FITZGERALD V MULDOON

Relied on s1 of the Bill of Rights - "That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of Parliament, is illegal" In order for something to become law, it relies on Parliament. NZ is a constitutional monarchy - without compliance, the monarchy would lack legitimacy.

Was a law suspended? Or a law executed?
In this case a law was suspended as contributions entirely ceased.

Was it by "regal authority"?
In this case the Prime Minister was considered to be regal authority as they are acting in the name of the monarch, even though they aren't a king or a queen.

Was there the consent of Parliament?
In this case, no.

What resolutions can be given?
In this case, the reversal was not granted; the action was illegal, but it would be repealed anyway. It was adjourned for 6 months.

WHAT IS PUBLIC LAW?

Feldman - compare with private law e.g judicial review vs. ordinary civil procedure to assert private law rights

Loughlin - the traditional idea is that legality is "a singular and universal" concept - and so public law is not distinctive. Constitutional law as a "product of the ordinary law of the land" and the position of the state is "determined by principles of private law." e.g a contract between the citizens and the forthcoming monarch, citizens and the state, interactions between the organs of government. Loughlin believes it is untrue. Public law is a separate branch of legal study.
More radical claim "distinctive juristic foundations" - distinctiveness comes from subject matter - "fundamentally political nature of the relationships which public law regulates necessitates methodologies which are distinct from those of private law"
Criminal law is also public law - the state punishes and prosecutes - seen as an act which violates the will of the state
The divide between private and public law is vexed - cannot understand the relationships in the same way - although it can be hard to distinguish

G Palmer - traditionally seen as "the distribution and exercise of power in the state, or public power" - "sprawling mass of reality about how public decisions are made", ie who makes them? / what rules do they have to follow? / how can they be influenced? At its broadest, public law in New Zealand is about policy outcomes.

Feldman and Bradley - "a broad concept embracing both principles of administrative and constitutional law."

WHAT IS A CONSTITUTION?

Palmer and Palmer - system or body of constitutional principles. A framework for government. Written rules, institutional structures, procedures and norms, and understandings.

Keith - "public power, the power of the state" It describes/establishes major institutions and states their principle powers, and regulates those powers in a broad way.

WRITTEN CONSTITUTION

AW Bradley and KD Ewing - a written constitution is a written document that contains all the content. Could have special legal sanctity. Seen as something worthy of respect because of its way of creation. It is accessible. Has special symbolism. Judiciary may be able to say other law is invalid. "In its narrower meaning, a constitution means a document having a special legal sanctity which sets out the framework and the principle functions of the organs of government within the state and declares the principles by which those organs must operate."

Benefits of having a judiciary enforceable constitution:

-

Written constitutions are necessary for federal jurisdictions - need something that tells the federation what their powers are (2 levels of government)

- Often but not always contain rights (AUS has no BORA) - can derive rights from the text of the constitution
- USA BORA - added after the original constitution as an amendment
- If you wrote down the rights, then that could be interpreted as the only rights they had

UNWRITTEN CONSTITUTION

- Whole system of government and a collection of rules
- Made up of a range of various sources
- Product of ordinary political processes - not special acts, ordinary statutes
- Restraints are both informal and political - the court can say that laws are inconsistent with NZBORA but cannot say that they are invalid, which hopefully could affect change, but not guaranteed
- Both self-created and self-enforced

Always up for debate what is included in an unwritten constitution. Also careful use of unconstitutional - something could be unconstitutional, but not illegal (e.g conventions)

AV Dicey "constitutional rules":

1) Rules which are law - "rules which… are enforced by the courts"
    a) Can include unwritten - e.g separation of powers, bill becoming law needs royal assent?
2) Rules which are not law - conventions
    a) Queen must assent to all Bills (as opposed to a Bill needs RA to become a law)

G Palmer: criticism of Dicey
Lawyers do not only need to know laws, but also have an awareness of conventions and understand how ministers behave etc.
"Law is a political instrument, using the word "political in its broadest sense."

MAORI CONSTITUTIONAL SYSTEM

Godfery: Three essential elements to a constitution:

1) Incorporating both values and rules
2) Establishing who or what sites of power can exercise political power; and
3) Regulating how that power is exercised.

"Government is the process that people choose to regulate their affairs and a constitution may be understood as the code they use to describe how government will function."

Based on tikanga, and tikanga values:

- Whanaungatanga - the centrality of relationships to Maori life
- Manaakitanga - nurturing relationships, looking after people, and being very careful how others are treated
- Mana - the importance of spiritually sanctioned authority and the limits on Maori leadership

- tapu/noa - respect for the spiritual character of all things
- Utu - the principle of balance and reciprocity

Tikanaga does not distinguish between a public and private domain - the primacy of relationships.
There is a presence of this tradition in certain legislation, as well as Maori seats in Parliament.

Could a written NZ constitution channel these elements?

ADMINISTRATIVE LAW

- Detailed rules for the control fo government Feldman
- Law which determines the organisation, powers and duties of administrative authorities Bradley
- However, line between constitutional and administrative law cannot be drawn
    - Only a "crude functional distinction" can be made Feldman and Bradley
    - They are inter-related and rely on each other
- Traditional focus on judicial review of administrative actions/discretion
    - But also other tools to check discretion/address grievances Chen and Palmer
    - E.g go to a complaints authority, send a complaint to a Minister, Ombudsman, talk to your MP, take them to court

SOURCES OF INTERNATIONAL LAW

- International treaties (e.g multi-lateral conventions, bilateral agreements, letters)
    - Agreements between 2 or more states/international organisations
    - Signature / ratification / implementation
    - Needs to be ratified (although changes from state to state) before recognised in the state - then they become bound by the agreement
    - NZ - domestic and international systems run parallel
        - Ratified treaties cannot be enforced by domestic courts as they are a part of international law
        - If they breach obligations, it will be illegal in international law, but not necessarily in domestic law
        - To enforce, they must be implemented e.g by legislation
- International custom (general state practise accepted as law)
    - Implicit - a failure to reject
    - Treat the same as a treaty
    - NEED: a state practise, opinio judis, and the idea that the state acts in that way because they feel a legal obligation
    - Something in a treaty could become so widely accepted that it may become customary law, which would become binding even if not a part of the original treaty
    - Implicit consent is enough to bind states, unless they express dissent? (e.g country always dissented from the beginning)
    - In NZ, customary law is enforceable by domestic courts unless they are not consistent with domestic legislation
- General principles of law recognised by civilised nations
    - Not obviously based on consent
    - Some principles that are recognised in all/most domestic legal systems
        - So should be treated as law in international courts
        - Seen by the statute of ICJ as a source of law and can be applied if there is a lack of treaty or custom

        - Also exists in civil code
- Judicial decisions and teaching of publicists as subsidiary means for the determination of rules of law
    - Article 38 - doesn't establish that it is a source of law but helps to identify rules of international law. Judicial decisions from not only international courts but also domestic courts, which can discuss and state a practise.
    - Academic writings - judicial writing and academic writing are at the same level

Four important features:

- Based on a notion of acceptance between states: Restatement
    - General law depends on general acceptance
    - Does not operate under majority rule like domestic law
    - E.g treaty must be signed by all states in order for them to be bound. They could be bound by custom, unless they have continually expressed reservations
- Peremptory norms (jus cogens) Restatement
    - Rules recognised by states after meeting which prevail over other international agreements or international law which conflict with them, e.g slavery or genocide
- Continuous development of international law to new areas
    - E.g new tribunals, areas (SPACE)
- Recognition/expansion of vertical relationships e.g individual human rights
    - Treats individuals/corporations as subject to international rights and duties e.g crimes against humanity

SOURCES OF THE CONSTITUTION	

- Legislation	What makes something constitutional?
	Matthew Palmer - if it plays a significant role in influencing the generic exercise of public power - whether through structures, processes, principles, rules, convention or even culture.
	
	Keith: "to be found in formal legal documents, in the decisions of courts, and in practises (some of which are described as conventions)
	- Constitution Act 1986 (NZ) as principle formal statement
	- Other major sources of the constitution include:
	  - The prerogative powers of the Queen
	  - Other relevant New Zealand Statutes
	  - Relevant English and United Kingdom statutes
	  - Relevant decisions of the courts
	  - The Treaty of Waitangi ("which may indicate limits on our policy on majority decision-making" but "policy and procedure in this area is still evolving")
	  - The conventions of the constitution
	
	PA Joseph: eight categories but not exhaustive
	- Imperial legislation
	- New Zealand legislation
	- Common law including customary law, judicial precedent and statutory interpretation
	- Customary international law
	- Prerogative instruments
	- The law and custom of parliament
	- Authoritative works
	- Conventions of the constitution
	
	2nd ed - "it is a matter of personal judgment whether human rights legislation is considered "constitutional"
	
	3rd ed - rules or provisions concerning human rights are inherently constitutional. Also added Treaty of Waitangi as a possible source of the Constitution.
	
	Many statutes have significant effect in specific governmental functions but they need to play in the general operation of the machinery of government.
	Includes domestic and imperial legislation, when they had the legal authority to legislate for New Zealand.
	
	Domestic legislation includes:
	- Constitution Act
	- NZBORA
	- Electoral Act
	- Senior Courts Act
	- Judicial Review Procedure Act 2016
	- More, depending on your definition of constitutional

- Imperial Legislation	English Laws Act 1858: Was it... - The laws of England - As at 14 January 1840 (time threshold) - So far as applicable to the circumstances of the colony of nz (refer to Faulkner v Gisborne district council) o look at the mischief that the English law addressed o and if the mischief is likely to happen in NZ Imperial Laws Application Act 1988: is the problem question a statute? Only imperial laws listed in the schedule of this Act have force in New Zealand following 1988. Imperial laws (common or statute) may still be repealed - doctrine of parliamentary sovereignty.
- Common Law	PA Joseph: 1) Customary constitutional laws: have legal source in legal decisions, including parliamentary sovereignty and purgatory powers etc. (they may have been enforced/recognised by judges and are now a part of the common law) 2) Judicial precedent: constitutional rules sourced in decisions e.g Entick v Carrington 3) Statutory interpretation: expands/limits meaning of constitutional statutes - can understand the content in a new way.

- International Law

Oppenheim, Jennings and Watts: dualist and monist schools of thought
Operate under the assumption that there is no conflict in between

Dualist:

- international and domestic law are two separate spheres
- Each is supreme in their respective systems
- International law is not necessarily a part of domestic law unless it has been explicitly adopted.
- Judges will attempt to interpret the law in a way that is consistent with international law obligations - but if there is a clear conflict, domestic law prevails.

Monist:

- International and municipal are in the same legal structure
- States are entities
- International is superior to municipal law - applies just as municipal law

Each state is free to decide which school of thought they follow, as long as they continue to honour their obligations.

NZ is dualist:

- Executive has power to enter into treaties
    - Obligations are binding in international sphere
    - Does not change NZ law unless specifically integrated
    - When they become domestic law, they can then be enforced by courts
    - Reflective of separation of powers and democracy (executive power and only elective members can legislate)

Attorney General for Canada v Attorney General for Ontario:

- Making of a treaty is an executive action, and does not have power by the treaty alone.
- Have to run the risk of Parliament assenting to related legislation.

R v Miller v Secretary of State for Exiting the European Union:
2 propositions:

- Treaties have effect in international law and are not governed by the domestic law of any state
- They are binding in international law and give rise to no right or obligations in domestic law

Customs:

- Directly enforceable by domestic courts as long as there is no conflict with domestic legislation
- Monoist component in dualist system

In NZ:

- Courts try to interpret in line with international obligations
- Seek to promote consistency (monist gloss):
    - Standing Orders: before executive enters into a treaty, it is presented to the House for consideration but cannot approve/veto
        - Seperation of powers - executive action
        - Democracy - should they have this power? Not in NZ, but:
    - Convention: Executive does not enter into a treaty until Parliament has changed domestic legislation to ensure consistency

	- Cabinet Manual (convention)
	  - Ministers must consider whether proposed domestic law is consistent with international law obligations
	  - Not just treaties - norms

- Prerogative Powers	Poole/Sunkin: Powers exercised on behalf of the Crown by the Monarch or relative government Minister. The powers that the Crown retains from before modern parliamentary system returned - includes informal powers that are controlled by convention. Parliament is sovereign - can control/abolish existing prerogative powers 3 principles: - Conflict between prerogative and statute: statute prevails (SOP, PS doctrines) - Use of the prerogative remains subject to common law duties of fairness and reason - possible to challenge use by judicial review - Can be abolished, but not created by statute Example: creating the office of Governor General and the Executive Council - through the Letters Patent
- Law and Custom of Parliament	Rules that regulate the functions, procedures and immunities of the House. Various sources e.g legislation - who is a member of Parliament (Electoral Act) Customs: could not have a custom that overruled a standing order etc.
- Authoritative works	PA Joseph: Textbooks, academic writings etc. None are per se a source of law But if cited by courts as accurately recording the law or particular question - Court treats as if expressing the law Identifying a convention test from Jennings is now used after it was adopted by the Supreme Court of Canada

- Conventions

Main political principles which regulate relations between different parts of out constitution and the exercise of power but which do not have legal force.

Conventions identified by PA Joseph:

- Ministerial advice
- Appointment of a Prime Minister
- Ministerial appointments
- Parliamentary ministry
- Resignation of a ministry
- caretaker government
- Collective ministerial responsibility
- Ministers' conflicts of interests
- Rule against oppressive legislation
- Rule against legislative judgments
- Impartiality of the speaker
- Judicial independence
- Various conventions relating to commonwealth relations
- 'Conscientious integrity' of the branches of government
- Police independence
- Attorney- General
- Public Service neutrality
- Budget Secrecy

Not judicially enforceable. Transforms into constitutional monarchy. Allows constitution to develop without formal legal change.

Conventions are not practices as they are considered binding by political actors.
Turpin, Tomkins and Sap: conventions are enforced politically e.g collective or individual responsibility to Parliament

- If broken, expected to resign
- Parliament would likely seek to enforce
    - Otherwise would face public embarrassment
    - There is a desire to conform to established legal practices
    - Desire to keep the machinery of government working

Consequences of a breach:

- Constitutional crisis
- Public embarrassment
- Change in convention

Example: Muldoon refusing to devalue NZD after National lost the election. Question over whether Governor-General could immediately appoint the leader of the Labout Party to solve a constitutional crisis. After Muldoon eventually devalues the dollar, it was clarified in s6 of the Constitution Act.

Sometimes unclear if a convention has been broken or changed:
Jennings test:

1) What are the precedents?
2) Did the actors in the precedents believe that they were bound by a rule?
3) Is there a reason for the rule?

Main convention: MONARCH ACTS ON THE ADVICE OF GOVERNMENT.

	Can convention crystallize into law? Attorney General for Canada v Attorney General for Ontario: No. would be in conflict with legal rules - requires you to do something which the law does not require you to do. Attorney General v Jonathan Cape Ltd: Agreed that conventions are not legally enforceable However, in this case, publication of Cabinet discussions could potentially be prevented through the tort of breach of confidence Conventions: should we avoid uncertainty or protect flexibility?
- Treaty of Waitangi	Differing views on constitutional status - e.g Joseph and conflicting editions. Joseph - 'ambivalent' status - it is not enforceable by courts, but is perceivable and permeates executive government with its presence. Emphasizes it is not entirely clear what the status is. M Palmer - Treaty of Waitangi is a constitutional document. It affects how public power is exercised. The question is how exactly does the Treaty of Waitangi affect and reflect the exercise of power in New Zealand?

PRINCIPLES OF THE CONSTITUTION	
- Democracy	- Also affects the understanding of other principles e.g parliamentary supremacy (who is democratically elected), separation between democratically elected institutions - Democracy as a principle: in exercise of public power, and in development of the constitution, we try to realise democracy to its fullest extent. What is democracy? Most basic form - that the people should be able to rule themselves Morrison - everyone affected by a decision has a right to participate - our representative democracy. Incumbent democracy: Understood from the view of the institution, of elected democracy. Type of government that exists in New Zealand. It looks democratic as there are processes set through the institutions. “Tyranny of the majority” Radical democracy: Powerless see democracy as a response to exclusion. Critical, and in opposition to the other form of democracy, operating at the margins so that excluded voices are included in the power making process. Calls for new mechanisms of participation Is it more democratic to reflect the beliefs of the majority, or to make sure that all voices are included in a conversation? Can you have democracy if you have high economic inequality, where people can’t afford to focus on democracy? Podcast - four ways of thinking: 1) Requiring equality of the world a) Majority rule gives the same weight to every vote 2) Accountability a) Representatives are accountable to their constituents and can be replaced if needed in frequent elections 3) A form of government where the right decisions are made / protection of minority rights a) Where everyone is treated with dignity and respect e.g would give judges right to invalidate on basis of minority rights 4) Public forum / place for public debate a) Majority rule vs minority rights b) Idea that the content of democracy is not settled

- Parliamentary Sovereignty	Elliot - parliament has the legal authority to enact, amend, or repeal any law, and no-one has the legal authority to stop it from doing so. Political factors are what constrain: (political constitutionalism) - Frequent elections - Conventions - Morality? Source of the principle: - Unwritten constitution does not tell us what powers Parliament has or does not have - Unconstrained law-making capacity presumed - Generally not contested by the courts Implicit/practical limits: Elliot : - In extreme cases, judges may refuse to validate Acts - Try to interpret legislation with constitutional values in mind - Interesting balance between parliament and the courts
- Separation of Powers	Montesquieu - legislature, judiciary, and executive perform different functions and should be kept separate. If the power manifests in one, we risk tyranny. NZ - executive and legislature are not kept entirely secret. Montesquieu used the English system as an example of effective separation of powers. However Bagehot notes that the traditional theory understood the English system incorrectly. Palmer and Palmer - if the power in concentrated on one arm of government, one can effectively adopt an unjust law, then direct law enforcers to focus on that law, and judge will then decide whether they are guilty or not. While separation of powers is important, you do need to have some crossover. C & D - parliament can adopt what it wants, but it has to be interpreted by the judiciary - but courts do not have the final say on law, as legislation can always be passed Kavanagh - modern theory - rejection of “one branch one role” “Radically detached from the practice of contemporary politics” “Necessary and desirable interconnections, interdependence and interactions.” a better view is of a “coordinated institutional effort in search of good governance.” Instead we should focus on checks and balances - which could be contrary to the separation of powers? E.g no branch can exercise their functions without meddling from the other branches / powers are separated to make checks and balances possible and therefore consistent?

- Rule of Law

Tamanaha - exceedingly elusive notion. under rule of law, the law is preeminent and can serve as a check against the abuse of power.

Contrast with rule BY law - systems that may lack democratic systems/elements

Joseph - an ambiguous concept. Was used to mean 'law and order' in the context of the Springbok tour by government ministers. However substantive meaning has also been used in the context of granting water rights when the rights were withheld by the Planning tribunal.

Matthew Palmer - notion of judicial independence: rule of law requires independent courts in order to interpret and apply. In NZ, the rule of law is not as respected as that of democracy and parliamentary sovereignty. Not clearly understood by constitutional convention - e.g Foreshore and Seabed Act 2004, PS prevails over the rule of law.

History of the rule of law:
The notion of supremacy of the law was subject to parliament's ultimate law making power

- Law is supreme, but parliament can change it
- Everyone is subject to the law, but it can be changed

Dominant view: king is subject to the law. Mostly about formal conception.

Formal conception:

The content of the law does not matter, but what matters is that the government rules. An authoritarian regime could be considered just per the formal conception of the rule of law.

Entick v Carrington - government can only do particular acts if authorised by statute or prerogative (positive law) - citizens can do whatever is not prohibited by law.

Applying to Dicey:
1 - no general claim of "state necessity" - and cannot exercise arbitrary power
2 - state actors subject to same law as ordinary citizens

Wood - third source of government authority, and that the gov is like a natural person and so does not need to be authorised to take act. Inconsistent with Entick v Carrington. Controversial, uncertain, and not yet authoritatively established.

Dicey	Raz	Habermas
Law as an instrument of government action Rule of law means: 1 "absence of arbitrary power on the part of the government" - rejection of wide, arbitrary or discretionary powers 2 "every man is subject to ordinary law administered by ordinary tribunals" - as opposed to where some people are granted exemptions	Law as a rule-book 2 aspects: 1 People should be ruled by the law and obey it 2 the law should be such that people will be able to be guided by it Principles: 1 all laws should be <u>prospective, open and clear</u> 2 laws should be <u>relatively stable</u> 3 the making of particular laws	Law obtains authority through consent Idea of democratic legitimacy - not ruled by laws that are created, but ones they have consented to, either themselves or through representatives - Law gains its legitimacy from the consent of the governed - Therefore cannot have rule of law under

3 “general rules of constitutional law are results of the ordinary law of the land” - result of judicial decisions brought to the courts by specific people - thinks that means that rights are more secure than in written constitution countries. Less relevant with the adoption of NZBORA. Kellman - effective protection depends on the willingness of judges choice on how they develop the law.	(particular legal orders) should be guided by open, stable, clear and <u>general</u> rules 4 machinery for enforcing laws should enforce and reinforce principles - Independent courts - Fair process - Accessible courts - Review powers - Consistent discretion This is consistent with oppressive law - not making on a judgment on if content-wise a law should be followed, but it should be in order to give the rule of law effect - people won’t know what is legal otherwise	absolute King, unless the subjects have been somehow consulted - Enables assessment of whether process by which law is made is democratic etc

Acts that exempt the Crown from liability may be in tension with the rule of law.

Substantive conception:

Dworkin	TRS Allen	International Commission of Jurists
‘Rights’ conception, individual rights e.g liberty... Requires that the rulebook capture and enforce moral rights - looks at the content Is not merely to apply rules, but in a way that gives effect to rights/identifies rights Issue: no exhaustive list of rights and what they mean - more work for judges	Individual justice, democratic order and equal participation “Unified complementary package” of democracy, formal legality and human rights Reflects what most people think when think of rule of law - don’t think about prospectivity, generality etc… in order to be consistent, all its institutions must be committed to respecting democracy and human rights, and must act through laws created in a legal form	Substantive equality, welfare, community rights Not only reflecting people’s civil and political rights, but also protecting socio-economic and cultural rights Rights are meaningless unless they have sufficient means to sustain themselves and people can exercise them Requires positive state intervention so that people can fulfil their potential

FUNCTION OF PARLIAMENT

- Parliament in the sovereign and the house of representatives, pre the Constitution Act 1986 they were known as the general assembly
- pre -1951 - there was an upper house called the legislative council
- The House of Representatives is an elected institution, who serve a 3 year term elected by MMP

Functions of parliament:
Parliament: to make laws
House of Representatives: to provide and sustain a government

1. Legislative function with the governor general
2. Responsible for raising and allocating money
3. Scrutinising as a check and a balance on government e.g question time, select committees
4. Political - competition for the support of electors
5. Representing the views of the populus

G Palmer - Parliament's job:

- To raise money by which the business of government may be conducted
- To approve the expenditure of money
- Consider and pass bills into law
- Provide a place for the airing of grievances
- Acts as a check on the manner in which government is actually carried out; and
- Serve as a forum for political party contest.

Proposals for reform:

- Select committee hearings to check that the legislation objectives have been achieved
- Longer parliamentary sitting hours - avoid unnecessary usage of urgency

ELECTORAL SYSTEM

Purely proportional system:

- Voters will only vote for party preference
- Very representative
- But can only vote for a party and not a geographical locality
- Only list members
- In some systems, the list could potentially be rearranged etc.

MMP:

- Adds the vote for locality
- Party must get at least 5% of the party vote or win at least one electorate seat (will then get whatever percentage they earned)

FPP:

- Every candidate represents a locality
- May over or underrepresent some interests
- FPP gives a disproportionate amount of power to a party
- Quite often single party able to govern by themselves
    - Members usually vote along a party line
    - Could essentially pass whatever laws they wanted, apart from conscience votes

- MMP alleviates the issue of voting for a major party as you know the smaller party doesn't stand a chance
- More scrutiny in select committees
- Parties may have to compromise wording of laws, which gives judges more room for interpretation
- MMP makes the system more difficult
    - Less clear who has the support
    - Harder to pass legislation

- E.g a question over why NZ First has so much influence when National has the most seats

- 3 year parliament term
- Can also be dissolved by Governor-General if advised to do so by the Prime Minister
  - Must give a writ to the electoral commission (and other rules e,g when is the last date to put in a candidate nomination) to hold another election
- Recount by district judge if the votes are the same for both candidates
  - If still the same, flip a coin
- Other jurisdictions, wasted votes can go to another candidate - not in NZ

PARLIAMENTARY SUPREMACY AND LIMITS

Dicey - parliament has under the english constitution the right to make whatever law, and no person or body is recognised as having a right to set aside legislation of parliament - just means can make any law, at any moment, even with constitutional values, ORTHODOX VIEW

Dicey - what is law? Any rule which will be enforced by courts - any act of parliament will be obeyed by the courts etc

Some authors refer to english parliament as legislative and constituent assembly - as in some countries, only a special assembly can make constitutional changes - in NZ, unknown as it has both regular lawmaking and constituent powers

Implications from this proposition that parliament can make any law: (Dicey)

1. No law that parliament cannot change - any act will be enforced by the courts
2. There is no clear distinction between fundamental or constitutional laws
   a. Unwritten - not in a constitutional text
3. No one can pronounce void a law adopted by parliament on the basis that it is unconstitutional
   a. 234 page - ellen streets estates v minister of health
      i. Possibility of implied repeal
      ii. 2 different laws passed by parliament - 1919 and 1925
      iii. Acts were in conflict in terms of the compensation of private land by government
      iv. 1919 - any other act inconsistent would have no effect
      v. 1925 - rules of compensation were in conflict
      vi. Which one applies?
      vii. When parliament adopted 1919 it had included a section that stated any other act with provisions inconsistent shall cease to have or shall not have effect - claimant's argument
      viii. Court: disagreed. Contrary to the provision that parliament can alter an act previous past - and can do so by repealing the act, or by enacting a provision which is clearly inconsistent
      ix. Other judge - legislature cannot bind itself as to the form of subsequent legislation
      x. Orthodox doctrine of PS - only hierarchy is time - which one was adopted most recently? It will prevail

In systems where constitutions are supreme, more hierarchies than time e.g constitution as supreme law - NZ and UK, works differently

Wade - parliament cannot bind its successors
Alleged impossibility of entrenching legislation
Suppose adopts BORA and says it cannot be edited without referendum
If it is repealed without referendum, is it invalid? - no, the most recent act would be invalid, as it cannot bind its successors - one perspective - the orthidox doctrine of parliamentary sovereignty

Form requirements (request and consent act for dominions) - Wade if they adopt an act without having being requested and consented to by the dominion, the act would still be valid, as it cannot divest itself of its law-making ability (ORTHODOX VIEW!!!)

Limits of the notion of continuing sovereignty:

- In context of acts that give full independence to a former colony, can parliament then legislate for former colony as if nothing has happened? Dicey and Wade - thought they can abdicate, as when parliament passes an act giving freedom, then it ceases to exist as a parliament to that country
- Western Samoa Act - no act of parliament of new zealand passed on or after independence day, or coming into force on or after, shall be in force in Samoa - nz parliament ceased to be recognised by the courts as their parliament

Unlimited law-making power from a legal perspective: always subject to extralegal limits (Joseph)
E.g members of parliament have their own sense of morality - internal constraints that they will never breach
E.g possibility of rebellion of populus - politically impossible as the laws will be disobeyed or revolution

ACQUISITION OF LAW MAKING POWER

- Beginning: iwi/hapu governance
- 1839 - UK decided to make NZ part of the Realm
- Treaty of Waitangi: treaty of cession in UK eyes, not enforceable as a part of international law, emergence of English style constitution
- Creation of reserved Maori seats
- 1852 New Zealand Constitution Act
    - Established NZ general assembly
    - Parliament
    - To make laws for the peace, order and good governance of NZ
    - Could not adopt laws with extraterritorial effect
    - NZ had a degree of representative government but not responsible - could select cabinet members from outside etc
    - Then governor instructed to only act on advice
    - Then only select cabinet members from inside the house
    - General assembly was not sovereign legislature as the law making power was derived from English statute and subject to certain limits
- 1857 - UK parliament gives New Zealand the power to amend/repeal provisions of the constitution act although some could not be amended
- 1865 (colonial laws validity act) CLVA - laws adopted by the general assembly would be void only if the laws of England were extended to the colony
- Statute of Westminster 1931 and Application Act (adopted in NZ 1947)
    - Removed remaining limits on NZ's legislation from CLVA - gave them the power to make laws that had an extraterritorial effect
    - Can legislate contrary to the laws of england
    - UK would only legislate for NZ if asked to
- NZ Constitution amendment (request and consent) act and Nz Constitution Amendment Act 1947 UK
    - General Assembly now is truly sovereign with one issue:
        - S53 of the constitution act forbade the power to legislate extraterritorially, but the statute of westminster then gave them that power, although it was never expressly repealed. Do we have this power or do we have to expressly repeal first?

PROCEDURAL RESTRICTIONS ON LAW-MAKING POWER

Would courts enforce those restrictions?

One example in NZ - s268 electoral act 1993
- identifies a number of provisions that are reserved
Reserved - who may vote, method of voting, term of parliament (s17 const act 19.. But also identified here)
P 265 - 268
Reserve provisions are related to core aspects of democratic system
S 268 does with the provisions - no reserve provision shall be repealed or amended unless passed with 75% majority, or carried by majority of votes in referendum
Is it effective legally or otherwise?

Barber reading - referendum expansion of voting unit
These provisions are entrenched - more difficult to change ordinary laws

P70 : section 268 does not protect itself by change from a simple majority - not self entrenched/double entrenched - only entrenches certain provisions - therefore in theory parliament can reverse s 268 by simple majority and then change the provisions that are no longer entrenched - single entrenchment can therefore be legally circumvented

Even if parliament decided to ignore 268 and decided to pass a law by simple majority, may not mean that it is invalid - could be seen as impliedly repealing a law based on doctrine of parliamentary sovereignty

However has always been respected - perhaps now a convention that it needs to be respected

Political entrenchment - barber - laws are difficult to change because of procedural restrictions but political conventions that make them hard to change

Legal entrenchment - requirements as to the form of legislation (eg manner and form provisions p273 barber)

Eg NZ adopts emergency law - says can only be done expressly - that is how you have to do it
Provisions in canadian law bora 1960 - for particular law to have effect must have a specific form of words - eg est that laws of canada should be interpreted in way that is consistent with the BORA, unless it says notwithstanding the BORA

Can courts enforce manner and form provisions?

MANNER AND FORM REQUIREMENTS

Trethowan case:
At this time, the power was till derived from the NSW Constitution Act 1865
1865 - Colonial Laws Validity Act applied in NSW, s5 the colonial legislature has full power to make laws in respect of the constitution provided that they have been passed in such manner and form as was required
1930 - Labour government decided to abolish the upper chamber, and did not follow the requirement that “the Bill be presented for royal assent after being approved by electors in a referendum”
They put through 2 bills - the first repealing the 1929 Act provision, and the second abolishing Legislative Council

- Court concluded that the referendum requirement was a manner and form provision
- Decided that they could not be ignored, and needed a referendum
- Law must be passed in accordance with the manner and form provision
- The laws were declared invalid

Does this apply in NZ or UK?
- NSW had law-making power derived from UK parliament
    - NZ and UK are sovereign parliaments (link has now been broken for NZ)
    - Therefore a different situation
    - Could say that the same is perhaps different for a truly sovereign parliament

Dixon J: suggests even UK parliament would be bound to respect manner and form provisions
- Sovereign parliament has continuing sovereignty, can also create a legislature that can limit law-making power
- Self-embracing sovereignty
- Although UK parliament cannot arguably do that? Unresolved but important question

BORA white paper:
- Recommended that the Bill of Rights be entrenched (was not carried out)
- The possible enforceability of manner and form requirements
    - Parliamentary sovereignty - there is nothing stopping them from repealing the entrenchment clause then repealing protected provisions (like in NSW case, but perhaps different in a sovereign parliament?)
    - Points to previous case - such a mode of proceeding - e.g first repeal may be unlawful
    - Provisions don't allow parliament to bind its successors but rather redefine Parliament for a particular purpose; you aren't prevented from changing, but rather you require more people as a different definition of Parliament.
    - Seen as parliamentary sovereignty adopting a different procedure for changing law.

Despite the difference between the case and the white paper, the case is still highly persuasive.

Judicial willingness to enforce laws may come down to democratic legitimacy:
- practical sanctity (widespread support)
    - SO 266 must be passing the adopted clause through the same majority that it requires

Westco Lagan Ltd v Attorney General:
- asked for injunction to prevent bill from being presented for royal assent
If the bill was passed, they alleged it would amount to a breach of contract as it did not allow for compensation after cancellation of the contract between the company and the crown
- Obiter comments:
- No doubt that the court can determine whether compliance with manner and form requirements have been observed
- Best moment for intervention is right before royal assent
- Manner and form requirements do not relate to content, but process - cannot intervene in this case as it is a content case
- Court cannot certainly strike legislation once it has been adopted - perhaps may not be invalid if not done at the right time?
- Hinted at substantive limits (e.g lord cooke)
- General rule that courts should have no right to intervene with content (parliamentary sovereignty) except perhaps in extreme situations.

Ngaronoa v Attorney General
- Plaintiff argued that the amendment to the electoral act affected the right to voting and therefore had to be passed at a 75% majority
- Rejected as the entrenchment only protected the minimum voting age and not the general right to vote
- Obiter: enforceability of the entrenchment provision - the authorities quoted indicate they favour that they are enforceable but would prefer to resolve on a real question of that issue

- Solicitor General argued in favour of manner and form provisions although also said that they did not apply in this case

VIRTUES OF ENTRENCHMENT

White paper: Parliament can legally take away all of your rights, but in practice there are political factors that are preventative

Perhaps more important than constitutional and entrenchment provisions - may be an overstatement, but a social commitment to rights is needed

Entrenchment are therefore important in a supplementary way
E.g as laws are gradually passed that erode rights, so still good to have an entrenched bora

Is it democratic? Telling a democratically elected government that they cannot do certain things?
Why it is democratic:

- Contains rights that protect the quality of democracy e.g the ones that are necessary for democracy to exist - only most basic rights e.g right to life
- However even within those rights - what is their scope? If entrenched, will be determined courts, if not then determined by Parliament
- Entrenchment still means that it can be changed - just need a wider consensus
- Also comply with international obligations (although not an implementation as such)

Nick Barber: for the entrenchment

- Protects the stability of the law (Joseph Russ's conception?)
    - More able to be guided by the law
    - Legal stability, not political stability - if it is too difficult to change, it creates political instability (inflexibility) - too strict can create the opposite result
- Protecting constitutional identity:
    - Common with a written constitution
    - It is so important that the identity of a state is unamendable e.g often protects democracy
    - However not convinced that this is a good reason to entrench - what if people want to change their identity - nothing intrinsically 'good' about identity
    - Sometimes a good idea to change

Particular reasons for:

- Aide-memoire - reminding those who want change why they are important to protect
    - Eg requiring parliament to confront what they are doing, and acknowledge they breach protected rights
- Protecting minorities, against moral panics (e.g terrorist attacks, when public may be allowing more oppressive legislation)

Reasons against:

- Prevents the evolution of the legal system - what was important by previous generations - now outdated?
- Tool for party politics - use to entrench preferred policies and prevent a future government from changing

SUBSTANTIVE LIMITATIONS ON PARLIAMENT'S LAW MAKING POWER

Lorde Cooke - there are 'fundamental principles of "free and democratic society"
E.g the existence and operation of a democratically elected legislature, independent courts, (perhaps) the Crown

- If the legislation undermined those principles to a significant extent, then the courts are obliged to say so and resign if ignored
- Not express but explicit that should try to strike down
- In addition - some common law rights are so fundamental, lie so deep that even Parliament could not override them (Taylor v NZ Poultry Board)
- Extrajudicial comments

Jackson v Attorney-General

1911 - passed a bill that meant a Bill could go for Royal Assent even if not approved by the house of lords, 2 years later.
1949 - reduced the time to one year; passed using the procedure of the 1911 bill.
Argued that the hunting bill 2004 was invalid because parliament could not use the procedure form the 1911 bill to pass the 1949 bill, and so any legislation as a result of this bill was invalid. Rejected by judges, determined that it was valid

Obiter comments about parliamentary sovereignty: lord steyn
- Classic diceyan account is not in line with modern UK
- Perhaps if oppressive and wholly undemocratic
- PS as a construct of common law - it is not unthinkable that courts may need to revise it

Lord Bingham:
- There is a tension between parliamentary supremacy and the rule of law - if judges want to uphold the rule of law, judges cannot uphold all laws
- The principle of PS is deeply grounded in the system - not developed by judges but over time and then recognised by the courts
- If parliament intended to adopt laws contrary to the rule of law, they must be upheld
- If there was a review of the constitutional system, relationship between PS and ROL should be addressed - not good that a country can adopt laws which are inconsistent

Inland Revenue Case:
- Argument that the income tax act was discriminatory and contrary to the Magna Carta (a constitutional law)
- Courts rejected, as magna carta is not supreme law, can only look at if it was adopted in the correct manner/procedure
- Some commentators argue courts may refuse to recognise the validity of acts of parliament
    - This is not an extreme situation
    - Does not need to enter this discussion

What would happen if this was put into practise? Who should be in charge of identifying fundamental principles? Judges themselves?

Substantive limitations checklist:
- Cooke's fundamentals
- Jackson v Attorney General
    - Steyn said that diceyan account out of line with uk
    - Perhaps if legislation was oppressive and wholly undemocratic
    - Construct of common law
    - Bingham: ps is deeply grounded, not developed but recognised by courts, if intended to adopt contrary to rule of law then that will have to be upheld
- Shaw: some commentators argue courts may refuse to recognise validity of acts
    - Indication that could happen in nz law

- Clash between PS and RoL - list of options now to proceed (if legislation violates fundamental norms)

1) Orthodox - apply how it is written
2) Interpret narrowly, in line with interpretive presumptions (principle of legality)
3) For constitutional statutes, apply doctrine of implied repeal narrowly
4) In theory, and only for extreme cases, refuse to apply and/or resign

Interpretive presumptions:

- Assume did not intend to legislate against these principles
- Burrows:
    - Principle of legality: "In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual." Simms
    - Another example: right of access to the courts - were unwilling to determine that the decision of a tribunal is unreviewable by courts
        - Arbitration court (act) meant that it should not be able to be reviewed by any court, but the courts have held that they can review if they exercised a power they did not have; have acted outside of their jurisdiction
        - They could reach this conclusion as the language of the legislation allowed it - otherwise they would be bound by law
    - Fundamental principles can lead to an artificial reading - or narrow interpretations - Acts that seem to be clear, courts try to interpret in a way that avoid negative effects
    - NZBORA s6 - should be recognised in respect to principles if possible
    - Presumption that consistent with international obligations

Principle of legality:

- Presumption against retrospectivity
- Also protects rule of law
- Not always a bad thing - e.g protecting past injustice in regards to homosexuality
- But criminal penalties to acts which were not previously crimes before it was adopted
- Courts will try to apply the principle strictly
- If it has a positive effect, may allow law to apply
- S7 interpretation Act 1999 - an enactment does not have retrospective effect, unless parliament clearly says so

Poumako:

- Whether P is subject to a new minimum 13 year non-parole period for home invasion murder committed in 1998, which caused significant public outrage
- Parliament introduced two new Acts:
    - 2 July 1999 - Crimes (Home Invasion) Amendment Act - increased maximum penalty
    - 17 July 1999 - amended s80 to require 13 year non parole period, mandatory minimum period with retrospective application
    - Clear intention of MP is that it would apply in this case
- Sentenced to 13 year non-parole period
- Appeal to CA
    - Said the crime was so brutal he would have gotten 13 years anyway
    - Majority: perhaps would have been able to read the retrospectivity to the 2nd of July as the Amendment Act only existed from that point
        - 15 day retrospective effect
        - Clearly contrary to will of parliament

        - Principles can be protected even in absence of written constitution
        - S6 of interpretation act
    - Minority:
        - Words were clearly not only for 2 weeks
        - S6 cannot be used to sustain what is clearly contrary to parliament's decision
        - Statement of incompatibility

Thomas J - is s 2.4 determined to be adopted to attack a particular rather than a general law? - would clearly be unconstitutional and a departure from the rule of law.

- What can the court do?
    - Have no alternative but to attack the issue head on
    - Reminiscent of Cooke

IMPLIED REPEAL

R v Fineberg (1968):

- Argued that s18 of the Crimes Act was ultravires as the murder occured off the coast of NZ
- Court expressed that NZ's lawmaking power was not as wide as the UK's and so could be challenged
- And as the Constitution Act had not been changed, New Zealand was still subject to the limits in it
- However the effect of section 3 meant that if Parliament passed a law for the peace, good governance etc. it would still be valid even if it had extra-territorial operation
- It still fell within this section of the Act and was therefore not ultravires
- If purported to ONLY have extraterritorial effect then it would have been invalid in theory
- You need to expressly repeal

Bruce Hines- disagrees

- Should have been seen as impliedly repealing s53

1973 - General Assembly passes Act that amends s53 - they have full power to make laws for NZ or having effect outside NZ

1986 - General Assembly becomes sovereign.
-n remaining power of the UK to legislate is removed
A lot repealed
NZ parliament emerged as sovereign
Peaceful revolution

- **May not override fundamental/constitutional statutes**
- **May need to expressly repeal earlier law or otherwise unambiguously make intention clear to override previous law**

Pora:

- Majority accepted that s2 (4) did not create a 2 week retrospective law, but went back to 1993
- Minority:
    - provisions irreconcilable and general/ambiguous words are insufficient to impliedly repeal dominant provision (eg, language, prominence, fundamental); Parliament must "speak plainly"
    - S 4 (2) - penal enactments do not have retrospective effect to the disadvantage of the offender notwithstanding…
    - Meant that parliament had anticipated the conflict, and that this would prevail
    - However, this is contrary to implied repeal

- Argument that implied repeal is a "judge made concept subordinate to legislative direction"
- Effect of implied repeal is not strictly to repeal but to make ineffective/override - doesn't exactly cease to exist
- Court must determine which is the leading provision, taking into account Interpretation Act, BORA, etc
- Have to explicitly say that they want to override
- Not necessary to say that human rights provisions will not be subject to implied repeal?

UK Thoburn:

- Common law created exceptions to the doctrine of implied repeal
- Classes of acts that can't be repealed by implication
- -constitutional statutes are those that:
- (a) condition the relationship between citizen—state; or
- (b) enlarge or diminish fundamental constitutional rights
- Must repeal by express words
- UK - only persuasive in NZ

Implied repeal checksheet:

Dicey and Wade: time is the only thing that matters because parliaments cannot bind future parliaments

Potential limits on implied repeal:
Minority in pora: court must determine which is the leading provision, taking into account interpretation act, BORA etc.
Thorburn determined a hierarchy of statutes: cannot impliedly repeal a constitutional statute

Entrenchment:

Whether it is legally enforceable - wade would say it isn't as parliaments cannot bind future parliaments
Legally courts potentially couldn't enforce as doctrine of parliamentary sovereignty?

Trethowan - manner and form provision of referendum was upheld
May be different is a sovereign parliament
Could have similar results in nz

Ngaronoa:

- Obiter: enforceability of the entrenchment provision - the authorities quoted indicate they favour that they are enforceable but would prefer to resolve on a real question of that issue
- Solicitor General argued in favour of manner and form provisions although also said that they did not apply in this case