Constitution Matters

- A Comparative Analysis of Constitutions in Two Legal Systems -

Thesis for Master of Laws [LL.M.] 1999
20 points

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May 17 1999

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1. Introduction

This thesis will be examining two totally different legal systems: Sweden and New Zealand, two jurisdictions which encompass diverse historical, political and constitutional backgrounds. Sweden, to begin with, retains centuries of old constitutional traditions, where a written and entrenched constitution is seen as fundamental. New Zealand, on the other hand, is almost unique in the world in not having a written and entrenched document known as ”The Constitution”.

The choice of topic might *prima facie* seem to lack logic. Why compare these two particular jurisdictions? However, the reason is more evident than at first glance. The author has during 1998 been studying the common law system in New Zealand on a reciprocal scholarship, and consequently, a comparison with this jurisdiction is reasonable. But on the other hand, the choice is indeed fruitful, considering the fact that Sweden is characterized as a nation typical for its Constitution, along the lines of countries like France, Germany and the United States. Thus Sweden serves as a distinct contrast to the uncodified approach applied in New Zealand. In addition, the two countries are similar in many ways. They are both small countries and are in the peripheral on the constitutional scale. Furthermore, constitutional law is of specific interest to the author, since he has been involved in lecturing on this area at the Faculty of Law, Lund University, Sweden, for several semesters while continuing his studies.

Although there is much written about matters involving the New Zealand Constitution, there is a very limited amount of literature concerning the legal aspect, since most publications relate to political and historical point of views. In this thesis the objective involves a more detailed

comparative analysis of New Zealand's constitutional regulations with a European civil law system. No explicit direct catalogue on whether or not New Zealand should adopt an entrenched constitution can be found in contemporary legal literature, since these investigations are more particularly related to the debate surrounding the entrenchment of the New Zealand Bill of Rights 1990. It is therefore the author's ambition to provide a more extensive and structured index on the present topic in this assignment. In other words, the focus and scope of this thesis will consequently mostly be made on the New Zealand aspect. The reasons for this are numerous; the particular constitutional issue in New Zealand is at present a very interesting and important matter, and further, the constitutional settlement in Sweden is comparatively uncomplicated. Accordingly, Sweden will therefore primarily serve as a reference and an example of a successful and well-working solution. In addition, the approach taken in regard to the Swedish discussion is intentionally made with the aim that persons not familiar with the Swedish legal system and terminology shall be able to comprehend. Thus, a rather basic description has sometimes been applied in order to obtain that approach.

The scope of this thesis can finally be narrowed down to one single intricate question: does the fact that New Zealand lack a written and entrenched constitution lead to the consequence that the people of New Zealand possess less constitutional protection against arbitrary power, in contrast to the protection granted the people of Sweden? In other words, does an entrenched constitution matters?

Sweden, in contrast to New Zealand, has a well defined Constitution containing extensive regulations relating to fundamental rights. This, in combination with Sweden's incorporation of the European Convention on Human Rights has resulted in a satisfactory situation for the citizens of Sweden. Although Sweden several times has been held not to fulfil its obligation under the Convention, it is the belief of the author that Swedes presently enjoy a very strong and adequate protection against arbitrary power.

Materials involved in this thesis are mainly books concerning the constitutional framework of New Zealand and the leading publication concerning the legal aspects must be considered to be Philip Joseph's extensive book *"Constitutional and Administrative Law in New*

Zealand" (1993). Regarding the Swedish material, literature discussing the Swedish Constitution is numerous, and the leading publication here concerning fundamental rights is Joakim Nergelius' doctoral dissertation *"Konstitutionellt rättighetsskydd"* (1996). For basic knowledge regarding the Swedish Constitution, Strömberg's *"Sveriges författning"* (1999), in combination with Holmberg's and Stjernquist's *"Vår författning"* (1999) have advantageously served as authoritative sources of information.

As will be shown in this thesis, the constitutional settlements of a country are closely related to its history. This is the primary justification for a rather extensive historical synopsis of the constitutional development both in New Zealand and in Sweden.

For the sake of precision, Swedish legislation and legal notions are set out in italics directly followed by a translation into English within brackets. Furthermore, Swedish statutes are generally given the name used in any recognized translation of which the Swedish Government Cabinet Office has issued a list.

2. Characteristic Features of Two Different Constitutional Systems – In an Historical Context

"There are really only two countries which have Constitutions of ancient origin, England and Sweden"

Pontus Fahlbeck in 1904

2.1. General

According to the French political theorist Montesquieu[1], there are three broad functions of a government. Firstly, the legislative law making function. Secondly, the executive function, comprising the administration of laws. Lastly, the judicial function concerned with interpreting the laws. Montesquieu stressed that these functions should never be concentrated in the hands

[1] Author of the famous *L'Esprit des Lois* (The Spirit of the Laws), 1748

of the same body, otherwise horrible results like tyranny would likely be the outcome.[2] The United States was the first to adopt Montesquieu's classical thoughts. Its modern Constitution of 1787 enforces the idea of a higher fundamental law by establishing a formal and entrenched declaration of fundamental rights and liberties.[3] The Americans asserted that the "decent respect to the opinions of mankind" gave rise to the requirement for their Declaration of Independence.[4] However, the idea of a written constitution was previously utilized early in the mediaeval doctrine of supremacy of law, where pacts were made between princes and vassals.[5]

The western world tends to seek a distinction between itself and *contra* regimes of totalitarianism by pointing out the protection of human rights granted to its citizens. This is done by looking at the democracy, freedom and liberalism associated with this protection in contrast to the absence or even suppression of human rights in other despotic jurisdictions.[6] In addition, effective legal systems with sufficient constitutional order are normally considered to be legitimate by virtue of the fact that those who govern have adequate authorization to do so. This in combination with the obligation to obey these regulations. In conferences and publications around the world, officials, journalists, scholars and concerned citizens discuss the nature of human rights and how they should be applied to all nations of the world.[7] The interesting question of how fundamental rights are adequately protected arises and, further, how they actually are being secured in states who truly care for these rights. Also considered is, how political principles and basic political institutions combine in these states to assure these rights for all citizens. Primarily this is done by an entrenched Bill of Rights.[8] However, the belief that this safeguard is most adequately achieved when fundamental rights are carefully defined in catalogues, has in later years been questioned by the introduction of "new rights" into the arena alongside the traditional civil and political rights of the constitutional systems.[9] Consequently,

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[2] R Youngs, *English, French & German Comparative Law* (1998) p.1
[3] C Brewer, *Judicial Review in Comparative Law* (1989) p.58
[4] A Sharp, *An Historical and Philosophical Perspective on the Proposal for a Bill of Rights for New Zealand* (1985) p.3
[5] C Brewer, *Judicial Review in Comparative Law* (1989) p.79
[6] R Goldwin, *How Does the Constitution Secure Rights (*1985) p.xiii
[7] Ibid
[8] R Goldwin, *How Does the Constitution Secure Rights (*1985) p.xiii
[9] Ibid

disputes arise concerning what kind of rights should be contained in a protecting constitution. This constitutional Catch-22 will be examined below.

There are significantly different ways in which a constitution can be altered. Firstly, in a totally flexible constitution, like the ones in Britain and New Zealand, the Constitution is altered in accordance with the procedure of modifying normal laws, *i.e.* by a simple majority decision by Parliament. Secondly, in a rigid Constitution, like Sweden and other continental European countries, a special procedure is required to accomplish an amendment to the constitution. The particular solution affirmed in each case utterly depends on the political structure and the traditions of each state.[10] Thus, to make an amendment to the Swedish Constitution two ballots on different occasions are required. Furthermore, a general election and a nine months time lapse after the matter is first presented to Parliament are prerequisites. Additionally, a referendum regarding the amendment issue can be arranged to settle the question, but this requires that a predetermined minimum number of members of Parliament demand this procedure.[11]

Depending on what kind of constitutional solution the jurisdiction has adopted, courts utilize different presumptions in their decision-making. In a rigid constitution, the principle *Lex superior derogat legi inferiori* is applied by courts, giving laws of higher rank superior power over lower ones, since there is considered to be a set of higher form of laws more important in relation to other regulations. This, for example, is the case in a traditionally constitutional state like Sweden. In New Zealand, which has a flexible Constitution and laws all of equal level, the principles *Lex posterior derogati legi priori* and *Lex specialis derogati legi generali* are utilized, where later enacted laws and more specialized laws are given preference compared to older and more general laws.[12]

Not all rights contained in a Bill of Rights are absolute, *i.e.* the rights cannot be interfered with under any circumstances. Classic absolute rights in Sweden are, for example, prohibition

[10] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p.10
[11] H Strömberg, *Sveriges Författning* (1999) pp.92-93 See also *Regeringsformen* Chapter 8 section 15 third paragraph
[12] C Brewer, *Judicial Review in Comparative Law* (1989) p.104

against death penalty and the prohibition against torture[13]. But when looking at freedom of speech, to mention one example, it becomes apparent that this is not an absolute right, because in certain circumstances this right has to give way to a superior interest, like defamation. However, it is of extreme importance that the circumstances under which limitations are possible regarding relative rights (*i.e.* rights which are not absolute) are clearly defined in the Constitution and in close connection with a Bill of Rights.[14] In the Swedish Constitution, for example, certain provisions assert that the limitation of fundamental relative rights is only possible when this is justifiable in a free and democratic society. Furthermore, restrictions of these rights may not be imposed solely on the grounds of political, religious or cultural opinion.[15]

2.2. New Zealand - A Constitutional Inheritance

New Zealand, which originally was a pioneer society, slowly developed a national identity and the country today comprises its own national spirit.[16] Thus, although New Zealand has a relatively short history, the Commonwealth realm has hitherto experienced many changes. New Zealand has since 1840, when it became subordinate to the British Crown, advanced through five different stages of constitutional entity. Initially a dependency of New South Wales, later evolving to a colony under the Crown, then advancing to obtain status as a self-governing colony, further existing as a dominion, New Zealand finally became an independent nation.[17] It is possible that New Zealand will become a republic sometime in the near future. This hypothesis finds support in Professor Brookfield referenced to New Zealand as being almost a *de facto*-republic.[18] According to Trainor, republicanism necessarily involves a constitutional settlement, including decisions about New Zealand's rulership.[19] This query will be examined below to consider how this could best be done.

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[13] See *Regeringsformen*, chapter two, paragraph four and five
[14] Human Rights Commission, *A Guide to the Proposed Bill of Rights* (1986) p.6
[15] H Strömberg, *Sveriges Författning* (1999) p.81. See also *Regeringsformen* chapter 2 section 12
[16] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p. 3
[17] F M Brookfield, *The Constitution in 1985:The search for legitimacy* (1985) p.2
[18] L Trainor, *Republicanism in New Zealand* (1996) p.18
[19] L Trainor, *Republicanism in New Zealand* (1996) p.18

As a result of this imperial inheritance, many regulations on the constitutional area relate to the United Kingdom. The New Zealand Constitutional Act 1852 (Imp.) defined constitutionally important matters between the United Kingdom's and New Zealand's Parliaments, and as a result a general assembly, comprised of the Governor and an elected House of Representatives, had the authority to legislate for the peace, order and good of New Zealand.[20] But gradually, since 1947, steps have been taken towards a complete constitutional separation from the United Kingdom[21] and with the Constitutional Act 1986, which extinguished any residual right of the United Kingdom's Parliament to legislate, New Zealand finally became independent.[22] But constitutional links still exist to the United Kingdom and one evident example is the fact that the Privy Council still operates as the highest court in New Zealand's judicial hierarchy.[23] This is quite significant, considering that cases are decided on the basis of legislation enacted by the Parliament of the United Kingdom still in force in New Zealand.[24] Another example of the tight relation to its mother is the head of state in New Zealand. Today, the Queen of the United Kingdom is also the reigning head of state in New Zealand according to section 2 Constitution Act 1986. However, the authority of the Crown is significantly limited by law.[25]

A very significant feature of New Zealand's constitutional system is the principle of parliamentary sovereignty. This means that Parliament not is bound by any legal restrictions and therefore is capable of legislating for any purpose.[26] Parliament is omnipotent: only the United Kingdom and New Zealand have entrusted their Parliaments with such great power.[27]

Although the principle of separation of powers has no formal role in New Zealand, the distinction between the lawmaking, executive and judicial branches of government is quite apparent.[28]

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[20] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) pp.96-97
[21] F M Brookfield, *The Constitution in 1985:The search for legitimacy* (1985) p.10
[22] McDowell, Webb, *The New Zealand Legal System* (1998) p.155
[23] Ibid, p.245
[24] F M Brookfield, *The Constitution in 1985:The search for legitimacy* (1985) p.10
[25] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p.5
[25] Ibid, p.8
[27] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p.11
[28] Ibid, p. 237

2.3. Sweden - Democratic Monarchy Comprising Ancient Constitution

The constitutional history of Sweden spans several hundred years. Ever since the 14th century, when a law became applicable to the entire kingdom, there has been a written and unified Constitution in Sweden[29]. The King's reign has constantly been a fundamental component in the Swedish constitutional arena and the principle of succession to the throne is still operating in the present day.[30] The first *Regeringsform* (Constitution of Government) was adopted in 1634 and comprised mostly of administrative regulations. The inheritance from this first *Regeringsform* is still perceptual in the present *Regeringsform* of 1974[31].

After almost two hundred years of wars, a more settled era began, known as *Frihetstiden* (the Freedom Period) commencing in 1718. This epoch is associated with acknowledgement of a less autocratic form of authority, establishing a legal division of power between the King and the people. New regulations were enacted and they were regarded as unchangeable fundamental laws, which could only be amended by proposal at one *Riksdag* (*c.f.* Parliament) and adopted by consensus at the next one. Moreover, since 1723, the *Riksdag* has retained a number of Ombudsmen, whose function came to be regarded as the basic right of citizens and this function is today treated as one of the fundamental laws of the realm.

Consequently the King became a puppet during *Frihetstiden* and a sort of *de facto* parliamentarism was introduced in Sweden.[32] By virtue of the ideas of *Frihetstiden* the *Tryckfrihetsförordning* 1766 (Freedom of the Press Act), the first of its kind in the world, was adopted. It endowed the quality of fundamental law and the act greatly increased the right to express opinions in print.[33]

However, the concept of *Frihetstiden* was bound to be interfered with, temporarily, in 1772. King Gustav III, obviously influenced by current French ideas of State absolutism, performed

[29] Holmberg and Stjernquist, *Vår Författning* (1999) p. 22
[30] J Nergelius, *Konstitutionellt rättighetsskydd* (1996) p.589
[31] Holmberg and Stjernquist, *Vår Författning* (1999) p.20
[32] J Nergelius, *Konstitutionellt rättighetsskydd* (1996) p.589
[33] Holmberg and Stjernquist, *Vår Författning* (1999) p.24-25

a *coup d'état* and thereby removed all the fundamental laws of *Frihetstiden*, subsequently replacing *Tryckfrihetsförordningen* 1766 with stricter legislation. The King was, however, later murdered in 1792, and soon a new *Regeringsform* was passed by the *Riksdag* 1809 and this Constitution has arguably strong influences from the theory of separation of power[34]. Thus the executive power was exclusively exercised by the King. Furthermore, the legislative power was to be applied by the King and the *Riksdag* mutually, whereas the judicial power was entrusted to independent and irremovable judges. In addition, a number of other fundamental laws were enacted in 1810 that were deeply entrenched in the constitutional setting and that therefore could be changed only by common consent in the *Riksdag*.

Parallel to the *Regeringsform* 1809, again a new *de facto*-parliamentarism gradually emerged. More particularly this involved the fact that the King was compelled to obtain adequate support from the *Riksdag* and, in addition, the King's possibility to decide matters eventually disappeared. Hence, without altering one single line in the *Regeringsform* 1809, its characteristic as a dualistic instrument slowly and gradually developed into a monistic parliamentary system.[35] After some deliberation whether a change could be carried out within the framework of the old *Regeringsform* 1809 or whether it should be solved by a novel construction in a new Constitution, it was finally decided through a compromise that a new Constitution should be adopted. Sweden would continue to be a monarchy, however the King was to be left with no political or judicial power.[36] In the new *Regeringsform* 1974 parliamentarism is a strong and leading principle and consequently this principle is set out already in the portal paragraph of the Constitution.[37] It declares that:[38]

> All public power in Sweden proceeds from the people. The people's rule of Sweden builds upon the free formation of opinions and a universal and equal suffrage and is

[34] H Strömberg, *Sveriges författning* (1999) p.72
[35] Holmquist and Stjernquist, *Vår författning* (1999) p.26
[36] Ibid, p.33
[37] H Strömberg, *Sveriges författning* (1999) p.72
[38] *Regeringsformen* first chapter, first paragraph

realised through a representative and parliamentary Constitution and a communal autonomy. All public power must be exercised under the law.

In contrast to the principle of division of power in the *Regeringsform* 1809, the power is here vested in one particular body – the people[39]. This statement is regarded as one of the most important regulations in the Swedish Constitution, and is accordingly often referred to, directly or indirectly, by courts in constitutional matters. Several fundamental principles can be derived from the provisions in the first chapter of the Constitution, adequately comparable with the conventions (discussed later) in New Zealand. These principles are *inter alia: Legalitetsprincipen* (the principle of legality), *Offentlighetsprincipen* (the principle of public access), *Proportionalitetsprincipen* (the principle of proportionality), and *Objektivitetsprincipen* (the principle of objectivity).[40]

Hence, curiously, Sweden, which is considered to be one of the most democratic countries in the world, is a monarchy, while the King today, as mentioned above, has lost his power to the *Regering* (*c.f.* Cabinet).[41] In Sweden, in accordance with the United Kingdom, the Cabinet exercises a collective responsibility and decisions are reached when supported by a majority of the ministers.[42] Furthermore, the dominant party in Sweden employs a strong influence and there are therefore seldom conflicts between the executive and the legislative divisions.[43] At present in Sweden, the legislative issue has usually been elaborated somewhere outside the chamber, where standing committees, the *Regering*, and interest groups draft most of the legislation and execution is therefore, in most cases, merely a question of ratification in the *Riksdag*.[44]

With reference to this procedure, it has been argued that this conduct displays a weakness of the legislative *vis-à-vis* the executive in Sweden, an issue closely related to the analysis of the New Zealand system, examined in this essay. On the other hand, the *Riksdag* always has the

[39] H Strömberg, *Sveriges författning* (1999) p.72
[40] Ibid, pp.14-15
[41] Holmquist and Stjernquist, *Vår författning* (1999) p.43
[42] H Strömberg, *Sveriges författning* (1999) p.61
[43] Holmquist and Stjernquist, *Vår författning* (1999) p.43

option of declaring its discontent towards the *Regering* by a referendum and consequently, in the most extreme of cases, put a definite end to an arbitrary or incompetent *Regering*.[45] In conclusion, the better view therefore would be that the legislative procedure in Sweden works satisfactorily.

The Ombudsman, the innovation from 1809 (*i.e.* originally 1723), made Sweden famous around the world for the benefit of the art of governing. An Ombudsman is a lawyer who exercises control upon the government on behalf of the citizens by investigating complaints on governmental misdeeds and injustices. Consequently, this institute ensures the uphold of constitutionally important matters and prevents arbitrary exercise of power. This phenomenon is today spread amongst a large number of countries, and New Zealand and the United Kingdom are two relevant examples of countries who have adopted this office[46].

3. Written And Entrenched Constitution or Not?

" Government without a Constitution, is a power without a right"

Thomas Paine

3.1. What Is a Constitution?

There are two different conceptions of what a Constitution is. The narrow meaning of "Constitution" encompasses two extensive characteristics: firstly the Constitution being an identifiable source of power, imposing limitations upon the executive organs of the state, and secondly, the Constitution enjoying the position of supreme and higher law.[47] The Swedish

[44] H Strömberg, *Sveriges författning* (1999) p.73
[45] H Strömberg, *Sveriges författning* (1999) pp.132-133
[46] Holmquist and Stjernquist, *Vår författning* (1999) p.200-201
[47] McDowell, Webb, *The New Zealand Legal System* (1998) p.98

Constitution fits well into the first narrow definition. The latter, broader view, is well described by Bolingbroke 1733:[48]

> By Constitution, we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs, derived from certain fixed principles of reason […] that compose the general system, according to which the community hath agreed to be governed.

One could argue that this broader view is in accordance with the constitutional setting of New Zealand today.

There are at present time only three countries in the world who do not have a codified complex of supreme rules comprised in one single document, categorised as ”The Constitution”. But although this is the case in the United Kingdom, Israel and New Zealand, a collection of rules *de facto* exists in these three jurisdictions. These regulations are partly written and partly unwritten, founding rules concerning the establishment, the regulation and the control of the government.[49] This means, when looking at the Commonwealth, that all its member-countries presently have written and codified constitutions and, furthermore, generally entrenched declarations of fundamental rights. This is the case of the Commonwealth, but with one distinct exception - New Zealand.[50]

Most constitutions roughly consist of the same components. Initially, after a few ideological pronouncements which declare the purpose of the state and some asserting principles about how the state operates[51], a constitution contains rules which regulate the government in a state and especially the government’s relationship towards the citizens[52]. More particularly, this involves the establishment of a system encompassing a central government, and the constitution

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[48] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p.9
[49] C Brewer, *Judicial Review in Comparative Law* (1989) p.57
[50] Ibid, p.177
[51] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p.9
[52] R Youngs, *English, French & German Comparative Law (*1998) p.1

is hence the source from where the powers of the government can be derived.[53] It has been argued that this allocation of power is equally applicable to a monarchy, a dictatorship, a democracy or an oligarchy.[54] Moreover, a constitution regulates the function of government, establishes rights and freedoms of citizens, and consequently describes the relationship between the state and the individual.

In a written constitution, the supreme provisions are reasonably easy to allocate, since they often are joint into one single document. On the other hand, it is typical for unwritten constitutions to have regulations scattered throughout statutes and common law.[55] By looking at this particular definition of a constitution, it can be argued that New Zealand, although lacking an entrenched single document, possesses a milieu of regulations, which in turn can be identified as a constitution.[56]

A constitution normally specifies particular procedures for amendments, *e.g.* a qualified majority decision by Parliament or a referendum by the people[57]. These procedures are established because the rules in the constitution are generally considered as being of more importance, compared to other regulations figuring in a legal system.[58] A problem, always of concern for writers of a constitution, is whether or not the constitution should contain a provision for its alteration and, moreover, in the presence of such a clause, whether the process of amendment should be easy or difficult.[59] Indeed the supremacy of an entrenched constitution is closely related to its rigid character and further demonstrated by the fact that the constitution enjoys immunity from the powers of the legislator. This in contrast to jurisdictions containing unwritten and not entrenched constitutions, where there is flexibility in the constitution, making it far easier to amend.[60] However, fundamental rules of this calibre are normally regarded harder to change.[61] Consequently, written constitutions are considered to

[53] McDowell, Webb, *The New Zealand Legal System* (1998) p.98
[54] M Taylor, *Is there a Case for Constitutional Reform in New Zealand?* (1997) p.2
[55] L Trainor, *Republicanism in New Zealand* (1996) p. 82
[56] McDowell, Webb, *The New Zealand Legal System* (1998) p.98
[57] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p.9
[58] R Youngs, *English, French & German Comparative Law* (1998) p.1
[59] S Bennett, *The Making of the Commonwealth* (1971) p.206
[60] C Brewer, *Judicial Review in Comparative Law* (1989) p.103
[61] R Youngs, *English, French & German Comparative Law (*1998) p.1

have the status of supreme law and the ability to establish limitations on the legislative power. In addition, the fundamental conception of parliamentary sovereignty is neglected. Hence, any act found contrary to this supreme law will be declared null and void.[62]

Judicial control is essential when dealing with rigid constitutions - amendments and reforms are accordingly only possible through special procedures, unlike the operations in an ordinary legislative process.[63] But even if a flexible constitution does not itself result in a system of judicial review, some basic legislative values may be ”constitutionalized”. This is, for example, the situation in Israel’s Constitution. Here some fundamental principles apply which can only be altered by a majority of the members of the *Knesset*[64]. One of these principles is the Basic Law, where the *Knesset* has limited its own parliamentary supremacy.[65] It is therefore possible for Israel to obtain a distinction between higher law and ordinary law, and as a result a system of judicial review can be established.[66]

When looking at judicial control regarding the constitutionality of new legislation, there are two doctrines stating how this might be exercised. Firstly, according to the interpretative doctrine, constitutional review is strictly limited to the application of defined rules, which are established in an entrenched constitution. This is, for example, the case in Australia, where the Australian Constitutional Court considers itself bound by the constitutional text. Secondly, in the view of the non-interpretative doctrine, and in strong contrast to the other belief, judges are allowed to go beyond the literal references of the constitution and, to an extent, enforce rules which cannot be found therein, but which still are in accordance with the fundamental values of society and its political system.[67]

Basic rights of citizens are often incorporated in a constitution and in many cases a Bill of Rights, containing a catalogue of the fundamental rights of the people, is the method of achieving this. These basic rights are *inter alia* freedom of speech and freedom of

[62] C Brewer, *Judicial Review in Comparative Law* (1989) p. 177
[63] Ibid, p.104
[64] The parliament of modern Israel
[65] C Brewer, *Judicial Review in Comparative Law* (1989) pp.104-105
[66] Ibid, p.106
[67] Ibid, pp.106-107

movement.[68] An instrument like a Bill of Rights attempts to protect rights of individuals *vis-à-vis* the State by, amongst other things, defining the powers of persons possessing authority. Therefore, a Bill of Rights acts as an additional check, since suggested new legislation must be in compliance with its provisions.[69]

It has been postulated that the people of New Zealand enjoy less protection regarding fundamental human rights compared to people in the rest of the world and the reason becomes evident when focusing on the three countries in the world lacking written and entrenched constitutions. Israel, to begin with, is in the progress of adopting a Constitution, section by section. Moreover, the United Kingdom is party to the European Convention on Human Rights, which contains several provisions protecting the fundamental rights. This means that the European Human Rights Commission exercises the safeguarding of infringements over these rights in the country. Consequently, people in the United Kingdom can have their rights considered in instances of an alleged breach, ultimately by the European Court of Human Rights. New Zealand, which in contrast to the United Kingdom lacks this mechanism and further, is without an entrenched Bill of Rights, therefore would provide less protection compared to other jurisdictions.[70] This issue will be thoroughly discussed below.

3.2. New Zealand

3.2.1. Does New Zealand Have a Constitution?

New Zealand is often criticized for not having a Constitution.[71] But according to Joseph, this is a common misconception.[72] It can be argued that these misconceptions are merely a matter of semantics.[73] In any event, it is clear that New Zealand is presently lacking a document known as "The Constitution".[74] On the other hand, regulations concerning constitutional matters can

[68] R Youngs, *English, French & German Comparative Law* (1998) p.1
[69] Human Rights Commission, *A Guide to the Proposed Bill of Rights* (1986) p. 1
[66] Human Rights Commission, *A Guide to the Proposed Bill of Rights* (1986) pp.2-3
[71] McDowell, Webb, *The New Zealand Legal System* (1998) p. 97
[72] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p. 1
[73] McDowell, Webb, *The New Zealand Legal System* (1998) p. 97
[74] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p. 1

be located in what is called a constitutional framework, contained in a number of sources. Thus, this body of rules is to be found in unentrenched legislation[75], the common law, conventions, the Treaty of Waitangi, the rule of law, Letters Patent of the Governor-General[76] and the imperial statutes still in force in New Zealand.[77] Looking at common law, many principles of New Zealand's Constitution can be inferred specifically from judicial decisions. One classic example is the case *Entick v Carrington*[78], concerning trespassing. Furthermore, conventions are the most important non-legal source of the Constitution, and these rules concern political conduct.[79] Conventions are not set out in any statute but they have become established over the years by frequent usage and custom and can be characterized as expectations; a specific person is expected to act in a predetermined manner. Hence, the most evident examples of conventions are the Cabinet system and the office of Prime Minister.[80]

There is no entrenched legislation in New Zealand. Although the Constitutional Act 1986 has several provisions which require a higher degree of consent in Parliament compared with normal enactment, it is arguable that this is only quasi-entrenchment. The reason for this is that section 189 of the act is not itself entrenched.[81]

There are two ways in which the legitimacy of the Constitution in New Zealand must be considered. The first aspect is the relation *vis-à-vis* the United Kingdom. The other aspect regards the relation to the Maori, being the indigenous people of New Zealand (*Tangata Whenua*).[82] New Zealand has inherited many of its laws and traditions from the United Kingdom, including the Bill of Rights 1688 (Eng.), which established the supremacy of Parliament.[83] The Bill of Rights, focusing on the relationship between the Crown and

[75] Of most significance are the Constitution Act 1986, the New Zealand Bill of Rights Act 1990, the Electoral Act 1993, the Judicature Act 1908 and the District Courts Act 1947.
[76] McDowell, Webb, *The New Zealand Legal System* (1998) p.98
[77] R D Mulholland, *Introduction to the New Zealand Legal* (1995) p.23
[78] *Entick v Carrington* (1765) 19 St. Tr. 1030. In the case the defendants broke into Entick's home to exercise a search. The case establishes that public powers must be exercised in accordance with existing law.
[79] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p.25
[80] R D Mulholland, *Introduction to the New Zealand Legal* (1995) pp.39-40
[81] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p.487
[82] F M Brookfield, *The Constitution in 1985:The search for legitimacy* (1985) p.2
[83] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p. 2

Parliament, is not a Bill of Rights categorizing under the current discussion in this thesis, since the contemporary definition of a Bill of Rights comprises a constitutional code of human rights. By this definition, the United Kingdom has never enacted a Bill of Rights.[84] The foundation of individual rights is instead established by judges. However, the problem arises that these rights can be interfered with or be destroyed by Parliament under the doctrine of parliamentary sovereignty. This potential underpins a contemporary discussion regarding the initiation of some kind of reform in the United Kingdom and in New Zealand.[85] The Constitution Act 1986 framed a new era, where a constitutional separation from the United Kingdom and Westminster was established, and New Zealand's sovereignty consequently was proclaimed. By Section 15 (2) of the act, the Parliament's of the United Kingdom power to legislate for New Zealand formally ceased.[86] Instead, the New Zealand's House of Representatives was granted full power to create laws. The Constitution Act contains regulations comparable with those of fundamental law, but the act is only declaratory regarding New Zealand's existing laws and institutions. It can consequently be altered in ordinary way[87], since none of the act's provisions are entrenched. Therefore, the act lacks the character of superior law.[88] Regarding the legitimacy of the New Zealand Constitution in relation to the Maori, one of the most significant matters is the Treaty of Waitangi signed between the settlers and the indigenous people in 1840. There are many problems involved in this issue. There are, for example, disputes connected to the wording of the actual document and also today factual situations which give rise to disagreement of interests. One of these situations concerns Maori customary fishing rights. It is the author's belief that some kind of entrenchment must come into force in New Zealand to settle the matter properly, thereby safeguarding the rights of the Maori minority.

3.2.2. A Written, Entrenched Constitution For New Zealand?

3.2.2.1. Arguments Pro

[84] P Norton, *The Constitution in Flux* (1988) p.244
[85] P Norton, *The Constitution in Flux* (1988) p.245
[86] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p. 14
[87] Ibid, p.10
[88] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p.99

New Zealand has, as shown above, a constitutional framework capable of bearing the name "Constitution". The fundamental question subsequently arises of whether the present situation is working satisfactorily. A number of reasons will be presented arguing that there is a strong need for constitutional reform, and that an entrenched Constitution is needed.

3.2.2.1.a. Desirable Inflexibility

One of the strongest arguments for an entrenchment of constitutional matters in New Zealand is to prevent Parliament from being able to create changes in legislation with just one single majority vote. By having a higher requirement for changes in constitutionally important issues, misuse of power and infringements of fundamental rights can be prevented more effectively than at present. There are a variety of ways in which an entrenchment can be done. The specific and preferable solution must be one that has a high compatibility with the New Zealand constitutional setting. When the New Zealand Bill of Rights was introduced, it was suggested that this document should be entrenched so changes could be done only by a 75 percent majority vote in Parliament, or by a 50 percent majority vote in a referendum.

There have been recent examples of governments with discretionary capability doing arbitrary changes. After the 1975 election the Muldoon government had a 63 percent majority, while the Labour government reached 59 percent in 1984 and 60 percent after the 1987 election. Higher majorities than this are theoretically possible, but they are unlikely to reach 75 percent.[89] This is a strong argument for a requirement of 75 percent. This would make it impossible for a single majority government to change the Constitution without further consent in Parliament, including that of the opposition. As a result of this, fundamental rights would enjoy a higher safeguard from arbitrary governments and their exercises of power.

3.2.2.1.b. Human Rights

Looking globally, the issue of defining and protecting human rights has been of great concern in many countries throughout the last century. Nevertheless, the situation in New Zealand is

somewhat different. As a result of the country's history and the development of New Zealand society, no real issue of human rights has emerged. It is often claimed that the citizens of New Zealand enjoy adequate protection from the fundamental rights. However, the argument in this thesis is that to be able to retain this high degree of protection, which up to present day results from obedience to democratic principles and a humane attitude from the government. An entrenchment of these human rights is crucial. One way of doing this is to entrench a Bill of Rights.

This particular issue was raised in New Zealand some years ago. The draft for a Bill of Rights in New Zealand was primarily based on the Canadian Charter of Rights and Freedoms, which is enacted as a part of the Canadian Constitution Act 1982.[90] When the Bill was introduced, it was described as an attempt to express the essence of New Zealand's constitutional and political system, especially regarding the relations between the individual and the state. Furthermore, it aimed to write down what New Zealanders have in common, not what divides them.[91] However, no entrenchment was made. Instead the Bill of Rights became just a promotional one. A declaration of this can consequently be found in the preamble to the act[92] which suggests that it is an act:

> To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

The argument against reform focused on how unnecessary it was to entrench a Bill of Rights, since there simply were no threats to human rights in New Zealand. This argument has lingered and is still the main reason why New Zealand has accepted this *laissez-faire* position. However, a Bill of Rights generally ensures the rights and freedoms comprised against conducts by the legislative, executive and judicial divisions of power. Just because these

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89 P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p.475
90 Human Rights Commission, *A Guide to the Proposed Bill of Rights* (1986) p.2
91 A Sharp, *An Historical and Philosophical Perspective on the Proposal for a Bill of Rights for New Zealand* (1985) p.5
92 P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p.19

branches of government have decided to comply with standards internationally regarded as satisfactory, this does not mean it will remain this way in the future. A quick shift in attitude, and the protection of these basic rights becomes insufficient. Moreover, defining the fundamental rights in entrenched texts can empower the courts to effectively enforce these human rights.[93]

Another argument for an entrenchment appears when looking at the United Kingdom. The jurisdiction has more cases decided against it in the European Court of Human Rights than any other European state. It is therefore arguable that the English common law system is not adequately capable of protecting human rights.[94]

3.2.2.1.c. Republicanism

The argument that New Zealand should cut the links to the United Kingdom and become a republic has been a rather zealous issue for several years. If New Zealand finally decides to execute this fundamental change as an entity, extensive constitutional changes will be deemed necessary. In the case of transformation to a republic, there would probably be a general constitutional reform, since there would be a need to update the constitutional regulations. This was the case in Canada, when the Charter of Rights and Freedoms (1982) was introduced. It would consequently be the perfect opportunity to once and for all comply with demands to satisfy fundamental human rights. Moreover, it would be a natural way of entrenching the regulations regarded as more important in the constitutional framework. An entrenchment would also enhance the impression of a new beginning for New Zealand and would be consistent with the statement of independence. This is the argument in Australia, where the country probably will break loose and become a republic in the year 2000. A written Constitution will accordingly be entrenched and nobody will doubt the independence of Australia.

3.2.2.1.d. Increased Effectiveness Regarding Executive Control

[93] R Goldwin, *How Does the Constitution Secure Rights* (1985) p.50
[94] Human Rights Commission, *A Guide to the Proposed Bill of Rights* (1986) p.7

Traditionally there has always existed a tension between the executive and the judicial branch of government. The *raison d'être* is clearly the judicial organ's function of controlling the executive wing, and reacting when executive conducts are contrary to policies adopted within the jurisdiction.

There are several ways in which the judicial branch can exercise checks and balances in New Zealand. Firstly, the courts can use judicial review of governmental decisions. Secondly, the court possesses the power to interpret statutes enacted by Parliament. Thirdly, the court can deliver decisions against the government. And lastly, there are a growing number of remedies available within administrative law. Consequently, the courts safeguard that the executive acts in accordance with the law. Moreover, the courts have developed a number of presumptions of statutory interpretation, serving as a security for individuals against the executive. One of these presumptions involves the fact that Parliament does not intend its statutes to be suspended, amended or repealed by subordinate legislation, an example seen in the case *Combined State Unions v State Services Co-ordinating Committee*.[95]
The possibility that the executive will overturn the "balance" imposed by the judicial branch by way of legislation is however of great concern, and has been discussed extensively, especially during the introduction of the New Zealand Bill of Rights 1990. It was argued that there was an urge for an entrenchment of the Bill, preventing misconduct from the executive and the legislative branches of government. This would have the consequence that new legislation and amendments should be compelled to comply with the provisions in the Bill. These suggested provisions were of fundamental character involving *inter alia* protection of retroactive legislation and freedom from discrimination. However, the New Zealand Bill of Rights 1990 was enacted as an ordinary law, lacking the feature of supreme law, and is now held to be simply of declaratory characteristic. Therefore, *de lege lata* retains the possibility that the executive can overturn a decision delivered by a court with which it disagrees.

Consequently, the existing checks and balances on the executive have been proven inadequate. In addition, New Zealand has fewer constitutional checks and balances than any other western democratic country and, accordingly, its citizens are more vulnerable to abuses

of executive and administrative powers. To take just one example, in comparison to the United Kingdom, New Zealand only has one House of Parliament instead of a lower house and an upper house.[96]

It has been said that something is fundamentally wrong when there is even a theoretical possibility that legislation would deny civil and political rights.[97] At present, the House of Representatives can, by simple majority, repeal and change any legislation, since section 189 of the Electoral Act is not itself entrenched.[98] Another argument concerning the fact that government has too much authority in the present constitutional constellation is that recent governments have legislated hastily with little consultation of parliamentary procedure.[99]

3.2.2.1.e. Compliance With International Obligations

This argument simply acknowledges that New Zealand, by entrenching its Constitution, containing a Bill of Rights, would meet the standard required by the international treaties New Zealand has approved. New Zealand has ratified a number of international treaties and obligations involving the protection of fundamental rights. Examples of these treaties are the United Nations Universal Declaration of Human Rights (1948), the United Nations International Covenant on Civil and Political Rights (1966) and the Economical, Social and Cultural Rights Covenant (1966)

Firstly, the United Nations Universal Declaration of Human Rights (1948) is a resolution of the General Assembly. This means that it is not directly binding upon the member states. But it still has a very strong authoritative nature and all member states want to comply with the provisions of the declaration.

Secondly, the United Nations International Covenant on Civil and Political Rights (1966), contains a number of important regulations relating to human rights. New Zealand ratified the

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[95] *Combined State Unions v State Services Co-ordinating Committee* [1982] 1 NZLR 742

[96] Human Rights Commission, *A Guide to the Proposed Bill of Rights* (1986) p. 6

[97] P Joseph, 'The Challenge of a Bill of Rights: A Commentary', *New Zealand Law Journal* [1986] 416 1986, p. 417

[98] M Taylor, *Is there a Case for Constitutional reform in New Zealand?* (1997) p.5

covenant on December 28 1978. Furthermore, the current Australian Bill of Rights is based on this covenant.[100] During the discussion of the New Zealand Bill of Rights, attention was drawn to the extensive power of Parliament in combination with the limited checks and balances from the judicature to control these powers. It was acknowledged contrary to New Zealand's obligations under the civil and political rights covenant.[101]

Thirdly, another international treaty that New Zealand has ratified is the Economical, Social and Cultural Rights Covenant (1966). However, several scholars have argued that many of the rights contained in this International Covenant are not human rights, because it benefits people better when prosperous economic, social and political circumstances exist.[102]

3.2.2.1.f. Time Aspects

Most New Zealanders confronted with the question of constitutional reform tend to have a rather confident and positive attitude towards the present situation. The common opinion seems to be that fundamental rights are sufficiently safeguarded. However, the belief of the author in this thesis is that these rights lack adequate protection and that there is a need for a reform. This is the case, even if it today might not seem an urgent matter. Commentators have postulated that a change in fundamental constitutional matters only is possible when some kind of crisis arises. This point of view is reflected by the analogy which constitutional protection and fire insurance: normally not necessary, but in case of need, the exigency arises very suddenly.[103] Nowadays many lawyers accord that constitutional matters have low priority and, admittedly, to some extent, they have good reason for this point of view.[104] However, if New Zealand is about to become a republic, there is need for a reform. This is a strong argument, discussed more thoroughly below.

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[99] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p.4
[100] Human Rights Commission, *A Guide to the Proposed Bill of Rights* (1986) p.2
[101] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p.849
[102] A Sharp, *An Historical and Philosophical Perspective on the Proposal for a Bill of Rights for New Zealand* (1985) pp.11-12
[103] P Joseph, 'The Challenge of a Bill of Rights: A Commentary', *New Zealand Law Journal* [1986] 416
[104] Finer, Bogdanor, Rudden, *Comparing Constitutions* (1995) p. 1

Allegedly, the most inferior prospect for introducing and adopting an entrenched Bill of Rights is when it is really needed.[105] Consequently, the time is right for New Zealand to deal with this matter, since there is no apparent threat to fundamental rights at present and therefore the prospects of introducing an entrenched Constitution are favourable.

3.2.2.1.g. The Treaty of Waitangi

The Treaty of Waitangi, signed 1840, is described as being a "fundamental charter".[106] But the treaty is not always regarded in this light, since there are *de facto* controversies regarding its meaning, interpretation and legal standing.[107]

One argument during the drafting of the New Zealand Bill of Rights was regarded the incorporation of the Treaty of Waitangi, because it would thereby make the Treaty applicable to circumstances as they arise and the spirit and true intent of the Treaty could in this way be considered.[108] Furthermore, an important question is whether the Treaty of Waitangi should be given even stronger constitutional protection than a traditional entrenchment.[109]

Present governmental practice is to follow the Waitangi Tribunal's recommendations. However, the government is not legally compelled to do this[110] and an entrenchment of the Treaty of Waitangi would therefore improve its credibility. Furthermore, this would assure the superiority of the Treaty and indicate the government's intention to be committed to it.[111]

3.2.2.1.h. Minority Groups

The rights of members in minority groups are always vulnerable and their position is particularly susceptible in times of deteriorating economical and social conditions. An

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[105] Human Rights Commission, *A Guide to the Proposed Bill of Rights* (1986) p.19

[106] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p.100

[107] McDowell, Webb, *The New Zealand Legal System* (1998) p.189. It is important to note that the Treaty was established in two different versions – one in English, and one in Maori. The controversies arise since there are discrepancies in the two specific versions.

[108] Human Rights Commission, *A Guide to the Proposed Bill of Rights* (1986) p.15

[109] F M Brookfield, *The Constitution in 1985:The search for legitimacy* (1985) p.25

[110] There is, however, one exception to this general rule. According to the State Enterprises Act 1988, the Waitangi Tribunal is granted binding power to order particular pieces of land to be acquired compulsory in accordance to Maori land claims.

[111] M Taylor, *Is there a Case for Constitutional reform in New Zealand?* (1997) p.4

entrenched Bill of Rights in a codified Constitution would therefore provide protection against their rights being eroded. These minority groups could hereby more adequately protect their own rights.[112] The issue of minority rights was one of the arguments put forward when the proposed New Zealand Bill of Rights was discussed. Through an entrenched Bill of Rights the interests of minorities would be protected, something that ordinary democratic and electoral processes cannot ensure.[113] It is further argued that a Constitution would maintain the balance of power between different sectors of society and maintain the democracy of the government, thus upholding the rights of minority groups.[114]

3.2.2.1.i. Educative Reasons

By creating a set of minimum standards for the community, these will be primarily considered rights that should be accorded against others, making them duties owed rather than rights owed.[115] With an entrenched Constitution containing a Bill of Rights, the level of awareness regarding human rights would consequently be increased in New Zealand.

The Constitution Act 1986 is close to a written Constitution, but most people in New Zealand have never heard of the act.[116] The Constitution is currently scattered throughout a great number of sources, *i.e.* statutes like the Constitutional Act, the Common Law, and in conventions. This clearly limits accessibility for a broad number of people, since it requires high skills in legal matters to be able to comprehend and to reconsider. This is a strong reason for gathering all regulations of a superior nature in one single entrenched document. This would make it much easier for citizens to access. Of course the problem regarding this issue is what exactly an entrenchment like this should encompass. But having managed dealing with this, the result would be one clear single source, where all the superior regulations are gathered, and which people could relate to.

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[112] Human Rights Commission, *A Guide to the Proposed Bill of Rights* (1986) p19
[113] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p.850
[114] R D Mulholland, *Introduction to the New Zealand Legal* (1995) p.20
[115] Human Rights Commission, *A Guide to the Proposed Bill of Rights* (1986) p.3
[116] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p.99

A further argument why New Zealand should have the Constitution written down in one document is in line with Lord Camdem's view upon legality in *Entick v Carrington*[117], where he stated that: "If it is the law it will be found in our books. If it is not to be found there, it is not the law". Consequently, by codifying the Constitution currently existing in New Zealand, the rules will be easier to review and also more accessible for the general public.

3.2.2.2. Arguments Con

3.2.2.2.a. Historical Context

The desire to make a fresh start and to break with the legal past are usually the main reasons for the birth of modern constitutions. This was the case with the American and French Constitutions. Moreover, the revolution in USSR in 1917 and Germany's defeat in the world wars 1918 and 1945 all resulted in new Constitutions.[118] In contrast, New Zealand's historical and legal continuity have probably had a significant influence upon its flexible constitutional settings.[119] Firstly, New Zealand did not have to fight through war to gain independence. There has been little political drama since 1947 and there has not been any need for proclaiming a new existence as a state. This traditional view entails an uncritical acceptance of the current constitutional setting. One example of this is the outcome of the 1952 Constitutional Reform Committee which doubted any legal efficiency of an entrenchment. It has further been pointed out that the Westminster system of government and the British common law have served New Zealand adequately in the past and therefore, no additional protections are needed.[120] Sweden, on the other hand, urged for a revolt against the vigorous king, and consequently adopted the Constitution of 1809. Still, regarding the latest Swedish constitutional reform in 1974, when a completely new written and entrenched Constitution was adopted, Sweden had not been at war for almost two hundred years and, consequently, had enjoyed an extensive period of stable and peaceful development.[121] This phenomenon makes the adoption of the

[117] *Entick v Carrington* (1765) 19 St. Tr. 1030
[118] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p.105
[119] Ibid, p. 104
[120] Human Rights Commission, *A Guide to the Proposed Bill of Rights* (1986) p.6
[121] Holmquist and Stjernquist, *Vår författning* (1999) p.26

new Swedish Constitution somewhat unique, but at the same time it constitutes an example where domestic or exterior disturbance is superfluous to bringing about a reform. It can therefore be argued that the situation in New Zealand today, in combination with its historical origin, is very well compatible with a constitutional reform like the Swedish. Moreover, the republican matter urges for fundamental changes in the Constitution and it is probably best to deal with this matter through an entrenchment.

3.2.2.2.b. Rigidity Towards Future Changes

One could justifiably state that an entrenched and written Constitution simply reflects the attitudes of the time when it was adopted. Such a solution is deemed to be inflexible, because it locks up compliance with future values. This argument focuses on the ability to quickly adopt to new circumstances which may arise in the future. One contemporary example of how a Constitution can become too rigid and inflexible is the American Constitution. According to one old amendment of the Constitution, all citizens have the right to protect themselves through the use of firearms. This has today led to a problematic situation in the country, where increased violence involving firearms has been the outcome. Although the provision has become rather obsolete compared with its original purpose, this right is very difficult to alter because it is firmly entrenched in the Constitution. The Constitution is inflexible and leads to an undesirable result. Evidently, the American Constitution is not the ultimate solution. There are many ways in which an entrenchment can be achieved, and a suitable and adequate settlement has to be chosen for New Zealand, which takes into account all relevant factors specific for the New Zealand jurisdiction.

It is further important that the virtues of the present system should not be overlooked. There is a desirable flexibility in the current arrangement. But on the other hand, the need for reform is also mentioned in this argument, although the particular view is taken that a written Constitution might not be the panacea for all constitutional problems.[122] Consequently, the argument of rigidity has to be weight up against the protection of citizens. It is more important to have this protection than to have flexibility towards future changes. Moreover, the outcome is

significantly dependent on which kind of solution is selected. The important task should therefore be finding an adequate solution, though perhaps not as drastic as the American one. Looking at the Swedish model, this seems to fit the typical features of the Swedish jurisdiction. A good balance has been achieved between, on the one hand, the protection of fundamental rights and, on the other hand, the need for future amendments.

3.2.2.2.c. Mixed Members Parliament - MMP

This argument acknowledges that with the new electoral system in New Zealand - the mixed member proportional representation electoral system - there is less opportunity for a majority government to rule. Consequently, co-operation over the party borders will be required in order to legislate and there is less likelihood of infringing fundamental principles. However, a lack of entrenchment still makes governmental manipulation possible and a lower degree of protection is achieved for citizens, especially minorities.

3.2.2.2.d. Parliamentary Sovereignty

One of the strongest arguments against entrenchment is the classical principle of parliamentary sovereignty. The question of whether Parliament can deny itself the capacity of future legislative power in any area is extensively disputed. One supposition, which consequently would make it possible for Parliament to abdicate power, is the theory of parliamentary suicide. This is conspicuously described by Scott:[123]

> If the New Zealand Parliament transferred its powers to a Constituent Assembly and at the same time abolished itself, and the Constituent Assembly thereafter chose to adopt a Constitution creating a Parliament with limited powers, then the new Parliament would have only such powers as the Constitution gave it.

A powerful argument against an entrenched Constitution is that a Bill of Rights would act as a restriction on the freedom of action of future generations, which is undesirable. On the other

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[122] J McEldowney, *Public Law* (1994) p.694

[123] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p.104

hand, these regulations are formulated from the collective wisdom of many nations during many years and are thus considered a significant advance in the constitutional structure.[124]

Parliamentary sovereignty would disappear as the cornerstone of the Constitution in New Zealand if an entrenched Bill of Rights was adopted, and as a consequence of this the courts would take over the role as protector of the rights of citizens.[125] But one of the strongest arguments in the debate is that the function of decision-making rightly belongs to Parliament, not to the courts.[126] It is further argued that focus should instead be on the function of Parliament when considering whether rights are better protected, *i.e.* efforts should be made to strengthen Parliament.[127]

It can, however, be argued that the phenomena of restraints on Parliament has already occurred in the United Kingdom through the incorporation of the European Convention on Human Rights[128], having the effect that the rules of the Convention enjoy precedence over acts enacted by Parliament.[129] Consequently, changes in New Zealand should also be possible through an entrenched Constitution.

3.2.2.2.e. A Constitutional Catch-22

This argument, categorized by some as a constitutional Catch-22, is based on the perception that there is a difficulty, not to say an impossibility, in deciding which rights be included in a future Bill of Rights incorporated into a written constitution. Political parties consider different rights to be of fundamental significance and these divergent interests can as a consequence come in conflict with each other. Yet, to be effective, a constitutional change requires a high degree of support from all political parties involved. This is obviously impossible to obtain

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[124] Human Rights Commission, *A Guide to the Proposed Bill of Rights* (1986) p.11

[125] P Norton, *The Constitution in Flux* (1988) p.250

[126] Ibid, p.253

[127] P Norton, *The Constitution in Flux* (1988) p.253

[128] This Convention forbids *inter alia* torture, slavery and compulsory labour. Furthermore, it guarantees the rights to liberty and security of person, the rights to private and family life and freedom of thought, religion, expression and association. Many of these rights are however subject to broad qualifications, and restrictions can be made if prescribed by law and if necessary in a democratic society in the interest of national security or public safety.

[129] P Norton, *The Constitution in Flux* (1988) p.251

when the parties emphasize different rights.[130] An example of this constitutional Catch-22 can be found in the draft of the New Zealand Bill of Rights 1985, where the Minister of Justice intentionally omitted rights related to privacy and family. They are on the other hand found in the Australian Bill of Rights.[131] This is, similarly, the case in the Swedish Constitution, which contains provisions regarding the right of family and the right of social security.[132] The rights on which the Catch-22 argument focuses can be categorized as ”non-judicable” rights. These rights include, for example, right to education, right to health care, and right to work, that is to say, rights which relate to economic and social matters.[133]

3.2.2.2.f. Too Much Power Vested in Judges

If the Constitution becomes entrenched in New Zealand, more power will be transferred to the courts and the judges, who will have the burden of upholding fundamental rules against suggested legislation. But judges are drawn from a very narrow social base and they are generally conservative in their views. It is furthermore alleged that lawyers are the most conservative professional group in society. It is therefore feared that judges will strike down progressive legislation, if empowered to do so. This would be a serious threat to politicians with radical ambitions.[134] It is commonly feared that a Bill of Rights would incline the courts into the centre of political controversy, where judges can generate pressure in the political system by interpreting the fundamental rights in their own discretionary ways. Therefore this power should remain with Parliament, since decisions like these are political, not judicial.[135]

Another argument objecting against more power being granted to the courts, is that judges are not answerable to the electorate. On the other hand, judges are, at present, already required to interpret and consider the legislation and the courts have traditionally applied a number of rights to protect citizens from the state. Moreover, a judicial decision considered to be in particular conflict with the interest of society as a whole, can ultimately be overturned by Parliament in accordance with the stipulated requirements in the entrenchment.[136]

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130 P Norton, *The Constitution in Flux* (1988) p.254
131 Human Rights Commission, *A Guide to the Proposed Bill of Rights* (1986) p.12
132 The Swedish *Regeringsform* Chapter 1 Article 2
133 P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p.851
134 P Norton, *The Constitution in Flux* (1988) p.256
135 P Norton, *The Constitution in Flux* (1988) p.257
136 Human Rights Commission, *A Guide to the Proposed Bill of Rights* (1986) p.9

3.2.2.2.g. Increased Costs

An increased number of cases before the courts would certainly arise as a direct result of constitutional alterations. These changes would ensure an enlarged administration, and would consequently generate increased costs. However, it has been argued that matters concerning Bill of Rights issues would arise in the courts anyway. This was, for example, the case in Canada. It is further presumed that these would only be initial expenses, diminishing as precedents in the area become established.[137] Therefore, this argument seems to lack strength in the current debate.

3.2.2.2.h. Public Opinion

This argument simply emerges from the idea that no matter how many or what kind of regulations there are in a society trying try to impose duties and grant rights to citizens, the fundamental and most important element is the opinion amongst the people. This means that the citizens themselves ultimately safeguard their rights, through their opinions. No constitution can ever replace public opinion. Therefore, it must be every citizens total concern to make sure that no arbitrary power is flowing from the government. Once again, no entrenched constitution can ever replace this important phenomenon; a written codified constitution is superfluous. The effort should therefore instead be focused on how to use public opinion, rather than oppose it. Although this might be very true, there is still a higher degree of protection and certainty if there is a codified Constitution with a Bill of Rights. The public opinion must of course continue to be the most important factor on the constitutional arena, but it will be easier for the citizens to act when they have a strong instrument to do so with, and a clear document to refer to.

3.3. Sweden

3.3.1. An Old, Yet Modern Constitution

The constitutional history of Sweden goes back several hundred years. The original Swedish Constitution, as mentioned above, was adopted in 1634, and although quite considerable amounts of changes have been made during the centuries, many provisions still remain the same[138]. Sweden had the oldest written European Constitution until the *Regeringsform* 1809[139] was replaced by the *Regeringsform* 1974.

There are in Sweden four *grundlagar* (fundamental laws) upon which all the other laws are based. The most fundamental and most important is the *Regeringsform* (the Instrument of Government), which particularly regulates the various branches of government and outlines the composition and powers of the *Riksdag* (Parliament). The *Regeringsform* also contains an entrenched Bill of Rights. The focus in this thesis will primarily be on this first of fundamental laws. The other *grundlagar* deal *inter alia* with the freedom of the press (*Tryckfrihetsförordningen*), the freedom in other mass media (*Yttrandefrihetsgrundlagen*) and the succession to the royal throne (*Successionsförordningen*). There are additional fundamental regulations in the Swedish Constitution. The new *Riksdagsordning* (Parliament Act 1974) enacted simultaneously with the *Regeringsform*, was, in contrast to the *Regeringsform*, not given the character of a fundamental law. It is thus liable to amendment by a sitting *Riksdag*, but changes require a qualified majority, which therefore makes the act harder to alter compared to ordinary legislation.[140] The written entrenched Constitution in Sweden is complemented by unwritten forms of decision, similarly to the situation in New Zealand. This involves, for example, procedures of decision within Government.[141]

A system of judicial control of the constitutionality of new legislation exists in two aspects in Sweden[142]. Firstly, all judges generally have the power of judicial review, *i.e.* no specialised judicial organ like a constitutional court is established in Sweden to exercise this control. Yet it

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[137] Ibid, p.13

[138] D Verney, *Parliamentary Reform in Sweden 1866-1921* (1957) p.1

[139] *Regeringsformen* 1809 was actually the world's second oldest constitution after the United States' constitution.

[140] Holmquist and Stjernquist, *Vår författning* (1999) p.128

[141] Ibid, p.13

[142] The power to exercise judicial review is recognised in chapter 11 article 14 of *Regeringsformen*.

is important to notice that the constitutional matter is required to be raised by a party in the litigation, having a personal interest, although the Constitution itself *prima facie* could be interpreted as permitting *ex officio* powers to the courts declaring a statute unconstitutional. Moreover, the constitutional matter only has to be decided if it is unavoidably related to the decision of the case and there accordingly are criteria on how to decide this unconstitutionality of an act. As a consequence of this, the effect of an unconstitutional decision is lacking *erga omnes* force, having only the restricted application between the parties in the litigation. The present law is as a result of this not declared void. Finally it is fundamental to apprehend that the inapplicability of the law will only be considered by the court when the error is found apparent and evident.[143]

Secondly, another way of judicial control exists in Sweden, besides the one exercised by judges. This is a system of judicial preview, where *lagrådet*[144] (the Council of the Laws) is giving advice on suggested bills' compatibility with the Constitution. This advice is given at the request of the executive and the *Riksdag*, and could be compared with the American model. However, since *lagrådets* opinion is not strictly binding rather advisory, and it is only mandatory to consider the request from government, it has been argued that this procedure is not a judicial preview in its strictest sense.[145]

One could claim that practical problems emanate from the Swedish model. The Constitution is occasionally found being overly rigid. One recent example is the issue relating to child pornography, where the intricate question arose whether criminalization in this area would interfere with the freedom of speech guaranteed by the Constitution. By making this area criminal the Constitution (*Tryckfrihetsförordningen* and *Yttrandefrihetsgrundlagen*) would be infringed, and it would therefore take considerable time to achieve such a reform since an alteration in the Constitution with its rigid procedures would be necessary. But a pragmatic method was finally issued by Parliament which made the area criminal by utilising a solution

[143] C Brewer, *Judicial Review in Comparative Law* (1989) pp.172-174

[144] According to chapter 8 article 18 of the Constitution. *Lagrådet* comprises of members of the two highest courts of Sweden (the Supreme Court and the Supreme Administrative Court)

[145] C Brewer, *Judicial Review in Comparative Law* (1989) p.173

without interfering with the fundamental principles of the Constitution[146]. So, despite its rigid character, the Constitution has, even in hard cases, demonstrated the ability to serve its purposes.

In conclusion, in Sweden today, there exists little controversy regarding the *de lege ferrenda* of preserving the present written and entrenched constitution. Not only political instances, but also the courts and public authorities perceive the Constitution as a living element of social life.[147] The whole concept of the Constitution is deeply rooted in Swedish society, and in people's attitude, it is something most Swedes take for granted and do not reflect daily. One obvious reason for this is, of course, the fact that the Swedish constitutional solution presently works satisfactorily.

3.3.2. The European Community

After dramatic changes in 1989 and 1990, especially in Eastern Europe and the Soviet Union, a new situation eventuated for Sweden. For many years, Sweden had exercised a clear non-alignment policy, consequently being neutral in both world wars. These changes, however, finally led to the application for membership in the European Union 1991 and the subsequent approval of the EU accession treaty 1995, enabling Sweden to become one of the present fifteen members of the European Community.[148] This had a dramatic influence on the Swedish Constitution.[149] This states that European law is superior to Swedish domestic law, *viz*., all Swedish laws inconsequent to European regulations are theoretically invalid and are thus prohibited.

Fundamental human rights are, however, still strongly safeguarded in Sweden through the incorporation of the European Convention on Human Rights, where basically all rights of

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[146] Proposition 1997/98:43. The real issue was that child pornography was illegal in the *tryckfrihetsförordning*, but possession of such material was not. By excluding this area from the *tryckfrihetsförordning*, it could then be made criminal in normal law, without infringing the constitution.

[147] Cronhult, Sterzel, Tiberg, *Swedish Law - a survey* (1994) p.61

[148] H Johnsson, *Spotlight on Sweden* (1995) p.7

[149] For further details concerning the Swedish membership, see *Regeringsformen* 10 chapter, 5 paragraph.

citizens contained in the Swedish *Regeringsform* are entrenched. Furthermore, it is an explicitly expressed general principle of European Community law to uphold the fundamental rights assured in the Convention. According to the Treaty of Maastrich (1992) the European Union shall respect those rights and European Community law shall subsequently be in accordance with the Convention.[150] Thus, although Sweden has ceded a great deal of its legislative power to the Union, the safeguard of the fundamental rights is still adequately and strongly protected.

4. How Safeguarded Are Fundamental Rights At Present in New Zealand

"Let no man who begins an innovation in a state expect that he shall stop it at his pleasure or regulate it according to his attention"

Machiavelli

4.1. Human Rights

To begin with, looking at the factual situation, New Zealand has, according to the Human Rights Commission, an excellent civil rights record.[151] This is a good indication that the people are enjoying their fundamental rights. So despite the fact that New Zealand does not have a codified Constitution, the state shows a remarkable consistency and continuity regarding constitutional principles.[152] However, the problem is that there is no adequate judicial safeguard for these fundamental rights. The present situation is only a result of high moral and conventional actions that can all change dramatically within a very short time period. A striking example of this entire moral protection is the New Zealand Bill of Rights 1990. The act affirms basic rights but does not promote these rights over the authority of Parliament. This becomes apparent when looking at section 4 of the act which prescribes that no enactment shall be

[150] The Treaty of Maastrich (1992) article F:2
[151] Human Rights Commission, *A Guide to the Proposed Bill of Rights* (1986) p.2
[152] Finer, Bogdanor, Rudden, *Comparing Constitutions* (1995) p.2

repealed or made inoperative just because it is inconsistent with the New Zealand Bill of Rights.

4.2. Arbitrary Powers of Government

A very important question is the one regarding a powerful executive branch of government. There is obviously a risk if this governmental power is too extensive, and it is therefore of great importance that there exist mechanisms and regulations capable of controlling this power. To begin with, there is a fundamental principle in New Zealand concerning this matter. The Rule of Law encompasses the liberty of the individual, equality before the law and, maybe most importantly, the freedom from arbitrary government.[153] Another watchdog on the government is the Governor-General. The function of the Governor-General is to make sure no breach of the Constitution and other laws are made. This function was discussed in the case *Attorney-General (U.K) v Wellington Newspapers Ltd.*[154] On the other hand these mechanisms can be abolished by one simple majority vote in Parliament. This, for example, is the case with the Ombudsman, the Human Rights Commission and the Race Relations Conciliator.[155] This extremely flexible procedure relates to all regulations adopted in New Zealand today. The phenomenon has indeed been recognized by Sir Robin Cooke of Thorndon, who conspicuously said in 1984:[156]

> If ever a government indifferent at heart to basic rights were to hold office in this country, it could force through, possibly even in a matter of hours and by the barest of majorities, legislation opposed to basic principles of justice.

The principle of Parliamentary sovereignty is very noticeable in New Zealand and there are very few restraints on this fundamental doctrine. The Governor-General is one of the few legal

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[153] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p.167
[154] A Stockley, *Becoming a Republic? Issues of Law* (1996) p.88
[155] Human Rights Commission, *A Guide to the Proposed Bill of Rights* (1986) p.2
[156] Sir Robin Cooke, "Practicalities of a Bill of Rights", F. S. *Dethridge Memorial Adress* (1984), reproduced (1984) 112 *Council Brief 4*

restraints upon the power of an elected ministry in a sovereign parliament.[157] But it is further contemplated by Lord Cooke that there might be laws that are beyond the purview of Parliament. This would mean that the courts could refuse to accept repugnant enactment which is forced through Parliament by a single majority.[158]

Looking at the United Kingdom, its membership in the European Union has significantly affected the traditional view of the sovereignty of its Parliament and the Constitution is presently under apparent strain. One could claim that New Zealand cannot adequately refer to this original solution of governmental powers to justify its own constitutional plight, including sovereignty of Parliament. In a time of globalisation and change in political attitudes there exists a need to adopt an updated constitutional setting. Ancient theories of governmental functions must consequently be viewed in this new context. The principle of Parliamentary sovereignty is therefore arguably obsolete, and a change in attitude is needed. Another argument which has been brought forward is that some common law rights are so deeply rooted that Parliament cannot override them. This argument was put forward by Lord Cooke in the case *Taylor v NZ Poultry Board*[159] and is another example of the limited powers of Parliament.

It has further been argued that there is a tendency by the executive and the administration to decay the rights and freedoms of individuals in different ways for the resulting ease and simplicity of administration, especially in times of deteriorating economic and social conditions. Thus, an entrenched Bill of Rights is needed to serve as a safeguard, preventing this kind of stealthy erosion.[160] A rather recent example of this simplicity of administration is the 1984 Muldoon scenario, mentioned above. This displayed the weakness of the current constitutional system in New Zealand.

[157] L Trainor, *Republicanism in New Zealand* (1996) p. 89
[158] A Stockley, *Becoming a Republic? Issues of Law* (1996) p.99
[159] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p.189 and *Taylor v NZ Poultry Board* [1979] 1 NZLR 394
[160] Human Rights Commission, *A Guide to the Proposed Bill of Rights* (1986) p.2

4.3. The Review Upon Administrative Actions

New Zealand has in later years adopted a number of mechanisms enabling improved means of accountability upon the government. One example of this, as discussed above, is the Swedish concept of Ombudsmen.[161] Furthermore, the Privy Council can to some extent be seen, upholding the rights of individuals against arbitrary conduct of government.[162] However, as the situation stands at present the executive has a very effective way of circumventing the check from the judicial branch. This is simply done by way of legislation. Since New Zealand does not have a written and entrenched Constitution, a single majority vote in Parliament is sufficient to enact or alter any legislation. This in contrast to countries like Canada and most continental European countries like Sweden, where an entrenched codified Constitution prevents enactment intervening with the Constitution, and procedures *per se* are more rigid. Consequently, if the executive is discontented with the outcome of a specific case, it might likely make use of this potential. This has actually occurred several times, one contemporary example being the Clyde dam case of 1977. The executive voluntarily engaged in litigation regarding the construction of a huge dam, but abandoned this when realizing it would lose. Instead the executive made use of its legislative influence in Parliament and legislated in its own favour. This *ipso facto* gives rise to a number of serious issues regarding the safety of citizens and infringement of fundamental principles in New Zealand's jurisdiction. It can, for example, be argued that essential principles like non-retrospective legislation and the Rule of Law can be seriously neglected. By codifying a constitution and entrenching the provisions, this would not be so easy to practice. This becomes apparent when comparing New Zealand with Sweden, which requires two decisions in two different Parliaments after an intervening election.

4.4. Hypothetical Scenario

The constitutional position in New Zealand today is capable of entailing rather abominable scenarios. Considering, for example, the continued immigration of Asian populations to New Zealand in combination with the existing economic distress and recession, it is likely that a

[161] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p.4
[162] R D Mulholland, *Introduction to the New Zealand Legal* (1995) pp.71-72

foundation for discontent could be established. Likewise, it is illustrated in several surveys that factors of this kind are the major reasons for xenophobia. Another hypothetical scenario could be a controversial decision from the Waitangi tribunal, generating major discontent and frustration towards the Maori minority. This would be a likely platform for a party of dissatisfaction, which are usually extremely right-wing orientated. The outcome of an election where people show their disapproval with the current government and consequently vote for an extremist party could be drastic, possibly with a majority in Parliament for the party. Instantly we would be facing a situation where one single political party has totally unencumbered powers to execute whatever it might find proper. Parliament will do exactly what the government instructs it to do. Thus, since the party in this example is right-wing orientated, it is highly conceivable that the rights of minorities and ethical groups could be violated. It is consequently the strongest belief of the author that this is a scenario of great concern and a serious constitutional problem.

In contrast, if New Zealand had an entrenched Constitution, this scenario would not be possible. After the introduction of such infringements, the public would have the possibility to react, debate and show their complete disapproval in the next election before an amendment in the Constitution was possible.

5. Fundamental Rights and Their Importance in Sweden

"The State finds its highest expression in protecting right, and therefore should be grateful to the citizen who, in demanding justice, gives it the opportunity to defend justice, which after all is the basic raison d'être of the State."

Piero Calamandrei, 1942[163]

[163] *Eulogy of Judges*, Princeton University Press, (1942)

A very brief summary of the Swedish constitutional framework reveals that the protection of fundamental rights is secured through several mechanisms in the Swedish Constitution. Most importantly and notably, the rights set out in the Bill of Rights, in the second chapter of the *Regeringsform* which defines which rights that are to be secured[164]. The Swedish Constitution also contains (as mentioned above) a right of judicial preview for an entity called *Lagrådet* (the Council of the Laws). In accordance with the provision in *Regeringsformen*[165], *Lagrådet* shall examine new legislation before enactment and its harmony with the Constitution. However, *Lagrådet's* opinion is only a recommendation and, consequently, an obligation to follow this preview does not exist. Finally, the courts possess a right of judicial review. More particularly, this means that Swedish courts and authorities can set a law or regulation aside if it clearly infringes the rights of the Constitution.[166] In conclusion, the judicial preview and review are apparent in the Swedish constitutional framework, protecting infringements of the Constitution and the fundamental rights therein. However, its function is not as strong as in other countries like Germany or France.

In addition, the European Convention on Human Rights is an important, integrated part of Swedish law. In 1995 it was declared that the Convention should be incorporated and no future legislation in Sweden is to be adopted contrary to the scope of the Convention.[167] Furthermore, older legislation enacted before the incorporation shall, as far as possible, be interpreted in harmony with the Convention.[168] Equally to the Swedish Constitution, the Convention contains a kind of Bill of Rights[169]. It has been rather extensively debated whether its Swedish counterpart fully covers the rights set out in the Convention. When the discussion was carried out back in 1951 regarding whether Sweden should acknowledge the Convention, the responsible Minister argued that Sweden by far covered the rights set out in the Convention. However, after the ratification of the Constitution, Sweden has been held not

[164] For a discussion on these rights in detail, see J Nergelius, pp.549 - 563
[165] Chapter eight, article 18
[166] This right is set out in the *Regeringsform* chapter eleven article 14.
[167] H Strömberg, *Sveriges författning* (1999) p.86. See also Regeringsformen chapter two paragraph 23
[168] H Strömberg, *Sveriges författning* (1999) p.86
[169] J Nergelius, *Konstitutionellt rättighetsskydd* (1996) p.543. A further presentation of the rights set out in the Convention falls outside the scope of this thesis. For a more extensive discussion, see J Nergelius, pp. 518 - 533

fulfilling its obligations under the Convention. The first case where this was established was the case of *Sporrong-Lönnroth v. Sweden*[170]. Does this fact mean that the Swedish Constitution is incapable of adequately protecting the fundamental rights? The Convention roughly protects the same rights as the Swedish Constitution, having only the difference of containing a stronger protection for right of decision of court and the right of a fair trial.[171] On the other hand, freedom of speech enjoys a stronger protection in the Swedish Constitution.[172] It can therefore be argued that the Constitution and the Convention complete each other. The answer to the question set out above must therefore be that the total outcome is a result comprising a very strong protection for the citizens in Sweden.

6. Future Solutions For New Zealand

"Without the power to strike down legislation in New Zealand, the courts must engineer social change within a narrower compass"

Philip A. Joseph[173]

6.1. An Entrenched Constitution

The heritage from the Commonwealth has left New Zealand in the unique position of lacking a written Constitution. As pointed out above, this is a significantly unusual solution viewed from a global perspective. All Commonwealth countries have deviated from the uncodified British doctrine. Only New Zealand lingers in the post-colonial era. A suitable example of a country which has chosen to proceed its own way is Canada. This country has several similarities with New Zealand regarding social, political and economic factors, yet Canada took the big step in 1982, adopting its entrenched Constitution.

[170] Case 52 / 1982, the European Court of Human Rights
[171] The complaints against Sweden can be divided into five areas, *inter alia* judicial review of administrative decisions, violations of property rights, and matters concerning aliens. For further discussion, see Ianin Cameron, *International and Comparative Law Quarterly* (1999) pp.20-56
[172] H Strömberg, *Sveriges författning* (1999) p.87

Another argument is that the whole system of government seems to be antiquated, and lacks the functions required in a modern regime. Doubts consequently emerge about the adequacy of the current unwritten Constitution, and a proposal for a written Constitution with a Bill of Rights has been suggested.[174]

The discussed constitutional protection of rights will probably not assist much in preventing armed conflict etc., but nevertheless, adequate protection of these rights undoubtedly aids to delay and even avert tyranny, and of a more contemporary nature, exercises the check upon arbitrary power.[175]

An entrenchment would also have the positive consequence of the courts having a clear document to refer to. This in contrast to the situation of today where provisions are vaguely spread out in the constitutional framework.

A reasonable consequence of an entrenchment would be the establishment of a special constitutional court or council. Such an entity would subsequently relieve the general courts from intricate constitutional matters. This is the solution used in the United States, France and Germany. Arguments have been put forward against a solution like this; one of them based upon the view that it would be against Anglo-American tradition to deviate from one single integrated system of courts.[176]

6.2. The New Zealand Bill of Rights

If New Zealand adopts an entrenched Constitution, it is important to pay attention to the material content of this superior law. Provisions which an entrenched and written Constitution suitable to embrace are *inter alia* those regarding elections, the Prime Minister, the Cabinet, the Sovereign, the Parliament, the Courts, the Governor-General, the Ombudsmen, and most importantly, provisions for amendments.[177] In addition, another class of the most important

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[173] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p.9
[174] J McEldowney, *Public Law* (1994) pp.685-686
[175] F M Brookfield, *The Constitution in 1985:The search for legitimacy* (1985) p.27
[176] P Joseph, *Constitutional and Administrative Law in New Zealand* (1993) p.485
[177] Ibid, p.102

provisions that a Constitution should contain is regulations regarding the fundamental rights of citizens. The most suitable of these are put down in a Bill of Rights as a part of the Constitution itself. Such is the case in Sweden, where chapter two of the *Regeringsform* contains an entrenched Bill of Rights. This would be a commendable and adequate solution for New Zealand as well. It could be arranged practically by including the present New Zealand Bill of Rights 1990 as a part of the codified Constitution or by at least using this Bill of Rights as an archetype and creating a new tailor-made Bill of Rights explicitly for the Constitution.

6.3. Amendment Procedures

It appears after this rather thorough analysis that the real issue in New Zealand not ought to be whether or not the jurisdiction should have an entrenched Constitution, but rather in what form this should emerge. There are many ways in which a country can achieve entrenchment of a Constitution. It is of great importance that New Zealand finds the solution and technical amendment procedure best suitable for its specific circumstances. Regard has to be given to the protection of fundamental rights, to secure their existence against rapid political fluctuations. However, it is also important to have flexibility in the Constitution towards future changes in attitudes and upcoming constitutional controversies. Comparing with Sweden, there have several times arisen controversies relating to the Constitution. In some cases it can be argued that the procedure for making amendment in the Swedish Constitution is too rigid to be able to meet new situations. This was the case (as mentioned above) in the child pornography affairs some years ago. The question of amendment is an important one and has to be deliberated thoroughly if New Zealand in the case of a written Constitution, is to end up with a settlement of abundant satisfaction.

6.4. Prospect of Changes

What are the prospects of adopting a written and entrenched Constitution in New Zealand? At present this issue seems to have become lost in the political debate. Most energy appears to be dedicated to economic matters rather than fundamental ones. Therefore it is reasonable to predict that no direct changes are likely to occur in the near future unless something catalyses the debate again. There are several phenomena capable of doing this. The probably most likely is the issue of New Zealand becoming a republic. This is discussed below. Another

possibility capable of triggering a change is an actual breach of fundamental rights in New Zealand. This would probably upset international organisations like the United Nations and Amnesty International and calls around the world for New Zealand to comply with their international obligations would be put forward. However, this last scenario seems today rather far-fetched considering New Zealand has excelled with good civil records. On the other hand if a scenario like this should occur, a change in the current situation would probably occur within a short period of time.

It has additionally been proposed that the position of an entrenched Constitution much depends on the values of society and the tendency of the people to uphold the Constitution.[178] Once again the constitutional issue seems somewhat less prioritized at present and there might therefore be less likelihood of changes in this constitutional matter.

6.5. The Republic Issue

An issue closely connected to the present discussion, is whether New Zealand finally should cut the traditional adherence to the United Kingdom and become a republic. *Per se* it would constitutionally be quite simple for New Zealand to obtain status as a republic, since one plain act of Parliament, declaring that the Queen no longer is head of state, is all that is required.[179] The debate has also become somewhat defused on the present New Zealand political arena, since there are many matters more acute that have to be dealt with. New Zealand is going through an economic recession and unemployment and social gaps are increasing. These are matters of great concern. However, in taking the step forward, separating from the United Kingdom and establishing itself as an independent republic, New Zealand could create a new beginning, both constitutionally and politically. This decision is crucial, and more attention ought to be paid to it in the present political debate.

7. Conclusions

[178] R D Mulholland, *Introduction to the New Zealand Legal* (1995) p.21
[179] L Trainor, *Republicanism in New Zealand* (1996) p.98

7.1. New Zealand

It is the conclusion of this thesis that New Zealand encompasses a rather well defined unwritten Constitution, although it is not contained in one single document. However, it is arguable that fundamental rights of the citizens of New Zealand are not properly protected because of the unconstrained procedure of changing the legislation and particularly the absence of an entrenched Bill of Rights. Paradoxically enough, most Kiwis instinctively seem to accept the fact that their fundamental rights are not better safeguarded. This is quite understandable considering the historical and cultural context the people of New Zealand are living in. In addition, New Zealand has shown a satisfactory record of respecting human rights. However, New Zealand is a democracy and its constitutional framework should consequently reflect this.

Furthermore, in a situation where political stability exists, it can be argued that there is no need in New Zealand for constitutional issues like the current. Focus should instead be on other more urgent matters. But, on the other hand, this area is one of the most fundamental concerning the citizens who form the society we are comprised of. *Ipso facto*, there should be a strong incitement to once and for all deal with these matters and to ensure that fundamental rights are sufficiently safeguarded. It is the belief of the author that fundamental rights are not properly secured in New Zealand within the constitutional framework of today. A written, codified and entrenched Constitution is therefore not otiose in New Zealand; there is a need for constitutional reform.

If the Constitution is entrenched, the ordinary citizen in New Zealand would probably not notice any significant difference or change in the everyday situation. However, through an entrenched Constitution there would be requirements for a longer and more difficult process in order to introduce or amend legislation concerning fundamental principles. There would hereby be more time for debate and publicity of the matter. As a result, the possible practice of secretly and quietly amending legislation would decrease and there would be a higher level of check upon the government. Consequently, the risk of an arbitrary exercise of power would under these measurements decrease.

There are undoubtedly many issues of great concern attached to the present constitutional *status quo*. It would require a rather immense effort to settle this problem once and for all. Regarding the incredible importance of the matter and the likelihood of New Zealand progressing into a republic, it becomes quite apparent that the advantages of a constitutional reform, including the efforts connected with such an amelioration, essentially prevail over the present *laissez-faire* solution.

7.2. Sweden

It has been proposed that the relatively rigid way in which the Swedish Constitution can be altered in a decisive way has resulted in the calm development of society that Sweden during the years has presented.[180] As shown in this thesis, during the long history of Sweden, constitutional matters have dominantly been considered as important and have, consequently, been thoroughly regulated. This is especially the case in recent years through the new *Regeringsform* in 1974, the entrenchment of the Bill of Rights in 1979 and through the incorporation of the Convention on Human Rights in 1995. The membership of the European Union does not affect this conclusion. Thus, it is one fundamental principle of European Community law to fulfil and to be in compliance with the Convention on Human Rights. Consequently, human rights are seen as important also within the Union.

In this thesis, the ambition has been to exhibit Sweden as an example of a successful solution of the constitutional matter. It is the belief of the author that this is quite fruitfully achieved. However, during the course of this thesis, several weaknesses have been displayed in the Swedish constitutional framework. Sweden has, for example, been held not fulfilling its obligation under the Convention of Human Rights. This is a matter of great concern. Albeit these weaknesses, the Convention and the Swedish Constitution together form a adequate and satisfactory protection for the citizens of Sweden.

[180] Holmberg and Stjenquist, Vår författning (1999) p.14

Moreover, the Swedish constitution has shown proof of possessing sufficient flexibility, being able to meet new constitutional situations. The procedure of altering the Constitution in Sweden is not as rigid as, for example, in the American Constitution. On the other hand, it is far from being as flexible as in the New Zealand legislative process of majority decision. Thus, a well-balanced outcome between rigidity towards arbitrary power and adaptability towards future needs has been achieved.

7.3. Comparative Conclusion

Although Sweden and New Zealand *prima facie* seem to be two countries totally different from each other, it has been displayed in this thesis that the similarities are rather numerous. Disregarding the fact that Sweden and New Zealand contain significantly different legal histories and have adopted two complete different legal systems, the situation both countries have faced in later years is quite similar. In New Zealand, like in Sweden, the issue of human rights has been, and is seen, as important. Having said that, it is the belief of the author that Sweden has managed to deal with this matter in a decisively better way. The reasons for this might be many. One aspect is surely that Sweden is situated in Europe, where a Convention on Human Rights has been adopted. Furthermore, Sweden extensively debated and later made considerable changes in this area in the 1970's. New Zealand, on the other hand, has been somewhat trapped in the colonial approach of uncodified philosophy. The belief has been that the principle of Sovereignty of Parliament adequately is assuring the outcome as satisfactory.

New Zealand, being a kind of constitutional *sui generis*, can nevertheless be fruitfully compared with traditional constitutional jurisdictions like Sweden when analysing the current constitutional situation. After all, there are many similarities regarding economic, social, and cultural factors. The concern for human rights appears to be the practice in both countries. Although having completely different historical backgrounds, Sweden here serves as an

example when analyzing whether New Zealand should choose to settle their constitutional matter.

The idea behind a more complex procedure of altering a Constitution emerges from the belief that things regulated in the Constitution are fundamental and that a change consequently only should be permissible with a broad consent among the people.[181]

A mechanism protecting the fundamental rights in the Constitution contains not only a technically complicated issue of composing the specific rules, but also a politically intricate and complicated question. How easily shall an alteration in the Constitution be carried out and to what extent shall fundamental rights be included and thereby protected in the Constitution? This issue has been the main constitutional debate in Sweden during the last thirty years.[182] The complete revision of the Constitution carried out in Sweden showed to be a very extensive piece of work. It was proposed that this effort was better needed in other important issues which at that time dominated the political arena.[183] Today, after several changes and extensive investigation, Sweden possesses a diverse and adequate Constitution. When looking at New Zealand today in the light of this Swedish constitutional development, it is arguable that Sweden serves as a good example of how a future change in the constitutional matter might be carried out in New Zealand.

In a time when social and economic pressure will dominate in New Zealand, and people believe that their fundamental rights as citizens are being infringed, there will unavoidably arise a demand for a written, entrenched Constitution containing a Bill of Rights. This is why New Zealand should be one step ahead and solve the problem today. After all, this is a highly important matter concerning all of us - ourselves, our families, our friends and our children. Constitution matters!

[181] Holmberg and Stjenquist, Vår författning (1999) p.14
[182] Holmberg and Stjenquist, Vår författning (1999) p.18
[183] Ibid, p.28

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