PUBLIC LAW

SUMMARY

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TABLE OF CONTENTS

FOUNDATIONS TO PUBLIC LAW **8**

Introduction **8**

Constitution classifications **8**

Written & unwritten constitutions 8

New Zealand's constitution 8

Constitutional Entrenchment 10

'Manner and Form' 10

'Form and Substance' 12

Incompatibility of Entrenchment in New Zealand **12**

From where does the constitution derive its validity? 13

Constitutional Conventions 13

What are constitutional conventions? 14

Why do constitutional conventions exist and where do they come from? 14

Why are conventions obeyed? **15**

How do we know that the constitutional conventions are? 15

New Zealand's Constitutional History **15**

Right of re-emption 16

Path to 'real independence' **16**

Limitations on Representative Government 17

S56 Constitution Act 17

S68 Constitution Act 17

Limitations on colonies 'law making powers' 17

"Good order and good government" 18

Effects of the adoption of the statue of Westminster 18

Colonisation **19**

The Proviso 20

Legislature Act 1908 20

Customary Public International Law 20

ENGLAND'S CONSTITUTIONAL HISTORY 21

Magna Carta ('The Great Charter') 21

What was the Magna Carta? 21

What is the relevance of Magna Carta to New Zealand today? 21

The Star Chamber 21

What is the Star Chamber? 21

How the Star Chamber worked? 22

The reality of the Star Chamber 22

The Function of Parliament 22

Tudor period (Henry VIII, 1600) 22

King James I and Edward Coke (judge) 23

The Theory of Limited government 23

Responsible and representative Government 23

New Zealand under MMP 24

PARLIAMENTARY SOVEREIGNTY 24

The Theory behind Parliamentary sovereignty 24

The Doctrine of Parliamentary Sovereignty 25

The Basis of legitimate Sovereignty in New Zealand 25

The History of Parliamentary Sovereignty 25

Parliamentary Sovereignty in Practice 25

The Rule of Law 26

Dicey's Three meanings of the Rule of law 26

Criticisms of the Rule of Law 26

Report by International Commission of Jurists 1959 27

Separation of powers doctrine 27

The 3 branches of government 28
How the separation of powers works in New Zealand 28
Executive vs Legislature 28
The Role of the Governor General 28
Executive vs Judiciary 29
Judiciary v Legislature 30
The Aims of the Separation of Powers Doctrine 31
Judicial Review **31**
Consistency with a democratic system? 31
Three grounds for Judicial Review 31
Advantages of judicial review 32
Is judicial review democratic? 32
Judicial review operates within the constitutional limits 33
The Doctrine of Implied Repeal 33
Constitutional Limits 33
Constitutional Gap **35**
THE TREATY OF WAITANGI **35**
The Constitutional significance of the Treaty of Waitangi **35**
The Conflict **35**
The Maori Position **37**
Implications of The Treaty on Parliamentary Sovereignty **37**
Treaty Jurisprudence **38**
The nature of Treaty obligations 38
Honour/Moral obligations 38
Fiduciary Duty 38
A duty to Consult 39
The Foreshore and Seabed **39**

Foreshore and Seabed Act 2004 41

Resource Management (Foreshore and Seabed) Amendment Act (2004) 41

Treaty Settlements **41**

Office of treaty settlements 41

The 'Fiscal Envelope' and the relativity clause 42

Aboriginal Title 43

Self determination and sovereignty 43

Possible ways to achieve self determination (recommendations) 43

Adoption of the 'new UN law of self determination' 44

Problems with the declaration 44

Treaties Generally **44**

HUMAN RIGHTS **45**

What are 'human rights'? 45

Elements of human rights 45

Hekin distinguishes between positive & negative human rights 46

Hohfeld's famous classification of human rights 46

Are human rights universal? 46

Universal Declaration of Human Rights and International Law **47**

UDHR 47

ICCPR & ICESCR 47

Human rights under the New Zealand Constitution **48**

The Human Rights Act 1993 48

Why do we have a Human Rights Act? 48

The Human Rights Commission Act 1977 48

Consistency 2000 50

Human Rights Amendment Act 2001 52

Human Rights Methodology 52

Difference between the application of the HR Act to the Private vs the Public sector 53

New Zealand Bill of Rights Act. (BORA) 54

Purpose of BORA 55

Rights Affirmed 55

Judicial responses to BORA 56

Section 4 BORA 56

Favouring Consistent Interpretations 56

Section 6 BORA 56

Justified Limitations 57

Section 5 BORA 57

Attorney General To Certify Inconsistent Bills 58

Section 7 BORA 58

Parliamentary Privilege 58

7 Privileges 59

Article 9 NZ BORA 59

Qualified Privilege 59

Is the Purpose to impeach or Question? 61

Effective repetition 61

Internal v External distinction 63

Sources 66

List of cases

Anisminic Ltd v foreign compensation commission. 1969 2AC 147 HC……31
Associated Provincial Picture Houses v Wedensbury Corporation [1948] 1 KB 223……..32
Betzel v Crabb [1992]2 VLR 121……..61
British Railways Board v Pickin (1974) AC 765……25
Council of Civil Service Unions v Minister for the Civil Service 1985 1 AC 374……...32
Church of Scientology of California v Johnson-Smith [1972] 2 QB 522……61
Chief constable of North Wales Police v Evans [1982] 3 ALL ER 141……..31
Daniels v A-G (no 1)3/4/02, HC Auckland M1615: SW99……51, 52
Deeble v Robinson (1954) 1 QB 81……34
Dean of Ely v Eliss (1842) 5 Beav 574 49 ER 700……33
Dr Bonham's case (1609) 8 Co Rep 107a……...23, 25
Donaghue v Stevenson [1932] AC 562……...31
Falkner v Gisborne District Council July 1995, Barker K, HC Gisborne API/95……19, 20
Flickinger v Crown Colony of Hong Kong (1990) 6 CRNZ 374 (HC)……56
Fitzgerald and Muldoon [1976] 2 NZLR 615 (HC)……25, 26, 30, 35
In Re Ninety mile beach [1963] NZLR 461 (CA)3 (1877)……..……39, 40
Egan v Chadwick (1999) 46 NSWLR 563……..64
Egan v Willis (1998) 195 CLR 424……64, 65
Hodge v Canada [2004] SCC 65……..51
Kalani v Jackson (2001) (2001) NZ Admin R 292……63
Kauwaeranga 1870.{FNREF|0-86472-103-X|5.14.1|78……..…39
Kelly v Carson (1842) 13 ER 225……..19
New Zealand Drivers Association v New Zealand Road Carriers[1982] 1 NZLR 374…….....33
New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641……..38, 39
Police v Beggs [1999] NZLR 615: (1999) 16 CRNZ 654; (1999) 5 HRNZ 108 (HC)……..…56
Quilter v Attorney General (same sex marriage case) [1998]1 NZLR 532 (CA)……..51
Jennings v Buchanan [2005] [2005] 2 ALL ER 205……..62
Lange v Atkinson [2000]3 NZLR 385 at 399, 401 (CA)……...60
Peters v Cushing [1999] [1999] NZAR 241 (Full Ct)……..62
Prebble v TVNZ [1994] 3 NZLR 1……66
Stockdale v Hansard (1839) (1839) 9 Ad & El 1……60
Attorney-General (NSW) v Trethowan [1932 AC 526 (PC) ……10
R v Abingdon [1795] 1 Esp 226, 170 ER 337……..59, 62
R v Pora AC 2001 2 NZLR 37……..34
R v Sloan 1991 NZLR……33
R v Oakes [1986] 26 DLR 200……...53, 57
Taylor v New Zealand Poultry Board Unreported (CA) 124/83, 18 April 1984……..……34
Te Runanga Muriwhenua v Her Majesty's Attorney General 28/6/90, CA110/90……39
Te Ruanganui o Te Ika Whenua Inc Society v Attorney-General [1994] 2 NZLR 20……..…39
Thoburn v Sundlin:CC 2002 186……..35
Trendex Trading Co v Central Bank [1977] 1 ALL CR 881……..20
Thames Valley Electrical Power [1994] 2NZLR 641at 652……..32
Te Heuheu Tukino v Aotea District Maori Land Board [1941] NZLR 590; [1941] AC 308

(PC)……...37
Wi Parata v The Bishop of Wellington (1877) 3 NZ Jur (NS) SC 72……..37, 38, 39

Foundations to Public Law

Introduction

New Zealand is a Constitutional Monarchy. This means that the royal family is at the top of our constitutional hierarchy ie 'The Crown.'

A constitution is a source of fundamental law which constitutes the law of the state. It sets up the organs of government and confers these organs with their necessary authorities.[1]

Constitution classifications

- Flexible constitution: a Constitution, which can be altered by parliament like an ordinary statute
- Rigid constitution: a Constitution which cannot be altered the same way as an ordinary statute which requires a simple majority, rather it may require some specific process such as a larger majority or a referendum.

Written & unwritten constitutions

- Written: a constitution is said to be written when the most important constitutional laws constituting the basis of the state are specifically enacted & specified in one formal document or a series of formal documents which are binding on the courts, the executive, the legislature & the people.
- Unwritten: the basic laws are given the importance of a constitution, but are not enacted as one formal set of fundamental constitutional laws (eg. New Zealand, Israel and the UK are the only three countries in the developed world without a written constitution.)

New Zealand's constitution

- New Zealand does not have a single constitutional document and is therefore said to be 'unwritten'
- The constitution is not entrenched and is therefore flexible. It may be altered by ordinary parliamentary process. (With some exceptions.)[2]
- However, in reality the structure of New Zealand's government (minority government's etc) means that it may not be so easy to alter in practical terms.

[1] J Phillip, *Public law notes* (2005)
[2] '*Ibid*'

- It comes from a number of sources including legislation, decisions of the courts, and international law.
- We do have a number of documents that each have some constitutional elements:
    - New Zealand Constitutional Act 1852

      Contains the origins of our government as it is today. Section 53 gave Parliament the power to legislate for 'peace, order and good government.'[3]

      The Act contained superior law and could therefore, not be altered by an ordinary act of parliament. In 1857 the British Parliament altered the Act enabling the general assembly to alter any part of the Act by ordinary legislation with a few minor exception. All limitations to altering the Act were removed in 1947.[4]

    - Electoral Act 1956

      Section 268 of the Electoral Act is the only example of constitutional entrenchment in New Zealand law. (Previously section 189.) Six provisions of the Act are preserved so that none of them may be altered unless there is a 75% majority vote in the House of Representatives.

      However, this only represents single entrenchment. Most constitutional documents are *double entrenched.* This means that section 189 was not itself entrenched. This was done deliberately so that parliament could change s189 by a simple majority and therefore remove any of the sections that were held to be preserved by that section. Leaving this loop hole is said to preserve Parliamentary Sovereignty. **(see 'parliamentary sovereignty page X)**

    - Constitution Act 1986

      This Act was set up with the intention of creating one constitutional document and to deal with the rules governing the transfer of government. The statute outlines the three branches of government and section 18 provides for the summonsing and dissolving of parliament.[5]

      However, this act cannot be our constitution as it is not the *source* of our governments legitimacy. It does not set up the origins of government.[6] It lacks the power of superior law.

    - The Treaty of Waitangi.

      This is considered to be a vital founding document in New Zealand law, however, it could not be considered New Zealand's constitution because it is

[3] New Zealand Constitutional Act 1852 Section 53.

[4] J Phillip, *Public law notes* (2005)

[5] Constitution Act 1986 Section 18.

[6] J Phillip, *Public law notes* (2005)

not even considered law in of itself. It cannot be held up in court unless it is specifically outlined in legislation.[7]

The failure to include an express or written Bill of Rights reveals some important themes in the drafting of the New Zealand constitution.

Many constitution writers were heavily influenced by the writings of Bryce & Dicey, who were both sceptical on the need to *expressly* guarantee rights in written constitutions

According to Dicey:

the common law & political processes will adequately protect civil liberties, which he saw as an aspect to the rule of law. This was consistent with his view of parliamentary sovereignty, how parliament could make & unmake any law & no person or body has a right to override or set aside legislation of parliament.

Our political structure has elements of Dicey's idea of parliamentary sovereignty which is subject to a limited judicial review.

Argument against express human rights	Argument for express human rights
The rule of law would provide adequate protection. Human rights are too obvious that if we expressly stated it in the written constitution it would reflect badly on New Zealand's image that it was even necessary to place a provision in the constitution from doing the grossest injustice to prevent it.	There are many instances in history in which people were seized with a sort of madness that have set aside principles of justice, hence an express right would provide better protection.

Constitutional Entrenchment.

Dicey: There can be no substantive legal limits on Parliaments power.

<u>The Principle that Parliament cannot bind its successors, is the only rule that Parliament cannot change.</u>

If the Constitution were entrenched, Parliament would be effectively binding its successors through any rules in the constitution.

In New Zealand the only entrenched provision of our law is section 189 of the <u>Electoral Act</u> which is itself only 'singly' entrenched as discussed above.

'Manner and Form.'

'Manner and Form' is the extent to which Parliament must follow the procedure laid down to make laws, established by a previous government.

[7] '*Ibid*'

In the *Attorney-General (NSW) v Trethowan* [1932][8] the issue was whether the Parliament of New South Wales (NSW) had the power to repeal section 7A of the 1902 Constitution in a way other than that provided by s 7A.[9]
Lord Stankey discussed this in relation to the Colonial Laws Validity Act. He said that some laws passed by the NSW legislature would only come into effect if they had been passed in the 'manner and form' required by any act of NSW.

Therefore, the s7 procedures must be followed.

> 'When confronted with what on its face appears to be an Act of Parliament, must New Zealand courts immediately and always accept its provisions as being valid and finally authoritative law, or are there some situations in which the Courts may exercise independent judgement over the validity of the purported enactement?'[10]

Later Parliaments must follow the 'manner and form' as set down by the former Parliaments.

The 'manner and form' requirement is conclusively held as a restriction on legislative power by requiring laws on certain topics to be enacted by a special and more difficult procedure

This restriction originated from the proviso to s5, *Colonial Laws Validity Act 1865 (Imp)* which provided that: "such Laws shall be passed in such manner and form as may from time to time be required by any Act of Parliament...".

This Restriction exists entirely independently of the question whether the legislature is sovereign. The legislature cannot change entrenched law simply because it is the legislature.

British Railways Board v Pickin[11]
Courts may investigate whether or not some legislative measure has been enacted in accordance with relevant 'manner and form' requirements imposed upon the legislature.

Parliament may, by way of legislation validity reconstitute itself or reformulate its legislative procedures. Courts are fulfilling their constitutional function of declaring the meaning of statues, holding Parliament to rules of law-making that parliament has imposed on itself.

Counter Arguments for 'Manner and Form,'

- A sovereign Parliament cannot impose real restrictions on itself.
- It is permissible for Parliament to make it easier for itself to pass bills, but not more difficult.

[8] [1932 AC 526 (PC)

[9] S Dorset, *Butterworths student companion, Public law* (4th ed, 2000)

[10] A Geddis, *Manner and Form' in the House of Lords, the University of Otago discusses the Law Lords' treatment of the foxhunting case in* The New Zealand Law Journal, (2005)

[11] *British Railways Board v Pickin (1974)* AC 765

- Entrenchment is permissible because it is a procedural restriction and not a substantive restriction on Parliament.

'Form and Substance'

Example: Assume that there was a dominant Labour Parliament that entrenched a requirement of a 90% majority to introduce nuclear power into New Zealand.

Technically this is a restriction, but in reality, does it restrict Parliament?

Incompatibility of Entrenchment in New Zealand

Does Manner and form apply in New Zealand?

-Prior to BORA there was debate concerning Parliamentary sovereignty in New Zealand and whether BORA should be entrenched.
-Looked as though the argument might lean towards a more limited Parliament.
-Cooke L thought that it should be entrenched.

Despite BORA not being entrenched, it is not certain that it could be changed by a simple act of Parliament. From where does the constitution derive its validity?

Kelsen[12]	***Kelsen's theory*** The entire legal order is a pyramid of norms from norms creating powers conferred by the constitution The constitution is the 'Grundnorm or basis norm', its content is regarded as 'self evidence' & is presupposed from the highest norm & from which norms for human behaviour is logically deduced. Other legal norms are not valid because it has a certain content but is valid because of the way it is created such that its content is logically deducible from a presupposed basic norm ***Problem with Kelsen's theory*** Kelsen seeks to construct a systematic framework for pure theory of law characterised by hierarchy & unity but in reality it is not so structured One needs to make a moral judgment to believe the constitution is the Grundnorm (ie. the one you should obey). There are still cultural & other influences that are simply masked by Kelsen's analysis that we simply obey it because it is an assumption. Theory is too inert & has no consideration of the cultural framework which contributes to the validity of the legal system[13]
Foucault[14]	***Foucault's theory*** Discourse can only ever be inconsistent & ruptured & that only out of such discourse can ideas originate. Power comes from all sorts of discourses eg. Cultural, political, economic. Our culture is a law-bound culture, it is inherent in the majority to obey the law. Our actions reinforce the validity of the law. Cultural assumptions & the way society has shaped us leads to an unconscious conformity to the legal system. ***Problem with Foucault's theory:*** lacks structure, in reality there is a need for some sort of structure for why we obey the law

[12] Kelsen '*Pure Theory of Law*' in Blackshield & Williams, *Australian constitutional Law & Theory: Commentary & Materials'* (Federation Press, 2006), 5.
[13] Foucault 'Politics and the study of discourse' in Blackshield & Williams, *Australian constitutional Law & Theory: Commentary & Materials'* (Federation Press, 2006), 8.
[14] 'Ibid', 2

Constitutional Conventions

Conventions are not laws, therefore they cannot be directly enforced in the courts.

Rather, they are 'rules of political obligation', but more than merely political practices.
ie: Cabinet meets at 10am on Monday mornings: this is political practice as there is no particular purpose for doing so.

What are constitutional conventions?

Habits, customs and traditions which have evolved over time to regulate the workings of the constitution. They can help to adapt the text to contemporary society. They are not laws, so can be legislated over, but are generally followed.

They are:

1) Accepted as binding to all those whom they apply, there is a sense of obligation. Practices are not considered as such.

2) Serve a necessary constitutional *purpose.*

Dicey's definition:[15]
Habits, practices and understandings which regulate the conduct of sovereign power.

They are not in strictness law at all, but can be judicially noticed and may influence the interpretation of statutes (with an assumption that parliament will not breach the conventions.)

Supreme Court of Canada decision[16]
Conventions impose no legal requirement and so demands of conventions do not need to be met to adhere to the constitution. They are not enforced by the courts because conventions are not judge made rules. They are based on precedents established by institutions of government.

The main purpose of conventions is to ensure the legal framework of the constitution will operate in accordance with the prevailing constitutional values of the period. They are an integral part of the constitution, breach of which, though unconstitutional, may not lead to legal consequences.

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[15] Dicey, 'Introduction to the Study of the Law of the constitution' in Blackshield & Williams, *Australian constitutional Law & Theory: Commentary & Materials'* (Federation Press, 2006), 122.
[16] *Re Resolution to Amend the Constitution* (1981) 1 SCR 753; (1981) 125 DLR (3d) 1 in Blackshield & Williams, *Australian constitutional Law & Theory: Commentary & Materials'* (Federation Press, 2006), 123.