SECTION A: Framework of Law (A s1-2)

Monday, 26 August 2013 12:48 p.m.

Part A: The Legal System

1. The Nature and Function of Law

a. Law compared to other concepts

- law is **differentiated from social etiquette and habits** because it is **enforceable** and **coercion** can be used.
- there are **consequences** (or **legal sanctions**) for those who do not obey the law.
    - consequences include **fines** and **imprisonment**.

b. Law and ethics in business

- law is generally obeyed because of consequences (see above).
- **breach of ethical/moral principles** are normally **not subject** to legal sanctions but there may be overlap.
    - **economic sanctions/repercussions** exist for businesses who breach ethical principles.
    - **adverse consequences** include loss of reputation and therefore profit.

c. Importance of ethics for professions

- **code of ethics**: code of behaviour or guidelines, commonly found in professions.
- consequences for breach of ethics include disqualification from practice.
  eg. lawyers are 'struck off the roll'

d. Interface between law and ethics in business

- **constraints** on business include the **Fair Trading Act**, advertising standards and other business codes of ethics.
- factors such as **employment law, environmental law** and **corporate social responsibility** also affect decision makers in business.

FUDICIARY DUTY: the obligation to act in utmost good faith and in the interests of others.
Notions of **fair dealing**, **trust** and **confidence**: in some cases the law requires us to serve interests of others rather than our own.
eg. Board of Directors work in shareholders' interests
eg. Notifying a party of any viable cost savings (especially when increases own profit)

2. Our Legal and Business Framework

- **laws** are made by **Parliament**.
- **Government departments, executive bodies/agencies** administer and enforce law.
  eg. Ministries, police.

Framework of Law (A s3-4)

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3. Sources of Law

Three broad sources of law:

1. **Legislation.**
   - primary source of law
   - certain and made by **Parliament**
   - **primary legislation**: known as **acts** or **statutes** (same thing)
   - Parliament can authorise others to make **delegated (secondary) legislation**
     eg. council bylaws, university regulations.

2. The **Courts (Judiciary)**
   - make **case (judge-made) laws**
   - courts are **independent and interpret the law**, not create them
   - case laws are made up of decisions and judgements
   - only some part of judgements make new law.

3. **Conventions** and **Customs**
   - practices recognised over time
   - **cannot be enforced** (courts cannot uphold convention)

4. Law as a guide

Conflict between two or more laws

- if **statute and case law conflict,** the ***statute*** *prevails*.
- if **two statutes conflict**, the ***later*** *prevails*.
  - earlier statutes may be **repealed**.
- if **two case laws conflict**, the ***ruling of the higher court*** *prevails.*

Framework of Law (B s1-3)

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Part B: The Constitution of New Zealand

1. Introduction

The **Constitution** outlines:
- the democratic state's **duties to its citizens**
- the **limits of the state's power**
- **rules governing powers of governmental institutions.**

★ the **STATE**: is not the same as the government and has a legal monopoly on force.

2. Nature of New Zealand's Constitution

- New Zealand has an unwritten Constitution (unlike countries such as the United States) -- it is found in court decisions, statutes, doctrines and conventions.
- the Constitution is **not higher law**.
  - legislation cannot be overturned on the basis of constitutional statutes.
    eg. NZBORA cannot be used to strike down acts that may be considered an infringement of human rights.

3. New Zealand's Constitutional Statutes

a. Bill of Rights 1688 (UK) gave Parliament:
- the **sole right to make or unmake law**
  - this overrode the traditional **royal prerogative**
- **complete freedom of speech** for Members of Parliament
- the **sole right to suspend or dispense laws**
  - eg. Fitzgerald v Muldoon - no legislation overturned.
- the **sole right to give consent to taxation**

b. New Zealand Bill of Rights 1990 (NZBORA)
- is **not meant to repeal existing laws** (laws cannot be struck down by NZBORA s 4)
- bills are checked for compatibility with the NZBORA by the Governor-General.
- includes rights and freedoms:
  - s 14: freedom of expression
  - s 17: freedom of association
  - s 20: rights of minorities
  - s 21: right to be secure against unreasonable search and seizure
  - s 23: rights of persons arrested or detained

c. Constitution Act 1986
- consolidates statutory rules governing the structure of government in New Zealand
  - **Separation of Powers** between arms of government (see B s4)
- outlines arms of government:
  - the Sovereign (Queen, Governor-General)
  - the Executive (Cabinet)
  - the Legislature (Parliament)
  - the Judiciary (Courts)

d. Electoral Act 1993
- provides rules on conduct of elections, voting age and electoral term.
- s 268 prohibits repeal or amendment of some sections, unless a
  - 75% vote in Parliament OR
  - majority in popular referendum is achieved.

Framework of Law (B s4)

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4. Constitutional Doctrines

a. Parliamentary Supremacy is the doctrine that states that Parliament has **plenary power**.

- **judicial subordination to Parliament**: courts must follow relevant acts, statutes or legislations as passed by Parliament.

b. Prerogative powers are now mostly ceremonial and traditional powers have been removed by Parliament through the Bill of Rights 1688 (UK) and Constitution Act 1986 (NZ).

c. Rule of law

- **nobody is above the law; everybody is subject to the same law.**
- does **not affect** the power of Parliament, which still holds **Parliamentary sovereignty.**
- concept of **due process** - fair trials must be given for offenders.
- **retrospection**: something cannot be made illegal retrospectively.

d. Separation of powers

- separate institutions carry out functions of government:
    - the **legislature makes the law,**
    - the judiciary **interprets the law,**
    - and the executive **implements the law.**
- separation of powers prevents individual powers from becoming too powerful.

5. Constitutional conventions

A convention is a **non-legal rule of a political or constitutional nature**. It is **non-justicable**.

Examples of conventions include:

- the **caretaker convention** -- newly-elected governments cannot be influenced by previous governments.
- the Governor-General always gives the **Royal Assent** to turn bills into acts.
- amity between branches of government.

Framework of Law (C Treaty of Waitangi)

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Part C: The Treaty of Waitangi

2. The text

a. Article 1: "the transfer of sovereignty from Maori to the British Crown"

- the Maori text distinguished between:
  - **te tino rangatiratanga** (**chieftanship**) - this was retained
  - **kawanatanga** (**governance**) - this was transferred

b. Article 2: "the Crown should protect Maori property rights"

- the Crown would protect lands, villages and treasures (**taonga**)
- the Maori text states that the Maori retain autonomy of Maori within their own spheres.
- **prime source of Maori grievances**: the Maori thought that they were giving away less than what was actually taken.
  eg. land confiscation.

c. Article 3: "extends to Maori all rights and privileges of citizenship"

- state has duty to take affirmative action to address negative social indicators
  eg. Te Whanau o Waipareria Report
- Crown must take special measures to ensure Maori attain equal enjoyment of social rights and benefits.

d. Ratification

- under common law, treaties must be ratified to be part of local law.
- the Treaty of Waitangi has **not been ratified** by either British or NZ Parliament.
- **principles of Treaty** have been adopted into legislation.

e. Waitangi Tribunal

- the role of the Tribunal is to make **non-binding recommendations** for both historical grievances and contemporary claims.
- the four **main principles of the Treaty** are:
  - analogy to fiduciary duty/trusteeship.
  - spirit of co-operation -- no unreasonable demands.
  - honour of the Crown -- acting in good faith.
  - fair and reasonable redress.
- major Treaty settlements include:
  - Sealord settlement (1992)
  - Wai 262 - note acknowledged failures such as Tohunga Suppression Act (1907) in force until 1967.

The principles of the Treaty are only enforceable when adopted in domestic law.