

PART A. BRANCHES OF GOVERNMENT AND HISTORICAL BACKGROUND

Common Law and Statutory Law

- **Common law** began in 1153 with Henry II became King of England
- Prior to then, legal disputes resolved locally, according to local customs, as a result legal rules varied dramatically
- Henry II changed this:
 - Instead of allowing disputes to be resolved locally, he sent judges from his court, The King's Court, to hear disputes throughout the country
 - This still didn't work, the judges could disagree on what the law was
 - Judges would decide cases according to what they determined English custom to be;
 - The judges would return to London and discuss cases and decision with other judges. The aim was to reach consensus on similar matters;
- Over time, a rule known as stare decisis (or precedent – looking at previous similar cases and seeing what the judge had ruled, and following that, especially if from a higher court) developed that required judges to follow decisions of earlier judges.
 - E.g. Burglary – 25 lashes. The judge has to apply this custom. Cannot just come up with own
- In the end, the doctrine of precedent replaced the system of local custom with a system of laws common throughout the country – the **common law**.
- **Common law** definition – a set of legal principles that have evolved over many centuries in courts. These concepts developed within a centralised legal system. It is a body of legal principles established by the courts through a series of decisions.
- New Zealand is bound by common law, since NZ was a Britain colony, and common law imported here.
- Parliament creates law by enacting **statutes**
- **Statutory Law** – is the body of laws enacted by Parliament (**legislation** or many **statutes/Acts**)
- **Statute** – a legal rule (**Act**) enacted by the sovereign
- **Statutes** codify and implement governmental policy
 - E.g. Government wishes to change the speed limit to 80kph, hence they pass a law
- **Statutes** ensure the provision of essential services e.g. Social Welfare Act, ACC; they facilitate commerce, private activity, trade (NZ – China FTA) – all of this policy codified in **statute**
- There are different types of **Acts/statutes**:
 1. **Public Acts** are applicable to the general public (the default position is that an **act** is public)
 - a. E.g. **Crimes Act**

2. **Local Acts** apply to a particular locality
 - a. E.g. **Wanganui Harbour Act**
 3. **Private Acts** concern a person or a few people. These are very rare.
 - a. E.g. **Terry Schiavo Act** – women left in vegetative state. Husband wants to turn off life support. Parents want to keep her alive. Courts decide in favour of her husband. Public support in favour of keeping her alive. **Legislation** introduced to keep her alive (it only applied to her)
 - b. Runs the risk of undermining the standardisation of laws which **common law** set out to achieve
- Although most **statutes** in NZ are determined by house of representatives, some **British statutes** have legal force in NZ
 - **Bill of Rights Act 1688**
 - Not all British laws have legal force, only specific laws which our parliament has determined
 - **Statutes** are often derived from **common law**. Parliament will codify and implement common law by passing **statutory law**.
 - E.g. Crimes originally **common law** crimes – Parliament decided to codify this law in **statute** – **Crimes Act**
 - When an dispute is brought before a judge, the judge has both **common** and **statutory law** to guide his/her decision

Differences

- **Common law** is retrospective – backwards looking
- **Statutory law** is prospective – forwards looking since parliament is looking to codify laws for future cases
- It is much easier to create new law by **statute**
 - E.g. Mobile Phones in car – negligent or not? Different judges will have different opinions, thus it will take some time before different decisions turn to precedent
- Role of judges through parliamentary Acts has become diminished – parliament is seen as higher authority (peoples choice) creating the laws whereas the judges are confined to the role of decision of relevance and what laws are applicable

Parliamentary Supremacy

- If there is a conflict between **common** and **statutory** law, statutory law takes precedence
- In principle, Parliament can enact any law that conflicts with **common law**
- In practice this is not entirely straightforward, since Judges are interpreting this law, and this interpretation is based on their understanding of **common law**
- **Statutes** in New Zealand are **ordinary statutes** – NZ BORA is one of these

- **Ordinary statutes** can be repealed and there are no **supreme statutes** to overrule **ordinary statutes**
- Judges interpret the law "Some **common law** rights presumably law so deep that even parliament could not override them" – Lord Cook
- There are different theories about **Parliamentary Supremacy**

The Annexation of New Zealand

- Process of **annexation**
 - 15 June 1893 - **Letters Patent** extended **NSW** jurisdiction to NZ
 - 14 January 1840 - **Hobson** sworn in as Lieutenant-Governor
Gipps signed **Proclamation** that – Jurisdiction of NSW Governor extended to NZ, Oaths of office to Hobson as Lieutenant-Governor, Title to NZ land only from Crown, (English law formally received in NZ – common law – and Hobson was in **Sydney** at the time)
 - 19 January 1840 - **Gipps** Proclamations published in Sydney
 - 30 January 1840 - Hobson issues **proclamations** in NZ that has assumed office of Lieutenant-Governor
 - 6 February 1840 - Initial signing of **Treaty of Waitangi** – Britain had already **annexed** the territory, and **English law** had already been received, so the British has already started the structure of NZ's government without the approval of Maori
 - 21 May 1840 - **Hobson** proclaimed **sovereignty** over North Island by **cession** (voluntary transfer of territory from the indigenous inhabitants to the British Crown), South Island by **discovery** (discovery is an act of finding unknown land – **Terra Nullius** – land without owners, but Maori had already lived there, French had already lived there)
 - 16 June 1840 - **Laws of NSW** applied to NZ through **NSW Act**
 - September 1840 - Treaty signing complete
 - 2 October 1840 - Hobson's May **proclamations gazetted** in London (Publicly notifying proclamation is an act of notifying other powers that Britain has claimed NZ as a dependency of NSW, therefore making it part of the British Empire)
 - 16 November 1840 - Royal Charter promulgated
 - 24 November 1840 - **Letters Patent Commission the Governor**
 - 5 December 1840 - Royal instructions to Governor
 - 30 March 1841 - Hobson notified of **Imperial ratification of Treaty**
- A **letter patent** is an instruction written by the Queen to the Governor-General

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- The purpose of the **notifications** was to let that Britain had claimed **sovereignty** and if anyone else wished to, then war would follow
- A **proclamation** is an act of setting out an intention of administration
- **BELICH** argues – That a **proclamation** occurred at one point, but possession of **sovereignty** took several decades. **Proclamation** is therefore a '**nominal**' assertion of sovereignty, not in fact control. If a proclamation was sufficient, then NZ would be a colony of Spain, since the **Treaty of Tortidias** allocated Spain the latitudes and longitudes within which law NZ
- The **proclamation** of **sovereignty** had little impact on NZ – a change in makeup of the Islands did not take place for a very long time

British Rule Imposed on Maori

- **Intervention** – the various measures that the state exerts to conquer land
 - Spain took no measures to secure NZ land
 - British intervention in NZ was minimal until late 1850s/early 1860s
 - To start with NZ had very few British troops, but Britain sent 1600 or so troops to secure her proclamation of sovereignty
- **Ostensible authority** – measures the intentions/state of mind of the empire
 - In 1835 there was a declaration of independence by Maori, encouraged by British so that French could not claim sovereignty over NZ as discovered land
 - In doing so, the British at this point were not claiming any authority over NZ
 - In the late 1830s Britain starts to toy with different ideas – partial sovereignty, protectorate?
 - By 1840 Britain claimed full sovereignty over NZ – the state of mind of the coloniser had shifted
- **Actual control** – how successful were the British in securing NZ?
 - Britain was reluctant to impose authority
 - Trade was taking place between NZ and other ports, eg Sydney
 - To put troops in NZ would cost a great deal of money and lives
 - According to Belich, the need for actual control didn't come from the British to assert control over NZ
 - According to him there were a number of factors pushing Britain to achieve actual control
 - Church – “white man's burden” to bring the Maori to civilisation and God, nothing occurred until the French Catholics started to arrive/pose a threat
 - Wealthy British individuals – believed that Britain was producing too many goods, had an oversupply of workers and a great deal of money, NZ was a outlet for all of these

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- A financial interest in NZ – 2000 settlers in NZ and significant settlement in NSW, trade began between both, traders NZ, merchants NSW and industrialists in GB wanted actual British control
 - **The French threat** – England and French at war, French interest in NZ,
 - Giving the **Maori/New Zealander's** some form of **governance**
 - **Superiority** of British over Maori – noble savages
- The **assertion of sovereignty** was purely **nominal**, actual control took several decades. Settlers were sent to cultivate the land, and troops were sent to put down the resistance to the colonisation process
- Why? Not because British Crown necessarily wanted control, but because certain interest groups persuaded Britain to take action – eventually public opinion to bring civilisation to Maori

Declaration of Independence

- Terminology is crucial
 - Article 1: **Rangatiratanga** – independence
 - Article 2: **Kingitanga** – sovereign power and authority
 - Article 3: **Kawangatanga** – functions of government
- These three terms placed a meaning of the treaty
- The Declaration of Independence meant that the British Crown was recognising the authority of the Maori Chiefs and hence the Maori people
- The British Colonial Office accepted this out of Anglo-French rivalry
- The DoI meant that the Chiefs governed a nation, and hence the French could not annex it by territorial discovery

Treaty of Waitangi

- Two versions – a **Maori version** and then **multiple English versions** (around 9)
- Multiple versions of the **Treaty** were sent to Britain by **Hobson**
- Only one of these is considered the official English version – why it is different to the others is disputed
- The **English** text is not a **translation** of the **Maori** text, nor is the **Maori** text a translation of the **English** text
- The **two treaties** were written separately
- **Article 1:**
 - Maori – Tribes grant **Kawangatanga** (functions of government) to the Queen
 - English – Tribes cede **absolute sovereignty** to the Queen
- **Article 2:**
 - Maori – Crown confirms tino **rangatiratanga** (independent control)
 - English – Queen guarantees **undisturbed possession** of land

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- The **Maori** text is more **expansive**, independent control really means possessions and authority, authority in turn is the ability to **regulate**
- The English text is more **restrictive**, possession is the ability to live and use the land, which in turn means that authority to regulate is not granted to Maori
- **Article 4: Protocol**
 - The governor is agreeing to respect all faiths and Maori custom/custom law
- There is **dispute** about what the treaty really means, since the English and Maori texts are different and therefore guarantee **different rights** to both parties
- The most reasonable reading of the Maori version is that the rights in **article 2 are superior to the rights of article 1**, since the Maori are able to regulate the land
- The most reasonable reading of the English version is clear that the **rights granted in article 1 are superior to the rights of article 2**, since the Queen guarantees possession but has absolute sovereignty
- Although the Queen allows the possession of land, she, not the Maori, has the ability to regulate the land
- The Maori version of the treaty gives Maori greater rights
- **Dispute** still exists in the courts
- The courts now speak of the **principles of the treaty**
- "The Queen will not interfere with your native laws or customs"
 - Common law already received in NZ, January 1840
- Maori believed they were forming an **alliance** with the British
- **Maori** and the **Governor** would be **equal**
- Governor would be responsible for regulating Pakeha "The shadow will go with the Queen, but the substance will go with us"
- **The Waitangi Tribunal** holds that the Maori understanding of the agreement was that the Governor would pay for the use of land, whereas the British understood that Maori were granting sovereignty to the Queen and that her power was absolute
- Maori may have believed that they would hold the **underlying rights**, which the British believed these were transferred
- Both versions confirmed what each party believed
- The **declaration** is clear about what the **Maori words** mean, to what extent were English aware of the difference?
- **The Waitangi Tribunal** determined that it was a **misunderstanding** – no intent to deceive or mislead (Calder Case 1973)
- Debate between the two positions:
 - Take into account the Treaty, article 3 means that Maori law should be considered
 - New Zealand law is controlled by the Treaty, which is a foundational document that confirms customary law and hence NZ law is controlled and Maori Law

Constitution Act 1986

- Outlines basic elements of **New Zealand's government**
- **Sovereign, Legislature, Executive, Judiciary**
- The Act also declares the **Parliament** has the power to make law
- **The Rise of Parliamentary Sovereignty**
 - Once upon a time monarchs ruled England
 - Collected taxes, fighting wars, keeping people happy
 - Kings made alliances with barons, dukes, lords (the nobility), to obtain their help in performing loyal duties
 - Gradually, the king became dependant on the nobility
 - The nobility was this able to extract concessions out of the King in exchange for their support
 - The most famous concession was the **Magna Carta of 1215**, originally a promise by the king to preserve the rights of the nobility
 - By the late **13th century**, the King was forced to make promises to landowners and merchants as well
 - Combined that body became known as '**Parliament**'
 - Mobility, landowners, merchants rose in power
 - Parliament acquired the power to enact **statutes** on authority of the King
- Prior to the **Constitution Act 1986**, which set forth the elements of government, we had the **Statute of Westminster 1947**, which gave NZ **legislative independence**
- When there was a dispute of law, the **Privy Council** made a ruling
- The UK still retains residual power in lawmaking in NZ, allowed by NZ Parliament, following WWII
- Residual power existed until **1986**
- The **Constitutional Act** establishes that NZ is a **constitutional monarchy** with a **Parliamentary** system of government, also know as the **Westminster system**
- **Sovereign** – the Crown (Queen) represented by the Governor General. The Sovereign has absolute power, it is the source of all power: judicial, legislative and executive
- **Executive** – functions are performed by the Prime Minister and the Cabinet, the executive is responsible for the implementation/execution of laws, but does not make them
- **Legislative** – Parliament, makes laws; Parliament provides a space/forum for public debate, laws cannot be made in secret, all laws are public and debated in public
- **Judiciary** – courts and judges, the courts interpret laws, when a dispute arises, the judiciary interprets the law, what Parliament intended when it passed the law
- The branches of government began to be distinguished in the **13th century**
- The idea behind separating the branches of government is that too much power in the hands of one branch would be dangerous

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- In all **tyrannical governments**, the **supreme magistracy**, or the right both of **making** and **enforcing** the laws is vested one and the same man, or one and the same body of men, and wherever those two powers are united together, there can be no public liberty
 - William Blackstone
- It is imperative to note that we do not have complete separation of power in NZ
- Voting decided on electorate and party
- There was no direct vote for the ministers
- The party decided who the leader of their party is
- Parliament itself appoints the executive
- Whilst there is a separation of power, the **executive** is appointed by the **legislative**
- The **judiciary** is appointed by the **executive** – **judges** have a life tenure, to protect them from **political interference**, we end up appointing people who resemble to government at the time
- Whilst in theory the tree branches of government are separate, in order to avoid the concentration of power, there are holes
- The **legislative** appoints the **executive**, who in turn **supports** the **judiciary**
- The Westminster system differs significantly from other systems:
 - In the **USA**, voters decided on the executive directly
 - The President himself appoints Supreme Court Justices
 - This decision is none the less approved by the Senate
 - This theoretically means that the decisions of one branch are vetted by another

Courts and Juries

- A **court** is loosely a body of persons that **resolves disputes** between parties, it can also be a physical place (**courthouse**), the courts consist of **Judges**
- Courts resolve disputes – there are primarily two types of cases, **civil** and **criminal**
- **Civil** cases include breach of **contract**, tenancy disputes – Both sides present evidence in support of their position. The burden of proof in civil cases is a "balance of probabilities" – if a party is more likely to be in the right, then that party 'wins' in the dispute, then the court decides on the remedy of the situation is
- In **criminal** cases, the **Crown** (state) attempts to prove that an individual has committed a crime. The threshold for guilt 'beyond reasonable doubt' – this is because the punishments tend to be much more severe, often limiting fundamental liberties. The court decides on the punishment if the accused is found guilty
- **Family** matters are treated differently by the courts, with a conciliatory focus – this is because the adversarial system has an impact on family relations during and after the court process
- **Courts** also **interpret** the law and **apply** the law – the court applies the law to a set of facts, and issues a ruling based on this interpretation of the law

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- All people in the country, as well as the state – the **executive** and **legislative** branches of government are subject to the law and can be brought before the courts – the **judiciary** is **independent** so that it is free from political interference
- **Common law** evolves as judges apply existing **legal principles** to a new set of facts – legal cases that are decided by a higher court are bringing on lower courts when dealing with similar facts. Courts of the same level treat each others decision as persuasive, but are not bound by these
- **Judges** vary in the extent of which they defer to **precedent**
- Structure of the **courts**:
 - The norm is that a **judgement** is originally determined by a lower court “court of first instance”
 - Only if a lower courts decision is **appealed** does a higher court become involved – these courts only review the application of law, but do not hear new evidence
 - Courts are sometimes divided by **specialisation** – eg Maori Land Court cannot hear an issue of contract
 - Court structure is also topical of **geographical**
- **Jurisdiction** – the power to hear cases
- It also refers to the moment the court becomes involved in a dispute, the court with original **jurisdiction** hears the case in the first instance – eg in a case of shoplifting, the **District Court** has original **jurisdiction**; in a murder case the **High Court** has original **jurisdiction**
- **Appellate jurisdiction** – courts that have jurisdiction to hear cases in **appeal** from lower courts
 - This allows **judges** of greater knowledge and experience to correct the legal errors of lower **judges**, additionally, **appellate jurisdiction** allows higher **courts** to influence the overall direction of the law
- **Geographical conditions** – most of NZ’s laws do not apply outside the country, however certain **criminal laws** extend beyond NZ, this means that individuals can be **extradited** or charged in NZ for crimes committed overseas (eg people trafficking)
- Characteristics of **courts**:
 - Operate in an **adversarial** manner
 - The **judge** acts as a **referee** – decides which evidence is **admissible/inadmissible** (valid/invalid), the Judges or juries determine which side has met their burden, whether or not a party is in the right
 - **Adversarial** process different to **inquisitorial** process – **inquisitorial** process has a judge as an inquirer who can seek information and assesses it – eg Waitangi Tribunal
 - **Courts** are open to the **public** – concept of “open justice” key in **judicial accountability**, and education of the public in the law, and the venting of emotions by victims so that they can be seen to be heard

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- The parties have a right to a [public hearing](#) – the public also have the rights to access judgments, just as they have the right to access statutes
- The [family court](#) is [closed](#) to the public
 - Courts must be [accessible](#) – not just for the privileged, the courts are everybody's, people of different wealth should have equal right to access the courts
- [Jury system](#) – [jurors](#) originally selected because they had information of relevance to the dispute, an expert jury
- Different today, if a [juror](#) has additional knowledge of the case he/she may be disqualified

Fitzgerald vs. Muldoon

- [Executive](#) vs. [Judiciary](#)
 - [Foreshore and seabed](#)
 - Courts “[diminishing respect](#)” for [Parliamentary supremacy](#)
 - Moving to a rights-based world, which [Parliamentary supremacy](#) is opposed to
 - New [supreme court](#) building
- [Fitzgerald](#) vs. [Muldoon](#) is an example of this tension, in which the [Judiciary](#) had to rule against the [executive](#)
- Facts:
 - [New Zealand Superannuation Act 1974](#) enacted by [Labour](#) Party – a requirement for both employees to pay into a scheme and employers to match that contribution
 - New Zealanders were saving too little and spending too much
 - [National](#) promises to [abolish](#) the scheme, and wins the election on [12 December 1975](#)
 - That same day the [Superannuation Board](#) received a letter from [Muldoon](#) informing them that there was going to be a press release shortly informing citizens of the intentions of the government to [abolish](#) the [superannuation](#) scheme
 - Three days later [Muldoon](#) issues a press release outlining the abolition of the [Superannuation](#) scheme when [Parliament](#) is next in session in [June](#)
 - However in the mean time New Zealanders need [not](#) make [contributions](#) to the scheme – they [wouldn't be prosecuted](#) if they failed to do so.
- The issue with this was that usually [Parliament](#) codifies voters' wishes into law, whilst the [executive](#) carries out this law
- Several citizens tried to [prosecute Muldoon](#) privately – trade [Unionists](#) and [labour](#) supporters
- These efforts were stayed by the [Attorney General](#)
- [Mr. Fitzgerald](#) was a clerk in the [Department of Education](#), and brought a [civil](#) action against [Muldoon](#)
- His claim was that the press release was [illegal](#) according to [section 1 of the NZ BORA 1988](#), and he called for an [injunction](#) (a court order that required someone to do something)
- He wanted [Muldoon](#) to withdraw his press release and the [Attorney General](#) to instruct the [Superannuation Board](#) to accept his [payments](#)