

THE SOVEREIGN AND HER REPRESENTATIVES

- Sovereign (Queen) is the Head of State
- Locates the source of her power from the Constitution Act 1986
- When they die or are incapacitated, they are succeeded
- Functions on the ground are performed by the Governor General, conferred by Letters Patent
- Countersigned by the Prime Minister of the day (Muldoon)
- Queen appoints the Governor General on the advice of the government of the day
- History of the office reflects three trends:
 - Diminution of the Governor General's powers
 - Transfer and consolidation of her powers to New Zealand
 -
- If Governor General unavailable, exercised by Chief Justice, and then by next most senior judge
- KEY PRINCIPLES: POLITICAL NEUTRALITY AND DEMOCRACY

SOURCES OF POWER

- Legislation confers power
- Prerogative power - Used to have a great deal of power
- Now has been whittled down by statute
- Generally thought of as a part of common law - exists as judges continue to apply it
- Letters Patent - prerogative instrument - made under the authority of the prerogative
- PP examples E.g granting royal assent to bills, appointing prime minister...

KEY CONSTITUTIONAL CONVENTION: The Queen/GG does as they are told by the elected government of the day. Generally communicated through executive council.

Palmer and Palmer - narrow exception are reserve powers that are exercised in accordance with democracy

Dame Silvia Cartwright - guiding principles

- non-political nature of role
- Role of democracy
- Act in a unifying way - nonpartisanship

RESPONSIBLE GOVERNMENT

Key constitutional conventions:

- Governor General Acts on the advice of her ministers
- There must always therefore be a ministry there to advise her
- Ministry must retain the confidence of the house
- No confidence - they must act in a caretaker capacity only

Keith - the government as those who are accepted to sit on the treasury benches

Constitutional conventions:

JENNINGS TEST

Cabinet Manual:

NOT law, but an authoritative guide

Does the cabinet manual create conventions or just record them?

Kitteridge vs Jennings test

INTER-PARTY GOVERNANCE

Single party majority government - most FPP elections

Single party minority government - one party at cabinet table with various support agreements outside cabinet

Majority coalition government - two parties make up the majority of Parliament

Minority coalition government - two (or more parties) are in cabinet but make up less than half

Coalitions: parties agree to be in government together

Confidence and supply: outside cabinet, but will support their right to be in office, also may have other agreements

Enhanced confidence and supply: gives support to the government, commits to support parts of the legislative agenda while the government will agree to advance some of their policies, given Ministerial roles outside of Cabinet, able to criticise if not their portfolios, minor parties can have power while retaining distinction

Cooperation agreement: may agree to abstain on a vote, or agree to cooperate on certain issues

Factors:

- How much influence on policy do you want?
- How desperate are you for the baubles of office?
- What is your bottom line and what will the other parties respect?
- How important is it to you that you stay distinct?
- Do you want to maintain distance from other support parties?
- How important is it that you can criticise government?
- Will being a junior coalition party threaten your survival?

TESTING CONFIDENCE

Three types:

- 1) By declaration of government
 - a) E.g PM's statement -tradition
 - b) Also may have soft support party - by saying that a vote is a confidence vote it puts requirements on it, although could backfire
- 2) Implied - emanating from Government
 - a) Government needs money - if lost on a money bill, would inherently go to confidence
- 3) Express - originating with the opposition
 - a) As an amendment to a motion
 - b) Motion must be sufficiently open ended to raise the government's survival
 - c) Only a couple of occasions: address in reply debate, PM's statement (now category 1) and supply debates (now category 2)

CARETAKER CONVENTION

Key convention: ministers who advise the Governor General must retain the confidence of the House

Government who has lost the confidence of the house must resign or seek general election

In practice, would find it impossible to govern

What are the obligations of a government who have been told there is no confidence?

Old regime will stay in office until a new administration is sworn in - do not want Governor General acting with no advice (underlying principle of democracy)

If clear who the new Government will be, the Governor General can appoint them - exercised against the background that an outgoing government still has ongoing executive authority

Established principles rather than hard and fast rules

Applies:

- After general election
- Mid term if has lost confidence

(1 It is not clear who will form the next government, or 2 it is clear but they haven't taken it yet)

1 UNCLEAR GOVERNMENT - cabinet manual

- Day to day business
- Previous commitments can be implemented
- Decisions relating to
 - Significant or potentially controversial issues
 - Issues with long term effects that could affect the next government's freedom of action
 - New policy initiatives
 - Changes to existing policy should be:
 - Deferred, if not then
 - temporary/holding arrangements; if not then
 - Made with consultation with other parties to establish majority support

Baxter and McClain:

- Concerns: doesn't think that decisions have to be made in consultation as not practical, essentially
- Should endeavor to reach a degree of consensus with other parties which reflects the support of the house

2: CLEAR INCOMING GOVERNMENT

- No new policy initiatives
- Act on advice of incoming government

RESERVE POWERS

"The question is whether, owing to exceptional circumstances, the usual convention enjoining ministerial advice does or does not apply. ... The feature that distinguishes each of the [reserve] powers is the element of independent judgment the Crown must exercise when necessity warrants." Joseph

Reserve powers arise when there is no one to advise

1. To appoint a Prime Minister
2. To dismiss a Prime Minister
3. To refuse a Prime Minister's request to dissolve Parliament
4. To force a dissolution of Parliament

Appointing a PM:

- Conferred by the royal prerogative (Vol 2.1, pp 17-18)
- Delegated to the Governor-General under the Letters Patent 1983, s 10 (Vol 2,1, p 9)
- One of the Governor-General's "reserve powers"

Role is to ascertain where the confidence of the House lies

"Even in a situation of doubt, it is not the function of the Governor-General to form a view about the relative merit of possible contenders. ... His task is the more humble one of finding the true successor, by ascertaining the will of Parliament."

- Party and electorate have that decision

In order to ascertain:

- There is no formal deadline: Parliament shall meet 6 weeks after the return of the writs - some pressure but not formal - there is opportunity for confidence vote (could clear up where the confidence lies), caretaker government instructs etc

It involves considerations of quantity and clarity (Reddy):

- Where does the confidence of the House lie? (Quantity)

- Have the parties' intentions been communicated publicly and unambiguously? (Clarity)
- POLITICAL NEUTRALITY AND DEMOCRACY

DISSOLUTION

Dissolve a government and end their term

- Conferred by the royal prerogative (Vol 2.1, pp 18)
- Delegated to the Governor-General under the Letters Patent 1983, s 3(a) (Vol 2.1, p 9)
- Clarified further in Constitution Act, s 18 (Vol 2.1, p 5)

PRINCIPLES: POLITICAL NEUTRALITY AND DEMOCRACY

- As long as the government retains the confidence of the house, the Governor-General cannot refuse a request to dissolve as she acts on advice
- If the confidence of the House is lost, the caretaker convention then arises - they must consult with other parties
- It is constitutionally proper to swear in a new grouping, but must make sure that they truly have the confidence of the House - no political bias
- David McGee - confidence as a negative concept - you have it until you lose it

Where they can refuse a request for dissolution:

- A government coalition/support party switches allegiances, giving a different grouping a majority in the House
- A Prime Minister is unable to form a government after the election and advises a dissolution without summoning Parliament to test where the confidence of the House lies
- A Prime Minister is replaced as leader of the grouping that commands the confidence of the House

Canada 1926 - Byng -

Byng failed to ensure that the political leaders accepted responsibility for the political situation through 35 appropriate public pronouncements. The question whether an alternative government can be formed may be speculative, and a wrong decision should not damn the Governor-General. Byng also faced the prospect of double jeopardy. King, who was refused a dissolution, was returned at the elections, and this was interpreted as a public denunciation of the Governor-General's actions. The decision as to where the confidence of the House lies is a political one, for which the Governor-General should never be asked to take responsibility

- The Governor-General will act on advice of the Prime Minister so long as the government commands the confidence of the House (and the PM commands support of her party)
- The Governor-General might be entitled to refuse a request for dissolution if a motion of no confidence was under debate (especially if the government's capacity to win it was uncertain)
- If it is clear the government no longer commands the confidence of the House:
 - The government is bound by the caretaker convention so should consult other parties before advising an early election (and a PM who no longer commands support of their party should resign)
 - Ordinarily, that is how the situation will be resolved. However, the Governor-General must exercise personal judgment and is entitled to inquire as to whether an alternative government could be formed (or whether an alternative PM has majority support)
 - This judgment is to be exercised in accordance with the key principles underlying her office: democracy and political neutrality
- It again involves considerations of quantity and clarity:
 - Where does the confidence of the House lie? (Quantity)
 - Have the parties' intentions been communicated publicly and unambiguously? (Clarity)

REFUSE ROYAL ASSENT

Is it a reserve power at all?

Officials committee: in all but the most exceptional circumstances, the Governor General would never refuse royal assent

Difficulties:

- Governor General has no democratic mandate
- Governor General would likely be dismissed

Does this power exist at all?

Palmer and Palmer - would be so extreme that much more serious constitutional issues arise

Joseph - perhaps in two situations:

- Where to grant RA would be unlawful e.g wrong legislative process
- Where bill would irreparable damage representative democracy - e.g undermining democratic mandate
- Should it also be for human rights? What would the threshold be?
 - Joseph: other options
 - Assent and leave to courts
 - Cooke's fundamentals
 - Governor General to resign as cannot accept

Can government advise not to assent:

Brexit: government accepted that it had to stand for RA, even though they did not pass the Bill suspending standing orders

Yes: Ekins and Laws

- The government is entitled to govern so long as it has the confidence of the house
- Parliament and executive should act in a partnership, with the executive to provide leadership and direction
- Parliament not equipped to take on complex policy
- If Parliament tries to upend constitutional balance, then it is legitimate that Queen resists
- Queen bound to act on the advice

No: Poole

- The constitution is built on Parliamentary supremacy over the executive
- RA not refused since 1707
- 2 principles
 - Acts on advice
 - Does not withhold consent
- Principle 1 trumps principle 2
 - 1 is in connection with electorate
 - 2 is an underpinning structure

NZ context:

- Gov controls the business of the House (apart from members bills)
- Standing Order 326 - House will not pass legislation if has a significant impact on the budget "more than a minor impact" financial veto

POLITICAL EXECUTIVE

Cast:

- PM
- Ministers
- Parliamentary undersecretaries
- Cabinet
- Executive council
- Secretary of the Cabinet/Clerk of the Executive Council

- Public service

Prime Minister

- Head to the executive government
- Appointment by Governor-General
- If loses the support of the House, must resign
- Key constitutional rules:
 - Principle advisor to the sovereign and Governor General
 - By convention, any formal conversation with the queen goes through the PM
 - She alone has right to advise governor general to
 - Appoint, revoke, dismiss, accept reg of government
 - Dissolve government and call an election
 - Responsible for forming, maintaining and coordinating government
 - Determines portfolio allocation and ministerial rankings
 - Oversees general policy declarations
 - Chairs cabinet - determines size and membership
 - Responsible for national security and intelligence matters
 - May have other portfolios - questions of some that PM should not have eg finance

Ministers of the Crown

- Appointed by GG on advice of PM who also may be influenced by party rules or coalition/support negotiations
- Constitution Act s6 - all must be members of Parliament (limited exception for smooth transition i.e after election)
- Must be in the Executive Council first
- Resignation or dismissal by GG on advice
- Collectively ministers direct branch of government

Cabinet Ministers

- Formally advise Governor General
- Attend Cabinet and one or more Cabinet Committees
- Take significant decisions and determine the government policy collectively through Cabinet
- Exercise statutory functions and powers
- Determine policy direction and that of their departments
- Have financial responsibility
- Are accountable to the house for their performance

Others

- Ministers outside the cabinet - James Shaw
- Associate Minister - members of EC, inside or outside Cabinet, assist the portfolio ministers
- Parliamentary undersecretaries - appointment by Governor General on advice of the PM, not members of the EC, assist ministers under ministerial directions (M decide what role that would be)

CABINET

Marie Shroff - the government has its clearest embodiment inside cabinet

- Collective forum where government decides significant issues
- Convention
- Takes no formal executive action and has no legal relationships
- Cabinet Manual - has a list of matters that should go to Cabinet
 - Constitutional arrangements, controversial proposals
 - Not: matters concerning day-to-day management of portfolio, operational matters

KEY MATTERS:

- Consultation, confidential nature, collective responsibility

EXECUTIVE COUNCIL

Formal forum where advice is communicated to the Governor General
 Advice given based on cabinet decision
 Power from Letters Patent, prerogative
 Attended by all ministers of the Crown
 Can operate in absence of Governor General

SECRETARY OF CABINET/CLERK OF EXECUTIVE COUNCIL

- Politically neutral public servant providing secretarial and advice services
- Important repository of knowledge concerning the constitution

PUBLIC SERVICE

- State Sector Act, s 27(1): The Public Service comprises departments and any departmental agencies in them
- Public Service Legislation Bill, s 8: Public service means public service agencies which are: departments, departmental agencies, interdepartmental executive boards, interdepartmental ventures (and Crown agents for limited purposes)
- Provision for interdepartmental agencies
- More flexibility for different kinds of departmental agencies

COLLECTIVE MINISTERIAL RESPONSIBILITY

Unanimity

Palmer and Palmer: three elements

- 1) Confidence: Cabinet must collectively enjoy the confidence of the House
- 2) Unanimity: once made a decision, all Cabinet ministers must support it publicly
- 3) Confidentiality: discussions are confidential

Exception: powers and functions allocated to a particular Minister under a statute (Cabinet Manual)
 E.g Minister of Health gets to decide what limits and restrictions imposed in COVID - not cabinet
 Where minister is doing so, should inform Cabinet as a courtesy and may take into account Cabinet but is ultimately an independent decision.

Pre-MMP: wanted to dissent, had to resign as Minister.

MMP: difficulties - Boston and Bullock: unity and distinctiveness as a dilemma for minor parties - previously there was an assumption that CMR would remain how it was, but was likely a big reason why one of the previous governments imploded

Agree to disagree provision: if one party wants to signal a particular issue as a part of their identity, they can go through a process to announce their position publicly.

CMR still has full force in single party government.

In a coalition, they may establish agree to disagree provisions: allows a process

- Must be a party decision rather than individual

- Ministers must still implement resulting decisions

Enhanced confidence and supply:

- Ministers outside of cabinet are bound in respect of their portfolio, or issues identified as those of confidence.

When overseas as a minister (in governmental capacity e.g as Minister of Climate Change), bound by doctrine.

Political agreement - if have agreed on a policy, should stick to that publicly.

Majority coalition party could in theory use agree to disagree, but in practise are for minor parties.

OPTIONS IF BREAK COLLECTIVE CABINET RESPONSIBILITY:

E.g Winston Peters quoted in article about COVID

2011 National Government - dissent over portfolios - PM said they were speaking as party leaders

- Demotion, political consequences, good telling off
- Lack of ways to address when relying on a minor party to retain confidence

Dean Knight:

- A2D provisions may have been invoked and not told about, or the convention may have been breached and not enforced, perhaps the convention has evolved (although Cabinet Manual has not changed since 2011)

Claudia:

- Perhaps now not a convention, but political practise

Phil Joseph - Perhaps now not a convention, but political practise - "a rule of pragmatic politics, not a constitutional convention" - political as have not always called on the Minister to resign

(claudia ran the convention through the Jennings test)

Key points:

- Has evolved under MMP
- May still be evolving
- Always been selectively enforced
- Might not be a convention at all

PRINCIPLE OF OPEN GOVERNMENT

- Tension with cabinet confidentiality
 - Although reinforces unanimity and allows free and frank discussion

However original: democratic participation in government

- Official Information Act (dif. To Official Secrets Act)
- Embodies availability
- S5 available or should be made available unless government has a good reason to withhold the information
- S9 - exceptions e.g necessary to maintain constitutional conventions, collective ministerial responsibility, effective conduct of public affairs for free and frank discussion
- Even where the exceptions exist, can be outweighed by the public interest
- Presumption in favour of disclosure
- Cabinet papers and minutes are now often released
- Oral discussions generally remain confidential
- New practice since 1 Jan 2019 - proactive release of cabinet papers and minutes

- Allows real in depth journalism

PUBLIC SERVICE

Definition:

1. Departments and department agencies in them
2. Public Service Legislation Bill, s 8: Public service means public service agencies which are: departments, departmental agencies, interdepartmental executive boards, interdepartmental ventures (and Crown agents for limited purposes)

Functions of the Public Service:

- Policy - what policy should we follow/seek
- Operational - delivering services
- Many ministries do a bit of both; could include:
 - Setting policy agenda
 - Developing policy
 - Monitoring performance
 - informing/advising ministers
 - Policy implementation

McLean: public service as extensions of the minister

Primary means by which the Government acts, rather than a separate actor "arms and legs of the Minister"

Key constitutional conventions:

- Loyalty to the government of the day
 - Give advice freely and frankly
 - Action the government's wishes
- Political neutrality
- Anonymity
 - Should not defend themselves as they are not political actors in their own right "grey and faceless"
 - Palmer - praised Bloomfield for taking a public role - appropriate that he should articulate reasons
 - Most often breached

State Sector Reform 19802

- Disaggregation of departments into policy, service, delivery and monitoring agencies
- Less ministerial control over day-to-day operations
- Interposition of Chief Executives with independent decision-making authority over financial and human resources

Relationship between Ministers and Executive

- Ministers decide their departments' direction and priorities
- Departments are generally responsible for day-to-day operations
- Officials owe a duty of loyalty to the Government of the day
- (But) should give, and Ministers should listen to, free and frank advice
- The Chief Executive is the main point of contact with the Minister, and is responsible for the department's actions
- CEs are politically accountable to their Ministers
- CEs should keep Ministers informed under the "no surprises" policy
- But CEs are employed with heavy involvement from the State Services Commissioner, and can be removed only if the Commissioner and the GG-in-Council agree
- Public servants are employed by the CE (not the Minister)
- Ministers ought not interfere in certain operational decisions that are supposed to be kept at arms length from political interference (eg prosecutions)

Public Service Legislation Bill

- Attempt to affirm and clarify bedrock purposes, principles, and values
 - Ideal behaviours that underlie the public service

Purposes	Principles
Enable the government to develop and implement their policies	Political neutrality
Support constitutional and democratic government	Free and frank advice
Deliver high-quality and efficient public services	Merit-based appointments
Support the government to pursue the longterm public interest	Open government
Facilitate active citizenship	Stewardship

- No loyalty in the principle list (but may be implicit)
- Stewardship - not just being responsive to immediate needs but long-term
- Legislative duty to support Crown in its treaty relationship
- Concern that it currently lacks
- Despite being known that vulnerable communities most likely to be affected by public health measures (e.g no consultation with Maori over COVID-19)

INDIVIDUAL MINISTERIAL RESPONSIBILITY

Accountability:

“At the heart of New Zealand’s constitutional structure and dynamics is the chain of accountability relationships between the electorate, Parliament, Cabinet Ministers, and the public service” – Matthew Palmer

“The executive comprises the Ministers of the Crown and the departments they head. ... Government departments are conceived as ‘extensions of the Minister acting in the Minister’s name and in accordance with the Minister’s wishes’. Constitutionally at least, the public service is conceived as the primary means by which the government acts, rather than as a separate actor” – McLean

Explanatory and amendatory

- Minister is responsible to parliament for explaining and making amends in relation to portfolio
 - Find out what happened
 - Ensure it is put right
- Responsibility to Parliament is effected through mechanisms such as oral and written parliamentary questions, select committee questioning, and participation in parliamentary debates
- Exceptions:
 - Some statutory powers and functions exercised by officials are supposed to be kept at arms length from political control (eg, prosecutions)
 - An individual Minister’s decision might be overridden by a collective Cabinet decision

Culpability

- - “... involves the expectation that a Minister will resign if found to be guilty of a personal impropriety” (Palmer)
- Not always clear:
 - What is a sufficient impropriety?
 - (Not all breaches of Cabinet Manual standards of propriety would be expected to result in resignation)
 - Avoid a conflict of interest e.g benefitting family

- Whether the matter needs to relate to the individual's portfolio
- Whether an alleged allegation is sufficient
- Whether they should be expected to resign because of the actions of their ministry

Vicarious liability:

- 1986 Budget leak - error from the ministers own office (PM refused the resignation)
- Cave Creek viewing platform collapse
 - For a long time resisted calls for resignation
 - Finally resigned after the issue was resolved

Matthew Palmer - must resign when he or she loses the confidence of the Cabinet as expressed by the Prime Minister.

Points of tension:

- Attenuation of relationship between Minister and officials impacts on:
 - Public service anonymity (can point the finger)
 - Culpability - less inclined to take the blame
 - Amendatory element - Minister can't discharge blame by employment actions against officials

Palmer - Official Information Act may make it more difficult for free and frank advice

PETERS V BENNETT

- Overpayment of superannuation: was sorted out
- Chief Executive briefed Minister Anne Tolley
- State Services briefed Minister Paula Bennett
- Basis of 'no surprises policy' in Cabinet Manual
- Leaked to media, sued for breach of privacy
- Failed as there was no evidence (but would have succeeded)
- Didn't just sue Ministers, but also State Services Commissioner and CEO. Should they have breached?
- Constitutional Conventions are not legal rules
- Can be examined by judges -relevant to the discussion, can be material

Example of officials exercising individual statutory function

- Ministers ought not to interfere with certain operational decisions
- 1st two relationships between Ministers and their department

Ces should keep ministers informed under the 'no surprises' policy

- Slight tension with idea of non-interference from Ministers

No surprises policy:

- Officials should inform their Ministers promptly of matters of significance within their portfolios, particularly if controversial or likely to attract public debate
- CEOs should exercise judgment about whether, when and how to inform Ministers of matters for which the CEO (or their officials) have statutory responsibility
- The no surprises policy does still apply
- But care must be taken to ensure that independence is maintained
- Venning J: "Relevant considerations will be purpose, timing, manner and scope of the briefing."
- The no surprises principle is subject to law

Should ministers have been breached?

Defendants:

Venning J held:

- Important for minister to be assured this case (involving senior MP) was treated no differently from others
- Not realistic to brief the ministers without disclosing Peters' identity
- Important for ministers to be assured that the error was not MSD's fault
- Issue would become controversial if entered into public arena
- The co-leader of the Green Party Metiria Turei had recently disclosed a historical fraud on MSD

- The ministers could have been assured about the integrity of MSD's processes without disclosing Peters' identity
- Error was in part MSD's fault (and, again, assurances could be made without disclosure of identity)
- The issue could only become controversial if Mr Peters' privacy was breached
- There was no action for the ministers to take in respect of it
- Ms Turei's disclosure tipped the balance in favour of briefing

COMPETING CONCEPTS OF THE STATE

The State Sector

The Executive

"The executive function ... involves the framing of government policy for legislative enactment and the general and detailed administration of the country according to law" Joseph

- Previously seen as something that keeps us safe
- Now involves the delivery of public services, e.g social welfare

How is the executive constituted?

- Far wider than "the ministers of the Crown and their departments" (McLean)
- Joseph? - comprises of Ministers of the Crown, public service, local authorities, police and numerous statutory and non statutory bodies - state sector
- Eichbaum - the public sector (without the statutory and non statutory bodies)

Reforms (1984 - 2004)

- Restructuring of core public services
- Fragmentation of the state - devolution of functions to arms length bodies
 - These have always existed
 - But received more functions
 - Would be performed more efficiently and accountably at arms length

State sector currently comprised of:

1. Ministers, and the ministries/departments that advise them
2. State-owned enterprises
 - Trading companies with shareholding Ministers
3. Crown entities
 - Five different types (Commissioner of Inland Revenue v Medical Council of New Zealand)
 - Administrative tribunals
 - Funding bodies
 - Advisory bodies
 - Providing services in public interest
 - Trading corporations
 - Control and supervisory bodies
 - Varying degrees of independence from Minister
 - Some subject to Public Finance Act; some not
 - Some subject to Official Information Act; some not

Support for devolving power:

- The belief that some functions are not the province of government
- The belief that the private sector is more efficient

- Certain functions should be free from political interference
- Belief that we should avoid the concentration of power

Janet McLean: the Crown Entities Act puts itself within the scope of the criticism

- Five categories of entities:
 - Crown agents
 - Autonomous crown entities
 - Independent crown entities
 - Crown entity companies
 - Crown owned subsidiaries
- Much of the thrust of the Act is reasserting central control, although it claims to be of independence of agency

PUBLIC SERVICE LEGISLATION BILL

Crown agents - special treatment

- Subject to higher level of ministerial control
- Brought within the definition of the public service for some purposes
 - Those parts of Act that set out values, principles and spirit
 - Subject to same ethos
 - Not subject to capability to support the crown in its relationship with Maori
 - Perhaps as ought to fall on the crown itself

Crown entities generally:

- May be subject to minimum standards of integrity and conduct set by the State Services Commissioner
- Although can apply for an exemption

DEFINING THE CROWN

- Jewelled headgear
- The monarch personally
- Executive
- State as a whole

Town Investments Ltd. case:

Rent freeze is given under some circumstances where the tenant is using the premises for business purposes. The tenant was a government department but was in use by a different government department. Held that they were leasing on behalf of the Crown, who in aggregate is one whole - the Crown is "one and indivisible", the government as a collective

Ambiguity in terms - most are not solid in their definition

E.g Fourth Labour GOVERNMENT vs branches of GOVERNMENT vs GOVERNMENT as executive

- The question is what they mean in a particular context

Key additional points:

- Terms such as "the executive", "the government" and "the Crown" are not terms of art (so their meaning can be imprecise)
- Precisely what they mean can sometimes matter
- It is sometimes resolved (in context) by legislative definition
- It is sometimes left to the courts
- Judicial resolution is generally
 - Highly context-specific and contextual
 - Focussed on the question of control rather than function

JUDICIAL INDEPENDENCE

Three related constitutional principles:

- Separation of powers
- Rule of law
- Judicial independence

Difference between judicial independence and impartiality:

- Impartiality: non-partisan/unbiased - treating all parties on the same footing
- Independence: free from dependence on government
 - More likely to be impartial
 - Depends on three core elements
 - Security of tenure (Constitution Act s 23): when judges can be removed - high bar. "Misbehaviour" and "incapacity" affect the integrity of the profession
 - Financial security (Constitution Act s 24)
 - Salary cannot be reduced
 - Joseph: historical examples of judges asked to take cuts because of economic issues e.g recession
 - Should judges be asked?
 - One case, the Judges offered and were rejected by the A-G.
 - Another, judges refuse, as it puts pressure on others
 - Others accepted the increase, donating to charity or ignored etc.
 - Joseph: should hold out in all situations
 - Avoids subjection to bribes, taking up other jobs etc
 - Should not be pressured financially
 - Institutional independence
 - Administrative support
 - Separation from bureaucracy
 - Currently serviced by the ministry of justice - has been criticised, e.g budget for court with the budget for the police
 - Bolstered by conventions of political restraint and judicial circumspection e.g judges don't respond to criticism

Appointments:

- By Governor General on advice of Attorney General or Prime Minister in case of Chief Justice
- Law Officer rather than member of cabinet
- Convention of non-partisan appointments
- Expressions of interest and extensive formal consultation
 - Would a judicial appointments commission be better?
 - Or just relocating a potential for harm?

Judicial Accountability:

- In tension with judicial independence
- Complaint of conduct - can go to the Judicial Conduct commissioner
 - Preliminary investigation - then can refer to the Bench or refer to panel etc.
- Heads of Bench have no disciplinary power but can meet to reproach, encourage, offer an idea of training
- Judicial Conduct Panel - if conduct is sufficiently serious - to investigate what may end up in removal
- Attorney-General: ultimately decides whether to appoint panel and recommendation of removal of judges
- Judicial Complaints Lay Observer - can request reconsideration