DISCRETION

"Decisions where the law does not dictate a specific outcome, or whether the DM is given a choice of options within a statutorily imposed set of boundaries" (Cartier)

-Purpose (Cartier): to decide individual justice to certain cases while creating and adopting norms for expertise, efficiency, and flexibility in law-making.

-Overall, discretion is "the margin of manoeuvre that is involved in making choices that suggests that there is a space or distance between the expression of the will of Parliament on the one hand, and the acts of the executive on the other, so that running the government exceeds 'mere executive.'

-Needed for unprecedented and unheard-of situations. Parliament may not have the necessary expertise or knowledge needed to make these decisions.

Discretion – good or bad?

-Robson – collective socialist state – social welfare and collective well-being – no rigidities of processes, methods, mindsets of law – needs emotion, flexibility and tailoring.

-Jennings – specialist division in the High Court to circumvent prejudices that ordinary courts had traditionally expressed against the government of the welfare state.

-Dicey -minimal libertarian state – rule of law – discretion should only be available in exceptional cases (war, trouble, or invasion) – parliamentary sovereignty – does not like wide discretionary and arbitrary power – judicial adjudication.

-FA Von Hayek – discretion prevented citizens "from knowing how the state will use its coercive powers and was contrary to the rule of law."

What is judicial review?

"A review by a judge of the High Court of… public decision-making powers in order to determine whether [it] is unauthorised or invalid." (Crown Law)

-Not concerned with merits of the decision

-Tensions arise particularly when disputes involve important political, Treaty, or human rights issues

-Safeguarding the rights and interests of citizens while getting the law right in the first place

-Judicial review must only be sporadic and peripheral

STRUCTURE OF JUDICIAL REVIEW

1. **Issue statement** – must include all the individuals involve – what is being challenged – what is the decision.

2. **Is the decision amenable to judicial review?** – e.g., actions of the executive, powers deriving from statute, regulations and subsidiary legislation, public powers that do not have a statutory basis, and prerogative powers (*CCSU*)

3. **Illegality**

   -*Error of law* – the DM must get the law right, otherwise they are acting outside of the scope of their legal powers and ultra vires (*Peters v Davidson* – tax evasion law applied wrong) – *Carter Holt Harvey v North Shore City Council* – you cannot construe a definition too wide otherwise law is wrong (paper is not waste)

   -*Error in fact* – fact finding is normally a matter of the merits and not for the courts to review especially where reasonably possible to hold differing views of facts (*NZ Fishing* – fishing resource rents, and *Moxon*) – serious and incontrovertible errors may be reviewable (e.g., hard-edged, no fluffy edges *Oggi* – billboard construction date clear mistake). Primary DMs = experts!!

   -*Improper purpose* – discretionary power is granted for a purpose so should be used for a purpose – it is improper when it runs thwart and counter to the statutory purpose (*Unison Networks*)

   -*Relevancy* – DMs must take into consideration all relevant elements when making decisions, weighted at their discretion (*NZ Fishing Industry* and *M v Syms* – gross misconduct, high school students with beer, factual matters relevant)

   -*Failure to exercise discretion* – delegated discretion must be used and the blind application of policy is not the exercise of discretion as that can exclude the merits of the decision (*M v Syms* – rigid application of alcohol policy – must be personal and no rubber stamps). Self-fettering – rigid application of predetermined policy.

   CONCLUDE UPON THE BALANCE OF PROBABILITIES

4. **Procedural impropriety** – failure to observe the basic rules of natural justice or failure to act with procedural fairness towards a person who will be affected by the decision (*CCSU*) = if the system was arbitrary, no one would believe it

   -*Natural justice* – all individuals have the obligation to be heard and contest matters before the DM. Fair hearing rights depend on the circumstances and context of the case (*CREEDNZ* – Cabinet decision-making is incompatible with giving oral hearing rights and *Daganayasi* – oral hearing rights in the statute)

   - -Nature of the decision – how was the decision made, who made the decision, etc. Administrative efficiency should be considered (*Daganayasi*). What were the prior practices and assurances? (*CCSU*)
   - -Statutory context – must consider what is inferred or presumed in interpreting the Act whereby you look at the statute as a whole and look what you can draw from it (*Daganayasi*) – statutory purpose must not be undermined or frustrated (*CREEDNZ*).
   - -Identifiable interest – based on the circumstances and the defendant must know the case before them (*Daganayasi*).

   -*Bias* – whether a fair-minded (reasonably informed) lay observer would reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the question (*Saxmere* – judge was in debt to counsel so had a conflict of interest – modest and close interests are acceptable).

   - -Dividing line between permissible and impermissible shifts with context – bias rule is flexible – legal and factual circumstances (*Saxmere*)
   - -Justice should be done and seen to be done / independence and impartiality / confidence (*Saxmere*)
   - -Joseph – financial interests and financial relationships / familial and past relationships / personal prejudice
   - -*Actual bias* – improper external factors are considered – matter of proof
   - -*Apparent bias* – risk of influence – settings and conditions suggest a risk regardless of actual risk
   - -*Presumptive* – financial interest in the outcome – intervention when there is risk of influence

   CONCLUDE UPON THE BALANCE OF PROBABILITIES

5. **Unreasonableness** – rationality and reasonableness. Choosing whether the *Wolf* or *Wednesbury* approach should be used. This depends on the context, e.g., the nature of the decision, who made the decision, the decision-making process, subject matter, policy content (PS!!) – HUMAN RIGHTS VIOLATIONS = WOLF!!

   -*Wednesbury* (15-year-olds Sunday movie sessions) – more stringent – Courts may intervene if the decision is one which no reasonable authority could have decided to impose – so unreasonable that no reasonable authority would have come to it – e.g., firing teacher bc red hair.

   -*Woolworths* – NZ case – adopts *Wednesbury* – pattern of perversity, absurd, outrageous in the defiance of logic – **high threshold**.

   -*CCSU* – "a decision so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied their mind to the question to be decided could have arrived to it."

   -*Wolf* (tribunal chose to stop deportation due to humanitarian grounds) (family break up) – did not occur bc of lack of robustness in factual evaluation and close scrutiny) – simple unreasonableness – greater scrutiny and high intensity of review – HUMAN RIGHTS!! But there is reluctancy to intervene when DM is democratically elected, process was transparent, or it is a matter for Parliament to consider.

   CONCLUDE UPON THE BALANCE OF PROBABILITIES

6. **Other substantive grounds (developments in NZ)**

-Substantive legitimate expectation – promises, contract to exercise discretion in a way

-Inconsistent treatment

-Disproportionality – Bill of Rights – disproportionate penalties – were there justifiable limits imposed by rights under the BORA – reluctant to look at the merits

-Substantive fairness

CONCLUDE OVERALL

On the balance of probabilities whether the decision will be judicially reviewable. Because of this sub-ground/ground it is likely/unlikely to succeed. Either remake the decision, declare that it is invalid (quash) or injunction

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OMBUDSMAN

"An Office provided for by the Constitution or by an action of the legislature or Parliament and headed by an independent, high-level public official, who is responsible to the legislature or Parliament, who received complaints from aggrieved persons against Government agencies, officials, employees, or who acts on [his] own motion and who has the power to investigate, recommend corrective action, and issue reports." (Judge Anand Satyanand)

Who? – appointed by the Governor-General (s 3(2)), governed by the Ombudsman Act 1975, similar protection and tenure as judges (s 6), filled by judges and senior civil servants

Jurisdiction (s 13(1)) – any decision or recommendation made, or any act done or omitted – related to the administration – any person or bodies

affected personally – any department or organisation listed in parts 1 and 2 of sch. 1, or any committee or subcommittee of any organisation named in part 3 of sch. 1. – any officer, employee, or member of any such department or organisation in his capacity such as officer, employee, or member.

Exclusions (s 13(7)) – Trustee Act 1956 – any decision, recommendation, act, or omission of any trustee – legal advisors to the Crown – any member of the police, other than any matter relating to terms and conditions of service – s 13(8) and s 14 (certain claims)

Restrictions/rules – the House may make rules for the Ombudsman (s 15) under the OIA, the LIOMA, and the Protected Disclosures Act, printed and published with the Acts and Regulations Publication Act 1989 (e.g., there is public interest in the departments/organisations) – s 16(1) the complaint must be made in writing or orally as soon as practicable – s 22(3)(g) only can make recommendations.

Decisions – can only be s 22(1) contrary to law, unreasonable, unjust, oppressive, or improperly discriminatory, mistake of fact / mistake of law, or was just plainly wrong. Section 22(2) improper purpose or irrelevant grounds of consideration.

Powers, remedies, outcomes – s 22(3) – referred to the appropriate authority, omission could be rectified, decision should be cancelled or varied, law = altered, practice = altered, reasons that the decision was made should be stated, any other relevant steps
Section 22(3)(g) – Ombudsman must report his opinion
Section 23 – might require publication (OIA)
Section 24 – the complainant will be informed of the result of the investigation
Section 25 – proceedings are not to be questioned or subject to review (no court can challenge, review, quash, or call into question the Ombudsman's decision or proceeding)
Section 26 – proceedings are privileged
Section 27 – the Ombudsman has the power to enter upon any premises occupied by the departments or organisations as per sch. 1 of the Act

PROS – free, not coercive, gets to a conclusion that both sides accept and the complainant's mana is intact, can look at the merits, powers are broad in scope (s 22(3)), usually concluded within 12 months coming in, getting a result that allows someone to move forward.

CONS – only makes recommendations (judicial review is binding), depends on whether the Ombudsman is motivated, cannot provide a quick solution for complex issues, sometimes cannot provide the remedy that certain people want, there is no control over the investigation.

THE OFFICIAL INFORMATION ACT 1982

Section 2 – department means a government department named in pt 1 of sch 1 of the Ombudsmen Act 1975.

Section 12
-Who? NZ citizens, permanent resident, in NZ, body corporate inside NZ and one that has a place of business in NZ – **For what?** May request a department, organisation, Minister of the Crown, or interdepartmental venture to make available info
-How? The official information requested shall be specified with due particularity in the request

Section 15 – **decision made by who and when?**
-no later than 20 working days after the request has been received
-as soon as practical
-time limit can be extended (s 15(1)) – having regard to the circumstances in a reasonable time
-small cost for labour and materials to get info
-department can ask a minister for advice (s 15(5))

Section 16 – **how can the request be filled?**
-inspection in a reasonable time given
-provided in a document as a copy
-written, visual, heard, or seen
-written transcript if codified
-excerpt or summary if necessary
-oral if required
-administrative efficacy (s 16(2)) or the legal duty of the department, minister of the crown or organisation, or prejudice must not be applicable here for the request to be filled

Section 17 – **deletion of info from docs** – there must be good reason to withhold some info contained in the doc if such alterations are necessary.

Section 18 – **refusal of request** – good reason, the ppl do not confirm or deny the existence or non-existence of the info request (provisions in enactment, constitute contempt of court or the House) – the info will be made publicly available soon – the request is made by the defendant, the info does not exist, no grounds for believing that the info is held by another person, connected more closely with the functions of the ppl.

Section 28 – **OMBUDSMAN** provisions - allows the Ombudsman the opportunity to investigate and review any decision to release official info subject to ss 12, 15, 16, or 17 of the Act. Ombudsman will make a recommendation, person will be heard, public duty to observe the recommendation, apply to the HC for review by the Order of Council and then appeal to the CA (ss 30-32)

REGULATIONS REVIEW COMMITTEE

-Chris Penk
-Chaired by an opposition member of Parliament
-Scrutinises the executive
-Part of Parliament to keep check on the executive
-Jurisdiction comes Standing Orders and is also limited by these grounds

What triggers a matter of concern?
-Look at regulations that are made > ensuring that they are made in accordance with primary legislation and the policy intent
-Looking at whether the new Bill will set up an appropriate set of regulations from the Minister or agency
-Looking at orders being able to scrutinise it as a routine matter

Strengths – technical, rather than political – has good conversations on how the law should reflect the intent of government rather than members trying to be government (e.g., in select committees and debates) – members can be lawyers (expertise!!) – constructive role

Weaknesses – time constraints (sit at the same time as debating of Bills), paperwork, reading and thinking of what is important (prioritising), competing demands, power can only be recommendatory in the conclusion (cannot strike down or amend regulations and policy)

INTERNATIONAL LAW

Dualism – domestic and international law are distinct systems; each is supreme in its own sphere and legal system. Only when international law has been adopted by Parliament can it have constitutional significance and be enforceable in the courts.
-Courts assume that Parliament would not adopt legislation that conflicts with international obligations.

Monism – domestic and international law are connected/integrated. International law is supreme to domestic law. it is the foundation for which each domestic legal system emerges, therefore, it applies to the domestic legal system as like any other domestic law.

Treaties in executive decision-making
-Has the treaty or international convention been signed and ratified by the executive?
-If it is incorporated, then the executive is obliged to apply law implementing the treaty.
  -If the judiciary fails to implement the treaty under the illegality ground (review to judicial review)
  -*CCSU* – the decision-maker must understand the law correctly that regulates his decision-making power and **must** give effect to it.
  -Falls under **material error of law**, a decision-maker must get the law correct otherwise they are acting outside their scope of authority and ultra vires (*Peters v Davidson*)

-If it is **not** incorporated…
  -International treaty obligations are **legally irrelevant** if unincorporated into domestic law (as per dualism) *Attorney-General for Canada / Brind*.
  -However, unincorporated treaties can be mandatory relevant considerations (*Tavita* / *Ashby*)
    -*Tavita* is obiter (the convention just needs to be relevant). *Tavita* was a case on humanitarian grounds.
    -*Ashby* it must be manifestly and apparently relevant – higher standard. The weight is for the DM.
  -As per the **presumption of consistency**, statutory powers, as far as possible on their wording, must be interpreted consistently with international law obligations (*Puli'uvea* / *Zaoui*). A broadly worded statute is easier to read in consistency and vice-versa.
  -Was the weight reasonable? (Refer to judicial review cheat sheet) – *Wolf* standard – implications of treaty obligations may trigger harder look or heightened scrutiny (can also look at *Wednesbury*)

TREATY OF WAITANGI

Think about what case law held > relevance in society (the Crown and Maori) > think about the question.

Te Tiriti

-Article 1 – cession of sovereignty to the Crown / "kawanatanga" (governorship/chieftainship)

-Article 2 – retention of iwi/hapu of "undisturbed possession" of "lands and estates, forests, fisheries and other properties." – Crown "pre-emption" / "tino rangatiratanga" (unqualified chieftainship), land, villages, and "taonga" (treasures or things highly prized), hokonga (sale and purchase / first right of refusal)

-Article 3 – royal protection and extension of "rights and privileges of British subjects" to Maori / "nga tikanga kaota rite ana mea k inga tangata o ingarangi" (protection of a collective way of life)

Evolvement

-He Whakaputanga o te Rangiratanga (the Decalaration of Independence 1835) signed to reserve iwi and hapu sovereignty

-Te Tiriti was signed on the 6th of February 1840 – uncertainty of the extent of the sharing of public power

-Darkness – Te Tiriti was ignored and dishonoured by the Crown – armed conflict, confiscations, and land sales – taonga – judicial ambivalence – treaty framed as international law

-Re-dawning – 1960s onwards – cultural and political activism for iwi and hapu – pressures on executive government

-Treaty of Waitangi Act 1975 – incorporation of the principles into law, Tribunal was established.

-Waitangi Tribunal Reports 1983

-Proposed inclusion into the Bill of Rights Act 1990 in a White Paper

-Cases extended the significance and prominence of the Treaty in the NZ legal system

-Today – settlements, legal academics calling for reform, implicit and explicit mention of the Treaty incorporation into legislation

-Contemporary claims connected to the Treaty are brought to the Tribunal (e.g., they are just slightly connected)

CASE LAW

-Huakina – the Treaty principles can be used as an interpretative aid even though not incorporated into legislation.

-SOE/Lands – proposal for transfer of 10m ha of Crown ladn to various SOEs - worried that once the land had been transferred to such a large percentage any existing or future claims would have no chance for adequate redress

- -s 9 of the SOE Act stated that the Crown could not act in a manner inconsistent with the Treaty, but s 27 was contrary to this – the court stated that they were "unconstrained by technical rules of English law"
- -highlighted the principles (especially redress and providing adequate redress once land has transferred) – partnership (reciprocity, mutual benefit, comprise, and an obligation to act reasonably, honourably, and in good faith), freedom to govern, active protection, consultation
- -emphasis on the spirit of principles – they are foundational

-Radio Frequencies – allocation of AM/FM frequencies with some reserved for Maori – the Radiocommunications Act provided broad discretion as to how frequencies can be allocated and arranged but did not incorporate the Treaty of Waitangi

- -A reasonable Minister would be bound to have regard to Waitangi Tribunal recommendations and would allow the Tribunal a reasonable time for carrying out the inquiry (*Wednesbury* / *Wolf*)
- -contrary to the purpose of the Treaty of Waitangi Act 1975
- -deprive the government of the day the opportunity of taking into account all the effective highly relevant considerations
- -if there is no or little incorporation of Te Tiriti in the Act, but there is some connection to iwi and hapu , then the court is required to relevantly consider the principles
- -Unincorporated treaties can be mandatory relevant considerations (*Ashby* / *Tavita*)

-Broadcasting Assets – Broadcasting split into 2 SOE's – sought a declaration that the transfers were contrary to s 9 of the SOE Act

- -Despite there being direct incorporation of the treaty and its principles in the SOE Act, there is indirect enforcement of a legitimate expectation to consider Maori interests. Where the threshold has not been met, or the considerations are unreasonable or irrelevant, the Crown is not acting unlawfully.
- -*Radio Frequencies* states that there must consideration to the principles, but they must be within reason and the threshold – the obligation is not absolute and qualified.
- -The taonga (in the language) could be protected in another way that does not prejudice the interests of Maori by the Crown
- -The principles are flexible and circumstantial in the situation – they will try to capture the underlying responsibilities and obligations and are not confined to expressed terms.

-Ngai Tahu (Whale Watching case) – Marine Mammals Protection Act 1978 permitted the DG discretion, but s 4 of the Conservation Act 1978 mandated their functions and incorporated a treaty clause that permits that the DG must administer permits consistently with the principles

- -Presumption of consistency between Acts
- -Not limited to mere consultation
- -Conservation was paramount and was not just a mere relevancy requirement like in the *Broadcasting Assets* case
- -Commercial whale watching was not referred to a taonga or fishery as referred to the treaty, but it was "so linked to taonga and fisheries that a reasonable treaty partner would recognise that the treaty principles were relevant."
- -Permits must be administered must be consistency between the principles because of the Act – Ngai Tahu were entitled to "substantial degree of preference"

-Mighty River Power – facts similar to the *Lands/SOE* case – Government intended to sell shares (government would retain 51%)

- -There was direct incorporation of the treaty principles due to there being an error of law
- -Obligations are not absolute or unqualified
- -there is an inconsistency with the proposed privatisation because it would "impair, to a material extent, the Crown's ability to take the reasonable action which it is under an obligation to undertake in order to comply with the principles of the Treaty."
- -the court must address this issue directly and from its own judgment, along the lines discussed in [89] (with the particular action does occur and its likely post-action capacity)

Ngai Tai Ki Tamaki Tribal Trust – issues with the issuing of permits for tours especially while there is an ongoing negotiation. Section 4 of the Conservation Act 1986 states that you must "give effect" to Treaty principles.

- -Due to the Crown not incorporating the Treaty principles, this was an error of law and misdirection with the statutory discretion.
- -Discretion is required of preference to be afforded to iwi, but there is no veto/exclusivity.

Constitutional Influence of the Treaty

-Parliament and democratic government –

-Section 45 of the Electoral Act 1993 House of Representatives has a Maori representative who can express partnership and reflect iwi and hapu interests through an important institution and vehicle (representation is unequal)

-Standing Orders 189 Maori affairs subject Select Committee, looking at views and interests of Maori

-Majoritarian politics vs minority interests, fundamental tension between legislative supremacy and majoritarian politics and the interest of Maori minorities in the law-making process.

-Executive

-Ministerial portfolios

-Cabinet Manual requirements (7.65(a)) this provides an entry point for the Treaty in the law-making process as a consideration and not a requirement

-Policy papers (consultation with the AG or Minister responsible re te tiriti settlements 5.14(f))

-Cabinet circulars on how the treaty should be addressed including 1989 (Crown and the Treaty of Waitangi) and the five principles (government, self-management, equality, reasonable cooperation, and adequate redress), and the 2019 (Te Tiriti o Waitangi Guidance) and this is the modern view of the treaty as a major source of the NZ constitution.

-Public Service Act (s 14) 2020 – people in the public service in supporting the Crown in its relationship with Moari under the treaty.

-Targeted administrative obligations – e.g., ss 14, 77, and 81 of the Local Government Act 2002

Judiciary and adjudication

-Te Tiriti jurisprudence – how the courts have grappled with this and the relevance to administrative decision-making, but it is not the only way.

-Lex Aotearoa (Williams J) – **tikanga** and the important contribution it has in common law – could this be a pathway for more productive and richer ways for Maori interests and values in the adjudication of the Treaty?

Waitangi Tribunal

-There have been contemporary claims (e.g., the Oranga Tamaraki Urgent Inquiry). The views of the Tribunal and the activity surrounding te tiriti is creating a significant impact on policy and on governance

-Using Tribunal claims related to Maori and somewhat connected to Te Tiriti – and not just solely about the Treaty

New Zealand Bill of Rights 1990
-White Paper – failed to propose to include te Tiriti in the Supreme Bill of Rights. There was concern on the part of Maori about the efficacy and nature of protection that would be afforded if it was included in the Bill (1985)
-NZBORA covers the rights of minorities (s 20) – "*a person who belongs in an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practices the religion, or to use the language, of that minority*."

International Domain
-Valid treaty at international law but can be used persuasively and in political pressure and conscience that changes the approach that we use to enforce it
-Other international instruments fortify and allies the interest of iwi and hapu – e.g., the UN Declaration of the Rights of Indigenous Peoples and the Convention on the Elimination of All Forms of Racial Discrimination.

Current constitutional settings
-Is there adequacy in the current institutional settings – a democracy with Westminster traditions?
-Are the current constitutional settings sufficient in protecting Maori interest, particular in the society that we live today?

Catalyst for Reform and Transformation (Jackson, 129)
-**Jackson** – challenges the mode of thinking and looks at constitutional transformation. He questions the adequacy of a Westminster system as New Zealand's model of government
-**Palmer and Butler** – believes it should be incorporated into a supreme constitution.
-**Ruru and Kohu-Morris** – the Treaty should be a constitutional limit on parliamentary supremacy. There should be a strong commitment to parliamentary supremacy, but not in a way in which undermines the rights of iwi and hapu, and the Treaty.
-**Maitike Aotearoa** – looks at six indicative and alternative constitution models – tri-cameral (iwi assembly, Crown and Parliament, joint iwi and Parliament chambers), multi-sphere (a greater mix?), uni-cameral (existing of iwi, hapu, and the Crown making decisions together in a constitutional mandated legislative assembly as one sphere today), and bi-cameral (one side iwi and the other side of the Crown).

TREATY OF WAITANGI – AVENUES OF REVIEW

There are two avenues for judicial review for te Tiriti o Waitangi.

Ordinary courts (judicial review)

1. **Issue statement**

2. **Do the claimants have standing / are their interest affected by the decision taking place?** A claimant can get judicial review if they have standing.

3. **Is the decision amenable to judicial review?** Is the decision public in nature? (e.g., Crown Law / *CCSU* definition)

4. **Has the Crown acted inconsistently with the principles of the Treaty?** Partnership – active protection – redress (the court recognises consultation as a separate principle)
   -**Partnership** (*SOE* / *Lands*) – the partners must act reasonably and in good faith, with reciprocity and mutual benefit. DM must consult and notify the iwi/hapu affected and give the chance to respond. The Crown must make informed decisions (Cooke J). Requirements depend on the circumstances (Richardson J). The iwi/hapu affected should feel like they have a stake in the decision, with all relevant facts considered.
   -**Active protection** (*SOE* / *Lands*) – *Radio Frequencies* also stated that the Crown needs to take active steps to preserve Maori access/usage of taonga to the greatest extent possible.
      -Is the damage likely to accrue to the taonga due to the Crown's acts/omissions? If so, the Crowns obligations of protection are larger.
   -**Redress** (*Lands*) – the Crown needs to give redress to past wrongs, and the Crown must ensure that it doesn't impair its ability to provide redress for future breaches. For example, in the *SOE* case, the privatisation of the lands could not be used for any future settlements and/or adequate redress for the iwi and hapu involved.

5. **Has the Crown acted consistently with the Treaty principles?**
   -If **YES** – stop here, there is no issue in making the decision.
   -If **NO** – continue the review process

6. **Are the principles directly incorporated in the legislation that is governing the exercise of discretion?**
   -Language that directly recognises and affirms the principles should be given effect to by the Crown = **positive incorporation** (e.g., must give effect, etc.)
   -Language that states that the Crown simply must not act inconsistently with the principles = **negative incorporation**.
   -Both incorporations require to act consistently, but positive is a higher burden because there is more pressure to make it evident that the principles are made out.

   -If the principles are incorporated, judicial review is easy to make out as there is a legal requirement for the decision-maker to act consistently with the principles. If they have not, this is an error of law (refer to judicial review for more info) and the decision should be quashed (e.g., re-done or declared as illegal).

7. **Where there is no direct incorporation, there is argument for indirect incorporation of the principles through …**
   -Error of law
      -*Use principles as an interpretative tool* (*Huakina*) – e.g., if a piece of legislation states that we must act in the public interest or in a social/moral way (for example), it could be argued that the principles should be acted in consistency with because the principles are so foundational to our society and acting inconsistently would be an error of law. **It is within the fabric of NZ society, so will be interpreted in this legislation even if there is no explicit reference**.
      -Where Maori rights and interests are affected, the principles are to be considered (e.g., taonga under art 2 of the Treaty (*Radio Frequencies*). Taonga examples: haka, karakia (prayers), waiata (songs), weavings, carvings, designs – does not necessarily need to be land.
      -*Presumption of consistency/legality* (*Ngai Tahu*) – Parliament gave discretion in the legislation because they intended this to be exercised consistently with the principles (held as international law in the courts) – analogise with the case of *Zaoui* (colonisers case – international law and the treaty as imposed as an international treaty)
   -*Mandatory relevant considerations* (*Radio Frequencies* – decision must wait for Waitangi Tribunal report, but the Minister did not consider the principles, so was considered a failure) – but this is easy to circumvent by stating "I have considered it". However, in conventional judicial review, courts usually do not intrude in the merits of the decision.
      -Using *Wolf* or *Ngai Tahu*, it is important to highlight that the principles are so foundational to New Zealand society that they ought to warrant heightened scrutiny. Arguably, the court would state that they the DM has not considered the principles sufficiently.
      -Draw factual analogies with the cases.
   -*Unreasonableness* (*Wolf*) – the principles are so important; they warrant a heightened degree of scrutiny.

8. **CONCLUDE!!**
   -Quash the decision if DM has not acted consistently with the treaty principles and they have not given effect.
   -Remedies – settlement process (if needed)

Waitangi Tribunal

1. **Issue statement**… The Treaty of Waitangi Act 1975 established the Waitangi Tribunal to make recommendations of issues between Maori and the Crown. The issue in this case is whether…

2. **Identify the legislation you are working with** (perhaps compare to s 9 in the SOE Act)
   -Direct incorporation (positive/negative) vs indirect incorporation.

3. **Will the tribunal investigate the particular claim?**
   -Section 6(1) of the Treaty Waitangi Act 1975 sets out the requisites for a claim through the Waitangi Tribunal.
      -Must be made by a Maori or a group of Maori
      -It has to relate to Crown in action – could be a statutory instrument, a Crown policy/practice, a Crown act/omission which includes proposed act/omission
      -Identify that this action was inconsistent with the Treaty principles

4. **Consistency with the Treaty principles?**
   -*Lands*/*SOE* case – Cooke P stated that the Treaty should be interpreted as a living instrument. Richardson J stated that the Treaty must be capable of adapting to new and changing circumstances. What matters is the spirit.
   -**Partnership** – obligations are analogous to "fiduciary duties" (Cooke P). Inclusive of consultation. Richardson J stated that "in some cases, extensive consultation will be necessary and in others the partner may act consistently with the principles without specific consultation." Notification is usually required.

-**Active protection** – "not merely passive but extends to active protection" (Cooke P), and "protection accorded to land rights is a positive guarantee" (Richardson J)
-**Redress** – Cooke P accepted that there is a duty to remedy past breaches

5. **The principles must be balanced with the Crowns right to govern.**
-Do breaching these principles outweigh the right for the Crown to govern sufficiently?

6. **The powers of relief**
-Only recommendatory
-Can recommend compensation but more likely to recommend that the decision should not happen or that if it does happen it accommodates for article 2

Tribunal: The process
-Filing the claim
-Groups of claims
-Historical research
-Hearings
-Evidence can be oral or written in te reo or English

COURT SETTLEMENT PROCESS

Can be related to the Tuhoe Settlement

1. **Prepare the claims**
-Historical research into grievances (through the Tribunal)
-Mandate to negotiate – "large natural group" with "well-founded claims" with a report triggered through the Treaty of Waitangi Act 1975 – recognised by the Minister of Treaty Negotiations
-Mandates can be contested by hapu that state that the body seeking mandate doesn't represent their interests

2. **Pre-negotiations**
-Agreement to full terms of negotiation
-Ground rules – parameters, identification of breaches, possible redress
-"Full and final" and privative clause (e.g., s 15 of the Tuhoe Settlement Act). This means that the Crown has discharged its obligations.
-Preclusion of the Waitangi Tribunal claim while negotiations are happening according to cl 37 of the Act
-Funding – Crown funding of claimant groups

3. **Negotiations**
-Te Arawhiti Officials/Crown negotiators
-Claimant negotiation team
-Aim
    -Agreement-in-principle
    -Deed of settlement – historical account (agreed facts) – cultural redress – commercial redress (property or financial), can be an opportunity to purchase Crown property with the money from the settlement

4. **Ratification / implementation**
-Ratification by claimant group
-Implementation through settlement legislation (Parliament will sign off but without scrutiny or amendments), apology recorded in legislation or post-settlement governance entity with certain processes to receive commercial settlement redress.

5. **Virtues / limitations**
-Sincere apology could help to offer closure
-Can the wrongs ever really be made up especially with a full and final settlement?
-Needs a large natural grouping – they need to operate under one or similar minds, but this does not always happen.
-Contemporary breach? Due to forced and rushed settlement.
-Finality – a principle of the Treaty is a nourished relationship – can you ever say that history has gone and dealt with the issues adequately?

NEW ZEALAND BILL OF RIGHTS ACT 1990

Types of rights
-**Deontological approach** – human rights are good in itself, something to be sought whether or not it advances any ulterior purpose
-**Teleological approach** – associates human rights with some further good which the exercise of human rights advances, an advantage either for society as a whole or for an individual group
-**Liberal rights theory** – human rights further the individual's own aspirations, fullest expression to each individual's moral autonomy
-**Social rights approach** – human rights are only useful if the social and economic structure of society provides a sufficient range of choices to allow people's capacity for choice to be exercised
-**Natural rights theory** – law may be natural because human nature makes it essential for people to be constrained by rules in order to survive or achieve some purpose which is thought to constitute a natural goal of humanity – rules to survive and safeguard us against the state that is organising us
-**Positive rights, utilitarianism** – rights do not come from nature but from laws duly passed by supreme political authority of the state (the sovereign legislature)

Cultural relativism
-Ethical and social standards reflect the cultural context from which they are derived from
-Uphold that cultures differ fundamentally from one another, and so do the moral frameworks that structure relations within different societies
-E.g., human rights in a Western construct are not applicable in certain cultures

How to interpret BORA?
-**Purposive approach** "focuses attention on the nature of the particular right infringed and the object which the particular provision is designed to serve" – e.g., language, scheme, contexts, ICCPR, overseas provisions, White Papers
-*Ministry of Transport v Noort* – generous interpretation needed
-**BORA as a scheme** – framework to protect other rights that are not explicitly stated
-Existing common law and statute – influenced by previously enacted statutes and common law
-**ICCPR** – "the international genesis" rather than having to have a detailed exploration of particular provisions
-**Comparative law** – NZ does not have a lot of BORA decisions in the courts, so we look at other countries for influence, inspiration, and understanding

Section 3

Section 3 is the gateway provision to decide whether the circumstances is one which NZBORA should apply to the act or omission.

Section 3(a) – includes the legislature, executive, and the courts.

Section 3(b) – bodies which would do things that are sufficiently public (but are not in the three branches of government) e.g., a body that we would consider the government to do
-*Ransfield* test
-*Brett* affirms *Ransfield* and applies the factors (facts: a former employee was not happy with working for the association and had a settlement with certain caveats for each party regarding what they could talk about. Freedom of expression was an issue here because it was questioned whether in contract this could be taken away from Brett. It was said that this body was sufficiently public because of the limited functions and powers of the authority who regulated the cooperative relationship). *Brett* states that there is no single test.
-*Moncrief* – is the function, in substance, public? In this case, the body exercising the power is ostensibly more private and the body may remain reviewable. The idea of agency.

Section 4

Mandates the court to apply the legislation because the court cannot strike down legislation even if the court cannot find a way to repeal, revoke, or stretch the legislation in the most Bill of Rights consistent manner.
-Essentially allows Parliament to pass legislation that infringes and is inconsistent with the NZBORA (parliamentary sovereignty)

Section 5

The rights and freedoms affirmed in the BORA are subjected "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."
-There are justified limits to the BORA.

Section 6

Requires the courts, when interpreting statutes, to prefer meanings that are consistent with the rights and freedoms affirmed by the BORA to meanings that are inconsistent.
-The challenge of this section is how the court can understand when they are making new law and whether they are interpreting legislation that is BORA compliant (the idea of "judicial activism")
-*Re Application by AMM and KJO* (applied legislative history, purpose, compared other Acts and looked at policy considerations – heterosexual de facto couples could fall under the meaning of spouse – Adoption Act – loving and stable relationship)
    -Tipping J – the meaning must be properly and fairly open, tenable, and reasonably possible. It must be intellectually defensible and follow from a legitimate process of construction.
    -The courts cannot used it as a concealed legislative tool.

-McGrath J – section 6 is subservient to s 5(1) of the Interpretation Act 1999 where the meaning of the enactment must be ascertained from its text and in the light of the purpose

THE OBVIOUS LIMIT IS S 4 (the rights-consistent meaning must not entail a refusal to apply the legislative provision (*R v Fitzgerald*)

-*Baigent* case – Cooke P accepted how much you could strain a statute in accordance with s 6
-*R v Fitzgerald* – Winkleman CJ stated that, as per the **principle of legality**, you can only go so far to interpret within the text and statutory purpose because of parliamentary supremacy. It must be a rights consistent purpose

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MOONEN

-Moonen owned a book that was said to be objectionable under s 3 of the Films, Videos, and Publications Classification Act 1993.
-He appealed the classification of the book by stating that they had to consider the freedom of expression when classifying the book (as per s 14 of NZBORA)
-Freedom of expression is as "wide as human thought and imagination" and censorship of the book impacted Moonen's right to freedom of expression
-As per s 5 of the NZBORA, the classification of Moonen's book was unjustifiable in a free and democratic society, so the appealed was allowed.
-Section 4

HANSEN

-Hansen was convicted of the possession with intent to supply cannabis under the Misuse of Drugs Act 1975 which was a reverse onus provision
-If the defendant is found to possess more than 28 grams of a controlled drug, then 'until the contrary is proved' by the defendant, the defendant is presumed to be in possession for the supply
-Hansen argued that the interpretation of the legislation was contrary to his right under s 25(c) of the NZBORA 'to be presumed innocent until proven guilty'
-The legislation was one of proof which meant that only one meaning was open, sufficing to show how ss 4, 5, and 6 interacted among each other

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APPROACHES TO NZBORA

1. ISSUE STATEMENT
2. **Always determine if there is a gateway through s 3**
   -Section 3(a) – must be in the three branches of government
   -*Ransfield* (does not need to satisfy all, just the main ones)
   1. Is the entity publicly owned or privately owned?
   2. Is the source of the function, power or duty statutory?
   3. What is the extent and nature of any governmental control?
   4. Is the entity publicly funded (for a specific function)?
   5. Does the entity stand in the shoes of the government?
   6. Is the function of broader public interest vs merely being of the benefit of the public?
   7. Does the entity have coercive powers (like the state)?
   8. Is the entity's function affecting the rights, powers, privileges, immunities, duties, or liabilities of any person?
   9. Is the entity exercising extensive or monopolistic powers?
   10. Is the entity democratically accountable?
3. **Define the scope of the right and the limitation in question** – a generous and rights-friendly interpretation is required, but we must be careful to not overshoot our target (*Ministry of Transport v Noort*) – e.g., freedom of expression = wide as human imagination (*Moonen*)
4. **Identify the different interpretations of the term of the Act which are properly opened within the scope of the right**
   -What did Parliament intend?
   -Go back to the legislation and determine what the Act means.
   -Think of counterarguments of why it could be opened or could be closed
   -Intentions – think societal and what was going on during the time
   -Again, think of a generous interpretation

IF THERE IS MORE THAN ONE MEANING OPEN > MOONEN! (i.e., is there discretion? Multiple meanings that could be argued)

IF THERE IS ONLY ONE POSSIBLE MEANING > HANSEN! (i.e., "must", there is burden of proof, evidentiary burdens, reasonable doubt, "it's either this or that")

MOONEN ANALYSIS (*Moonen* is wider and gives more leeway)

5. **Identify the meaning which constitutes the least possible limitation to the right** (i.e., look for the best meaning to uphold the right or freedom) – as per s 6 of the NZBORA
6. **Identify the extent to which the meaning chosen limits the right or freedom found**. How does this meaning limit the right or freedom to the person?
7. **Is the legislation demonstrably justified in a free and democratic society? (section 5 test)**
   1. **Identify the objective of the provision**
   2. **Figure out the importance and significance of the objective**
   3. **Is achieving the objective statutorily reasonable and important?** (i.e., what would the repercussions be if the objective was not followed? Are there any other ways for which this objective could be achieved?) – "a sledgehammer should not be used to crack the nut" (*Moonen*)
      a. The meaning used must have a rational relationship with the objective.
      b. In achieving the objective, **there must be as little interference as possible** with the right or freedom affected.
         i. We are looking at the legislative provisions that give discretion to the implementing authority
         ii. It is a mandate to the authority if you use these provisions – you must use it in a way that least infringes the rights of the people that you are dealing with
      c. The limitation to the right must be justifiable in the light of the objective
8. **If it is demonstrably justified in a free and democratic society, then there is no limitation on BORA.**
9. **If it is not demonstrably justified in a free and democratic society, then there is a limitation on the BORA** (as per s 4 of the Act).
   -The court can feel obliged to make a declaration of this but must give effect to the justified limitation.

HANSEN ANALYSIS (less infringing approach – little room for government leeway/discretion)

1. **Ascertain whether the meaning of the legislation is consistent with the right or freedom.**
2. **If it is consistent, then your analysis will end here.**
3. **If it is inconsistent, then the analysis continues.**
4. **Is the meaning demonstrably justifiable in a free and democratic society?**
   1. **Does limiting the freedom or right serve a purpose sufficiently important to justify curtailment of the right or freedom?**
   2. **Does limiting the freedom or right rational to achieve the purpose?** (i.e., could the purpose be achieved in a different way? Are there repercussions if the right was limited? Or if the purpose was not achieved?)
      a. Does limiting the freedom or right impair the right or freedom **no more than reasonably necessary** for sufficient achievement of the purpose?
      b. Because there is only one possible meaning, did Parliament mean for this by narrowing the meaning down as much as possible to what is demonstrably justified in a democratic society?
      c. **Margin of appreciation** – the courts will give Parliament less interference in social and political matters because they acknowledge that Parliament has more knowledge than the court has about this
   3. **Is the limit to the right or freedom in due proportional importance of the objective?**

5. **If it is demonstrably justified in a free and democratic society, then it is BORA compliant.**

6. **If it is not demonstrably justified, then we can do the s 6 test.**
   -Is there an alternative meaning which is more consistent with BORA?

   -If there is an alternative meaning, then this meaning should be adopted.
   -If there is no alternative meaning that is consistent or less inconsistent with the right, then the court may feel obliged to make a declaration of this but might give effect to the justified limitation (as per s 4).

CONCLUDE!!

REMEDIES

Declaration of Inconsistency

-The Human Rights Act 1993, s 92J (remedies for enactments in breach of Part 1A) states that a declaration can be found if there is an inconsistency with the right to freedom of discrimination.

Attorney-General v Taylor

-Section 80(1)(d) of the Electoral Act stated that "a person who is detained in a prison pursuant to a sentence of imprisonment after the commencement of the Electoral (Disqualification of the Sentenced Prisoners) Amendment Act 2010
-Section 80(1)(d) of the Electoral Act 1993 (as amended by the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010) as inconsistent with the right to vote affirmed and guaranteed in s 12(a) of the New Zealand Bill of Rights Act 1990 and cannot be justified under s 5 of the Act
-*Taylor* wanted to use the Human Rights Act in order to receive an declaration of inconsistency, despite it being a different right which was explicit in the Human Rights Act

-The case had **four issues**:

1. Did higher NZ courts have the jurisdiction to make a declaration?
2. Was there a source of jurisdiction? If so, what was it? Common law? In the Bill of Rights?
3. What is the proper ambit of the jurisdiction to make a declaration? What are the limitations?
4. Did the judge breach parliamentary privilege by using a report made under s 7 of the BORA, in which the AG advised Parliament that the 2010 Act was inconsistent with the protected right to vote?

-It was submitted that:

-There was no historical power to make declarations to give advisory opinions
-Remedial power can only be conferred by statute and NZ did not have this. They stated that a declaration without conferred statute would be "inimical to the preservation of the institutional character and authority of the judicial branch"
-The ICCPR did not generate or support a jurisdiction to make a declaration (could argue monism/dualism)
-Section 92J of the Human Rights Act did not support the declaration jurisdiction. If it did, it would **open the flood gates** If the jurisdiction exists, it is discretionary and exceptional and ought not to have been exercised here.

-However, the Attorney-General lost all accounts. The Court of Appeal hstated that higher courts of NZ did have this jurisdiction and it derives from the power of these courts to answer questions of law which are confirmed in the Bill of Rights.
HOWEVER, THIS POWER IS DISCRETIONARY AND EXCEPTIONAL!!
-There is acknowledgement that the court must interpret legislation while Parliament legislates – "three pillars of government" – bettering the community's evolving needs – working efficiently together – optimising democracy and rule of law

The Supreme Court stated that it is important to provide an effective remedy for a breach of BORA in itself. There is nothing in the scheme that stated that there the court should not make declaration.
-Endorses *Baigent* and Cooke J
-NZBORA has occupied a position which is properly described as constitutional and that the principle of legality required that Parliament must speak unmistakably when limiting parliamentary rights recognised in common law.

Future?
-Canadian approach: when there is a BORA violation, Parliament will explicitly state that "we know, but despite knowing, notwithstanding (a violation of a particular right), they will still legislate and enact the legislation." – Explicitly overriding the declaration and indicating this to the SC.
-Could there be a moral obligation for the legislator to reconsider?
-Three pillars of government? Balancing between the courts constitutional and institutional statutes over the "Supreme" Parliament?
-Other countries allow courts to strike down legislation = issues with parliamentary sovereignty

***BAIGENT* CASE**
-Parliament would not have intended to have no remedies regarding BORA. If there were no remedies, then the BORA would be a toothless tiger, which essentially means that Parliament would do what they want without feeling restrained and refrained from consequences and repercussions.

Other remedies
-Dismissal / stay of proceedings
-Exclusion of evidence
-Sentence reduction
-Habeas corpus
-Mandatory or prohibitor order
-*Baigent* damages (allows public law damages for the violation of the BORA. "Toothless tiger" – Parliament has intentionally left it to the courts to develop these remedies and particular damages)

SECTION 7

-Attorney-General's reporting duty after the introduction of the Bill (as soon as practicable)
-Section 7 makes BORA considerations a significant focus on the government's formulation of legislative policy proposals in drafting legislation. The legislature is trying to avoid a s 7 report when formulating policies.

-Parliament will be notified so that they can squarely address the BORA inconsistencies to the extent that it regards the inconsistency as a matter of public concern.
-If Parliament was to enact the legislation that is said to be inconsistent with BORA, it must confront this inconsistency – e.g., robust debates, promoting accountability
-Section 7 report finds an inconsistency = negative report.

Deficiencies?
-No reporting can be done on amendments after the introduction of the Bill. It must be done as soon as practicable after the introduction of the Bill because the introduction can only be done once and so the duty arises only once (*Boscowen* – AG did not issue a s 7 report on the Electoral Finance Bill 2007, B sought a declaration).

-Legislative process would be delayed with the court hearing and considering all relevant arguments
-the courts are poorly placed to undertake a broad review of a whole piece of legislation… with limited evidence and no ability to act to an inquisitorial manner.
-Giving legal advice to the AG would be problematic considering if there is a later challenge to a provision in an Act on the basis of an inconsistency.

-No requirement for Parliament to grapple with BORA issues raised by the Select Committee (because it is too late)
-No specialised Select Committee as in the UK

The Court should not intervene in s 7 matters because it would 'place the court at the heart of a political debate actually being carried on in the House and would effectively force a confrontation between the AG and the courts, on a topic in which Parliament has entrusted the required assessment to the AG, not the courts.