Act 1962 or s66 Dog Control Act 1996]

Disputes Tribunal Referees

- Appointed under the Disputes Tribunal Act 1988
- Appointed by the Governor-General by warrant under the Governor-General's hand (s7(1))
- Capable, by reason of personal attributes, and experience, of performing the functions of a Referee (s7(2)(a))
- No requirement to hold qualifications in law

Ombudsmen

The Ombudsmen are appointed to office pursuant to The Ombudsmen Act 1975, which provides for the appointment of a chief Ombudsman and any number of further Ombudsmen. The major function of the office of Ombudsman is to hear complaints brought by New Zealand citizens about the administrative decisions of government departments. The Ombudsmen will not usually consider matters that may be reviewed through the process of Court proceedings. By virtue of s13 Ombudsmen Act 1975 an Ombudsman may investigate a complaint relating to a decision, recommendation, act or omission by any governmental department, organisation, committee, subcommittee, officer or employee.

Once an Ombudsman has completed an investigation recommendations may be made, amongst other things, that the decision, law or practice under review be reconsidered, varied or cancelled. If the Ombudsman is not satisfied that the recommendations have been adopted then a copy of the report and recommendations may be sent to the Prime Minister and then to Parliament. The Ombudsmen do not have any legal authority to enforce their recommendations.

Related websites

Office of the Ombudsmen: <http://www.ombudsmen.parliament.nz/>

Lawyers

To practice law in New Zealand a law degree (LLB) must be completed at one of the five New Zealand Universities with law faculties (Auckland, Waikato, Victoria, Canterbury and Otago). At the conclusion of the law degree it is necessary to be admitted to the High Court of New Zealand, before it is possible to begin practising as a lawyer. To be admitted to the bar an extra course of study known as "professionals" must be undertaken. The professional course is presently provided by the Institute of Legal Studies and is made up of a semester of practical legal education. When the course is completed an application to be admitted to the bar must be made before the admission process can take place.

In New Zealand lawyers are admitted to the profession as both barristers and solicitors and it is usual, following admission, to practice in both capacities. In some cases lawyers may choose to practise as barristers (barristers sole) and specialise in Court work, although most major law firms in New Zealand have a litigation department and employ solicitors who appear regularly in the Court room, so that it is unnecessary to brief a barrister on every occasion a litigation matter arises.

Barristers sole may not deal directly with the public and clients must be referred to them through a solicitor. There are certain stringent restrictions imposed on the right of a law practitioner to commence private practice as a solicitor which do not apply to a lawyer who practises as a barristers sole. A lawyer must not practise as barrister or solicitor unless they have a current practising certificate for which a fee must be paid.

Juries

It is the Juries Act 1981 that defines the make up and the rules relating to the jury process in New Zealand. A jury is comprised of 12 ordinary members of the community chosen from a pool of people randomly selected for jury duty from the electoral role. There are certain persons, such as practising lawyers and Judges, who because of their occupation are excluded from the jury selection process. Juries are used most commonly in criminal cases although may, on occasion, be used in a civil trial. A jury is required to hear the evidence and reach a decision (verdict) with guidance on the law from the Judge.

NZ Law in brief

Contract law

The law of contract relates to legally enforceable agreements made between individuals. A contract may be oral or made in writing. Not every agreement between individuals will constitute a contract and social and family arrangements will not usually fall within the ambit of contract law. The key components of a contract are offer, acceptance and consideration. Consideration can be defined as something supplied in return for a promise. A promise will not be binding if it is gratuitous. The most usual form of consideration is money.

Special rules and principles may apply to contracts that concern specific subject matter, such as employment contracts, the sale of land and the sale of goods.

Contract Law may also be concerned with the enforceability of contracts. Although a contract may have the elements of offer, acceptance and consideration it may not be enforceable because of some other issue.

Situations, that might affect the enforceability of a contract, include

- The lack of capacity of one of the parties to make the contract (e.g. where a contract is made with a child)
- When a mistake is made about the nature of the contract
- Where a party to the contract had made a false representation that induced the contract.

The application of contract law may concern a dispute about whether the terms of a contract have been properly carried out by one of the parties. The Court will look at the contents of the agreement and determine whether any terms of the contract have been breached. In the case of a breach of contract the Court may order that the wronged party be paid compensation for the loss suffered or may, in some circumstances, order the defaulting party to complete their obligations under the agreement.

Torts

The law of torts relates to obligations between citizens and deals with wrongs committed by one citizen against another. A tort is a "civil wrong" for which damages, monetary compensation, can be sought through the Court system.

Torts (some examples):

- Negligence: That a person in a proximate relationship with another person should take reasonable care not to do anything which could cause that person foreseeable harm;
- Nuisance: That a person should not use land in a manner which would unreasonably affect the use of adjacent land by the owner or occupier of that land;
- Defamation: That a person should not publish or broadcast untrue statements about another person which might have an adverse effect on that person's reputation or bring that person into hatred, ridicule or contempt;
- Passing Off: That a person shall not, in the sale of goods or the carrying on of business, take advantage of the goodwill of another business by acting in a manner calculated to mislead consumers into believing that the goods in question derives from or belongs to that other business.

Some torts may also amount to criminal behaviour such as conversion (theft) and battery (assault).

In New Zealand it is generally not possible to bring a lawsuit for personal injury caused by the wrongful or negligent act of another. This area of the law is currently governed by the Injury Prevention, Rehabilitation and Compensation Act 2001. Accident Compensation legislation, introduced in 1972, created a statutory scheme whereby a person who sustained a personal injury through accident, was entitled to compensation administered through what is now known as the Accident Compensation Corporation.

This controversial scheme has come under fire for several reasons, most particularly because compensation available under the Act may not be adequate to compensate for the loss suffered as a result of the accident and may not be as great as that that would be available through a tort action. Criticism has also been made because the existence of the legislation has meant that persons are not held to be accountable for their negligent acts, so that care received in areas such as medicine is perceived to sometimes dip below an acceptable standard. There seems also to be a perception that changes to the system since 1972 have significantly watered down

available compensation to the extent that the system is not adequately catering for the needs of persons suffering personal injury by accident.

Despite such criticism the benefits of the scheme are seen as including the fact that compensation is able to be accessed for any accident, without the need for litigation, and does not depend upon the financial position of the person or agency that caused the accident.

Criminal law

Criminal law is an area of public law and it is the State rather than the individual victim of the crime that acts as the wrongdoer's accuser. This is because a criminal act is viewed as a wrong against society. Although the Criminal Law was originally based upon Common Law, in New Zealand today the Criminal Law is codified, with the exception of certain common law defences, so that for an act to be classified as a criminal offence it must be prohibited by some criminal law statute.

One of the cornerstones of the Criminal Law is the presumption of innocence. Once the State has charged an alleged offender with an offence, the accused person is presumed to be innocent until found guilty at trial. This principle has been arguably undermined in recent years because of the phenomenon of "trial by media", whereby details of a crime are reported in the media and an accused person is named in connection with the crime. The naming of an accused person can in itself perpetuate a public belief that the accused person is guilty, because accusation is often perceived to be synonymous with guilt. The principle that justice must be seen to be done is another fundamental aspect of the criminal justice system, so that name suppression is not lightly granted by the Courts. The presumption of innocence does not sit particularly easily with the concept of remanding an alleged offender in custody without bail until trial, although this option is available to the judiciary in certain circumstances.

Public outrage has been fuelled in recent times by an increase in reported incidents of offenders committing further offences whilst on bail, so the judicial discretion not to grant bail in certain situations, most particularly in relation to serious violent offences, is likely to continue to be exercised. There are a small number of offences where the presumption of innocence does not apply, so for instance where it is established that an offender was in possession of a threshold quantity of illegal drugs, there is a presumption that the offender is guilty of drug dealing.

The Crown bears the onus or burden of proof in a Criminal proceeding and must prove the case beyond reasonable doubt. This can be compared with Civil Proceedings where matters are proved on the balance of probabilities (the most probable argument will win). The accused is not required to prove his or her innocence so may choose to lead no evidence at all, and a Judge and jury are not entitled to draw any conclusions as to guilt or innocence from the fact the accused has chosen to remain silent. The standard of proof "beyond reasonable doubt" in essence means that even if the Crown's case is the most probable, if a tenable doubt as to guilt exists, rather than an outlandish or highly unlikely explanation, a "not guilty" verdict should follow.

Family law

The scope of Family Law in New Zealand continues to extend beyond the traditional spheres of marriage and divorce, to include areas such as property division following the breakdown of a marital or de facto relationship (whether or not the couple is a same sex couple) and the protection of persons in family relationships, including de facto relationships, that are characterised by violence and abuse.

The shift in focus from the view taken in past centuries that woman and children were to be regarded as chattels of marriage, is highlighted both by the principle that the interest of the children is paramount when determining issues of custody and access and by the fact that there is a presumption of equal sharing of matrimonial property, following the breakdown of a marriage or de facto relationship.

The fact that the Property (Relationships) Act 1976 sets out the rules for property division following, not only the breakdown of marriage, but following the breakdown of a de facto relationship, whether or not the couple is a same sex couple, seems to suggest that the development of Family Law will continue to cater to the needs of New Zealand families in all their diversity.

Land law

Land Law is concerned with interests in land, and particularly the transfer of interests in land and the rights associated with interests in land. There are a number of interests that a person might have in land:

- Estate in Fee Simple: a person who holds the estate in fee simple in a parcel of land holds the title to that parcel of land and is the registered owner of the land;
- Leasehold Estate: a leasehold estate is most commonly defined as an estate or interest in land held for a fixed term of years;
- Covenant: a promise made in an agreement, that is enforceable between the parties, whereby one party agrees to give something to another, or to do or not to do an act (e.g. a covenant contained in a lease whereby the lessee agrees to keep the house in good repair);
- Covenant Running With The Land: Successive owners or lessees of the same land are entitled to the benefit of, or liable for the original covenant (e.g. the covenant to keep a house in good repair will become the responsibility of any person to whom the lessee assigns the lease);
- Easement: A right enjoyed by a person over a neighbouring property (e.g. a right of way over land giving vehicular access to an adjoining property)

The system of registration of title to land in New Zealand is known as the Torrens System or the Land Transfer System. A parcel of land under the land transfer system has an individual certificate of title setting out the name of the registered proprietor, the nature of the estate which he or she holds (e.g. an estate in fee simple), the legal description of the land, a note of any encumbrances, restrictions and interests (e.g. mortgages, easements) to which the land is subject and a plan of the land drawn on it. One copy of a certificate of title is held by Land Information New Zealand, whilst a second copy is held by the landowner or appointee, such as a solicitor or bank.

The Land Transfer (Automation) Amendment Act 1998, which came into force on 1 February 1999, has paved the way for the creation of an automated land titles system, known as "Landonline", which will convert the paper certificate of title and plan system to an electronic process. The design of the system will make land title information available through the internet, will allow documents to be registered online and will combine the plan examination and title issuing process.

One of the most significant features of the Torrens system of land registration is the concept of indefeasibility of title. Indefeasibility of title describes the protection afforded to the registered proprietor of land from an adverse claim in respect of that land. The title to land of a registered proprietor is, within certain limits, guaranteed by the State and is generally immune from attack by any adverse claim. Thus in general and in the absence of fraud, another person cannot successfully claim to have a right to land which would defeat the title of a registered proprietor.