

**LAW5004 –
PUBLIC LAW AND
STATUTORY INTERPRETATION**

CLASS NOTES

Public law

- Individual relationship with state

Common terms:

- **Accountability:** ensures exercise of power is within legal limits/conforms with underlying purpose & expectations of community
- **Constitutional conventions:** unwritten rules of behaviour that restrict the exercise of power
 - Not enforceable through courts, but are generally observed as they ensure smooth running of system. Based on historical observance
- **Constitutionalism:** political doctrine that the law of the Constitution is supreme in a legal and moral sense
- **The Crown:** defines entire government structure. The sum of the judicial, legislative and executive branches.
- **Federalism:** constitutional design in which government power is shared between a central government and sub-national governments operating in same geographical territory
 - Allows for dispersal of power, greater local participation etc.
 - Australian Constitution created a federation in 1901
 - Main purpose of Constitution is to define powers of central gov (Cth) & its relationship with sub-national gov (States)
- **Human rights:** norms that are considered to be inherent to all human beings regardless of race, sex, nationality, religion. No person can waive these rights (inalienable)
 - Standards prescribing how gov should treat its population eg. Free from arbitrary detention, right to privacy
 - Outlined in *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights (ICCPR)*
- **Judicial review:** judicial branch reviews executive and legislature branches. Involves 2 types:
 1. **Guardian of Constitution:** reviews exercises of legislative powers against constraints of Constitution
 2. Ensures executive action is exercised in accordance with legal limits (eg. In common law, statutes)
- **Liberalism:** political theory based on ideas of freedom & equality
 - Underpins Australia's system of democratic gov (also in UK & US)
 - Supports principles such as free & fair elections, open government, accountability, etc.
- **Representative gov:** democratic form of gov where those with power have been selected from state to rule on their behalf
- **Responsible gov:** means by which executive gov is held accountable by Parliament. 2 ways:
 1. Ministers of government are individually responsible to Parliament for their decisions & performance of their departments
 2. Entire ministry must retain confidence of the Parliament to remain in gov
- **Separation of powers:** horizontal division of gov power between the 3 branches of gov
 - Provides limits & checks on exercise of power
 - No separation at state level, only federal
- **Sovereignty:** supreme power/authority
 - **External sovereignty:** independent power and authority of individual nation-states within international law
 - **Internal sovereignty:** sovereignty within single states
- **Westminster system:** systems of gov in British colonies based on UK Parliamentary system
 - Main features incl. division of powers between head of state (eg. Queen) and head of gov (PM), who has executive power with other senior members of governing party (Ministers)

Parliament

Rule of law

- Principle of English common law - requires the supremacy of law (no one is above the law)
- Individual citizens shouldn't be subject to arbitrary power of other citizens/government
- Aims to curtail arbitrary gov action, guarantee equality, ensure accountability
- Differing concepts of the rule of law
 - Dicey: excludes exemption of officials from duty of obedience to law
 - Says public law treats law as different from public citizens
 - Gov can't take coercive action against citizen without clear and existing legal authority
 - Common law has developed to protect civil liberties
- Clause 5 of preamble of Constitution makes all laws binding on everyone
- Types of approaches
 - Thin/procedural approach (Raz)
 - Independent judiciary
 - Open/fair hearing
 - Prospective laws
 - Accessible justice
 - Thick/substantive approach (Dworkin, Bingham)
 - Adds condition of morality
- Critique: Marxist view that abuses of government power often occurs, minorities aren't protected

Values underpinning public law

- Freedom
- Equality
- Community

Democracy

- Core values:
 - Freedom of election
 - Freedom to be elected
 - Freedom of speech, expression and religious belief
 - Adherence to the rule of law
 - Adherence to other basic human rights
- Principles:
 - Belief in individual
 - Belief in reason & progress
 - Belief in a society that is consensual
 - Belief in shared power
- Framework:
 - Legitimacy: appropriate authority to rule through elections
 - Justice: equal treatment, dignity and respect
 - Freedom: to make decisions
 - Power: define and limit power
- Problems:
 - Citizen disengagement
 - Decline of major parties
- How to improve:
 - Strengthen community sector: enable advocacy for community organisations
 - Protest rights

Separation of Judicial Power: *Boilmakers* principles

- Ch III courts: courts created by/under Australian Constitution
- Ch III courts constrained by separation of powers
- Ch III creates unique combination of principles:
 - Separation of judicial power juxtaposed with the retention of responsible government
 - Creation of a HC as a general court of appeal
 - Conferral of federal judicial power on the former colonial, now State, courts

Boilmakers case

- Established two-limbed test for determining when the separation of powers implied from the Australian Constitution will be breached:
 1. It is beyond the competence of parliament to invest with any part of the judicial power any body or person except a court created pursuant to s71 and constituted in accordance with s72, or a court brought into existence by the state
 2. The Constitution doesn't allow the use of courts established by/under ch III for the discharge of functions which are not in themselves part of the judicial power and are not auxiliary or incidental thereto
- Made it clear that there is some overlap between executive and legislative – no overlap with judiciary

Principle 1: The judicial power of the Commonwealth may only be exercised by Ch III Courts

- Tenure, remuneration etc.
- *Waterside Workers' Federation v J W Alexander (1918)*

Principle 2: Ch III courts may only exercise federal judicial power

- Can't exercise any other power eg. executive, legislative (this is what happened in *Boilmakers*)
- *R v Kirby; Ex parte Boilmakers' Society of Australia (1956)*

Exceptions to the principles

- Federal court judges are considered to be within the limits of the Ch III courts
- In certain circumstances federal judges are entitled to perform roles outside their judicial functions
 - This is provided that the judge acts in their personal capacity (*persona designata*: not as a judge of the court) and that the other role is not 'incompatible' with their judicial tasks
 - *Persona designata* doctrine allows federal judges to continue with roles such as tribunal members → but not ambassadorial roles (eg. Aus Ambassador to the US)
- *Drake v Minister for Immigration and Ethnic Affairs*: first case to accept the constitutionality of the conferral of non-judicial powers on individual federal judicial officers
 - Bowen CJ & Deane J: "there is nothing in the Constitution which precludes a justice of the HC or a judge of this or any other court created by the Parliament under ch III of the Constitution from, in his personal capacity, being appointed to an office involving the performance of administrative or executive functions including functions which are quasi-judicial in their nature"
 - Can do something non-judicial if it is in their personal capacity, not professional
 - As long as it doesn't impact their impartiality
- Houses of Parliament may punish for contempt of Parliament
- Military tribunals may enforce military discipline
 - *White v Director of Military Prosecutions (2007)*
- The *persona designata* exception

- Judge was not allowed to be Minister, have to be separate otherwise it undermines confidence of judicial system *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (1996)*

The Kable doctrine

- State constitutions don't entrench the separation of powers as the Federal Constitution does
 - Also State courts are not creatures of legislation authorised under the Federal Const.
 - No equivalent Ch III in state Constitution
 - When Federal Parliament invests a State court with the power to exercise federal jurisdiction → Parliament must take that court as it finds it
 - This means the *Boilmakers'* principle doesn't extend to State courts invested with federal jurisdiction
- *Kable v DPP (NSW)*: concerned *Community Protection Act 1994*, which was designed to enable the NSW Supreme Court to issue a preventative detention order against Gregory Kable, who had been convicted of manslaughter of his wife. During imprisonment he had written threatening letters to his children, their guardian, deceased's sister
 - Can state courts exercise executive power
 - Act was general, but s3 made it clear it was limited in application to Kable → means it was *ad hominem* legislation
 - For this reason, it was argued that the legislation involved an usurpation of (28) in breach of the separation of powers

Inherently judicial powers

1. Deciding authoritatively and conclusively whether someone is guilty of a crime
- *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs (1992)*
 - Lim arrived from Cambodia by boat, argued sections of the *Migration Act* were beyond the legislative power of the Cth Parliament
 - Lim asserted that mandatory immigration detention was a contravention of Ch III Constitution
 - However the HC found the system came within the 'aliens' power of s51, and that Ch III wasn't contravened as the system didn't include an infliction of punishment by a non-court, the Executive had the power to detain for purposes of expulsion or deportation, or to determine an application of entry
 - *Plaintiff M68 v Minister for Immigration [2016]*
 - P was from Bangladesh, was an 'unauthorised maritime arrival' as per the Act, taken to Nauru which is a 'regional processing country' under the Act
 - Argued their detention on Nauru was unlawful as it was not authorised by any valid law
 - HC found that s198AHA of *Migration Act* authorised Commonwealth's participation in the P's detention on Nauru
 - *Thomas v Mowbray [2007]*
 - T sought to challenge 'interim control order' placed on him under *Criminal Code*
 - T had trained with Al Qaeda, vulnerable
 - Control order meant he had a curfew, restricted phone services, no communication with certain terrorists, must be fingerprinted, mustn't leave Australia
 - Argued the order was invalid under three grounds:
 - Conferred a federal court with a non-judicial power contrary to Ch III Constitution

- In so far as there is conferred judicial power on a federal court, it's authorised the exercise of that power in a manner contrary to Ch III
 - Absence of express/implied legislative power
- HC found the interim control order was constitutional
 - Defending bodies is the primary concern of s51(vi)
- The law is plain that there are powers of executive detention → but these are subject to executive command
- Court can investigate whether it is in the public interest to make an order, however there must be an appropriate standard of proof