PUBLIC LAWS

1. FITZGERALD V MULDOON [1976] 2 NZLR 615

Supreme Court Wellington
Wild CJ

The plaintiff employed by the Education Department sought a declaration against the Prime Minister that a press statement made by the latter on 15 December 1975 announcing the abolition of the superannuation scheme established pursuant to the New Zealand Superannuation Act 1974 was illegal, a mandatory injunction requiring the withdrawal of the announcement, and an injunction restraining him from continuing to instruct the Superannuation Board from taking any action to enforce payment of contributions under that Act. Somewhat similar declarations and injunctions were sought against the Attorney-General for alleged failure of the Crown to make contributions, and against the Controller and Auditor-General relating to the alleged failures of the Superannuation Board.

The learned Chief Justice held that on the proven facts the Prime Minister had not given instructions to the Superannuation Board and the State Services Co-ordinating Committee and various branches of the state services, but that these bodies had acted on the announcement. The plaintiff's contention was that the Prime Minister's announcement constituted the exercise of a pretended power of suspending laws and was illegal under and by virtue of s 1 of the Bill of Rights (1688).

Held:

Declaring that the announcement was illegal and adjourning all other matter in issue for six months:

1 The sovereignty of Parliament is such that it has the right to make and unmake laws and no person or body is recognised as having the right to override or set aside the legislation of Parliament (see p 622 line 35).

2 The public announcement by the Prime Minister made in the course of his official duties as Prime Minister was made "by regall authority" within the meaning of that expression where it occurs in s 1 of the Bill of Rights (1688) (see p 622 line 48).

Action

This was an action seeking a declaration that an announcement by the Prime Minister and the actions of persons acting thereon were illegal, and mandatory injunctions.

A. Muldoon's Perspective (Defendant)

Was that the superannuation was compulsory that employers had to pay for their employees, he saw it as communist and he wanted it to be a voluntary scheme. He raised his objection publicly during his campaign. He then won the election 29th November 1975 and was sworn in as Prime Minister in December 1975. He then makes a press statement to the affect that legislation would be put into effect that would be retrospective in effect and compulsory contributions would cease.

"PRESS STATEMENT BY THE HON R D MULDOON, MINISTER OF FINANCE

The Prime Minister, Hon R D Muldoon, today issued a statement on the future of the New Zealand Superannuation scheme. This was to give effect to National's election policy to abolish the scheme and refund all contributions to employees.

Mr Muldoon said that early in the next Parliamentary session legislation would be introduced to carry out the government's election promises relating to the New Zealand Superannuation Scheme. In particular the compulsory element in the law would be removed with retrospective effect."

B. Fitzgerald's Perspective

He sees that Muldoon's actions are a loss to him personally, he would lose money. So he issues proceedings against Muldoon in the hope that Muldoon's statement will be retracted, that it won't be treated as legally binding – he wants the scheme to be continued. An **INJUNCTION** forces whomever an injunction is against, would be an order of the court to stop/or keep doing something.

> *The first thing he was seeking (pg 8, l 35) was a finding from the court that the statement by the PM was unlawful.*
>
> *He used as the basis for his claim the Bill of Rights 1688 (Eng.) – it's actually passed in England and therefore isn't NZ Jurisdiction directly?*
>
> *Judge on the applicability of this case to NZ: (pg 11, l 5)*
>
> "It is a graphic illustration of the depth of our legal heritage and the strength of our constitutional law that a statute passed by the English Parliament nearly three centuries ago

to extirpate the abuses of the Stuart Kings should be available on the other side of the earth to a citizen of this country which was then virtually unknown in Europe and on which no Englishman was to set foot for almost another hundred years. And yet it is not disputed that the Bill of Rights is part of our law. The fact that no modern instance of its application was cited in argument may be due to the fact that it is rarely that a litigant takes up such a cause as the present, or it may be because governments usually follow established constitutional procedures. But it is not a reason for declining to apply the Bill of Rights where it is invoked and a litigant makes out his case."

(Pg10, l 50) It asserts a breach of s 1 of the Bill of Rights (1688) (Eng) the material part of which, as printed in 6 Halsbury's Statutes of England (3rd ed) 490, is in these words: "That the pretended power suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall".

*In this case, the declaration that contributions would/had ceased via **the press statement**, 15/12 and 21/12 by Muldoon. That there was also an instruction by Muldoon to the Superannuation people to stop trading.*

However, the instruction argument fell away, Fitzgerald's counsel conceded on the evidence that the instruction by Muldoon was no relevant (pg 9, l 45)

Press Statement – Did it suspend the laws OR execution of laws? (l 20) He said the compulsory aspect would cease from today (the day of the press release)

"The compulsory requirement for employee deductions to the New Zealand scheme will cease for pay periods ending after this date."

"Mr Muldoon said the government had already made it clear that the superannuation scheme finished on December 15 and the compulsory requirement for employee deductions and employer contributions ceased for pay periods ending after that date."

Muldoon went further than saying he was introducing legislation, he said it was "an unequivocal pronouncement that the compulsory super scheme had/will cease"

Did he act in Regal Authority? Well the Queen didn't give the press release – and the BOR applies to the exercise of power by kings/queens. BUT, CJ Wilder (pg 11, l 30)

"Because this pronouncement was made in the course of his duties as Prime Minister, it can be considered he was acting in regal authority (in substance)"

He's the Prime Minister

Leader of the Elected Government

Chief of the Executive Government

Commissioned by Royal Authority

Taken his Oaths

Entered onto his duties

Without the Consent of Parliament? The legislation that had been being talked about hadn't gone through parliament – parliament wasn't due to meet until June; so there was no opportunity for Parliament to consent to the change.

The consequence for satisfying the preceding few requirements is that Muldoon's statement was illegal (CJ Wilder pg 12).

2. PUBLIC LAW

A. Constitutional Law

Constitutional law concerns the distribution of powers between branches of government, the general principles governing their relationships and those guaranteeing the fundamental rights of citizens. Administrative law consists of the detailed rules for the control of government. In so far as they rest on constitutional principles, administrative law may be regarded as an aspect of constitutional law. (Feldman *English Public Law 20)*

- According to one wide definition, constitutional law is that part of national law which governs the system of public administration and the relationships between the individual and the state. (Bradley and Ewing *Constitutional and Administrative Law 21)*

A national constitution is about the questions of who exercises the power of the state, how they exercise power, how much can be exercised, whether other people and which people can stop them and how they do it. (Palmer *Bridled Power 27)*

- A constitution is the system or body of fundamental principles under which a nation is constituted or governed; it sets up the framework for government itself. It is a set of rules, structures and procedures.
    - NZ is a mature democracy, and has been steadily democratic 1950
    - The rules of a constitution may be written down in law, but NZ does not have a written constitution in that sense.
- The underlying constitution of any nation state includes all the principle under which the nation is governed. A constitution is a mixture of written rules, institutional structures, procedures and norms and understandings.
    - In particular, constitutional conventions are recognises customs, norms or practices that are generally understood to be important to government and worth following.
        - E.g. Cabinet is a vital actor but in law is no more than an informal committee.

New Zealand's constitution is made up of a variety of rules and understandings, and much of the content of these rules – deal with how the key players in NZ Constitution relate to each other. Our constitution is flexible and to a large extent un-codified, it is iterative, in a state of constant evolution. (Palmer *Bridled Power 28)*

New Zealand is a unitary State. It functions under a central government that has comprehensive jurisdiction over all parts of NZ and over all aspects of government. Responsible government facilitates democratic decision-making in a constitutional monarchy. The Crown acts always on, and in accordance with ministerial advice and responsible government is representative government. (Joseph *Constitutional and Adminstrative Law 40)*

a. AV Dicey on Constitution Law 55

Constitutional law as the term is used in England appears to include all rules which directly and indirectly affect the distribution or the exercise of the sovereign power in the state. It includes all rules which define the members of the sovereign power, all rules which regulate the relation of such members to each other or which define the mode in which the sovereign power or the members thereof, exercise their authority. As the term is used in England, includes two sets of principles:

1) Rules which are law – law of the constitution
    a. Laws in the strictest sense, rules that are enforced by the Court
2) Rules which are not law – conventions of the constitutions
    a. Consist of conventions, understandings, habits or practices which though they may regulate the conduct of the several members of the sovereign power, of the Ministry or other officials, are not in reality laws at all since they are not enforced by the Courts.

Or it can be seen as law of the constitution and conventions of the constitutions.

Dicey believes the Constitutional Lawyer has only to care about the written laws not conventions.

Palmer on Dicey – Completely Disagrees with Dicey, believes the political of law (conventions) hold equal importance as written law does.

2. The Constitution Act 1986

The Act first recognises the Queen (Sovereign in right of New Zealand) is the Head of State of NZ, and the Governor-General appointed by her is her representative in NZ. (Keith *On the Constitution of NZ 29*)

- Executive
    - The Act emphasises its parliamentary character
- Legislature
    - Parliament (the legislature) consists of the Sovereign and the House of Representatives. The members of the House are elected in accordance with the Electoral Act 1993 – and each Parliament has a term of 3 years.
    - Constitution Act provides for Parliament to have full power to make laws, and the Crown may not levy taxes, raise loans, or spend public money except by or under an Act of Parliament.
- Judiciary
    - Enhancing their independence, the Judges of the Supreme Court, The Court of Appeal and the High Court are protected against removal from office or reduction of salary.

ii. Public Law

In the traditional understanding it is about the distribution and exercise of power in the state, or public power. Public law in contemporary NZ parlance is both constitutional law and administrative law. At its broadest, public law in New Zealand is about policy outcomes. (Geoffery Palmer *The New Public Law 22)*

Political parties provide a vital link between the people, Parliament and the government. The competition for power of the state is organised by and through political parties. The importance of the political parties is recognised in the Electoral Act 1993. (Keith *31)*

i. Role of the Prime Minister/Ministers

PM is head of government, chairs Cabinet and has a general coordinating responsibility across all areas of government. By Constitution convention, the PM alone can advise the GG to dissolve parliament and call and election and to appoint, dismiss or accept the resignation of minister. Ministers powers rise from legislation and the common law (including the prerogative). (Keith *32)*

ii. Role of Public Service

Stated in some detail in legislation, particularly in the provisions of the State Sector Act 1988, the Public Finance Act 1989 and the Official Information Act 1982. Constitutional principles and that legislation support four broad propositions, members of the public service:

1. Are to act in accordance with the law
2. Are to be imbued with the spirit to the community
3. Are (as appropriate) to give free and frank advice to Ministers and others in authority, and, when decisions have been taken, to give effect to those decisions in accordance with their responsibility to the Ministers or others;
4. When legislation so provides, are to act independently in accordance with the terms of that legislation.

The bodies set up separately from government include regulatory agencies, providers of a wide range of services, state trading bodies, and supervisory, control or advice agencies.

1. English Public Law

Principles of the Constitution in the UK: (Feldman 34)

- Legislative Supremacy of Parliament
    - The Traditional Doctrine
        - Under the doctrine Parliament has unlimited legislative authority and it asserts no other institution enjoys independent legislative capacity.
- Rule of Law
    - Conceptions of the Rule of Law
        - In particular, no one could be punished at the whim of an official or court, a breach of law had to be established before the ordinary courts.
        - Secondly, everyone, including an official is subject to the same law, the rule of law means equality before the law or the equal subjection of all to the ordinary law of the land.
- Separation of powers
    - Theories of the separation of powers
        - Pure theory on the separation of powers that there are 3 distinct functions of government – legislative, executive and judicial which should be exercised by independent separate persons or institutions.

B. Constitutions

Many constitutions seek to avoid a concentration of power in the hands of any one organ of government by adopting a separation of powers (Bradley and Ewing 49)

The word constitution has 2 meanings: (Bradley and Ewing *47)*

- Narrow – A constitution means a document having special sanctity which sets out the framework and the principal functions of the organs of government within the state and declares the principle by which those organs must operate.
- Wider meaning - The whole system of government of a country, the collection of rules which establish and regulate or govern, the government.
    - That assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system according to which the community hath agreed to be governed Bolingbroke 1733.

Narrow, Written Complete	Wide, Unwritten, Customary
• Document w special legal sanctity • Symbolic and accessible • Often higher status and judicial enforcement • Necessary for federal jurisdictions • Often but now always contain "rights"	• Whole system of government and collection of rules • Made up of a range of various sources • Product of ordinary political processes • Restraints are informal and political • Both self-created and self-enforced.
Fixed and certain content, not flexible but does entrench human rights and is therefore more protection (minority rights)	Flexible and able to be modified, not rigid. Written amendments freeze rights at a particular time and those norms don't change.
In Practice, a written constitution does not contain all the detailed rules upon which government depends. Thus the rules for electing the legislature are usually found not in the constitution but in statutes enacted by the legislature within limits laid down by the constitution (Bradley and Ewing 47)	Knowing when something is unconstitutional in an unwritten constitution is much more uncertain. It becomes a question of definition/opinion, a value judgement that is "personal and subjective".
Normally the making of a written constitution follows some fundamental political event, instead in NZ/UK legislation has been passed to give in effect in law to what was made necessary by each political event. (Bradley and Ewing 47)	

There are 3 essential elements to a constitution. It is a code: (Godfery 57)

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

i. Māori Constitutional System (Godfrey 58)

The Māori constitutional system – like the Māori legal system is based on tikanga: the right, correct or just way of doing things. Tikanga is a normative system embracing

more than the strictly legal. It operates across politics, culture, religion, law and more. Tikanga is in turn, based on a series of fundamental values:

- Whanaugatanga – the centrality of relationships to Māori 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 Māori leadership
- Tapu/Noa – respect for the spiritual character of all things
- Utu – the principle of balance and reciprocity

Maintaining a balance in relationships (between people and the land etc.) is the normative principle in Māori Law and restoring balance when relationships are compromised is regulated by the constitutional values outline earlier. One means of restoring balance after wrongdoing is **muru**, a process where the whanau or hapū. The severity of the muru varies with the severity of the wrongdoing, but the governing rule and value is utu.

ii. New Zealand's Constitution

Underlying principle of democracy can be seen in our unwritten constitution: *The Queen reigns, but the government rules, so long as it has the support of the House of Representatives. (Keith 30)*

In theory, many parts of the NZ Constitution can be amended by legislation passed by a simple majority in Parliament, but in reality, that power is constrained (Keith 32):

- Some key elements of the electoral system can only be amended through a referendum or if 75% of Parliament agrees.
    - 3 Year Parliament Term
    - Membership of the Representation Committee
    - Re-division of electoral districts
    - Voting Age
    - Method of Voting

New Zealand is a constitutional monarchy in which political power resides in the people's elected representatives, the monarch still has significant legal powers, but those powers must be exercised by or through the elected Members of Parliament who form the executive branch of government. (Baxter and Mclean *This Realm of NZ 42).*

- We moved from a monarchy to a constitutional monarchy after George III attempted to act independently of his ministers.
    - This can be seen and set out in the Bill of Rights 1689

- Interestingly, there was no change to the formal site of constitutional authority. Executive authority (the force of law) remains vested in the Sovereign but is exercised by the Sovereign on the advice of Ministers or directly by Ministers and officials themselves.

a. When should a rule be regarded as constitutional?

A rule should be regarded as constitutional if it plays a significant role in influencing the generic exercise of public power – whether through structures, principles, rules, conventions or even culture (Palmer 89)

Summarise Joseph's rule from page 93 – he listed statutes including human rights

iii. Constitutional Sources

Keith	Joseph	M Palmer (89)

1. Constitution Act 1986
2. Prerogative powers of the Queen
3. Relevant NZ Statutes
  a. Electoral Act, Official Information Act 1982, NZBORA 1990
4. Relevant English and UK Statutes
  a. Magna Carta 1297, BOR 1688, Act of Settlement 1700
5. Decisions of the Courts
6. The Treaty of Waitangi
7. The conventions of the constitution
	1. Imperial legislation
	2. NZ Legislation
	3. Common Law incl:
	  a. Customary common law
	  b. Judicial precedent
	  c. Statutory interpretation
	4. Customary international law
	5. Prerogative Instruments
	6. Law and Custom of Parliament
	7. Conventions of the constitution
	8. Authoritative works
		1. Instruments of Legislature
		  a. Legislation (Imperial and NZ)
		2. Common Law of Courts
		3. Instruments of Judiciary
		  a. Rules of Court
		4. Instruments of Executive
		  a. International Treaties
		5. Constitutional principles and doctrines
		6.
		7. Standing orders of the House of Representatives
		8. International Treaties
		9. Instruments of the royal prerogative
		10. Rules and Procedures approved by Cabinet
		11. Rules of the court

1. NZ Legislation

2. Imperial Legislation

Iconic English constitutional sources were presumed to apply through inheritance from 1840. These included: Magna Cart, Petition of Right 1627, Bill of Rights 1688. However the Treaty of Waitangi caused complications for the reception of English Law, as the

treaty was ostensibly an instrument of cession and the common law distinguished between settled and ceded colonies. The common law held that in a ceded colony, British law did not automatically apply the way it would in a settled country. (Joseph 98)

- The problem with inheriting the British law, or applying them presumed settlement (93 Joseph) was that the Treaty existed and that this was an act of cession rather than settlement. NZ was already settled. So they codified the presumption says that Imperial laws applied English Laws Act 1908

Imperial Laws Application Act 1988

- The only Imperial Laws that are imported into NZ are those that are listed in Schedule 1 (as referenced in s3(1))
- However, we still use the Falkner Test/English Laws 1858 if common law was/is imported
- Imperial law (statutes and common law) may be amended, repealed etc. by domestic legislation

3. Common Law

Common law or case-law has an important role in supplying constitutional principles and doctrine. Although statutory law takes precedence over that of common/case law, it is a distinctive feature of the UK constitution that law can be and frequently is, also made by the judiciary. The law itself is conceived of in terms of the way in which it is applied in concrete situations. The words and reasoning of the judge therefore assume a fundamental importance and are literally themselves sources of law (Feldman, *English Public Law 118).* These can be seperated into 3 distinct sources within common law:

1. Customary Common Law – embrace constitutional conventions but have their legal source in legal decisions.
2. Judicial Precedent – judicial decisions arising in the ordinary course of litigation
3. Statutory interpretation – incidental source of constitutional law. (Joseph 119)

Declaratory theory of judging – didn't want to describe the common law as judge made because they weren't elected and didn't have Parliaments legislative authority/legitimacy, so they pretended that judges just declared what the common law actually meant, uncovered/discovered what the common law rule was rather than creating it. However, this is not a modern way of looking at the common law.

Although English Common Law is imported (and our regular common law is made), statute law can actually overrule common law (Feldman 118)

a. Falkner v Gisborne District Council 100

Hight Court 1995

Barker J

Facts: *The appellants owned residential properties fronting Wainui Beach, these were susceptive to erosion from the sea. Over many years the first respondent council and its predecessors had erected and maintained coastal protection works, for which the residents have been levied special rates. In 1972 the council resolved to discontinue further protection rights. Some residents wished to undertake protections works themselves. In the course of applying for consent to undertake the protection works, issues arose about whether the Crown had a common law duty to protect the realm from the inroads of the sea and whether the frontagers had a common law right to continue protecting their properties without the need for any consent.*

Issue(s):

a. *The appellants' claim of common law duty incumbent on the Crown to preserve the realm from the inroads of the sea*

b. *A similar claim to a common law right of frontagers to protect their properties from the sea*

c. *The extent to which either or both of a) and b) have been abrogated or modified by statute.*

Counsel for the residents (appellants): *Cited a large number of English Authorities in support of the proposition that there is a common law duty on the Crown to protect the realm from inroads of the sea and a corresponding right of citizens to protect their properties from the same.*

Counsel for the respondents: *Recognised that the Crown Duty was the historical bases for the powers conferred by statute on various agencies in relation to council protection in England but submitted that any such duty on the Crown is of an imperfect nature in that it cannot be enforced. The corresponding right of the residents to carry out their own works has been overtaken by developments in the law of private nuisance.*

Held: *Tribunal accepted that the duty was a part of the English common law, the question whether this duty and right became part of the laws of NZ under English Laws Act 1908 (and its 1858 predecessor). In order for this common law right and duty to apply in NZ 4 criteria need to be met:*

1. *Law existing in England on 18 Jan 1840*
    a. *√*
2. *Applicable to NZ*
    a. *Principle underpinning English Laws Act was one of full inheritance*
3. *In force in NZ before English Laws Act 1908 commenced*
4. *Part of the laws of NZ prior to 1988 Imperial Laws Application Act commenced*

a. *Re 3 & 4 Nothing to suggest the Duty and right was not applicable to NZ, both NZ and UK are surrounded by sea and susceptible to erosion.*

2. Tutorial Question 5:

In 1839, a person of Scottish descent, Andrew Apple, who lived and worked in London, took a case to the United Kingdom courts, challenging a decision of his employer to refuse to allow him to wear his kilt during his hours of employment. Ultimately, in Apple v Basil (a decision handed down in December 1839), the House of Lords held in his favour, and declared the common law of England and the United Kingdom as follows:

The common law has always protected the national identity of the Scottish people, because they are a minority within the United Kingdom and one of the discrete national groups that make up our Union. This protection must at very least extend to their right to wear their traditional dress and, accordingly, no employer should prevent them from doing so. The rule in Apple v Basil has never been invoked before a New Zealand court.

Charlie Cauliflower lives in Auckland, New Zealand and teaches law at the University of Auckland. Born in New Zealand, he is of Samoan descent. He continues his family's Samoan traditions and practices, including wearing a formal lava lava (or ie faitaga) on formal occasions such as while he teaches. However, the University has recently adopted a formal dress code that requires male teachers to wear tailored suits while teaching – meaning he is prohibited from wearing his ie faitaga.

Mr Cauliflower sues for damages. Assume that there are no other relevant statutory or common law rules.

(a) Does Mr Cauliflower have a common law cause of action before a New Zealand court which he can rely on when suing the University? Why or why not?

Because the case was decided before 1840, he's hoping the Imperial Laws Application Act 1988 s5 "Application of common law of England" – in order to find out if it was in action in NZ before 1988 we go to the English laws Act 1858 (because the replacement acts say that if it applied before it applies now – the new act maintains the position of the 1858 Act).

- *English Laws Act 1858 cl I. the laws of England as existing on the 14th January 1840, shall, so far as applicable to the circumstances of the said Colony of NZ, be deemed and taken to have been in force therein on and after that day (shall be deemed to be part of NZ law)*
    - *Law of England*
    - *Existing on 14 January 1840*
    - *Shall, so far as applicable to law of NZ*
- *Falkner Test*
    - *What is the mischief? (What is the problem the law is dealing with)*
        - *Broad*
            - *Minority Protection?*

- *Protection of National Dress*
- *Narrow*
  - *Scottish people protection National Dress*
- *Whether that mischief existed/was likely to exist in NZ?*
  - *If Yes, it's part of NZ Laws*
  - *If No, it's not part of NZ Laws*

(b) Assume now that the New Zealand Parliament enacted the Uniformity in the Workplace Act 2015 which provides, amongst other things: Notwithstanding any rule of the common law, employers are not required to allow members of national minorities to wear their national dress in the workplace. How does this affect your answer?

If statutes and common law are inconsistent, statutes will prevail because of parliamentary supremacy.

(c) Now assume, the rule in the Apple v Basil was not a common law rule but instead a provision of a UK statute, the Wearing of National Dress Act 1838 (UK): All minority groups have the right to wear their traditional dress at work and no employer shall prevent them from doing so.

How would you go about determining the case, and how would your answer to question (a) differ?

Under s3(1) Imperial Laws Act – imperial enactments listed in Schedule 1 to this act – only listed acts in Schedule 1 are NZ Laws.

Would your answer be the same if the case was brought in 1980, rather than today?

No it would be different because the Imperial Laws Act 1988 didn't exist yet and so you could bring in general legislation under the previous acts.

(d) Now, assuming the rule in Apple v Basil is part of New Zealand law, do you think the common law rule is "constitutional"? How would you assess this?

Joseph – believes in Statute not common law but really cares about human rights so would probably consider it constitutional.

Palmer – could be argued either way;

(e) In proposing the Bill that became the Imperial Laws Application Act 1988, the Law Commission said that:

"It is convenient too in that, once identified in this definitive way, [imperial legislation] can be further examined to see whether it fully meets the present day circumstances of New Zealand."

Consider whether imperial legislation deemed New Zealand law under the Imperial Laws Application Act 1988, such as Magna Carta 1297, should be reviewed, revised and re-enacted as Acts of the New Zealand Parliament. Why or why not?

4. International Law

Public international law is the system of law that's primary function it is to regulate the relations of states with one another. International law deals with the external relations of a state with other states; constitutional law deals with the legal structure of the state and its internal relations with its citizens and others on its territory. Both are concerned with regulating by legal process and values the great power that states yield (Bradley and Ewing 73)

The principal entities of the international political system are states, the system is loose and decentralised. Its principal components "sovereign" states retain their essential autonomy. International law is like other law – promoting order, guiding, restraining, regulating behaviour. States consider themselves bound by it, attend to it with a sense of legal obligation and with concern for the consequences of violation. A principal weakness perceived in international law is the lack of effective police authority to enforce it. Effective police authority deters violations of law but there are other methods to induce compliance. International law is observed partially because of the recognition by states generally of the need for order and of their common interest in maintaining particular norms and standards, as well as every state's desire to avoid the consequences of violation, include damage to its credit. (American Law Institute 80)

International law is made in two principal ways – by the practice of states 'customary law' and by purposeful agreement among state 'conventional law'.

The Eurocentric character of international law has been gravely weakened in the last sixty years or so and the opinions, hopes, and needs of other culture and civilisations are beginning to play an increasingly role in the evolution of world juridical thought. International law reflects first and foremost the basic state-orientated character of world politics. The equality of sovereign states has helped to create a system that enshrines values such as non-intervention in internal affairs, territorial integrity, non-use of force and equality of voting in the UN General Assembly. Together with the evolutional of individual human rights, the rise of international organisations marks perhaps the key distinguishing feature of modern international law. International law in the modern era cannot be understood without reference to the growth in number and influence of such intergovernmental organisations (these have now been accepted as possessing rights and duties of their own and a distinct legal personality. (Shaw *International Law 83).*

i. Sources of International Law

The principal sources of international law are treaties, international custom, judicial decisions and academic writings. An international agreement can have a variety of names: Treat (political importance), Agreement (regulate trade, fisheries etc. normally bilateral), Exchanges of Notes/Letters (two documents exchanged, normally bilateral), Convention (multilateral treaties – a framework convention establishes its own

institutional and decision making framework) (NZ Law Commission 75), Protocols (supplementary agreement).

ii. Treaties

A treaty is an international agreement between two or more states or other international persons, governed by international law. They serve the functions of distinct legal instruments available in national legal systems – constitutions, legislation, conveyancing documents and contracts and cover a wide range of subject matters (war/peace, disarmament, international trade and finance, international communications and transactions, human rights, labour conditions etc.) (NZ Law Commission 77).

Treaties come into force and take effect at the international level according to their own terms. In some cases that can be on signature, though normally signature means only an expression of intention to ratify the treaty in the future. Ratification is sometimes known as acceptance and approval (can often be referred to when states implement it in national law – but these are not the same). (NZ Law Commission 78)

A treat might have at least four major effects:

a) Creates rights and obligations simply for the parties (usually states but sometimes extending to individuals)
    a. UN Charter – obliges states to settle differences in a peaceful way
b) Have consequences for others (especially individuals) in their dealings with the parties
    a. Law regulating the public aspects of international trade and communications -Chicago Civil Aviation Conventions
c) Create rights owed to an individual by a state
d) Regulate rights between individuals with the state parties having little immediate interest
    a. Treaties governing private law relations

The rights and obligations under a) are for the most part given effect to through the prerogative or other foreign affairs powers of the executive in the day-to-day relations of states. By contrast treaties under d) operate almost solely within the national legal systems (including the courts) of the states that are parties to them. Once the relevant legislation (if any) has been enacted, the states parties generally have nothing to do with the treaty. The treaties under c) contrast with those under a) since they operate within the national legal systems and generally require new legislation. (NZ Law Commission 79)

- In NZ the making of a treaty is an executive act, Parliament although having constitutional control over the executive, it is only the executive that has the function to create obligations and assent to their form and quality (Attorney General for Canada 124)

a. *R v Miller v Secretary of State for Exiting the European Union 2017 (125)*

Subject to any restrictions imposed by primary legislation, the general rule is that the power to make or unmake treateies is execisable without legislative authority, and that the exercise of power is not reviewable by the courts – this principle rests on the dualist theory. The prerogative power to make treaties depends on two related proposiiotn; that treaties between sovereign states have effect in international law and are not governed by the law of any state, and although they are binding on the UK in international law, treaties are not part of UK law and give rise to no legal rights or obligations in common law.

It can thus be fairly said that the dualist system is a necessary corollary of Parliamentary sovereignty, and it exists to protect Parliament not the ministers.

iii. Customary International Law

Customary international law embodies the law of nations as acknowledged by international jurists, state practice, international treaties and conventions, and municipal law applied in national courts. (*Joseph* 120)

iv. Implications for NZ Law making

Transnational activities cannot function effectively without a degree of regulation and standardisation. This means they must be subject to international agreements or laws which bind members of the community of nations. As a party to a treaty NZ is obliged to comply with the relevant treaty provisions, and where necessary, give full effect to them in its domestic law. New Zealand's international obligations may not only require the enacting of dedicated legislation, they may also have an effect in the development of domestic legislation in general and even in already existing legislation. About a quarter of NZ public Acts appear to raise issues connected with international law. Any proposal to amend such legislation should prompt the question whether there is a treat which must be taken into consideration. (NZ Law Commission 74)

Any proposal for NZ to sign a treaty or to take binding treaty action must be submitted with the text of the treaty to Cabinet for approval. Domestic implementation must be completed before binding treaty action is taken, There are constitutional conventions that before the exec unequivaocally enters a major treat, it is presented to the House for consideration (but not approval or veto) and it gives the parliament by convention an ability to throw a judder bar in front of the treaty making process and delay ratification.

v. International and Municipal Law (Oppenheim 122)

At opposing extremes are the dualist and monist schools of thought, though this doctrinal dispute is largely without practical consequence.

- Dualist – International law and the internal law of states are totally separate legal systems. Being separate systems, international law would not as such form part of the internal law of a state to the extent that in particular instances, rules of international law may apply within a state, they do so by virtue of their adoptions by the internal law of the state and apply as part of that internal law and not as international law.
- Monist – The two systems of law are part of one single legal structure, the various national systems of law being derived by way of delegation from the international legal system.

International law imposes obligations upon and grants rights to states. A State is within its right to not exercise a right, but must fulfil their obligations under international law or risk being held responsible.

5. Prerogative instruments

Formal Instruments: Although this source is principally of historical interest, the Queen retains a constituent power to legislate for the Crown in the right of NZ. The office of Governor-General and the Executive council are constituted by prereogative instrument known as the letters patent. (Joseph 129)

Wide range of powers including formal law-making powers: The Royal prerogative refers to those powers left over from when the monarch was directly involved in government, powers that now include making treaties, declaring war, deploying the armed forces, regulating the civil service and granting pardons. Prerogative powers are exercised today by government ministers or else by the monarch personally acting in almost all conceivable instances, the definng characteristic of the prerogative is that its exercise does not require the approval of Parliament. (Poole 129)

6. Law and Customs of parliament

The basics of Parliamentary Procedure (McGee 132):

- Statute
    - Authority for the existence of Parliament and the House of Representatives are derived from statutes e.g. Constitution Act 1986, Electoral Act 1993, The Bill of Rights 1688 etc.
- Standing Orders
    - Primary Rules of the house – providing for the conduct of its procedures and for the exercise of its powers
    - They are adopted solely by the house and are not intended to diminish or restrict the rights, privileges, immunities and powers otherwise enjoyed by the house.
- Leave of the House

    - Sometimes it is desirable to depart from Stranding Orders which can be done by granting leave
- Sessional orders and orders of continuing effect
    - Other temporary or limited orders
- Rulings of the Speaker
    - Where Standing Orders don't cover a situation, the Speaker looks at previous rulings by Speakers and established practice to decide interpretation of SO or unexpected situtations.
- Points of order
    - These usually precede Rulings of the speaker
- Practice (conventions)

7. Authoritative works

No textbook has intrinsic authority as a source of law, no matter how eminent the author a text has authority only to the extent that it accurately records the law as enacted by Parliament or decided by the courts. A change in legal professional practice has made it increasingly common for living authors to be quoted in an argument and cited in judgements – references to leading texts has become commonplace in cases involving constitutional or administrative law questions. (Joseph 134)

8. Constitutional Conventions

The working of our government in conditioned by many practices and some have the status of 'conventions of the constitution'. The modern conception of convention via Lord Wilson of Dinton "constitutional conventions are the main political principles which regulate relations between the different parts of our constitution and the exercise of power but which do not have legal force" or Jaconelli "conventions are social rules of a constitutional character which govern the relations between poltical parties or the institutions of government, regulating the manner in which government is to be conducted. (Turpin, Tomkins and Sap 138)

Conventions provide flesh which clothe the dry bones of law, they make the legal constitution work and they keep it in touch with … modern society basically. Dennings

Conventions, that is to say, are rules and are part of the constitutional order, interwoven with but distinguishable from rules of law. On this view, a breach of a constitutional convention is every bit as unconstitutional as a breach of constitutional law – the difference lies in the nature of the enforcement and of the sanction. Conventions are non-legal but binding rules of constitutional behaviour, their enforcement is poltical rather than legal and is the responsibility of poltical bodies such as the House of Commons. (Turpin, Tomkins and Sap 138)

Customary/social rules which serve necessary constitutional purpose

- Not rules of law, not judicially enforceable though other effective sanctions may exist

Restrain and modify legal power

- Transform the monarchy into a constitutional monarch and promote responsible government

Regular relations between different parts of the constitution and the exercise of legal power

Sometimes facilitate constitutional development without formal change

Conventions as identified by (Joseph 137):

- Ministerial advice
- Appointment of the Prime Minister
- Ministerial appointments
- Parliamentary ministry
- Resignation of a ministry
- Caretaker government
- Individual ministerial responsibility
- Collective ministerial responsibility
- Ministers conflicts of interest
- Rule against oppressive legislation
- Rule against legislative judgements
- 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
- Cardinal Convention – Monarch acts on advice of ministers
- Caretaker government; ministerial responsibility, speaker impartiality

a. How do conventions arise?

Whether a convention exists is sometimes a matter of uncertainty, Sir Ivor Jennings in his The Law and the Constitution (5th edn 1959 p 136) suggested the following approach (but it's not authoritative):

1. What are the precedents?
    a. Do we have a practice?
    b. Is there a pattern of behaviour?
2. Did the actors in the precedents believe that they were bound by a rule?
    a. Whether the actors believe its obligatory to follow the rule

b. Morally bound to act in accordance
c. Is it binding on me?

3. Is there a reason for a rule?
    a. What's the purpose for the convention?
    b. What does it add to the constitution – evaluate using definitions.
    c. Is it constitutional?

A single precedent with a good reason may be enough to establish a rule, a whole string of precedents without reason won't establish themselves as a convention unless the persons regarded themselves as bound by the rule. (Turpin, Tomkins and Sap 138)

The issue with establishing a convention is that many conventions that are acknowledged to exist are not always precisely formulated and the limits of their applications may be unclear. (Turpin, Tomkins and Sap 139)

Many conventions are the result of a gradual hardening of usage over a period of years or generations. Jaconelli suggests that their essence is bound to subsist in a stream of concordant actions and expectations deriving from such actions. (Turpin, Tomkins and Sap 139)

How do we know a convention when we see it? There is no clear rule of recognition, but there is the Jennings's test for establishing conventions.

1. Is this good?

On one hand this imprecision makes for a flexibility that allows a congruous development of the constitution in response to experience and changes in society. However, Peter Madgwick and Diana Woodhouse have noted that the imprecision and flexibility of conventions means that it is difficult to determine or appeal to them against people in power. (Turpin, Tomkins and Sap 139)

Both elements are important: for a constitutional convention to have been established it is not enough that a repeated course of behaviour has occurred, It is necessary in addition, that such behaviour must be expected to recur (Turpin, Tomkins and Sap 139).

b. Why are conventions not legally binding?

Principal reason for this is theoretical, as conventions are the products of neither statute or judge made rules. Constitutional precedents are no more than series of event from which insights into the constitution may be derived. Arguments that a convention may crystallise into law through evolution were rejected by the Supreme Court of Canada.

A breach of convention can carry a significant poltical sanction in NZ as seen in the events following the 1984 election. The legal outcome may be regarded as an indication that the poltical consequence of breach of a convention will, at time, include legislation clarifying and thus, reinforcing the power of the principal actors to apply constitutional values.

Professor Hogg argues that the effect of a court-granted remedy for a breach of convention would be the judicial transformation of a conventional rule into a legal one.

What is their force and their constitutional authority -

a. *Attorney-General v Jonathan Cape Ltd [1975] 142*

Facts: *C was a cabinet minister from 1964 to 1970, throughout the period C kept diaries which contained details of discussions held in cabinet and in Cabinet committees and disclosed the differences between cabinet ministers on particular issues. The diaries also contained details of communications made between C and senior civil servants together with criticisms of certain civil servants. They were kept with the expressed intention of publication at a later date, the fact that C was keeping a diary intended for publication was known to C's colleagues in the cabinet. After C's death in 1974 a firm of book published wanted to publish the diaries.*

Issues: *The Attorney-General brought two actions (1) against that book publishers and (2) against the newspaper seeking permanent injunctions restraining them from publishing the diaries or extracts therefrom.*

AG Claim: *In support of his claim he contended that all cabinet papers and discussion and proceedings were prima facie confidential and that the court should restrain any disclosure thereof if the public interest in concealment outweighed the public right to free publication. The basis of that contention was that the confidential character was derived from the convention of join cabinet responsibility whereby any policy decision reached by cabinet had to be supported by all members of cabinet whether they approved or not.*

Held:

One scholar has said:

> *Conventions are a particularly important source of [New Zealand's] constitution and they are also crucial to understanding how the constitution functions. … An observer of the [New Zealand] constitution would build up a very incomplete account of its workings if attention was given only to legal rules, since conventions, in the words of one commentator, 'provide the flesh which clothes the dry bones of the law.'…*
>
> *The difficulty in defining conventions is mainly because they encompass a wide range of practices, some of which are a lot more certain than others. … In some situations it may be difficult to know whether a practice has actually been recognised as a convention. … Conventions vary, from well-established practices which will be applied with predictable outcomes to rather vague guidelines which are open to interpretation in the way they are applied. … [A] more extensive process of juridification, [that is, legal enforcement] or codification would serve to clear up other ambiguities surrounding the way conventions apply.*

In the light of the above quotation:

(a) explain the role and function of constitutional conventions within New Zealand's system of constitutional law; and

(b) discuss whether any or all of New Zealand's constitutional conventions ought to be codified in statute or otherwise made legally enforceable.

Reference the quote – The author thinks… or give a theory and say the author agrees or disagrees with it. Say maybe in your intro if you agree with it or not.

They say that the intro should signpost, and state your thesis statement. Can do more subheadings – under a/b -

9. *Treaty of Waitangi*

In a later edition of his text PA Joseph includes the Treat in his list of constitution sources "The Treaty's institutional presence permeates the processes of executive government." (145) but it has an ambivalent status, perceivable, whether or not enforceable in law.

Matthew Palmer describes the place of the Treaty as "the Treaty of Waitangi is a written symbol of commitment to the rights of a minority who ground their claims in their cultural identity" (145) Is already a constitutional document – it affects how public power is exercised in NZ.

iv. Legal Consequences of the unwritten constitution (Bradley and Ewing 49*)*

The absence of a written constitution is widely considered to make it difficult and even impossible for the courts to be entrusted with the protection of such rights against legislation by Parliament – however the Human Rights Act 1998 has significantly extended the role of the courts in protecting human rights.

- What is certain is that the absence of a written constitution means that there is no special procedure prescribed for legislation of constitutional importance.
- Referendums about the government/big changes are held because they seem desirable or necessary on political grounds, not because of a constitutional obligation. It would seem there is no aspect of our constitutional arrangements which could not be altered by an Act of Parliament.
- The absence of a written constitution affects the source of constitutional law. We looks to Act of parliament and also to judicial decisions, which settle the law on matters such as the principles of judicial review that have never been the subject of comprehensive legislation.
    - Accordingly the absence of a written constitution means that on many matters British government depends less on legal rules and safeguards than upon political and democratic principles.

v. Palmer and Butler: A Written Constitution for NZ (60)

Propose a written codified Constitution for NZ – Constitution Aotearoa anchors the core branches of government: parliamentary, executive and judicial. It sets out the rules around cabinet government, affirms the central importance of free, fair and democratic elections, guarantees fundamental civil and political rights, enhances the rule of law and the Position of the Treat and provides mechanisms for 10 yearly reviews of the Constitution.

A constitution is "the system or body of fundamental principles according to which a nation, state or body politic is constituted and governed." Believe that a constitution is the foundation of law and politics in any country – it should be easy to find, so that people know the basic rules by which they are governed, and public power is regulated.

a. Current Issues with NZ Customary Constitution:

Accessibility, overtly flexible, dangerously incomplete, obscure, and fragmentary, weak rule of law – Parliament can change things way too easily.

b. Proposition

- Proposing that House of Representatives have terms of 4 years instead of 3 – might allow for legislation to be thought about more deeply because of less rush.
- A new Head of State, a New Zealander who lives here who would be selected by a free vote in the House of Representatives but NZ would remain in the commonwealth.
- Accessibility and certainty
- Education – provide a better framework to learn about civics
- Rule of Law – Judicial Independence and Impartiality, and that Parliament can't just change the constitution
- Democratic Accountability – not just elections
- Transparency
- Protection for rights of citizens – Treaty and NZBORA are better observed
- National identity and the preservation of the elements of the system that have served NZ well
- Protections against the abused of power
- The Constitution belongs to the people

Tutorial 2

Think about what you are being asked to do and how you might approach your answer, namely:

- What general type of question is being asked (eg, problem question; short answer; essay; etc)?

- What type(s) of answer is being sought (eg, description of event, state of affairs or legal doctrine; analysis of problem and advice on likely legal outcome; advice to person or office holder about legal issues which might arise or how to approach a particular scenario; critique or evaluation of some existing event, state of affairs or legal doctrine; opinion on how something should be changed or desireability of adopting an alternative approach; critical assessment of the accuracy or completeness of someone else's description of an event, state of affairs or legal doctrine; etc)?
- Is the answer sought primarily descriptive (talking about things as they are) or normative (talking about how things should be)?
- Is the answer sought primarily doctrinal (based on rules, precedent, etc), or conceptual (more abstract ideas and principles)?
- What components or ingredients would you need to include in your answer (eg, issue, law/rule, application, conclusion; factual explanation; factual analysis; legal analysis; description, comparison, pros and cons, conclusion; etc)? And what component(s) or ingredient(s) requires the most work or treatment?
- What types of sources or authorities will you need to rely on (cases; statutes; official documents; scholarly writing; etc).

Descriptive: Explaining what the current state of affairs is
Normative: Analytical – Should it be like that?

Entrenched – Need more than a simple majority to change. Supreme – laws can be disagreed/dismissed if they conflict with the rights/duties set out in the Constitution.
Complete – all texts of all laws that we wanted in the constitution

3. CONSTITUTIONAL PRINCIPLES

Values or key concepts: inform constitutional rules but are normally not justiciable.

Examples:

Traditional Three-Fold Statement (Feldman 34)

- Parliamentary Sovereignty
- Separation of Powers
- Rule of Law

Underlying principle of democracy (Keith 30)

Bruce Harris (149) 16 of the more important principles to give the system of government its operational effectiveness:

1. Rule of Law
2. Legislative, executive and judicial respect for the Treaty
3. Parliament and the executive are democratically elected
4. Continuation of supreme law-making power of parliament
5. Parliament controls raising of taxes, govt. borrowing and public money
6. Parliament is free to manage itself
7. Governor-General normally acts on the advice of ministers
8. Executive functions of govt. are carried out by many offices and agencies
9. Operation of government demands positive law enabling exec. To deal with emergencies
10. Exec is accountable to parliament through the ministers of the crown
11. Courts many oversee government action through judicial review
12. Exec. Government is accountable through integrity branch of government
13. Judicial independence
14. Courts are accountable for the exercise of their powers
15. All aspects of NZ government are subject to NZBORA
16. International law increasingly influences domestic constitutional law structure

Principles are manifest in or associated with positive law, but do not in and of themsleves have formal status in the community as justicable law. Tension between constitutional principles is inevitable. The constitutional system facilitates attempted resolution of any conflicts by providing either that one principle such as parliamentary supremecay should prevail over other, or by leaving the courts to decide, ostensibly for justifiable reaons, why one principle should preavail over another in a particular context (Harris 150) On their face there is nothing on the principles that show hierarchical preference, and which one would trump the other in any particular circumstance.

A. Democracy

Democracy suggests that everyone affected by a decision has a right to participate in the decision-making process. Democracy is government of the people, by the people, for the people. Democracy is fundamentally a struggle over power, viewed from the centre of institutions of power; democracy appears as a set of structures where interests are represented, and participation enabled through institutionalised channels and by means of voting systems. This is incumbent democracy (Morrison 152).

With formal incumbent democracy, the focus is on frameworks for decision-making while more radical democracy is concerned with process. This connects to the distinction between the 'market' and the 'forum'. With liberal, representative or incumbent democracy there is a market for choices and the most popular policy or poltical part will win the competition for votes. (Morrison 152).

In contrast a more deliberative approach may well be concerned more with preference building. The emphasis here is on 'voice' and which argument is most persuasive in the forum of ideas and deliberation. It is an integrative as opposed to aggregative approach which moves beyond simply counting. (Morrison 152).

Morrison – it's an inversion of the long standing idea that the rulers job to govern and the peoples job to obey.

Professor Sandel 'Democracy' BBC Radio 4

- Fundamental principle but definition is still contested
    - Equality of vote/electoral process
    - Accountability/right to change the government
    - 'Doing the right thing'/Protection of (minority) rights
    - Public forum/place for public debate

B. Parliamentary Sovereignty

Parliamentary sovereignty is a simple concept – to paraphrase Dicey, 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. Implicit in this statement is there is no difference between ordinary or constitutional law because parliament can repeal all legislation. It is poltical, not legal factors – including; one hopes, legislators' own sense of morality – that operate as the restraining force. (Mark Elliot 154)

In the UK, in the absence of a written constitution, there in nothing to tell us what powers Parliament has; and there is equally nothing to tell us what powers (if any) Parliament lacks. It appears that the constitution fails to perform the twin functions – of allocating and limiting authority – that usually result in something other than legislative sovereignty. (Mark Elliot 154)

Unlike written constitutions, our unwritten constitution does not tell us what powers Parliament has or lacks, however, while unconstrained law-making capacity is presumed (based on historical constitutional settlement), generally the principle is not contested by the courts.

While ostensibly unconstrained, parliamentary authority may have some implicit or practical limits. Constitutional Fundamentals (155)

There is a note that a principle such as judicial review could possibly not be subject to parliamentary sovereignty as the judges could refuse to carry out parliamentary orders. However, neither the courts nor Parliament are anxious to provoke a constitutional crisis and exercise mutual self-restraint – it could be interpreted that although Parliament possesses unlimited legislative power, this does not mean that Parliament is in a position to exercise the full width of that authority. (Mark Elliot 155)

C. Separation of Powers

Three sorts of powers: legislative power, executive power over the things depending on the right of nations, and executive power over the things depending on civil right. When legislative power is united with executive power in a single person or body there is no liberty, because the same person that makes tyrannical laws will execute them tyrannically. (Montesquiue 157)

The existence of different parts of government, exercising different powers, is a key part of New Zealand's constitution. The principle lying behind this is called the 'separation of powers' a doctrine advocated by the French Political philosopher Montesquiue. Practically, we cannot have either complete separation or complete fusion of powers. Some coordination of various administration is necessary which would be impossible with complete separation of powers. However complete fusion could produce tyrannical government. As set out in the Constitution Act 1986, our system has 3 separate branches of government in the classic 3 way division between legislative (Parliament), the Executive (Cabinet and Public Service) and the Judicial (the courts). (Palmer and Palmer 159).

Kavanagh rejects the traditional 'pure view' of the separation of powers based on a strict separation between three mutually exclusive functions. It argues instead we should think of the separation of powers as requiring two dimensions, a division of labour between three branches of government where each branch plays a distinct role in the constitutional scheme and a requirement of adequate checks and balances between the branches – the dual dimensions of the separation of powers – division of labour and checks and balances are underpinned by the value of coordinated institutional effort in the service of good government. (160 Kavanagh)

Modern theory 'rejects the one branch, one function idea"

- Would a system of checks and balances undermine independence and separation of powers?
- The triparte separation is archaic because it doesn't account for other sources of power – in a modern state, the fourth branch of the 'administrative state'.
- It must be remembered that separation of powers was forged as a foundational principle of constitutional government at a time when the prevailing concern was to limit power and curb its abuse.
- Pure theory of separation of power cannot deliver on the promise of containment of government function because it is radically detached.

The efficient secret (Baheot 158)

D. Rule of Law

Constitutional law is dominated by three principles, the legislative supremacy of Parliament, the rule of law, and the separation of powers. (Feldman 163). Joseph ties the concept of the rule of law to our monarchical system and contends it is an essential organising principle of our legal system.

Mentioned very rarely in legislation but is in: Senior Courts Act 2016, Policing Act 2008 s8, Lawyers and Conveyancers Act 2006 s 4.

Conformity to the rule of law is one among many moral virtues which the law should possess. It is necessary condition for the law to be serving directly any good purpose at all. (Raz 190)

Without formal legality, democracy can be circumvented (because government official can undercut the law) without democracy, formal legality loses its legitimacy (because the content of the law has not been determined by the legitimate means). (Brian Z Tamanaha 192)

1. *But what is the meaning of 'Rule of Law'*

F.A. Hayek rule of law: stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand – rules which makes it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of the knowledge. (188)

The rule of law: in its broadest sense this means that people should obey the law and be ruled by it. But in political and legal theory it has come to be read in a narrower sense, that the government shall be rules by the law and subject to it – 'government by law and not by men'. The doctrine of the rule of law does not deny that every legal system should consist of both general, open and stable rules and particular laws, an essential tool in the hands of the executive and judiciary alike. It is one of the important principles of the doctrine that *the making of particular laws should be guided by open and relatively stable general rules.* Therefore, if the law is to be obeyed *it must be capable of the guiding the behaviour of its subjects.* It must be such that they can find out what it is an act on it. (Raz 188)

Waldron pg 166

Rule of law is proclaimed a virtue as is distinguishes the liberal democracy from totalitarian rule – but it is an ambiguous concept. During the 1981 Springbok tour the rule of law meant law and order. In 1978 the concept was substantive where the Attorney-General stayed 170 trespass prosecutions and the opposition alleged breach of rule of law. In 1982 when Muldoon's government announced it would pass special legislation if the Tribunal withheld water rights, and lawyers and opposition alleged breach of law (condemning legislation to reverse judicial decision). There are seven distinct uses that are all ambiguous or incomplete (Joseph 168):

- Government according to law
- Common law jurisdictions
- Minimum of state intervention
- Fixed and predictable rules of law controlling government action
- Standard of common decent and fair play in public life

- Principle of democracy, freedom and equality

Matthew Palmer SR suggests that the third ultimate principle underlying the NZ constitution is the rule of law, supported by the independent of the judiciary – it was notoriously difficult to define. The notion that there is some distinctly separate or objective meaning to law that has independent existence underlies every definition of the rule of law – certainty and freedom from arbitrariness. The meaning of a law must to some extent be independnt; independent of those that make the law, and independent of those who apply it, independent to whom it is applied, and independent of the time at which it is applied. (169 Palmer SR)

> When we use this conception, it becomes clear that the separation of powers is a necessary condition for the rule of law. If the lawmaker has the unilateral and untrammelled power to change the law, or to apply it in a particular case then the law has no expression independent of the intention of the lawmaker. The rule of law is only upheld when the lawmaker is not free to apply, and thereby determine the meaning of the law.

In reality in NZ the rule of law is sometimes used as a political catchphrase, and clearly has general public support. Lack of clarity in its meaning – by the Muldoon government to mean law and order in relation to the 1981 Springbok Tour, against the Muldoon government to mean non-reversal of judicial decisions by legislation. (169 Palmer SR)

The reason Matthew Palmer ranks rule of law third is because of a concern about how well entrenched the rule of law is in popular understanding and support. (169 Palmer SR)

In many examples, aspects of the rule of law were trumped by constitutional norms that run more deeply in New Zealand constitutional culture:

- Foreshore and Seabed Act 2004 – parliamentary sovereignty reinforced by egalitarianism and authoritarianism
- Electoral Amendment Act 2004 – parliamentary sovereignty in the context of representative democracy reinforced by authoritarianism and pragmatism
- Appropriation Act 2006 – parliamentary sovereignty in the context of representative democracy, reinforced by authoritarianism and pragmatism

The other 3 constitutional norms I characterise as fundamental are each reinforced by salient dimension of NZ constitutional culture: representative democracy by egalitarianism, parliamentary sovereignty by authoritarianism, and an evolving unwritten constitution by pragmatism. (170 Palmer SR).

Governments wield considerable power. Constitutions are concerned with the allocation of power and the control of its exercise. The doctrine of the rule of law is concerned with the later. (Allen and Thompson 181)

- Bracton in his famous book on English law which was written in the first half of thirteenth century, held this theory and deduced from it the proposition that the king and other rulers which were subject to the law. He laid it down that the law bound all members of the state, whether rules or subjects, and that justice according to law was due both to ruler and subject.
- The rise of the power of Parliament in the 14th and 15th centuries both emphasized and modified this theory of the supremacy of the law. The law was supreme, but Parliament could change and modify it.

Thus, the modern doctrine of the rule of law has come, as a result of this long historical development to mean the supremacy of all parts of the law of England, both enacted and unenacted.

a. AV Dicey Three Meanings of Rule of Law (Dicey 183)

1) Absence of arbitrary power on part of the government

The absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative or even of wide discretionary authority on the part of the government.

2) Every man subject to ordinary law administrated by ordinary tribunals

Equality before the law, or the equal subjection of all classes to the ordinary law of the land administrated by the ordinary Law Courts; the rule of law in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals.

3) General rules of constitutional law are results of ordinary law of the land

May be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts, that, in short, the principles of private law have with us been by the action of Courts and Parliament so extended as to determine the position of the Crown and of it's servants; thus the constitution is the result of the ordinary law of the land.

i. Disagreement with Dicey

It is easy to dispute aspects of this account. Many statutes in England confer wide discretionary powers on public authorities and officials; it may sometimes be hard to distinguish such powers from the arbitrary authority incompatible with adherence with the rule of law. Further, Dicey was wrong to argue that civil liberties are more securely protected in English law merely because they emerge from the decisions of the courts in particular cases. In principle they may be guaranteed as strongly by written constitutions, in practice their effective protection depends on the interpretation and application of the constitution by the courts.

2. *Formal v Substantive Conceptions of the Rule of Law (Craig 171)*

Formal: Formal conceptions of the rule of law address the manner in which the law was promulgated, the clarity of the ensuing norm and the temporal dimension of the enacted norm. Formal conceptions of the rule of law do not however seek to pass judgement upon the actual content of the law itself.

Substantive: Those who believe in substantive conceptions of the rule of law they accept that the rule of law has the formal attributed mentioned above but take the doctrine further. Certain substantive rights are said to be based on, or derived from, the rule of law. The concept is used as the foundation for these rights, which are then used to distinguish between 'good' laws which comply with such rights and 'bad' laws which do not.

The fact remains that government officials worldwide advocate the rule or law, and equally significantly, that none make a point of defiantly rejecting the rule of law. Explicit and implicit understandings of the rule of law suggest contrasting meanings – some believe that the rule of law includes protection of individual rights – some believe that democracy is part of the rule of law. Some believe the rule of law is purely formal in nature, requiring that only laws be set out in advance in general clear terms, and be applied equally to all. Others assert rule of law encompasses the "social, economic, educational and cultural conditions under which man's legitimate aspirations and dignity may be realised" Dissidents point out that authoritarian governments that claim to abide by the rule of law routinely understand this phrase in oppressive terms. The rule of law thus stands in the peculiar state of being the preeminent legitimating political ideal in the world today, without agreement about precisely what it means. (BrianZ Tamanaha 167 -Gives 6 alternative meanings)

It is not surprisingly that one of the principal advocates of the formal conception of the rule of law, Raz is also a leading exponent of legal positivism – the complete opposite than Dworkin. Dworkin two different conceptions of the rule of law: (Craig 196)

- Rule book conception, formal rule of law – nothing about the content of the laws but merely insists that the government should never exercises power against individuals except in accordance with rules which have been set out in advance.
- Rights conception – insists that moral and political rights be recognised in positive law – it does not distinguish between the rule of law and substantive justice.

In Dworkin's theory there is no place for separate concept of the rule of law as such as all. On this view, the rule of law simply captures the theory of law and adjudication which he espouses.

a. *Entick v Carrington Court of Common Please*

Entick is still cited by other courts, nearly 250 years after it was decided, primarily the Entick principle: any interference with private liberty or property by the police is unlawful unless it can be justified either 'by the text of the statute law, or by the principles of common law'.

1765 Lord Camden CJ

Facts: The plaintiff, John Entick, declared that the defendants Nathan Carrington and three others, messengers in ordinary to the King, on 11 Nov 1762, at Westminster, in Middlesex, with force and arms broke and entered his dwelling-house in the parish of St Dunstan, Stepney, continued there four hours without his consent and against his will, all that time disturbed him in the peaceable possession thereof, broke open the doors to the rooms, and the locks, iron bars, etc, thereto affixed, broke open the boxes, chests, drawers, etc, of the plaintiff in his house, broke the locks thereto affixed, searched and examined all the rooms in his dwelling. house and all the boxes, etc, so broken open; read over, pried into, and examined all the private papers, books, etc, of the plaintiff there found, whereby the secret affairs, etc, of the plaintiff became wrongfully discovered and made public, and took and carried away 100 printed charts, 100 printed pamphlets, etc, of the plaintiff there found, to the damage of the plaintiff, 2,000 pounds.

Defendant's Theory: It was Thought since the King/Government had said that they wanted them to do that they were allowed to – not a mere private citizen and was authorized by the government for public interest

Held: The power claimed by the government must be granted by some exception in positive law, the government is held to the same standard as every other citizen. If it would be a tort by a normal citizen, unless the government is specifically authorized, it will be a tort by the government.

i. Tutorial Question Entick v Carrington

HuaWhenua City has been plagued with gang battles and violence, with many residents being so terrified by the gang warfare that they are too afraid to leave their houses. Mayor Areti Apple is determined to take a stand against the problem and directs his Council officers to take whatever steps necessary to ensure that calm is restored on the streets of HuaWhenua.

Officer Barry Basil takes the initiative and when he sees a Mongrel Mob member, Charlie Cauliflower, in the street wearing his gang patch. He flashes his Council officer badge and orders him to remove and hand over his jacket. The only statutory power to seize property available to Council officers is section 164 of the Local Government Act 2002.

> *This power allows them to "seize and impound property that is not on private land if the property is materially involved in the commission of an offence" (defined as a breach of a bylaw).*

Presently, because of freedom of expression concerns, the Council does not have any bylaw regulating what clothes people can wear in public. Oblivious to these issues, Cauliflower is anxious to ensure he complies with the directions of the officer and

reluctantly hands over his jacket. Officer Basil then burns the jacket in a nearby 40-gallon drum. Cauliflower is aggrieved and sues Officer Basil in tort (conversion) for the cost of the jacket.

Government acted unlawfully and would be liable for the tort of conversion - The law that could give the officer authority to do what he did was s 164, but it would have had to been involved in the commission of the offence (and wearing gang insignia was not) – and s 164 gave them power to seize or impound, not to burn and destroy the jacket. Although the mayor might have told his officers to do what he needed to do, but that doesn't make it positive law which is necessary in Entick v Carrington.

Officer Diane Daikon assists Officer Basil in securing the scene. She is aware that government and Council officers are entitled, under a long-standing common law rule, to take steps to protect citizens against fires in public places. She quickly installs a cordon around the burning drum to ensure that no-one in harmed. In doing so, she ends up momentarily locking a local student, Eru Eggplant, in a dead-end street. This causes Mr Eggplant to be late for his exam at the university. He is aggrieved and sues Officer Daikon in tort (false imprisonment) and seeks compensation.

Governments actions were lawful – has common law rule support that gives extra authority than a private citizen would have. There was a fire in a public place and acted to protect citizens, she was acting within its scope.

Meanwhile, Officer Freddie Fiddleheads is on parking duty. He sees that another Mongrel Mob member, Gerry Grape, has parked his car in a public street on yellow lines while watching the fracas unfold. Officer Fiddleheads is aware that parking on yellow lines is in breach of the HuaWhenua Parking Bylaw, clause 67:

> *It is an offence under this bylaw to park a vehicle on yellow lines indicating that stopping, standing or parking is prohibited.*

Office Fiddleheads quickly arranges for Mr Grape's car to be towed away. Mr Grape is upset and sues Mr Fiddleheads in tort (trespass to goods) for the interference with his vehicle.

Government probably not unlawful, but we don't know what the punishment for the offence is under the bylaw – unclear what the government is allowed to do (but you could reference back to 164 would be an easy way to get around the lack of facts).

Is it likely that Charlie Cauliflower, Eru Egglant and Gerry Grape will succeed with their claims (you can assume that if a private citizen did the various acts described, the torts alleged would have been established)? Why / why not?

The Crown's powers to carry out what might be described as natural persons act (that is, the power to do everything that is not prohibited by law) are sometimes referred to

as the 'third' source of the Crown's power. There is a substantial difference between what a single private individual can do with his or her own resources and what the Crown can do with the vast resources of government available. It could be argued that there is a greater scope for abuse when it is the Crown exercising 'natural person' powers, the Crown should be limited to carrying out only those acts that are authorised by statute or under the common law. (Wood 187)

2. Principles of Rule of Law (Raz 188)

1) All laws should be prospective, open and clear
2) Laws should be relatively stable
3) The making of particular laws (particularly legal orders) should be guided by open, stable, clear and general rules.
4) The independence of the judiciary must be guaranteed
5) The principles of natural justice must be observed
6) The courts should have review powers over the implementation of the other principles
7) The courts should be easily accessible
8) The discretion of the crime preventing agencies should not be allowed to pervert the law.

When the phrase the rule of law is uttered is typically understood to include democracy and individual rights along with formal legality. (Brian Z Tamanaha 197)

The International Commission of Jurists regards the rule of law as a living concept permeating several branches of the law and having great practical importance (198)

4. ADMINISTRATIVE LAW

Administrative law has tended to be narrowly defined in NZ and has focused almost exclusively on judicial review, or the courts control of the exercise of discretionary power, to the exclusion of; (Geoffery Palmer 70)

- How policy is formulated and best implemented and
- Administrative process

There are many tools which can be used to achieve a favourable exercise of administrative discretion or to check and challenge an unfavourable or wrong administrative decision. These include:

- Parliamentary Remedies
    - Getting an MP to ask oral and written question fo key Ministers
    - Making submission to select committees

    - Petitioning Parliament
- Complaints to the Ombudsman/Regulations Review Committee
- Judicial Review

5. PARLIAMENT

The Parliament of NZ today consists of the Sovereign in night of NZ and the House of Representatives. It was the endeavour of most the early parliamentarians to achieve for NZ a 'responsible' form of government. (McGee 204)

1. Governor-General

The Governor-General, acts as the Sovereign's representative in respect of the Sovereign's legal duties as a member of Parliament of New Zealand. The GG is the head of executive government, appoints Ministers and formally performing many executive acts. (McGee 203)

Only when a proposed law is agreed to by the House can it be submitted to the Governor-General for concurrence. Neither Parliament nor the House governs the country in the sense of having direct control of the civil and military apparatus of state and making day-to-day decisions on management and deployment of these resources. This is the job of the executive, (the Government) which carries on the government of the Country by appointment of the GG. (McGee 204).

In 1856, the Governor after consulting the Imperial Government, accepted that he would in future chose Minister from among members of Parliament (rather than random friends and people he favoured) and responsible government was achieved. It is on this principle that Ministers are appointed by the GG today. (McGee 204).

2. House of Representatives

The House of Representatives is the popularly elected component of the Parliament, its members being elected for a three-year term. The Parliament of NZ has one function, to make laws. The present legislative description of its law-making power speaks only of Parliament having 'full-power' to make law. The House of Representatives has no role outside of the life of a Parliament and cannot function once that Parliament has been dissolved or has expired. (McGee 204)

The HOR is the largest and most significant part in the making of laws by Parliament. The most visible part of this is when a proposed law becomes law as an Act of parliament, in which it is processed by the House. (McGee 204) The House provides and sustains the Government from among its own members, and the Government although appointed by the Crown, remains in office only for as long as it can maintain a majority in the House. The House exists to scrutinise and control the government, as quid pro quo for the authority they consider necessary to carry on governing the country,

Ministers must defend their policies and explain the administration of their portfolios to the house. The final function of the House identified here reverts in part to the diea embodies in the Title of the original NZ Constitution Act – the idea of the representation of the views of the population. The HOR as the elective element of the Parliament of NZ, fulfils this representative function. (McGee 205)

i. Functions of Parliament (Sir Palmer 206)

- To raise money by which the business of government may be constructed
- To approve the expenditure of money
- Consider and pass Bills into law
    - While Parliament passes a lot of legislation, it hardly ever goes back to find out whether the objectives aimed at have been achieved. It should conduct Select Committee hearings aimed at this.
    - MMP has slowed down the legislative process
    - *Dissatisfaction with the legislative process has increased over the years. The volume of legislation is greater than Parliament can manage. There is frustration that routine technical bills cannot get passed.*
- Provide a place for the airing of grievances
- Act as a check on the manner in which government is actually carried out
    - Parliament must be able to produce stable government
    - Cabinet is responsible to Parliament
    - Parliament is a check and balance on the activities of the executive government.
- Serve as a forum for party political contest
    - If the community wants members of Parliament to behave differently there have to be incentives and rewards for them doing so. One problem is that the media in reporting Parliament concentrates on sensation and trivia

A. Electoral System

Each voter has two votes, a party vote and an electorate vote. Your party vote helps to decide how many seats each party gets in Parliament. Parliament is currently made up of 63 general and 7 Māori electorate seats, plus 50 seats allocated from party lists, giving a total of 120 seats. Your electoral vote helps decide who becomes your local MP. A party will get seats in parliament based on its party vote if it passes the threshold and wins: 5% or more of all the party votes, or one or more electorate seats. (211)

Party votes cast for parties that don't cross the threshold are disregarded in the allocation process, and they are not in any way reallocated to the other parties. If a party wins more electorate seats than its share of seats determined by the party vote then the extra seats are not taken away and the number of MPs in parliament increases, for the life of that parliament. (212)

1. FFP

Westminster system of government: close union, the nearly complete fusion, of the Executive and legislative power. In truth its merit consists of their singular approximation. The connecting link is the Cabinet. By that new word we mean a committee of the legislative body selected to be the executive body… a cabinet is a combining committee. (Walter Bagehot 223)

Before MMP, NZ had a Westminister system where a singular political party characteristically held a majority of seats in parliament and 'ruled' by controlling the Cabinet as well as Parliament. (Palmer and Palmer 223)

- A singular political party was elected to government
    - Elected under an FFP electoral system, which contained a systemic bias in favour of a single party obtaining a majority of parliamentary seats, thereby electing it to government.
- The governing party selected the Cabinet from among its own MPs. Because a single party formed a majority in Parliament and therefore had the 'confidence' of the HOR, it appointed its own leader as the Pm and its own members to run the government as Cabinet ministers.
- The governing party dominated Parliament, which could make any law it wished. The Constitutional doctrine of parliamentary sovereignty gave Parliament virtually unlimited political power.
    - Sometimes on matters such as abortion and homosexual law reform or capital punishment MP's voted on conscience votes.
- The governing part acted as one unit. There were strong pressures on all MPs in a single governing party to be disciplined in following whatever decision was made by Cabinet.
- Cabinet ran and still runs the government through the public service.
    - The actions of government are carried out largely by public servants.
- The opposition parties did not figure in the key series of relationships under FFP
- The courts are independent of the other institutions and judges the actions of other institutions against the law. Their function is to provide fair, impartially administered justice according to the law.
- The primary restraint on the Executive's power was that the governing party faced the electorate at least once every three years. Limited Parliamentary terms are a key feature of the Westminster system.

2. MMP

A referendum conducted in 1993 ushered in mixed-member proportional or MMP system. Although MMP simply changed the voting system, it also has: (Palmer and Palmer 225)

- Slowed down the system of government
- Made it less friendly to executive power

- Increased the distinction between the Executive and Parliament
- Revitalised Parliament

This change was fundamental to NZ's Constitution because it makes it much less likely that any one political party will get a majority of seats in Parliament. (Palmer and Palmer 227)

- The GG has more potential power under MMP but only exercises it cautiously
- There is less pressure on Cabinet ministers to agree publicly with coalition Cabinet decision. The convention of public unanimity between ministers in a coalition Cabinet still exists, but no longer reinforced by all members being from one political party.
- It is difficult to know when a matter needs to go to Cabinet and when an individual minister can deal with it – Ministers may tend to make decisions within their portfolios without reference to a coalition Cabinet.
- Regulations tend to be used to avoid the need for legislation under a minority government. Since minority government needs other parties' support to pass legislation but not to pass regulations, it can tend to favour implementing policies by regulation.
- Parliament is much more important that before. Parliamentary debate is generally more meaningful as parties and the public listen to speeches to gauge whether a particular piece of legislation will be passed, defeated or modified.
- Legislation that is not supported by a minority government and sometimes a coalition government may be passed.
- Select committees of Parliament are more important to the passage of legislation and the scrutiny of the government through select committee investigations.
- The Judiciary may take up an increased policy-making role. Increased use of regulations may lead to more challenge to regulatory power in the courts. If the legislative wording is unclear or ambiguous, policy decisions are effectively being left to the courts.
- There is more meaningful public debate over government policy.

MMP has meant that it is more difficult to change policy, but once it is in place, a change is likely to be more enduring. MMP means that policy is more contestable, lobbying is more common and there is greater public debate over government policy. (Palmer and Palmer 228)

B. Law Making Power

i. Supremacy

a. Orthodox Doctrine

ii. Limits

i. Procedural Restrictions

Entrenchment, 268 of the Electoral Act – orthodox theory: Parliament cannot bind its successors, and therefore entrenchment is legally ineffective.

- The Courts wouldn't do anything about it.
    - It would still trigger the morality and conscience of the members of Parliament.

However, convention Parliament obliges Parliament not to amend other than through enhanced requirements:

- Originally, only expected to create constitutional convention
- Hence no attempt to protect entrenchment clause itself through double entrenchment
    - Though single entrenchment can be legally circumvented

1. Modern Trends

Manner-and-form entrenchment is legally possible:

- Before colonial legislatures acquired full law-making power, courts prepared to strike down legislation outside limited grant of power
- Courts are mandated to enforce law
    - At least until new law receives assent, manner-and-form requirements are legal conditions capable of enforcement
- Identifying necessary conditions for making law is a matter for Parliament itself
- As yet, NZ Courts have not definitively ruled (but conceded in *Taylor*)

However, judicial willingness to enforce manner-and-form restrictions may depend on their democratic legitimacy.

- Practical sanctity (widespread support) may be required
- Entrenchment provision must be passed by the same proposed majority (SO 226 NZ)

ii. Substantive Restrictions

Historic Substantive restriction in grant of power to colonial legislation (peace, order and good government - Fineberg). Perhaps fundamental principles of 'free and democratic society (Cooke).

- The existence and operation of a democratically elected legislature, independnt courts (perhaps) the crown

- If legislation undermined these principles to a significant extent then courts obliged to say so and resign if ignored

- Fundamental human rights (Cooke, Taylor v Poultry Board; compare Shaw)
  - Some common law rights, lie so deep that even Parliament could not override them
  - The conditions that led to this comment (Muldoon was exercising supreme executive power), and the concerns the court had seem to have fallen away.
  - Fundamentally undemocratic to have unelected Judges override the wishes of an elected legislature? Thoughts?

b. *Reconciliation*

Clash between Parliamentary sovereignty and the rule of law: legislation passed by Parliament that violates the fundamental norms. Options:

- Apply legislation as enacted (orthodox approach to parliamentary sovereignty)
- If possible, interpret legislation narrowly, in accordance with interpretative presumptions (principle of legality)
- For constitutional statutes (apply doctrine of implied repeal narrowly)
- In Theory, and only for extreme cases, refuse to apply or resign.

a. *Question 15*

Prince Harry is in town on a royal publicity visit and is due to attend, amongst other events, a Super rugby match at the local stadium between the Hurricanes and the Sharks. Kerry Kale, a staunch republican, wants to make a point while Prince Harry is in town. He draws up a sign (pictured).

"Hei Aha! We want a Kiwi Head of State. Not kings, not queens and a fancy wedding. www.republic.org.nz"

Kerry stands on the concourse outside the stadium, holding his sign while Harry enters the stadium. Unbeknown to Kerry, the Super rugby match qualifies as a major event under the Major Events Management Act 2007. The Act was controversial, demonstrated by the fact it was only just passed by the House: 61-59.
Amongst other things, the Act includes the following prohibition:

s 18 No advertising in clean zone without authorisation
(1) No person may advertise in a clean zone at a major event without the written authorisation of the major event organiser.

(2) A person who commits an offence against this section is liable on conviction to a fine not exceeding $25,000.

A clean zone is defined as "the sports stadium at which the major event takes place and any surrounding curtilage which is visible from the gates of the stadium".

(a) Kerry Kale is charged with an offence under s 18 of the Major Events Management Act 2007. The Police have taken the view that his sign amounts to an advertisement, because it seeks to persuade people to support his campaign for a Kiwi Head of State. Kerry is taken by surprise by this, because he thought he wasn't advertising anything, merely making a political statement. Is he guilty of an offence under s 18? What interpretation should the courts give to s 18? Why?

If the definition of what Kerry is doing counts as advertisement, s18 would be breaching his rights to freedom of speech.

Case of Sims – principle of legality (Parliament is sovereign and supreme and can override human rights but they have to make it clear and unambiguous that they want to do that. Fundamental rights can't be overridden by general or ambiguous words. We would define s18 narrowly, because it is general and ambiguous and likely wouldn't come under the narrow interpretation and wouldn't be guilty of an offence.

(b) If s 18 also included the following subsection, would your answer be the same:

(3) In this section, "advertise" means any statement that seeks to encourage or persuade any person to:

(a) purchase particular goods and services; or

(b) vote for a particular candidate or party in elections; or

(b) otherwise support a particular cause, mission or project.

Why or why not?

Parliament can overrule fundamental rights because Parliament is supreme if they do it expressly, so there wouldn't an interpretation issue and Kerry would be charged under the additional subsection.

(c) Assume Kerry's sign does amount to an advertisement but he has discovered that the concourse outside the stadium where he was standing was designated as a "town square" under the Town Squares Act 1975. This Act provides:

Town Squares Act 1975

An Act to affirm, protect and promote the ability of citizens to engage in civic activities and protect their freedom to make political statements in public spaces where civic debate has traditionally taken place.

s 2 Interpretation

"town square" means any public space where people have traditionally assembled for collective discussion and debate, including the curtilage outside civic buildings such as Parliament, town halls, railway and bus stations, and sports stadiums.

s 3 Political statements in town squares protected

Every person shall be entitled to make political statements in a town square if done in a non-violent manner and they shall not be liable for any civil or criminal punishment for doing so.

Given the Town Squares Act 1975, is Kerry guilty of an offence under s 18 of the Major Events Management Act 2007? Why or why not?

Orthodox Doctrine:

We now have two pieces of legislation that directly contradict each other, which could be dealt with under the 'doctrine of implied repeal'. (Even if the act doesn't specifically say that they repeal a contradictory statement, simply by their being an implication it would overrule the contradictory section of the old act. When we have two contradictory statutes, we can say that Parliament has impliedly repealed the old statute to the extent that it disagrees with the new statute (impliedly repealed only to the extent that it is inconsistent).

Town Square might still apply to things that are not Major Events, however in this case it is a major event and it appears that Kerry was advertising under the newer Act, would impliedly repeal the Town Squares act and he would still be liable.

The new doctrine says that implied repeal doesn't work with older statutes that are constitutional or dominant, an ordinary statute can't impliedly repeal those statutes (sims doctrine – they must use clear manner and not ambiguity/implied).

Foburn? Two ways that we can figure out if a statute is constitutional

Constitutional statute:

- *Conditions the legal relationship between citizen and state in an overarching manner*
- *Enlarges or diminishes the scope of what we now regard as a constitutional or fundamental right.*

In this case you could argue that the Town Squares act was constitutional – how the citizen and state relate on freedom of expression, and defines the scope of a fundamental right (possibly). If we hold that the Town Squares act is constitutional then it wouldn't be impliedly repealed due to its constitutional nature.

(d) Now, assume that s 18 of the Major Events Management Act 2007 contains a further subsection as follows:

(4) This section applies to the making of political statements in town squares despite s 3 of the Town Squares Act 1975.

Is your answer to question (c) the same? Why or why not?

This changes it because it's no longer unambigious and therefore Parliament is able to repeal the constitutional ac, compliant with the principle of legality.

(e) Assume, now, that relevant legislation included the following provisions instead:

- *Section 18 of the Major Events Management Act 2007 included the following subsection:*
  (4) Section 3 of the Town Squares Act 1975 is hereby repealed.

- *The Town Squares Act 1975 included the following additional section:*

  s 4 Means of amendment or repeal
  Section 3 of this Act may not be amended or repealed unless the proposal for the amendment or repeal is passed by a two-thirds majority of all the members of the House of Representatives.

  Is your answer to question (c) the same? Why or why not?

Section 3 is an entrenched provision, and the Major Events Act was only passed narrowly, and therefore wasn't supported by a 2/3rds majority of Parliament.

- *Will courts care about the two thirds majority and not enforce the provision?*

Orthodox view: Under the orthodox view judges won't care about manner and form provisions. Parliament can't be controlled by its predecessors and therefore the provision would be repealed.

Modern view: would NZ follow it (maybe, they haven't confirmed this absolutely but some statements suggest that they would make manner and form provisions enforceable.)

Trethrown? Not settled, but likely that entrenched provisions would be enforceable.

(f) Based on the outcome in (d), are there any additional arguments might Kerry try to raise about the validity or otherwise of s 18 of the Major Events Management Act 2007? Are these arguments likely to be successful? Why or why not?

Some common law rights lie so deep that presumably Parliament cannot override them –

6. THE SOVEREIGN (AND HER REPRESENTATIVES)

The Constitution Act 1986 s2

(1) The sovereign in right of New Zealand is the Head of State of New Zealand

(2) The Governor-General appointed by the sovereign is the sovereign's representative in New Zealand

The Act goes on to state that the royal powers can be exercised by the Governor-General on behalf of the Sovereign or by the Sovereign in person.

i. The Queen (Sovereign)

In 1867 the British writer Walter Bagehot noted that the monarch had three rights: the right to be consulted, the right to encourage and the right to warn. (Palmer and Palmer 10)

1. Legal provisions recognising Queen as New Zealand's Head of State

Under NZ law, the Queen is Queen of NZ, the Royal Titles Act 1974 says so. Almost all of the Sovereign's power and in fact exercised by the Queen's NZ ministers.

2. Concept of the Crown

Wide ranging and at times irreconcilable definitions of 'the Crown' can be found throughout statute books, case law, and in text books. (ACC v Stafford 22)

The Crown in its narrowest menacing it refers to a "piece of jewelled headgear under guard at the Tower of London" and at its broadest it is as close as the constitution comes to a notion of the state. In between these extremes it may refer to the monarch personally, the Queen or King or to the executive itself. The most obvious expression of the Crown's significance is the fact that the business of government is carried on in its name by ministers and civil servants who are all servants of the Crown(Dainties and Page 23).

a. Town Investments Ltd v Department of the Environment

House of Lords 1978

Lord Simon of Glaisdale, Lord Morris of Borth-y-Gest dissenting

Facts: Rent freeze applied if the tenant was occupying the premises. The lease of the premises expired in December 1972, and a fresh lease was granted by the present landlords in substantially the same terms save that the rent was increased. The landlords took out an originating summons for declaration that the Orders of 1972 and 1973 did not apply to the premises.

Prior Proceedings: Foster J found in favour of the landlords. The Court of Appeal dismissed an appeal by the appellant department in respect of two of the summonses on the grounds that premises were occupied by the tenant and that no arts of the premises were occupied for the purposes of a business and that, accordingly, the counter inflation legislation did not apply.

Relief Sought:

Plaintiffs Theory:

Defendant's Theory:

Issue(s):That leases have been executed under his official designation by the minister of the Crown in charge of the government department to which, for administrative and accounting purposes, there was entrusted the responsibility for acquiring and managing accomodation for civil servants employed in other government departments as well as that of which the minister himself was the official head, the tenant of the premises was the government acting through its appropriate member, or, expressed in the term of art in public law the Crown.

It is not private but public law that governs the relationships between Her Majesty the Queen acting in her political capacity, the government departments among which the work of Her Majesty's government is distributed, the ministers of the Crown in charge of the various departments and civil servants of all grades employed in those departments.

The Crown and Her Majesty are terms of art in constitutional law. They correspond, though not exactly not exactly, with terms of political science like 'the Executive' or 'the Administration' or 'the Government'.

All the great officers of state are.. emanations from the Crown. They are delegations by the Crown of its own authority to particular individuals (Day J in Gilbert v Trinity House Corporation).

Held:

Dissenting:

Result: Allowed the appeal.

Policies: The Crown as "one and indivisible"

b. *Attorney-General v Chapman 2011*

NZ Supreme Court Elias CJ, McGrath and William Young JJ

Facts: The plaintiff sued the Attorney-General (who represents the Crown in legal proceedings) for damages of the NZBORA 1990, the alleged misconduct was perpetrated by a court, damages in respect of the actions of a judge.

Prior Proceedings:

Relief Sought:

Plaintiffs Theory:.

Attorney-General Theory: The NZ domestic law knows no such concept as 'the State', it is also part of his argument that 'the Crown' are properly to be understood as references to executive branch and that there is no procedure by which the BORA and the Crown Proceedings Act both operate, 'the Crown' means 'the government of NZ' or 'the State'. I used the term 'the State' to make it clear that, in the Bill of Rights context, 'the Crown' extends to all three branches of the government of NZ described.

You can't sure for NZBORA damages in respect of the damages in respect of the actions of a judge. Even if you could the Attorney-General (as rep of the Crown) wouldn't be the right defendant.

Issue(s):

Held: Ultimately, the Supreme Court agreed (by a 3:2 majority) that NZBORA damages are not available in respect of the actions of a judge. However, both the majority and dissenting judges agreed that, ***had*** *damages been available, the Attorney-General* ***would*** *have been the appropriate defendant.*

In particular context of BORA – there Crown or the State must be understood as extending to all three branches of the executive

Dissenting:

Result: If the State is required to provide public law compensation for judicial breach of the BORA, the courts would have to be able to identify an appropriate defendant. We are not able to think of anyone other than the Attorney-General who could adequately represent the state.

Policies:

Without the Crown Proceedings Act 1950, the NZ Government could not be sued in contract if it were to breach a contract and would not be able to be held liable not have been obliged to discover its documents in civil case. The Act's aim was that suits would be taken against the Crown as if it were a private person (Law Commission 28). It is because of its importance the Crown Proceedings Act now needs to be updated. The Crown Proceedings Act is also somewhat confusing and convoluted. For example, in most cases a plaintiff attempting to sue the Crown in tort must first establish that an employee of the Crown has committed a tort. (Law Commission 29).

The Government disagrees with the Law Commission's proposal and believes that: the proposal may lead to an extension of the scope of Crown liability at common law, treating the Government differently from other litigants, especially corporations, can be justified because the Crown serves the public as a whole as a matter of duty; the Crown owes international obligations that require it to act in ways that may be to the detriment of private citizens etc. (Government Response 29)

ii. Governor-General

1. How the office of the GG is constituted

The office of the Governor-General is constituted by the Letters Patent issued by the Queen. The Governor-General is appointed by the Queen on the advice of the government (Palmer and Palmer 8). In all but the most extreme situations the Governor-General acts on the advice of his or her responsible ministers. The positive

aspect of the non-political nature of the office is that it transcends politics. Although the Governor-General is appointed and not elected, it is their duty to uphold democratic traditions and to act in a unifying way. (Palmer and Palmer 9)

- Political Neutrality
- Underlying principle of democracy
- Unifying Role

2. History of GG

Governor-General Bledisloe purchased and gifted to the nation the site where the Treaty of Waitangi was signed-vesting ownership in a trust board and purchased the Bledisloe Cup for 1931. (Palmer and Palmer 10)

William Hobson 1840-1842 was also the first in an era when the Governors actually governed. Hobson's most significant contribution was the negotiation of the Treaty of Waitangi. Hobson and his successors were governed by autocratic rule – with powers akin to the monarchs of earlier times. The Governor virtually ran the country. The settlers were opposed to this autocracy, Governor Grey was in fact 'chief author' of the new constitution, this 1852 Constitution Act marked the beginning of the reduction of Governor's executive powers. Grey also played a role in the introduction of universal adult male suffrage, the move to abolish plural voting (where property owners vote in each electorate in which they have property) (Cartwright 14).

A number of matters are still reserved for the Governor's discretion; these included defence and Maori affairs international trade and foreign affairs, and certain Bills reserved for the Queen's assent. Under this arrangement the Governor-General served both the NZ ministers and British Secretary of State, and this split loyalty cause some tension. (Cartwright 15)

a. 20th Century

In 1906, NZ became a dominion. Bledisloe was the first lawyer to be NZ Governor-General and at his instigation, his salary was reduced by 30% to match the cuts in public servant's salaries. He regularly insisted on full and unedited newspaper coverage of his speeches, something that I doubt I could achieve today. (Cartwright 16)

In 1939, the first British High Commissioner to NZ was appointed and in 1947, NZ finally adopted the Statute of Westminster 1931. Thus, NZ Parliament gained legislative freedom. (Cartwright 16)

b. Three Trends over Time (Cartwright 17)

- The diminution of the executive powers of the Governor-General
- The transfer and consolidation of all the powers of government within NZ – the pace and enthusiasm of this assumption of powers varying over time
- The office of Governor-General being seen as a distinctively NZ institution.

3. Functions of the GG in the constitution

The Governor-General performs three main sets of functions – ceremonial, symbolic and constitutional.

a. Ceremony

The Governor-General acts as head of state; he or she officiates at the opening of Parliament, conducts investitures and receives the credentials of diplomats accredited to New Zealand. (Palmer and Palmer 9)

The Governor General is also Commander-in-Chief of the New Zealand armed forces. He or she is the embodiment of the Crown to which they give their loyalty. This does not however give the Governor-General personal authority to command the military. (Palmer and Palmer 9)

b. Symbolism

The Governor-General role involves travelling to all sorts of functions throughout New Zealand making speeches, holding numerous receptions at Government house and generally meeting and greeting as broad a cross-section of the NZ community as possible. (Palmer and Palmer 10)

c. Constitutionalism

Constitutional functions of the Sovereign and the Governor-General include (Palmer and Palmer 10):

- Formally appointing and dismissing ministers and governments
- Dissolving and proroguing Parliament
- Being part of the legislative process by assenting to bills
- Providing appropriation messages to Parliament for the expenditure of public money
- Formally appointing CA and HC judges and senior officials of state
- Exercising the royal prerogative of mercy and pardon
- Presiding over meetings of the Executive Council

In theory, all these are great legal powers. In practice they are, by constitutional convention and democratic principle, exercised on the advice of ministers. (Palmer and Palmer 10)

4. The role of the Governor General (Appointing and Ending Governments)

iii. Prerogative Power

Prerogative powers are the special powers that remain from the time before the establishment of the modern parliamentary system in the late 17th century and which are now exercised on behalf of the Crown either by the Monarch or by government

ministers. No new prerogative powers can be established, and existing prerogatives can be abolished or placed on a statutory footing (Sunkin 19)

In practice Monarchs will follow established conventions and act on ministerial advice; no Monarch for example has refused to grant royal assent to a Bill passed by Parliament since 1708 and it would be virtually inconceivable that the Monarch would now do so. (Sunkin 19)

1. Key Prerogative Powers that exist in New Zealand (Joseph 20)

- The appointing power (appointment of all royal officers)
- The prerogative in external affairs (NZ's foreign relations often conducted in the name of the Crown under prerogative by Minister of Foreign Affairs and Trade)
- Defence and Wartime Prerogatives (vested authority but does not have actual supreme command)
- Keeping the peace
- Eminent domain (right to acquire privately held land (or interests in land) for public purpose)
- Conferment of Honours
- Summoning, proroguing and dissolving Parliament
- Royal Assent (to Bills)
- Prerogative of mercy
- Other prerogatives in the administration of justice (Crown by ordinance or Letters Patent can establish courts, proceedings in the name of the crown are filed by Attorney-General)

In practice under NZ constitution, these powers are exercised by the Sovereign or Governor-General on the advice of the executive.

There are four generally accepted reserve powers in Westminster governments (where the Crown can exercise powers independently from ministerial advice (Palmer and Palmer 21):

- To appoint a PM
- Dismiss a PM
- Refuse to dissolve Parliament
- In limited instances, force a dissolution.

B. Responsible Government

Despite the advent of representative government with the 1852 Constitution Act, the settlers were still not happy perceiving representative government to be tokenism, Members of the Executive Council were still appointed and not elected. In May 1856, the

first responsible ministry, with its members having been elected to the House of Representatives was formed. (Cartwright 15)

The Queen Reigns, but the government rules… so long as it has the support of the House of Representatives. (Keith (30 (2)). The Governor-General (or Queen) acts on the advice of his/her ministers; there must always be a ministry to advise the Governor-General (or Queen); that ministry must retain support of the House of Representatives.

1. Constitutional Conventions that impact on the exercise of public power in NZ: (Palmer 31)

See Page 20 of these note for the Jennings Test on what actually is a convention.

1. The Governor-General acts on the advice of his or her Ministers
2. Ministers must have the confidence of the House of Representatives
3. Ministers without the confidence of the House act in a caretaker capacity only.

b. Cabinet Manual

The executive's own operating instructions, setting out the practices and procedures (including constitutional conventions) by which Cabinet government operates)

- Not a source of law
- But an 'authoratative guide to central government decision making'
- Adopted by Cabinet at the outset of each new administration

Sir Geoffrey Palmer – The Cabinet Manual is the most authoritative account of many of these conventions. It gives a better indication of how the Government actually works than the Constitution Act. (32)

The Cabinet Manual's authority derives from Cabinet. The Manual, effectively provides a convenient, transparent and proven basis on which successive government have chose to operate and it is updated form time to time by Cabinet to reflect established changes in Cabinet procedures and constitutional developments(Kitteridge 33).

c. Confidence of the House

It is fundamental to the doctrine of responsible government that any government formed after an election must possess the confidence of the House. This means the the government must have the support – at least on issues of confidence and on money supply. Under MMP to date, no single political party has commanded an absolute majority of seats in the House following an MMP election. This means that political parties must seek to enter into coalition or support arrangements if they wish to govern (34).

A government must have the 'confidence' of the House of Representatives. This is measured by majority of those voting, if the government loses a vote of confidence then it 'falls' and must resign. Under MMP a minority government could easily lose a confidence vote if the opposition parties decide to bring down the government. A coalition government could lose a vote of confidence if one of the coalition partners

decides to withdraw from the coalition. A confidence vote occurs automatically on certain votes, concerned with 'supply' of finance and the Budget . The opposition may also move a motion of no confidence in debates that are broad enough for that to be in order – such as the address in reply debate and debate Ron the Prime Minister's statement (Palmer 51).

A Government subsists in office because it possesses the 'confidence' of the House. This is the continuing basis of responsible government. The confidence of the House underpins any Government's right to hold office; constitutionally, except in a caretaker capacity, it cannot do so without that confidence. It is fundamental that a Government that has lost the confidence of the House must resign or seek a general election. Strictly speaking, confidence is a negative and somewhat circular concept. (McGee 51)

The confidence of a House in a Government is a matter of political judgement. A confidence vote must, by definition, be a party vote, with the party whips operating to ensure a turnout of members to support or oppose the Government.

2. When can votes of confidence happen?

- Express votes of confidence
    - Motions expressing want of confidence in the Government normally arise by way of amendment to other motions before the House and amendments must be relevant to the motion they seek to amend (so it has to be a pretty open-ended debate).
        - Prime Minister's Statement
        - Address in Reply debate
        - Budget
        - Imprest Supply
            - Opportunity for open ended debate on a Bill
- Implied votes of confidence
    - When Government want's to pass a Budget or a Bill they are inescapably asking for implied vote of confidence. A failure of a Government to secure parliamentary support at all for their grant or imposition demonstrates a loss of confidence in the Government
        - Money Related
            - *Budget*
            - *Setting annual tax rates*
        - Fundamental Bills to their ability to govern
- Votes of confidence arising by declaration of the Government
    - Open to the Government to declare that it will treat a vote on any issue before the House as a matter of confidence in itself and thus resign or seek an election if it is defeated. A decision of the PM on behalf of the whole government rather than for an individual minister to decide if the matter is to be treated as a vote of confidence.

i. MMP

MMP changed the dynamics of government, now there almost always has to be some sort of negotiation between the parties after an election about which parties will form or support a government.

Single Party Minority Government (Confidence and Supply Parties may be ministers but aren't in cabinet)	**Minority Coalition Government** (Parties in coalition both sit in cabinet)
Single-Party Majority Government Has never happened under MMP	Majority Coalition Government

It is possible that sometimes a question may arise about the legal status of a coalition agreement. One commentator has suggested that there may be a question as to whether a coalition agreement is a legal contract, enabling parties to sue for its breach in court. We consider that coalition agreements, or party's agreement to support a government, are clearly not legal contracts. The obligations they create are matters for political enforcement. (Palmer and Palmer 37)

1. Coalition under MMP

Entirely political – negotiated before or after (generally after), not legally enforceable, significant diversity in the kinds of matters that are covered in the agreements. Significant diversity in the types of support that is given.

As governing arrangements under MMP are purely political, a degree of experimentation has occurred. The preferred method is for one of the major parties to form a minor government or a coalition government with one of the other parties, along with having "enhanced" confidence and supply agreements with more small parties. These enhanced agreements involve the support parties putting their votes behind the governing party (or parties) on key matters of confidence and supply, thereby providing the majority needed for a government to enter and remain in office. They also commit to supporting central parts of that government's legislative agenda, while the governing party (or parties) in turn agree to advance some of the support parties' policies. Further complicating matters, the leader or leaders of the support parties also receive a ministerial role and gain some control over executive government decisions. (Geddis 37). Although these enhanced supply and confidence arrangements confer mutual benefits, they are by no means a relationship of equals. The political consequences of a minor party demanding "excessive" policy trade-offs in exchange for its support limit this kind of hold up power. A major party always has the option of publicly declaring that a minor party is making it impossible for government to function. (38).

Since MMP's introduction in 1996 the largest party still was able to attract the necessary support from other parliamentary parties to govern in some form of a multi-party arrangement. It appeared this tradition would continue following the 2017 election, however, the NZ First Party (with 7%) instead agreed to form a coalition arrangement

with the Labour Party (37%) supported by the Green Party (6%). This outcome is significant for two reasons:

1. Disproved assertions regarding a general public expectation that the largest party should have some role in this country's government. This was clearly just a mixture of assumption (this is just what always has happened before) and general notions of fairness (the most popular ought to run things). The new governing arrangement demonstrates an evolution, the public generally accepting that a combination of smaller parties able to command a parliamentary majority can govern over the top of a larger party.
2. The preferred model has Beene for one of the majority parties (N or L) to form a minority government on its own while entering into so-called 'enhanced confidence and supply agreements' with a range of other support parties

Labour and NZ First Parties following 2017 election chose to enter into a formal governing coalition, with ministers from each party sitting together in cabinet. The Green Party entered into an enhanced confidence and supply with the coalition – in formal terms Labour-NZ First Gov. is minority one, holding confidence with Green Support. (Geddis 39).

2. Coalition vs Enhance Confidence and Supply Agreements

For every minor party that has joined a coalition it has threatened their survival because their voter base feels they have been tainted by the policies of the larger party in government. In NZ we have decided (since 2005) to create a hybrid form of government coalition/agreement.

- Support parties give support on confidence and supply
- Support parties commit to supporting key parts of governments legislative agenda
- Governing parties agree to advance some of the support parties policies
- Support parties do not have a seat in Cabinet
- But Support Paries are given ministerial roles outside of cabinet

This allows for more stability for the larger/major parties by getting support from minor parties that might not agree to be in government together. If you are able to make more agreements with support parties and gain a greater percentage of the votes it is easier for you to push your agenda through Parliament. Even using this format, Minor parties survival can still be threatened – quandary with MMP how minor parties can have influence and maintain their survival.

b. Governing during a transition (Caretaker Capacity)

A government without the confidence of the house only acts in a caretaker capacity.

A caretaker PM or government is often used to describe the arrangements applying in transition periods, between the defeat of one elected government and the entry into

office of another. The need for formal caretaker arrangements has become greater as MMP lengthened the amount of time after election to form an install a new government. Because an outgoing government must continue to carry out the task of governing until the incoming government is appointed, the purpose of the caretaker convention is no ensure that, the caretaker government does not make significant new commitments that would tie the hands of a future government, perhaps irrevocably. (Baxter and McLean 55)

1. Cabinet Manual 2017 (57)

In the period immediately before a general election, the government is not bound by the caretaker convention unless the election has resulted from the government losing the confidence of the House. In practice restraints have tended to be applied from about 3 months before the general election is due or from when it is announced (if less than 3 months). Following an election, the Governor-General will appoint a PM and a government in accordance with the principles and processes set out in the manual.

There are two sets of circumstances in which the government would see itself bound by the caretaker convention: after a general election 1 of the 2 conventional arms applies until a new administration is appointed, or if the government has lost the confidence of the house.

Two arms of the caretaker convention:

- Where it is not clear who will form the next government
- Where it is clear who will form but they haven't taken office yet

Matters for a caretaker government to worry about:

- Significant or potentially controversial issues
- Issues with long-term implications that would likely limit the freedom of action of an incoming government
- New policy initiatives
- Changes to existing policy

And there should be dealt of in one of three ways:

- Be deferred if possible
- Be handled by way of temporary or holding arrangements that do not commit the government in the longer term
- If neither are possible, consult all the other political parties,

Where it is clear which party or parties will form the next government, but Ministers have not been appointed, the outgoing government should: undertake no new policy initiatives, act on the advice of the incoming government on any such matter of such constitutional, economic or other significance that it cannot be delayed until the new government formally takes office.

c. MMP Tutorial

Question One

A general election is held in November 2020. After the election the makeup of the House of Representatives is as follows:

Labour 56
National 51
The Environment Party 10
NZ Great Again 3
ACT 0
Māori Party 0
TOTAL 120

The Environment Party is a left-of-centre party with a strong focus on environmental protection and combatting climate change. It has significant support amongst younger voters but is perceived by some traditional Labour voters as being flaky and economically naïve. In the past, the Environment Party has preferred to sit outside government, but its members are becoming increasingly impatient to have more influence on what the perceive as being time-critical environmental direction. The Environment Party has a very poor relationship with National and opposes many of its economic, social and environmental policies.

NZ Great Again is a populist party with particular appeal amongst superannuants. Its economic philosophy broadly aligns with Labour but it has a particularly strong focus on regional development. As part of that focus, NZ Great Again made an election promise to end the previous government's ban on oil and gas exploration off the coast of Taranaki. The leader of NZ Great Again, Derek Krump, is a flamboyant and controversial figure who rose to fame when he appeared as a judge on a TV talent show, "Kiwiz Got Skillz", on which he was known for nasty comments and for rating the appearance of female contestants.

a. What different forms of government could potentially be arranged between the various parties?

Multiparty Minority*: Labour/National and NZ Great Again (coalition) + confidence and supply agreement*
National + NZ Great Again = 54 (10) *Labour + NZ Great again = 59 (10)*
Multiparty Majority*: Labour/National and Enviornmental Party (coalition)*
National + Environmental = 61 *Labour + Environmental = 66*
Single Party Minority*: Labour/National + confidence and supply with either Environment or both Environment AND NZ Great Again.*
Labour (56) + (10) and/or (3) in confidence and supply
National (51) + (10)(3) confidence in supply

b. What considerations should each of Labour, the Environment Party and NZ Great Again bear in mind in deciding what sort of arrangement they might be prepared to enter into?

Also enhanced confidence and supply agreement = get a minister out of cabinet, not in government but you have a little bit more than a traditional agreement.

- *Keeping your identity*
- *Baubles of office*
- *Money?*
- *Getting your policies through*

Question Two

In the event, Labour forms a single-party minority government, entering into confidence and supply agreements with each of The Environment Party and NZ Great Again. In its confidence and supply agreement with the Environment Party, Labour agrees to support a number of specific environmental initiates. The confidence and supply agreement also states that "Labour will desist from any policies that may directly or indirectly contribute to increased carbon emissions."

In its confidence and supply agreement with NZ Great Again, Labour agrees to enable NZ Great Again to discharge its election promise to bring the ban on oil and gas exploration to an end.

At the conclusion of these negotiations, Jacinda Ardern, is appointed Prime Minister and the Labour- led government survives a vote of no-confidence moved by the Opposition in the Address-in-Reply debate in February 2021.

In late April 2021, Cabinet agrees that, in discharge of its promise to NZ Great Again, it will support through the House a Bill reversing the ban on old and gas exploration.

On 14 May 2021, the Oil and Gas (Facilitating Exploration) Bill 2021 is introduced to the House. Chaos results at the first reading. Labour and NZ Great Again vote in favour of the Bill but all other parties vote against it. The Bill is defeated.

The Environment Party believes that Labour's support of the Oil and Gas (Facilitating Exploration) Bill was directly contrary to Labour's confidence and supply agreement with the Environment Party. Its parliamentary members feel betrayed and no longer wish to give their support to the Labour ministry. The leader of the Environment Party, Sam Green, comes to you for advice on the legal and constitutional position. They want to know:

a. Are there any legal avenues open to the Environment Party to complain about the Labour Party's breach of the confidence and supply agreement?

No. They're purely political agreements.

B. The Environment Party feels that, by voting against the Bill on a matter of such importance to it, the Environment Party has expressed its lack of confidence in the Labour-led government. Is that so? Ought the leader of the Labour party now tender her resignation to the Governor-General?

Only applies to very general bills or bills to do with passing budgets, voting down any bills doesn't necessarily mean you've made a vote of no confidence in that government.

c. What (other) options are available to the Environment Party to test whether the Labour ministry still retains the confidence of the House?

Wait for a real vote of confidence to come along, a budget bill etc.
They can take certain political steps. State they have no confidence in the government and vote down every Bill that comes through the house and paralyse the government.

Question Three

A week later, on 21 May 2021, the Appropriation (2021/10 Estimates and Tax Cuts) Bill comes to the House for its second reading. The Appropriation Bill deals with a number of budget initiatives including a further programme of tax cuts. Labour and NZ Great Again vote for the Bill; all the other parties in Parliament vote against it. It is defeated.
As if that's not enough, the Prime Minister hears that afternoon that the price of petrol has jumped 60 cents and passed the $3 per litre mark, nearly crippling the transport industry. There are widespread calls – supported by advice from Treasury – for the Government to intervene immediately and remove GST from petrol to ensure that the economy does not immediately go into recession.
Jacinta Ardern comes to you for advice on the legal and constitutional position. She wants to know:

a. *What are her constitutional obligations following the defeat of the Appropriation Bill?*

McGee – Must resign and have a new election OR try and regain confidence of the house.

b. As a matter of constitutional law or principle, is she entitled to take action to immediately remove GST from petrol? What steps is she obliged to take first?
Is it part of the day to day dealings of the government?
Policy decided before the caretaker provision came into account?
Urgent?
Could you defer the decision?
Are there other options that are temporary?
We would double check with treasury, and then discuss with other parties
To ensure we have the confidence or consensus of the house. Cabinet manual
Says majority so that is authoratitive.

NB: In order to answer this last question, 3(b), you will need to apply the tests set out at pp 58-59 of the course materials, relating to the application of the caretaker convention.

d. To dissolve The role of the Governor General (Appointing and Ending Governments)

Crown's 'reserve powers' include (Joseph 62):

- Appoint a PM
- Dismiss a PM
- Refuse a PM request to dissolve Parliament
- Force a dissolution of Parliament
- Refuse the Royal Assent to a Bill where to grant the assent would be unlawful or would irreparably impair representative democracy

While these actions are taken only in extremely, they do not involve any extraordinary powers. The above situations are distinguished, not by any exceptional power, but by the rejection or lack of ministerial advice.

The formation of a government is a political decision and must be arrived at by politicians and the Governor-General's role is to ascertain where the support of the House lies. This may require me to communicate with the leaders of all the parties represented in Parliament. (Hardie Boys 1997) Government formation is an inherently political enterprise – being able to demonstrate the confidence of the House was the key to government formation under FFP, and it remains the case under MMP. A party or grouping of parties may be able to secure a majority even if it does not hold more than half the seats in the House. This is because a confidence vote, is decided through a simple majority. Another possible outcome of the government formation process is that the person appointed PM is not the leader of the party that secured the single-largest share of seats. (Mateparae 2013)

There is little doubt that the Governor-General exercises personal judgement when granting or refusing early dissolutions in the same way as when appointing or dismissing a PM. Before exercising the power to dissolve on the advice of a PM with only minority support in the Parliament, the Governor-General should probably consult with other parliamentary party leaders, or at least carefully analyse their public statements at the time. (Palmer and Palmer 2004).

3. Cabinet Office Manual 2017 (71)

The Prime Minister may advise the Governor-General to dissolve Parliament and call and election (usually this will be timed in accordance with the electoral cycle). In some circumstances, a Prime Minister may decide that it is desirable to advise the Governor-General to call an early election. A Prime Minister whose government does not have the confidence of the House would be bound by the caretaker convention.

Ultimately, it is a matter for the Governor-General in the exercise of the reserve powers of the office to judge whether a Government possesses the confidence of the House. (McGee 71)

a. Request to dissolve Parliament

In very few situations the Governor-General can refuse a Prime Minister's request for dissolution. The Governor-General must grant the request where a Prime Minister retains the confidence of the House, even if it is believed than an early dissolution would not be in the country's best interests.

The constitutional options for a Governor-General change where some other party leader claims to command the confidence of the House. The Governor-General may, with

propriety, refuse the Prime Minister a dissolution and swear in the other person as Prime Minister and leader of an alternative government. (Joseph 71)

In three situations it would be constitutionally inappropriate for a Prime Minister to advise a dissolution, and constitutionally proper for the Governor-General to refuse the request:

- A coalition or support party withdraws its support from the government and joins one or more other parties giving that grouping the majority the government formerly had
- A Prime Minister is unable to form a government after an election and advises another dissolution without summoning Parliament and testing where the confidence of the House lies
- A Prime Minister is replaced as leader of the party or group of parties that commands the confidence of the House.

b. Refusing Royal Assent

Circumstances in which there would be any suggestion that an appointed Governor-General could overrule the decision of a democratically elected House of Representatives would be so extreme that much more serious constitutional issues would arise. (Palmer and Palmer 75)

ii. Cabinet and Government

1. Prime Minister (Cabinet Manual 2017 77)

The Prime Minister is appointed by warrant by the Governor-General. The Prime Minister is the head of the government. There is no statutory provision that constitutes the office of the Prime Minister or defines it's role. The Prime Minister is the principal adviser to the Sovereign and to the Sovereign's representative. By constitutional convention, formal communication with the Sovereign is a matter for the Prime Minister. The Prime Minister advises the Sovereign on substantive matters: the appointment of a new Governor-General, amendments to the Letters Patent Constituting the office of the Governor-General of New Zealand 1983 (Letters Patent) and the conferment of royal honours.

The PM alone has the right to advise the Governor General to:

- Appoint, revoke, dismiss or accept the resignation of Ministers
- Dissolve Parliament and call a general election

PM is the head of executive government – which includes forming and maintaining a government. The PM determines portfolio allocations and ministerial rankings, taking into account practical and political considerations. As the chair of Cabinet, the PM approves the agenda, leads the meetings, and is the final arbiter of Cabinet procedure.

2. Deputy Prime Minister (78)

If the PM is unavailable or unable to exercise the statutory or constitutional functions and powers of the office, the statutory or constitutional functions and powers of the office, the Deputy Prime Minister can, if necessary, exercise those powers and functions.

3. Ministers (79)

In appointing Ministers, the Governor-General acts on the advice of the PM. The primary legal restriction, as set out in Constitution Act 1986, is that all Ministers of the Crown must be members of Parliament. Following a general election, it irrespective of the outcome, it has been the practice for all Ministers from the outgoing administration to resign as Ministers and from the Executive Council; this formal process, marks the end of the administration.

Collectively direct the executive branch of government, Ministers:

- Are members of the Executive Council
- Formally advise the Governor-General (either individually or collectively as the EC)
- Make significant decisions and determine government policy collectively, through Cabinet decision-making process
- Exercise statutory functions and powers under legislation
- Determine both policy direction and priorities for their departments
- Most cases have financial responsibilities
- Are supported by and direct officials in the state services and the wider state sector
- Are members of parliament and are accountable to the House
- Have a political role in maintaining government stability
- Power is derived from both the common law power of the Crown and from statute.

Although all Ministers are members of the Executive Council, they are not usually all members of Cabinet. Ministers outside Cabinet have full legal power as Ministers, and may be appointed to full portfolios. They have the same role, duties, and responsibilities as Ministers inside Cabinet, and are also bound by the principle of collective responsibility. The PM determines the allocation of portfolios to Ministers, taking into account various matters.

ii. Cabinet System in NZ

The elusive nature of Cabinet arises from the fact that although it is so powerful, it is informal. The Cabinet in NZ has never had legal functions or powers, it takes no formal executive action. It has no legal relationships with the institutions of government, instead the roles and responsibility's of executive government are those of individual Ministers. The Executive Council is the equivalent formal body to that of Cabinet, although its membership is broader and includes Minister's outside Cabinet. Key

features of Cabinet decisions making includes consultation, the confidential nature of Cabinet discussions and collective responsibilities. Consultation is about coordination and quality. There has long been a requirement to consult with other Ministers and government agencies affected by a proposal at the earliest possible stage. A second important feature of Cabinet government is confidentiality. The third fundamental feature of Cabinet decision-making is the principle of collective responsibility. This principle is essential to underpin Cabinet's government. All these features are both fundamental and evolutionary. Almost all proposals are initially considered by a Cabinet committee. The Secretary of Cabinet and Clerk of the EC has a function to provide advice to the Prime Minister, as Chair of Cabinet and to the Governor-General on central decision making processes and constitutional procedures. (Shroff 81)

a. Cabinet Manual 2017

Cabinet is central to NZ's system of government. It is established by convention not law.

The Secretary of the Cabinet is a public servant and therefore politically neutral. The Secretary of the Cabinet is responsible for ensuring that the functions of the Cabinet Office are carried out effectively. These functions include:

- Conducting and maintaining the central decision-making processes of executive government
- Providing secretariat services to Cabinet and Cabinet committees
- Attending all Cabinet and Cabinet committee meetings to facilitate and record impartially the decisions taken
- Maintaining and preserving the records of successive Cabinets
- Providing advice on certain central government issues
- Building and sustaining knowledge and understanding of centre-of-government constitutional functions
- Promoting effective relationships between Cabinet and departments and agencies
- Providing guidance on central government operations and processes
- Coordinating the policy and administrative aspects of the government's legislation programme
- Advising on Minister's conduct, public duty, and conflicts of interests

2. Collective Ministerial Responsibilities

The doctrine of collective responsibility reinforces collective ministerial responsibilities; it as three essential elements: confidence, unanimity and confidentiality The Cabinet must collectively enjoy the confidence of the House of Representatives in order to continue in office…unanimity and confidentiality are the other elements of the doctrine of collective responsibility. Once Cabinet makes a decision, all Cabinet ministers must support it publicly, and Cabinet discussion leading up to it must remain

confidential. The unanimity and confidentiality elements of collective responsibility have important consequences, the first consequences is that every government looks more unified that it is. Every minister must be prepared to defend every policy the government has, and that advances the value of cohesion and purposeful ness. Collective responsibility is one the factors in producing strong executive control over Parliament. Ministerial responsibility is a constitutional convention, it is in a state of continuous evolution. (Palmer and Palmer 86)

The conventions around collective responsibility have evolved again, the present trajectory leans toward allowing dissent to be publicly expressed. It is more real and consistent with transparent government. Pre MMP, Cabinet collective responsibility was strict. Even if they disagreed with a decision of Cabinet, they had to publicly support it. When we moved to the end of the era of coalition government. Strict application of Cabinet collective responsibility would have seen them subsumed into the wake of larger, lead party – and ultimately paying the price at the next election. Parties negotiated 'agree-to-disagree' processes to allow them to speak contrary to the government position on certain matters, as and when agreement was reached with the lead party about the expression of dissent, but the ad hoc expression of dissent still involved pre-approval by Cabinet. More recently parties have negotiated "selective collective responsibility," Cabinet Ministers from coalition or support parties were only bound to support the agreed Cabinet position for matters falling within their portfolios, but otherwise were not bound to support the Cabinet position. In other words, when wearing the hat of Minister responsible for the relevant portfolio, Ministers spoke for the government had to tow the government line. When wearing the hat of leader or member of a coalition party, they were free to criticise the government the government position, the critical distinction was whether the matter fell within a Minister's portfolio or not. The Prime Minister confirmed, without hesitation, that under his leadership Ministers from support parties are now authorised to dissent about matters within their own portfolio, as long as they do so as leader of their party not as Minister. The fact that the PM is 'relaxed' about dissent by a Minister within their portfolio means one of three things:

a) The PM has authorised dissent in this case, engaging the agree-to-disagree processes for matters within a Minister's portfolio
b) The Minister has breached Cabinet collective responsibility, but the PM has decided not to sanction the Minister or enforce the convention
c) The PM and Cabinet has effectively agreed to change the rules around collective responsibility (Knight 95)

Cabinet unanimity is a rule of pragmatic politics, not a constitutional convention. Whether or not a minister should resign is ultimately the PM's call. Collective

responsibility is what the PM deigns it to be as a matter of pragmatic politics. (Joseph 97)

i. Confidential Cabinet Manual v Official Information Act

Discussion at Cabinet and Cabinet committee meetings is informal and confidential. (Cabinet Manual 2017)

S 9(2) Other reasons for withholding official information: maintain the constitutional conventions for the time being which protect – confidentiality of communications by or with the Sovereign or her representative, collective and individual ministerial responsibilities, political neutrality of officials, the confidentiality of advice tendered by Ministers of the Crown and officials, or maintain the effective conduct of public affairs through – the free and frank expression of opinions by or between or to Ministers of the Crown (Official Information Act 1982)

ii. Confidentiality

The third element of the doctrine of collective responsibility is that Cabinet discussion must be kept confidential. This reinforces unanimity by preventing the unauthorised leakage of differences of ministerial opinions. The Official Information Act 1982 contains an overall presumption in favour of release of information, subject to certain exemptions. Cabinet papers and Cabinet minutes, as well as Cabinet discussions are therefore subject to the Official Information Act 1982 as they contain official information. The convention of confidentiality does however, usually constitute good reason to withhold information about oral discussions at Cabinet under section 9(2) (Palmer 89).

iii. Unanimity

Unsurprisingly, the first fully-fledged coalition – between National and United in early 1996 – embraced tight discipline in law making. In the end, the coalition was short-lived with United winning only one seat at the first MMP election in October 1996. Following the 1996 election, a new majority coalition government was eventually formed between National and NZF. This preference for tight discipline was driven by political rather than constitutional considerations. The Parliamentary arithmetic placed NZF in a strong bargaining position (as the pivotal party) and the party leadership was eager to exercise its new found influence for various political ends, including key ministerial roles. The inflexible coalition arrangements contributed to increasing tensions, the enforcement of tight inter-party discipline gave NZF MP's little opportunity to differentiate their party from National. (Boston and Bullock 90)

The new Labour-Alliance minority coalition government, crafter a more open-ended approach, which was incorporated into a brief coalition agreement. Initially referred to as the 'party distinction' provision (the agree-to-disagree' provision) was as follows:

> Where there is an issue of importance, we raise it with the coalition management committee including possibly identifying the matter as one of 'Party-Distinction'. In this event there may be public differentiation between the parties in speech and vote which will not be regarded as being in breach of the convention of collective cabinet responsibility.

Additionally, the provision acknowledged that party differentiation within a formal cabinet coalition could not be frequent because of the likely political fallout. Coalition government may decide to establish 'agree to disagree' processes which may allow Ministers to maintain in public, different party positions on particular issues or policies. Ministers must implement the resulting decision or legislation, regardless of their position throughout the decision-making process.

In the 2005, Labour and the Progressive remained in a 'formal coalition' (with an agree-to-disagree provision) and Labour negotiated highly unusual 'enhanced' confidence and supply agreements with NZF and United Future. These agreements were 'enhanced' in the sense that the leader of each minor party received a ministerial position, albeit outside cabinet; previously, confidence and supply agreements had entailed no more than a legislative coalition. Finally, Labour and the Greens negotiated an 'enhanced' cooperation agreement, the parties agreeing to collaborate on issues of shared interest in return for the Greens' pledge not to oppose the government on confidence and supply. (91)

In short, the Manual enabled NZ and United future ministers to speak freely as MPs or leaders of their party, rather than as ministers on any matter outside their portfolio areas. One difficulty with the new arrangements was defining a 'portfolio area', as ministerial portfolios overlap and the boundaries are often blurred. The Labour-led government addressed this by redefining problematic portfolios. Hence when NZF leader was appointed Foreign Minister, trade policy was removed from his portfolio and designated as a separate portfolio. Where necessary the government adopted a narrow interpretation of what matters fell within specific portfolio boundaries. Hence, if a matter could not be said to fall squarely within a portfolio, dissenting ministers were given the benefit of the doubt. It was expected by the relevant parties that dissent within the executive would be (a) limited to matters of party distinction, with little tolerance for ministers opposing their own party's position (b) employed as a last resort, and only after efforts to find a consensus had failed and (c) relatively muted, with ministers criticising government policy less stridently that if they were in opposition.

Overall, the frequency and tone of inter-party dissent was limited two automatic stabilisers, the principle of reciprocity inherent in the doctrine of collective responsibility and the practical realities of parliamentary politics. National's decision to embrace governance arrangements similar to those of 05-08 reflected its desire to avoid undue reliance on ACT, a mall, often contentious, market-liberal party which was known to oppose several key National initiatives, including changes to moderate the previous government's controversial legislation on emissions trading.

iv. Collective Responsibility Cabinet Manual 2017 (93)

In all areas of their work, therefore, Ministers represent and implement government policy. Acceptance of ministerial office (whether in or out of Cabinet) means accepting collective responsibility. Once Cabinet makes a decision, Ministers must support it, regardless of their personal views and whether or not they were at the meeting concerned.

Coalition governments may decide to establish "agree-to-disagree" processes which may allow Ministers within the collation to maintain, in public, different party positions on particular issues or policies. Once the final outcome of any 'agree-to-disagree' issue or policy has been determined, Ministers must implement the resulting decisions or legislation, regardless of their position throughout the decision-making process. Agree to Disagree process may only be used in relation to differing party positions within a coalition. Ministers outside Cabinet from Parliamentary party supporting the government may be bound by collective responsibility only in relation to their particular portfolios, including any specific delegated responsibilities. When they speak about matters outside their portfolio, however, they may speak as political party leaders or members of Parliament rather than as Ministers, and do not necessarily represent the government position.

3. Cabinet Decision-Making

a. Cabinet Manual 2017

The following matters must be submitted to Cabinet (through the appropriate committee):

(a) significant policy issues;

(b) controversial matters;

(c) proposals that affect the government's financial position, or important financial commitments;

(d) proposals that affect New Zealand's constitutional arrangements (see paragraph 5.76);

(e) matters concerning the machinery of government;

(f) discussion and public consultation documents (before release);

(g) reports of a substantive nature relating to government policy or government agencies;

(h) proposals involving new legislation or regulations (see chapter 7 and the CabGuide);

(i) government responses to select committee recommendations and Law Commission reports (see paragraphs 7.21, 7.119 – 7.122, and the CabGuide);

(j) matters concerning the portfolio interests of a number of Ministers (particularly where agreement cannot be reached);

(k) significant statutory decisions (see paragraphs 5.34 – 5.38);

(l) all but the most minor public appointments (see the CabGuide);

(m) international treaties (see paragraphs 5.77 – 5.80); and

(n) any proposals to amend the provisions of the Cabinet Manual.

Matters that should not, as a general rule, be brought to Cabinet include:

(a) matters concerning the day-to-day management of a portfolio that have been delegated to a department;

(b) operational (non-policy) statutory functions; or

(c) the exercise of statutory decision-making powers (within existing policy) concerning individuals.

Portfolio Consultation:

- Minister of Finance – proposals seeking additional resources
- Minister of State Service – machinery of government issues
- Minister of Foreign Affairs – proposals relating to international treaties
- Minister of Justice – proposals affecting constitutional arrangements
- Attorney-General – proposals raising significant legal issues

4. Individual Ministerial Responsibility

Individual Ministerial Responsibility has three distinct elements (Palmer 100):

- **The Explanatory element**
- **The Amendatory element**

A Minister is responsible to Parliament for explaining and making amends in relation in matters within his or her portfolio. There are several elements to this

- A Minister is Responsible to Parliament
- A Ministers is responsible for explaining it
- A Minister is responsible for making amends
- A Minister is responsible in relation to matters within his or her portfolio

The doctrine of collective Cabinet responsibility effectively means that an individual Minister's decisions can be over-ridden by a collective Cabinet decision.

- **The Culpability element**

It is generally agreed that the culpable element of individual responsibility involved the expectation that a Minister will resign if found to be guilty of personal impropriety in relation to his or her portfolio.

- Impropriety? Lack of clarity as to whether behaviour involves impropriety by a Minister or not
- In relation to his or her portfolio? If responsibility is generally related to a portfolio then logic suggests that the culpability element should do also.
- Actual or Alleged Impropriety?
- Personal or Vicarious? It is sometimes argued that on the basis of vicarious responsibility for the actions for the actions of his or her officials even when he or she was not personally aware of them and could not reasonably have expected to be so aware. I have never been able to find convincing evidence that resignation on the basis of vicarious responsibility was ever part of the constitutional convention of individual responsibility.

Individual responsibility exists to give Ministers power and to make them responsible to Parliament for the exercise of that power. That convention constitutes the powers of individual Ministers to direct the running of their portfolio, especially their officials, as well as to ensure that there is accountability to the elected parliament for everything that goes on within that portfolio. Similarly, the convention of collective responsibility constitutes the power of the Cabinet as a collective entity that overrides the powers of individual Ministers through unanimity and confidentiality. It makes the Cabinet responsible to Parliament in its dependent on the confidence of parliament for its very existence. Practice shows us that the circumstances of when an individual Minister resigns are not determined in advance by a rule, but at the time by the PM speaking on behalf of the Cabinet collectively. The doctrine of collective responsibility subjects individual Ministers to the authority of the Cabinet collectively (which itself is subject to dismissal). It has been the consistent practice of governments that it is the loss of confidence as expressed by the PM that is key – not the circumstances in which that confidence is lost. That consistent practice, supported by recognition by enough authoritative commentators, is enough to define a constitutional convention. (103)

Ministers are accountable in this House in two ways: collectively as an Executive, and personally as individual Ministers. The principle of collective responsibility means that the whole Cabinet stands or falls together on policy decisions jointly taken. If the Cabinet loses the confidence of this House, then the Government must fall. A Minister's personal political responsibility means that he or she is accountable of the activities of his or her department. In a very real sense, the matter is not that the Minster of Conservation as a person is responsible, but that his office is responsible. On ministerial responsibility, Minsters should at the very least publicly make themselves accountable and ensure that the errors will not occur again. (NZ Parliament 106/110)

5. Standard of Ministerial Conduct

i. Conduct, Public Duty and Personal Interest - Cabinet Manual 2017

Executives, Ministers and Parliamentary Under-Secretaries must conduct themselves in a manner appropriate to their office. Ministers are expected to act lawfully and to behave in a way that upholds, and is seen to uphold, the highest ethical standards. Includes exercising a professional approach and good judgement in their interactions with the public and officials and in all their communications, personal and professional. Ultimately, Ministers are accountable to the PM for their behaviour. Accepting additional payment for doing anything that could be regarded as a ministerial function is not permissible and accepting payment for any other activities requires the prior approval of the PM. All members of Parliament are required to disclose certain assets and interests in an annual Register.

Conflicts of interest may arise between Minister's personal interests and their public duty, because of the influence and power that Ministers exercise, and the info to which they have access both in the individual performance of their portfolio responsibilities and as members of the Executive. Ministers are responsible for ensuring that no conflict exists or appears to exist between their personal interest and their public duty. Ministers must conduct themselves at all times in the knowledge that their role is a public one; appearances and proprietary can be as important as actual conflicts of interest. Ministers should avoid situations in which they or those close to them gain remuneration or other advantage from information acquired only be reason of their office. Ministers themselves are responsible for proactively identifying and reviewing possible conflicts of interest, and ensuring that any conflicts of interst are addressed promptly:

- A conflict of interest may be pecuniary (arising from the Minister's direct financial interest) or non-pecuniary (concerning a Minister's family)
    - Pecuniary – Financial interests as assets, debts and gifts, where conflict of interest may arise if a Minister could reasonably be received as standing to gain or lose financially from decisions or acts for which he or she is responsible, or form information to which he or she has access.
    - A conflict may arise if people close to a Minster such as a Minister's family, whanau, or close associates might derive or be perceived as deriving, some personal, financial or other benefit from a decision or action by the Minster or the government.
    - Public perception is a very important factor. If a conflict arises in relation to the interests of family, whanau or close associates.
    - Ministers should take care however, to ensure that they do not become associated with non-governmental organisations or community groups where:
        - The group's objectives may conflict with government policy
        - The organisation is a lobby group
        - The organisation receives or applies for government funding

ii. Managing Conflicts of Interest

The Secretary of the Cabinet should be kept informed of conflicts of interest as they arise. In addition, the PM should be advised in writing of conflict that are of particular concern or that will require ongoing management. If a conflict between a Minister's portfolio responsibilities and a personal interest is substantial and enduring, it may be necessary to consider a permanent change to some or all of the Ministers portfolio responsibilities.

Measures:

- Declaration of Interest
- Not receiving papers
- Transferring responsibility to another Minister
- Transferring responsibility to the department
- Divestment
- Blind Trusts
- Resignation from an organisation

b. Individual Ministerial Responsibility Tutorial

Question One

Mr Chuck Gourmé is New Zealand's top chef and runs the famous Restaurant Escargot in Wellington, which is popular with members of the current Government. He employs over 150 workers in his restaurants and his dedication to the use of fresh regional organic produce benefits the country's economy. He caters for official events, including banquet dinners for foreign dignitaries and the annual summer party of Dr Apple Aday, the Minister of Health. Mr Gourmé also lives in Dr Aday's electorate. The specialty at Escargot is the snail and garlic mousse.

a. Two weeks ago, an inspector from the Ministry of Health conducted an annual check of hygiene conditions at Escargot. While giving the restaurant a "pass" for general cleanliness, she found that the kitchen would benefit from a makeover to eradicate germs.

A panicking Chuck Gourmé contacts Dr Aday, hoping she will have a word with the inspector. How should Minister Apple Aday handle this request?

This is potentially a conflict of interest for the Minster – his electoral constituency and his political constituency are coming into conflict. Other spouse conflicts include

- *Spouse/family member has shares/interests in something*
- *Association with a community group or board member*
- *Conflicts can arise from a family member or an NGO/Business interest you may have, not only personal and can be pecuniary or nonpecunairy*

Merely acting ethically will not be enough, that you also must be seen to be acting ethically (The Cabinet Manual) – and are accountable to the PM for their behaviour.

What should a minister do when their constituent ask them for advice? Cabinet Manual

- *You can use a different letterhead or something else to make it clear whether you are acting as a member of Parliament or as a Minister. If it is not within your portfolio matter, you can make representations to the Minister in charge.*
- *In this case, it is people from her Ministry conducting the inspection, so in this case we would look at 2.79/2.80 of the Cabinet Manual (to manage conflict of interest) – and the question is whether it is minor or a major change.*
    - *I would suggest passing it off to the department (or another Minister), it's probably not a big deal.*

If it is something that should be kept separate from politics, it would be improper to have involvement in trying to subvert the law in some way by making them political.

b. Last week, the Dumb Post ran a story that a bacteria in the snails served at Escargot affected 20 customers. The bacteria was caused by snails originating from Queensland. It seems that an elaborate scam occurred within the Customs Service, where snails were falsely labelled as sourced in Wellington. Interrogated by the Prime Minister at the Cabinet meeting, the Customs Minister, Cam Embert, responded: "I am not responsible for checking the paper work. Whatever the origin, the snail and garlic mousse is great!" The opposition leader calls on the Prime Minister "to do the right thing."

What should Minister Cam Embert do to avoid being in breach of the convention of individual ministerial responsibility? Can (or should) the Prime Minister sack him?
Explanatory – duty to explain what happened, how it arose, what the extent of it is to the House
Amendatory – taking steps to make things right, fixing the immediate problem, putting in place changes to stop it happening in the future.
Interlink – Where you have a duty to come back to the house your Amendatory steps, how you fixed it, how it was caused etc.
Culpability – When something goes wrong in the Ministers department there is a theory they should resign – in reality they should resign where there is personal improprietary.

The Minister needs to fulfil these limbs and perhaps if he doesn't that is an example of personal improprietary. I don't personally believe there is anything he could have done here, he doesn't have personal responsibility. BUT there wasn't a mistake, there was a scam at customs which is kind of a big deal.

Question Two
The materials at pp 104–110 set out excerpts from the parliamentary debates relating to the Cave Creek tragedy. On a close reading of those materials:
a. In what ways did the Hon Denis Marshall discharge his explanatory and amendatory responsibilities under the doctrine of individual ministerial responsibility?
b. What parliamentary processes were used to hold him responsible to Parliament?

c. Marshall held out for a long time but eventually resigned many months after the tragedy. Do you think the convention of individual ministerial responsibility required him to resign? If so, should he have done so earlier?

C. Public Service

The formal relationship between Minsters and the public service is governed primarily by the State Sector Act and the Public Finance Act. This is governed by convention. Ministers are responsible for determining and promoting policy, defending policy decisions, and answering in the House on both policy and operational matters. (Cabinet Manual 2017 117)

Officials are responsible for:

- Supporting Ministers in carrying out their ministerial functions
- Serving aims and objectives of Ministers by developing and implementing policy and strategy
- Actively monitoring the performance or condition of state sector organisations, government assets, and regulatory regimes within their Ministers' portfolios
- Informing Ministers of significant developments within their portfolios, and tendering free and frank advice
- Implementing the decisions of the government of the day

Officials must be poltiically neutral in their work, this principle of political neutrality is central to the public service's ability to support the government of the day and any future government.

State Services – We must be fair, impartial, responsible and trustworthy

The constitutional conventions of ministerial responsibility define the power of the Cabinet and individual Minsters. Alongside those conventions and are the corollaries that govern the public service. These can be characterised as the duties of:(Palmer 121)

- Loyalty
- Neutrality
- Anonymity

The public service must be loyal to the Government of the day. The public servant's duty of loyalty is not absolute. It is balanced by the need to ensure that the same standard of loyalty will be owed and be seen to be owed to future governments. There are very high standards of political neutrality maintained by public servants in NZ. According to conventional constitutional theory, public servants should not speak publicly themselves. Rather the Minister speaks publicly and should defend public servants. If

public servants are grey and faceless, they are less at risk of generating an independent public profile in the media. Such a profile carries an inherent risk of the official being separated from the Minister's view or other political views.

Yet there are legally difficult questions buried in the State Sector Act and the Public Finance Act as to how far an individual Chief Executive's responsibility extend. Accountability for financial decision is difficult to separate out from a group of interconnected decisions – if a lack of resources leads to error who should bear the consequences.

The fear of untimely premature disclosure of information under the Official Information Act can lead to undesirable behaviour, such as Officials giving advice orally rather than in writing or not give advice at all when it is warranted. I believe the Official Information Act needs to be tightened up in two ways: it should be made clearer in the Act that there may e good reason to withhold advice or exchanges of news between officials and Ministers if it relates to an issue currently under active consideration. Second, where the Ombudsman finds that Ministers or officials have refused to release information or ignored the statutory deadlines, the penalties should be increased, and made politically and bureaucratically real. Ministers are seen to attack the public service, not to defend it. I worry that in the longer term, if left unchecked, this tendency will carry the seeds of unravelling the relationship of trust between ministers and public servants that is crucial to the effective operation of the government. (Palmer 123)

a. State Sector

The original tasks of organised government were internal order and security, defence and external relations and public revenue needed to underwrite those tasks. Minsterial portfolios are allocated for an array of public service, social welfare, broadcasting, health, housing, education, employment, the environment, Maori affairs, transport, overseas trade, consumer affairs, revenue, state-owned enterprises and so on. (Joseph 124)

The new managerial focus on ends in preference to means necessitated the increased legal autonomy of various parts of the state sector. Entities should have the flexibility to meet policy objectives by whatever lawful means they choose. (Mclean 125)

i. The Executive

Defining 'the executive' as it has emerged as a result of these attempts, is no easy task and is not entirely meaningful. (Mclean 125)

1. Political notions of the executive

The executive compromises the Ministers of the Crown and the departments they heard. Traditional constitutional understandings about the executive focus on political relationships. The poltical relationship between Her Majesty in Right of New Zealand and her responsible ministers is central and defining. Conventional understandings also define the relationship between the public service and minsters. Government departments are conceived as 'extensions of the Minister acting in the Minister's name

and in accordance with the Minister's wishes.' The public service is conceived as the primary means by which the government acts, rather than a separate actor (Mclean 125).

2. Legislative definitions of the executive

Legislation in this area, invariably refers to the government's obligation as attaching to the Crown (otherwise undefined). This usage has presumably arisen not only because Queen Victoria was a party to the 1840 treaty, but also because government assets, on which Maori grievances have been focused, vest in the Crown. Quite apart from these different conceptual understandings, the executive is commonly defined for the pragmatic purpose of determining whether internal government accountability and control mechanisms should apply. (Mclean 127)

There are five broad categories that are supplemented by scheduled list of entities:

- Crown agents which must give effect to government policy when directed by a minster
- Autonomous crown entities that must have regard to government policy
- Independent crown entities that are not subject to direction
- Crown entity companies
- Crown owned subsidiaries

3. Judicial Definitions

The leading judicial authority on the scope of the executive branch is CIR v Medical Council of NZ. The Court of Appeal rejected a functional test and opted instead for a control test. It is not for the courts to second-guess the political judgement made by the legislature. Keith J characterised the public sector into three groups: the group of bodies serving ministers and the Governor-General who make up the public service. Such bodies are led by Chief Executives who have direct responsibilities to ministers and who tender advice to ministers. The second group comprises government trading enterprises that are characterised by placing greater accountability on board and managers and by the greater distance of ministers from their day-to-day operations. The third group is made of different entities enjoying various degrees of independence from ministerial and other controls. It includes administrative tribunals. Funding bodies, advisory bodies, trading corporations that are not state enterprises and control and supervisory bodies. (Mclean 128)

a. State Services Commission (129)

Public Service – the departments listed on the Schedule 1 of the State Sector Act 1988, including any departmental agencies listen on Schedule 1A of the same Act

State Services – By definition, the State Services comprises the agencies that operate as Instruments of the Crown in respect of the Government of New Zealand. This includes in the Public Service.

State Sector – The State sector comprises the agencies whose financial situation and performance is included in the Financial Statements of the Government of New Zealand as part of the Government reporting entity under the Public Finance Act 1989. The States Services tertiary education institutions, State-Owned Enterprises and Mixed Ownership Model companies – as well as small numbers of agencies that operate as instruments of the Legislative Branch of Government.

b. *Commissioner of Inland Revenue v Medical Council of New Zealand*

1997 Court of Appeal Keith J

Facts: In the exercise of its functions the medical council was completely independent of Ministers. Next the medical council was not subject to the Ombudsmen Act 1975 or the Official Information Act 1982. By contrast, almost all, if not all, Crown entities are subject to the Official Information Act and many are subject to both.

Issue(s): Is the Medical Council 'a public authority'? The income tax exemption under s 61(2) of the Income Tax act depends on whether the medical council was an 'instrument of the Executive Government of New Zealand.'

Held: The fact that the state accepts as a major responsibility the promotion and maintenance of the health of its people does not mean that all the bodies set up to carry out that function, or all those who have related responsibilities, are 'instruments of the Executive Government of New Zealand.' It does not follow from such propositions that the body which carries out the health-related function is an 'instrumentality of the Executive Government.'

By contrast Ministers could and give directions to state-owned enterprises for instance in respect of their statements of corporate intent; they have extensive powers in respect of the statements of intent of some Crown entities; they can require information about an entity's affairs (and not simply the statistical information that could be required of the council) and they can extract a profit from the funds of certain Crown entities. Those wishing to challenge the decisions of the council took that challenge to the regular Courts and not to Ministers as is more commonly the case with a body which falls within the scope of the Executive Government.

Result: Accordingly, I conclude that the medical council was not at the relevant time an 'instrument of the Executive Government' and so accordingly not a 'public authority' falling within the exemption provided by s61(2) of the Income Tax Act. The Crown does not have a sufficient degree of control over it.

Law: Income Tax Act 1976 61(2) Incomes wholly exempt from tax: The Income, other than income received in trust… of any public authority

S(2) Public authority means the Public Trustee, the Maori Trustee and every other department or instrument of the Executive Government of New Zealand.

c. *Lab Tests Auckland Ltd v Auckland District Health Board*

2009 Court of Appeal Arnold J and Ellen France JJ

Facts: The three district health boards in Auckland decided, following a tender process, to award a single contract for the provision of pathology services to Lab Tests Auckland Ltd, commencing on 1 July 2007. The incumbent provider, Diagnostic Medlab, which had been unsuccessful in the tender process, challenged the decision by way of judicial review. Diagnostic Medlab alleged that the decision was fundamentally flawed and ultra vires as a result of the involvement of a Dr Bierre, a member of the Auckland District Health Board who also had a financial interest in Lab Tests. It was said that Dr Bierre had a conflict of interest and had access to inside information which had assisted the Lab Tests proposal. It was also alleged that the district health boards had failed to consult with primary health organisations about the proposed changes to pathology services.

At the time he was elected to the Auckland District Health Board in December 2004, Dr Bierre pursued the possibility of providing a boutique laboratory service to the health board. For various reasons that proposal did not proceed and was mothballed in June 2005. Subsequently, when Dr Bierre became aware in November 2005 of the request for proposal issued by the district health boards, he approached other parties to sound them out about being involved in a consortium to make a bid (which in due course became the successful Lab Tests proposal). On 22 December 2005 Dr Bierre sought, and was granted, leave of absence from the district health board.

They say that about 30 central government organisations were transformed into state-owned enterprises (SOEs). This period of change also saw the increased use of contracting within the public sector. For present purposes there are two important elements to this. First, there has been increasing use of broadly stated performance agreements, both to provide specific objectives for the enterprises to which they relate, but also to allow for performance assessment and to facilitate accountability. Statements of corporate intent under s 14 of the State-Owned Enterprises Act 1986 (the SOE Act), agreed between the boards of SOEs and the relevant ministers, are one example. Secondly, state agencies have been encouraged to consider whether they should "make" or "buy" particular services (that is, whether they should provide services themselves or contract with the private sector for their provision). By this means the private sector has increasingly performed work previously performed directly by the public sector.

Prior Proceedings: The High Court, adopting a broad-based "probity in public decision-making approach", held that the district health boards had made serious procedural errors in the tender process in accepting the bid from Lab Tests, when Dr Bierre's role gave rise both to a conflict of interest as well as unfairness based on access to confidential information not available to other tenderers. The High Court also held that the boards had failed to consult with primary health organisations when they had been obliged to do so. Lab Tests appealed.

Relief Sought:

Held: First, the objectives set out in s 22 of the NZPHD Act, and the functions described in s 23, are social or public welfare-type objectives and functions. They are not explicitly commercial. it is clear that DHBs are expected to act commercially at least to some extent or in some contexts. They are obliged to perform their functions "efficiently and effectively", albeit "in a manner consistent with the spirit of service to the public." Thirdly, s 25(2)(a) and (b) of the NZPHD Act empowers DHBs to "negotiate and enter into" service agreements or amendments to such agreements. That is relevant to the question of what, if any, public law procedural obligations apply to DHBs when acting under s 25.

It does at least indicate that the courts should take a cautious approach to imposing public law procedural obligations of the sort at issue in this case on DHBs. Clearly, judicial review will be available where there is fraud, corruption or bad faith. Further, we accept, as a matter of principle, that it may be available in analogous situations, such as where an insider with significant inside information and a conflict of interest has used that information to further his or her interests and to disadvantage his or her rivals in a tender.

It follows, then, that we do not accept the final element of the formulation that Mr Hodder put to us. He submitted that a s 25 decision was reviewable "if it was tainted by fraud, corruption, bad faith or any other material departure from accepted public sector ethical standards which requires judicial intervention" (emphasis added). That open-ended formulation is not, in our view, consistent with the authorities, or, in the present case, with the statutory context.

It follows also that we do not agree with the Judge's view of the scope or standard of judicial review to be applied in the present case.

Law: The changes to the public sector over the last 20 years have presented a considerable challenge to the courts, and in particular to their approach to judicial review

First, where a public body is involved in a commercial process, in this case seeking tenders and awarding a contract, that body must exercise its contracting power in accordance with its empowering statute, if there is one. Here the ARDHBs must (at least) comply with the requirements of s 25. If they do not, their contracting decision is susceptible to judicial review on the ground of illegality. None of the parties before us disputed this.

Secondly, the procedural obligations of a body performing a public function will vary with context. So, a public body exercising a particular statutory power may be bound by natural justice obligations, but such obligations may have less, or even no, relevance to the same body when making another type of decision under statute.

Thirdly, "context" for these purposes includes the nature of the decision being made, the nature of the body making the decision and the statutory setting within which the decision is made. In the present case, the statutory provisions dealing with confidential information and conflict of interest assume critical importance.

Fourthly, the Privy Council's decision in Mercury Energy indicates that the courts will intervene by way of judicial review in relation to contracting decisions made by public bodies in a commercial context in limited circumstances, although that is subject to the point about context just made.

The Privy Council's unwillingness to import public law notions into the contractual framework suggests that their Lordships saw the contractual framework as sufficient in itself.

In the wake of decision from NZSC *Proprietors of Wakatū v Attorney-General.* The Crown appointed a commissioner to investigate these purchases. The Commissioner concluded that these purchases were equitable and determined that in order to give effect to them, a grant of 151,000 acres should be made to the New Zealand Company, with one tenth of that area to be reserved for the benefit of the customary owners. In fact, only around a third of that amount was every reserved for Māori, and even those reserves were not all retained for Māori use. The plaintiffs in Wakatū were descendants of the original customary owners.

In *Wakatū,* the SC determined that the Crown held the land that was served for Māori on trust for the Māori customary owners, and that the crown held an equitable obligation in relation to the shortfall (the land that should have been, but was never, reserved). Meanwhile, the ACC wanted to sell a parcel of land which included within it land that was subject to the grievance. Mr Stafford (the lead *Wakatū* plaintiff), tried to lodge a caveat on the title to the land. The issue before the HC was whether the caveat should be removed.

d. Accident Compensation Corporation v Stafford

2018 High Court Collins J

Facts: The public nature of the scheme is evident in s 3 of the Accident Compensation Act 2001, which refers to the purpose of that Act as being to enhance the public good and reinforce the social contract represented by the Accident Compensation Act 1972 under which those injured by accident lost the opportunity to sue for personal injury in exchange for comprehensive cover and compensation. The public nature of the scheme is also confirmed by the fact that two of the accounts administered by ACC are funded, at least in part, by appropriations approved by Parliament. All of ACC's accounts are funded to varying degrees through returns on ACC's investments. First, the Minister plays a pivotal role in appointing

members to the Board (by making recommendations to Cabinet, which makes the appointment decision).

Issue(s): Does Mr Stafford have a reasonably arguable case that he has a caveatable interest over the title to a property in central Nelson owned by the Accident Compensation Corporation (ACC)? The sub-issue – whether it is reasonably arguable that the ACC property may be applied towards settling any Crown liabilities arising from the Wakatū proceeding?

Held: Third, through the mechanisms of setting ACC's "strategic direction and performance expectations and monitoring [ACC's] performance under [the Crown Entities Act]". Although ACC is subject to a degree of oversight and control by Ministers, the Crown is not liable to contribute to the payment of any debt or liability of ACC.

It is therefore reasonably arguable the Minister could, after following the steps in s 115 of the Crown Entities Act, issue a direction to ACC pursuant to s 103 of the Crown Entities Act forbidding the sale of any land held by ACC that is the subject of a claim by Māori on the basis that such lands may be used by the Crown to settle Māori land claims.

This analysis leads to the conclusion that it is reasonably arguable the ACC property may indirectly be the subject of control by the Minister or Ministers when giving directions concerning government policy for the resolution of land disputes between the Crown and Māori, or when managing the Crown's fiscal risks in relation to land disputes with Māori.

Result: The answer to the question posed in Part II of this judgment is therefore answered in favour of Mr Stafford.

Law: A statutory entity is "a legal entity separate from its members, office holders, employees, and the Crown" (emphasis added). It continues to exist until it is dissolved by an Act. There are three categories of statutory entities provided for in the Crown Entities Act, namely Crown agents, autonomous Crown entities and independent Crown entities.

(1)First, the effect of s 15(b) of the Crown Entities Act is that all statutory entities, and therefore Crown entities, are separate legal bodies from the Crown. The legal distinction between the Crown and Crown agents such as ACC leads me to the view that it is better to examine the relationship between the Crown and ACC in terms of agency rather than as ACC being a "emanation" or "instrument" of the Crown. The concept of agency fits more comfortably with the terminology of the Crown Entities Act, in which organisations such as ACC are classed as Crown agents.

(2)Second, it is not particularly helpful to simply ask if ACC is an agent of the Crown. The reason why this stark question is not particularly helpful is because the answer is dependent on the circumstances in which the question is asked. ACC may act on behalf of the Crown for some purposes but clearly not for others. Thus, for example, a claim against ACC in relation to a personal injury by accident is not the same action as a claim against the Attorney-General seeking exemplary damages arising from the same events. In those circumstances, ACC "is not the Crown". In other circumstances, for example when Ministers give lawful policy directions

to ACC pursuant to ss 103 or 107 of the Crown Entities Act, it is reasonably arguable ACC gives effect to those directions on behalf of the Crown.

(3)Third, the appropriate inquiry is whether it is reasonably arguable, in the context of this case, that responsible Ministers can lawfully exercise control over ACC in a way that could lead to the ACC property being applied towards the settlement of any Crown liability arising from the Wakatū. Only in those circumstances would ACC hold the property on behalf of the Crown.

D. The Judiciary

1. Political and Judicial Branches

The argument over constitutional fundamentals posited a blunt choice between two extremes – **parliamentary** supremacy or **judicial** supremacy. Political and judicial powers are essential correlatives of representative democracy and the rule of law. The ideal of government under the law postulates a system of independent and impartial courts dispensing justice according to law. (Jospeh 146)

The judiciary's constitutive (law-making) role is not well understood. An historically antagonistic view held that judges do not make law.

> *Sir William Blackstone: Judges did ot make the law they merely discovered it (judicial decisions evidenced the law but did not constitute it)*

The common law was purposefully summoned into existence by decisions of the courts from the time of their creation. The judicial authority to develop the law is synonymous with the common law. However, the common law does not exist in isolation of Parliament. (Jospeh 147)

The courts' authority to mould and develop the law is exercised also in applying legislation. This authority is implicit when Parliament confers a statutory discretion on the courts. The authority to develop the law is equally manifest when courts resolve ambiguities in legislation, adapt existing authority legislation to new circumstances, build legislative meaning around undefined terms, and fill gaps in statutes that are open-ended or incomplete. The court's law-making role in construing and applying legislation in interstitial, exercised within the parameters of the statutory text. (Jospeh 147)

a. Judicial Independence

Judicial independence is an indispensable principle of a liberal democracy and the rule of law. Judicial independent is also a key element of the separation of powers. All persons – politicians and officials included – must be answerable to the law as administered in a system of independent and impartial courts. A guarantee of judicial independence is aimed at maintaining public confidence in the administration of justice. Confidence is likewise destroyed when right-minded people believe that the institutional independence of judges is compromised. Their independence includes

security tenure, secured judicial salaries and institutional independence, including adequate state resourcing and support. The concepts of independence and impartiality although related are distinct. Judicial independence is conduit for achieving far and just decisions and is a necessary condition of impartiality. Judges and the legal profession bear primary responsibility to uphold the independence and integrity of the courts. Successive Chief Justices have lamented the exposure of the judicial branch to corrosive public invective. (Jospeh 148)

i. Security of Tenure

1. The Removal Power

The power of removal is circumscribed by the need to establish either of two grounds – misbehaviour or incapacity. District Court judges do not enjoy the same security of tenure as their High Court counterparts. They may be removed by the Governor-General on advice of the Attorney-General, without an address of Parliament on the grounds of misbehaviour or inability. Some believe that District Court judges should enjoy the same security of tenure as their High Court counterparts. (Jospeh 148)

2. Historical Precedents

No address to remove a judge has been moved in the history of the New Zealand Parliament. There are no precedents for the removal of an inferior court judge, although there as several instances of forced resignation from the Bench. Most complaints against inferior court judges have been resolved out of public view.

3. Misbehaviour

Conduct as would justify removing a judge from office must compromise the integrity of the judicial function. It must be so 'manifestly and totally contrary to the impartiality, integrity and independence of the judiciary' as to shake the public's confidence in the justice system. *Gibraltar* case confirms that the standard is an exacting one.

Wilson v Attorney-General, the Full Court made two rulings: first that it is not appropriate to attempt a rigid categorisation of conduct as might amount to misbehaviour. The Court endorsed the PC decision in the *Cayman Islands* case which emphasised the cumulative effect of the Judge's conduct.

4. Incapacity

There are no New Zealand precedents for removing a superior court judge for incapacity. Most judges, afflicted by mental or physical impairment, would retire rather than suffer the ignominy of removal. Physical or mental incapacity must exceed mere aberration (Jospeh 149).

ii. Financial Security

1. The legal framework

The guarantee of financial security is the second element of judicial independence. Under the Act of Settlement 1700 (Eng) judicial salaries were to be 'ascertained and established' as fixed by Act of Parliament, and not left to the discretion of the executive.

Indirect, non-discriminatory reductions in judicial salaries do not breach the principle of judicial independence. Judicial independence necessitates independent salary-fixing structures for judges that can dispel any appearance of political manipulation. (Jospeh 150)

2. Exigencies of National Economy

Exigencies of national economy have tested the guarantee securing judicial salaries.

iii. Institutional independence

The third – and arguably most vexed element of judicial independence is the court's institutional independence. The State must provide adequate resourcing and administrative support services for the judiciary to function as an autonomous branch of government. To be institutionally independent, the courts must be separate from the central bureaucracy under the control of government ministers. Institutional independence implies judicial control over the assignment of judges, the sittings of courts, court lists, the allocation of courtrooms and the direction of court staff. (Jospeh 151)

1. Extra Legal Protection

By convention, ministers and public servants refrain from criticising judicial decisions. Ministers may comment on punishment policies or the effectiveness of the law, but they may not impugn the performance of the courts. A minister should inform the Attorney-General rather than comment publicly if he or she disagrees with a sentencing decision. Ministers may say that a decision differs from the legal advice they received and announce what the government may do but they may not say a judge was mistaken or wrong. Nor should they make public comment calculated to influence the courts in future cases. Judges have taken umbrage at ministerial statements on the proper interpretation of statutes, as an affront to judicial independence. Politicians do not always respect conventions and protocols. (Jospeh 152)

iv. Miscellany

Miscellaneous rules devolve from the principle of judicial independence, Judges who become personally involved in proceedings may undermine their own independence. Judicial independence necessitates that judges be granted immunities, awarded only in the 'rarest of circumstances' where the officer has acted 'perversely, oppressively or in bad faith.' Errors of law of process by a judicial officer will not support an award of costs. The conduct complained of must be 'particularly egregious' calling for 'strong disapproval'; gross negligence or recklessness will not displace the protection. (Jospeh 153)

v. Judicial Appointments and Complaints Processes

1. Judicial Appointments Process

a. Transparent and Standardised Procedures

The 1999 changes standardised the appointments process under more transparent, uniform procedures. The Attorney-General assumed primary responsibility for appointments. In 2013, the Attorney-General's office published the procedures for appointing superior court judges. Subject to three exceptions, all judicial appointments are made on the Attorney-General's recommendation. The three exceptions involve the Chief Justice, judges of the Maori Land Court and community magistrates. The PM recommends the appointment of the Chief Justice and the Minster of Maori Affairs recommends the appointment of Maori Land Court Judges.

The extent of consultation varies. All names that meet the criteria are held by the Judicial Appointments Unit on a confidential database. The Chief Justice, the President of the CA and the Chief High Court Judge individually rank the names held on the Unit's register, from which is produced a 'long list' of potential candidates. The Solicitor-General undertakes further consultations annually to ensure that the long list remains current and relevant.

When a vacancy occurs, the Attorney-General consults the Chief Justice and other and selects from the long list a 'short list' of up to three names. The Solicitor-General investigates the personal integrity of the short-listed candidates, who must declare their fitness for office and undertaken not to resume legal practice on vacating or retiring from office. (Jospeh 154)

b. Judicial Appointments Commission

Views remain divided over whether New Zealand should establish a judicial appointments commission. Supporters of the proposal believe a commission would promote efficiencies, allow wider consultation, remove mystique and avoid suggestions of poltical influence. Others have opposed a judicial appointments commission. Three past Attorney-General expressed distrust of a formal bureaucratic structure. Appointing commission members would be highlight political, creating potential for covert political influence. (Jospeh 155)

2. Judicial Complaints Process

a. Constitutional Tension

All of the common law jurisdictions face a common challenge: how to reconcile the guarantee of judicial independence and demands for judicial accountability. (Jospeh 156)

b. Disciplining Judges

Demands for judicial accountability often use the expression 'disciplining judges' but it is a misnomer. There are no formal procedures for disciplining judges. The only powers to discipline judges are those exercises under the JCC JCPA. This Act reserves a counselling role where a complaint of inappropriate conduct is upheld. This process is essentially voluntary.

c. Developments

The former removal procedures suffered from systemic bias. A panel of retired judges would investigate a complaint and recommend appropriate actions. The Attorney would then make an election: whether or not to move that the House of Representatives pass a resolution for an address to seek the judge's removal. It was question whether this process made the Attorney both 'prosecutor' and 'judge', contrary to the principles of natural justice. (Jospeh 156)

d. Judicial Conduct Commissioner and Judicial Conduct Panel

The JCCJCPA off-sets two aims: to provide an investigative process for examining complaints, and to protect judicial independence and rights of natural justice. The Act addresses two classes of complaint against judges: those alleging inappropriate conduct, and those alleging serious misconduct that might initiate removal proceedings.

Judicial Conduct Panels are ad hoc. Membership comprises one lay member and either two judges, or a judge and a retired judge or a judge and a legal practioner. Where it is determined that a complaint has substance, the 'default option' is referral to the Head of Bench , who must independently determine the merits of the complaint and the best way to deal with it. He or she may admonish, encourage or counsel the judge, who may apologise to the complainant and/or undertake not to repeat the conduct. This process while consensual and voluntary, it is solemn one. Explaining one's behaviour to the Head of Bench will usually help. A Judicial Conduct Panel is charged with the fact-finding inquiry. (Jospeh 157)

Commissioner takes especially seriously allegations of corruption. It was prudent to formalise the complains process, but it cannot prevent complaints that are unmeritorious, vexatious or irrational.

i. Judicial Complaints Lay Observer

A Judicial Complaints Lay Observer exercises a quasi-appellate role for overseeing complaints of judicial misconduct. The Lay Observer is not constituted under any statutory authority. One is required under a consensual complaints system that lacks coercive powers to discipline inappropriate judicial conduct. A complainant dissatisfied with the complaints process may refer the matter to the Lay Observer. (Jospeh 158)