Public Law 211

Lecture 1 – Introduction

- Power is good (Hobbes) – it's important to have someone in power otherwise it becomes the survival of the fittest – a bad leader is better than no leader – governments need power to control people – people are nasty, and life should not depend on the powers given at birth
- Power needs to be restrained (Locke) – people have inherent liberties and there is a limit to what public power can do to us
- Courts are always trying to balance these two philosophies – they wish to give you your rights but make sure that the government is able to function properly
- Idea of constitution – government according to a system of rules rather than personal or arbitrary rule by a sovereign or council
- Basic functions of a constitution
  - Constitute, define and legitimize power – supervise the power and make sure it is used correctly
  - Distribute power across institutions and office holders – executive, parliament and judiciary
  - Create controls over the misuse of power – judicial reviews, BORA 1990
  - Create controls on the people who control power – for example judges – too much power how do we control them
  - Give citizens protection against the abuse of government power
- Functionally the NZ constitution does all of these things, but it is in an unwritten form
- Form of NZ's constitution – it contains laws that regulate matters that are fundamental – BORA 1990, Treaty of Waitangi Act 1975 (present cases and can only make suggestions), Constitution Act 1986
- Laws distinguished from ordinary legislation by more stringent procedure – Electoral Act 1993 – special majority – this could give too much power to the government of the day making it harder for future governments
- NZ unlike many others we don't have a single text or set of rules known as a constitution
- Legislation considered fundamental is not always entrenched – legislation considered fundamental cannot be used by judges to invalidate other legislation
- We have legislative supremacy not judicial supremacy
- Ultimately constitution is enforced by politics rather than law – texts are never complete – judges don't deploy guns, tanks or money – liberty are the products of politics they are not prior to politics
- NZ's constitution is highly flexible – the life of most constitutions is 12 years and continuously changing generation by generation – constitution is not based on strict separation but on the theory of responsible government

Lecture 2 – History of Constitutional Law

- Constitutional history – 16th to 18th century the problem in Britain was that the Kings and his ministers enjoyed too much power over parliament, courts and citizens

- House of commons took away the power from the king – had to have a civil war, kill the king and bring back a king
- The new problem was that too much power were given to the parliament – which gave too much control over the citizens – until they are voted out – but still years of control
- This gave a lot of power to the people who appoint these parties and the parties themselves who appoint these ministers – so government dominates parliament
- Parliament means the HoR and the Queen – government means the ministers
- Prime minister Muldoon who ruled without parliament due to one act that was passed and didn't force parliament to meet
- We now have MMP system – this is designed coalition governments – ministers have to compromise – reduce the power of political parties and increase power of the Parliament
- Parties create lists of the ministers that go into the Parliament – even though they are trying to reduce political party but actually increase it – the number of votes the party get actually determines how many seats they actually get
- We now we have BORA 1990 due to the labour government was in power as they felt they had too much power and during the end of their reign they created this to help constrain governments
- In the 19th century the administrative group grew extremely fast and big – these are the executive who deliver the service and regulate all tasks of the government
- There were then civil servants – who regulate and act on behalf of the government – there is no mention of this in the big documents since it didn't exist back then
- There was nothing to regulate the executive – until the 1960s when the judges created government control by judicial reviews through writs from the past
- The new problem was that judges were not elected democratically – executive acting under people who were democratically elected
- Judges – sometimes considered the least dangerous branch – they can't make a programmatic change like a statute – it's done case by case – predict much more what a judge will do rather than what government relatively – they are a-political – they are not supposed to take someone's view politically – they are more conservative – they are not very radical – they cannot test many legal points they don't have control over what cases are presented to them
- Judges are meant to be independent – give them enough money so that they are not bribed – they are not subject to 3-years so they may look longer into the future of the effects of the case – they are very hard to get rid of – s23/24 in the Constitution Act 1986 – gives the provision on how to remove judges and their salary
- Judges are accountable – through appeals – judges can be reviewed by higher courts – recusals where when judges should step down – removal – cannot bring a civil law action against a judge for losses (as this would mean litigation would not be finished)
- When at the top there is no real constraints – however, in the future you can be overwritten by a new court
- Compulsory retirement age of 70 – can be acting judge till 75 – America judges can stay as long they like
- International law – many problems that cannot be decided by just the governments themselves – parliamentary supremacy won't solve war, global warming, refugee

crisis – move power to international institutions – international courts and civil servants

- It has greatly who increased the power of the executive as they are the ones that go for Treaty signing
- Power very diffuse and no one knows who has it and who to hold accountable – international organisations don't have to respond to anyone
- Constitutional law is dynamic and responsive – enduring universal values

Lecture 3 – Legitimacy of Power

- As a public lawyer it is important to consider who has the authority to do what – and you should always question what gives that person that right
- **Entick v Carrington (1765)** – judges decide if it is the law then it will be in our statutes or common law
- Common law values with a layer of statutes on top – common law represents the norms and values of the community – and the layer of statute has holes in it to allow the common law to come through and fill gaps
- **Fitzgerald v Muldoon (1976)** – the prime minister issues a press statement stating the super annuation scheme had been suspended – suspending the law – there was no doubt that he had the numbers in parliament to pass this law – but he hadn't done it through the parliament yet
- **BORA 1689** – the pretended power of suspending laws or the execution of law by regal authority without consent of Parliament is illegal – the court decides that it is illegal for Muldoon to have done this
- This helps to make sure that collective decision making is important as it legitimizes the law and enhances the outcomes for all
- **Declaration of the Independence of NZ** – **s2** – all sovereign power hereby resides with the chiefs and heads of tribes in their collective capacity, do not permit legislative authority separate from themselves – nor any function of government to be exercised unless appointed or acting under the authority of the congress assembled
- British used international law, British law and the Treaty of Waitangi to claim sovereignty over NZ in 1800s
- **Article 1** – English text says that Maori give their sovereignty while in the Maori version its chieftainship which were very different ideas
- **Article 2** – British are taking something – British wanted to be the sole purchasers of land from the Maori and then they wanted to sell it off to settlors at a higher price
- **Article 3** – outlines the Natives of NZ her royal protection and Rights and Privileges of British subjects
- The meeting of minds according to the Waitangi tribunal was that British were getting external control of NZ (protection from other countries such as France or USA) and they had control over their British settlors but no control over Maori
- In 1852 Britain passed the NZ Constitution Act – we had a constitution that was given by the British parliament not made by the people
- **S71** – gave some power to Maori's to govern themselves – saying that in dealings with themselves that particular districts should be set apart within which such laws, customs and usages are observed

- It also allowed for the assembly of parliaments – but these Maori districts never really happened
- There was also a writ that meant that customs and common law of the aboriginals of NZ would be respected a part of the common law as long as they were not repugnant to general principles of humanity
- There was a governor that had to give assent to bills being passed and could send them back to reviewed again, exercised control over native affairs – this is because they didn't trust settlor governments since they were too self-interested and just wanted land – at the time the General Assembly was not proper law-making power
- After 1926 – it changed and there became different crowns for different governments – the governor became the Governor General – became much more a symbolic figure
- 1931 UK Statute of Westminster – giving many countries the ability to fully self-govern – this was not adopted till 1947
- Any future request for the UK parliament to make law for NZ would have to be made by the act of the NZ parliament – gave power to NZ parliament to change its own constitution act
- Took till 1986 for the provisions of the Constitution Act 1952 to finally become part of the NZ law – s15 parliament now has full law-making power

Lecture 4 – Constitution Act 1986

- Took from 1931 to 1947 – to take up autonomous power under the statute of Westminster
- It took us till 2003 to remove the judicial counter of the Privy Council to the Supreme Court of the NZ
- NZ has no real point at which the constitution really started – these events are considered people events – people constituting themselves – but in NZ the constitution changes happened by the elites – UK Constitution Act – Constitution Act 1986 was written by officials (civil servants) not by a community
- Parliament has not had law making power for that long – political and legal powers were not always aligned – lawyers wanted to have full law-making power
- Constitution Act 1986 finally replaced the UK Constitution Act
- **Constitution Act 1986** is merely declaratory – it's the codification of the law – describes things as they already are
- Starts with the Sovereign and Governor General – separate sovereign in relation to each country – this is important since we need different advisors for different countries – the sovereign does not represent NZ in foreign affairs it is instead done by the Governor General – GG is appointed by the sovereign to represent them – historically were military men – they report back to the queen
- HoR – s10 – there shall continue to be a HoR which is the continuation of the general assembly – HoR is the people elected by the people
- Parliament includes the HoR **and** the sovereign or GG
- S15 – the parliament of NZ continues to have full power to make laws and the UK does not have the power to make any laws for NZ or any laws it does make do not apply to NZ
- S16 – a bill passed by the HoR shall become law when the GG assents to it and signs it in token of assent

- S17(1) – a term of parliament is 3-years unless dissolved sooner – this is the only provision that is entrenched – s17(2) – section 268 of the Electorate Act 1993 shall apply in respect to s17(1)
- S23/s24 – judges of the high court and above cannot be removed from office except by the GG acting upon the address of the HoR – only on the grounds due to judge's misbehavior or the incapacity to discharge the functions of the Judge's office
- S16 – first meeting of parliament after an election has to be no later than 6 weeks – gives parties an absolute deadline to come up with a coalition – since at the meeting you need a vote of confidence – if not achieved than there will be a new election
- S22 – only parliament can tax – the executive government has to come to the parliament to spend, borrow money
- Executive council is the one that makes regulations
- Things left out of the Constitution Act 1986:
- Constitutional Convention
- Power of the monarch – they can only use their power when advised by the HoR
- There are no human or environmental rights
- No history – just the way it's been – no mention of the ToW or Maori
- No mention of the prime minister – no mention as a constitutional role, how he/she is chosen – mainly determined by politics who is the prime minister – vote in the HoR to remove the prime minister
- Nothing about the formation of cabinet – that's where all the provisions are made
- No mention of how bills are to be passed – these rules are written by parliament themselves known as the Standing Orders of Parliament – the judges won't be able to enforce these orders
- Does not mention what the power of judges are
- Does not mention what happens when the GG refuses assent
- S16 does not mention if the GG can refuse to sign a bill – and what would be the procedure of that – one view is that the queen must assent to the bill
- There is another view is that it is a nuclear option – if something is so unconstitutional that is being proposed that there might be power for the GG to interfere with this
- If the GG doesn't sign the prime minister will most likely advise the sovereign to replace the GG with someone else and the new GG is almost guaranteed to sign
- This does however mean that GG can delay helping warn the Parliament
- Constitutional Convention – when a government is in a care-taking role (between an election and swearing in of a new government) they have a convention of not starting policies of their own and agreeing to policies of the incoming government
- Political Constitution – the NZ constitution is "that the government of the day may continue in office for only as long as it continues to enjoy majority support of the HoR. The moment that support is withdrawn the government is required to resign" – Tomkins, Our Republican Constitution
- AV Dicey (1885) on Constitutional Convention – "The other set of rules consist of conventions, understandings, habits or practices which, though they may regulate the conduct of several members of the sovereign power, of the Ministers, or of other officials, are not in reality laws at all since they are not enforced by the courts"
- Constitutional convention – can moderate legal powers, legal gaps, central part of political constitution

- The queen reigns but government rules; the queen acts on the advice of her ministers who command majority in the HoR

Lecture 5 – Sources of Constitutional Law

- Main sources of constitutional law – statutes – NZ English common law – Maori customary law – ToW – International treaties – international customary laws – constitutional conventions – letters patent on which the GG represents the queen
- Republican Constitution – Liberals conceives rights to be natural and superior to the political order, republicans insist that those rights are man-made and worldly – we create a climate from which rights come from – rights are derived from public order – rights are therefore are fragile – **Adam Tomkins**
- Self-correcting government – Constitution only protect the Electoral Act but at the heart the idea is that it will allow future ministers to change and improve the law for the better – it protects the people from lifetime suppression
- Keep politics free – let people decide for themselves – let them participate – this implies that majority would always win – politically we create rights even if we discuss them as always being there and natural – this is too optimistic about politicians – you must feel politics are noble – you must use politic channels to fix what is not perfect
- Legal constitutionalists – say that the judges gave parliament to be sovereign – republican constitutionalists would argue it happened through politics and wars were fought over it and they are democratically elected
- Common law constitutionalists – believe that the judges should be there to create the law
- Rule of law – is the underlying principle shared by common lawyers – but there are different views about the context which explains why judges disagree – contest about how much politics can be subjected to law
- Core elements of the rule of law – rule by law rather than arbitrary powers – equality under the law everyone is subject to law
- Individuals are to be punished for breaches of law and not at the whim of an official – Entick v Carrington (1765) – you cannot punish me unless you have legal authority
- **AG v De Keyser's Hotel (1920)** – government ceased land but did not pay compensation – officials need to abide by the whole statute not just parts of it
- Lawyers tend to agree that an act creates an offence after the fact is contrary to the rule of law – so you can't apply a new rule to past events since at that time they were obeying the law – if this was possible it would mean that officials can try and get a certain people
- What if official obeys the law at the time which we now think is morally wrong – for example what if someone commits genocide – one argument by international lawyers is that since this is generally accepted by all countries that this is wrong such as slavery – then it is okay to punish these people since we all agree
- **Procedural view of the rule of law** – laws passed properly passed by proper procedures are valid regardless of their content
- **Internal morality of law** – you don't appeal to morality at large but there is a criterion – to be valid law, a law must: be stated in advance – be clear – be generally applied – treated like cases alike – must be capable of being complied with

- **Substantive** – for law to be valid it must conform to standards of morality that are external to law

Lecture 6 – Parliamentary Sovereignty

- **NZ Senior Courts Act 2016** – s3(2) – nothing in this act affects NZ's commitment to the rule of law and parliamentary sovereignty
- 17th Century – Parliament was weary of calling itself sovereignty as this could lead to an abuse of power like kings – Kings claimed only god can judge the him
- Judge's believed that the King could not give sovereignty to others – they couldn't pass laws of successions – if everyone is appointed by god, they are bound by past laws
- 18th Century – voting system changed giving more power to the people in general
- **Dicey's basic propositions** –
- Only parliament can make and unmake law
- No court of law can question the validity of parliament's enactments
- No person or body is recognized by the law as having the right to override or set aside the legislation of Parliament
- All parliaments are equally sovereign; no parliament is bound by its predecessor or can bind its successor
- Parliament is the supreme law-making body and may enact laws on any subject matter
- Parliament is legally sovereign, but the electorate is politically sovereign – parliament can make any law it wants but if law is unjust people will rise up – minority is left out
- Ultimate safeguard against tyranny is the electorate who will ensure that parliament enforces its will (not for judges to enforce the will of the electorate) – during times of tyranny there is a lot of repression so it can be hard to rise up
- **Kereopa v Te Roroa Whatu Ora (2013)** – there should be a constitutional constitution to not undo the deeds made with the Maori – s13(1) – the courts cannot override the act, but they can interpret them – judge cannot re-assert customary title – parliamentary enactment is the highest form of law
- Only parliament can make or unmake the law – the executive frequently enters into treaties with other nations – this also has the effect of changing the law internally – you agree to other regulations that will make laws
- Power is moved internationally – have to create new laws and judicial functions
- Since it's the executive that enters into treaties and is done behind the scenes

Lecture 7 – Parliamentary Sovereignty 1 – International Treaties

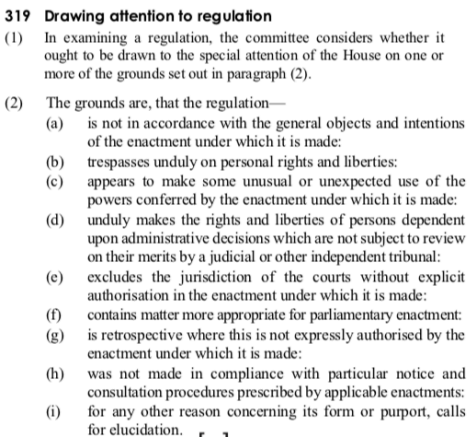
- As seen from BORA 1689 and Fitzgerald v Muldoon – the ministers do not have the power to suspend the law or make only parliament does
- Multilateral (more than 2) Treaty making in NZ:
- Negotiations by officials (civil servants who are not elected) – traditionally very secret
- National interest analysis prepared by officials saying the advantages and disadvantages to NZ
- Cabinet given authority to sign the Treaty (agreed to but not yet binding at international law)

- Treaty and NIA is presented to the HoR
- Considered by a committee (usually a specialist committee) which reports to whole house
- Ratification: formal documents exchanged with other countries to bring Treaty into force – confirmation that domestic procedures have been completed – such as certain laws and regulations need to be passed – or parliament wants to have separate laws away from what the treaty says domestically
- NZ is a dualist country
- In some countries Treaty also becomes domestic law – however, due to the protection of Parliament Sovereignty treaties in NZ are not domestic law until legislation is passed prior to the ratification – MFAT Guideline 2018 – this is to ensure that NZ does not breach the Treaty when it becomes binding
- Bilateral treaties have little to no involvement of parliament – unless they are of national significance
- European Communities Act – s2(1) – all decisions made under the treaties will be law for the UK not just the treaty without further enactment – they set up a judiciary, parliament, executive and they will all become part of the UK law
- S2(4) – that EU law will prevail over UK statutory law – not just statutes in the past just all statutes – this takes away Parliamentary Supremacy in large areas of the UK trading
- **R (Miller) v Secretary of State (Majority Judgement) (2017)** – [60] – under these sections not only does decisions made by the EU become part of the UK law but they also take precedent over domestic UK law
- [25] – if a member chooses to leave they have only 2-years to discuss an agreement with parliament – this puts pressure and there is nothing the parliament will accept – so they would be left with no agreement at all – treaty enter and withdrawal is up to the executive not so much the parliament
- [81] – it would inconsistent with long-standing and fundamental principle for such a far-reaching change to the UK constitution is done by ministerial decision/action
- UK parliament would not change any laws on the devolved powers without their consent
- Delegated regulations – the parliament enacts legislation delegating power to the executive to make the regulations – executive is making secondary legislation

Lecture 8 – Parliamentary Sovereignty 2 – make and unmake law

- Parliament has to be the one authorizing such a significant change to the UK law
- The regulations made happens behind government doors – this is done without transparency – could this be a way of getting past parliament
- Delegated legislation many fears could perish the power of the parliament

- Economic Stabilization Act – passed after world war you can do almost whatever to help solve economic problems within NZ
- Delegated legislation carries a lot of the detail of how the legislation will be used – technical things can be done much quicker by delegated legislation
- Standing Orders of HoR – rules made by parliament for parliament – not enforceable in any court – enforced by the privilege committee in parliament
- Standing Orders created the regulations review committee – to draft regulations and hear complaints from companies and people – usually a member of the opposition will reside here – much broader grounds than a court



319 Drawing attention to regulation

(1) In examining a regulation, the committee considers whether it ought to be drawn to the special attention of the House on one or more of the grounds set out in paragraph (2).

(2) The grounds are, that the regulation—

(a) is not in accordance with the general objects and intentions of the enactment under which it is made:

(b) trespasses unduly on personal rights and liberties:

(c) appears to make some unusual or unexpected use of the powers conferred by the enactment under which it is made:

(d) unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal:

(e) excludes the jurisdiction of the courts without explicit authorisation in the enactment under which it is made:

(f) contains matter more appropriate for parliamentary enactment:

(g) is retrospective where this is not expressly authorised by the enactment under which it is made:

(h) was not made in compliance with particular notice and consultation procedures prescribed by applicable enactments:

(i) for any other reason concerning its form or purport, calls for elucidation.

- A member of the opposition party would be the chair of that committee – this is about giving power back to parliament not the executive
- **Legislation Act 2012** – this attend to anything with legal effect – s42 and s43 – that a member of the committee can bring a disallow to the parliament and if they do not respond then the motion is automatically disallowed – this forces them to respond
- GG may, by Order in Council, make regulations for all or for any of the following purposes
- Courts will supervise whether delegated legislation made for the purposes contemplated in the Parliamentary enactment – is the motion in line with the intentions of the Parliament – it doesn't matter if it's a good purpose its more about whether it fulfills the purpose of the Act
- Act empowers GG to regulate worker's safety – a child walked into a construction site and was injured – the company said that the act was concerned with the safety of workers not trespassers – the site was perfectly safe for workers
- Courts are willing to find regulations as ultra vires (outside the scope of) the power conferred in the statute by parliament – regulations are invalid to the extent of inconsistency – courts portray themselves as protecting parliament and its sovereignty
- If the regulation is made broadly in purpose with the statute but overrides common law rights and liberties – the court will interpret it narrowly so that regulations does not override common law rights
- **Taylor v NZ Poultry Board (1984)** – Famous Orbiter – Judge Cooke – I do not literal compulsion of torture would be within the power of parliament some common law rights presumably run so deep that not even parliament could override them

Lecture 9 – Taylor v NZ Poultry Board (1984)

- In the 1980s there was a regulation on how many eggs you could produce, where you could sell, you were given quota's
- Mr. Taylor is selling eggs from a different place from where he produced them – he was stopped by an authorized official of the Poultry board 3 times – and asked what he was doing – replies were evasive – one occasion he said they are potatoes – he was fined but only in very small amounts since they could only fine up to $5000
- He pushes to the case all the way to the COA to make law for us
- He believed his allocation of egg production is too low and fights all the way up

- **Poultry Board Act 1981** – s57(4) every person commits an offence against these regulations refuses or fails or misleading information to answer any inquiries put to him in accordance to this act
- S57(3) – any officer authorized by the Board may require any persons in possession of eggs intended for sales or poultry to answer any inquires relevant to this act
- **In DC** – the problem of ultra vires was not raised
- **In HC** – Justice Jefferies – ruled that the regulation was not too broad – he looked at only the words and purposes of the act and he said they put the board at the center of production – they are in charge – these purposes would be frustrated if you weren't allowed to ask questions – you need a power to ask questions
- Does the statute authorize by sufficiently clear words the creation by regulation of an offence for refusing or failing to answer questions in breach of the common law principles that a person cannot be forced to answer a question under a threat of sanction – what burden is there on Parliament to breach rights – it has to do so very clearly – transperancy and clarity – people will know who voted for it and supported it
- **Justice Cooke** – starts with the common law floor – every individual has the right to refuse to answer to any official – the right to silence – starting with the right will get you further than starting with the statute
- Does the statute authorize by sufficiently clear words the creation by regulation of an offence for refusing to answer questions in breach of common law rights?
- If Parliament wants to breach rights, they need to be very clearly stated
- Sometimes there is the ability to compel witnesses to give evidence
- Does this apply outside court proceedings – statute cannot be used to take away a right – can only be done by clear words or by the intentions of the Parliament or necessary implication
- Sites Chief Justice Mason from Australia – should defense against self-incrimination apply outside court room – statute will not be used to take away a right unless the legislature clearly states it – whether by clear words or by necessary implication – focus on the language, character and purpose in order to work out if the liberty is taken away
- Would the intent of the statute be frustrated if the right is invoked?
- There are some limits to what is authorized in this act – it would not permit peremptory demand for information that could not be reasonably supplied immediately
- Reasonable time for answering those questions – this act does not permit cross examination or prolonged interrogation
- There are still restrictions to how these regulations are to be applied
- 1st principle – starting point matters – starting with legislation will mean the case is quickly over – starting with rights it does penetrate further to see if this legislation is applied to breach rights
- Does the regulation apply to Taylor at all – has the statute expressly or by necessary implication limited the right to silence – even if the regulation has been authorized and there is a necessary limit even then there may be limits to how the regulations can be applied
- Challenge to ultra vires, common law rights and application of the regulation

- Famous orbiter – if Parliament writes too clearly breach rights (eg torture), courts will not treat it as valid law – this is just saying that there is a cliff that parliament should not get to – this is just a warning to parliament
- Henry 8th Clauses – empower the executive to amend or repeal statutes by secondary legislation avoiding parliamentary debate and processes – **Canterbury Earthquake Recovery Act (2011)** – s71(2) gives a minister power to modify statutes – s71(3) has the list of statutes that can be changed
- These changes cannot be reviewed in court there is just a panel that has the right to review these changes – there are other provisions that are not allowed to be changed – but this people in charge of this are appointees not judges themselves
- S76(1) – if there is a disallowable instrument under the Legislation Act 2012 you can take a claim to Order in Council

Lecture 10 – Parliament Sovereignty 3 – Courts and Parliament

- Courts will very much willing to intervene when parliament has delegated power – by reading statutes narrowly to protect common law rights
- Parliament gives authority by giving authority to an organisation – or give to officials to decide
- Dicey's proposition – no court of law can question the validity of parliament's enactments
- BORA 1689 – Article 9 – Freedom of speech and debates and proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament
- What happens if ministers in parliament defames someone – it allows for more freedom in parliament as this allows them to inquire about things – if this was held then you couldn't say anything if it wasn't true – representation of the people and it allows them to say things that people want to say – guard against the sovereign – if it were done like the court MP's couldn't inquire unless they had proof it was true
- People who bring litigation have deep pockets – so this might give power to certain views and standings – this stops the most money voice win and so just protect all of them
- Standing order – 235-237 – to help them in select committee – if MP's have gone too far to defame a minister – there is no compensation – it does help to build back some reputation – this will remove what is said during the Parliament proceedings
- **AG v Leigh (2011)** – minister said some things in oral answer that Ms. Leigh took exception to – she took action against the civil servant who briefed the minister of how to ask the questions – the minister claimed that communications with the public service were privileged – that privilege was necessary to help proceedings in Parliament
- The court found this as too much of a creep out of Parliamentary Privilege – in such communications the court found only attracted qualified privilege – that is they were only protected if they did not have ill will or bad faith – and didn't take improper advantages – if you want to say something for personal reasons you say it inside so that you have protection
- **Parliament Privilege Act (pg68)** – s4(2)(c) – including the preparations of documents for the purposes of or incidental to the transacting of any business in the House or

Committee – (d) – the formulation, making or communication of a document, under the House's or a committee's authority

- **S11** – (a) – courts or tribunal cannot have its truth, motive, intention or good faith of anything forming part of those proceedings in Parliament questioned
- What happens when Parliament has not correctly followed its own procedures or has been deceived
- **British Board of Railways v Pickin (1974)** – the adjoining owner's land was taken without compensation that was abandoned – parliament was misled in legislating this legislation therefore the courts should disregard this section – failure to give notice to the land owners
- **Lord Reid** – said that it's not up to the courts to decide when Parliament is going against natural law and human rights – Doctrine of Parliamentary Sovereignty is so well established and has not been questioned for 100 years and is basically inarguable
- Courts cannot look at how the bill was introduced, its progress or even what was said about it in parliament – they can only check to see if it has been passed by both Houses and received royal assent
- Leaves open the face of the bill has gone wrong without looking into parliament itself – there must be royal assent – Electoral Act require 2/3 majority – otherwise judges are free to intervene using statutes to make their point
- **Lord Morris** – says that it is up to parliament to decide whether it has been passed properly and procedures were followed
- If Parliament breaks its own rules it is up to them to decide what to do about them and to repeal it – so long as the provisions of an Act are clear the judge's role is to obey them and carry them into effect
- In the US sometimes they pass bills just for votes – knowing that the SC will fix it for them – such as you can't be prosecuted for flag burning
- So, Morris suggests that you break so you fix it
- Leaves open the possibility that it is up to the courts to decide how to interpret the statute if it is ambiguous and unclear
- **Lord Simon** – parliament has laid down its own procedures and it is up to them to fix it and follow them – this protection is so Parliament can fulfill its democratic function – must take responsibility for their conduct – this is because of the self-governing principle – parliament is democratically elected not judges
- What if the procedures laid down by parliament were laid down in statute and not in standing orders? – does parliament has to follow its own rules
- Even when parliament has been misled the courts should not interfere – they want law to be valid – they don't want statutes questioned to see if they are valid

Lecture 11 – When can Courts intervene in Parliamentary Procedure

- Questions that have been left open – what happens when Parliament's procedures are not followed – what if parliament procedures were in statute – what should the judges do then?
- **WestCo Lagan LTD v AG (2001)** – property rights vs environmental rights – political agreement supported by legal contracts of sustainable rimu logging – the parliament decided to terminate all the rimu logging – Forest West Coast Accord Bill 2000 – no one would be entitled to compensation

- The bill amounted to breach of the contract – they wanted to stop it from getting royal assent
- AG – seek a striking out order – this isn't even an arguable case – no recognized cause of action and the court will not recognize it
- This case about the content of the substance of the bill – courts should not decide whether to uphold the bill – courts should not decide whether they like the bill or not
- NZ courts should be prepared to intervene – if there is a procedural irregularity of a certain kind
- **Judge McGechan** – [91] – I have no doubt this court has jurisdiction to determine whether procedures are being followed in statutes – such as the Electoral Act where parliament needs 75% majority – and to make sure royal assent has been given
- These are requirements – on these we can expect a court of NZ to intervene – if a statute had not gained the 75% required under the Electoral Act in those circumstances it is possible for courts to intervene to stop the bill
- He does leave open questions of extreme cases such as acts of torture
- Parliamentary sovereignty means that judges can't interfere with the contents of statutes even when it is contrary to human rights
- **BORA 1990** – the NZ BORA cannot be used to strike down legislation or invalidate legislation
- **S7** – where the AG has an obligation to report a bill which is inconsistent with the BORA to the parliament upon introduction – (b) – HoR should be notified if any bill is inconsistent with any rights and freedoms contained in the BOR – if you can limit the BOR
- **Boscawen v AG (2009)** – AG breached s7 in not bringing the Electoral Finance Bill to the attention of the House – the money that could be spent during campaigns, and different spending limits on MP's – was limiting the freedom of speech – how best to regulate campaign financing – Labour passed this bill
- The HC struck out the claim saying it was non-juiceable – not subject to judicial enforcement or interpretation
- The COA – the scope of the AG was to report when he/she thought the bill was inconsistent and there was no restriction to report when it was borderline inconsistent or plainly inconsistent
- All s7 reports are publicly available and available to MP's – people can use this to help their arguments on select committees – the inconsistency is already largely available to MP's it is not the AG's requirement to highlight these
- 2ndly – people can take a different view rights – MP's can take different approaches to rights – you can't make a particular view about rights the only view
- S7 requires the genuinely held view of the AG – it's for the AG to form that view not the courts – if the courts formed the view that the AG has to espouse in parliament that he/she did not believe – and this would interfere with parliamentary procedure as this is part of the process of how a bill is passed

Lecture 12 – Principle of Comity

- COA said that s7 of the BORA 1990 – was a parliamentary procedure that they had no jurisdiction to intervene with

- However, courts can take action in extreme circumstances – where a bill quite clearly breaches rights and the AG does not submit a report – then the courts will have some jurisdiction against passing that bill
- **Ngati Whatua Orakei Trust v AG (2018)** – principle of comity – there is an established principle of non-interference by courts in parliamentary proceedings – its exact scope is open to debate – sometimes it is put as a matter of jurisdiction, but more often seen as a rule of practice – however it can be formulated in its limits in that it requires the courts to refrain from prohibiting a minister from introducing a bill in Parliament
- Instead of stopping the bill from being passed – you can ask for declarations – about the status of the Ngati Whatua Orakei – who's tikanga should govern the settlement – consultation with government should be expected – what Ngati Whatua Orakei's rights are under ToW, Tikanga and under the Declaration of the Rights of Indigenous People
- This is not a claim to stop the passing of a bill – but rather to get declaration from courts about what the rights are
- **Chief Justice Elias** – you cannot get a declaration of rights in this case – even asking for a declaration would affect the passing of the bill – would be against the principle of comity and parliamentary privilege
- All judges push back on parliamentary privilege creeping too much into the executive policy making sphere
- What is parliamentary privilege doing in terms of supporting parliament's function – courts have a function too – you can't use parliamentary privilege to inhibit judicial process
- Referring to WestCo Lagan – said that parliamentary privilege only extends to the 4-walls of parliament
- Treaty settlements can be seen a form of policy development – they are amendable to judicial review
- Parliament only talks to courts through enacted legislation – until law is changed, they can only find law in the enacted law – just as executive cannot bind itself to a contract to introduce legislation – it cannot give assurance the legislation it proposes will be passed
- The executive cannot make a contract that binds the legislature from passing legislation
- You need a more temporal link with what occurs in the House to influence the passing of a bill

Lecture 13 – Can Parliament Bind Itself

- Both parliament and courts have a role in determining parliamentary privilege – there is concern that using the AG to expand the scope of privilege to executive branch and keep it out of supervision
- Parliamentary privilege is to let parliament functions, but courts have a duty to protect rights and privilege should not become so broad that it erodes the judicial function
- The judges in **Ngati Whatua Orakei v AG (2018)** – disagree as to what remedy is available – majority allow the declaration to be heard – especially those parts that are forward looking and will be there even after legislation is passed

- The courts however do not allow the last two claims – to do with the breach of ToW and the rights of Indigenous people
- The reason for this is to stop any dispute between parliament and courts – since it would be unfair to give land to someone only for parliament to override it – that would seem as if they were feeding the dispute instead of resolving it
- Elias argues that the declarations are discretionary anyway and courts have the option of giving them or rejecting them – so they can determine if this will interfere with parliamentary privilege
- Dicey proposition – no parliament can bind a future parliament
- Ways parliament can make or unmake law
- Express amendment or repeal – for example s46 is amending by inserting…
- By implied amendment or repeal – enacting provisions that are inconsistent with previous act but not evening mentioning the previous act
- Courts will try and give both conflicting statute some effect in order to make all legislation equal under the law
- For example – **Prohibition of Lead Pipes 1950** – lead pipes are prohibited in all domestic dwelling – **Lead Pipes Act 2009** – you may use lead pipes except for conveying drinking water – the courts will say you can't use lead pipes for drinking water and domestic dwelling but for everything else
- The particular will prevail over the general – the more descriptive and clear statute prevails over the more general one
- **Ellen Street Estates v Minister of Health (1934)** – Later acts will prevail over previous ones because of implied amendment – this means no parliament is bound by previous parliaments and protects democracy since a parliament can't bind every other one
- **Maugham LJ** – says that you can't even force a future parliament to repeal it can just be implied if it deals with the same subject matter
- If it is expressly stated that Parliament is repealing an Act it must be given affect because it is the will of the Parliament
- Doctrine of Implied Repeal – if two statutes genuinely conflict – then the latter one in time prevails even if the earlier statute says it prevails – this protects the point the no Parliament cannot bind its successors
- This protects democracy – as you can get elected once and bind all other parliaments
- If Parliament's cannot bind its successors, then how is it possible to have any entrenched act within the NZ constitution
- What happens if a statute puts constraints on how a statute can be changed – such as 2/3 majority
- Will a court uphold a statute in which it has a manner which needs to be satisfied before it can be changed?
- **Harris v Donges (1952)** – has a strong provision in which it requires a 2/3 majority to change but also require a 2/3 majority to repeal the section itself – **double entrenchment**
- Provision that was being entrenched was one that was protecting voting rights – changes require 2/3 majority – that was the South African Constitutional Act enacted by the UK parliament

- There was a law that was passed that put coloured people on a separate poll – thereby depriving them of electoral rights
- The court said they are not discussing the content of the Act but rather just the process of amending this Act
- They say that they are not interfering in the internal workings of Parliament but rather just applying the act since Parliament had not gained 2/3 majority – so they just invalidated the law since it did not follow the procedure outlined in the act
- **The Bribery Commissioner v Ranasinghe (1965)** – Ranasinghe is being prosecuted for a bribery offence – he challenges this by saying the members of the bribery commission were not properly appointed according to the constitution
- **Bribery Amendment Act (1958)** – had changed the appointing of members without 2/3 majority and there was no certificate from Head of House indicating the act had achieved that majority
- Can the courts look into the absence of the speaker's certificate – court decides it is an essential part of the legislative process – there no reason can't take notice that there was certificate
- They find that the act is invalid – legislature has no power to ignore the conditions of law making that are imposed by the instrument which itself regulates its power to make law
- Constitution Act defines the law-making power of Parliament – those conditions need to be reviewed and protected

Lecture 14 – Entrenchment in NZ

- Due to all parliaments being equally sovereign it is hard to find norms that control the power of politicians
- What happens when a statute conflicts with fundamental human rights?
- One way to parliaments have tried to protect fundamental constitutional rights is to require a special majority in Parliament
- **Jackson v AG (2005)** – what constitutes parliament for law-making power – different case as it is about reducing provisions for passing law
- **Lord Steyn** – [81] – parliament acting as ordinarily constituted is able to functionally redistribute legislative power in different ways – ordinary parliament can redefine itself for particular purposes
- Parliament could require 2/3 majority for specified purposes – legal sovereignty maybe divided as ordinarily and unusually constituted – when parliament is making constitutional rules it can reform with different rules
- There are still cautions as to what parliament can do – [102] – such as what if parliament in UK decided to get rid of the upper house
- Dicey's propositions are out of place in a modern constitution – parliamentary sovereignty is a construct of common law – judges are capable of defining its limits
- Judges have the power to stop parliament from introducing oppressive and wholly undemocratic legislation
- **Electoral Act 1993** – **s268** – (2) – says that none of the sections stated in (1) can be repealed unless there is 75% majority or a referendum majority – this is singly entrenched because the provision itself is not protected – ordinary parliament can change s268 – politicians have voluntarily complied with it

- Parliament argued that it should be politically enforced rather than using the courts – suggesting that it might be hard considering parliamentary sovereignty
- This was a political settlement since parties were constantly worried the other would change the rules for the electorate when they got into parliament
- **NZ Parliamentary Standing Order** – s263 – entrenched provisions – (1) a proposal for entrenchment must itself be carried in a committee of the whole house by the majority that it would require for the amendment or repeal of the provision entrenched – so, if you want a 2/3 majority to repeal or amend you need 2/3 majority to enact
- (2) – proposal for entrenchment is where the House is required to have more than 50% (+1) to repeal or amend an act
- **Ngaronoa v AG (2018)** – what does s268(1)(e) protect from ordinary amendment – does it protect everything in s74 or just voting age – and if it is the former then Electoral Amendment Act 2010 which prevents prisoners from voting *may* be invalid
- Does section 268 entrench all of section 74, section 3(1) and section 60(f) or just the part in section 74 to with voting age
- Section 74 refers to the qualifications for voting in NZ
- Majority argued that if they intended to entrench all of s74 then they wouldn't need to mention section 3(1) and section 60(f) specifically which only relate to voting age

Lecture 15 – Entrenchment - Continued

- **Ngaronoa v AG (2018)** – continued
- Majority say that this only applies to the voting age in s74 in the Electoral Act 1993 – while Chief Justice Elias takes a different view
- The reason for this dispute is because of the words added to s268 – focusing on the age to vote – but s74 is just referred generally while the other two sections are specifically mentioned
- S80 lists who are disqualified from voting – if the whole section was to be entrenched then you wouldn't need to refer to specific sections
- They reject the view that the BORA 1990 should be interpreted differently – is it clear enough to restrict the right to vote
- Should judges have a supremacy role when protecting democratic rights – should judges take a different interpretative approach when it is to do with democratic rights – such as when people are being left out from voting
- Majority says that it depends on how you interpret the comma and the "and" within the statute – because it is referring solely to age with the other 2 provisions s74 only protects the voting age
- CJ Elias – says that all of s74 is protected under this section – by implication all of the sections to which it is subject which determine the qualifications to vote
- It also protects s80 which will also require a 75% majority in House to repeal – so you can have disqualifications but only those enacted in 1993
- This is because the comma comes after s74, so it is separated from the rest of the sentence and therefore refers to the whole section enacted in s74 – why have the comma that's where she finds the ambiguity
- Elias is also concerned with the fact that Maori are proportionately imprisoned more than other races

- Principle of legality starts with the common law floor of rights and then moves to statutory interpretation
- The courts will not just support any provision – they will focus on whether the legislation itself has received a super majority from the House
- For the BORA 1990 to actually become supreme law – it would need to have gotten 75% majority in the house and the courts must uphold it – or some referendum of the people – BORA 1990 was passed by bare majority
- Whether or not a provision should be preserved – it needs to answer the question of whether it is protecting democracy – did it have special majority – has it been obeyed over many years and has the constitution recognized as a fundamental part
- Technique without morals is a disaster – we need to know the techniques for statutory interpretation but also need to consider morals
- Judge Cooke was warming up the BOR by using common law rights – he was helping to show how it should be interpreted and applied

Lecture 16 – Principle of Legality – Statutes vs Rights – Access to Justice

- Now we focus on what happens when a statute conflicts with a right – and how much the courts can do to restrict the statute
- How clear does Parliament have to be before judges will obey it – principle of legality has given courts a lot of power to protect common law rights
- **R v Secretary of State ex parte Simms (1999)** – a prison rule made under delegated power made under general empowering words imposing a complete band on prisoners speaking to journalists
- **Lord Hoffman** – in the absence of express language or necessary implication to the contrary, the courts presume that even the most general words were intended to be subject to the most basic rights of the individual. In this way the courts of the UK acknowledge parliament sovereignty, but they apply principle of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document
- Invalidate the interpretation of the statutes – there is still room to read them narrowly to allow basic rights to come through
- This is giving parliament squarely for what it is doing – and pay the political cost for what it is doing – making parliament more transparent – they can make it clear where rights are being infringed
- This is also making the parliament more powerful by making them be clearer and really restricting the executive's power
- Principle of legality is about the demand of clarity – how clear does parliament have to be – can the court force parliament to be clearer before they uphold the breach of rights
- Parliament can do whatever it likes – it can legislate contrary to right – loss must be political not legal – but parliament must squarely say what it is doing and take the political loss – fundamental rights cannot be overridden by broad words
- It can be that sometimes the parliament does not fully consider how these words can be used to override fundamental rights
- Parliament must pay the political cost of overriding rights – people need to know what the politicians are doing

- Separation of powers – the broadly worded power empowers the executive – in this they help parliament to supervise the executive power from going beyond its bounds
- There might be cases that a prisoner needs access to journalists due to a miscarriage of justice – and a journalist could be the only way they have to gain access to justice
- Liberty makes the statutes unworkable then it may be enough to override the rights
- **Re Witham (1998) – Supreme Court Act 1981** – s130(1) – The Lord Chancellor by order under this section prescribe the fees to be taken in the SC other than fees he/she or some authority had power to prescribe it
- The court held that eventhough it is written in very broad terms it was subject to limitations – and that it could not stop people's access to justice – the fees order was considered okay unless someone was genuinely unable to pay
- **R (on the application of Unison) v Lord Chancellor (2017)** – this is a case about access to the employment tribunal – set up to be easier access than courts – there was a system to allow the very poor to be able to pay the fees order – however, it was set very high
- The court judged the effect of the fees order on the access to justice not just the fees order
- **Remedy** – void en initio (never valid) the fees order was never valid from its beginning – 40 million pounds would have to paid back the fees they had paid – this is a statement from the court that they will not stand for anything that overrides fundamental rights
- There is also a point about judicial politics – in that the UK leaving the EU and abandoning the Human Rights Convention the courts want to make a statement to make sure common law rights are protected
- The employment tribunal has exclusive jurisdiction about wages – wrongful dismissal – hours – meal break – zero-hour contracts – maternity leave – equal pay claims – pay equity claims
- **Lord Reed** – Fundamental principle – right of access to the courts – regulations cannot override statutes
- Cases generate principles of general importance – that go well beyond the individual case – that help provide basis of future advice, interpretation – Lord Chancellor cites himself 60 cases
- The role of the courts is to enforce the legislation and interpret it – the legislature can make laws all it wants but without courts they are of no use to society
- People in business need to know they can enforce – if they fail, they will have some remedy against them
- Nothing short of expressed words will do to override well-established common law rights – if you're going to remove access to the court you must do it expressly – attempt to stop access to court also requires express authorization by parliament
- Even where statutes restrict rights, you're only allowed to do enough to fulfill the necessary purpose of the provision in question
- **S41** – says the Lord Chancellor can determine whatever fees order they desire – but fees order will be ultra vires if some persons are effectively denied to justice – degree of intrusion cannot be more than what the purpose of the provision is
- There were different bands for different groups of people – it was found that a fees of 390 pounds was required for a claim worth 500 pounds – and if you miss 1-2 days off work then there is no gain for the plaintiff – even courts were more accessible

- They found a couple working full-time on minimum wage wouldn't qualify – the couple also needed less than 3,000 pounds in assets – but since they were planning for a baby, they would have to save anyway putting their asset value above 3,000
- Need to save for 3 ½ months without personal spending to just bring in one of these claims – 10% reduction in cases overall

Lecture 17 – Statutes vs Rights – Retrospective Penalties

- **R (on the application of Unison) v Lord Chancellor (2017)** – continued
- **Lord Reed** – says the Chancellor can't lawfully impose whatever fees he chooses in order to achieve these purposes – the fees order will be ultra vires if there is a real risk that persons will be effectively prevented or inhibit access to justice
- The act that gives powers to the Chancellor says nothing about the fact that there is no inhibition of access to justice – the intrusion of right should not be more than the purpose of the provision
- Nothing in the statute states that access to justice is to be limited – even if it does say this, it should be interpreted as far as to fulfill the purpose of the statute
- Identify the common law right:
- Its sources and its purposes – define how important it is and the purpose it serves – such as right to justice – if you can't reach the courts it renders the laws of parliament useless as they cannot be applied
- Rights encountered so far – freedom against self-incrimination (Taylor v Poultry Board) – freedom from unreasonable search and seizure (Entick v Carrington) – access to courts (Unison v Lord Chancellor)
- Lawyer client privilege (access to justice) – access to justice (access to journalists)
- Right to be free from retrospective penalties – the legislature can't increase the penalty from the time you committed the crime and time of your sentence
- Prohibition on bills of attainder – rules on specific people not for general people
- The legislature should not be able to increase the penalty from the time of when the crime was committed and when you are sentenced and bills of attainder
- **R v Paumako (2000)** – man entered into a farmhouse – sexual assault against the husband and then murdering the wife in front of the husband after several hours
- At the time of the murder that no court impose a minimum period of imprisonment unless it was satisfied that the circumstances of the offence are so exceptional that a minimum period of more than 10 years is justified
- Before the sentence was given a new law was passed – if the offence is murder involving a home invasion – judges have no discretion they must give a mandatory non-parole period of 13 years
- The problematic sentence applies – even if the offence was committed before the date of commencement of new provision – so, there was legal challenge saying that a heavier penalty was applied to Mr. P than that had existed at the time
- **Justice Henry** – finds a number of sources for the common law right to not have retrospective penalties – these include
- **NZBORA 1990** – s25 (g)
- **International Covenant on Civil and Political Rights** – Art 15 (1) – in this it is said that there is no derogation from this right
- **Interpretation Act** – s7 – you interpret legislation so that there aren't retrospective effects

- **Criminal Justice Act 1985** – s4 (2) – you can't have retrospective penalties – notwithstanding any other enactment or rule of law to the contrary no court shall have the power, to impose a sentence or make any order in the nature of a penalty that it could be imposed on or made against the offender at the time of the commission of offence, except with the offender's consent
- It suggests that this the rule that should prevail against all other statutes if there is a conflict
- **Rule of Law/Blackburn Commentaries** – 18th century – there should not be retrospective penalties

Lecture 18 – Retrospective Penalties – Continued

- **S2(4)** – **s80** of the principle Act – applies in respect of making any order under this section on or after the date of the commencement of this section, even if the offence concerned was committed before this date
- Select committee added this section – suggesting that we will miss the people we are trying to be tough on about home invasion and this was necessary
- The majority dodge the problem – saying that this was a particularly brutal murder with extended time of torture and suffering – and he would have gotten a 13-year sentence either way
- The case continues as an orbiter statements due the 4-5 cases that have not been decided yet – the rest of case is orbiter to help the future cases
- All judges agree – **S2(4)** is contrary to principle of the common law – many others
- **Richardson, Gault and Keith JJ** – to give this section a restrictive reading as possible that they will only apply it to sentencing orders 15 days between the coming into force of the crimes and amendment act
- **Crimes (Home Invasion) Amendment Act (1999)** – defines 'home invasion' definition and increases penalties for certain crimes involving home invasion – this was not retrospective – came into effect 2nd July 1999
- **Criminal Justice Amendment Act (1999)** – this act was retrospective and enacted the 17th July 1999 – this suggests that we can only apply this act when we know the definition of home invasion which was defined on in the Crimes (Home Invasion) Amendment Act 1999
- Home invasion laws were brought in with two parts – this had a 15-day separation and judges said that this can only be applied 15-days retrospectively as home invasion was only actually defined on the 2nd of July 1999
- The judges do call on parliament to fix this breach of rights
- **Justice Henry** – agrees the 13-year period is appropriate – rejects the majority's orbiter approach – these are clear words and there is no possibility of ambiguity
- **S4(2)** – **Criminal Justice Act 1985** – notwithstanding any other enactment or rule of law – under the rules of implied repeal this section is repealed
- Legislature needs to reconsider since it is contrary to principle – isn't concerned about giving a declaration of inconsistency to the parliament – up to Parliament to repair it
- **S7** under the **BORA 1990** did not perform watchdog function as originally introduced this was not retrospective – it was very late in the process that the offending provision was introduced – and **s7** was only informed after introduction of the Act – no mechanism to draw attention to the fact that right was being breached

- **Thomas J** – rejects the majority orbiter approach – s6 and s4 does not allow the courts to change the meaning of s2(4)
- Bill of attainder – it is focused on capturing a small group of identifiable people already facing trial – contrary to the rule of law – rules should be general and perspective – aimed at people who can be identified who are in a trial process
- Too strained – contrary to parliament's intentions – proper remedy is a declaration of inconsistency – court has a duty to alert Parliament of the unconstitutionality of this section
- Argues there is a problem with the majority's orbiter – just too fictional – too dependent to happen stance
- And contrary to Parliament intent – because they wanted to capture these people as well that were up for trial

Lecture 19 – Retrospective Penalties – Continued 2

- **R v Pora (2001)** – the reason Pora was being sentenced under this act because he appealed – and had got pinged with the retrospective penalty
- The judge did not have any discretion to give a penalty of this kind before the act
- No judge found that Pora was subject to the 13-year sentencing period
- **Minority** – Elias, Tipping and Thomas JJ – s2(4) (retrospective clause) must yield to s4(2) (Criminal Justice Act 1985) – which meant you can't have retrospective penalty – changed the rules for implied repeal
- Justice Thomas agrees with Elias and Tipping but writes a different reasoning – Elias writes for Tipping
- **Majority** – Gault, Keith and McGrath JJ – they argue there should be limited retrospectivity of the provision – they don't used the 15 days period
- You cannot increase the minimum parole period since the trial judge did not at the time have discretion to give a minimum parole period – all the retrospective provision did was to change the minimum parole period
- **S4(2) Criminal Justice Act 1985** – notwithstanding any other enactment or rule of law to the contrary of court shall have power, on the conviction of an offender of any offence, to impose a sentence or make any order in the nature of penalty that it could not have imposed on or made against the offender at the time of the commission of the offence, except with the consent of the offender
- Both, s4(2) when it says when there is retrospective penalty choose this provision and 2(4) applied to offenses prior to this date, are very clear
- **Elias** – puts weight on that this is the same justice act – and they are contradicting provisions – either you disapply the retrospective provision or the provision that tells you what to do when there is a dispute
- Reading them in one statute makes them very unclear – reading them separately they are very clear – this means that one of them must yield to the other
- She argues that parliament has many provisions that say not to apply retrospective penalty as shown in **R v Paumako by Henry**
- However, doctrine of implied repeal stands in the way – since s2(4) came after s4(2) – she argues though that these are judge made and they shouldn't be mechanically applied – she makes the point that if this were true than you would never be able to give effect to rights since they are very general while statutes are more specific

- She instead says I will follow what parliament said – in s4(2) Criminal Justice Act – Interpretation Act and BORA 1990
- She looks at both provisions as they are a part of a single statute and figure out which is the leading provision – s4(2) is the leading provision as this is the provision that tells us what we should do when there is a conflict
- She continues to argue that – implied repeal cannot be applied here since parliament has not specifically overridden s4(2) which is the principle provision – they needed to make sure that they knew about the notwithstanding clause in s4(2) unlike in s2(4) and confront it squarely by cross referencing
- **Thomas** – principle of legality is to operate here – [128] fundamental rights are to be taken seriously this court will not accept that parliament has eroded those rights unless it makes its intention manifest, clear, unambiguous
- When there is a conflict between two provisions there must be express reference to override those rights
- [156] – says that the implied repeal would result in complete abandonment of the BOR – implied repeal shouldn't be allowed when one of the statutes is protecting rights
- S4(2) is not limiting the power of the Parliament – it is a power that judges must exercise
- **Keith** – says that the 13-year period should not apply – he is offended by this provision – doesn't apply it
- Solicitor General did not wish for the retrospective penalty to apply to Pora either
- Majority apply that the retrospective penalty cannot apply when the judges didn't even have the power to set a minimum parole period
- However, Keith doesn't want to change all the maims of statutory interpretation in order to not apply the penalty

Lecture 20 – Retrospective Penalties – Continued 3

- Majority do not allow the retrospective penalty to Pora – but this can still be applied to other cases
- Majority limit the retrospective period to 1st September 1993 which avoids Pora from getting the penalty since he was convicted in 1992
- **Keith** – disagrees whether the words in s2(4) are unclear – Parliament's intent is clear from the words – there is no need to go behind them
- Majority disagree about how Elias view interpretation maxims – they are not simply mechanical and artificial
- Text and purpose are perfectly clear here and we just stop at that – whenever the offence occurred – it is meant to applied retrospectively
- The interpretation maxims are not artificial – these are rules we use in our everyday lives – these reflect how we operate as a society as a whole
- All maxims point in the same direction – they do believe they should leave s2(4) to have some effect in the future – since parliament can make any law it wishes we need to make sure that this provision still has some effect
- Keith also argues that the threshold for breach of rights that Elias has stated is too high – as this would mean that Parliament literally needs to write "Now I breach the BORA"
- You can't put too many restrictions on Parliament before you uphold its intentions

- **Elias** – You can't impliedly repeal a statute that protects human rights – as this would lead to the erosion of human rights
- This reasoning comes from **Thoburn v Sunderland CC 2002** – saying that constitutional statutes cannot be the subject of implied repeal only express repeal
- Laws LJ – suggests that there is a hierarchy of statues – ordinary ones that can be impliedly repealed – constitutional ones which cannot
- Constitutional statutes defined by him are – those that condition the relationship between citizen and state in a general overarching manner – and those that enlarge or diminish fundamental rights

Lecture 21 – Revision

- The court will focus much more closely on delegated power – and add restrictions on it according to common law rights – the courts will exercise managing the executive on behalf of the parliament
- The court suggested that they can look at the executive proposals even if it is to parliament – saying that parliamentary privilege has creeped too much

Lecture 22 – What gives Executive Power

- When referring to the executive the main focus is on cabinet – they make big core decisions about regulations
- We need to hold cabinet accountable both politically and legally – in a way that our rights are not compromised
- The executive encompasses – the sovereign, GG and the government – cabinet ministers
- Formal legal power to govern – NZ is ruled by a monarchy (Queen of England as Head of State) – **Constitution Act 1986 s2** – sovereign is Head of State – sovereign has prerogative powers – the sovereign or GG can dissolve Parliament – they can summon the parliament – they must give royal assent to any bill produced by the house before it can be law (**s16 of the Constitution Act**)
- Formally sovereign at the top who delegates to the GG or to the Government (Cabinet)
- Real public power to govern – Government/Cabinet is at the top who gives instructions to the GG – they are the seat of power in NZ
- **Justice Palmer** – "Cabinet's voice is more insistent, more frequently heard and more agenda setting than any other institution that exercises public power in NZ"
- The sovereign does not get involved in day to day political affairs – that is the responsibility of the cabinet – "while the sovereign reigns the government rules"
- GG acts on the advice of the ministers – through Constitutional Convention – you can only be prime minister if you have majority of the House supporting you – the GG acts on the advice of the ministers which tips power upside down
- Reserve power – GG can refuse the advice of the minister when deciding whether they have the confidence of the House – this is very rare
- Sources of Executive power – prerogative powers (ancient residual Crown Powers) – statutes – third source (idea that government can do anything provides that it does not break the law)
- Prerogative powers – can also include being able to go to war or to enter into international treaties – it's a residue of the power that was held by monarchs many

centuries ago – these can be trumped by legislation – most are not in statute – these are timeless and were held by sovereigns which is now exercised by cabinet

- **Constitution Act 1986 S16** – is a prerogative power – saying that it is not law unless the GG gives their royal assent
- Having in statute means that there is no ambiguity – it helps to provide evidence for prerogative power – and helps to show that it has not been trumped by legislation
- **S18** – power to summon, dissolve Parliament – how to advertise that – and how to summon in a different place – allows Parliament to specify the prerogative power and write the bounds for it
- There is no reference to conventions that these are to be done on the advice of the Prime Minister
- There is argument that all the prerogative powers should be put into statutes – as this allows for clarity – and gives Parliament more power rather than the executive – it allows for legitimacy
- **Letters Patent 1983** – the queen's open letter – it delegates Sovereign's powers under clauses III, X, XI – there is a duty to keep GG informed (XVI)
- Cabinet asked the queen to sign the Letters Patent – 1917 patent was outdated – since the GG could refuse minister's advice which was acting against Constitutional Conventions and referred to NZ as a dominion
- It is written in 1st person as if written by the queen herself – archaic language – at the start it has the sovereign's name with all her titles
- **Clause II** – appointment of the GG by us (referring to the queen's different titles)
- **Clause III** – authorize and empower the GG to exercise the executive authority of our realm on our behalf directly or indirectly (through cabinet) – no reference to act on the advice of the PM
- **Clause X** – appointment of Member of Executive Council authorizes the GG to constitute and appoint under the seal of NZ – this is referring to the meeting and appointment of cabinet
- **Clause XI** – exercise of prerogative power of mercy – provides right to write pardons to people who have been unjustly imprisoned
- **Clause XVI** – GG must be fully informed – used to be the case that GG was kept in the dark
- This relates to the executive only – not courts or parliament
- Prerogative powers are subject to constitutional conventions – the GG can use its prerogative powers on the advice of ministers
- Constitutional Convention – unwritten rules of Constitution – omitted from the Letters Patent 1983 – Clauses VII and VIII – suggests that Ministers should advice the sovereign when choosing the GG
- Some examples of Constitutional Conventions include – GG acts on the advice of PM – ministers must resign if they don't have the confidence of the house
- Nature of these are habitual practice – just what has been established from what has happened in the past
- These are not law – so cannot be enforced by courts – courts can take them into account when deciding questions of fact – and they can modify or contradict legal rules and powers
- For example, the GG appoint PM but on the advice of the PM and the confidence of the house

- Tests for determining whether it is a constitutional convention
- Are their historical precedents for the rule?
- Did the actors consider themselves to be obliged by the rule?
- Is there is a reason for the rule?

Lecture 23 – Executive Prerogative Powers

- Dicey's Definition – the remaining portion of the Crown's original authority, and it is therefore the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such be in fact exercised by the King himself or his ministers – this is distinct from the third source
- Powers wielded by the cabinet and the GG
- If there is a conflict between prerogative power and statute – the statute always prevails – you can legislate prerogative powers as well
- In statutes there is no reference to constitution convention – such as s16 is on the advice of the PM
- Constitutional Convention – **4.1** – ministers must resign or advise a dissolution of Parliament if not have the confidence of the HOR
- **4.2** – Nature of Conventions – rules of constitution, but not of law – these are rules made by usage kind of like customary law – validated this way and develop over time
- **4.3** – Test for Constitution Conventions – is there historical evidence – did the actors in those precedents consider themselves obliged by the rules – it there a reason for the rule
- **4.4** – conventions cannot be enforced by courts – conventions do not mature into law – but courts may take conventions into account as relevant background in deciding questions of fact
- Reserve Powers – when GG may act against the PM advice – they apply in relation to the executive and to the legislature
- GG may not assent to a bill – GG should always assent to the Bill – even when Parliament has not followed proper procedure for approving a bill – the GG still has to assent to it
- Reserve powers apply during the election – when it is not clear who has the majority of HoR – the GG has some discretion – they have to exercise caution – coalition government mid-term collapses – GG can be called in to decide the composition of the next government
- **Confidence-and-supply agreement** – whereby one party or member of Parliament support the government in motions of confidence and budget supply by either voting in favor or abstaining
- **Coalition Government** – is a more formal arrangement than a confidence-and-supply agreement, where members in junior party gain seats in cabinet – in this they parties will govern together – spell out policy matters and dispute resolution
- **Election in Tasmania 29th May 1989** – Liberals (Gray [PM], incumbent government 17 seats) – Labour (Fields, 13 seats) – Independents (Greens, 5 seats) – If Labour can enter into a coalition with Independents they will be able to form the next governments
- Fields goes to the GG (Bennet) – since he has power to form the government – Fields promises to form a coalition that will be robust – GG asks for evidence – asking for a coalition agreement with the Greens

- Field's goes away and comes back a coalition agreement – GG asks for signatures from the Independents – Field's comes back with the signatures
- GG talks to each of the Independents (Green) to figure out if they all agree to the coalition agreement
- Then he calls Gray telling him you may not be able to be government and if you have any rebuttals – Gray agrees to let GG appoints Field's and Gray resigns
- Before the next PM is appointed the incumbent runs the government – just to keep the seat warm until the next government
- **Canadian Elections 14th October 2007** – after the election the Liberals had gained some seats in the house but didn't have a majority
- The opposition party had lost many seats and were thinking of replacing their leader – Harper (Conservative) was in the minority – Liberal, NDP and the Aquia Block Party were the oppositions
- Harper would need support from other parties in order to have confidence in the House – he tries to become friends with the other parties – trying to gain support – does a lot of gestures in order to get a majority
- He wanted to enter into a confidence-and-supply agreement – Harper shafts them – in order to undermine the opposition – introduces new policy to bankroll the opposition through subsidy – he still failed to get a majority
- And so, the opposition (Liberal, NDP and the Aquia Block Party) just formed their own coalition together they would have majority
- GG must now decide whether there is a strong coalition government – but they actually look like they would fail – as in the Aquia Party who wants to succeed from Canada is willing to form a coalition seems unlikely
- Furthermore, Liberal were even thinking of replacing their leader in May
- Before the GG has meeting with coalition Harper intervenes and asks for a meeting – after that meeting the GG prorogue (suspend for 8 weeks) parliament
- This leads to the coalition falling apart – this leads to the Liberals supporting Harper in confidence-and-supply

Lecture 24 – Applying Canada and Tasmania Elections to NZ

- There are 120 members in the HoR – need 61 members to have confidence of house
- National – 56 seats
- ACT – 1 seat
- Labour – 46 seats
- Green – 8 seats
- NZ First – 9 seats
- NZF has a coalition agreement with Labour, with the Greens in a confidence-and-supply agreement
- Supply relates to the money – anytime the government needs money for funds
- Cabinet is a creature of constitutional convention – around 30 members in cabinet

Lecture 25 – Limits to Prerogative Power

- Cabinet is where there is a cease of political power – cabinet has power that doesn't start at the HoR – but rather from sovereignty

- This has been somewhat rolled back through statutes who are created by ministers that we have elected into the house – there is some legitimacy – most of what Cabinet does is mandated by legislation
- Some of it is held by prerogative power – such as enter into international treaties or enter into war or protect the realm
- Main focus of executive is the cabinet – it also includes:
- Executive council – cabinet and GG where GG is given formal instructions to assent to regulations – appointment of people
- Government departments/Civil servants – **State Services Act 1988** – provide services to the public – they have servants who provide advice to ministers
- State owned enterprises
- Government departments – would run like businesses – there was a CEO – more flexible employment rules – making the government more efficient
- **Public Finance Act 1989** – funding was provided on the basis of inputs – given a certain amount for salaries and up-keep – the funding was changed to output – what you could produce – the more you were able to produce – the more efficiently you could employ regulations – the more money you received
- SOE's – you would take government departments and prepare them for privatisation – prepare it to sell – should be in the business of business – more efficient to sell assets and let 3rd parties operate them – the shareholders would be the Crown
- With smaller government – there would be more flexibility – the benefits would flow down to the public
- Political Checks and Balances:
- **Responsible government** – we elect our MPs – cabinet ministers have to come from the people who we elect – and we can change them
- **Collective Ministerial Responsibility** – collective decision-making to find the best policy and stay by it – and keep everyone in line – if a minister disagrees, they may be asked to resign
- **Individual Ministerial Responsibility** – when a minister messes up badly they will be required to resign
- **GG reserve powers** – dissolve parliament or appoint the PM
- Cabinet ministers come from who we elect as MP's – and we can kick them out in the next election if they mess up
- **Entick v Carrington (1765)** – Entick writes a journal and write very much against the government and ministers
- Secretary of State is a member of the Cabinet and Cabinet advises the crown – he issued a warrant to cease Entick's property – they bust in and take a lot of the property – they take the things back to the SofS
- Entick is upset – they created 2000 pounds of damage – Entick sues the Crown – there is no law Secretary can give this authority to issue a warrant – it's very intrusive
- Entick argues that they had no right to enter into his property – there is no prerogative power that allows the SofS to do this
- The crown in response – is that they had statutory authority – Conservative Peace Act
- Court finds – there is no statutory authority that the secretary can do this – the judge says "if this law it will be found in our books, but no such law exists"

- The judge refers the common law – he says he cannot find anything to support this action by the secretary
- An argument could have been made that this is ancient power that the crown possessed – but it is not argued that – if they did rely on this, they need to provide some kind of statute that says this
- You find evidence of prerogative power back in time that enabled the sovereign to do this – however, if it is the law – then again, the question arises that it is not in the books of the judges
- Prerogative power can override the common law but cannot override statute
- The right to property means you cannot trespass – if someone steals something you are able to take it back, but there are checks and balances
- This all shows that we have a clear statute – that prevents everything that Carrington has done, and we need to be more careful about how these powers are used

Lecture 26 – Legal Checks and Balances on Prerogative Powers

- The legal checks are:
- **The BORA 1990** – civil and political rights – making sure what it does is consistent with human rights
- **Official Information Act 1982** – gaining information into what the government does, what kind of policies they propose, emails – 20 working days to respond for a formal request – needs to provide reasons why they do not reveal information
- **Ombudsman Act 1975** – remedy where you have a complaint about government department – no binding powers – Ombudsman using their power to resolve
- **Police Complaint Authority** – check on police and their conduct
- **Public Finance Act 1989** – legislation is needed for raising money
- Executive can do anything that is not illegal – Blackstone describes prerogative power as – those powers that the King enjoys alone, in contradistinction to others, and not those he enjoys in common with any of his subjects
- Prerogative power – residual power – not covered by statute but can be trumped by statute – distinct from the 3rd source
- **AG v De Keyser's Hotel (1920)** – a hotel is trying to be claimed – government wants this for war related purposes – they wanted to house officers from the air-force
- They enter into negotiations – the owner asks for 100,000 pounds – the negotiations break down – and the officer sends a letter that they will take it and will not get any compensation – under these regulations
- The owner sues – saying that he did not get compensation – the loss of profit – the government said that they used their prerogative powers to acquire it **in time of war** (defense of the realm) without compensation
- To support the prerogative power cabinet needs to establish that this power exists – that a King can demand property in times of war
- The defendant relies upon – the **Defense Act 1842** – where crown can take land, but they need to compensate
- Back in the day – war was funded by the sovereign from the land taxes – this is modern warfare and the tax payers pay for it – not the crown
- LJ Moulton – agrees with the defendant – that yes there is statute – and that there is a prerogative power

- Prerogative power is not abrogated by legislation – it is rather suspended – so, when the Crown assents it is letting the prerogative power being overridden
- The prerogative power sits aside – Lord Atkinson – the power lies aside – so when the legislation is repealed the prerogative power comes into effect again
- Prerogative power is stomped by statute – since a statute is much more legitimate, exhaustive, comprehensive – therefore the prerogative power is suspended
- Source of prerogative power is tradition – the sovereign – it enables the crown to cease property in war time without compensation – impact on of the prerogative power is that it suspends it
- The prerogative still needs to exist as sometimes we do need to go to war and need to protect the country – and so, this power is necessary for the cabinet – extinguishing it would mean a future cabinet could not use its prerogative power to do all these things
- Challenges to prove a prerogative power – there needs to be some evidence – there is great ambiguity as to what it means
- Source of statutes is the parliament – statute allows you to cease property with compensation – it renders the prerogative under suspension – no problem with evidence since it is all written out

Lecture 27 – Legal Checks and Balances on Prerogative Powers – Continued

- **R v Secretary of State for the Home Department, Northumbria Police Authority (1989)** – SofS is responsible for making sure the UK is safe – following this is the police authority – following is the police/Chief Constable
- A lot of riots happening in London – a house burned down with many black kids in it – police didn't respond in time – resulted in riots against the police
- Thatcher is introducing very neo-liberal ideas – coming down hard on the youth and blue-collar workers – Thatcher instructs SofS to make rubber bullets available in a central store and cannisters of gas
- Police authority is charged with supplying equipment to police – appointing the Chief Constable – they object to this
- Secretary of State – issues a circular (written statement of government) – giving rubber bullets to the police – this concerns the police directly
- SofS – cabinet minister acting on the advice of the minister – below her is the Police Authority and below them is the police/Chief Constable
- This means that the SofS is getting around the police authority – the police authority is claiming it has sole authority to provide rubber bullets
- PA objects – **Clause 4** – if the Chief Constable has problems getting approval for bullets from the PA, they can go to the SofS even they withhold authority
- **Clause 8** – if the PA refuses to approve of the purchase they may also not want to train you but the SofS can do that for you
- The problem is – normally we use this equipment for dangerous criminals – this is more to do with citizens – this is just people expressing their views – this could greatly injure or kill a lot of them
- The SofS also has that authority to do this and she has legal power to make all this equipment available – and to train them – two grounds – statutory authority and prerogative power

- The prerogative power they are relying on is to keep peace within the realm – seems very broad – does it even exist – it could be replaced by statute (Police Act 1964) – even if the prerogative power exists it could have been suspended
- In the **Keyser Case** – the prerogative power was that in war time you can take property without compensation
- PA is arguing that the SofS is making this up – all judges agree that it exists
- **Johnson LJ** – **s4(4) Police Act 1964** – the police authority has authority to provide and maintain such vehicles, apparatus, clothing and other equipment to the police force
- **S41** – SofS may provide and maintain or contribute services to the police as he considers necessary or expedient for promoting efficiency of the police – this is again very broad
- This claim that the PA has exclusive authority cannot be sustained as if they are read together as both these provisions give both of them to provide the equipment and both are very broad provisions
- If you were going to give PA sole authority – you would need add words that are not there such as you can provide services as long as you have permission of the PA – and this would interfere with the authority of the Chief Constable
- The Chief Constable act independently from the executive and PA – ministers should not meddle with the operations of the police force – the police force needs to make these decisions independently
- They can provide these bullets but only in times of emergency – yet again you would need to read more words into s41
- **Orbiter** – argument from the police – there is not original prerogative power in 1820 from *Chitty's Prerogative of the Crown (1820)*
- You have all these statutes that come along that provide for the administration of the police force – these statutes are that give effect to that prerogative power actual power
- The crown does have the power to keep peace – but has this been replaced by statute – s4 does not give the police authority a statutory sole authority – they can both co-exist
- In this case you think of the prerogative power is being the bigger circle which is broader – inside it is the statute
- S4 has something missing – the prerogative power is very broad – this give the prerogative power the ability to sneak in and co-exist – meaning the PA does not have sole authority
- The statute falls short of express words to abridge the prerogative power – here it was not clearly assented that the prerogative power was suspended
- **Purchas LJ** – before courts hold that executive action is contrary to legislation, you need express and unequivocal terms – here the statute falls short of this
- It can also be argued that if you don't allow these processes – then the city could go out of control
- The courts still want to keep the prerogative power – since it provides for some back-up – in cases of emergency there may not be time to pass legislation you may need these powers to maintain peace
- Duty of the king to protect the people

Lecture 28 – Judicial Review of Prerogative Power

- Judges say that the source of the prerogative power is in the common law – the judges created it – the origin is still from history used by the Kings – the modern approach is that the courts are giving effect to the PP
- **Council of Civil Service Unions v Minister for the Civil service (1984)** – spies want to go on strike in the case – people who work for the sovereign
- Thatcher (PM) issues an order in council to remove the right of spies to belong to a trade union – citing national security – there is no notice or consultation – this is made under PP
- The unions challenge this decision saying courts should be able to review PP's
- Courts can review executive decision – which is usually made under legislation – common law can review the PP – but there are certain grounds for review
- Honors, pardons, relations to foreign state, defense of the realm
- Executive should be subject to judicial review since they are working from the legislation and courts are the ones that apply and interpret them so, this can be reviewed by the courts
- Grounds for judicial review
- Illegality – whether this can legally be reviewed
- Irrationality – where a decision is reached that doesn't make any sense
- Procedural impropriety – to be given notice, principles of natural justice – is the way the decision made fair
- This can be seen as unfair as being a part of a union can help protect your rights – the spies expected to be a trade union member
- On the other hand – they have to protect security – would be at risk because there may be confidentiality issues – it is justified as the spies may go on strike and this could be a national security risk
- **Diplock** – expectation that spies should be in unions – there is high risk of national security – advanced notice would have led to a strike which would have risked national security
- National security is unjudicial – cannot be reviewed by courts
- The subject matter is too political to intervene – particularly national security questions – considering things that are not public knowledge
- Concerns policies and decisions that the courts are too ill-equipped to address
- There is some procedural impropriety, but it is justified by national security
- This can be compared with the Treaty settlements in NZ – claimants go to court to review the decision of ministers – but this is too political in nature to review
- **Regina (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (2008)** – to remove from the island (Chagos) they inhabit and put them in another location
- PP is used to expel the people – the PP of the colonial government – it was used as a military base – it was rumored that it was used for torture – the locals were removed to operate this base
- The PP is challenged and the won – the government agreed to not appeal the decision
- This creates legitimate expectation – government does a new turn and doesn't allow the people to go back to the island

- It is decided that there are no grounds for judicial review – the PP was carried out properly
- It doesn't appear to be fair – since they won and now the government isn't allowing you to return
- It's unlikely that the people can return back to their country – the right to return is more symbolic – if they really return, they need help from the British government to help finance them and resettle
- There is also a lot of climate change – the island would be in salt water in a few decades – the return was subject to contingencies
- This also has a problem of national security – if the islanders return it could lead to disputes with the USA
- There was a very negative view to this decision – many believed that the HL didn't do right by the islanders – and they needed to wake up to the fact that this is the modern age – there was a lot of dispute about getting rid of the PP and replacing it with legislation – since national security can be used to override judicial review

Pros	Cons
Subject matter is highly political	Undermines democracy
Gives much needed flexibility	Sheer potential impact
To legislate them would be overwhelming	Uncertainty of content – how to prove it
	Can override common law rights

Pros and Cons of PP

Lecture 29 – The Third Source

- The definition of the 3rd source is the executive is free to do anything that is not prohibited by law – either in statute or by the common law
- These include things such as – making contracts, hiring and firing staff, acquiring or disposing of property, obtaining and disseminating information
- **Malone v Metropolitan Police Commissioner (1979)** – when the police wire-taps phones are they violating a law
- This is right defined by the negative – there is nothing there to say it is illegal
- Malone is a criminal – into dealing with stolen property – steals mainly antique things – he is being prosecuted by the police force – in the course of the prosecution it is revealed that the police have been wire-tapping his phone
- The phone was tapped at the post office – where they can hook on to the wires and listen to what he is saying on the phone – this is being used as evidence
- If the police had entered his property without his permission that would be considered trespass and the police force would not be able to rely on the 3rd source
- The authority from the warrant isn't robust enough to give authority to do this wire-tapping – so, need to focus on if any law was breached
- There were 3 grounds were raised – privacy, confidentiality and human rights
- If there is a breach of privacy you cannot rely on the 3rd source – property has not been trespassed
- **Megarry** – the courts are still grappling with the privacy – there is no legislation – courts are struggling with developing privacy principles
- He believes that courts are inadequate to decide the principles of privacy – he says that it is up to legislation to write it up

- What if someone overheard the conversation from nearby – There is an intention from the police to listen to the conversation – while when you accidentally hear something there is no intention to listen
- The right is too broad – there is no breach of privacy in this case according to the judge – so, this has not been violated in this case
- Have the cops violated the rights to confidentiality – this area of law was being developed – the conduct shows that there is a level of confidence between the parties
- The leading authority was **Coco v A.N. Clark Engineering LTD (1969)** – in that case there was a conversation between the parties about a product – and the defendant took the idea without the plaintiff's permission and made a lot of money from it – was there a confidentiality agreement there
- For something to be considered confidential it must be passed in a way in which it seems that the parties do not want it to get out to anyone else
- In this case there is a different scenario since the cops have no idea that Malone has no idea that the police are listening – the judge uses another analogy
- If someone sends confidential information – there is always a risk of an overhearer – someone can be listening unknowingly – there is no breach of confidentiality here
- The police, however, are still intending to overhear – even if there was an obligation of confidentiality between Malone and Cops it wouldn't apply because this is about someone committing a crime – it is in the public interest to know about these crimes
- There is no violation on the right of confidentiality
- There is no violation of any statutory or common law right
- Is there a breach of human rights – can Malone assert that there is a violation of rights in the EU convention – is it even judiciable in the UK – but, to be judiciable it needs to be ratified by statute
- Article 8 – the right to privacy – it's not a legal ground that could be violated – the court says it is not judiciable
- The problem here is that there is no legislation that says that cops have the ability to tap Malone's phone – there is no statutory regulation
- Legislation will help – the circumstances in which a phone can be tapped – allows for a definition for privacy – this provides safeguard and administration
- They are nothing in legislation or the common law that says that the police cannot tap people's phones
- You would use a human right to bolster the right to privacy and confidentiality – the courts lack the capacity to create these laws – they want to leave it to the parliament to develop this – as much of this will influence political matters
- This finally means that there is nothing there that can stop anyone from wire-tapping each other's phones
- Malone appealed to the Strasburg Commission – there he won where it was decided that there was a breach of privacy
- The convention has a lot of authority – the executive must now listen to the convention – and the UK did enact statute in what circumstances for wire-tapping

Lecture 30 – The Third Source - Continued

- **R (on the application of Shrewsbury and Atcham Borough Council) v Secretary of State for Communities and Local Government (2008)** – SofS wanted to merge local

councils together to rationalize local government – issued a paper to giving warning by it – and a statute was passed – it was argued that this action by the SofS was unlawful – preparing proposals and drafting statutes

- **Carnwath LJ** – the examples of 3rd source that are usually given (contracts, buying or selling land) are more ancillary powers (provide support for necessary activities) – there is need for these powers to get things done
- The power can be used past these ancillary powers to extend to substantive functions – for example, Northumbria – you are training police and giving them bullets, but these are being used to kill ordinary citizens – suspicion of 3rd source
- **Richards LJ** – he says that we need something to show the ways in which business is conducted apart from statute and PP – believes that the 3rd source does that nicely
- He says there are limits to the 3rd source – can't override statute, common law and rights
- **Minister for Canterbury Earthquake Recovery v Fowler Developments Ltd (2013)** – massive earthquake in Christchurch – parliament adopts the **Christchurch Earthquake Recovery Act (2011)** – sets up a statutory scheme to help clean up the problems caused by the earthquake
- Give ministers the power to help rebuild after the earthquake and give them compensation
- June 2011 – The CERA minister declared parts of Christchurch red zone – in these zones they offered to buy back houses if they were insured – offered to buy back the house at full value – the buying back of houses
- The zoning was not included in the CERA – they are zoning these out to keep people safe – and they need to clear people out of there – this compensation will help to clear people out
- This, however, does violate the right to property – conflict with the Resource Management Act – under RMA there are powers for zoning areas of land – by red zoning parts of Christchurch you are conflicting with stature it is only under RMA that you can make changes
- There are provisions in CERA to change the RMA but, they didn't rely on that they relied on the third source
- In the HC the red zoning did conflict with the RMA – you need positive legal authority to zone out areas
- The judges disagree – they argue that you can rely on the 3rd source since it doesn't impact the RMA – you are not trying to change the planning of housing – you are simply providing information as this information hasn't caused damaged by the earthquake
- SC decided that there is no 3rd source here since the CERA occupies this field – the statute is comprehensive – any exercise of the 3rd power does not exist

Lecture 31 – Emergency Powers/International Law and the Executive

- **Republic of Fiji v Prasad (2001)** – racial tension between indigenous Fijians and Indians – the Fijians make up 54% - and 38% to the Indians who were brought there by the British's
- This led to a coup in 2000 by Speight – objecting to the constitution of 1997 – to help mitigate the tensions and provide a constitution

- In the coup the PM and cabinet were taken hostage at gunpoint and demanded that the 1997 constitution be abolished
- 19th May 2000 – the PM acting as a GG declared a state of emergency and on the 27th appointed an interim PM – a cabinet minister that was not held hostage – the interim PM was advised to suspend Parliament
- Police on the 29th May were unable to control the anarchy within the country – they say we need the army to maintain security
- The head of the army then took emergency steps as a member of the military established an interim military constitution – propagated to abrogate the constitution
- The head of the army had significant power to enforce his will – he establishes this interim government – the Speight releases the hostages but there is no attempt by the interim government to restore the 1997 constitution or the parliament elected
- Prasad has lost his farm in the coup and seeking a declaration from the court that the propagated abrogation is unlawful
- Does the CA even have jurisdiction to hear the case – what is legitimate anymore since the courts were created under the 1997 constitution
- It finds a case from the HL in Zimbabwe – finds authority that court is able to determine the legitimacy of current constitutional regime – relying on this CA has the ability to determine the question of abrogation
- Court has 2 options:
- Validate the new regime as lawful – accepted by the general population, established and no rivals
- Declare the new regime as temporary and unsuccessful so that the 1997 constitution emerges once the crisis is over
- **Doctrine of Necessity** – whereby unlawful or unconstitutional acts can be seen as lawful if they are used to restore order onto an emergency – does it apply here
- Mara wants to rule Fiji under this new constitution – get rid of the old constitution – Doctrine of Necessity cannot be relied on as the desire is not to return to the state before the coup but rather to further – Mara went too far under this principle
- The abrogating meant that he was taking a different path – which signaled a desire to create a new regime
- **Doctrine of Ethicacy** – there is no evidence that people were happy with the interim government – and there was continued resistance
- The constitution of 1997 remained supreme law and had not been abrogated – Frank is the PM is the leader of the Fiji First Party – there was another coup by Frank adhering to the 1st decision but there was another HC decision which meant the coup in 2006 was unlawful – Mara stayed in power – after years and years of delay he called an election in 2014 and won with 60% of the votes
- **X v SoS for Home Department (2004)** – Article 15 of the ECHR – in time of war or public emergency threatening the life of the nation… to the extent strictly required
- Case concerning of non-nationals in UK who are imprisoned without trial for 3-years due to the Anti-Crime and Security Act 2001
- People are imprisoned without trial – it is a few years after the 9/11 attack – this is a product of concern internationally about security
- The act breaches habeas corpus and it is about non-nationals – which raises an issue of racial discrimination

- Whether this legislation breached human rights – majority said there was a violation of a right, but it was too non-discrimination – the question turned on whether the government could rely on Article 15
- Can the courts independently assess whether an emergency exists or is it too political
- **Lord Bingham** – says that whether anything is threatening the life of the nation is a pre-eminently a political judgement – the courts stay out of it all together – concerns the question of the factual prediction of risk – the government has information that courts may not have access to
- **Lord Hoffman** – threat to life of the nation is not terrorism – it is laws such as these – that undermine judicial values of the UK – did not agree that the government rely on this exception
- The nation has gone through WWII – this is not a threat to the institutions of government or existence of a civilized community
- **Sellers v Maritime Safety Inspector (1999)** – executive power and impact of international law – 1900 treaties the NZ has entered into – in this case it is about the Convention on the Law of the Sea – the impact on the executive power
- Seller is the owner of a boat – private yacht – he was not granted clearance to leave the NZ port on the basis he was not carrying a radio or emergency locator beacon – in accordance with s21 Maritime Transport Act (1994) – making sure the vessel complied with any relevant rules – the craft and safety equipment are up to standard to sail
- Seller was not carrying the radio due to his personal philosophy in that he wanted to be one with the sea – so he didn't need any of this technology – he would be guided by the stars and his institution
- He is prosecuted in the DC – he appeals to the CA – on the basis on the principle of the freedom of the high seas – to him having to carry a radio was against his right to navigate his vessel as he pleases
- Exclusive jurisdiction of the flag state – guaranteed by the convention – high principle with few exceptions – it is not for the port state (NZ) to determine safety matter in the high seas it's up to the flag state – the vessel was registered in Malta – so, it was their responsibility to determine that the vessel was safe not up to NZ
- This principle is guaranteed by the Convention – the Maritime Safety Guidelines interfered with this international jurisdiction – the international law influences the way you read legislation
- The guidelines were going too far as they were ultra-vires as they breached international law – the guidelines need to read consistently with international law

Lecture 32 – Introduction to BORA 1990

- Moral theory – human rights are things that protect our moral property just because we are human – not cause of what we have done or who we are but just because we are human – make these rights legally enforceable
- Political rights – they represent the boundaries of state power – they are to limit the power of the state
- Human rights maybe nonsense on stills – vague, abstract notions that hide or conceal how we should be living our lives – behind these rights conflict with other rights or statutes – they conflict with how we live our lives

- Whether or not human rights should be protected and upheld by the courts
- We support human rights as we worry about the political procedures – it helps to protect the rights of people who are in the minority – every claim is contrary to parliament power and given to judges how these rights are to be interpreted
- To what extent should courts have the power to protect human rights – they have power to interpret or declarery power not to invalidate the law
- Civil and political rights – protection against civil and political acts
- Socioeconomic rights – goods/services people need – these are not in the NZ legal system
- Through the common law human rights have been legally enforceable – such as in **Entick v Carrington** – and habeas corpus – there is protection against unreasonable search and seizure
- The BORA 1990 has not developed rights – they have been around for many centuries in different legal reasonings and legislation
- 1970s – NZ was highly regulated society – journalists would be banned – the ability to buy music were controlled by government – there was a worry about the level of executive power – 1984 the Labour wanted a BORA – wanted entrenched style of BOR
- **Palmer** (Minister of Justice) – drew up a white paper – there a proposal for the BOR – in this it gave judges power to strike down legislation that were inconsistent with BOR – and it covered the ToW rights – modelled under the Canadian Charter without adopting equality before the law and equal protection as too many claims were made under these provisions
- Opposition parties were not very supportive – in order to get the BOR enacted – he added s4 – clear to courts to not invalidate other laws within NZ – the BOR has no ability to invalidate a law
- No general demand for the BOR – passed as a normal statute – there was no entrenchment – it is just ordinary
- S4 was introduced just to get this BOR approved in parliament and passed with a majority
- The BORA can do is:
    1) It can mandate a right consistent provision where it is possible – courts will interpret statutes to be consistent with the BOR – allows the courts to broaden or narrow the interpretation of legislation
    2) It can also constrain the executive power – form in which judicial review has developed – executive's power is constrained by the BORA
    3) It also requires to the common law to be consistent with the BOR
    4) It can upon a judge's discretion can force a government to pay compensation if your rights are breached
    5) It can allow at the judge's discretion a declaration of inconsistency – there is a law that infringes your rights
    6) It can serve help formulate policies and statutes
    7) Evidences the existence of rights to everyone
- It still cannot take away parliamentary sovereignty due to s4
- **S2** – it is not creating new rights – it is codifying these rights into the legal system – give them statutory power

- **S28** – An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part – there is room for other rights to be developed by the law
- The sections refer to any person – any person within NZ jurisdiction have these rights – it also applies to organisations – any legal person
- **S3** – This Bill of Rights applies only to acts done – **(a)** by the legislative, executive, or judicial branches of the Government of New Zealand; or **(b)** by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.
- While legislature is bound by these rights – they cannot be used to invalidate any law – the actions you can bring are very limited – s4 trumps s3 – you cannot use s3 to try and invalidate the law
- There are lots of instances where aren't part of the 3 branches of government, but they are performing some form of public duty – such as private prisons – prisoners need their rights to be protected but it is not clear that these rights are enforceable
- **Ransfield v The Radio Network LTD (2005)** – this private radio banned a politician from speaking – the politician claimed breach of s14 rights – there was problem whether the rights can be enforced since it is part of a private body – this private radio station is providing a public good but there are other factors
- Even though it is doing something for th public interest hosting a broadcast with election candidates that is not going to be determinative
- There are number of factors that determine who s3 includes:
- Ownership – private or publicly owned
- Whether or not it is exercising a statutory power or duty
- Whether it is run by the government
- Whether it is advertised for public interest
- Is the institution democratically accountable?
- There is big distinction between a public and private broadcaster – it's not doing any of the things outlined above – it is about figuring out what functions are private in nature and what are governmental in nature
- The ultimate goal for the radio company was to make money for itself
- **S3(b)** – is clearly focused on a branch of the government or something performing public function
- **S7** – when the bill is introduced – the AG must report whether the bill is inconsistent with the fundamental rights – can the courts examine the way s7 is exercised
- **Mangawero Enterprises Ltd v Attorney-General (1994)** – where someone was asking if the courts can review the AG's decision whether or not to issue a certificate of inconsistency
- There is a duty under the statute to warn the parliament – but, since it relates to the procedures that parliament takes it is covered by parliamentary privilege – the courts cannot look into it
- **Boscawen v AG (2009)** – question about comity – this relates to parliament's law-making powers – the courts will not look at the AG's role in s7 – there is no legal technique you can use
- Even if the AG determines the bill to be inconsistent – it can still vote for the bill to be passed as we don't want any legal limits as to voting – AG has different roles – as a member it is part of a party

- Courts when a statute infringes rights can – declare it inconsistent but due to s4 still needs to apply it
- This leaves the supreme power to the parliament to resolve it instead of courts – without invalidating statutes courts can do anything else to it in order to be consistent with rights
- Declarations allow for political penalties – as this shows the people that parliament is enacting legislation that is inconsistent with rights

Lecture 33 – How courts apply the BORA 1990

- There are some rights that have no remedy – legally speaking if you breach someone's rights there is no consequence
- The act needed some remedy – someway of creating legal consequences
- Courts give a right consistent remedy – you may be able to convince the court to adopt a narrow interpretation
- Courts will exclude evidence where the evidence was obtained that was inconsistent with your civil or political rights
- Rights allow public action to be unlawful – this holds officials and ministers accountable in regard to your interests
- With no other remedy courts can award monetary damages
- Court can finally provide declaration of inconsistency of statute to a right
- S4-S6 show the courts as to how the BORA 1990 is supposed to operate
- S4 – no other legislation can be struck down by the courts
- S5 – subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society
- This can be confusing as we don't know whether we are referring to the prima facie right (what is written) or the right after the limitations
- For example, freedom of expression – but there are limits to their expression – these are defined by the law
- S6 – Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.
- What role does s5 have given the fact it is subject to s4 – the Canadian charter does not have s4 just s5
- The Canadian courts have protected parliamentary supremacy where there is a law that infringes rights and we think it is justified in a democratic society we will leave that law to not be invalidated
- If we go through the right and see that the right is breached and is not justified but we still have to give effect to it – this means the s4 and s5 contradict
- S5 and s6 – we have to interpret legislation which is consistent with the right – do we give effect to the right itself – or the right that has passed the justified limitation test – is it giving effect to all rights or just those that can pass the s5 test
- If there is no way to give a reasoning that complies with s6 then what does s5 imply
- S5 – what does it imply – should the courts consider a different cause of action should they have the ability to do something about the rights that cannot be justified – but s4 is stopping them from doing this

- Is s6 just a tiebreaker – choose the reasoning that is right consistent – or does it tell courts to adopt uncommon meaning to legislation to require the law to be consistent with rights – if so, this contradicts s4 as this reinvents the law itself
- This all depends on the rights that we are considering – some rights we know are subject have limitation – but some rights already have some limitation and you don't need to go to s5 – there are some rights that cannot be limited – s5 is variable
- The law we are trying to interpret which might have broad and vague language or it is very narrow and precise – this means a variation as to how much discretion courts have
- How far can courts go to straining the legislation to be consistent to the right
- **Ghaidan v Godin-Mendoza (2004)** – s3 of their **Human Rights Act 1998** in the UK – this is very similar to our act – their s3 is our s6
- **Rent Act 1977** – your husband or wife can carry on with that tenancy after one's death – a person living as husband or wife (de facto) can also carry on with the tenancy
- Before the human rights act – the HL didn't include people in same-sex relationship
- This came after the human rights act but before the ability of same sex marriage
- **Nickels** – interpretive directive applies to all past and future legislation
- The interpretative directive is not just to be there as a tie-breaker – this is not confined to ordinary interpretation – may allow the courts to adopt an unordinary meaning if it gives a right consistent result – this may mean that they depart from the intention of the parliament
- Rent Act was meant for heterosexual couples and those living like married couples, but it needs to compliant with the human rights act
- Despite the fact that the provision was meant for heterosexual couples they believed that they could extend it to same-sex couples as the provision was also trying to give effect to those who lived like married couples
- There are 3 limits:
- The new meaning must be consistent with the fundamental features of the legislation
- New rights consistent meaning must be consistent with the other sections in the legislation
- This does not able the court to decide non-judicial cases – difficult part is what should be left to court or to parliament
- We can see in this that those living in relationships of married couples regardless of their sex or orientation still works under this act – it's just an extension – is not conflicting with any other provision
- This can be argued that it is a role of the courts to protect this minority of same-sex couples – who would be compromised due to the majority set-up of parliament
- **Seales v AG (2015)** – **s179 Aiding and abetting suicide, Crimes Act 1961** – the plaintiff wanted to be able to the time of her own death – so, she didn't want her doctor to be liable for providing a fatal dosage of drugs under s179
- **S179** – (1) everyone is liable to imprisonment not exceeding for a term of 14-years who – (b) aids or abets any person in the commission of suicide
- All the court have to do is interpret suicide in a right consistent meaning – ordinary meaning of suicide is when a person intentionally ends their own life

- The court said – what suicide should mean – is an irrational decision by a vulnerable person to end their own life – this giving a right consistent meaning with the BORA
- The court did not allow the declaration to be made
- Possibly the rule of law tradition requires – the ordinary meaning of a word to be adopted to make sure that it is accessible by everyone – can't conduct ourselves relying on the courts to stretch the meaning of a word
- The parliament in 1961 could have adopted different meanings of suicide – the role of the courts is possibly to update the law – the rights allow courts to update court's version of what we think
- One reading of the Crimes Act is possibly – we don't permit suicide because it is wrong but because we are worried vulnerable people would do it – courts focus on individual litigants – while parliament focuses on the social impact
- This can allow the courts to see the individual effects of the law on a person – while parliament can see general policies
- This is fine as non-vulnerable people can be aided in suicide – but now we need some way of working out who are vulnerable and non-vulnerable – need laws to differentiate that which parliament has to do
- The shift from vulnerable and non-vulnerable should be made by the parliament and not by courts – **Collins**
- The language in the Rent Act 1977 is quite malleable – there is no rule his has to be about his wife and not his husband – there is quite a lot of discretion to courts to adopt the meaning to a homosexual couple
- **Collins** – one of the policies of the crimes act was to give effect to principle of life – it is there to protect people's lives – it hard to give the unordinary meaning of suicide and say that it is consistent with the background policy
- Courts give a right consistent meaning where available – but how far should the courts go to give right consistent meaning

Lecture 34 – BORA – Interpretation

- NZ should not be quite as free as the UK judges – due to **s5 Interpretation Act 1999** – meaning of an enactment must be ascertained from its text and in the light of its purpose – our legislation focuses a lot more on text than in the UK
- In the UK there is an appeal for human rights in Strasbourg – a claimant only gets appeal rights – AG can never bring an appeal – this allows the claimants to get more rights – these appeals are routine – UK courts wants to protect the rights itself rather than let some international court – so, they are more creative about protecting rights so it is not taken away from them
- While in NZ you can appeal to the UN Right Committee – but they are not very routine – and it is not very well-established court
- How the interpretive provision is written – **s6 NZ BORA 1990** – wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning
- **S3 UK Human Rights Act 1998** – so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention Rights – this shows that go as far as you can to give a right consistent meaning

- **R v Hansen (2007)** – **CJ Elias** – the difference in UK and NZ do not matter – the purpose under **s5 of the Interpretation Act 1999** should include the purpose of the NZBORA which is to affirm rights – may yield a less obvious meaning if rights are involved and may strain meaning – she doesn't go this far though in this case
- **Anderson** – said that you shouldn't give a strained meaning
- **Tipping** – an alternative meaning may not be the originally intended meaning
- **Blanchard** – you can only displace natural meaning in favor of another meaning which is genuinely open in light of the text and its purpose
- **McGrath** – take a reasonably viable meaning – and not one that is in conflict with s5
- **Re Application by AMM & KJO to adopt a child (2010)** – Judges Wild and Simon France – both say that guidance from Hansen was of very little assistance
- AM and KO are unmarried heterosexual partners – AM already had a son, S who was conceived by a sperm donor
- KO acted as the father of S but was not legal parent – AM and KO have another child together – and KO wants to become the legal parent of S
- **Adoption Act 1955** – would allow KO to adopt on his own but that would terminate AM's status as mother – in order for both of them to be S's parents they have to make a joint application
- The provision says – an application order may be made on two spouses jointly in respect of a child – does this provision apply to a man and woman who are unmarried but in a committed and stable relationship
- What does s6 require – here the provision breach s19 discriminatory against marital status – as the 1955 interpretation was definitely to mean two people that are married
- Tipping in R v Hansen sets out a kind of methodology you can bring to interpreting the BORA 1990
    1) Ascertain parliament's meaning of the word
    2) Decide if that meaning is inconsistent with the relevant right or freedom
    3) You would decide is the apparent inconsistency is a justified limit on the relevant right or freedom
    4) If not, whether is it reasonably possible to give a consistent meaning with the right or freedom
- If you read the right fully it will be harder to read the statute consistently with it – it may be better to read a bit more narrowly in some contexts to allow it to operate better
- Judges move onto look at the purpose of the **Adoption Act 1955** – and it is that couples that are adopting should be in a stable and committed relationship – that is satisfied here – since they have been together for 10-years – they are also heterosexual – and they find many meanings where spouse also include de-facto spouse – so, spouse can extend to that meaning
- Court says their job is to decide now as the case is in front of them to alleviate discrimination – while parliament can do it in its own time and decides for the general public
- Parliament's inaction is not intent – courts just read the statute itself – not focus on what parliament is doing

Lecture 35 – BORA as a Supporting Role

- **Drew v AG (2002)** – whether a regulation is inconsistent with the right to natural justice – reads the regulation narrowly and says that it is ultra vires – the visiting justice acted unlawfully when they did not allow lawyer assisted cross examination in the hearing
- Broad words are not read in a way to take away rights
- Right to natural justice is a common law right protected by judicial review – this right is under s27 of the BORA 1990
- Under s4 – no enactment can be made invalid or ineffective due to the BORA 1990 – the question is whether this regulation is invalid
- The main words of focus in s4 are – ***by reason only*** that the provision is inconsistent with any provision of this BOR – this read broadly can mean that you cannot use BORA 1990 to invalidate an enactment or regulation
- Drew was a prisoner and he failed a drug test – he is charged under prison discipline – penalties include longer sentence, solitary confinement, delayed parole
- Drew argued that he was not allowed legal representation in this hearing – his defense for failing the drug test was because he had been taking prescription codeine for pain relief – he says he was deprived of the ability to cross examine the expert witness because he did not have a lawyer
- **Penal Institutions Act 1954** – s34 – (1) Power to hear any complaint (can be delegated) – (2) Every such hearing shall be in the presence of the inmate charged with the offence, who shall be entitled to cross examine any witnesses
- **S45 – (1) (19)** general empowering provision allowing making of regulations for purposes of and to give effect to the Act
- **Regulation 136(4)** – an inmate may, at his or her own expense, contact his or her legal adviser for the purpose of assisting with the preparation of his or her defense, but the inmate's legal adviser may not represent the inmate at the disciplinary hearing
- Drew got his own expert witness to help prove that he was on codeine and the drug test results may have been false – she could not make but did provide a letter – he tried to cross-examine the expert witness of the justice but examined in-factually
- The visiting judge took the letter into account – trying to give it weight in his decision – Drew's defense was not successful
- Drew here bring a judicial review – is challenging the lawfulness of this decision – the way the decision was made – did visiting justice run the hearing properly – Drew argues that this is inconsistent with s27 of the BORA
- There is an argument that s45(1)(19) cannot mean to deny the right to legal representation before a visiting justice – especially when it is necessary for the inmate's rights to be heard
- So, without legal representation in the hearing the right to cross-examine witnesses is rendered ineffective
- **S27 (1)** – Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognized by law
- [64] – the decision maker here holds judicial office and exercises a judicial power – this is a judge – an appointed judge who is making this decision – they are following

a procedure of the courts – more like a judicial decision as they have to resolve questions of fact and possibly law – the prisoners may not be able to address those facts properly if they are not legally represented

- This disadvantages the prisoner and decision maker – the penalties here are also very substantial – outside of prison this would certainly call for legal representation – could be a penalty of 6-months more imprisonment – in public the accused would be entitled to a jury trial
- **Drew's lawyers** – argued that inmates in all cases regardless of the charge or the complexity of the case or the analytically ability of the inmate then natural justice would be affected, and the regulation would be ultra vires
- The BOR shows that these regulations are ultra vires – a total denial of representation would not properly enforce the right
- **The AG argued** – fairness could be achieved in other ways – the visiting judge could help the inmate make arguments from the bench – the judge did so by taking the letter – the accused was also given time to prepare their defense and given assistance – just in the hearing he didn't have representation – interpreters could be allowed – anymore than this might delay the speed in dealing with the disciplinary matters – there are 8,800 hearing a year – this would lead to significant delays
- [66] – s45(1)(19) – cannot have been intended by Parliament to authorize the making of a regulation which in its operative effect, results in some hearings which may be conducted in a manner contrary to the principles of natural justice
- Going beyond the words of the regulations to look at the effects on rights – the court says that this is bound to occur if legal representation is always denied – regardless of the charge
- Regulation 136(4) – are ultra vires – they ae void as they go past the regulation making power
- Since this regulation is void the visiting justice could not have denied Drew legal representation – the judge should have considered in this case what natural justice required and whether natural justice in this case required legal representation
- The reasoning of the court – was that this disciplinary scheme had high penalties attached to it – this would usually qualify someone for a jury trial – and legal representation is required at those hearings
- The court was also concerned about an inmate to put together an adequate defense – an inmate doesn't need legal representation in every case in order to have natural justice – if the facts are straight-forward an inmate of a mature age and average intelligence would be okay to run their own defense – but an immature or dysfunctional inmate would not be possible to do this – there is a high-rate of prison illiteracy
- Drew himself was of intellectual ability and mature – but the facts were complicated, and this was a technical matter of technical evidence
- The visiting justice cannot do enough to help the unrepresented inmate from the bench – not fair to think that the judge could help the inmate as much as a lawyer
- In these circumstances – inmates are out of their depth for cross examination because of the complexity of the case and their own limitations – the right to cross examination under s34(2) has been effectively denied
- The visiting justice should have permitted representation in this case due to the complexity of the evidence

- [67] – there could not be a reasonable limitation on the principles of natural justice – in this that s5 of BORA 1990 does not operate into s27 – natural justice itself is flexible and has adapt to circumstance – you need to only define what natural justice requires – and you don't need to reach if this was a reasonable limitation
- They do not consider the efficiency problems as all of that is taken into account when you define natural justice itself
- This signals that not all rights under the BOR will not be dealt with the same methodology
- [68] – what role s4 plays – s4 protected all enactments from being disapplied – you cannot disapply this regulation as it is an enactment therefore you can't disapply it
- **Blanchard** – that argument was so plainly enormous that would be desirable to dispatch it – regulations are not protected by s4 – they are not striking down regulations only because they are inconsistent
- They are interpreting the empowering provision in s45 – consistently with the BORA 1990 – s45 is read in a way that allows a regulation to be applied in this way – s4 is not engaged because this is just an interpretation point
- It is not so much striking down legislation but rather creating exceptions to the rule
- BORA 1990 is to give effect to common law techniques – the BORA 1990 also gives some democratic legitimacy to the common law techniques – BOR goes beyond what common law might be able to do

Lecture 36 – Revision on the BORA 1990

- Rights are entitlements – they mandate that somebody must or must not do something
- Rights mean that someone else must do something and it can override other general consideration or reasons
- A right means that someone else is under a duty to do or not to do something
- Rights are a strong claim because it means that someone else has to do something
- Society disagrees about rights – how should they be protected – who should have the final say – strong v weak judicial review of legislation
- Strong judicial review – strong BOR – so they can strike down legislation
- Weak judicial review – weak BOR – cannot strike down legislation – courts can interpret legislation consistently with rights – they can issue declarations of inconsistency – but cannot invalidate legislation
- BORA 1990 – can constrain executive action – regulations must be consistent with rights – they can act contrary to rights unless mandated
- Damages can be awarded for rights – and declarations can be made for inconsistency
- Protected rights are listed from ss 8-27 – these are affirmed as they are believed to have already existed
- No socio-economic rights – such as right to water, housing, social security, education
- No 3rd generation rights – no recognition of ToW and specific Maori rights
- S5 – is the reasonable limit section
- S4 – no power to invalidate law only by reason of inconsistency of BORA
- S6 – right consistent interpretation of statutes
- It is considered an ordinary in Parliament – as it can be amended with an ordinary majority – but is given a lot of weight in court

- These are rights to all-natural persons within NZ and can extend to certain organisations such as charities
- Rights against the government – but it is not applied to the internal workings of parliament – can extend to any person or body performing any public function – BORA only allows for claims against government
- BORA – applies to enactments – acts of parliament, regulations – delegated legislation – by-laws – orders in council
- What is the relationship between ss 4 and 5 – if a statute clearly limits a right – should the court even go on to consider whether the limit is reasonable
- Relationship between ss 5 and 6 – are we applying s6 to the right itself or the limited right that has passed s5 test
- How should the right be defined in the 1st place – before the sections are even at play – the broader a right the harder it will be to find a right-consistent meaning
- **R v Hansen** – **Tipping** [92] –
- **Step 1** – ascertain parliament's intended [or natural] meaning
- **Step 2** – ascertain whether that meaning is apparently inconsistent with a relevant right
- **Step 3** – If apparent inconsistency – ascertain whether that inconsistency is a justified limit under s5
- **Step 4** – If inconsistency is justified – he apparent inconsistency at step 2 is legitimized and Parliament's intended meaning prevails
- **Step 5** – If Parliament's intended meaning represents an unjustified limit under s 5, the court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted
- **Step 6** – If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament's intended meaning be adopted [ie: adopt meaning at Step 1]
- Different rights have different approaches – freedom from torture is an absolute right – you cannot limit the right
- Some rights are subject to reasonable limitation – such as right to freedom of expression or religion
- Some rights already contain limitations on themselves – so you don't need to go to s5 – unreasonable search and seizure
- The interpretation issue may determine the approach of the court – some words might have conceptually different meanings – spouse can have multiple meanings – the word offensive can be interpreted narrowly or broadly
- The words of the statute limit how robust the courts can be in applying the rights – might be less of a role for s6
- Results may be very different due to the wording of a particular statute – some have very strong and clear language – others have many open-ended words – this will result in courts having different level of room to apply the right

Lecture 37 – How to apply ss 4, 5, 6 of the BORA 1990

- **R v Hansen (2007)** – the majority tried to set out steps as to how to apply the BORA 1990 to different statutes – but don't use these blindly – think of the right itself – **[92] by Tipping laid out in the previous lecture**

- **Elias CJ** – different rights require different tests – such as freedom of speech is not an absolute right – while freedom of torture is and is not limited by anything
- Other rights have their own limitations
- The different wording used in the statute can influence how these sections are applied – if the word is more open texted there is more room for interpretation
- Hansen is convicted on a charge under the Misuse of Drug – supply or sale of drugs – excess of 28g of the cannabis plant – he had almost 400g – he said they are for his personal use – issue is whether he wished to sell them
- If it was not for sale, he would get a penalty of 3-months – if he was selling, he would be sentenced to 8-years
- S6(6) – Those in possession of controlled drugs above certain threshold quantities (28g) deemed to possess the drugs for the purpose of supply or sale "until the contrary is proved"
- He has to disprove this presumption – he is convicted by jury – the legal burden of proof was on Hansen – the CA holds the decision – SC grants him to appeal to them
- Does s6 place a legal onus on the accused – can this section be interpreted as to whether it puts evidentiary or legal burden – the court says it is a legal burden
- How does the court approach ss 4-6 of the BORA 1990?
- Majority give central role to s5 – while Elias had no role to play for the purpose of s6 interpretation
- The right to remain innocent until proven guilty – s25(c) BORA 1990 – s6(6) is against this right
- S6 of the BORA 1990 requires you to give a meaning that is consistent with the BORA 1990 – this would be achieved if there was only an evidentiary burden
- Consistency would be achieved if the evidence given was able to give doubt – and the onus would be on the prosecutor to prove beyond reasonable doubt
- He argued that if it was phrased as – "unless there is evidence to the contrary which, if accepted, would raise a reasonable doubt as to the purpose of supply or sale"
- The AG agrees that this is contrary to your right – but this is a justifiable limitation against s5 – the Crown did not want this as there was no other evidence other than the large amount of cannabis, he was holding
- **Elias CJ** – says that you can have a strained meaning you can't have an untenable meaning – hear only transferring the evidence burden is not true – agrees appeal must be dismissed
- She does not accept the methodology applied by the majority – she does not agree that s5 applies to the s6 preference for meaning consistent with the enacted freedoms
- She thought that s5 had not role to play in interpreting the statute using s6 – because it distorts the interpretative obligation under s6 from preference of a meaning consistent with the rights to one of preference for consistency with rights as limited to s5
- She believes this does not conform to the purpose structure of the BORA as a whole – risks erosion of fundamental rights through judicial modification of enacted rights according highly constable distinction and value
- The risk is by persistent suggestions necessary to identify the content of rights by a balance to be struck in each case which weighs a wider public interest against rights

- She is worried about the rights being eroded by applying s5 to the s6 interpretative process – she says when we use s6 the right is already being watered down to put a consistent meaning to it
- We should look at the content of the right and see if we can interpret it consistently with the BORA 1990
- Rights are entitlements and so they are meant to trump the needs of society – s5 brings in the needs of society – balancing process taken by s5 is about contestable values of society – and those should not come in before you have applied s6
- She also says that sometimes within the right itself there is no room for s5 – right to presumed innocent is an unqualified right meaning it can't subject to limitations
- S5 presumes that rights are limited before they go through the s6 test – she believes using s5 destroys the purpose of the BORA as it fails to respect the rights as enacted by Parliament
- She uses Canada and South Africa to justify her point – saying that first you use s6 then s5 is a separate question after you have interpreted the right
- She says there might still be a role to play for s5 but doesn't mention it – the text of s5 is not a rule of statutory interpretation – in her view it is not necessary to go beyond s6
- S25(c) is an unqualified right – there is no point going to s5 to limit it – any restriction put on it would completely erode the right
- Majority says that s6 should only be applied after the right has gone through the s5 test – when they get to s6 test – they can choose a meaning that is consistent with right or which is consistent with the right as it has been justifiably limited
- **Blanchard** sees Elias's approach to not giving an adequate role to s5 in the interpretative process – the scope of any right must be constrained by other sections including s5
- When they get to s6 – they need to figure out the meaning of the right – and the only meaning that need to be discarded are those that unjustifiably limit right

Lecture 38 – How to apply ss 4, 5, 6 of the BORA 1990 – Continued

- **R v Hansen (2007)** – continued
- **Blanchard J** – not enough recognition is given to s5 by Elias – **[59]** scope of rights must be seen as constrained by other statutes which includes s5 – when we are looking at s6 it is only the unjustifiable meanings that have to be discarded
- **[83]** – finds that the limitation on the right of innocence was a demonstrably justified limitation – the limitation on the presumption of innocence was justified by s6
- **Tipping J** – must consider whether any apparent limitation is legitimate – if you can find a justification in s5 there is no need to go to s6
- **McGrath J** – **[180]** – main difficulty since the BORA is how they should factor in s5 – or how they should apply s6 with justified rights – **[186]** adopts the same methodology as the majority
- This allows the rights to be justified and the interests of society as a whole – they are a part of social order
- Part of parliament's purpose was so that courts do consider whether the right has a justified limitation
- Imposing a legal burden of proof with such a serious offence – doesn't think this is a justified limitation on the right

- All the judges apart from Blanchard come to an agreement that this is not a justified limitation, but they all have to apply the legislation anyway and appeal dismissed
- S6 is only triggered where the interpretation of an enactment would produce a meaning that would be an unreasonable limit on a right
- **Scope/definitional balancing** – reading limitation into the definition of the right by placing limits on the scope of the right itself
- **Justification balancing** – defining the right broadly without reference to other competing values or considerations and then separately addressing questions as to the reasonableness of limitation on the broad right
- **Tipping** – there were only two meanings for the court to consider in Hansen – they found that the meaning that breached the right was the correct one because it was Parliament's intentions
- However, in Moonen they had a vert conceptually elastic word – objectionable – which would have a range of meanings and the court had to decide which meaning it would adopt and Parliament is not very helpful – because Parliament cannot interpret all the ways it can be used
- **Moonen v Film and Literature Board of Review (2000)** – if more than one meaning is available, the second step which constitutes the least possible limitation on the right in question
- It is that meaning which s6 of the BORA, aided by s5, requires the courts to adopt

Limitations on Rights – S5

- Most rights are not absolute they are limited in some way or form – courts limit rights based on the harm it may cause and general society interest
- NZ's justification standard on rights is reasonableness – reasonableness is it must be capable of being demonstrably justified in a free and democratic society
- **R v Hansen (2007)** – uses the Canadian case of **R v Oakes (1986)** – which is **proportionality test** – there must be a proportionate (reasonable) relationship between the objective and the means to achieve it
- In order to do this – what is the scope of the right – and is the limitation reasonable
- **AG v Smith (2018)** – wearing a head piece is not expression for the purposes of s14 of the BORA 1990 – because it does not convey a meaning
- Wearing a bourka or having tattoos for religious purposes can be seen as expression
- Prescribed by law – is there a law – it must be identifiable – is it adequately accessible – has to be sufficiently certain
- Reasonable limits as can be justified in a free and democratic society

Lecture 39 – How to Apply s5 of BORA 1990

- Rights cannot be limited unless there is a law – any type of enactments – in **R v Hansen** there is a statutory obligation – others have common law limitations
- The law has to be published has to be accessible by those who are likely to be affected by it
- It has to be sufficiently certain – it has to be formulated in a way in which the individual understands the circumstances in which their rights may be restricted and foresee the consequences of their actions – this is to help regulate your conduct – the degree of certainty required depends on the circumstances of the case

- Some laws apply at a general level such as statutes and the common law – it might apply at a particular level – this where you have a statutory or common law standard and it applies to an individual situation
- **Sunday Times v UK (1979)** – concerned an order to stop the plaintiff from publishing a case that criticized the settlements about drug affecting pregnant women leading to disfigured children – publishing would mean they would be contempt of court
- Was contempt of court sufficiently certain – plaintiff argued the law was so vague and uncertain – the restraint could not be seen as prescribed by law – contempt of court is written by the judiciary
- Word law covers not only statute but also unwritten law – including the common law – common law had been developed by sufficient certainty to enable them to see a risk to see they may be held in contempt of court
- **Malone v UK (1984)** – internal code of guidance that was produced by the police and that was not made public – this was not prescribed by law – as Malone was unable assess when his conversations were being listened to or what the basis for surveillance might be
- **Wingrove v UK (1997)** – board denied his application to classify the film about Jesus – the content of the film violates the law of blasphemy
- Law of blasphemy was uncertain – he could not clearly see that the film be denied by the board
- There is no disagreement as to what it is under English Law – we know what it is – the plaintiff could see that his film would breach the law of blasphemy
- Limitations on rights – they have to be prescribed by law – and they must be reasonable as can be justified in a free and democratic society
- **R v Oakes (1986)** – pressing and substantial objective for the limitation on the right – what is the purpose of the limitation of the right not the purpose of the entire statute
- Rational connection between the limitation and objective
- Minimal impairment of the right – guarding against excessive impairment of the right – minimum impairment gives the Parliament very limited room to legislate – are there other ways parliament can achieve its objective that might be less intrusive on the right
- If there are alternative ways – then the government will have to explain why they didn't choose that option
- Proportionality between limitation and objective – context is important – some limitations on rights will be more serious than others – in terms of the nature of the right being violated – and how important the right is to society
- Right to life or torture – the limits to those rights will be very serious
- **Tipping's Methodology – [104] – R v Hansen (2007)**
  (a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom? [sufficiently important objective]
  (b) (i) is the limiting measure rationally connected with its purpose? [rational connection]
  (ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose? [minimal impairment]

(iii) is the limit in due proportion to the importance of the objective? [proportionality]

- **Blanchard J** – objective of the limitation – because of the difficulty of figuring out trafficking drugs in street dealings – Parliament has considered it necessary to override the right in order secure more convictions – [kind of too much as just because you can't gain convictions you put the legal onus on them]
- Rational connection – rational connection between the objective and the means by which it is implemented
- The expert committee tells Parliament if you can more than 28g of cannabis you will most likely be supplying it – because if you have it for your personal use you won't have that much
- He finds there is a rational connection between the means used and the objective
- Minimal impairment – it is as reasonably possible – he says he is persuaded nothing short of a reverse onus would be necessary
- Proportionality – he says we must only impair the right only to the significance of the objective of the statute
- He says in a small number of border line cases – user of illegal drugs can be convicted of possession of supply of drugs where there existed a reasonable doubt about the purpose – but the limitation of the presumption of innocence would not be disproportionate to the overall net gain to society
- **McGrath** – he says that was there any other way of getting more convictions – he believes there is and the s5 is not justified – he believes the evidential onus would have a very close effect
- He says the provision intrudes the core value of the justice system – the disadvantage on an accused are disproportionate – and it was a disproportionate means of achieving the objective
- But they still all have to apply s4
- Value judgements – if you have offensive material involving children then the court has to consider value of free expression against the value to society of protecting children – court has to decide what is more valuable
- Deference and expertise – as to what extent courts to defer to the legislature when determining the reasonable limitation on a right – should the court conduct its own assessment

Lecture 40 – The use of s6 and s7 of the BORA 1990 – Remedies and Effect

- S6 – rights consistent interpretation – what does "can be given a meaning" mean – is that meaning just what can be made out from the text – or does it reflect parliament's intentions
- Purposive approach – what are Parliament's intentions – how do we know what the purpose is
- Do we look at the intention of the Parliament that passed the Act or the purpose of the BORA?
- **AMM and KJO (2010)** – s6 was doing a lot of work as an interpretative aid – showed the BORA working in a way that the common law couldn't – the common law didn't have so much protection on discrimination

- Here it was discrimination based on marital status – whether spouse can be read to de-facto heterosexual couples – court found that it could be read to apply to de-facto couples
- Eventhough in 1955 the intention was not to mean de-facto couples – they looked at the purpose which they believed was to make sure a couple was in a stable and committed relationship
- S5 did not have to be used as the AG admitted that this was clear discrimination within this statute
- In 2005 Parliament considered this issue and decided not to change the law – court said just because Parliament did not act that is not regarded as intent
- **Tipping** – said that a right consistent meaning can be used even if it was not something the Parliament intended at the time of enactment of the Act
- **Seales v AG (2015)** – requirement of s6 – is to interpret the act in contemporary circumstances not the intentions of the Parliament at the time the Act was enacted
- But how strained should the meaning be – **R v Hansen** – **Elias CJ** – you may include a strained meaning – difference in the wording between the UK and NZ BORA does not matter – you can also include the purpose of the BORA 1990 to affirm rights – a less obvious may yield better results
- **Tipping J** – alternative meaning may not be the originally intended meaning
- **Blanchard J** – can only displace from the natural meaning which is genuinely open in light of the text and its purpose
- **All** – a rights consistent meaning cannot give the words an untenable meaning
- Still no judge could find a right-consistent meaning from the words of the Misuse of Drugs Act
- **Ghaidan v Godin-Mendoza (2004)** – you can use the BORA to change the original intention of Parliament – it can help strain it – as long as it goes with the purpose of the Act
- People living with the same-sex partner can be included in the Act – and right to be free from discrimination was upheld
- **Millet** – **dissenting** – said how do we even know what the purpose of the Act was and so does not invalidate the Act
- **S7 – was discussed in Lectures 11-12 –** is about the role of the AG where Bill appears inconsistent with the BORA 1990 – s7 report is not binding – Parliament can have its own opinion
- **Delegated Legislation** – what happens when delegated legislation breaches BORA
- This is made by bodies or people who makes legislation after they have been authorized by the Parliament
- Can parliament be taken to authorize a breach of the BORA 1990 when it is delegated legislation – Parliament creates the statute that creates delegated legislation – Look at **Drew v AG (2002)** (Lecture 36) and **Taylor v Poultry Board (1984)**
- **Drew v AG (2002)** – [84] – the regulation was not only struck down due to the BORA 1990 – it is struck down because it cannot be interpreted consistently with rights
- Effect and remedies – BORA cannot be used to invalidate primary legislation – making of regulations must be consistent with the BORA 1990 – has effect on the legislative process under s7

Remedies and Effects of BORA 1990

- You can gain damages and declarations of inconsistency – since the BORA has no remedies in it courts have developed these – a breach of the BORA can mean that evidence is inadmissible – can provide grounds for judicial review
- Constraints executive discretion – the BORA might be used to make them choose the conduct that is consistent with the BORA
- Requires the common law to be consistent with rights – guides the Parliament in criminal investigation
- Due to the BORA 1990 when the state breaches a right it needs to justify it before they can be allowed to breach it
- Without the possibility of remedies, the act would be just a hollow shell – Parliament cannot have intended to enact a statute that is empty
- **Simpson v AG (1994)** – how can rights be protected if they are affirmed but there is no remedy for their breach
- **Martin v DC at Tauranga (1995)** – Remedies are needed to vindicate the right in the Act – the value that should be created is to give effect to the right not so much on punishing the state for its misconduct
- **Taunoa v AG (2007)** – Focus on value of the rights and not on disciplining the person who has committed the breach
- In some instances, the remedy is to compensate people for their losses – some remedies may act as a deterrent
- When there is a breach there are two victims – immediate victim and society – because a breach undermines the rule of law and undermines the interests of society in the observance of rights
- Remedies are discretionary – the court will focus on the circumstances
- Seriousness of the breach
- The conduct of the right holder – the conduct of the violator
- Public interest, what is the impact on the society
- How much it will cost the public
- Will it be a deterrent?
- What about the class of people affected – were they vulnerable
- Remedies:
- Right-consistent interpretation
- Damages
- Declaration of Inconsistency
- Exclusion of evidence
- Successful judicial review action
- **Simpson v AG (1994)** – damages were available for breach of right – giving damages is to stop the executive from breaching rights not Parliament – these are actions that are not authorized by Parliament
- This case was a violation to be free from unreasonable search and seizure under s21 of the BORA 1990
- Police obtained a search warrant for the plaintiff's property based on incorrect information – when they came to the door and they asked about whether such people live here

- They said none of those people ever lived here – person opening the door said you have the wrong house – the police officer said "we get this wrong a lot, and that while we are here, we might as well have a look around anyway"
- The Crown argued that the court had no jurisdiction to reward damages because there is no remedy section in the BORA 1990
- The majority rejected this argument – just because there is no remedy section does not mean the court does not have jurisdiction – there are other BOR that don't have remedy sections either
- Under international law the court have an inherent power to protect rights by granting remedies – there is a common law principle that where there is a right there is a remedy

Lecture 41 – Declarations of Inconsistency with BORA 1990

- Declaration of inconsistency – the courts are already able to determine whether a statute is inconsistent – a formal order is given – can the court issue a formal order
- **R v Hansen (2007)** – **McGrath** – while the courts are limited to only interpretation of a statute – they should indicate that a consistent interpretation cannot be found – this is known as a "Hansen Indication" – they are concluding that the legislation is inconsistent with the BORA
- There is an expectation that the legislature will amend the Act in some way – there is not obligation but there is a constitutional expectation
- **AG v Taylor (2017) (CA)** – is whether the high court has the power to make declarations that the legislation is inconsistent with the rights – and if they do should they
- All prisoners are prevented from voting – prior to the 2010 amendment it was only to prisoners who were sentenced to 3 years or more
- The HC had given a declaration – AG is arguing that the HC cannot issue a declaration of inconsistency – core of the AG's case rests on the jurisdiction – it is of no part unless there is express statutory authorization
- And even if the courts have power to do, they should not do it because it departs from constitutional tradition
- Jurisdiction is the power to decide a dispute – restraint is choosing not to intervene as a matter of settled practice – they don't have the institutional competence – some matters are better left to the Parliament
- **Hunting Act case** – there is a principle that the courts will not question the validity of an Act of Parliament – if it is on the statute books the court will just accept this – they won't look at the procedure
- By issuing a declaration it is questioning parliament process – if there is a question about the validity of the legislature this a matter of law – that rests with the courts
- AG says that it invites useless litigation that the court does not have knowledge to decide – litigants should focus on the legislative and political branch
- Judicial function is to answer the rule of law – by doing this they are just performing their role in the constitution – they are not question Parliament procedure
- AG argues your only power from the BORA is to give a Hansen indication – the court says there is no jurisdiction or provision in that statute that says any of this
- And under the ICCPR the courts have a right to give an effective remedy – a right without a remedy is empty

- Declaration allows them to award costs – it gives precedent value – dialogue – the court's opinion brings it to the attention of the Parliament – helpful for costs purposes – help decide future cases – vindicates the right
- **AG v Taylor (2018) (SC)** – making of a declaration is an advisory function which is outside the jurisdiction
- The minority says that there is nothing in the BORA that the courts can do this so they should not do it – the majority says there is nothing to stop this so they should be able to do it
- An effective remedy is reasonable under the BORA and so making of a declaration is consistent with this
- Because there is still s4 – declaration does not confront with Parliament Sovereignty – this is not a new remedy – the text and purpose of the BORA supports issuing a declaration
- Formal declaration allows for a formal inconsistency – it can vindicate the right – the CJ can make declaratory judgments anyway, so this is not new
- AG argues the declarations are advisory – as not action can be taken so it is just advice to the Parliament by the courts
- SC disagrees – as it provides formal confirmation of the right being breached – it can help with making complaints to the HR committee
- AG argues that there are no breaches of rights when Parliament enacts legislation – as Parliament is not breaching a right, they are changing the scope and content of the right
- **Elias CJ** – says this breaches the fundamental nature of rights – you can't just change rights by enacting legislation – they come from the ICCPR (some may say god) – NZ is a statute and fundamental part of the constitution is that when Parliament wants to limit rights they have to do so expressly
- **S3** means that the Parliament must take rights into account – and when there is no other relief available this may be the only one good enough
- The minority says – if jurisdiction does exist it has to come from the BORA itself – because there is no express provision there is no jurisdiction
- **O'Reagan** – says the declaration may harm the court – as the legislature may ignore it and that would question the standing of the courts
- **Morgan** (Writer) – says that the declaration is not a dialogue – as the Parliament can choose or choose not to respond – and if we really want this dialogue it should be happening in Parliament and through Parliament

Lecture 42 – Right to Protest

- There is no strict right to political protest – it is encompassed by 4 rights – mainly s14 freedom of expression – everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form
- Purpose will determine the scope – is the limitation reasonable – two-step test from s5 from **R v Hansen (2007)**
- Freedom of expression is valuable because of:
- **Truth** – expression is a way of discovering the truth – it's important to have true beliefs as this is how we progress as society – process of arriving at what is said to

be true – we humans are often wrong – so if we want to know what is true we need to open to other people's views

- **Essential for self-government** – us as the governed need to be able to express our views – ensures government accountability through press – give feedback to the government – ensures transparency as the workings of government is exposed
- **Essential to human flourishing** – intrinsic worth from expression such as music and art – it is valuable to us – develop our personalities
- Expression – what constitutes is going to be very broad as the provision says – "any kind in any form"
- **AG v Philip John Smith (2018)** – has to convey a meaning to another – cannot be confined to actor's own ego – because he was trying to make himself less distinctive and so is not conveying a meaning – this is the antithesis of expression
- Conduct is also expression
- **Pointon v Police (2012)** – free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence, freedom only to speak inoffensively is not worth having
- In what circumstances should freedom of expression should be limited – ICCPR says – **3(a)** for respect of the rights and reputations of others – **3(b)** for the protection of national security or of public order, or of public health or morals
- Pre NZBORA – **Melser v Police (1967)** – appellant was found chained to the pillars of the outside Parliament – they refused to move – they said "we are going to be here until after the Vice President of the USA has arrived" – they were protesting involvement in Vietnam War
- **S3D Police Offences Act 1927** – Every person commits an offence... who in or within view of any public place... or within the hearing or any person therein, behaves in a riotous, offensive, threatening, insulting or disorderly manner, or uses any threatening, abusive or insulting words
- **Tomkins J** – Not only must the behaviour offend but cause annoyance to others who are present
- **Turner J** – Tend to annoy or insult such persons as are faced with it — and sufficiently deeply or seriously to warrant the interference of the criminal law
- **McCarthy J** – Is likely to cause a disturbance or annoy others considerably
- Does the right exist – **Turner/McCarthy JJ** – inherent right to protest – this is about individual freedoms
- Limitations on the right – onus is on the defendant to change their conduct – may not have been annoying had they done something else
- Having chained themselves on another day or chained themselves at another place would have been okay – argument to this is that it defeats their purpose as they wanted to be heard by the vice president of the USA
- The task of the law is to define the limitations which our society puts on freedoms – ministers have the right to freely enter their house (Parliament) and right to freely entertain their visitors without embarrassment by unseemly behaviour on part of the intruders
- The emphasis is really on interests of the politicians rather than the protesters – focus on protesters being able to express themselves in other ways – rather than the

state being able to address the concerns raised and interpret statute in a way that less undermines the right

- Post-NZBORA – **Brooker v Police (2007)** – had gone outside the police officers house – protesting with his guitar singing a song – he was convicted of disorderly behaviour – SC squashed his conviction the right of the right outweighed officer's interest in this case
- **S4(1)(a) of Summary Offences Act 1981** – every person is liable for a fine not exceeding $1,000 who within view of any public place, behaves in an offensive or disorderly manner
- All the judges reject the previous Melser decision – and they reject the focus on annoyance
- **Elias CJ** – Melser test was wrong – the court is applying it wrong – unsettling expression will often be annoying to those who do not agree with it – is insufficient to constitute disruption in public
- They replace the test with whether there is substantial or serious disruption of public order – the statute was to keep public order – so you need to show that they disrupt public order
- They raise the standard of disruption according to s5 so that this does not put an unjustified limit on the right
- The importance to society of freedom of expression is very high
- The Melser test would breach s6 – because it is more restrictive than necessary
- S14 is relevant when they are interpreting the words disorderly and offensive – and when they are applying it to Brooker's circumstances
- The minority placed interests on the police officer's privacy

Lecture 43 – Introduction to Discrimination

- Tension between social policies and discrimination – many policies try to benefit people through this discrimination only, so they are able to benefit the right people
- Tension between judicial and legislative function – BORA invites the courts – but does that invite them to perform a legislative function
- Is the tension between right to be free from discrimination and right to expression – insulting comments can marginalize people on the grounds of discrimination – so, there is tension between two things which are valuable in society
- **Human Rights Act (HRA) (1977)** – the provision of goods and services – housing, employment and education – applied to both public and private actors that provided goods and services
- Created its own tribunal to hear complaints and take inquiries – has a commissioner that can take inquiries – and director of proceedings can take a case for you – the grounds of discrimination were limited to race, ethnicity and marital status
- **BORA 1990 – s19** – everyone has the right to freedom from discrimination on the grounds of discrimination in the HRA.
- **Human Right Act (1993)** – **s21** – broaden the basis on which discrimination occurs – sex, marital status, religious belief, ethical belief, colour, race, ethnic origin, disability, age, employment status, political opinion, family status, sexual orientation
- S21 applies to both private and public actors

- HOR creates its own stand-alone complaint procedure, you go to the HR tribunal – sits parallel to the BORA where if the government breaches your rights you go to HC – they both have the same grounds of discrimination
- Range of government departments were worried about as to how this may cause them to constantly breach discrimination – such as social policies
- Any discrimination on the basis of s21 would be a breach to the HRA unless they can provide a reasonable reason
- Government departments are allowed to discriminate as this allows them to provide benefits to the right people
- Part 1A of the HRA – complaints about government discrimination can either go to the HC or go to the tribunal
- And if you are complaining about a government department discriminating against you – if the director believes your case has merit – they will allow the director to bring the claim against the government – funded by the government
- The HR tribunal can provide up to $330,000 in compensation – same as a DC – but this only applies to private sectors – government departments the remedy is limited by s92J
- You need a majority from the tribunal to gain a declaration that you have been discriminated against – has no ability to change the law or invalidate it – requires a minister to report it to Parliament – can trigger a political dialogue about whether the discrimination was reasonable – but there is no remedy
- **Quilter v AG (1998)** – claim under the NZBORA on appeal at the CA from the HC – what does marriage mean
- 3 lesbian couples in a stable relationship – they applied for a marriage license – they were denied – the opinion of homosexual couples in the 1990s was very negative
- **Marriage Act 1955** – marriage is not defined – 1955 when Parliament was legislation everyone in parliament knew what marriage was – formalized relationship between a man and woman
- No country had recognized same-sex marriage – Netherlands recognized it in 2001
- **Gault J** – something more than differentiation – when we differentiate in a wrong or unfair way that amounts as discrimination
- This case is about discrimination according to sex – it is not discrimination as regardless of your sex you cannot marry someone of the same sex – everyone is treated the same – if you are a man you cannot marry a man – if you're a woman you cannot marry a woman
- No one is treated differently on the basis of their sex
- The court does not need to worry about **s5** and **s6** – since the court has shown there is no grounds for discrimination – when a registrar decides not to let same-sex couples marry
- **Keith J** – we need to approach discrimination in a pragmatic way – you require visas for foreign nationals – we limit how young you can be when you drive – not all differential treatment amounts to discrimination – we need to be more functional
- **S19** does not reach the matter of same sex marriages – s19 does not lead to a more right consistent interpretation of marriage under the **Marriage Act 1955**
- If you the court was to permit same-sex marriage – this would affect other laws – it should not be approached by courts but rather Parliament

- **Tipping J (Richardson J)** – we define the right broadly – better to start with a broad right – in doing so we should focus on the impact of laws rather than strict analysis – impact of the **Marriage Act 1955** is that homosexual couples cannot enjoy the legal benefits of marriage – the Act does discriminate against sexual-orientation
- The **Marriage Act 1955** sanctions this discrimination – he went hard on s4 of the NZBORA 1990 – even though it is discrimination it is what the Parliament had in mind at the time – they intended to discriminate against homosexual couple
- **Thomas J** – we shouldn't go directly to s4 – it is a cope out – it pre-concludes what is said in s5 and s6 – it precludes whether any other meaning of marriage could be attributed to the **Marriage Act 1955**
- Just because Parliament intended meaning does not stop them from giving a right consistent meaning
- There is discrimination here – you are denying the right to marry the person of your choice – Act discriminates on the basis of sexual orientation
- Changes to the law must come from Parliament – de-facto declaration of inconsistency
- This case can be seen as a **failure** – we expect courts to be arms-length from society – not to be caught up in political disagreement – they should not get caught up in marjorityism – the court adopted social views
- To be free from discrimination means – everyone is equal under the law – we all have equal legal status – we all should benefit from equal protection
- Laws that treat people differently simply on the basis of personal characteristics that bear no relation merit, capacity or need are inherently discriminatory
- **S21 (A-M)** – these are your personal characteristics that you should not be discriminated against
- Provided those characteristics bear no relation to merit, capacity or need – some people deserve additional legal rights or benefits
- Treating everyone will also be unfair – not thinking about these characteristics may lead to inequality
- Marriage is a legal relationship prescribed by the state – marriage infers certain legal rights and benefits by virtue of existence – the reasons for conferring these rights and benefits is because marriage is a civil institution, it is worthwhile, provides emotional independence, intimacy, trust, and financial help – that is the merit
- In defense of **Quilter v AG (1998)** – yes there is discrimination – but when we are talking about a social institution that we prescribe values to – then that is something that is developed by society – what are the aspects of it are up to society – it would be very brave of the CA to change the meaning of marriage at the time

Lecture 44 – Who is Better Fit to Defend Rights

- **Quilter v AG (1998)** – **Keith and Gault** held that the rights do not extend to concern issues of marriage – whether or not there was discrimination that went about differential treatment – **Tipping and Thomas** said that the discrimination required explanation
- **Tipping** held that the purpose of the Marriage Act 1955 to discriminate against same-sex couples
- **Thomas** argued that we should try to take a right-consistent meaning

- **All** – even if it was discriminatory and it could be justified under s5 – such reform should be left to Parliament – changing the definition would affect a range of laws
- **Ghaidan v Goldin-Mendoza (2004)** – the job of the courts is not confined to define ambiguity – courts can expand the definition to give effect to right – they can change the intended meaning to be more right consistent – the **Rent Act 1977** was a stand-alone legislation – by giving a broad meaning only affects that Act – unlike reinterpreting marriage – difference here is statutory context
- **AMM and KJO (2010)** – can spouses can be read to apply to de-facto couples in the opposite sex in this case – could court give a wider meaning to what spouses is or should it be left to Parliament – they all agreed that the plain meaning is discriminatory that cannot be justified
- Was another meaning reasonable – whether or not that broad meaning was consistent with the Act while also being right consistent – this is a discrete area
- If we interpret spouse to mean de-facto couples this also allows same-sex couples to adopt as well
- They are just removing one barrier to adoption, this is still very discrete area of law – Parliament had the opportunity to change the Adoption Act 1955, but they didn't and so should the courts step in
- These cases identify how far courts can go to legislate/change the law under s19 of the BORA 1990 – give alternative meanings from what Parliament intended when they enacted the legislation and what the words say – hands more power to the courts – these cases show how much power is being given to courts
- Members of our community are committed to rights – yet we encounter disagreement what they ought to require – Parliament has to take a side on all of the issues on rights – whether or not the courts are there to supervise these decisions
- **Process related reason** – either courts or parliament should be making these decisions based on the process of the decision maker – which method is better
- **Outcome related reasons** – who are more likely to arrive at the appropriate result when there is an agreement

Outcome related reasons:

- Legislature can only formulate general policies – they do not know how they apply to individual separately – they do not know how their policies will impact people
- Courts have context of specific cases – they have better moral insight – courts are there to hear the cases and hear their story – courts are there to see the context specific – and protect individuals from the general law
- Courts only ever see the individual litigant – they do not see the full set of rights and interests in policies that Parliament is concerned with
- Legislatures to asses' individual cases in relation to other cases
- Where there is a discrete area of law courts feel more able to intervene – courts approach it with only the text and purpose – focus on the abstract rights – courts are focused on the text not the substance of the disagreement – legal text provides a base on which we can resolve these problems
- Some argue that just the words and purpose of the Acts do not give a clear lens from which to view rights – often the document fits poorly with our debates

- Courts engage in reasoning – and they have an obligation to give a reason for their decision – their outcomes are at least reason based ones – they need a clear and explicit reasoning process
- There is no obligation for Parliament to give reasons – they are pandering to a political base – so the quality of reasoning is worse
- When courts give reasons, their reasons are legal reasons – they are comparing past legal texts that is authoritative material – they get hung up on particular words and Acts – they are not as focused on rights disagreement

Process related reasons:

- Parliament legislates and you're in a minority – why did this set of 120 persons get to decide this question when this affect 4 million – or why those 7 people in the SC – Parliament can say there were fair elections where everyone could give their opinion – and everyone's view counted equally
- Eventhough you were in the minority when that decision is made – the 120 people get to decide because everyone had an equal vote
- The answer that the courts can give – they protect rights because we don't want majoritarian process and how Parliament may abuse that majority
- How are the courts going to decide these issues – they do so on a majoritarian basis – giving much smaller set of people to decide
- The minority had no way of influencing the court – only the litigants had their reasoning heard
- Why does the judiciary have the right to make decisions – because they protect the minority – they so on majoritarian basis
- Why did the courts not give more weight to your weighting – well because you had nothing to do with that process unless you're the litigant
- In defense of the court supremacy – in the case that you are always in the minority and you are always losing – you will have no recourse – so you will need some way out – and this is where the courts come in

Lecture 45 – Discrimination by Government Departments

- Discrimination is differentiating people on the basis of s21(A-M) without any capacity, need or merit
- Governments target their goods and services by differentiating – they have the capacity and need to do this as they need to allocate their resources to those who need it most
- There is tension when governments make these decisions what is the role of courts of supervising these decisions
- **Ministry of Health v Atkinson (2012)** – parents caring for their disabled adult children – it is the parents who take care of their day to day wealth
- There was a change in the Ministry of Health policy where those parents cannot gain anymore benefits
- Does this policy discriminate on the basis of someone's family status?
- They went to the review tribunal – director agreed to take the case – they agreed that this policy did discriminate, and they made a declaration – they couldn't get any other remedy due to s92J

- They sought a remedy under the courts under s19 NZBORA – reason you are not paying me is because of my parenthood status regards to my child – you are discriminating against me based on my family status – discriminates against the parent and the child
- **Test for discrimination** – whether there is differential treatment of effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground...whether that treatment has a discriminatory impact.
- Whether there is differential treatment and does that have some impact on other people who would be discriminated in the same way
- Who do you compare the parent to in this case?
- **Atkinson** argued the correct comparison is a paid carer – not every parent is willing to provide care for their disabled child – and so the ministry will pay someone to care for the taking care of the child – there is differential treatment as you pay the carer and not the parent
- The child is discriminated as their carer (parent) is not accommodated financially and so is not able to have the full benefits that a paid carer would be able to provide
- There is argument that the parent knows the child better and is able to provide better care – the paid carer is new and so will be less knowledged with the child – and the child may not be accustomed to them
- The discriminatory impact is the paid carer is paid and the parents are unpaid
- The ministry argues that the comparative is parents who are willing to provide the usual needs of a child that any other parent would provide whether disabled or not under the age of 18
- The ministry will fill the need of taking care of disabled children by giving a paid carer – as they have limited financial resources – they target those with the greatest need – and they can't provide day to day care and so the ministry will provide a paid carer
- **CA** held parent who are willing and able to provide care are compared with someone who is paid to provide care – they agreed with Atkinson and said this is the right comparative and there is discrimination here
- The adult children are also discriminated against – what is the difference to the child of having your parent rather than a paid carer – the child is denied the access to care that all other disabled persons can access
- This can be said to be not true – as the disable child can access to paid carer but the parent is choosing to provide care as they would be more thorough and lengthy care – it is hard to find what the discrimination against the child
- S19 was breached as there is discrimination on the basis of family status – they say that these two situations are most alike, but you are differentiating these people to their detriment
- **S5 test** – Ministry says even if you find discrimination – we are discriminating for good reason and lawfully – make most of the limited financial budget – target those who need it the most – we don't find that parents who are willing and able to provide care do not need those benefits
- CA disagreed – **France J** – there is no support for the suggestion that there is a social contract for adult disable children for the remainder of their life – the existence of such contract is inconsistent with Ministry's policy
- There is no expectancy that parents will provide care for their disabled adult children

- This is inconsistent with Ministry policy as they do provide paid care – paid care for those who are unwilling and/or unable to provide care is gap filling – it is where that social contract cannot be fulfilled
- There is discrimination under the NZBORA that cannot be justified under s5 – and there is a clear rights infringement
- The parent who takes care of the child is also under some financial burden as they have to leave their job to focus on the child
- Government passed under urgency – **NZ Health and Disability Act 2000** – Part 4A – manages the risk of too many litigations leading to high payouts – enacted s70C
- s70C – payments to family members cannot be given unless it is permitted by a family care policy or expressly authorized – as a general rule family member who care will not get paid
- It is seeking the protection of s4 of the NZBORA – Parliament says this is their call not the courts – enables the Ministry to differentiate from any part of s21 – saying that they want to identify those people who need it the most – and courts can't interfere
- Courts only view in isolation – they cannot make polycentric decisions – there is opportunity cost that could be used for other projects
- **S70E** – stops people from bringing discrimination claims to the courts and tribunal – it exempts the ministry from discrimination on the basis of s19 (1)
- **S7 Attorney General Report** – **[18]** New s70E appears to limit the right to judicial review because it would prevent a person from challenging the lawfulness of a decision on the basis that it was inconsistent with s19 (1) of the Bill of Rights Act
- **[19]** on the balance this cannot be justified under s5 of the NZBORA
- The law was still enacted – tries to create a dialogue – have the courts telling the executive they are discriminatory – executive goes to Parliament to reverse it – and they enact part 4A – and they are doing so in a way which is inconsistent with rights
- Parliament says they do not care and enacts it anyway
- They are changing the policies starting 2020 – they are going to repeal part 4A – they are going to provide funding for those who have high needs – for those family members who care – they are going also going to provide support for those who care for people under the age of 18 who have high and very high needs
- Arguably this would not have happened had the courts not stepped in

Lecture 46 – Relationship between s14 and s19 of the NZBORA

- What is the relationship between free speech and discrimination – relationship between s14 and s19
- S14 – how do we work out the limits to this freedom – starting point is that people should be free to express themselves – because the limit, limits their autonomy – only time we can limit it, is where the exercise of it will cause harm to someone else
- You need to show a harm that is caused, and that harm needs to be greater than the harm of limiting free speech
- You cannot express yourself if it defames someone – difficulty is that the idea of harm is vague – being offended/insulted is a feeling not a harm
- **Wall v Fairfax NZ Ltd (2018)** – should these cartoons be prohibited under the HR Act
- Government extended free breakfast from 3 days to 5 days – in decile 1-5 schools
- Cartoons published depicted Maori/PI whose children are benefitting – and is depicted as being more concerned with their ability to access tobacco/alcohol –

rather than providing breakfast for their kids – that they are somehow opportunistically benefitting from this program

- Wall went through the HR tribunal – and was unsuccessful and she appealed – she said they misinterpreted **s61** of **HR Act 1993** – you can appeal to the HC if you believe the tribunal misinterpreted a section
- The newspaper will not be caught by **s3** of **NZBORA** – as they are not performing a government function and nor is it a public entity
- We cannot rely on s19 as they are not applying the cartoons in a manner that is discriminatory – it is just referring to a government enactment
- **S61** is in conflict with **s14** – **s61 Racial disharmony HR Act 1993**
  - (1) It shall be unlawful for any person:
  - (a) to publish or distribute written matter which is **threatening, abusive, or insulting**, or to broadcast by means of radio or television or other electronic communication words which are threatening, abusive, or insulting
  - being matter or words likely to **excite hostility against or bring into contempt** any group of persons in or who may be coming to New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons
- In the back drop is the right to free expression – **s61** identifies times your free speech is limited
- It needs to be threatening, abusive or insulting – it is likely to excite hostility or bring into contempt – against people based on colour, race or ethnic or national origin
- **Hostility** is unfriendly conduct or behaviour
- **Contempt** is an opinion or view – view someone not worthy of consideration
- Are we considered with behaviour or an attitude?
- **Tribunal** – when interpreting s61 for a publication to be unlawful it needs to be threatening, abusive or insulting in an objective sense and it needs to be objectively likely to excite hostility or bring into contempt
- What would a reasonable within that group would consider threatening, abusive or insulting
- The characters in the cartoon could be readily be identified as Maori/PI
- The cartoons were objectively insulting – as the parents are interested more in smokes/alcohol/gambling than the upkeep of their children
- The behaviour targeted by **s61** was at a serious end of the continuum of meanings – to limit free speech, **s61** has to pick out quite a serious harm – this is what the appeal is about – doesn't need to cause a riot but needs to be extreme
- By a substantial margin the cartoons were not likely bringing Maori/PI into contempt or to excite hostility against them
- The cartoons are protected by **s14** and are not prohibited by **s61** was the Tribunal's decision
- **HC** – it is not one person's right against another person's nor is it against the government – the appellant does not have a right as she can't rely on the NZBORA – and she cannot rely on free from discrimination because the paper does not discriminate against her
- Rather what we have is the racially offensive expression being communicated by the newspaper which is a private company – it is bound by **HR Act 1993**
- The appellants case is most powerful under **s61** – when interpreting **s61** the court has to give effect to free expression to the respondent

- Rights of the company against the government's interest in protecting against discriminating speech
- **The 1st Threshold is behaviour vs attitudes** – what does it mean to excite hostility or have contempt
- Does the cartoon cause a behaviour or attitude – is it enough that it views Maori parents as unworthy of government benefits – or does it require that the cartoon treats Maori parents with hostility
- You can succeed under s61 if it shows that it causes someone to adopt a particular attitude – however, under s14 you should be able to influence attitudes
- To view a racial group disfavourably but without acting on it is a sufficient limit on someone's free speech – s61 is not clear – the HC does not clarify this they use both behaviour and attitude
- The Tribunal was clearly concerned with exciting behaviour/conduct that was threatening – causing someone to treat a group with disrespect
- **2nd Threshold is likelihood** – you don't need to show causation – you need to show probability – you don't need to show that anyone was bought into contempt by the cartoons – you need to show that there is a probability that someone will be contempt
- It's not on the applicant to show causation – it's on the them to show probability – there is no direct evidence in the tribunal that there is someone who were hostile
- There are difficulties in applicant establishing a cause or link between the publisher and particular conduct/attitude
- HC did consider that poor representation of Maori and racial stereotyping could on a particular set of facts affect the likelihood of hostility being excited
- They decide not on these facts do they believe that the publication invites hostility or bring into contempt – it is not within the interest of society to stop publishing that might offend or insult – they say the Tribunal set the bar possibly too high
- **The Space Issue** – these cartoons were published in a particular space – where there is free exchange of ideas – that is the purpose of the newspapers – cartoons for the rich part enjoy a license to exaggerate public figures and policies
- Cartoons are always insulting – they are to make fun of – as part of that we have made exaggerated criticism of public figures
- The targets of the cartoons are not public figures – it is concerned with policy, but it is targeting parents in low-decile schools – that is punching down
- This is a space where issues can be raised – and we should keep it as broad as possible so that people can express their views – even if they are insulting
- That problem can be mitigated by responding to the cartoon – you don't limit it by prohibiting people from making the cartoons
- If we say s61 applies to free expression, then you are limiting someone's right to express their views in a space where issues are raised – the purpose of it was to criticize a government policy

Lecture 47 – Discrimination in Different Spaces

- When is someone's freedom of speech harmful enough to outweigh the benefits of expression – whether hateful speech can be harmful itself or does conduct matter – degree of how we treat hate speech is different with the context and space?

- **R v Keegstra (1990)** – defendant was a schoolteacher and he made remarks about the Jewish community – saying that the holocaust was a conspiracy fabricated by Jewish people – and marked down students who tried to tell him she was wrong
- He was charged under **s319(2)** of the Criminal Code of Canada of Willful Promotion of Hatred
- **S319(2)** – anyone willfully communicating statements other than in private conversation willfully promotes hatred against any identifiable group is guilty of [an offence]
- Keegstra said that this impeached his right under **s2(b)** of the Canadian Charter of Rights and Freedoms
- **S2(b)** – freedom of thought, belief, expression, opinion – including freedom to press and communication
- CA overturned the conviction – they found that **s319** infringed his right under **s2(b)** – **s319** is there was to prevent harm to groups – this was however unconstitutional because the injury from his hateful speech was not serious to convict him
- In order for **s319** to be constitutional more than reputational harm is required – you need to show something at the very serious end
- SC asked whether this teaching was able to gain protection under **s2(b)** – they said if government is going to restrict free speech, they cannot do it on its content but something else
- 2nd question is whether the limit is a justified one – there was no real harm at stake – hate propaganda is harmful in two ways – harm to the members in the group as they may be humiliated or degraded
- There is a societal harm – as it affects the way society views – even if society does not agree the statement can still be corrosive
- We usually associate harm to the damage to reputation – or the behavioral harm – as to the behaviour it may cause
- This can mean that group may distant themselves from society or say they are not a part of such a group
- 3rd question is if there is a right to free expression and a limit is justified – is the limitation proportional – applying this test
- They found that values are connected to what is said in s2(b) – teaching a class in an anti-Jewish way qualifies as freedom of expression – they say that this teaching has low value which we don't associate with free speech
- The SC is lowering the value that comes out from hate speech and attribute certain harms – it is an infringement of the freedom of speech but a justifiable and proportional infringement
- Therefore, hold up the validity of the criminal code as it applies to the defendant
- 1st accept that there is a presumption of free speech – and accept that teaching is the exercise of free expression
- 2nd we can only limit hate speech by recognizing the harm it may cause
- 3rd figure out how valuable is hate speech to society and the group targeted – as it does not add much value to society it only has marginal value – and allows the SC to say that its value is not high enough to avoid **s319**
- What are the differences between **Wall v Fairfax** and **R v Keegstra**?

- Keegstra is a decision of a criminal code – it is concerned with a crime – none of that is in NZ – we have s61 of HR Act – this is not a part of the criminal code – Keegstra has a primary area of law – and NZ has this secondary area
- There are different tests compared to Canada – willfully promoting hate speech which is different from exciting hostility – willfully insulting is much worse than saying things that are hateful or threatening
- In the Canadian code – there is no threshold that needs to be met as to excite hostility or holding in contempt – CA did want to add on your promotion of hate speech caused people to act hatefully against the targeted group
- The space is very different in both cases – one is a classroom – and the other is an open discussion newspaper
- The cartoons suggested that Maori were more concerned with smokes than their children – while in Keegstra it was a direct attack on the Jewish community
- We can see from the Canadian SC that causing people to adopt a certain attitude towards a group can be seen as harm and harmful to society – such as that group distancing themselves from society – which may be harmful enough to limit free speech
- Insulting language maybe harmful to society at large – everyone may accept the ideas – and lead to hate – and can lead to the group to deny their heritage
- If Keegstra was to be applied under s61 we can see that it would have excited hostility as you are telling children, the Holocaust was a conspiracy – this does satisfy the likelihood test
- This is a high school teacher who is using his ability to teach to say untrue things and target directly a group in society
- In Wall is a cartoon that was judging the government policy – and the purpose of the newspaper was to have an open discussion and given the opportunity to respond
- What is tolerable is different depending on the space

Lecture 48 – Introduction to Administrative Law – Judicial Review

- How government decision makers are held accountable – what happens if the decision is wrong – what if the procedure if weak – what standards do we use – what are the accountability processes and pathways available to you – how effective are the pathways
- Law is influenced by the surrounding circumstances
- Judicial review – courts do it – about the decisions of the executive – when you are unhappy with a government decision you can go to HC to review that decision – the type of review it will undertake is of a very limited kind – it's hard to win
- The court is aware that it is the government's job to make decisions – you need to make very specific legal points in order for it to be successful
- The courts ask – is the decision the right decision – could the court reviewing a decision make a better one **(This is not what it is for)** – they are not concerned with the substance of the decision
- It is not an appeal – appeal means that courts can overturn that decision
- Review is focused on the process
  - Does the decision maker have authority to make this decision?
  - What lawful basis is there?
  - Has the decision maker communicated with other people well?

- Have those impacts been treated seriously by the decision maker?
- Have they got the correct considerations? – often statutes will list factors that are to be considered – courts may say that additional considerations need to be taken into account – or whether the decision maker takes into consideration irrelevant evidence
- Has the decision been made in the right kind of way?

- The review assesses:
  - **Fairness** – have they consulted the parties involved – is the decision maker biased – is the decision a reasonable one – has the decision been made in accordance with the law – what does the legal context require – it is also about the broader political context – principle matters more than precedent
  - **Reasonableness**
  - **Lawfulness** – process and legality
- Reasonableness is tricky – as this assess the substance of the decision – the threshold is quite high
- **Institutional capacity** of the courts – courts are good at making legal decisions between two parties
- Is it useful to use that for government decision maker – it makes decisions that affects a lot of people – multiple interests in play that make government decision making complex – doesn't fit well with how courts function
- Governments need to consider wide range of factors – including tax-payers – doesn't make sense for courts to make those decisions who are insulated from political matters – courts can't do their own research to find the best policy answers
- **Democratic legitimacy** – the courts doesn't have as much legitimacy as the government – the government is thinking of the electorate generally
- There is a political answer which is done by democratic processes – not for courts to say this the right answer – it is a matter for the government
- Judges are independent from politics – and don't have the same accountability
- If you do not like a decision do you have political remedies available to you as well as legal ones – in general if you have political remedies available, the courts are going to be reluctant to provide you with a legal remedy
- The rule of the courts is to support political accountability methods – make sure governments act in a lawful manner – government can't ignore legal requirements
- Can you appeal to a minister, can you gain additional information, can you complain to another authority – you should exhaust those options first
- Scope of review – when is review available – there are three criteria's that need to be met:
  - Has there been a **decision** – what is the decision you are reviewing?
  - The court must have **jurisdiction** – legal reasons why you may not review a decision – the statute may say that
  - **Justiciability** – political assessment – is this an issue that courts don't want to get dragged into – other accountability mechanism – political/policy issue instead of a legal issue
- Grounds of review
  - **Fairness** – have affected parties been consulted – has that decision been meaningful – has the decision maker seek advice

    - **Applying the law** – what does the statute require of the decision maker – does the common law imply any requirements – have the relevant considerations been take – has someone else made the decision for the decision maker
    - **Substantive matters** – only intervene if the decision is extremely flawed
- **Unreasonableness standard** – no reasonable authority could have reached that decision
- **Investigate proportionality** – will insist that the right being interfered that the right is breached in the smallest way possible
- **Relief** – if you are successful then the decision maker will make that decision again – taking into account the courts discussion – any relief is discretionary by the courts even if you make a successful claim

Lecture 49 – The Right to be Heard

- It helps to understand the views of all the parties – you may have evidence and opinion to help change the decision-makers mind – what if the decision maker doesn't know how a decision may affect you – this principle is the right to be heard
- What does it involve – when does it apply – what is required to disapprove the decision
- **Ridge v Baldwin (1964)** – the plaintiff was the constable – charged with conspiring to overthrow the authority – he was suspended – but not dismissed
- Plaintiff was found innocent in the trial – Trial Judge gave a very dim of Ridge – the watch committee met to consider if any action should be taken against Ridge as to his employment – it is an administrative body – they dismissed Ridge from employment – this is what is under review
- **S191(4) Municipal Corporation Act 1882** – the committee may dismiss constable at any time who they think has been negligent
- The word "may" give discretion to the committee – you can do it at any time – anyone you like – the standard you need to meet is that they have been negligent – this is very subjective opinion – this is a very broad discretion
- The committee agreed that Ridge was negligent with his duties – Ridge did not like this – this meant that he lost the right to his pension – he would have retained the pension if he was demanded the resign
- He did not challenge the decision – it implied that the committee must act in accordance to natural justice – both sides be heard before a decision is made – Ridge did not get an opportunity to give a defense – so the decision was unlawful
- Right to be heard is very well established but it has mainly applied in the judicial context – that's where natural justice comes from
- Extending the idea of natural justice to an administrative body who is making a decision – the committee argued that this principle does not apply
- There was only one decision that a reasonable body could make was dismissal and anything he would have said would not have changed their minds – there is no statutory obligation to hear from Ridge in this case
- HL rejected both arguments from the committee – the power of dismissal cannot be exercised until they have given him an opportunity to present his case in defense
- You need to set out the proposed decision (you don't need to give the reasoning in full) and provide a reasonable opportunity to respond

- Impact on the individual and rigour of process – these are two very important contextual factors
- Ridge was the subject of the decision – he was directly affected – his future lively hood was put into danger – as it was about his pension rights – impact is quite high
- Rigour of process – broad discretion – there is not a very prescribed process – should not be surprised if courts add implied terms – to make it more robust – putting procedural steps are very important as the statute does not provide much – which was giving him an opportunity to be heard
- This case brings the principle of natural justice from the judicial context to the administrative context – when the statute is silent on the matter
- If a minister makes a decision affect many people – there is no right to be heard – there are ways for the minister to be notified of the negatives
- The right to be heard is contextual – does not apply the same in every decision – look for material differences – if there is a right to be heard what factors discharge that right
- Focus on the wider public law matters – what if it is not the individual only that is affected by the decision – which elements of Ridge are relevant
- **Daganayasi v Ministry of Immigration (1980)** – Fijian citizen living in NZ on a temporary basis – she overstayed – she applied for PR on the grounds that her son had a disease that required medical attention and diet that was available in NZ and not in Fiji
- Such as constant medical attention and a high protein diet which would be hard to obtain had he had to go back to Fiji
- Application was rejected by the defendant and she was charged with remaining in NZ – she was to be deported back
- **S20(2)** – Minister may make such an order, in prescribed form, if he is satisfied that, because of exceptional circumstances of a humanitarian nature, it would be unduly harsh to deport the offender from NZ
- Minister declined to exercise his discretion – in his letter he had gone through to gain medical advice – report provided was not favourable to the plaintiff – she sought review
- The specialist clinic had not been fully consulted who were treating the son everyday – this can be framed as not presenting all of the reports that are considered by the minister in the decision
- This decision was invalid because of the procedural impropriety – the general contents of that report should have been disclosed to the appellant before any final decision was made – and she needs a reasonable opportunity to respond
- The right to be heard in this case creates additional obligations from what was in Ridge v Baldwin – it is not the notification of a decision but also the reasons
- You also need to provide access for the reason to the decision – how high is the impact here – health and well-being and maybe even life of the child – higher interest so they are requiring more
- The medical report is quite a technical thing – minister may not understand everything – this is a question about a rare and specific medical condition – there is information that doesn't directly relate to the minister's expertise
- You would want the report to be given to the appellant in order for her to defend herself against the report

- Giving the minister enough technical information in order to make a decision
- **Cooke J** says that the standards that need to meet vary from case to case – it depends on the impact – if the interest is higher there may be more standards put in place
- These cases do not show precedents but treat them as principles
- The court described the minister's decision as an appeal – moves it away from an administrative decision to a judicial one
- This was not a code governing the minister's power – there was not a rigid consideration that needed to be taken – the only standard was that the decision needs to be made in 14 days
- Other than that, it is up to the minister to determine which process is best
- It would be unsurprising for the courts to add additional considerations in order to make the process more rigid and fair
- Decision by minister affect the people generally – they do not affect a particular individual – there is an exception in these cases – as it has a profound impact on the mother and child
- This is a technical matter not a policy judgment matter – these are reasons why the court is inclined to go further than Ridge v Baldwin
- It is not the court's job to challenge the minister's decision they are just making the process fairer – but in this case it is very clear that the minister made the wrong decision based on a false medical report
- Ridge v Baldwin is what began the right to be heard – and Daganayasi is the extreme end of the right to be heard

Lecture 50 – Notify Parties/Considerations

- **Resource Management Act 1990** – resource consent decisions are notified to the public – the notification process adds a lot of costs and delays – these may not always be justified – there are then exceptions
- The decision was whether or not to notify
- **Discount Brands v Westfield (2005)** – exceptions to give notice are interpreted – plaintiff applied to the North Shore council to open a shopping center – it was out the designated area of the district plan
- They needed to notify unless – council needed to be satisfied that the impact on environment would minimal – and obtain approval of all the parties affected – unless it is unreasonable to do so – such as too many people
- The plaintiff pushed hard to apply this exception – the council staff that there was insufficient information and so they advised the application to be notified
- The council decided that the application did not need to be notified – they needed consent from a competitor – plaintiff was in a different market from other shopping centers
- The existing centers were premium brands – those brand name stores are in a different market compared to the plaintiff
- There was still an argument here that they didn't need to worry about the other shopping center – the defendant applied for judicial review to not notify them
- There was insufficient information as to the effects on the existing centers – council can only make an exception if they are satisfied, they have enough information

- **S93** – clearly states that the decision not to notify can only be made when the council has sufficient information to base the decision on
- **CA** – they took the view that it was not up to the courts to assess the adequacy of the information available to council – we are not going to intervene unless a high threshold is met – it is not up to the court to 2nd guess whether the council thinks it has enough information as it would intrude the substance of the decision
- **SC** – took a different view – a consequence of the decision is the shut out of the parties those who might have opposed the decision
- The purpose of the provision is to protect the interests of society by notifying them unless it is impractical
- If you are going to avoid notifying, then we are going to look at you quite closely as to why you did not do that
- The purpose is to protect the rights and interests of those affected and to enhance the quality of the decision making – you are compromising this purpose if you don't give a notification
- You would want technical evidence to help resolve the differences in market – not seeking expert views and going away from staff recommendation of getting expert view you are not fulfilling the purpose of the provision

Relevant and Irrelevant Considerations

- There a number of decisions the decision maker can make that is consistent with the statute – making the best decision under all circumstances
- A decision may be unlawful if the decision maker is affected by a consideration that they shouldn't have – and they miss a consideration that may affect the decision
- The decision maker may misunderstand the purpose of the provision
- They may only choose considerations that are in line with their preferred outcome
- **Fiordland Venison Ltd v Ministry of Agriculture and Fisheries (1978)** – established a meat-processing farm – in 1970 they needed a license and they obtained the license – 1975 needed a new license – due to export requirements to Germany – happened quickly – Germany allowed some meat to come in on a transitional basis
- Plaintiff was not one of those plants – they applied for a new license after it had brought the plant up to standards required
- The minister had the power to give license if he is satisfied that the issue of license would not have a significant detrimental effect on the economic operation of any game establishment or the stability of the game industry as a whole
- The minister did not give a license – and the Fiordland sought review
- There is no discretion to refuse the license – if criteria are met then you have to give the license – the minister did not give reasons for this decision – the letter by minister stated the minister only considered what was set out in the Act
- **CA** – did not put much wait on that assurance – if we don't have actual reasons then we can only refer from the records
- In making the decision the minister put weight on the level of competition that may take place – this would impact the revenue of the existing plants
- Court suggested that the concern about individual revenue is not the same thing as the stability of the game industry as a whole – merely to show that there may be some loss of profit is not at play here – that was an irrelevant consideration

- The statute doesn't want the whole industry to fall over – but if someone losses some of their profit and they still survive this is not something the minister needs to worry about – it is not for the minister to manage competition
- The decision was unlawful as the minister took an irrelevant consideration
- The court said the minister based on the facts available rejected the purpose of the statute because of the level of competition and profitability of existing firms – not those provided by the statute
- Usually the remedy after a successful review is that the decision is sent back to be made again
- The court simply ordered that the license to be granted – made the decision for the minister – this dispute had been going for years – the delay would be unfair on the defendant – and there was no other option about the decision would be
- This is a narrow power – the court can see what boxes needed to be ticked – there is no discretion to the minister to grant the license

Lecture 51 – Considerations – Continued

- Whether or not the statute gives the decision maker a wide or narrow discretion the courts can still intervene – when it is wide courts add implied terms in order to make the decision more robust – if it is narrow the court looks closely at whether you have complied with all the terms
- **Wahrlick v Bate (1990)** – the plaintiff was a single mother with 4 dependent children – she was unemployed – she was charged for item of clothing worth less than $100 – she had 4 previous convictions for theft
- She applied for legal aid under the **Offender's Legal Aid Act 1954** – that was refused by the DC – she reapplied – that request was also refused – no reasons were given for the refusals
- Subsequent report provided that the allegation for theft for a low value item was not enough to give legal aid to a person in court
- In making the decision he took into account 1) finite nature of legal funds available in criminal cases – 2) if she was found guilty, she would not get a serious punishment such as jail time
- There was no evidence that the DC judge knew about the 4 previous convictions
- The applicant sought judicial review on the account that the judge took account of irrelevant considerations – this was the finite nature of funds
- What does the statute say – **s2(1)** – if in its opinion it is desirable in the interests of justice to do so – **s2(2)** court shall have regard to – financial means of the person being charged – the gravity of the offence – any other circumstance that in the opinion of court are relevant
- There is nothing on the face of statute that the consideration was relevant – on the basis that if the applicant gets the legal aid someone else who might need it more will miss out
- **HC** took a different view – they said taking other considerations into account must be taken from the purpose of the statute as revealed by other factors that are mandatory considerations
- The context requires that this discretion is only of the most residual kind – it is difficult withholding legal aid despite it is in the interest of justice to do so

- The assessment must be tenable and reasonable informed – desirable does not mean essential – justice can still be served without legal aid
- The basic requirement is **s2(1)** – any discretion needs to be constrained by that empowering provision – any other circumstance must be in the interest of justice for it to be a relevant consideration – not any public interest test
- The only way that the DC judge could have considered the finite resources – does it come in the framework of justice
- There are two interpretations of this statute
  - General administration of justice – certainly include financial considerations
  - Justice in this particular case – excludes more general considerations such as the finite resources
- The HC prefers the 2nd option – the broader issues seem to be dealt with other factors that are in play here – it is not traditional role of the court to worry about state finances – that is a matter for government
- In 1954 when the statute was passed NZ was in a boom – concern for resources were not an important matter – in 1990s NZ was in a different state
- The statute does not engage that the judge should take into account of state finances
- The decision was sent back to be made again by the DC judge
- This is a review of a judicial decision – determining the relevant factors is a matter of interpretation – you need to read the statute in the full context

Mandatory and Permissible Considerations

- Empowering statutes may set out a list of considerations – however some of the considerations may just be permissible – others are mandatory
- This all depends on the wording of the statute – if it uses "may" then it is discretionary – if it uses "must" or "shall" are mandatory considerations
- Others may be applied by common law – if the statute affects Maori rights, then taking into account the ToW maybe mandatory even if the statute is silent
- Also, if it affects the international law – then they may need to take into account NZ's international obligations
- The weight given to the consideration is a factor for the decision maker – as long as they can say they did consider it and prove it
- Failure to take into account mandatory consideration will usually lead to illegality
- **Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986)** – **Aboriginal Land Rights 1976** – that statute provides for the Aboriginal land commissioner on application on behalf of traditional Aboriginal land people claiming traditional land to ascertain whether the applicants are the traditional owner of the land
- If they are traditional owners, they can make a recommendation granting the land to them as part of the recommendation to the minister
- Where the commissioner has made a report under s50(1)(a) recommending a grant for land and trust for the benefit of Aboriginal people and the minister is satisfied the grant should be made then the minister must recommend that the land is granted to the land trust
- In the commissioner's report they must comment on the detriment that may be caused if the land claim was granted

- Application was made for the Alligator Rivers – after an inquiry the commissioner recommended that land be granted to a trust
- This land included an area full of a lot uranium – and all of the uranium was in this part of the land
- The respondent had applied for mining leases from the government to dig up the uranium – granting the land to the aboriginals would have frustrated the economic use of the land from mining leases
- The minister's report had understated the detriment to the respondents of the grant being made – the minister did grant the land as recommended
- Following the commissioner's report, the respondents made submissions to the ministers making it clear that the value of the land claim would be detrimental to the economy and the respondents
- Minister granted the land – made his decision without the subsequent submissions – was he allowed to do that
- The courts said that these are mandatory considerations – you need to take into account the commissioner's report and comments made about the report – even though there is no mention of taking into account other people's views – the court reads more terms
- The statute requires you to take into account the detriment – based on the commissioner's report you cannot do that – to make sure you understand the detriment you need to take into account these additional submissions – no sensible decision maker would ignore those submissions
- The decision maker is bound to take into consideration anything that is mandatory – not all considerations will meet this test
- You read the statute carefully to understand what is mandatory – if it is unclear you need to figure the answer by implication – what is the subject matter – what is the scope – and what is the purpose
- Purpose here is to take into account any detriments that occur – taking into account submissions that are given after the report are necessary
- Failure to take into account mandatory considerations may be set aside – if the consideration is not very important to the substance of the decision then the court will let the decision stand
- The weight of the considerations is not up to the courts to determine – as long as you take them all into account
- There is still an unreasonable threshold – you cannot give an unreasonable amount of weight on a consideration
- Just because someone said I took these into account – that is not going to be enough – you need to demonstrate in your reason that you have taken this into account – and describe why you put that much weight on it

Lecture 52 – Considerations – Continued 2

- **Tavita v Minister of Immigration (1994)** – Mr Tavita citizen of Samoa – granted a visitor permit – became an overstayer in March 1989 – after a removal warrant was issued on 12th March 1990 – he appealed to the minister under the **Immigration Act 1987** under **s63** seeking cancellation on humanitarian ground
- The minister declined that appeal in April 1991

- His daughter was born in 29th June 1991 and 7th July married the mother of the daughter
- September 1993 the immigration took acts to execute the warrant because of the changes of the way law was operating under the **Immigration Amendment Act 1991**
- Mrs. Tavita was the primary income earner and Mr Tavita was the primary caretaker of the daughter
- Mr Tavita did not have support in Samoa and no means of supporting himself – if he was deported, he would lose all contact with his daughter – according to evidence given by his brother
- After the 5-year return he would become a stranger to his daughter – there was no prospect of having a good relationship with his daughter
- Expert Medical evidence given – not having her father would be detrimental to her emotional well-being and development – because of the absence of the father-daughter relationship
- Judicial review proceedings were brought – seeking the minister to reconsider his decision
- Reliance placed on international law – **ICCPR 1966** – **Convention on the Rights to a Child 1979** – these are things NZ has agreed to but not features of NZ domestic law
- Decision was made before the child and marriage – so when the minister made the decision, he did not need to consider the covenant and convention
- **ICCPR 1966** – Family is entitled to protection by society and State
- **Covenant** – State parties shall ensure that a child shall not be separated from their parents against their will, except when judicial review it is necessary for the best interests of the child
- The international law is stated very expressly and seriously that separation should only occur in extreme circumstances
- Presumption here is that separation won't occur unless there is a good reason for it – at no stage did the minister take into account the covenant or the convention – they said they thought they were not relevant
- They were no obliged to take these considerations because of the statutory framework – and they could ignore an international law – NZ had ratified the covenant and convention – but was not in the domestic law
- **CA** puts significant weight on these international law obligations – because of the context there needs to be some consideration between keeping a family together and deportation
- Starting point in international cases is the best interest of the child – the best interest is not to separate the applicant from his daughter – the minister did not consider the best interests of the child
- The Crown accepted that if they had adopted this argument this would have led to a different result
- **CA** said that the daughter was not responsible for her father being an overstayer – her future is definitely a significant consideration
- The interests are high – interest of a child to have a full life – and interest of keeping a family together
- At the time of the original application the daughter had not been born and not married – the minister just needs to reconsider his decision in light of those changed circumstances – successful judicial review

- Government officials being allowed to ignore international law is unattractive – it implied that NZ was just window-dressing and did not intend to give effect to them
- The interests here are quite high – the interest of the well-being of the child and interests of family – these are fundamental – there may be some international law that is so significant that it cannot be ignored
- **Puli'uvea v Removal Review Authority (1996)** – Mr and Mrs. were Tongan citizens they came to NZ from Samoa – they came to NZ in 1987 but remained as overstayers – they had four children during their stay
- They sought temporary visas, but they all failed – warrant was issued to remove them in May 1992
- They sought appeal against the warrants – but they were declined – Mr was removed in February 1995 – Mrs. applied for judicial review
- The authority had not considered the harm to the NZ born children
  - Exceptional humanitarian did not apply as the separation would not cause psychological harm
  - International law considerations – the authority failed to take account of international law covenant and convention
- The court found that the decision maker did not fully need to consider the international law in detail – just the substance would be enough
- When referring to the considerations the CA found that they had considered these considerations when the decision was made
- Under **Article 3 of the Convention** – the best interest is primary consideration but not paramount
- When we are in the immigration context, we are concerned with the overstayer – in the previous case when the decision was challenged there were serious disruption to family life
- In this case there was no question of children actually being separated from their parents – they can go back to Tonga with their parents – and the NZ government would pay for their tickets – there was no barrier to cause separations
- The officials are very aware with the **Tavita** requirements – these were both decided around the same time – the interest of the child and family were both taken into account when framing this argument
- They have integrated the new obligations stated by the CA into their decision-making considerations
- It is not the court's job to take the assessment of the reasonableness of the decision – as to what is more important between child's well-being and overstaying
- The court is more concerned with whether all the considerations have been taken by the decision maker properly
- The factual context matters – just because separation is involved does not mean that the child's interests are paramount – if separation is a real problem then more interest is placed on the child
- It is actually about saying what the interests of the child and family here – have I turned my mind to those
- Court is mindful to ensure legality – this does not amount them to changing the decisions – as long as you tick the legal boxes you can make the decision you prefer

Lecture 53 – Improper Purpose/Unreasonableness

- No power is unlimited – no matter how wide a discretion it must have some limits – power granted for purpose must be used for that purpose alone – a local authority may have power to close streets for emergency purpose – they cannot close the streets because of other reasons even if it is for public reasons
- A finding that decision maker has acted with improper does not mean you need to prove bad faith and deliberate misapplication – the scope and purpose are both very legal questions – courts will feel very comfortable interrogating
- Courts need to make sure that they should have a good system but still leave some discretion to the decision maker
- **Unison Networks Ltd v Commerce Commission (2007)** – **Part 4A of the Commerce Act 1986** was passed in 2001 to control electricity lines business
- **s57E** – the efficient operation of the electricity distribution market by ensuring that the suppliers were limited in their ability to extract excessive profits
- Electric line companies are a natural monopoly – the only way to get electricity is through the wires and poles – the only way to compete is to replicate the network
- What that means is that they will only gain 50% of the market – that is not enough money to justify that amount of investment – no one wants to enter the market
- The respondent was required to create thresholds for profitability – if you make too much profit the commission will take over the company – you get one warning and then 2nd time you can get taken over
- They made a regulation that the prices at the same price as before – after the expiry of this threshold – the respondent had time to look at what level of pricing was good enough for the companies to make a healthy profit
- They set thresholds based on that – the way the respondent made those thresholds was in terms of the old thresholds – so initial threshold plus 3% growth per year
- Unison wanted to raise its prices past the regulation – they sought to judicially review the Commission's setting – they said the initial setting was essentially arbitrary – it was a price freeze
- The Commission's job was to make sure there is not excessive profitability – no assessment was taken before setting that initial price
- So, the initial threshold was set for an improper purpose – the revised thresholds would be challenged as they are both arbitrary
- **SC** said the basic principles are clear – a statutory has limits even if it is very broad – exercise to promote the purpose of the Act which is attained by reading the legislation as a whole
- An exercising power will be invalid to run counter to the objectives of the Act
- SC said a statutory power may be used for another purpose – as long as the purpose doesn't interfere with the stated purpose of the Act
- Where an expert body is given broad power to design economic objectives – it would be expected they take wide consideration – because of the expertise the court would be unlikely to intervene in the absence of bad faith, material misapplication of the law
- Or you have to well outside of what the purpose of the statute is
- The broad purpose is to limit price raising – eventhough the initial threshold does not have any assessment of profitability it is doing what the broad purpose is trying to achieve

- It is putting a break on your ability to raise prices – this is policy decision – we are going to let it stand – judicial review was unsuccessful
- The Commission is very far away from the people – the court did consider that this is an economic policy not so much a legal concern

Unreasonableness

- The courts are not concerned with the substance – there are exceptions – courts can review the reasonableness of a decision – even if it is fair – consistent with the statute – the decision may be set aside simply because the result is absurd
- It is not an invitation to look at the substance – courts almost never find that the decision was unreasonable – decision makers try to do the right thing
- To win this argument you are asking the court to look at the substance and say it is untenable – that is very hard to run
- **Associated Provincial Picture Houses Ltd v Wednesbury Corp (1948)** – the local council was under control to strict adherence to God
- Sunday was to be used for prayer not for entertainment – so council granted applications to be open on Sunday but stated a condition that children under 15 are not to be submitted into the cinema
- Cinema was a popular – this put pressure on council to lift the ban on Sunday but apply conditions they see fit – there are no televisions in people's homes – parents cannot leave their children at home alone
- The effect of the ban it means that families cannot go to the cinemas and destroys any profit they would have made
- The ground here was if it was appropriate for the cinema to be open at all – then it was unreasonable for the condition to destroy any benefits gained – since families cannot go to cinemas
- The decision here is the power is broad – the onus on the applicant to show the law has been contravened
- Unreasonableness is a stand-alone decision for judicial review – you can make a decision that is so absurd it is unlawful
- Unreasonableness is a standard that is very high – no sensible decision maker would dream that the decision was within its powers – such as dismissal of an employee because she has red-hair
- The court said that the physical and mental well-being of young children is something the council should be concerned about – so the judicial review fails

Lecture 54 – Substantive Review

- There is a dissatisfaction in the law of having such a high threshold of **Wednesbury** – any less does however lead to a societal issue
- Looking at the reasonableness means that courts need to look at the substantive merits of the decision – judicial review is about procedure not the merits
- **Wolf v Minister of Immigration (2004)** – in 1982 Mr Wolf was convicted of sentences in Germany and escaped and entered in NZ under a false passport – he married and divorced and had right to see the children
- In 1997 his wife told the government about his past – in 2000 under **s20** of the **Immigration Act 1987** – for revocation of his permit since he obtained it by fraud

- The minister revoked his permit – when he made an appeal on humanitarian grounds the deportation review tribunal dismissed that appeal – he sought review of the tribunal under **s117** on the basis of areas of law made by the tribunal
- The decision was a disproportionate one in breach of the rights to not be subject to disproportionate treatment under **s9** of **the BORA 1990**
- The decision was unreasonable being indifferent from his children since he had not told his children his real name
- This was seen an indifferent as not caring about his children – there was evidence that he had a good relationship with his children
- The minister argued that the decision was not unreasonable as it was not absurd – applying the **Wednesbury** standard
- **Lord Cooke** – **Wednesbury** sets the bar quite high and that hasn't been a very good development of the law for judicial review
- The courts should look at the decision and look at what level of scrutiny is appropriate – there isn't a one size fits all – we need to figure out what is a reasonable standard here
- Standard of reasonableness we adopt has a large bearing of how the case plays out
- Relevant factors that need to be taken into account to determine the level of scrutiny:
  - **Who made it?**
  - **The decision-making process** – how robust was it
  - **What is the subject matter** – how much of a policy matter is it as opposed to legal standards that need to be met – is this something the courts should be involved in
  - **The importance of the decision to those affected by it**
- Administrative law had developed quite a lot – **Wednesbury** was decided at a time that judicial review was very new – today the law is more robust and more developed
- The courts suggest that they still prefer the **Wednesbury** standard but look at the circumstances
- The Tribunal said that Wolf did not care for the children because he hid his identity from him
- His wife had fabricated evidence that he did not treat the children well – as they would come home hungry and stressed
- A Pastor had said that he very deeply cared about him
- The evidence in front of the court meant that the put more weight on the Pastor's evidence and said that he clearly very deeply loved his children and the tribunal had not considered a relevant consideration
- There is also a breach of natural justice as Wolf was not given a chance to respond to those claims made by his wife
- In terms of unreasonableness the Wednesbury standard was not met – but lesser test requiring close scrutiny was met – because of the implication on the family
- The tribunal's decision was unreasonable because it failed to take into account the effects on the children from the deportation – unjustified conclusion between Wolf and his children
- **Taylor v Chief Executive of Department of Corrections (2015)** – what happens when fundamental rights are looked on

- Taylor is a serious criminal – drug offenses and armed robbery
- He was serving a lengthy stay – he was denied for parole multiple times – he is a paroled prison at the time of case
- He has been a part of many cases in NZ representing prisoners – and a news company wished to interview him – he was challenging the legality of prisons to create a smoke free prison
- Because he was a prisoner there needed to be approval before he could be interviewed under **s105 of the Corrections and Regulations Act**
- The Chief Executive denied the application to be interviewed under maintaining safety and security of prison
- This is limiting the freedom of expression – there needs to be a balance that needs to be struck
- Taylor is arguing is that the denial for the interview could not be justified under the **s5** standard of the **BORA 1990**
- Taylor was a maximum-security prisoner – the problems were
  - One was that moving Taylor around the prison was an issue
  - The safety of the news crew could not be guaranteed
  - And there may be large protest from prisoners – due to the smoking ban
- The peer review of the report was fine – there is a very robust procedure here so that the Executive can have the most accurate considerations
- The executive has a specialist report then has it peer-reviewed so he can be fully informed as possible
- The court finds that high priority put onto the freedom of expression – prisoners don't have many options other than reaching out to news outlets
- Under **R v Secretary of State ex parte Simms (1999)** case the court argues that prisoners having freedom of expression is very important as it helps prisoners help prove their innocence – however, this is not a case about Taylor trying to prove his innocence
- There needs to be a proportionality test in administrative decisions as well
- Prison managers are experts on prison safety – but they are not experts on rights – there is a fundamental right in question to make sure that it is being breached in the most limited way making sure safety is still achieved within prison
- The courts say that there must be some way to accommodate the interview as far as you reasonably can – there are a number of ways to conduct the interview
- Freedom of expression is the starting point – purpose of statute must be weighed proportionally – caution is required
- The safety of a prison is not something the court knows a lot about – you need to cautious in sending the decision back
- The intensity of review depends on the subject matter – in this case it is a fundamental right
- There are 4 grounds for allowing the application for review –
  - No alternative methods of interview would be considered
  - There was consideration that Taylor was disruptive which he had not done anything recently
  - The risks associated with transporting could be managed – he could be barred they were not extreme

- There was no evidence that there would be protest from the interview itself – since prisoners were already upset
- The court finds a more proportionality approach instead of the **Wednesbury** standard

Lecture 55 – Logistics of Judicial Review

Bringing a claim

- **Judicial Review Procedure Act 2016** – file a statement of claim under the HC under part 5 of the HC rules – likely to seek interim orders
- Government has made a decision – kind of want them to not act on the decision until the review is heard
- The Crown will file a statement of defense – includes affidavit evidence – setting out all the factual background – there is no direct/cross examination
- In filing a claim – this is important to the applicant – not so much to the government – in raising a claim you may be raising a government issue
- It may bring into light the procedure – and so it means the government has to follow a more robust procedure and brings into account previous decisions that have been made – which is costly
- The government throws a lot of resources in defense for this

Relief

- Court has wide discretion as to the relief that is appropriate
- Traditionally the court would –
  - Writ of mandamus an order to do something
  - Writ of prohibition an order to not do something
  - Writ of certiorari an order to squash a decision – retrospective – the decision does not apply
- Even if you win the court has discretion to not grant you a relief
- Remedy of declaration – a statement of the law
- Injunction – temporary restraint on action
- The decision will be sent back to the maker and with the court's guidelines
- The only exception was **Fiordland Venison** – where the court made the decision for the minister – since it was just a ticking the box exercise and there was little to no discretion – and much time had passed due to the hearings
- Always a risk parliament may overrule the judgment and change the statute

Standing – who can bring a claim

- Usually people who are directly affected by the decision get the opportunity
- You can't just bring a claim if you have no interest in it
- The lines were blurred – **Taylor case** – he was not directly affected it was more the news crew from the decision

In Review

- Decisions can be set aside on a number of grounds
- There are 3 basic lines:
  - **Legality** – relevant considerations and acting for improper purpose
  - **Fairness** – natural justice rights – right to be heard
  - **Reasonableness** – **Wednesbury Test** – modern development since then – such as in **Wolf**

- Reasonableness is about whether courts should review the substance of the decision – we have clearly moved away from the **Wednesbury** test – we are now following more **Wolf** and **Taylor** reasoning
- The court will get a feeling that something has gone wrong – grounds for review could be seen as excuses to intervene rather than reasons
- If the courts want to, they can find a reason to intervene – standards like reasonableness can be excuses to not intervene
- The context of the decision making is highly relevant – the questions to ask:
  - What does the statutory power actually require?
  - Have those requirements been met?
  - Who is the decision maker?
  - What authorities or expertise do they have?
  - Do they have access to all consideration – if not how do they get that information
  - How significant is the decision to the applicant – is it someone's life at risk or their livelihood
  - Does the decision affect one individual or is it a broad policy – which affects just one and a lot of other people
  - Is the decision legal or political in character? – if it is more political process the courts will not intervene
  - Are there other accountability mechanism in the statute to correct the decision
- If the only remedy is a legality one, then court will be more likely to intervene
- Scope of review issues – identify the decision that is statutory able to be reviewed
- What is the scope of the court's jurisdiction in legal terms?
- How judiciable is the decision – is it more judicial than political
- It is very difficult to win a judicial review case – 80% fail – just pause and reconsider the case given in the exam
- Facts of the problem are very similar to the cases covered in class – any differences do not go to the root of the case
- If you can't find a close precedent, you need a compelling argument – understanding of the public law values – fundamental to a decent democracy

Exam

- Problem based question – given a set of facts – you will be asked to give advice
- You cannot sit on the fence – you must reach a conclusion
- There should be very good public law reasons – drawing on themes discussed – using cases as examples
- Application – apply the law as you know it to the facts – it is not applying a rule it is applying the law
- The right to be heard – it is not enough to say the right to be heard is part of judicial review – you have given no indication on why they applied that law
- What factors motivated the court to make that rule – the decision-making process – the affected party – lack of avenues for appeal – nature of the decision – is it a political decision or an administrative one
- Things to consider:
  - Express words of the statutes
  - Affected interests
  - Law of politics
  - Consultation of the decision

- Reasons for the decision
- International instruments that may be relevant
- And human rights considerations

- Introduction is nice but it doesn't have to be long – 2-3 sentences – "The decision that is possibly challengeable under Judicial Review is…"
- Conclusion is vital – you need to say what your legal position is – as long as you have the reasons you are fine
- If the facts aren't clear just call it out – don't assume – give separate scenarios

Lecture 56 – Q/A on Judicial Review/Treaty of Waitangi

- Public law values:
  - Democracy
  - Rule of law
  - Human rights standards
  - Treaty of Waitangi principles
  - Political accountability
  - Restraint on arbitrary government power
  - Informed and responsible decision-making
- **Puli'uvea** – quality of decision making – the consideration of the effects on family were very clearly taken together
- **Puli'uvea** – the family can be given an opportunity to stay together – they did not have to be separated

Treaty of Waitangi

- Treaty is hard – this is politically controversial – NZ's constitution is highly politically – we learn about the way that the constitution reacts to these issues – exposes the underlying working of the Parliament

Article	English text	Maori text
I	Tribes cede absolutely their sovereignty to the Queen of England.	Chiefs grant Queen of England rights of kawanatanga (governorship) over others.
II	Queen guarantees full exclusive and undisturbed possession… of lands, estates, forests, fisheries and other properties. Crown has exclusive right of pre-emption over land that Maori wish to sell.	Queen reaffirms rights of rangatira (chiefs) to exercise tino rangatiratanga (absolute chieftainship or independence)… over whenua (lands), kainga (villages) and taonga katoa (all things treasured).
III	Maori become British subjects.	Queen will respect tikanga katoa (rights, ways) of Maori as she does those of the English.
Oral Protocol		Governor agrees to respect all faiths and the laws and customs of Maori.

- The two texts cannot be reconciled – they are two very different cultures – it is reconciled by the **Treaty of Waitangi 1975**
- The Tribunal has exclusive authority to determine the meaning and effect of the Treaty in regard to the Maori and English text – only people of Maori decent can bring a claim

Lecture 57 – Waitangi Tribunal Jurisprudence

- Tribunal Jurisprudence is important because – it does not give you a statement of the law – by statute the tribunal has the exclusive ability to determine what the Treaty means
- **Report on the Manukau Claim** – neither language version is inherently superior than the other – the Maori version is preferred more
  - Due to it being understood better by the Maori understand
  - International presumption the people preparing the document should be read against them

- Because the British made the Treaty – the Crown should not be able to take advantage of any discrepancies
- Maori understand that the Treaty protected their mana – there authority over land and seas – so something less would have been given to the British
- Kanwantanga has to mean something less than sovereignty – magistrate power to prevent lawlessness
- Article 2 – must mean something more than exclusive right – absolute power and authority over something
- Harbors, foreshores – it is not unlimited – it was clear that more settlers would be arriving – this was a document about the colonization of NZ
- Even given that context – there is some Maori power in retaining political power – the power is significant and needs to be recognized
- The Treaty actually means:
  - Active Protection of Maori rights – government must try and sustain them
  - Recognition of Maori Values – their ways of thinking should be considered – document between sharing the two cultures
  - Taonga is a broad category – Maori understanding of what would have been included
  - Maori control resources – where the Treaty reaffirms possession should be respected
- **Muriwhenua Report** – principles of the Treaty are the standard against which the government's actions are to be measured – that includes historic practice of the government
- Difference between express words and principles
  - Textual analysis is really hard – you need something else to guide that –
  - Principles don't override the express terms – enlarging the terms of the Treaty helping reconcile – updating the Treaty for a modern context
- Principles can be seen as a compromise away from the intent of the Treaty – the Treaty is about an exchange of between the British and Maori
- The Treaty cannot be seen as building a house or a car – it was an agreement between two political parties – and should be interpreted understanding the parties' intentions
- It suggests that we should adopt a broad interpretation
  - Understand terms as they would be understood as they were to the Maori – there should be no appearance of sharp practice from the Crown
  - Any ambiguity should be resolved to not cause any undue prejudice to Maori
  - Oral promises also form part of the Treaty – because of the Maori culture who put much more weight on the oral agreement than written
- Principles of Treaty –
  - **Protection** – Treaty suggests Maori interests would be protected – peaceful settlement – this was respecting the Maori – they were to be full participants in the new nation and economy – they should be equal partners – Pakeha became more powerful and had more control
    - Fiduciary duties arose – so it's when party has to prioritize the interest of another party

        - When one of the parties to the Treaty gets more power, they can't ignore the interests of the weaker party – you need to exercise the power in a way that respects the interests of the weaker party
    - **Honorable conduct** – working relationship between the Maori and the Crown – requires absolute trust
        - Cultural imperative – is part of the Tikanga in which Maori entered the Treaty – important cultural reasons – no sharp practice
    - **Fair process** – required that the government should be accountable for its actions – Maori complaints should be fully inquired into by a separate agency to put an objective lens on the matter
        - What is needed to ensure robust process
    - **Recognition** – respect between parties into the relationship – respect for each other's authority – government is being set up here
        - Maori retain right to their Tikanga and government process – issues over land – business arrangements – management of natural resources
- Sets a high standard of the Crown – for the Crown to discharge its Treaty obligations it has to do a lot of work – Tribunal recognizes this – as this is about what the Treaty means – so you can't back down – this is separate from a claim
- To bring a claim – the claimant needs to establish under the Treaty of Waitangi Act:
    - Act or omission from the crown
    - That act or omission caused some kind prejudice
    - That act or omission has to be contrary to the Treaty
- **Te Ika Whenua Rivers Report** – active protections – actively protect Maori interests to as far as reasonable possible
- Reciprocate – sharing of political authority – consultation with Maori when dealing with Taonga
- Partnership – fiduciary relationship between both the parties – the parties have to act in good faith
- **Rivers** – are treated very differently under Tikanga than under English law – they are seen as independent entities under Tikanga
- The tradition in English law is that no one owns the water – if you own the land next to the river you get to river up until the halfway point
- Transferring land to the government was common practice – but against Tikanga – when Crown land was granted you owned up to the half-way point of the river
- **Fisheries** – are a Taonga under the Treaty
- In theory those fisheries should be Maori property – the Treaty never states that the Maori gave up their rights to the fisheries
- The fisheries have been depleted due to mismanagement by the Crown – due to lack of consultation with the Maori
- Restricting Maori from fishing breaches Treaty principles of protection and recognition – Maori have interest in them
- **Right to Development** – Maori are entitled to develop their rights and interests – the rivers have hydro-electric technology put on them
- Maori didn't know about this in 1840 so there is no problem – Tribunal says Maori rights are not restricted to how they viewed them in 1840 – this destroys the spirit – Maori are able to develop their rights
- Anyone doing anything need Maori consent

- There are good government reasons such as economic development – but it was just done without Maori consent which was the problem – it is rare to not find a mutual agreement between the Crown and Maori
- **Crown response** – it said that the Iwi had voluntarily sold the land next to the river – so they sold the interest in the river – it became a Crown title – there was no further prospect of a breach of the Treaty
- Tribunal rejects that argument – as it does not promote the Treaty principle of active protection – unwillingness of the Crown to apply Treaty principles
- **Recommendations** – establish a co-management – to participate in how the river is used – aligning better with Treaty Principles

Lecture 58 – Article 2 of the Treaty

- Taonga Katoa (all control of natural resources) – what does it mean for Maori to retain their Taonga Katoa – this includes Maori intellectual property – this is very broad – includes intangible objects
- **Ko Aotearoa Tēnei Report** – ownership/rights of Maori knowledge – this is unusual because it is exceptionally broad in scope – and it is a contemporary claim
- It concerns more than 20 governments – makes reforms according to law, policies, practices, health, education, science, intellectual property, land, sea, Maori language, art and culture, heritage, and involvement of Maori in international agreements effecting indigenous rights
- Matauranga Maori – coming together of two distinctive cultures – the defining feature of Maori is kinship
- Relationships – relationship between people and their ancestors – connections between the physical and spiritual world – referring to the cultural understanding of the Maori
- People who settled had to their own culture – but a distinct Maori culture was also created when they came on the land – referring to
- Treaty provided each party cultural possessions according to their own understanding – the settlers retained governance and Maori retained chieftainship – this in itself is a relationship
- The basis of the claim is that this relationship has not been fulfilled
- In the contemporary world the Pakeha dominates – this is not an accident – result of a deliberate strategy of neglect as new laws are developed – the Pakeha is favoured more
- The resources are used by non-Maori individuals – these are Maori resources – used by people who have no right to it – that needs to be respected
- Maori should have a say over their resources and their own way of life – given the way that government has acted they need to protect Maori interests
- There is a balance that needs to be struck – absolute authority over Kanwantanga is given to Maori where possible
- Where not possible some sort of shared authority would be more important – to support the Maori world view
- Absolute government authority is foreign to the principles of the Treaty – the tribunal is not keen on a fiduciary duty – as this means that one party is always in power – that is not respectful of what the Treaty is trying to establish

- Legal effect of the Treaty – **Wi Parata v Bishop of Wellington (1877)** – **Prendergast** – the Treaty is a simple nullity – Maori did not have the political capacity or sophistication to enter into a Treaty
- **Tahiti Tekno v Aotearoa Maori District Land Law (1941)** – The trust board had been negligent in maintaining Maori resources leading to large debts
- The PC said that the Treaty was a valid international mechanism – overruled the Wi Parata case – however, because it is an international law until it is incorporated into the domestic law it has no effect
- There was no remedy that could be given due to the dualist system
- Politically foundational but legally limited – it does effect where it is given so in statute – but words in the statute affects the way it is interpreted
- Parliament has to be clear if it legislates against the Treaty – it might be an implicit standard when government acts
- **NZ Maori Council v AG [1987] [Lands case]** – it concerns the **State-Owned Enterprises Act 1986** – provided for 14 SOE's – basic policy was running government functions in commercial principles – run closely as businesses
- Provisions that the enterprises would move to new entities – 10 million hectares of land owned by the Crown to be passed on
- There was claim that because the Tribunal was considering land claims there was a fear the transfer of land may frustrate the ability of the Crown to provide redress if a favourable Tribunal recommendation was coming
- These state-owned enterprises are operating as commercial businesses – the Crown has to buy it at a market rate – the Crown may not want to pay that
- The parties may sell to 3rd parties – they have complete authority to sell the land to private sectors – so the Crown may not be able to purchase the land back at all
- The bill may be contrary to the principle to the Treaty – at least without some amendment that continued the responsibility of the Crown for the return of land – and restricted further alienation
- **S9** – provided nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty
- **S27** – if you had your claim before 18th December 1986 – provided that the sale of that land would not be sold until the Tribunal report was made

Lecture 59 – Modern View of the Treaty

Definitions

- Wairua – spirit/essence
- Koku – words
- Ropu – group
- Kaitiakitanga – guardianship
- Whanautanga – kinship
- Matauranga – Maori knowledge/intellectual property
- Te Reo Maori – Maori perspective
- Kaumatua Maori – Maori person
- Iwi – Maori group

Lecture Notes

- **NZ Maori Council v AG [1987] [Lands case]** – continued

- There were still come claims that were in the process after that date who were in the process to preparing their claim – they brought a challenge in court
- It was brought by way of judicial review
- They argued that the transfer of land would be inconsistent with s9 of the Act – they sought a pause on transfers until the Tribunal had looked at all relevant claims
- Take reasonable steps to make sure that the land maybe needed for a Tribunal claim – and assess all the likelihood of that happening
- The Crown argued that s27 is the code of law that deals with all the land transfers – meaning that it is its own set of law – s9 does not specifically deal with land claims – s27 is designed to do the work that the claimants are saying
- Furthermore, the specific provision tends to override the general area of law – so s27 which is more focused on land transfers would override s9 which deals with just general Treaty principles
- Furthermore, any other interpretation to further protect the Maori would make it really hard for the Crown to achieve its policy objectives
- The only reason this comes to the court is because the Treaty principles are in the statute – it is important because this is the 1st time courts get to talk about the legal position of the Treaty principles
- The SOE's are designed to act as businesses and the key reason is to avoid government interference – this means weak political accountability – so the court gets very involved in what sort accountability actually exists
- The courts question whether the Crown has done work to understand the political ramifications of what you're proposing because they will no longer be accountable – the response was a "no" from the Crown itself
- **Richardson** – says that the Treaty is very ambiguous – we can interpret as a contract – or is it better to see it as an international Treaty between sovereigns – or is it a foundational constitutional instrument
- The court is keen to treat the Treaty as an instrument – this invites a very broad definition – it is history – requires broad interpretation
- S9 is very broad and it engages the constitutional ideas
- **Cooke** – a broad and practical interpretation is demanded here – hard to imagine anyone suggesting otherwise
- No one is arguing that the Treaty is fundamental – it does relate to fundamental rights and nature of the NZ state
- The courts will not allow Parliament to go against the principles of the Treaty unless very plainly stated
- If you are engaging with s9 properly you see that this is constitutional fundamental and overrides the specific over general – the wording of s9 is plain and unqualified – in its ordinary sense it gives an ordinary constitution guarantee
- Cases will arise where s27 will not be enough – s9 is always going to have some residual effect
- Richardson says it would be a bold move to exclude the land transfer from s9 – and if this weren't true then s9 would have no effect
- Maybe that was the point – it was just window-dressing – no legal effect but political power

- Courts do not themselves want to define what the Treaty means due to the ambiguity – they wished to look at the Tribunal which was very influential even though courts are not bound by it
- Courts say there is partnership – there is an implied obligation to act in good faith – it is a sole compact between the parties
- The claimants want to the Crown to hold off on transferring all the land – but the court knows this is not practical – there needs to be renegotiations – that is as close the court can get
- There are interests here in which the court cannot get involved in – it needs to go back to the political realm

Lecture 60 – Modern View of Treaty – Continued

- **NZ Maori Council v AG (1994) [Broadcasting Assets Case]** – triggered by s9 of the SOE Act – goes to the PC – instead of just focusing on land it focuses on broadcasting assets as it would affect the ability to promote the Maori language
- Council argues – the potential to revitalize Maori in NZ would not be a priority – and it is in decline especially in the 1980s – only the television assets were in issue at the time of this case
- **HC** – you need to protect the Treaty principles – says it is consistent with the SOE Act – the Maori party was not satisfied
- Broadcasting TV in Te Reo helps with learning Maori better
- There are 3-pillars of language survival – one is use in the home – two is formal education and three is television entertainment
- Having Maori on NZ TV would mean it would be heard by a lot of people – credible and fashionable to young people
- It is accepted by the Crown that there is an obligation to protect Maori – the question is to what extent does this obligation extend
- Underlying obligation and responsibilities which the Treaty places on the parties, they reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty
- PC is out of their depth trying to figure out what the Treaty means in NZ – they are trying to focus on the essence of the Treaty – they do not want to go into the express words
- The foremost principle is the protection by the Crown of Maori property – this includes Maori is a Taonga
- Te Reo is a guarantee under the Treaty – this is a fundamental concept – positive obligation to do certain things to protect and promote Maori – but this is not unqualified as the Crown has other obligations
- Reasonableness, mutual corporation and trust – there is emphasis on the context
- The duty of the Crown to protect Maori is clear – but what it means if unknown in different circumstances – such as during boom times the Crown may be expected to do more to protect Maori
- Importance of the Treaty interest may be important – decline of language here means that the Crown should be doing more vigorous in order to help it grow better
- The question is whether the transfer of assets could impair the ability of the Crown to protect Te Reo

- PC does believe that there is not a massive decline of the language – so the transfer may be okay
- Council argues – the Crown can't instruct the administrators to do what it wants
- Ministers will be shareholders of these assets – this not complete privatisation – as shareholders they can give directions on running these assets – and ministers are politically accountable in Parliament and people voting
- Direct control is quite substantial – Crown is still largely able to protect Maori – the owner of the assets is not accountable however – is that enough to breach s9 though?
- There is an onus on the Crown to show that it has positively protected the principles
- The Crown argued that it can make the decisions itself about whether the principles have breached
- There was an argument that the courts should not intervene unless it meets the Wednesbury unreasonableness standard
- The courts should have a supervisory role to ensure that there is some consistency in the way the Crown acts
- The PC finds that the control over the assets by the Crown is sufficient – because the Crown could still direct how the assets would be used and there was still enough political accountability there was no breach of s9
- This is helped by the solicitor general – who says that the Crown will use its control to promote the language
- Treaty Provisions in Legislation – s9 looks pretty inconvenient to the Crown since the Court makes s9 very constitutionally fundamental
- The Crown did not appeal to PC in the Lands Case because if they lose this will be a very strong precedent – this could mean that you may challenge with everything you are doing
- S9 is a constitutional provision – it becomes hard to repeal due to political reasons – they can't just repeal it due to it is annoying – it is only in one Act and that will be finished in 4-5 years
- S9 has set a broader principle – it suggests that when Maori interests are affected there will be some provision to make reference to the Treaty – otherwise it looks like unconstitutional behaviour
- S9 was very broad – the CA jumped on this and said this a constitutional guarantee – so if the Crown can craft a very specific provision, they can pay lip-service to the Maori but don't have to deal with the consequences – spell it very clearly for the courts to what they mean
- **Resource Management Act 1991** – there is a signal that the Treaty is relevant – but what is the scope – there is a purpose to promote natural and physical resources
- You can act inconsistently to the Treaty but as long as you took account of it, it is still not illegal
- **S6** – sets out what needs to be taken into account – the relationship of Maori to their culture, land, wahi (sacred place), tapu, taonga – express protection of customary rights – says shall recognize and provide for – you have to do something to achieve this
- **S7** – shall have particular regard – more weight needs to be put onto these Maori principles – kaitiakitanga to be taken into account so the Maori way of doing things

- **S8** – person exercising power under this Act must take into account the principles of the Treaty – bare relevant consideration
- This is an attempt to downplay the legal effect of the Treaty – is this appropriate though? – the Treaty does not have priority here
- This does make the Act workable – but is this the main goal – does this provide Maori with enough recognition?
- **Ngai Tahu Maori Trust Board v Director-General of Conservation (1995)** – plaintiff had a permit to engage in whale watching tourism business – they were the only ones with this license
- The Director gave another permit to do the same – the plaintiff was not the exclusive provider – and he went to the courts to challenge the permit
- He said that he was entitled under the Treaty principles carry on protected from competition for about 5-years from the commencement of the business
- And the Director should at least ask for consent from the plaintiff as he is an affected party
- The HC said that the director has ought to consider Treaty interests – they did not invalidate the license and so it was appealed to the CA
- **CA** – the Act gave the minister broad discretion in giving a permit – this included conservation of mammals, NZ international obligations, and submission provided from affected parties
- The Act also provides that this Act shall be interpreted to give effect to the principles of the Treaty
- The wording of this Act is very strong – as the words used such as "give effect" means you have to do something
- The use of the resources for commercial gain was a development of the resources from 1840 – how does the Treaty deal with these new developments
- CA recognizes a right to development – it is not appropriate to measure Maori interests as they were in 1840 – we can update them – but these can't trespass other legitimate interests
- The court says that the plaintiff's argument goes too far – yes you do have a Treaty interest here – but this is a development you do not have exclusive right
- The whale-watching is too remote from any contemplation of the parties during the making of the Treaty – a reasonable partner would recognize that there needs to be some consultation
- The Director at least needed to take into account the Maori view – the plaintiff should have been asked – Director should consider about the exclusivity under the Treaty here

Lecture 61 – Modern View of the Treaty – Continued 2

- **NZ Maori Council v AG (2013) [Water Rights Case]** – Mighty River Power subject to long-standing claims under the Tribunal – it was state owned enterprise – 100% owned by the Crown – Maori had rights in the relation to ownership
- Claims were based on wrongful use of claimant's waters – and the way in which they were dispossessed – the effect Crown's inaction – and past and future management of rivers by the Maori of geothermal resources
- There were negotiations between Maori and Crown for redress – the government determined it was going to sell 49% of the shares – as part of privatisation of assets –

this was prevented by **SOE Act 1986** – they passed the **SOE Amended Act** in 2012 and **Public Finance Act 2012**

- **Part 5A under Public Finance Act 2012** – new style of company – one called a mixed ownership company – a sub-category – enabled the government to change status of a company by order in counsel – GG signs it off
- The government would be permitted to sell shares – but was required to retain at least 51% of each class of shares – due to political reasons of losing complete control – they didn't pay attention to the Treaty
- The amended legislation did not make mention of the Treaty whatsoever
- Maori see these policies and say that they have rights over the rivers under the Treaty – and the Tribunal supports them and says that the government needs to negotiate with the Maori – the government relents and say that they were wrong
- **S45(q) in Part 5A** – nothing in this part shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty
- The company cannot be transferred because not enough is done by the government to take Treaty rights seriously
- The government continues with its policies – but Maori wish to test this and so they take it to the courts – they argue that Mighty River Power cannot be transferred to the MOE regime because not enough is done by the government to protect Treaty interests
- The **HC** found for the Crown
- Leave to appeal directly to SC – due to its significance that it went straight to the highest court after in the HC decided for the Crown
- Single, unattributed judgment – speak with one voice – the bench comprised the **Elias CJ, McGrath, William Young, Chambers and Glazebrook JJ** – we have no idea who wrote the SC judgment – this is not about different personalities – this is the court speaking not individual justices
- Is the government process reviewable – this is certainly reviewable – we can review them for consistency with the Treaty – the movement from **s9** to **s45(q)** is seamless – there is no period where the Treaty principles do not apply to the government
- This allows the court to lean on the **Lands Case** – allows them to adopt a broad interpretation
- You are framing this as a constitutional guarantee – you are subjecting to the same standards that you were subject to in the **[Lands Case]**
- The court argues that you could've appealed the Lands Case – and you can challenge the approach of the **Lands Case** in this court which has right to overrule it
- **S45(q)** must receive the same application as **s9** – it brings in the heritage of **s9** and so it deserves the same level of significance – so these actions are reviewable
- There was also a campaign from the Treasury to sell either 100% or 0% - they believed that the government should not be in this type of business – and this could have caused the oversite of Treaty implications
- Is MOM (Mixed Ownership Model) consistent with Treaty Principles – the test comes from the **Broadcasting Case** – whether the sale of shares could impair the Crown's ability to comply with Treaty principles
- Courts can only intervene if they do not comply
- Effective control was retained or by those who were politically accountable – you can vote people out – and there was a statement by the Solicitor General

- If Crown cannot provide redress – that will be significant – and will likely show a breach of the principles of the Treaty – it is not enough to only listen to the Crown's submissions
- The court does not accept the Crown's statements blindly – they must be looked at objectively to see whether they have actually been complied with – the court must reach its own conclusions
- Under the common law no one owns water – it was under the Crown's view the water was going to be transferred back – the electricity was going to be provided to all NZer's and it is not necessary for Crown to provide Maori with compensation when public activities have occurred
- However, the Tribunal is still considering the claims from this area
- Crowns files an affidavit from the Solicitor-General – the sale of shares will not compromise the Crown's ability to recognize the rights of Maori – will not compromise the Crown's ability to respond effectively to the Tribunal's work and will not change my commitment to make provision to help redress any inconsistency
- Crown ownership and control is diluted but it does not rule out all forms of redress – there are possibilities of reform to make sure these assets are managed in the interest of Maori:
  - Crown retains majority
  - They can in theory buy back all the shares
  - Or to provide direct compensation
- The court accepts these claims – accepts that the Crown will do its best to redress – which included the affidavit from the AG and the Deputy PM – acknowledge that it was really concerned about this issue – government went out of their way here
- However, AG and the Deputy PM were the same people that didn't recognize the Treaty principles in the first place – they wanted to push on with this – and now they are saying we considered the issues
- The MOM does not breach the principles of the Treaty because meaningful redress will be available – Appeal Dismissed – no legal impairment of the Crown pushing on with its policy here
- Scope of the Treaty itself in law is limited – however where the statute allows the courts to check Treaty principles these can be quite broad
- Due to the political tension here and due to s9 in SOE Act 1985 – it means that the government can't really have a limited provision – something more is needed – the legitimacy of the government

Lecture 62 – Maori Customary Rights

- How does the common law incorporate the custom law of Maori (Tikanga) – how does it relate to statute and common law
- Maori custom pre-dated settlement – there was an understanding of resource use and by who, conduct, personal law, dispute resolution and property – there is going to be intersection between custom and Treaty rights
- Article 2 – guarantees Maori fisheries and hunting rights – and these are protected by indigenous custom
- Custom is not frozen to the 1840 – it can be developed as it evolves throughout – such as for tourism reasons

- Custom may take you further than Treaty rights – unlike Treaty rights which have to be statutory incorporated in order to have legal effect – custom are still active and enforceable unless they have been extinguished in some way
- Common law of the British Empire says – local laws and property rights of indigenous peoples were not to be set aside by the establishment of British Sovereignty – this does not discharge British obligation to protect custom – **Campbell v Hall (1774)**
- **R v Symonds (1847)** – accepted this view in NZ
- Even in England the English custom would be recognized by the law if it met the standards longevity, consistency, reasonableness, certainty and have not been extinguished by statute
- **S71** of the **NZ Constitution Act 1852** – where it may be expedient that the laws, customs and usages of the aboriginal inhabitants of NZ so as far they are not repugnant to the general principles of humanity should in the present be maintained in all relations and dealings with each other, and should be set aside allow them to practice their customs and usages
- Fish are protected in both versions of the Treaty – they are a customary right – to take fish
- **Te Weehi v Regional Fisheries Officer (1986)** – **s88(2)** of the **Fisheries Act 1983** – nothing in this Act shall affect any Maori fishing rights
- Regulations were made – take under-sized paua without lawful excuse was illegal
- 2 officers were on patrol – they approached Te Weehi – they asked to inspect the bags of shellfish – the plaintiff said to the officers to leave them alone and threatened them with a stick
- The group eventually relented – they found 49 paua – 46 of these were smaller than the minimum size permissible
- He is charged under regulation **8(1)(b)** under Fishing Regulation 1983
- Te Weehi is charged in the DC **s94(1)(c)** with behaving in a threatening way against an officer – he appeals that conviction to the HC
- The fishing regulations are made under that Act – he is mounting an offense that he was exercising a Maori fishing right – he was only getting it for personal use – when he threatened the officer – that officer was not acting in the execution of his duties as he didn't have power to charge him
- HC agreed this was viable defense – how does the court know you are exercising a Maori fishing right
- **Summary Proceeding Act** – it is up to the defendant to show that he is exercising a Maori fishing right – it is up to him to make a case that he is following Tikanga
- This beach was in the traditional jurisdiction of Ngāi Tahu – he was from the North Island – yet he is claiming fishing rights to a South Island beach which is under the jurisdiction of Ngāi Tahu
- He went to the Ngāi Tahu tribe elders and obtained their permission – they had traditionally had a lot of dealings and let each other to use each other's resources
- Ngāi Tahu no longer had a proprietary right over the beach anymore – they still traditionally exercised the right to take shellfish for personal use this was within their jurisdiction – there was a historical relationship as well
- The evidence included testimony from the Elders and expert witness from University and evidence that there was permission sought – he was exercising a customary right under **s88(2)** and it was not distinguished by a statute but rather upheld

- He had not committed an offense – his conviction was squashed – no law to charge him because he was exercising a Maori fishing right
- It was reasonable for him to take the fish as this amount was not going to deplete the fishing resources
- Assault charge was still upheld – the officer had no knowledge of fishing rights and so he had a reasonable right to approach Te Weehi
- Ngāi Tahu did not need to retain ownership in order to retain their jurisdiction to the place
- The Maori obtained 10% of the fishing quotas and 20% of any new species that would come under the Act
- **Attorney-General v Ngati Apa (2003)** – the local council would not give them resource consent to operate mussel farms – and those consents went elsewhere
- So, they are now saying that they own the foreshore and seabed where the mussels actually are from – they are not asking for the beach itself but up to the high-tide mark and 12-mile limit
- This case decides that Maori can take their claims to the Land court – HC decided that the sovereignty was given to Crown so they passed the property as well
- HC Judge is overturned – transfer of sovereignty did not affect customary property
- Customary property rights were not extinguished
- Overrule the **90 Mile Beach Case** – which was wrongly decided
- They said Maori customary land was not a creation of the Treaty or statute but has been recognized by them – there is nothing to effect property rights
- The fact that Maori could only sell to the Crown was a sovereignty right not a property right

Lecture 63 – Maori Foreshore/Seabed Rights

- **Attorney-General v Ngati Apa (2003)** – continued
- Does the Maori land court have jurisdiction to grant Maori customary title to the foreshore and seabed?
- What is the extent of the Maori customary title – what passed with sovereignty
- Has Maori customary title been extinguished – by Crown Grant, vesting order, investigation or legislation?
- Can as a matter of fact and law Maori title be claimed
- **HC** – only people who could bring a claim were those Maori's who had a customary title to the adjoining beach
- **CA** – transfer of sovereignty did not affect customary property – Queen did not get the property she got sovereignty
- Customary property rights were not extinguished
- What passed with sovereignty – Maori customary land is not the creation of Treaty or statute – it is recognized by both
- Common law recognized such property in 1840 and no presumption that a change in sovereignty would affect property rights
- Crown's regulation of alienation was the exercise of sovereign right not a property right – when Crown granted land back was not because they owned the land, but it was regularity
- Setters could not derive property until Maori rights were extinguished

- Crown only received full ownership when Maori rights were surrender or extinguished – in times of peace you have to extinguish indigenous title by some kind of consent from the indigenous people
- Crown got radical title – right to govern the territory – burdened by customary title – Maori got their land, but the Queen got the shadow of the land – something less than ownership
- There were many authorities given by the court in support of this – as it was overruling a case – Nigerian case, US case, Canadian Case PC, **Wallis v AG** (PC) which overruled that customary title was extinguished by sovereignty
- Contrary line of authority was the **Wi Parata** Case – said that the Maori did not have any social authority
- Conflation of imperium (power to rule, execute law) and dominium (authority over property)
- English feudal tenure system combined territory and property – that the Queen owns everything, and she grants it to everyone – this is trying to import English law without regard to surrounding circumstances
- **Salmond** (Professor of Law and AG/SG) thought Crown title burdened only by moral and not legal obligations to Maori
- **CA** says Queen did not get property, she only got some kind of radical title
- Has the title been extinguished – when Maori sold the adjacent land – did that extinguish any claim they had to the foreshore/seabed? – the court says no – the grant of land above the water does not affect the land below
- Was title extinguished through investigation of title in the Land Court – no assumed its continuous existence of customary title – does not rely on Crown grant
- By legislation or other lawful authority – no RMA only restricts use – it is not enough to extinguish claims – the court doesn't mention that there is a presumption by the statutes that customary rights have been extinguished
- **Foreshore and Seabed Act 2004** – right to navigation and access to everyone to the Seabed
  - **s12** – no jurisdiction of Maori Land Court to consider existing applications to the foreshore and seabed – so cutting off access to the courts
  - **s13** – foreshore and seabed are the absolute property of the Crown
  - **s32(2)** – if you want to prove you have customary rights – you need to prove you excluded everyone since 1840 and you have continuous title to the land
  - **s32(3)** – your rights cannot be spiritual or cultural, they need to be physical
- The Maori went to the Tribunal – there is a report talking about the rule of law, removal of property rights
- Article 3 rights are tested – as to the respect given the Maori – if everyone else can get it then why can't Maori
- CERD UN Committee – resume dialogue with Maori – great pressure on government stating this looked discriminatory
- A minister in government under Labour leaves and forms Maori Party – Maori party form a coalition with the National Party – part of the agreement was to repeal the Foreshore and Seabed Act 2004
- **Marine and Coastal Area (Takutai Moana) Act 2011** – **s11(1)** no one owns or is capable of owning the foreshore and seabed – the thing no one was going to compromise was ownership – they slice ownership

- The Crown has international title – to regulate it and the upkeep
- Customary title includes veto and governance power – in the Maori Land Court
- Less onerous legal requirements for customary order and customary title

Lecture 64 – Incorporating Maori Custom into Common Law

- Custom does not have to indigenous custom – when the common law was becoming the common law to standardize the law – they came across practices they didn't want to disturb – established rules around how they operate
- If they met certain requirements, we let the customs rule and the common law rules would enforce them
- The criteria needed are:
  - Long-standing practice – about centuries of practice
  - Not contrary to law – common law rule prevails if custom is contrary
  - Certain and reasonable – can't lead to unreasonable outcomes – Wednesbury Standard is a good way of thinking – it has to be applied like a rule – it needs to achieve consistent results
- Tikanga Maori – first law of NZ – it functions as a legal system and did so before the common law – it's not as strict rules – more of a way of doing things – aligning your behaviour and practices with the Maori world view
- Tikanga is enforceable at common law but it can be very difficult in practice to give it the force of common law – often legislation overrides Tikanga – it can be difficult to prove for evidentiary reasons – Maori has an oral tradition – common law prefers more written documents
- Colonization tends to disrupt customary practices – essentially Pakeha would have disturbed the way you did things unless you were very remote
- **Takamore v Clark (2011) (CA)** – Takamore died very suddenly – he hadn't made arrangement about how he would be buried – he had very loose conversation with his workmates
- He didn't have a will – he didn't leave any instructions on how he wanted to be buried
- He was Ngati Tūhoe – he was living in Christchurch – his family came from their home to claim the body – they wanted him to be buried in the family burial ground – with the rest of his family
- He did have a de-facto partner – Clark – she was Pakeha – she wanted him to be buried in Christchurch – they had children together – the immediate family viewed that it was better for him to be buried at Christchurch
- The whanau took the body without the permission of Clark – she was the executor of the will – so she had first rights – she debated and sued the whanau about this
- The next day the whanau said they are not coming in – because of the antagonistic relationship – the response from the whanau was to take the body anyway – so they drove it up and took it to their burial grounds
- Common law does not recognize corpses at property – this can't be considered theft – but it is still very sensitive issue – you can't just take a body however
- Ngati Tūhoe said that they have been acting according with their Tikanga – they are meant to fight for the body – whoever gives up first loses – this gave them the right to take the body – the stronger party would win – and that is consistent with Tikanga

- Dealing with a deceased body is very sensitive – there are many customary practices – you don't want to regulate this past the most basic points such as health and sanitation – you want to leave it open so that it is permitted by law
- Everyone accepts that according to the Tikanga that is all consistent – we are determining whether it can take the force of law
- Does Tikanga meet the requirements for customary law – and if it doesn't should it form part of the common law anyway?
- CA breaks it down to 5-steps –
  - Time immemorial – from 1189 according to English law
  - Continuous – needs to be traceable continuous practice
  - Reasonable
  - Certain
  - Not extinguished by statute
- There is no extinguishment by statute because we want flexibility and so it is not controlled by statute
- Any extinguishment must be clear in the statute
- It does not make sense to trace it back to time immemorial we need to adapt this to Tikanga – it is sufficient that the practice goes to 1840
- Tikanga is not a set of rules – it is a guiding principle – the court is likely to be open to flexible standard when investigation Maori customary law – burial practices have been continuously been ongoing since 1840 – Maori people are usually buried according to their Tikanga
- Reasonableness – of not being inconsistent with fundamental principles of the common law – it is not enough that no statute extinguishes the custom it needs to co-exist with the common law in some way
- Right not might argument – here there is fundamental principle of common law that justice is prioritized over raw power – Tikanga arguing that the stronger party wins so they can possibly remove the body
- Tikanga falls down on reasonable criteria
- Certainty also falls – the outcome must be predictable – common law values stability and predictability – there is tension as it should not be applied too rigidly
- One of us can take it just due to power is very loose – there is not set of clear guidelines to determine how this will work in the abstract – it is a free for all and one party comes out on top
- **CA** rules that Tikanga isn't the sought that can be recognized by the common law so it does not have the force of law – the executor gets to determine what happens with the body and Tikanga cannot override that – Clark wins

Lecture 65 – Incorporating Maori Custom into Common Law

- **Takamore v Clarke (2012) (SC)** – the family appealed to the SC
- **Elias CJ** – a rule of law is not appropriate to determine the outcome – any rule you develop is going to cut someone's cultural practices – it is inappropriate to have a rule to deal with this subject
- The common law recognizes a range of values that need to be taken into account – the decision needs to be reached in all the circumstances – Tikanga will fill this gap as well

- There is no common law rule that says the executor has the right to determine how the body is disposed off – what the executor decides is what happens is because there is no dispute between other parties – they reach a decision that is reasonable
- This is a just where there is a dispute needs to be resolved not how a common law rule will be in the future
- It is not relevant because it meets certain tests – it is important because Tikanga deals with these issues
- We need to reconcile there are different values here and we they are at dispute – Tikanga does not need to prove itself as it exists – it does not need to meet standards to be incorporated – it is an inquiry of the facts – the Takamore's argument can't stand – Tikanga isn't a trump card
- This is contest between the spouse of the deceased and the whanau of the deceased – both set of values are paramount
- The role of the court is not to judge the validity of traditions or values within their own terms. It is concerned with the application of established tradition and values fulfilling the Court's own function of resolving disputes which need its intervention
- The determination of the court says nothing about what is right according to the value systems themselves. Indeed, the determination of the Court can only settle the immediate legal claim. Family and tikanga processes may will continue
- Tikanga will still continue – there is a clash here so we must resolve it – but it does not apply to all future cases – Tikanga still applies when there is no dispute
- CJ prefers Clarke's position to bury him in Christchurch – because Takamore left his family to be with his spouse – this tells us about the choices and values of what Takamore believed – he chose his family in Christchurch – it would be inconsistent to undo that in death
- **Majority – Tipping, McGrath, Blanchard JJ** – there is a common law rule – the executor determines the issue – it means that someone has the right to make the decision – someone takes responsibility – that person also takes account of different opinions and mediate it
- Usually this does not need to argue – we will enforce a rule as a common law rule – where it is not possible for parties to work out what to do – the court will determine what is right according to the common law
- You need to consult with people on how the body is disposed – you need to take into account their views and consult them
- Tikanga is already recognized by the common law – it does not need to pass through tests
- Clarke did everything right – she discussed it – she genuinely considered their interest – she never made a final decision – she just did not consent to the body being taken
- And since the whanau took the body without the executor's permission that was an unlawful act
- **William Young J** – he disagrees that the executor has the final decision – he believes it is more open – you need to come to a mutual decision – if you can't then you come to the courts
- Says that no common rule can give enough weight to Tikanga as it would be the Pakeha Tikanga – the Pakeha way of thinking about it

- CJ's solution here doesn't give enough weight to Tikanga – he doesn't have an alternative that would do any better – he prefers CJ's approach rather than the majority as she give more weight to Tikanga
- **Declaration on the Rights of Indigenous Peoples** – adopted by the UN
- The 4 states that did say no were USA, NZ, Australia and Canada – because all of them have very big indigenous colonization – and they haven't done well after colonization
- This will also mean that the government will have to do something if they sign it
- This is not binding – this helps keep government in check – only a state can take a claim to the UN if the indigenous rights are breached
- Indigenous people do not constitute a national state for the purpose of the UN
- The Declaration deals with:
  - Rights to culture, identity, health, education, language, employment
  - Maintain and strengthen their own institutions, cultures and tradition, pursue development in keeping with their own needs and aspirations
- National came into power in 2008 and joined the Maori party's campaign to sign this in Parliament and it was finally adopted in 2010

Lecture 67 – Summary of Treaty/Maori Rights

- The claims are constitutional, political and legal in nature – it all starts with the Treaty – even if we take the English version only
- So, ignoring indigenous rights is constitutionally wrong – when this arises politics is in play rather than law
- Due to unwritten constitution we need to mediate the claims made – politics is not less than law neither is it separate
- When the law applies it can't be ignored – the court can require the government to take actions
- Politics always applies – they have to be addressed without the standard of having a legal obligation
- Political accountability is more than just not breaching the law – that is not enough – we can still judge the government for what they have or have not done
- Political pressure can be turned into legal standards – due to the Treaty's relevance – but it can be hard to distinguish between the two – trying to understand the difference is important – because constitutional politics raises the stakes – invoking the Treaty raises the stakes much higher
- **Waitangi Tribunal** – investigate breaches of the Treaty which requires it to interpret the treaty in the modern concept and make political recommendations – these carry political weight – they can ignore it but with a cost
- Treaty doesn't become a part of the law unless it is incorporated in a statute

Indigenous Rights

- These exist until a statute extinguish them
- They can be incorporated into legislation – the common law doctrine of aboriginal title – incorporation of Tikanga into the common law as customary law
- Legal right is directly enforceable against the Crown – these are more specific than political claims – always the risk that these can be repealed – such as the aftermath of the **Ngati Apa Case**

- But political pressure on the government still exists – the government had to adopt a different approach
- Unwritten constitution can be seen as very flexible – but where there is an obvious breach of rights than…
- Both law and politics matter – the interaction of law and politics to deal with Maori claims – law helps resolves tension in each case – but politics is always speaking and means that Treaty has to exist and matter
- There will be a question on Maori rights issues – it can include both Treaty and custom – problem-based question – pose an issue on a set of facts and ask you to give advice – there is no black and white answer
- You need to engage with the core theme – demonstrate cogent public law reasoning
- What makes an issue constitutional rather than just political or lawful
- What legal influence do political matters have on legal standards
- How much does legal precedent shape decision making
- What is the broader political and legal context – what created the legal standards and what the fallout from the case
- How far are courts willing to take political statements into account

Practice Questions – BORA 1990

Issues:

1) **Is there a right infringed** – right to be free from discrimination – and freedom of expression
2) How is naked yoga expression – needs to be conveying a meaning – doesn't matter what form you are using – connection with nature
3) Discrimination – male participants being charged not female
4) Is it justified – interpret the provision – R v Hansen – Moonen (multiple interpretations) – R v Brooker where there is elastic meaning

   Problem in Hansen is when there is a choice of two meanings
   When there is an elastic interpretation – where there are many meanings – Hansen does not apply – Moonen and Morse would be better
5) Did the people involved offended – this test was rejected after the BORA – moving away from the subjective view to what a reasonable person would view it as
6) Interpretation – subjective meaning (overruled) – mixed test (the law) (consistent with free expression but when applied this leads to discrimination) – objective test

Practice Questions – Essay Question