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

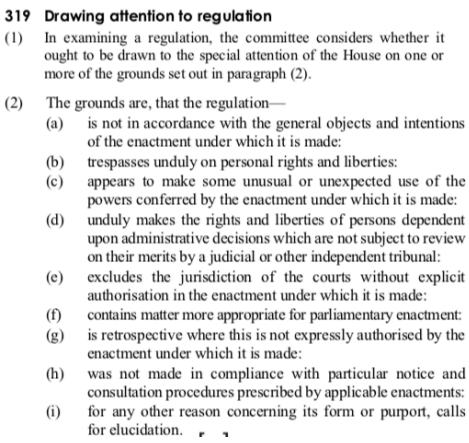
- As seen from BORA 1689 and Fitzgerald v Muldoon – the ministers do not have the power to suspend the law or make only parliament does
- Multilateral (more than 2) Treaty making in NZ:
- Negotiations by officials (civil servants who are not elected) – traditionally very secret
- National interest analysis 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